

THE COST OF ICE'S POLICIES AND PRACTICES

Evelyn Griggs
Brian Schaeffer
University of North Carolina School of Law



Immigration and Human Rights Policy Clinic
University of North Carolina at Chapel Hill

May 2009

Deborah M. Weissman
Reef C. Ivey II Distinguished Professor of Law
Director of Clinical Programs





Immigration & Human rights Policy Clinic
University of North Carolina at Chapel Hill
Document Design: Rebecca Rodriguez

THE COST OF ICE'S POLICIES AND PRACTICES

May 2009

Immigration and Human Rights Policy Clinic
The University of North Carolina School of Law

Submitted by:

Evelyn Griggs

Brian Schaeffer

University of North Carolina School of Law
Immigration/Human Rights Policy Clinic Students

Deborah M. Weissman

Reef C. Ivey II Distinguished Professor of Law

Director of Clinical Programs

www.law.unc.edu/documents/clinicalprograms/thecostoficespoliciesandpractices.pdf

TABLE OF CONTENTS

| | |
|--|----|
| Executive Summary | 7 |
| Statement of Purpose | 15 |
| History of Immigration Enforcement | 19 |
| A. Immigration Enforcement Prior to 1996..... | 19 |
| 1. Immigration Enforcement Post 1996..... | 20 |
| i. AEDPA | 20 |
| ii. IIRAIRA..... | 21 |
| 2. Immigration Enforcement Post 9/11..... | 22 |
| i. Patriot Act | 22 |
| ii. HSPD 2..... | 23 |
| iii. HSA..... | 26 |
| iv. ICE | 27 |
| 3. ICE’s Current Methods of Immigration Enforcement | 30 |
| i. ICE’s Official Policies | 30 |
| ii. ICE’s Actual Policy Implementation – Attack Easy Targets..... | 31 |
| B. Conclusion | 33 |
| Worksite Raids | 34 |
| A. Human Rights Violations | 34 |
| 1. The “Paramilitary Style” of Worksite Investigation..... | 34 |
| 2. Disregard of Caregiving Status for Those Arrested | 35 |
| 3. Transportation to Faraway Detention Centers..... | 36 |
| 4. Refusal to Give Bond Hearings to Many of Those Arrested | 36 |
| 5. Refusal to Disclose Whereabouts of Detainees in a Timely Fashion..... | 36 |
| 6. Inadequate Provision of Counsel | 37 |
| 7. Inadequate Translation of Court Proceedings | 38 |
| 8. Overzealous Criminal Prosecutions | 38 |

| | |
|---|-----------|
| 9. Fast-Tracked Prosecutions | 38 |
| B. Case Studies | 39 |
| 1. New Bedford and Aguilar | 39 |
| 2. Postville | 42 |
| C. Costs | 43 |
| 1. Financial Costs..... | 43 |
| 2. Other Costs..... | 45 |
| Home Raids | 46 |
| A. Human Rights Violations | 46 |
| B. Case Studies | 48 |
| 1. Arias | 48 |
| 2. Mancha | 49 |
| 3. Soto..... | 50 |
| C. Costs | 51 |
| 1. Stepped Up Future Litigation..... | 51 |
| 2. Multiple Defendants Increase Defense Costs | 53 |
| 3. Multiple Plaintiffs Increase the Likelihood of Fragmented Cases..... | 54 |
| 4. Conclusion: Other Costs | 55 |
| Local Law Enforcement | 56 |
| A. 287(G)..... | 56 |
| B. ICE Access..... | 57 |
| C. Human Rights Violations | 59 |
| 1. Racial Profiling..... | 59 |
| 2. Due Process..... | 60 |
| 3. Case Study: Juana Villegas de la Paz | 62 |
| 4. Costs | 65 |
| i. Effect on Communities | 65 |
| ii. Increase in Litigation..... | 66 |
| a. Juana Villegas de la Paz | 67 |
| b. Pedro Guzman | 68 |

| | |
|--|------------|
| c. Casa de Maryland, Inc. | 71 |
| d. Manuel de Jesus Ortega, et al. | 73 |
| D. Conclusion..... | 75 |
| Detention..... | 76 |
| A. Human Rights Violations | 77 |
| 1. Inhumane Conditions..... | 77 |
| 2. Overcrowding | 78 |
| 3. Insufficient Healthcare | 79 |
| 4. Indefinite Stays | 82 |
| 5. Transfers of Detainees | 84 |
| B. Case Study: Hiu Lui Ng | 86 |
| C. Costs | 88 |
| 1. Increased Litigation | 88 |
| 2. Cost of Maintaing Detainees | 89 |
| 3. Questionable Deaths | 89 |
| D. Conclusion..... | 90 |
| International Mechanisms & Their Associated Costs | 91 |
| A. International Mechanisms..... | 91 |
| 1. IACHR..... | 91 |
| 2. ICCPR Committee..... | 93 |
| 3. CERD | 94 |
| B. Case Study: Wayne Smith | 95 |
| C. Costs..... | 97 |
| 1. Financial Costs..... | 97 |
| 2. Other Costs..... | 98 |
| D. Conclusion..... | 100 |
| Conclusion | 101 |

EXECUTIVE SUMMARY

Over the last decade and a half anti-immigrant sentiment has grown in the United States. Immigration is seen as a threat to national security and an invitation to terrorists. Federal lawmaking has in many ways encouraged this ideology, as has the manner in which the laws are executed. Because of the conflation of immigration and terrorism, immigration enforcement has gotten increasingly aggressive in the United States, often without concern for the economic, political, or social costs. This paper discusses the enforcement methods used, the human rights violations that occur as a result, and the costs associated with such methods and violations.

A. LEGISLATIVE FRAMEWORK

In April 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA). Even though the AEDPA was drafted to focus on eliminating terrorism in the United States, it included restrictions on immigration. This began a trend of merging immigration and terrorism, one which continued with another act passed in 1996 called the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA). With IIRAIRA, detention became a primary source of immigration enforcement. It also expanded the definitions in the INA so as to allow the exclusion of a wider group of individuals. For example, it eliminated forms of relief for aliens convicted of aggravated felonies, and included minor crimes in the definition of “aggravated felonies.”

The already existing anti-immigrant climate coupled with a foreign and domestic policy shift focused almost entirely on eradicating terrorism allowed for a further conflation of immigration and terrorism in a Post-9/11 United States. This conflation is evidenced in the USA

PATRIOT Act, which was also written to punish and deter terrorists, but nonetheless included provisions inhibiting immigration into the United States. One of these provisions, for example, allots an additional \$50,000,000.00 to protect the Northern Border from the passage of unwanted immigrants. President George W. Bush also issued Homeland Security Presidential Directive 2 in October 2001. Although this directive seemed to stress policies that would aggressively identify, prosecute, and deport terrorists, the directive actually implied an anti-immigrant sentiment generally. The policies and procedures that have stemmed from such anti-immigrant lawmaking are questionable at best and unconstitutional and illegal at worst.

In November 2002, Congress passed the Homeland Security Act (HSA), which set in motion the current immigration enforcement agencies and created the scheme whereby these questionable policies and procedures are implemented. The HSA abolished the Immigration and Naturalization Service which was the agency that had previously enforced immigration laws in the United States. In its place, the HSA created the umbrella agency, the Department of Homeland Security (DHS), and created two immigration agencies under DHS, one in charge of facilitating legal immigration and the other with eliminating illegal immigration. Then in January 2003, DHS created a third agency which is the organizational framework that currently exists for enforcing the immigration laws in the United States. One of these agencies, Immigration and Customs Enforcement or ICE, is charged with enforcing the immigration laws by targeting criminal networks and terrorist organizations. ICE's enforcement methods, due to the anti-immigrant sentiment embedded in legislation and policies, are overreaching and overly aggressive and often violate constitutional and human rights norms.

For example, ICE claims that its mission is to stop terrorist and other criminal activity, and to do so by apprehending child predators, removing criminal aliens, intercepting illegal arms, drugs, pharmaceuticals, and to eradicating human trafficking networks. In actuality, ICE spends the majority of its time and resources by augmenting its deportation statistics by seeking to remove easy targets—namely immigrants who, although they have no legal status in the United States, have no criminal records and pose no national security risk. While this does fall within the ICE’s purview, the manner in which ICE is targeting, apprehending, detaining, and prosecuting these immigrants flouts international human rights norms and U.S. constitutional rights.

B. WORKSITE RAIDS

ICE relies on enforcement methods such as “workplace enforcements,” better known as worksite raids. These raids involve ICE agents who target a factory or a company that it believes hires immigrants who have no legal employment authorization. The manner in which these raids are carried out leads to a series of human rights violations including:

- Unnecessary threats and intimidation by ICE agents who brandish and threaten the use of weapons
- Detention of individuals for extended periods of time without access to bathrooms or water
- Denial of Miranda rights
- Arrests and detention without probable cause
- Searches without warrants
- Denial of the opportunity to speak with family and provide proper care for unattended children
- Transfers to distant states with little access to documents and attorneys in order to properly bring their immigration case before the court
- Denial of bond hearings
- Trials without appropriate court translation

- Fast-tracked criminal prosecutions and use of coercive tactics to force individuals to sign voluntary departure agreements.

These human rights and constitutional rights violations become apparent by examining two instances of worksite raids, one in New Bedford, Massachusetts, and the other in Postville, Iowa. These two raids illustrate the costs associated with workplace raids as an enforcement method. The financial costs alone are staggering—the raid in Postville cost an estimated \$5.2 million or \$14,000 per immigrant. Additionally, such raids often financially devastate small communities, increase costs of litigation for the U.S. citizen taxpayer, as well as diminish the reputation of federal government and its agencies among citizens and noncitizens alike.

C. HOME RAIDS

Similar to workplace raids, ICE has instituted home raids, which also call into question the constitutionality of ICE's practices. Home raids typically involve ICE agents who forcibly enter the homes of ethnic minorities under the pretense of searching for specific individuals who are alleged to be in violation of U.S. immigration law. These raids too are legally questionable and bring to light a number of human rights and constitutional violations committed by ICE. These violations include ICE agents:

- Entering without a warrant or probable cause
- Misrepresenting or failing to announce themselves entirely before entering a home
- Conducting raids in the early morning hours of the day when people are most vulnerable
- Ignoring the rights of the individual to due process and counsel. .

Case studies also illustrate how these human rights and constitutional violations manifest themselves during home raids as well as the costs associated with such raids. For

example, ICE agents conducted home raids in Willmar and Atwater, Minnesota and in Stillmore, Georgia. These instances of home raids demonstrate the high costs to the U.S. citizen taxpayer. They also necessarily increase the amount of litigation in federal court, and taint the reputation of the federal government at home and abroad.

D. LOCAL LAW ENFORCEMENT

In recent years, ICE has also initiated several programs and partnerships related to local law enforcement of immigration laws. Although enforcing immigration law is the responsibility of the federal government, IIRAIRA allowed for ICE to enter into agreements with local law enforcement agencies and authorized them to deputize local officers to act as federal immigration agents. The program is known as the 287(g) program. ICE has also implemented another program known as ICE ACCESS. The ACCESS program allows ICE agents and officers to meet counsel with local agencies who are requesting ICE help in order to assess how to best meet the immigration needs of the agency. While these programs seem useful on their face, in actuality they are also instigating ICE agents and local law enforcement agents to engage in constitutionally reprehensible behavior including:

- Racial profiling
- Mistaken identifications
- Wrongful arrests and deportation
- Imprisonment without probable cause

As a result of these programs, there have been a number of instances where these violations have occurred.

In the case of one woman, Juan Villegas de La Paz, local law enforcement officers committed egregious human rights violations when arresting her for a minor traffic violation

while nine months pregnant, shackling her to her hospital bed while in labor, and denying her proper medical supplies and attention after giving birth. These violations sparked litigation against the federal government as well as the local law enforcement agency that apprehended her. Litigation is one of the greatest costs associated with 287(g) because of the careless manner in which the program is implemented. Additionally, as is evidenced by the results of 287(g) implementation in Alamance County, North Carolina, the program marginalizes immigrant populations and makes them vulnerable to crime and racial injustice. It also affects the relationship of the police with the general population and the local economy of the communities where it is implemented. The collaboration of local law enforcement agencies with ICE increases human rights violations and imposes numerous costs.

E. DETENTION

As ICE apprehends more individuals and as laws have changed to require mandatory detention, ICE has been overwhelmed with its detention responsibilities. As a result of the increase in the immigrant detention population, ICE has been unable to ensure properly oversee the care given to detainees. Consequently, detention facilities across the United States violate the human rights and dignity of those being detained. These violations include:

- Overcrowded and unsanitary facility conditions
- Insufficient healthcare
- Verbal and physical abuse
- Sexual harassment
- Inadequate food and nutrition
- Indefinite detention

In the case of Hiu Lui Ng, a Chinese national who was married to a U.S. citizen and was detained after filing for a green card, makes apparent the deplorable, and sometimes fatal,

conditions in U.S. detention facilities. Mr. Ng was denied necessary medical care and died of undiagnosed cancer as a result. Detention conditions in the United States are costly, including the cost of litigation that arises as a result of the human rights violations, the monetary cost of detaining the immigrants, and most significantly and worrisome, sometimes death.

F. INTERNATIONAL MECHANISMS

As the federal government continues to use these aggressive immigration enforcement procedures as currently implemented by ICE, it is necessary to bring the human rights and constitutional violations that are occurring as a result to the attention of the international community. Currently, the international mechanisms available to those whose rights are affected by ICE are:

- Inter-American Commission on Human Rights (IACHR)
- International Covenant on Civil and Political Rights (ICCPR) Committee
- Committee on the Elimination of Racial Discrimination (CERD)

In a recent case, a man named Wayne Smith brought a case before the IACHR claiming that he was denied judicial relief in a manner that was contrary to constitutional principles. The IACHR held that the U.S. was under an international obligation stemming from human rights commitments that require certain rights be afforded Mr. Smith. Ultimately, the IACHR granted Mr. Smith's petition, illustrating a number of costs due to ICE's behavior and the violations it committed against Mr. Smith and others. Aside from the monetary costs of litigating the cases before the IACHR, such suits decrease the image in the U.S. government in international human rights issues and result in exceptionally bad publicity and embarrassment.

G. CONCLUSION

The current sentiment in the United States is anti-immigrant as demonstrated by legislation, executive orders, and agreements. Immigration is viewed as an avenue for terrorism, and consequently the methods used to enforce immigration have become increasingly aggressive in recent years. An outgrowth of these methods is human rights and constitutional rights violations, all of which result in a number of costs to the United States. Costs include the appropriations of taxpayer dollars, resources used to defend ICE in lawsuits, the reputation of the federal government locally and abroad, and the deportation of U.S. citizens and deaths of detainees. This trend is destructive and lawmakers must be made aware so as to reverse the sentiment as well as current implementation policies.

STATEMENT OF PURPOSE

The purpose of this paper is to examine the current immigration enforcement policies in the United States, how these policies are implemented, and the various costs of these implementation strategies. This is accomplished by first identifying an ideological shift that has occurred within the last decade and a half, evidenced through legislation passed by Congress. Beginning in 1996, federal immigration enforcement changed dramatically. In 1996 Congress enacted two pieces of legislation, the AEDPA and IIRAIRA, which established special deportation procedures for people who are considered terrorists, allowed for expedited removal of some groups of immigrants entering the United States, eliminated relief for convicted aggravated felons while expanding the definition of aggravated felons to those who committed minor crimes, and limited habeas corpus relief. This legislation also signified an important ideological shift that associates immigration with terrorism, an ideology that became a permanent element of the immigration landscape in the United States following the 9/11 terrorist attacks.

Post-9/11 immigration laws in the United States indicate a conflation of immigration and terrorism, which has led to strict immigration enforcement policies that are questionable at best and illegal at worst. Six weeks after the attack on the World Trade Center, the Pentagon, and the plane crash in Pennsylvania, Congress passed the USA PATRIOT Act, which was signed into law in October 2001 by President George W. Bush. The PATRIOT Act was enacted to deter and punish terrorist attacks, and it included provisions that demanded tougher implementation of the Immigration Nationality Act (INA). Shortly thereafter, following a presidential directive, Congress passed the Homeland Security Act (HSA) completely overhauling the immigration

agencies in the United States. The HSA dissolved the Immigration and Naturalization Service and created two new agencies. Eventually DHS added another agency, creating the current federal immigration organization consisting of the U.S. Bureau of Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Patrol (CPB). ICE is the agency charged primarily with enforcing immigration laws, and consequently engaging in questionable enforcement policies.

After finalizing the agency organization, the former Secretary for Homeland Security Michael Chertoff, who was appointed by and served under President Bush, stated that these agencies embarked on a “new and tough interior enforcement strategy.”¹ The Bush Administration claimed that this strategy was principally developed with the purpose of ridding America from criminal aliens and protecting American citizens from the threat of terrorism. Yet, in actuality, this strategy has accounted for numerous violations of the U.S. Constitution and international human rights norms. This paper identifies a portion of the enforcement strategies and the rights that they violate.

For example, ICE has, under the direction of the Secretary for Homeland Security and under authority of the Homeland Security Act, instituted a number of enforcement strategies that consistently victimize and marginalize the immigrant community. These include conducting home and worksite raids in a manner that violates due process of law, and failing to properly train and oversee local law enforcement officers deputized to enforce federal immigration laws so that racial profiling and improper detention occur. Home and workplace

¹ United States Department of Homeland Security, *Department of Homeland Security Unveils Comprehensive Immigration Enforcement Strategy for the Nation's Interior*, Apr. 20, 2006, available at http://www.dhs.gov/xnews/releases/press_release_0890.shtm.

raids are often conducted in a manner that flouts the fourth amendment. ICE agents have entered homes unannounced waiving weapons, without probable cause, and continue searching even after the suspect is determined to be away from the home. Worksite raids are conducted in a similar manner, often involving paramilitary methods of displaying guns, blocking exits, and lining workers against the wall. During these raids, ICE agents often disregard the well-being of those being held, and refuse post-apprehension rights such as access to an attorney, translation in court proceedings, and bond hearings. ICE also enters into 287(g) agreements where they deputize local law enforcement agencies to enforce immigration laws. Constitutional and human rights violations often occur under these agreements because ICE often neglects its oversight responsibilities and inadequately trains local enforcement officers. Consequently, the 287(g) program leads to racial profiling and other due process violations.

ICE is also charged with maintaining detention facilities where immigrants are held waiting deportation. As the immigration enforcement laws have changed, the number of individuals in immigration detention has increased. ICE has proven unable to appropriately maintain detention facilities as the population rate rises. Multiple human rights and constitutional rights violations occur as a result. Individuals in detention are often denied adequate health care, placed in overcrowded and dirty facilities, transferred without notice, and held indefinitely. These are just a sampling of the human rights violations that occur as a result of the immigration policy shift and enforcement methods.

In addition to identifying some of the constitutional and human rights violations that are occurring, the paper identifies the costs of such policies. The costs differ depending on the

nature of the violation, as does the population that is affected. Aside from the costs associated with ICE's policies in general and the expense of the expansive bureaucracy it has become, immigration raids often cost millions of dollars. Local economies are often affected when entire populations are detained. Entire populations become marginalized and therefore are vulnerable to victimization. They lose confidence in the government and law enforcement. Often the costs are more dramatic in how they affect the individuals involved, sometimes resulting in economic ruin, emotional trauma, and death.

By identifying the shift in ideology that conflates immigration with terrorism, evaluating the recent history of immigration legislation, examining the questionable enforcement strategies, and discussing the costs of those strategies, this paper exposes the inefficiencies and illegalities of the current immigration enforcement scheme. Further, this paper is written with the intent to convince policymakers and the U.S. polity that immigration enforcement in this country must change along with macro changes to immigration laws and policies generally.

HISTORY OF IMMIGRATION ENFORCEMENT

The national narrative that drives immigration policies, especially enforcement issues has been constantly shifting throughout the history of the United States.² The current trends in immigration enforcement are an outgrowth of an overall ideological shift among U.S. leaders, lawmakers, and citizens and holds to the view that strict immigration policies are necessary in eliminating terrorism. However, there exists a fundamental disconnect between targeting immigrants and actually guarding the country against terrorism.³ By closely associating immigration generally with terrorism, policymakers, federal immigration officers, and local law enforcement officers may feel justified in sacrificing constitutional and human rights of immigrants in the United States, in the name of national security.⁴

A. IMMIGRATION ENFORCEMENT PRIOR TO 1996

Immigration enforcement has always fallen under the purview of the federal government, and the federal immigration laws have changed throughout the centuries. These changes are often determined by national sentiment towards a particular group or toward immigration generally. The 1980s marked a time where legal immigration admissions reached as high as 11.8 million annually, while illegal immigration continued to rise due to the demand of unskilled labor coupled with minimal law enforcement against employers.⁵ Consequently, Congress passed the Immigration Reform Act of 1986 (IRCA) offering amnesty for a specified

² Brandon E. Davis, *America's Immigration Crisis: Examining the Necessity of Comprehensive Immigration Reform*, 54 Loy. L. Rev. 353, 361 (Summer 2008).

³ Katherine L. Vaughns, *Symposium Broken Fences: Legal and Practical Realities of Immigration Reform in the Post-9/11 Age*, 5 U. Md. L.J. Race, Religion, Gender & Class 151, 154-155 (Fall 2005).

⁴ Davis, *supra* note 1, at 362.

⁵ *Id.* at 359.

group of immigrants who had been in the country for a specified period of time.⁶ This legislation also established an official employment based eligibility procedure, and imposed sanctions for employers who hired illegal immigrants.⁷ This would, however, lead to a shift where immigration is more limited and where immigration enforcement obtains more focus.

1. IMMIGRATION ENFORCEMENT POST-1996

I. AEDPA

In 1996 Congress passed a series of laws that implemented increasingly restrictive policies against noncitizens.⁸ The first of these acts, the Antiterrorism and Effective Death Penalty Act (AEDPA) was passed on April 24, 1996, and although it was drafted to focus on eliminating terrorism in the United States, it initiated a trend of conflating terrorism and immigration.⁹ The AEDPA suggests that stricter immigration enforcement is necessary to keep the United States safe from terrorists. Although on its face, the conceptual framework of the statute may be unobjectionable, it has been implemented in such a way as to suggest that opening the United States to immigrants means inevitably opening it up to terrorists. The AEDPA affected immigration in that it:

(1) established a special deportation procedure for persons who were considered terrorists; (2) established an expedited exclusion process to remove certain persons arriving in the United States without benefit of a hearing; (3) severely limited judicial review and habeas corpus relief; (4) expanded exclusion and deportation procedures; and (5) permitted the deportation of wider classes of foreign nationals who previously would not have been considered threats to the national security.¹⁰

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 361.

⁹ Pub. L. No. 104-132, 110 Stat. 1214 (1996).

¹⁰ Davis, *supra* note 1, at 361.

2. IIRAIRA

A second law passed in 1996 is entitled the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA).¹¹ The IIRAIRA furthered the concept that restricting immigration is necessary to eradicate terrorism. It eliminated forms of relief for aliens convicted of aggravated felonies, and sometimes minor crimes.¹² IIRAIRA also completely transformed how detention would be used in immigration matters. With these changes, detention became a primary use of enforcement, regardless of whether individuals posed a threat to society or a flight risk.¹³ It required mandatory detention without bond provisions for immigrants who commit crimes, again often minor crimes, even if those immigrants have a green card.¹⁴ Detention also became mandatory for those who tried to enter the U.S. without proper documentation and permission, even if those individuals came to the country seeking asylum.¹⁵ Additionally, IIRAIRA “reformulated the entire framework of deportation for foreign nationals, and changed the legal mechanisms upon which determination of the grounds for removal were based.”¹⁶

These two pieces of legislation set in motion the ideological shift and cognitive dissonance that laid the foundation for constitutional and human rights violations against immigrants in the U.S. and all of the associated social and economic costs that are a consequence of these laws and policies.

¹¹ Pub. L. No. 104-208, div. C, 110 Stat. 3009 (1996).

¹² *Id.*

¹³ Seattle University School of Law International Human Rights Clinic, *Voices from Detention: A Report on Human Rights Violations at the Northwest Detention Center*, July 2008, available at <http://www.law.seattleu.edu/documents/news/archive/2008/DRFinal.pdf>, [hereinafter Detention Report].

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Davis, *supra* note 1, at 361.

2. IMMIGRATION ENFORCEMENT POST 9/11

I. PATRIOT ACT

The September 11, 2001 attacks on the World Trade Center and the Pentagon, and the attempted attack on the White House that led to a plane crash near Shanksville, Pennsylvania, led to further fears about the relationship between immigration and terrorism in an already existing anti-immigrant climate that had been developing in the United States. As a result of the attacks, U.S. foreign and domestic policy dramatically shifted to focus almost primarily on the eradication of terrorism. Stricter immigration enforcement policies as a means of eliminating terrorism were immediately evident. Only six weeks after 9/11, on October 26, 2001, President George W. Bush signed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act or PATRIOT Act) into law.¹⁷ The purpose of the PATRIOT Act, as set out by Congress, was to “deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.”¹⁸

The PATRIOT Act allows the government more latitude in detaining immigrants. It authorizes detention of immigrants for seven days before bringing an indictment.¹⁹ Additionally it permits the indefinite detention of illegal immigrants once they have a removal order for deportation.²⁰

The PATRIOT Act also includes provisions designed to enhance domestic security and surveillance procedures, abate foreign money laundering, increase the terrorism investigatory

¹⁷ Pub. L. No. 107-56, 115 Stat. 272 (2001).

¹⁸ *Id.*

¹⁹ *Id.* at 313.

²⁰ *Id.*

powers, and strengthen criminal laws against terrorism.²¹ Title IV of the Act, “Protecting the Border,” illustrates a significant shift in the immigration policies of the United States and begins to couple anti-terrorism efforts with strict immigration enforcement. Subtitle A of Title IV of the PATRIOT Act strengthens immigration enforcement at the Northern Border in part through an increase of funds to the Immigration and Naturalization Service (INS), the U.S. agency that controlled matters relating to immigration at the time Congress passed the Act.²² Congress appropriated, such sums as may be necessary to triple the number of INS inspectors and the necessary personnel and facilities to support such personnel, at ports of entry in each State along the Northern Border; and an additional \$50,000,000 . . . to the Immigration and Naturalization Service . . . for purposes of making improvements in technology for monitoring the Northern Border and acquiring additional equipment at the Northern Border.²³

This increase in funding for more stringent immigration enforcement along the Northern Border, together with more latitude in immigrant detention, was a prominent provision of a statute aimed at anti-terrorism activities. It is indicative of a Congressional effort to link the task of combating terrorism with the enforcement of immigration law, which has led to human rights and constitutional violations in the name of immigration enforcement.

II. HSPD 2

Only a few days after President Bush signed the PATRIOT Act into law, he issued the Homeland Security Presidential Directive 2 (HSPD 2), which is one of the first executive order of

²¹ *See id.* at 272-275.

²² *Id.* at 342.

²³ Pub. L. No. 107-56, 115 Stat. 272, 343 (2001).

its kind.²⁴ Bush used these directives “to promulgate Presidential decisions on national security matters,” and for governing homeland security policy.²⁵ HSPD 2 was issued on October 29, 2001, and its subtitle alone illustrates the furtherance of the belief that allowing immigration means making the U.S. vulnerable to terrorism. The subtitle is “SUBJECT: Combating Terrorism Through Immigration Policies,” and it begins with a statement from President Bush about U.S. national policy:

The United States has a long and valued tradition of welcoming immigrants and visitors. But the attacks of September 11, 2001, showed that some come to the United States to commit terrorist acts, to raise funds for illegal terrorist activities, or to provide other support for terrorist operations, here and abroad. It is the policy of the United States to work aggressively to prevent aliens who engage in or support terrorist activity from entering the United States and to detain, prosecute, or deport any such aliens who are within the United States.²⁶

President Bush ties immigration with terrorism, and here explains that immigration policies are to be used by the federal government as a means of eliminating terrorist activity in the United States. HSPD 2 states that the Attorney General, who had supervisory power over immigration enforcement and INS, will create and organize the Foreign Terrorist Tracking Task Force (Task Force) to ensure that,

to the maximum extent permitted by law, Federal agencies coordinate programs to . . . 1) deny entry into the United States of aliens associated with, suspected of being engaged in, or supporting terrorist activity; and 2) locate, detain, prosecute, or deport any such aliens already present in the United States.²⁷

²⁴ Homeland Security Presidential Directive-2, October 29, 2001, available at http://www.dhs.gov/xabout/laws/gc_1214333907791.shtm.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

The Attorney General, according to HSPD 2, is to organize a number of efforts under the directive, working with the heads of various federal agencies as necessary. Those efforts include developing and implementing “multi-year plans to enhance the investigative and intelligence analysis capabilities of the INS and the Customs Service,” to “implement measures to end the abuse of student visas and prohibit certain international students from receiving education and training in sensitive areas, including areas of study with direct application to the development and use of weapons of mass destruction,” and “initiate negotiations with Canada and Mexico to assure maximum possible compatibility of immigration, customs, and visa policies.”²⁸ Additionally, the Attorney General is to,

make recommendations about the use of advanced technology to help enforce United States immigration laws, to implement United States immigration programs, to facilitate the rapid identification of aliens who are suspected of engaging in or supporting terrorist activity, to deny them access to the United States, and to recommend ways in which existing government databases can be best utilized to maximize the ability of the government to detect, identify, locate, and apprehend potential terrorists in the United States.²⁹

Finally, HSPD 2 states that the Office of Management and Budget, together with the Attorney General and agency heads, is to,

review the budgetary support and identify changes in legislation necessary for the implementation of this directive and recommend appropriate support for a multi-year program to provide the United States a robust capability to prevent aliens who engage in or support terrorist activity from entering or remaining in

²⁸ *Id.*

²⁹ *Id.*

the United States or the smuggling of implements of terrorism into the United States.³⁰

Through this directive U.S. lawmakers and policymakers are being led to push the limits of the Constitution and human rights in order to protect the nation from terrorism. Additionally, they are misguided in their assignment to attack immigration as a means of eliminating terrorist threats, which is a trend that continues currently in the United States.

III. HSA

The trend continued with the passage of the Homeland Security Act (HSA), enacted into law on November 25, 2002, which further tied immigration to terrorism.³¹ HSA is a decidedly anti-terrorist piece of legislation. Yet it completely reorganized the immigration enforcement landscape in the United States, suggesting a tie terrorism and immigration. Congress passed the HSA in order to establish the Department of Homeland Security (DHS). Part of the mission of DHS is to prevent terrorist attacks in the United States, to reduce the vulnerability of the United States to terrorism, and to minimize the damage from terrorist attacks as well as assist in the recovery of terrorist attacks, should they occur in the United States.³² HSA abolished INS³³ and separated its functions into two separate entities: the Bureau of Border Security and the Bureau of Citizenship and Immigration Services (USCIS).³⁴ According to the HSA, these agencies should be considered of equal importance and given equal appropriations.³⁵

³⁰ Homeland Security Presidential Directive-2, October 29, 2001, available at http://www.dhs.gov/xabout/laws/gc_1214333907791.shtm.

³¹ Pub. L. No. 107-296 tit. IV, subtit. c-f, 116 Stat. 2135 (2002).

³² *Id.* at 2142.

³³ *Id.* at 2205.

³⁴ *Id.* at 2193-2195.

³⁵ *Id.* at 2209.

iv. ICE

Through a January 30, 2003 press release, DHS reorganized border and transportation security, creating the Bureau of Customs and Border Protection (CBP).³⁶ The press release also changed the name of the Bureau of Border Security to Immigration and Customs Enforcement (ICE), thus establishing the current organizational framework for immigration enforcement.³⁷ Of the three major agencies making up this framework, USCIS is the one that oversees lawful immigration to the United States by establishing immigration services, policies, and priorities by adjudicating immigrant visa petitions, naturalization petitions, and asylum and refugee applications.³⁸ CBP protects the U.S. border. Its mission is to keep “terrorists and their weapons out of the U.S.,” and it has a “responsibility for securing and facilitating trade and travel while enforcing . . . immigration and drug laws.”³⁹ ICE is charged with enforcing the Immigration and Nationality Act (INA) and “targeting criminal networks and terrorist organizations that seek to exploit vulnerabilities in” the U.S. immigration system and financial networks.⁴⁰ Methods employed for accomplishing this include the apprehension, detention, and deportation of fugitive aliens, identification of money laundering schemes and other financial system exploitation, interception of drugs and other smuggled goods, and elimination of human trafficking operations.⁴¹

³⁶ United States Department of Homeland Security, *Border Reorganization Fact Sheet*, Jan. 30, 2003, available at http://www.dhs.gov/xnews/releases/press_release_0073.shtm.

³⁷ *Id.*

³⁸ United States Citizenship and Immigration Services, available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=2af29c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnnextchannel=2af29c7755cb9010VgnVCM10000045f3d6a1RCRD>.

³⁹ United States Customs and Border Patrol, available at <http://www.cbp.gov/xp/cgov/about/>.

⁴⁰ United States Immigration and Customs Enforcement, available at <http://www.ice.gov/about/index.htm>.

⁴¹ *Id.*

The passage of the HSA and the creation of ICE is yet another manifestation of a shift in U.S. domestic policy that emphasizes immigration enforcement as an instrument for eliminating terrorism.⁴² ICE is currently the second largest law enforcement agency in the country, and the largest investigative agency in DHS.⁴³ Its appropriations have grown from \$3.1 billion in 2006 to \$4.99 billion from 2006 to 2009 alone.⁴⁴ The very size and appropriations of the agency suggest that enforcing immigration is perceived to be tantamount to fighting terrorism and thus warrants a significant infusion of resources to the agency assigned the enforcement task.⁴⁵ ICE's own mission statement also illustrates this viewpoint: ICE, protects national security and upholds public safety by targeting criminal networks and terrorist organizations that seek to exploit vulnerabilities in our immigration system, in our financial networks, along our border, at federal facilities and elsewhere in order to do harm to the United States. The end result is a safer, more secure America.⁴⁶

In its annual report for fiscal year 2007, ICE explains that it was formed “as a 21st century law enforcement agency for the post-9/11 era.”⁴⁷ It further states that it “expanded upon the ongoing effort to re-invent immigration enforcement for the 21st century.”⁴⁸ These statements are yet additional indications that the agency is conflating immigration enforcement

⁴² ACLU of Massachusetts, *Detention and Deportation in The Age of ICE: Immigrants and Human Rights in Massachusetts*, (2008), available at http://www.aclum.org/ice/documents/aclu_ice_detention_report.pdf, [hereinafter ACLU Report].

⁴³ ICE Fiscal Year 2007 Annual Report, *Protecting National Security and Upholding Public Safety*, (2007), available at http://www.ice.gov/doclib/about/ice07ar_final.pdf, [hereinafter Annual Report].

⁴⁴ United States Department of Homeland Security Office of Inspector General, *An Assessment of United States Immigration and Customs Enforcement's Fugitive Operations Teams*, Mar. 2007, available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-34_Mar07.pdf. United States House of Representatives Committee on Appropriations, Summary: 2009 Homeland Security Appropriations, available at <http://appropriations.house.gov/pdf/DHSFY09CONFSummary09-22-08.pdf>.

⁴⁵ Annual Report, *supra* note 41.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

with fighting terrorism. Harsh immigration enforcement policies, when placed in an anti-terrorism framework are justified in the name of a full-throttle attack on terrorism.

The numerous offices, divisions, initiatives and programs that have been established for the purpose of immigration enforcement are expressive of a moral panic that conflates immigration and threats of terrorism. Moreover, the manner of implementation of these programs has been cause for concern. For example, ICE has three organizational divisions: Office of Detention and Removal Operations (DRO), Office of Investigations (OI), Office of Federal Protective Service (FPS), Office of Intelligence, and Office of International Affairs (OIA).⁴⁹ Each division creates its own initiatives in the effort to enforce immigration. In 2003 the DRO chose to implement a comprehensive plan entitled “Operation Endgame,” which has a goal of removing 100% of persons subject to deportation by the year 2012.⁵⁰ Operation Endgame has received an incremental increase of funds. In 2003, the program received \$9,333,519, which increased to \$110,638,837 in 2006, with ICE spending a total of \$204,842,510 on the program over a 4 year span, demonstrating how such policies, in an effort to protect the U.S. from terrorism, are not only misguided, but also costly.⁵¹

Operation Endgame has been criticized because of concerns about due process violations, detention facility conditions and supervision that fail to meet the minimal standards promulgated by ICE itself as well as the lack of availability and quality of medical care for detainees.⁵² The focus on removal of immigrants who may be subject to deportation,

⁴⁹ U.S. Immigration and Customs Enforcement, available at <http://www.ice.gov/about/index.htm>.

⁵⁰ ACLU Report, *supra* note 42.

⁵¹ *Id.*

⁵² *Id.*

regardless of their circumstances, contributes to a climate of fear about such individuals and suggests that their mere presence creates such danger as to justify a departure from basic principles of fairness and decency.

3. ICE'S CURRENT METHODS OF IMMIGRATION ENFORCEMENT

1. ICE'S OFFICIAL POLICIES

The official statements of ICE's policies coincide with what is expressed as the purpose of HSPD 2 discussed above.⁵³ Julie L. Myers, the former Assistant Secretary of Homeland Security for Immigration and Customs Enforcement, in a statement given before the House Appropriations Committee Subcommittee on Homeland Security (the Committee) given on February 26, 2006 stated that "ICE's mission is to uphold public safety and protect the American people from the illegal introduction of goods, as well as the entry of terrorists and other criminals seeking to cross our Nation's borders."⁵⁴ In the statement, Assistant Secretary Myers addressed the Committee about the 2009 official budget request.⁵⁵ She explains that:

ICE has a continual fight to stop potential terrorist and other criminal activity; apprehend child predators; remove criminal aliens; thwart the illegal export of weapons, illicit proceeds, and sensitive technology; interdict the smuggling of dangerous drugs; prevent the importation of tainted commodities and counterfeit pharmaceuticals; disable human trafficking networks that endanger human life and national security; and ensure our Federal buildings are safe to work in and visit.⁵⁶

⁵³ HSPD 2, *supra* footnote 24.

⁵⁴ Statement of Julie L. Myers, Before House Appropriations Committee, Subcommittee on Homeland Security, Feb. 26, 2008, available at http://www.ice.gov/doclib/pi/news/testimonies/before_the_house_appropriations_committee_subcommittee_080221.doc

⁵⁵ *Id.*

⁵⁶ *Id.*

She presents to the Committee what she describes as “the agency’s top law enforcement priorities,” of which immigration enforcement is the first that she discusses.⁵⁷ The enforcement strategies are, according to her statement, focused on those “who pose a threat to our Nation,” “criminal aliens,” “child predators,” “gang members,” “alien absconders,” “criminal smuggling organizations,” those who hire illegal aliens, and those who trade phony documents for immigration fraud.⁵⁸ The only mention that Assistant Secretary Myers made relating to targeting illegal immigrants who have no criminal history and are merely working in the United States is when she explained that ICE identified and arrested “11 unauthorized aliens who were employed at water treatment facilities.”⁵⁹ Yet, she stressed that most of these workers “were in highly placed positions with access to by-pass most of the protective measures designed to protect the water supply,” implying that the arrest and removal of these individuals nonetheless was necessary to protect the nation from terrorism.⁶⁰

II. ICE’S ACTUAL POLICY IMPLEMENTATION—ATTACK EASY TARGETS

The direction that ICE has taken as illustrated by the programs that have been developed does not primarily target and apprehend dangerous criminals and terrorists. For example, in a memorandum sent out on January 22, 2004 from the Director of the Office of Detention and Removal ordered that at least 75 percent of the people that agent teams seek out have criminal records.⁶¹ Then on January 31, 2006, another directive increased the number of people each team of agents must arrest from 125 a year to 1,000. At the same time, this directive eliminated the requirement that 75 percent of all those apprehended be criminals and

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Myers, *supra* note 52.

⁶¹ http://graphics8.nytimes.com/packages/pdf/nyregion/2009/20090205_RAID_FINAL.pdf

instead could include “fugitives that are non-criminals,” meaning noncitizens that have an outstanding deportation order but no criminal record.⁶² This memo did maintain that if other incidental arrests (known as “collateral arrests”) occurred where ICE apprehended undocumented noncitizens who had neither a deportation order nor a criminal record that those arrests did not count toward the 1,000 person quota.⁶³ These requirements further deteriorated however, when in a memorandum dated September 29, 2006, ICE changed its position and allowed collateral arrests to count toward the 1,000 person arrest quota.⁶⁴ The documents indicate that while ICE officials touted its operations as a method for apprehending terrorists and dangerous criminals in an effort to increase the security of the United States, ICE was in fact going after easier targets.⁶⁵ In fact, almost three-quarters of the 96,000 people apprehended by ICE in a five year period had no criminal convictions.⁶⁶

While ICE claims success with these raids,⁶⁷ questions of efficiency arise, along with many constitutional and human rights concerns.⁶⁸ Because ICE agents have implemented Operation Return to Sender by conducting sweeping raids of workplaces and homes of individuals who are possibly fugitive illegal immigrants, U.S. citizens and noncitizens are

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Nina Bernstein, *Target of Immigrant Raids Shifted*, THE NEW YORK TIMES, Feb. 3, 2009, available at <http://www.nytimes.com/2009/02/04/us/04raids.html?pagewanted=1&ref=opinion>.

⁶⁶ *Id.*

⁶⁷ U.S. Immigration and Customs Enforcement, *available at* <http://www.ice.gov/pi/news/newsreleases/articles/060614boston2.htm?searchstring=>.

⁶⁸ Jennifer Ludden, *Immigration Experts Predict Fewer Workplace Raids*, NPR, Dec. 2, 2008, *available at* <http://www.npr.org/templates/story/story.php?storyId=97700373>. Doris Meissner, a former head of the Immigration and Naturalization Service is not convinced that work raids are helping curb illegal immigration and said with regard to the raids, “I think a lot of what’s been going on has been high-visibility disruption for its own sake. I’m not sure there’s a real strategy that’s guiding it.”

affected.⁶⁹ The methods involved in performing such raids are questionable, if not contestable. Individuals aggrieved by these tactics have challenged these operations through litigation against ICE in an effort to restore constitutional principles and norms of decency as well as vindication for the violation of their rights. The financial cost of enforcement-only based immigration policies carried out under the pretext of combating terrorism combined with the costs to human and constitutional rights suggest that immigration enforcement developments are fiscally irresponsible and morally reprehensible.

B. CONCLUSION

With the shift in immigration policies, the creation of ICE, and the conflation of immigration and terrorism, there have been increased instances where ICE has stepped beyond the bounds of lawfulness. ICE's methods for enforcing the immigration statutes and regulations have become more and more aggressive, thereby increasing the occurrences of constitutional and human rights violations. This, in turn, triggers a rise in litigation against ICE, as aggrieved parties seek redress. As more and more immigrants find themselves detained as a result of increased and often wrongful immigration enforcement practices, the very circumstances of their detention-- conditions, timeframe, and legality— have been challenged in litigation. The costs of defending ICE in the lawsuits have been significant, both in terms of taxpayer dollars and resources of the judicial and administrative systems. These costs are even greater when considering how ICE's strategies compromise the integrity of government processes, marginalize communities, and flout basic legal protections found in the Constitution.

⁶⁹ Nina Bernstein, *Despite Vow, Target of Immigrant Raids Shifted*, THE NEW YORK TIMES, Feb. 4, 2009, available at <http://www.nytimes.com/2009/02/04/us/04raids.html?hp>.

WORKSITE RAIDS

A widespread and controversial way that ICE has tried to carry out its mandate is to enter workplaces they believe to contain a substantial number of illegal aliens and arrest persons without adequate identification. These activities, called “workplace enforcements” by ICE, are more broadly and commonly referred to as worksite raids. These raids, and particularly the methods that ICE has used to carry them out, have been costly for immigrants, their families, the U.S. legal system, and the U.S. taxpayer. This section aims to provide an overview of the human rights violations that have been committed by ICE in the course of worksite raids, then to examine two case studies in worksite raids, then to categorize and catalogue the significant costs involved in these raids.

A. HUMAN RIGHTS VIOLATIONS

The following are some of the human rights violations that have been committed by ICE in the course of its worksite raids.

1. THE “PARAMILITARY STYLE” OF WORKSITE INVASION

ICE’s modus operandi in its worksite raids, which has been described as a “paramilitary style,”⁷⁰ is chillingly detailed in a case relating to the Van Nuys, California raid, *In the Matter of Perez-Cruz*.⁷¹ The case reveals a litany of human rights violations. One hundred ICE agents entered the Van Nuys worksite with their guns prominently displayed. They blocked all visible exits and shouted at workers to stop working, and not to use their cell phones under any circumstances. After removing those who claimed to be U.S. citizens and Legal Permanent Residents, ICE agents stood members of the other group against the wall, patting them down

⁷⁰ Mark Cooper, “Lockdown in Greeley” in *The Nation*, February 26, 2007.

⁷¹ *In the Matter of Perez-Cruz*, Immigration Court, Los Angeles, CA, A95 748 837, 2/12/09.

one by one and shouting in the face of anyone who dared to speak. Each person in this group was placed in handcuffs while being questioned. They were repeatedly asked the same questions and repeatedly photographed as they were taken to downtown Los Angeles to be detained. The immigrants had no use of the bathroom for six hours, and no food or water for eighteen hours. They were never advised of their Miranda rights.

In other raids, ICE agents have made little or no attempt to discriminate between those who are likely to be illegal immigrants and those who are not, as everyone is simply rounded up and detained. For example, the recent *United Food and Commercial Workers et al. v. ICE* (henceforth “UFCW”) complaint, which stems from the Swift raid in Cactus, Texas⁷² alleges that UFCW members were detained without reasonable suspicion or probable cause. This was, it contends, consistent with other Swift Raids in which ICE engaged in “mass warrantless detentions of workers.”⁷³

2. DISREGARD OF CAREGIVING STATUS FOR THOSE ARRESTED

In the New Bedford, Massachusetts raid of a leather goods factory, many of the immigrants arrested were sole caregivers for children who had no idea their mother or father was not coming home. The children went significant periods of time alone and uncared for. ICE could have taken measures to prevent the raid from tearing apart these families, but it did not. For example, it failed to adequately alert social welfare agencies to the raid, presumably in order to attain maximum secrecy and surprise. A similar claim is alleged in *UFCW*.

⁷² *United Food and Commercial Workers et al. v. ICE*, Original Complaint—Class Action, U.S. District Court for the Northern Division of Texas, Amarillo Division, September 11, 2007, p. 3.

⁷³ *Id.* at 10.

3. TRANSPORTATION TO FARAWAY DETENTION CENTERS

In the New Bedford raid, ICE initially transported the detainees to Fort Devens in Ayer, Massachusetts. However, in an entirely foreseeable problem, Fort Devens lacked adequate bed space for the detainees. As a result, ICE then transported 90 detainees to a detention center in Harlingen, Texas, and 116 others to a detention center in El Paso, Texas, flying them on commercial airlines shackled head to toe.⁷⁴ ICE's transportation of these detainees across the country only exacerbated the family separation issues listed above, and it made it more difficult for the detainees who had received help from counsel in Massachusetts to retain that help.

4. REFUSAL TO GIVE BOND HEARINGS TO MANY OF THOSE ARRESTED

In the New Bedford raid, many of those arrested who were legally entitled to bond hearings were refused those hearings. The improprieties surrounding treatment of the detained immigrants while they still in Massachusetts were sufficient to alert the Guatemalan consul, which filed a petition for a writ of habeas corpus and a complaint for declaratory and injunctive relief.

5. REFUSAL TO DISCLOSE WHEREABOUTS OF DETAINEES IN A TIMELY FASHION

In New Bedford, family members of detainees often had to wait several days to find out their loved ones had been flown to Texas. Many of these family members thought that the detainees were still in Massachusetts rather than halfway across the country. Delay in disclosing the whereabouts of detainees is an accusation that has been made against ICE with regard to several other worksite raids.

⁷⁴ Id. at 5.

6. INADEQUATE PROVISION OF COUNSEL

In the Postville, Iowa raid, legal representation of the detainees was lacking in three respects. First, the detainee-to-lawyer ratio was about seventeen to one, requiring lawyers to explain the charges and possible legal strategies to large groups rather than individuals (keeping in mind that these persons were also listening to translations that they were unlikely to completely understand).⁷⁵ Second, the detainees were not represented by immigration lawyers but by criminal defense lawyers who did not know the immigration-related legal strategies that might otherwise have been pursued. For example, some of the detainees may have had derivative citizenship claims, some may have had fears of persecution in their home country, and others may have been eligible for visas as witnesses to crimes committed by their employer.⁷⁶ Third, the defense lawyers were given by government officials a script from which to read to their clients to discuss legal options. Most of the lawyers, undermanned and quite possibly intimidated, agreed to do so. It is telling, though, that one brave dissenting lawyer who walked away from the proceedings in disgust characterized the scripts as “guilty plea handbooks.”⁷⁷

In New Bedford, a squad of volunteer lawyers who had offered to provide legal guidance at Fort Devens was initially turned away. Although attorneys were allowed to meet the next day with those detainees who had specifically requested legal advice, a one-day delay was both unwarranted and onerous. Furthermore, individuals who may not have known of their right to

⁷⁵ Id. at 5.

⁷⁶ American Immigration Lawyers Association, “Op-Ed for ICE Worksite Enforcement Actions,” ILA InfoNet Doc. No. 08071567, July 25, 2008.

⁷⁷ Rockne Cole, letter to Representative Zoe Lofgren regarding the May 12, 2008 Postville Immigration Raids, written on July 24, 2008.

seek counsel, or that counsel were available without charge to them, might not have had access to counsel as a result of the refusal to grant all volunteers full access to detainees.

7. INADEQUATE TRANSLATION OF COURT PROCEEDINGS

In the Postville raid, detainees were arraigned ten at a time via a Spanish translation. Apparently it was assumed that, because the detainees looked Hispanic, Spanish was their first language. In most cases this assumption was incorrect. Most of the detainees were Guatemalans who spoke primarily Mayan languages, and spoke Spanish as a second language, if at all.⁷⁸

8. OVERZEALOUS CRIMINAL PROSECUTIONS

At Postville, the detainees were charged with aggravated identity theft, a criminal offense that carries a minimum of two years in prison. Aggravated identity theft requires that a person “knowingly uses a means of identification of another person with the intent to commit any unlawful activity or felony.”⁷⁹ Almost all of those arrested at Postville had invented Social Security numbers that did not match any actual person’s number. It is obvious that the charge of aggravated identity theft was inappropriate for these individuals.⁸⁰

9. FAST-TRACKED PROSECUTIONS

At Postville, government officials offered the detainees a plea bargain that amounted to a cruel dilemma. Detainees could plead down from the criminal offense detailed in the

⁷⁸ DHS-NGO Enforcement Working Group, “Immigration Enforcement’s Newest Strategy” in *Defending Human Rights and Due Process*, Fall 2008.

⁷⁹ Camayd-Freixas, p. 11.

⁸⁰ Compare the Postville factual situation, for example, to the one in *U.S. v. Mendoza-Gonzalez*, a case that stemmed from the Swift Raid in Marshalltown, Iowa. In that case, an identity theft conviction was upheld precisely because the evidence was sufficient to show that the original holder of the identity existed as a real person. See *U.S. v. Mendoza-Gonzalez*, U.S. Ct. App. 8th Circuit, March 28, 2008. Perhaps such inconvenient precedents have played a role in motivating ICE to step up its efforts to find identity matches at all costs, as we see in the fact that its Secure Communities program mandates that arrestees’ fingerprints now be checked against U.S. Department of Homeland Security (DHS) databases, rather than just against FBI criminal databases. See National Immigration Law Center, “More Questions Than Answers about the Secure Communities Program,” March, 2009.

previous section to the lesser offense of knowingly using a false Social Security number and serve five months in jail, get deported without a hearing, and be placed on supervised release for three years. Their other option was to refuse the plea and plead not guilty, which, according to the defense attorneys' script, meant waiting in jail up to six to eight months for a trial without the right of bail—and then still getting deported even if they won at trial.⁸¹ There was an additional catch: the plea “exploded” after seven days, meaning the offer was no longer good, so the decision had to be made quickly.⁸²

The plea agreement was represented to the detainees in a highly deceptive manner. The greater offense from which the detainees pleaded down was one that they were unlikely ever to be found to have committed. As previously noted, most of the detainees had invented Social Security numbers that did not match any existing ones, which would have made a grand jury conviction on the criminal charge unlikely. The detainees, however, had no guarantee that they could get a grand jury hearing in time to test the efficacy of accepting the plea bargain, because it might take longer than seven days to do so. Pressured for time, having little understanding of their legal situation, deeply frightened, and wanting most of all to continue to work to support their families (even if that meant deportation), they signed the plea bargain.

B. CASE STUDIES

1. NEW BEDFORD AND AGUILAR

ICE agents conducted a raid on March 6, 2007 on a leather goods factory in New Bedford, Massachusetts. They arrested five executives on immigration-related criminal charges

⁸¹ Camayd-Freixas, p. 5.

⁸² Amazingly, according to Rockne Cole, the rationale for the exploding plea was a humanitarian one: officials were concerned about getting the detainees back to their families in Guatemala as soon as possible. See Rockne, p. 3.

and took more than 300 employees into custody for civil immigration infractions.⁸³ As noted in the previous section, ICE transported the detainees to Fort Devens in Ayer, Massachusetts, and then transported 90 detainees to a detention center in Harlingen, Texas and 116 others to a detention center in El Paso, Texas.

Legal actions ensued, and the matter was eventually heard before the First Circuit Court of Appeals as *Aguilar v. Immigration and Customs Enforcement*. The district court had held that it lacked jurisdiction to hear any of plaintiffs' complaints because, pursuant to 8 USC § 1252(b)(9), all matters arising from removal proceedings must be addressed through administrative remedies, e.g., immigration courts. The Court of Appeals, though, held that some of petitioners' claims could be reviewed. Two of the petitioners' claims were of this kind: a claim concerning detention conditions and a claim concerning family integrity. The claim concerning detention conditions was dismissed, not because they necessarily lacked merit but rather because petitioners had not raised these issues in district court, a prerequisite for appellate review.⁸⁴ The circuit court did give substantive consideration, however, to petitioners' Fifth Amendment due process claim that ICE's actions violated their right as parents to make decisions for the care, custody, and control of their children. It held that the proper standard when challenging executive action via a substantive due process claim is whether that action "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."⁸⁵ The court determined the conduct of ICE officials did not cross this line, at least in part because ICE did in fact release some detainees in New Bedford on the ground that they

⁸³ Facts summarized in *Aguilar v. Immigration and Customs Enforcement*, 07-1819 (First Circuit Court of Appeals, November 27, 2007), p. 5.

⁸⁴ *Id.*

⁸⁵ *Id.* at 15.

were the sole caregivers to their children.⁸⁶ Although this determination led to the dismissal of the detainees' claims, it strongly suggests that to avoid liability, ICE must take into consideration the needs of parents to make arrangements for their children as part of the detention process.⁸⁷

Aguilar points to the promise of litigating due process claims arising in the context of workplace raids, as the court tellingly refers to ICE's "ham-handed ways of carrying out its important responsibilities."⁸⁸ Claims that do not "arise from" removal proceedings, which include at least some substantive due process claims, may be heard on their merits in federal circuit court. The "shock the conscience" standard they must meet appears dauntingly high, but even here there is reason for petitioners to have hope. The standard refers to the "contemporary conscience" and is thus meant to be a kind of barometer of present moral sensibilities. These societal sensibilities are subject to change, and to some extent it appears they have already changed as negative publicity continues to swirl around ICE's workplace raids and other activities. It may now be up to judges to acknowledge that change as they encounter other due process claims in future cases. Additionally, commentators have already noted the "educational value" of the case "not only for local attorneys, advocates and community organizers, but also for the nationwide network of immigrant rights organizations."⁸⁹

⁸⁶ *Id.*

⁸⁷ The court added that petitioners must also show in their substantive due process claim that the government deprived them of a protected interest in life, liberty or property, and that petitioners' contention about family integrity does not address this. *Id.*

⁸⁸ *Id.* at 17.

⁸⁹ Gregoire F. Sauter, "Case Study: *Aguilar v. ICE*, Litigating Workplace Immigration Raids in the Twenty-First Century" in *Bender's Immigr. Bull.* 1 (2009), p. 17.

2. POSTVILLE

In the Postville raid the issue is not so much what might constitute successful litigation, but the extraordinary fact that ICE managed to foreclose any due process litigation before petitioners could bring it. ICE agents raided the Agriprocessors meatpacking plant in Postville in May of 2008. In the largest workforce raid in U.S. history at the time⁹⁰, federal officials arrested nearly 400 workers, most of whom were Guatemalan, taking the detainees to the National Cattle Congress, a cattle fairground turned into a makeshift detention center.⁹¹ The detainees were then arraigned and represented as detailed in the previous section.

Government officials then fast-tracked detainees into signing plea bargains in the way previously described. They justified their use of this system by trumpeting its efficiency, and they may yet seek to replicate the system elsewhere. Whether by direct intention or indirect consequence, however, the system had the suspiciously convenient result of suppressing any due process litigation that might otherwise have been raised by detainees. As such it presents detainees and their advocates with a different kind of challenge than that of *Aguilar*. The challenge of Postville is to stop coercive and deceptive fast-tracking from taking place at all so that there is genuine recourse to seek remedies via due process litigation. Only then might the legal strategies learned from *Aguilar* be taken on board.

Several courses of action have been designed to respond to these events. One way is to alert employees at places of employment ahead of time about prudent courses of action if they think it is possible they will be the subject of a raid. For example, the National Immigration Law

⁹⁰ See “Mayor: Feds Turned My Town ‘Topsy Turvy.’” Its scale has subsequently been topped by the raid in Laurel, Mississippi.

⁹¹ Camayd-Freixas, p. 1.

Center, in its bulletin “How to Be Prepared For an Immigration Raid,” offers practical advice to immigrants such as carrying a “Know Your Rights” card, and advice to the workplaces to reach out ahead of time to immigrant rights advocates and community groups.⁹² Another method of action, related to the first, is to make sure at all costs that detainees have adequate access to the right kind of counsel. The formation of volunteer coalitions of immigration lawyers for this purpose, available on a moment’s notice, would be invaluable and is currently underway as evidenced by increased trainings and networking for this purpose.⁹³

C. COSTS

1. FINANCIAL COSTS

The sheer logistics of worksite raids are costly, which is one reason why ICE, as of 2007, had an annual budget of \$5 billion.⁹⁴ For example, the immediate cost of the infamous Postville, Iowa raid was \$5.2 million, or \$14,000 per immigrant, which does not include further costs of detaining individuals for months afterward.⁹⁵ Such further costs would undoubtedly add millions more to the bill.

Working even from the conservative Postville figure of \$5.2 million, we can roughly extrapolate the enormous cost of worksite raids across the country. Worksite raids have been so numerous that a complete list of them is difficult to compile. A partial list of recent worksite raids, though, includes Laurel, Mississippi; Greeley, Colorado; cactus, Texas; Grand Island, Nebraska; Hyrum, Utah; Worthington, Massachusetts; Louisville, Kentucky; Marshalltown, Iowa; Denver, Colorado; New Haven, Connecticut; Van Nuys, California; San Francisco,

⁹² National Immigration Law Center, “How to Be Prepared for an Immigration Raid,” March 2007.

⁹³ This is the model of Robert Hildreth’s group, the National Immigrant Bond Fund.

⁹⁴ Erik Camayd –Freixas, “Interpreting After the Largest ICE Raid in U.S. History: A Personal Account” in *Monthly Review*, December 7, 2008, p. 11.

⁹⁵ Robert Hildreth, “ICE Immigration Raids Waste Time and Money” in www.indiversity.com, December 26, 2008.

California; Annapolis, Maryland; Providence, Rhode Island; Loveland, Colorado; Asheville, North Carolina; and Sarita, Texas. Even if these raids were a little cheaper on average than was Postville, the list tallies many tens of millions of dollars, money that might be better spent actually securing our borders and ports from potential terrorists.

Then there are the indirect costs of these huge raids—costs to devastated small communities that hit local taxpayers in the form of factory closings, school closings, and slowed economic output.⁹⁶ Such costs are difficult if not impossible to quantify, but they are undeniably real. The costs are inevitable and significant given the fact that immigrants are originally lured to factories like the ones in New Bedford and Postville precisely because there is little willingness among people already living in those communities to do the jobs in question. There is little reason, in other words, to think that the slack will be picked up adequately when immigrants are rounded up and deported.

We must also include the costs of litigation to the U.S. taxpayer. Individuals who are aggrieved have a right to a remedy, and every time that ICE must defend itself in court, the taxpayer foots the bill. While ICE succeeded in avoiding due process litigation in the Postville raid by fast-tracking the process, this kind of strategy is unlikely to work in the future. Lawyers are better prepared for it now, and thanks to *Aguilar*, they have a better idea of what legal claims to bring against ICE and how to frame those claims. It is a safe assumption, then, that absent a significant change in its practices, ICE will face considerably more litigation in the

⁹⁶ See, e.g., “Mayor: Feds Turned My Town ‘Topsy Turvy’” on CNN.com, October 14, 2008. See also Camayd – Freixas, p. 3 (quoting the Postville school superintendent as saying “this literally blew our town away”). See also Mark Cooper, “Lockdown in Greeley” in *The Nation*, February 26, 2007, reporting that multiple raids on Swift & Co.’s factories cost the company \$30 million.

future concerning its worksite raids than it has faced to date. For example, the previously mentioned *UFCW* complaint raises the stakes against ICE by including as a plaintiff a union of food workers that represents 1.3 million workers, joining a list of immigrants who also claim violations.⁹⁷ One wonders if the owners of the worksites themselves could be far behind.

2. OTHER COSTS

As we have seen, worksite raids often cost immigrants their dignity and their ability to make a contribution to the U.S. economy. They are costly to the family structures of immigrants that are such a vital part of those working peoples' lives.⁹⁸ Perhaps even more tragically, they are costly to ICE in terms of reputation, which could hinder its ability to pursue its actual mandate of protecting the country from terrorism, should it find occasion to attempt to do so. Given the political fallout from raids such as New Bedford and Postville, U.S. citizens might be forgiven for thinking that if ICE cannot uphold core U.S. values, it might not be trusted to defend the nation that adheres to those values.

⁹⁷ See *UFCW*.

⁹⁸ For a thorough examination of this issue with a special focus on children, see *"Paying the Price: The Impact of Immigration Raids on America's Children"* by the Urban Institute for the National Council of La Raza, 2007.

HOME RAIDS

Among the activities of ICE that incur varied and formidable costs to taxpayers, immigrants, and the U.S. justice system is the conduct of home raids. In the name of keeping the country safe from terrorism, ICE agents have forcibly entered homes of ethnic minorities, almost always Hispanic and often U.S. citizens, ostensibly to round up particular individuals they often have little reason to think they will find. These home raids have taken place across the country, and often occur in conjunction with workplace raids in a given town. Like workplace raids, these home raids are logistically expensive. They have incurred the costs of multiple cases of complex litigation. They have also frayed if not entirely broken the already tenuous trust felt in hard-working immigrant communities toward the U.S. government. This section will first look at the human rights violations that these raids typically involve, then provide a factual overview of several cases to see the variety of contexts in which litigation against ICE has arisen, and finally examine the variety of costs incurred by ICE's home raids.

A. HUMAN RIGHTS VIOLATIONS

ICE's modus operandi in its home raids, calculated to create maximum fear and confusion, has run roughshod over basic human rights in a way that contravenes core American values. The raids are often performed late at night or in the pre-dawn hours, which ensures that residents will be asleep, will be confused as they awaken, and are more likely to perceive the ensuing commotion as a genuine emergency.⁹⁹ ICE agents usually do not have a Spanish speaker among them, even though they know that the residents of the home are likely to be

⁹⁹ See, e.g., *Aguilar, et al. v. Immigration and Customs Enforcement, Class Action Complaint, United States District Court, Southern District of New York, Sept. 20, 2007.*

Spanish-speaking and may not speak any English at all. It is in this context that ICE agents pound on, or even break, doors or windows while yelling to the people inside.¹⁰⁰ Residents awaken terrified and confused. The agents often represent themselves as the police in order to gain entry,¹⁰¹ but of course they are not the police. If a resident opens a door to see what the commotion is about, agents force their way into the home on the pretext that they have been invited in.¹⁰² Agents search the home ostensibly to see if a particular fugitive is present, though they often have no reasonable basis for believing the fugitive in question is actually there.¹⁰³ Consistently in these home raids, the agents' underlying goal is simply to round up as many unauthorized workers as possible, and in actual practice the persons they detain are sometimes U.S. citizens.¹⁰⁴

ICE's methods of conducting home raids are unduly deceptive and violate the dignity of each resident. More specifically, those methods invite litigation based upon constitutional claims that serve as some of the central U.S. embodiments of human rights protections. Plaintiffs whose homes have been invaded by ICE commonly claim violations of their Fourth Amendment right against unreasonable search and seizure, their Fifth Amendment rights to due process and to counsel, and their Sixth Amendment right to counsel. Equal protection claims are also sometimes raised via the Fourteenth Amendment. A brief overview of some of this litigation will allow us to better understand the factual contexts in which such claims arise.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

B. CASE STUDIES

1. ARIAS

Arias v. Immigration and Customs Enforcement, decided by the U.S. District Court for the District of Minnesota, concerns a series of home raids conducted in the towns of Willmar and Atwater, Minnesota.¹⁰⁵ ICE agents, with the cooperation of state and local officials, conducted warrantless, non-consensual searches of the homes of several different plaintiffs. They entered some homes under the false pretense that they were the police. They did not advise detained Plaintiffs of their right to remain silent and to speak with an attorney. Upon detaining Plaintiffs, ICE agents coerced some of them into waiving their rights and stipulating to removal from the United States. Plaintiffs brought legal action, claiming violation of their Fourth Amendment, Fifth Amendment, Sixth Amendment, and Fourteenth Amendment rights, as well as violation of the Immigration and Nationality Act. They sought damages, declaratory relief, and injunctive relief.¹⁰⁶

As a bizarre footnote to *Arias* that demonstrates the rashness of which ICE is capable, it is worth noting the recent complaint of Jim Slaughter, U.S. Customs K-9 Officer at San Luis, Arizona, who with his wife endured a botched ICE home raid for a “fugitive.” Seven ICE agents showed up at his door, and when he opened it to talk to them they stormed in and demanded that and his wife stand in the middle of their living room while the agents searched the house. When Slaughter, an ex-Marine, told the lead agent that he was a U.S. customs officer, “the lead agent, his eyes got real big, and he’s like what?” You are?”¹⁰⁷ Slaughter is suing each agent for

¹⁰⁵ *Arias v. Immigration and Customs Enforcement*, 2008 WL 1827604 (D.Minn.).

¹⁰⁶ *Id.*

¹⁰⁷ “CBP Officer Sues Homeland Security for Violating Rights,” www.kswt.com.

\$500,000 in damages, claiming that he suffered great humiliation and that his wife’s high blood pressure was worsened.¹⁰⁸

2. MANCHA

*Mancha v. Immigration and Customs Enforcement*¹⁰⁹ is a class action suit that stems from the actions of ICE in the small town of Stillmore, Georgia. ICE agents regarded the poultry plant in Stillmore as a prime target for rounding up illegal aliens, but did not confine their activities to a raid of the factory itself. In addition to raiding the factory, ICE agents raided the homes of families of factory employees, entering the homes without warrants. Entire families were detained without probable cause. Plaintiffs brought legal action in district court, asserting that they were racially profiled, harassed, and discriminated against in violation of the Fourth and Fifth Amendments. They sought declaratory relief and an injunction against ICE carrying out similar home raids in the future.¹¹⁰

The same court also considered another count in *Mancha* in a separate hearing. The count concerned a matter related to ICE’s home raids, namely the seizing of a motorist who found herself caught up in a caravan of ICE vehicles as ICE was preparing to conduct its home raids. Plaintiff, a U.S. citizen, found herself behind a long caravan, then found herself inside it, as the car in front of her pulled over to let her pass, and then pulled behind her. That car and the car in front of Plaintiff then stopped and turned on their flashing blue lights. Plaintiff was then aggressively questioned by the officers about her citizenship. At the conclusion of the questioning, she was ominously warned not to use her cell phone to tell anyone “immigration”

¹⁰⁸ *Slaughter v. ICE*, complaint in the U.S. District Court for the District of Arizona, filed February 13, 2009.

¹⁰⁹ *Mancha v. Immigration and Customs Enforcement*, U.S. District Court, N.D. Georgia, Atlanta Division, Dec. 5, 2007.

¹¹⁰ *Id.*

was in town. She alleged violation of her Fourth Amendment rights and her Fifth Amendment right to equal protection.¹¹¹ Not surprisingly, these are the same claims that form the heart of the case of the other *Mancha* plaintiffs.

Mancha appears to be a classic case of racial profiling, as no non-Hispanic residents were the victims of home raids. It is encouraging, though, that a backlash against such profiling appears to be developing. In Otero County, New Mexico, the Sheriff's Department recently agreed to a settlement of \$100,000 with plaintiffs who claimed that sheriff's deputies were involved in racial profiling, unlawful stops, and other civil rights violations.¹¹² The role of immigration NGOs in calling attention to the unlawful conduct was indispensable to achieving this result.

3. SOTO

In *Soto v. Paredes*,¹¹³ a crime suspect in a highway shooting informed ICE of the location of a "drophouse" that was used in connection with an alien smuggling ring. The suspect could not provide an address and could only draw a map of the house's location. Based on this "drawing" and oral directions from an ICE supervisor, ICE agents decided to target the house of Plaintiffs. Even after the agents surveilled the house and found no suspicious activity, they were able to procure a warrant and subsequently raided it. This investigation was a part of a larger investigation of the alien smuggling ring by ICE agents in the Phoenix area, an investigation that featured surveillance of hundreds of houses conducted like an "assembly

¹¹¹ *Id.*

¹¹² Texas Civil Rights Project News, "Immigration Rights, Civil-Rights Violations Suit is Settled for \$100,000."

¹¹³ *Soto v. Paredes*, U.S. District Court, District of Arizona, March 31, 2008.

line.”¹¹⁴ Plaintiffs brought suit, alleging violations of their Fourth and Fifth Amendment rights, and judicial deception. Plaintiffs’ basic contention was that the search warrant had been procured unconstitutionally. Plaintiffs also alleged the use of excessive force in the raid itself.

C. COSTS

The following is an analysis of just some of the costs incurred by ICE’s policies and practices in the realm of home raids.

1. STEPPED UP FUTURE LITIGATION

As we can see from *Mancha*, home raids and other related activities by ICE agents result in litigation, as aggrieved parties seek redress in the courts. If such circumstances continue, more litigation will result. This is particularly true as lawyers become familiar with which legal strategies are successful and they are able to develop nuanced legal strategies to meet new sets of circumstances.

Evidence that litigation in the realm of warrantless home raids is likely to increase is found in the recent class action complaint of *Aguilar v. Immigration and Customs Enforcement*. *Aguilar* aggregates the complaints of dozens of Hispanic residents of the greater New York City area who were victims of ICE’s home raids. Like *Mancha*, it is likely to incur considerable court costs as at least some of its claims are likely to be considered separately by the U.S. District Court for the Southern District of New York. As in *Arias*, Plaintiffs in *Aguilar* are taking action against ICE, ICE officials at the federal level, and ICE officials at the state level—indicating that the cost of the defense in this pending case will be quite high.

¹¹⁴ *Id.*

Soto gives indications that litigation will increase in the future even regarding some cases in which ICE procures a search warrant. The court identified as “troublesome” the fact that ICE agents found the house in question based only upon a hand-drawn map and oral directions. The Court was also troubled by the fact that surveillance on Plaintiffs’ house was conducted for only about an hour and no suspicious activity was found, yet this played a role in ICE’s procurement of a warrant. Perhaps more importantly, Plaintiffs were allowed to proceed with their claims of excessive force, as the court granted them leave to amend this claim.¹¹⁵

Furthermore, Plaintiffs’ allegation of excessive force was not dismissed, as Plaintiffs were given leave to amend their complaint to frame their allegation differently. This demonstrates that the Court was sensitive to the legitimacy of the allegation that ICE used excessive force. The overall lesson of *Soto* for our analysis of costs is that ICE does not insulate itself from litigation stemming from a home raid simply by procuring a search warrant. When ICE does actually procure search warrants, lawyers will undoubtedly continue to take a hard look at how the warrants are procured and will litigate matters when appropriate. The result will be further use of government lawyers and further costs to taxpayers.

In addition to direct constitutional claims, other legal avenues are being increasingly pursued by advocates in the context of home raids. One example is the motion to suppress. Under the exclusionary rule, lawyers representing victims of home raids are increasingly focusing on filing motions to suppress evidence obtained in violation of the Constitution, usually in violation of the Fourth or Fifth Amendment. Evidence may be kept out of a removal

¹¹⁵ *Id.*

hearing if it was gained through an “egregious” violation of rights.¹¹⁶ Motions to suppress evidence in removal hearings concerning home raids have been filed in matters across the country. See, for example, *In the Matter of Calderon*,¹¹⁷ *In the Matter of Perez-Cruz*,¹¹⁸ *Fair Haven Motion to Suppress*,¹¹⁹ *San Jose Motion to Suppress*,¹²⁰ *San Francisco Motion to Suppress*,¹²¹ *Bloomington Motion to Suppress*.¹²² Three such motions have, in fact, been found to have made a prima facie showing of egregious conduct on the part of ICE,¹²³ which may well indicate a trend in changing political times. Each motion to suppress that is filed is ultimately costly to taxpayers, because matters in the taxpayer-funded immigration courts are further complicated and extended. Victims of home raids who find themselves in removal proceedings in immigration court can also file a motion of termination, seeking the termination of the removal proceeding.

2. MULTIPLE DEFENDANTS INCREASE DEFENSE COSTS

A striking point to note about *Arias* and *Aguilar* is the massive number of defendants sued, defendants who each taxed the government’s judicial resources by presenting U.S. Attorneys with considerable work to do on their behalves. Consider briefly the catalogue of *Arias* defendants: ICE itself; Michael Chertoff, Secretary of Department of Homeland Security, Julie L. Myers, Assistant Secretary of Homeland Security for ICE; John P. Torres, Director of Detention and Removal Operations of ICE; Scott Banieke, St. Paul Field Office Director for Detention and Removal Operation; Peter Berg, Supervisory Detention and Deportation Officer

¹¹⁶ See *Motions to Suppress in Removal Proceedings*, p. 1-18.

¹¹⁷ *In the Matter of Calderon*, Office of the Immigration Judge, San Francisco, CA, 2007.

¹¹⁸ *In the Matter of Perez Cruz*, Immigration Court, Los Angeles, CA, 2009.

¹¹⁹ *Fair Haven Motion to Suppress*, Office of the Immigration Judge, Harford, CT, 2007.

¹²⁰ *San Jose Motion to Suppress*, Office of the Immigration Judge, San Jose, CA, 2007.

¹²¹ *San Francisco Motion to Suppress*, Office of the Immigration Judge, San Francisco, CA, 2007.

¹²² *Bloomington Motion to Suppress*, Immigration Court, Bloomington, MN, 2007.

¹²³ Announcement by Centro Legal, Inc. Names of cases have been redacted.

for Detention and Removal; Allen Gay, Deportation Officer for Detention and Removal; John Doe ICE Agents 1-30; James A. Kulset, Willmar Police Department Chief of Police; John Doe Willmar Police Officers 1-10; Reed Schmidt, Atwater Police Department Chief of Police; Paul Schmidt, Atwater Police Officer; Dan Hartog, Kandiyohi County Sheriff; John Doe Kandiyohi County Sheriff's Deputies 1-10; and Jane Doe Kandiyohi County Probation Official.

Two points must be made in this context. First, the addition of each defendant was facially legitimate and represented good legal strategy for the plaintiffs in *Arias*—and would be in the interest of all plaintiffs suing ICE regarding a raid or most any other matter (especially if performed via 287(g)) in the future. Plaintiffs' claims yielded positive results. The motion to dismiss filed by U.S. defendants Myers, Torres, Berg, and Gay was denied in part. The motions to dismiss filed by many of the Willmar and Atwater defendants were also denied in part.¹²⁴ The result is extended litigation in the matter, and more cost to the taxpayer. Second, the addition of each defendant means a greater cost to American taxpayers, because lawyers must take time and care to provide a defense for each defendant.

3. MULTIPLE PLAINTIFFS INCREASE THE LIKELIHOOD OF FRAGMENTED CASES

Mancha is illustrative in yet another way: it demonstrates that class action cases against ICE, which are a logical way to proceed in instances of raids, are often heard by the court at multiple times as the court considers multiple counts alleged by Plaintiffs. The result is greater burdening of judicial resources, and greater cost to taxpayers. As noted, *Mancha* is a class action suit in which the district court considered two separate but related matters on two different occasions, one pertaining directly to ICE's home raids and another pertaining to a car

¹²⁴ *Id.*

stop that happened around the same time.¹²⁵ Multiple hearings such as these increase costs to taxpayers because they increase the cost of defending ICE and increase federal court costs. This kind of case fragmentation is very likely to happen in the future concerning ICE's home raids (as well as workplace raids), because those raids are complex and multifaceted operations that invite class action litigation. It would not be at all surprising, for example, to see this fragmentation occur in *Aguilar*. More plaintiffs involved in a given suit means more likelihood that multiple related hearings.

4. CONCLUSION: OTHER COSTS

This section has focused primarily on the financial costs of home raids, simply because there is much to report on these costs. However, it is best not to lose sight of the fact that ICE's home raids, and especially the methods by which these raids are conducted, incur significant non-financial costs as well. These include costs to immigrant families, costs to the trust that immigrants and non-immigrants alike have in government policies and practices, and even costs to the international reputation of the United States. Though difficult to quantify, these costs constitute wounds that we all have a chance to heal in light of the shifting political climate. They combine with the financial costs analyzed above to constitute an indictment of ICE's current policies and procedures.

¹²⁵ *Mancha v. Immigration and Customs Enforcement*, Oct. 24, 2007.

LOCAL LAW ENFORCEMENT

As the federal government began to be more aggressive in enforcing the INA, the government began an unprecedented trend to delegate its authority in immigration enforcement to state and local governments. This sharing of authority is highly controversial, and opponents claim that because immigration law and the INA are complicated, allowing state and local administrators and law enforcement officers to enforce the laws leads to an increase in human rights and constitutional violations due to a lack of sufficient training and a confusion of responsibilities.

A. 287(G)

In 1996, when Congress passed IIRAIRA, it also added Section 287(g) to the INA.¹²⁶ This section allows INS (now ICE) to enter into agreements with local law enforcement agencies, authorizing them to enforce immigration laws, a responsibility heretofore reserved for federal immigration officers.¹²⁷ The agreements are called Memoranda of Agreements (MOAs). Over sixty law enforcement agencies have entered into such arrangements with ICE.¹²⁸

According to ICE's website, the intent of the 287(g) program is to target and remove undocumented immigrants convicted of "violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling and money laundering."¹²⁹

Consistent with a national climate where terrorism and immigration have been conflated, the

¹²⁶ U.S. Immigration and Customs Enforcement Fact Sheet, August 16, 2006, available at <http://www.ice.gov/doclib/pi/news/factsheets/060816dc287gfactsheet.pdf>.

¹²⁷ University of North Carolina at Chapel Hill Immigration and Human Rights Policy Clinic, *The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina*, February 2009, available at, <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf> , [hereinafter 287(g) Report].

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ ICE Fact Sheet, *supra* note 126.

287(g) MOAs instead are being used by local law enforcement agencies to rid communities of unwanted individuals based on their immigrant status alone.¹³⁰ Due to the 287(g) program, ICE has had to implement other programs in effort to allow other enforcement options to state and local governments.¹³¹

B. ICE ACCESS

According to ICE's website, ICE developed what is called ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) in response to what ICE called "widespread interest" from local law enforcement agencies requesting "ICE assistance through the 287(g) program."¹³² Under the ACCESS program, ICE agents and officers meet with the local agencies requesting ICE help to determine the needs of the agency. Once the needs are assessed, ICE drafts an action plan outlining what authority will be delegated to the agency in order to meet those needs.¹³³ Then ICE will form a partnership with the local agency and enter into an official agreement.¹³⁴ ACCESS includes a number of programs, one of which is the Criminal Alien Program, or CAP.¹³⁵ This program, according to ICE, "focuses on identifying criminal aliens who are incarcerated within federal, state and local facilities, thereby ensuring that they are not released into the community by securing a final order of removal prior to the termination of their sentence."¹³⁶ ICE maintains that while CAP has allowed ICE to make

¹³⁰ 287(g) Report, *supra* note 127.

¹³¹ United States Immigration and Customs Enforcement website, available at <http://www.ice.gov/partners/dro/iceaccess.htm>.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

considerable progress in identifying, detaining, and removing criminal aliens, it is insufficient.¹³⁷

Thus ICE created Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens (Secure Communities).¹³⁸

Through Secure Communities, ICE claims that immigration enforcement will change “by using technology to share information between law enforcement agencies and by applying risk-based methodologies to focus resources on assisting communities remove high-risk criminal aliens.”¹³⁹ In order to do this, those arrested will have their fingerprints checked not only against FBI databases, but also DHS databases to determine alienage.¹⁴⁰ ICE will then be notified if the fingerprints of an individual match with those found in the DHS databases, at which point ICE officers will do follow-up interviews and then act according to how they see fit.¹⁴¹ Implementation of Secure Communities began in October 2008 in Texas and North Carolina, and ICE hopes to have it in all prisons and jails within the next four years.¹⁴²

Through their manner of implementation, Secure Communities and 287(g) MOAs have led to human rights violations including racial profiling, denial of due process, and wrongful restraint and deportation. The consequences of these violations create costs for the communities where they are in effect. These costs include increased litigation, marginalized

¹³⁷ United States Immigration and Customs Enforcement website, Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens, available at, http://www.ice.gov/pi/news/factsheets/secure_communities.htm.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ National Immigration Law Center, *More Questions Than Answers about the Secure Communities Program*, March 2009, available at <http://www.nilc.org/immlawpolicy/LocalLaw/secure-communities-2009-03-23.pdf>. [Hereinafter NILC Report].

¹⁴¹ *Id.*

¹⁴² *Id.*

populations, and a damaged relationship between law enforcement officers and those they are inclined to protect.

C. HUMAN RIGHTS VIOLATIONS

1. RACIAL PROFILING

The manner in which the MOAs are carried through local law enforcement agencies have led to a number of questionable practices, many of which violate U.S. federal law and basic human rights. For example, the MOAs have been demonstrated to result in an increase in racial profiling. The 287(g) program has encouraged, or at the very least has tolerated racial profiling and baseless stereotyping, resulting in the harassment of local residents and the isolation of an increasingly marginalized community.”¹⁴³ The University of North Carolina Immigration and Human Rights Policy Clinic, together with the ACLU of North Carolina examined the effects of MOAs on North Carolina’s communities, and issued a report (N.C. Report) stating that:

Anecdotal evidence and other data suggest that § 287(g)-deputized law enforcement officers in some North Carolina counties are violating legal standards and engaging in racial profiling by stopping motorists in the community who appear to be Hispanic/Latino. Alamance and Mecklenburg County residents have raised concerns that under the guise of “pretextual” vehicle stops, law enforcement officers appear to be hunting for minor traffic offenses by Hispanic-appearing individuals. Concerns mount daily that law enforcement officers equate Hispanic last names and appearances with criminality and use national origin and ethnicity without probable cause or reasonable suspicion to stop and detain residents.¹⁴⁴

¹⁴³ 287(g) Report, *supra* note 127.

¹⁴⁴ *Id.*

The same report maintains that further “anecdotal evidence suggests that some Hispanic-appearing individuals are stopped, at times while on foot or in public places, and are otherwise mistreated, notwithstanding a lack of any individualized suspicion or any evidence of criminal activity, including traffic infractions.”¹⁴⁵

Additionally, in a report issued by the National Immigration Law Center (NILC) in March 2009, NILC points out that Secure Communities begs more questions than it answers.¹⁴⁶ For example, the report asks “how will ICE ensure that police do not make arrest based on racial or ethnic profiling, or that they do not make arrests simply as a pretext to check immigration status under Secure Communities?”¹⁴⁷ In response the NILC points out that ICE fact sheets and press releases neither indicate recognition of the issue of racial profiling nor acknowledge that it might occur.¹⁴⁸ Yet, based on the evidence in the 287(g) implementation, racial profiling and pretextual stops for minor traffic violations will likely occur.¹⁴⁹

2. DUE PROCESS

According to findings published in the N.C. Report, “Section 287(g) has been implemented without proper concern for due process and legal protections and without concern for the negative consequences occurring among communities throughout North Carolina.”¹⁵⁰ Because these programs are implemented without proper concern for due process, the manner in which they are implemented often leads to due process violations. For example, according to a report released by the Government Accountability Office in advance of

¹⁴⁵ *Id.*

¹⁴⁶ NILC Report, *supra* note 140.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ 287(g) Report, *supra*

hearings on the 287(g) program held by the House Committee on Homeland Security, one sheriff said that he understood his authority under 287(g) meant that “287(g) trained officers could go to people’s homes and question individuals regarding their immigration status even if the individual is not suspected of criminal activity.”¹⁵¹ Such use of authority would violate a number of due process claims under the Constitution, including the right of life and liberty without due process of law, the right to be free from unreasonable searches and seizures, the right to be informed of the charges, and the right to privacy.

Additionally, due process violations often occur when local enforcement officers are able to place immigration detainers on individuals. The NILC report explains that a detainer is merely a request from the local agency to ICE that ICE assume custody when an individual is to be released by the local agency.¹⁵² The local agency also receives permission to temporarily hold the individual for forty-eight hours while waiting for ICE to assume custody.¹⁵³ “But many jails and police departments treat detainers as a requirement that the jailed person not be released, and deny bond in the criminal case, including in minor cases such as traffic offenses or misdemeanors.”¹⁵⁴ ICE often fails to comply with the forty-eight hour time limit, leaving the jailed person unconstitutionally incarcerated with no mechanism to challenge the wrongfulness of the detainer.¹⁵⁵ Such government action violates the Fifth Amendment right to not be deprived of life, liberty, or property without the due process of law.¹⁵⁶ It also violates due

¹⁵¹ N.C. Aizenman, *Report Cites Problems in ICE Training Program*, THE WASHINGTON POST, Mar. 4, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/03/AR2009030304231.html>.

¹⁵² NILC Report, *supra* note 140.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ U.S. Const. 5th Amend.

process laws and the Eight Amendment which states that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹⁵⁷ These due process violations, together with racial profiling, offer compelling reasons why ICE ACCESS and the 287(g) programs are ineffective and overly aggressive in immigration enforcement.

3. CASE STUDY: JUANA VILLEGAS DE LA PAZ

There are a number of reported instances, and quite definitely still more unreported cases, that fully illustrate the spectrum of human rights violations that are the result of enforcing 287(g) MOAs. One such case is involving Juana Villegas de La Paz, a woman who was arrested in a 287(g) county by local police while nine months pregnant.

On July 3, 2008, Ms. Villegas was stopped while driving with her three children in Berry Hill, Tennessee.¹⁵⁸ She was nine months pregnant at the time.¹⁵⁹ Her fourteen-year-old son interpreted the conversation between Ms. Villegas and the police officer who stopped her for a minor traffic violation. He asked her for her driver’s license and registration, and because she did not have a driver’s license from the United States, she instead provided him with her consulate ID and vehicle registration.¹⁶⁰ Because Davidson County Sheriff’s Office’s (DSCO) internal policy states that when someone commits a misdemeanor such as driving without a license, he or she should be issued a citation, there is reason to believe that Ms. Villegas would not have been arrested and her rights violated had there been no 287(g) MOA in place.¹⁶¹

¹⁵⁷ U.S. Const. 8th Amend.

¹⁵⁸ Complaint

¹⁵⁹ Villegas complaint

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

Instead she became the victim of racial profiling, was denied due process, and lost her right to privacy.¹⁶²

Ms. Villegas was then taken to the Metro-Davidson County Detention Facility in Nashville, Tennessee for processing under the 287(g) program and a detainer was placed against her.¹⁶³ On July 5, 2008, Ms. Villegas went into labor and was taken to the nurse's station, where she was forced to wait with shackles on her feet and hands until she could be taken to the hospital.¹⁶⁴ While in the hospital, the DSCO's officers disobeyed the pleas of the nurses and medical staff and they continually subjected Ms. Villegas to embarrassment, pain, and suffering. They refused to allow her to undress in private, shackled her to the bed while in labor, and only removed the shackles during delivery.¹⁶⁵

After delivery they kept Ms. Villegas shackled and even though the medical staff informed the officers that Ms. Villegas needed to be free from restraint in order to recover from the labor, walk around the room, and maintain proper hygiene.¹⁶⁶ She remained shackled even while taking a shower.¹⁶⁷ Her baby was taken from her; she was not sure when she would see him again. The officers refused to allow the nurses to show her a picture of her baby, and refused to allow her to contact her husband of his birth.¹⁶⁸ Upon her release, although the medical staff informed the officers of the importance of a breast pump and moisturizers to Ms.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Villegas Complaint

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

Villegas's health, they refused to allow her to take the medically recommended supplies.¹⁶⁹

Because the officers disobeyed the advice of the medical personnel, Ms. Villegas breasts were so swollen that she could neither move nor sleep without tremendous pain, and she eventually developed an infection to in her breast tissue related to her inability to breastfeed or pump her breast milk.¹⁷⁰ She also experienced cramping and pain for weeks because she was shackled during and after pregnancy.¹⁷¹

Ms. Villegas experienced a number of human rights and constitutional violations due to her arrest under the 287(g) program. She was pretextually stopped and racially profiled. She was never told why she was being arrested. She was made to sit for hours while police determined what to do with her. She was separated from her children. Ms. Villegas was not given privacy to change into her hospital gown; she was watched by officers while in labor, despite being incapable of fleeing and being shackled to the bed. The act of restraining her while in labor violated international law and constituted unreasonable punishment bordering on torture. She was denied access to her son, and was unable to contact her husband so that he could participate in the birth of his child. She was denied access to medically necessary equipment which led to complications and illness, and others. The excessive level of punishment Ms. Villegas endured due to the insufficient training and ignorant officers was paramount to torture and unjustified yet preventable. This is just one example among many of the human rights and constitutional due process violations that occur as a result of the abdication of federal immigration authority on local law enforcement officers.

¹⁶⁹ *Id.*

¹⁷⁰ Villegas Complaint

¹⁷¹ *Id.*

4. COSTS

I. EFFECT ON COMMUNITIES

Because the constitutional and human rights violations that accompany the implementation of 287(g) are so egregious, as evidenced with the previous examples, the costs associated with entering into an MOA are high. For example, MOAs have a number of negative effects on the broader communities which enter into them, and not just on the immigrant populations residing in those communities. Hannah Gill, the assistant director of the Institute for the Study of the Americas and a research associate at the Center for Global Initiatives at UNC-Chapel Hill recently completed a case study where she focused on how the 287(g) program has affected Alamance County, North Carolina.¹⁷² Alamance County entered into an MOA in 2007, and interviews with residents of the county indicate that the program has a number of associated social costs.¹⁷³ These “include (1) the erosion of trust between law enforcement authorities and immigration communities, (2) an increase in unreported crime, and (3) an increase in anti-immigrant sentiment in the general population.”¹⁷⁴ The program, despite assurances to the contrary by the Alamance County Sheriff’s Office (ACSO), has led to the arrest and immigration processing of undocumented immigrants, the majority of whom were not felons but traffic offenders and individuals stopped at roadblocks for license checks strategically placed in areas frequented mainly by Latinos.¹⁷⁵ Neighborhoods began to shut down, clinic providing health care saw an increased number of missed appointments by patients and their children, businesses reported a significant loss in revenue, the Hispanic

¹⁷² Hannah Gill, et.al, *Legal and Social Perspectives on Local Enforcement of Immigration under the Section 287(g) Program*, (Mar. 2009) (unpublished paper, on file with Hannah Gill).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

community center had a decrease in intake, and posters plastered around the county warned immigrants to avoid law enforcement officers.¹⁷⁶

Police were no longer seen as protectors, which made immigrants easy targets to criminals, especially since victims of violence were being deported after contacting police of the crimes perpetrated against them.¹⁷⁷ The children of immigrants, most of whom were U.S. citizens, had difficulty in school because of the fear of their parents being taken away.¹⁷⁸ Still other immigrants reported losing their jobs, having work privileges removed, and receiving threats from landlords, all because their status could be used as a “leveraging tool.”¹⁷⁹ The 287(g) program negatively affects communities, demonstrating one of the various costs of the program generally.

II. INCREASE IN LITIGATION

The human rights violations that occur as a result of the MOAs deputizing local law enforcement officers as immigration officials have instigated a number of lawsuits in an effort to halt illegal practices occurring under the 287(g) program. They offer specific examples of how individuals are victimized through 287(g) program and how the public is kept in obscurity about the details of the program because the information that would allow transparency is suppressed. The examples also illustrate different legal remedies that are sought as a result of the human rights violations that occur under 287(g).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Supra*, note 172.

¹⁷⁹ *Id.*

a. Juana Villegas de La Paz

Ms. Villegas, because of the abuse that she experienced as described above, filed two lawsuits. The first of these was filed under the Freedom of Information Act (FOIA) seeking “declaratory and injunctive relief to compel the disclosure and release of agency records improperly withheld from [Villegas] by Defendant Department of Homeland Security,” so that she could adequately be represented in her removal proceedings.¹⁸⁰ The second she filed against the Government of Davidson County, Tennessee, Davidson County Sheriff’s Office (DCSO), Janet Napolitano as the Secretary of Homeland Security and four police officers working for DCSO. She alleges that the defendants violated her 14th Amendment rights under the U.S. Constitution, among others.¹⁸¹ Specifically she alleged that,

ICE failed to train and/or require the training of DCSO officers, failed to review DCSO policy when it entered into the Agreement with DCSO or thereafter, failed to enforce the terms of the Agreement or to take such other actions that could have avoided the injuries caused to Ms. Villegas, facilitated and enabled a program that led to Ms. Villegas’ detention, and therefore facilitated, enabled, ratified and/or sanctioned DCSO in carrying out the policies that resulted in the conduct complained of.¹⁸²

Because of the 287(g) program, Ms. Villegas, a woman who had no outstanding criminal charges, arrests, or warrants, no history of violence, no tendency of being uncooperative, and who did not present a flight risk was arrested, detained, shackled, and subjected to egregious

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

human rights violations.¹⁸³ Thus evidencing inherent issues with the 287(g) program and the manner in which it is implemented, and provoking an increase in litigation against the U.S. government and its agencies.

b. Pedro Guzman

In February 2008, Pedro “Peter” Guzman and his mother Maria Carbajal also filed suit against more than 100 defendants, including the Secretary of DHS, Michael Chertoff, the Field Office Director of ICE James Hayes, the Sheriff of the County of Los Angeles LeRoy Baca, as well as the County of Los Angeles, California. The facts of Guzman’s case are particularly disturbing and offer evidence of egregious human rights violations, including racial profiling and lack of due process. Pedro Guzman is a California-born U.S. citizen who had been serving a 120-day prison sentence for trespassing and vandalism.¹⁸⁴ His family and friends maintain that the incident leading to his incarceration was a manifestation of mental problems that he had been prone to since a child.¹⁸⁵ Because of his developmental challenges, Guzman had always struggled in school as a child, and was illiterate. Guzman was supposed to be released on house arrest in May 2007, but instead he was illegally deported to Mexico.

On May 11, 2007, Guzman called his sister-in-law, explained to her that he had been deported, that he was at the border, and that he was in a state of confusion.¹⁸⁶ He simply said “I don’t know why I’m here,” at which point the phone went dead and his family did not hear

¹⁸³ *Id.*

¹⁸⁴ Daniel Hernandez, *Pedro Guzman’s Return*, LA WEEKLY, Aug. 9, 2007, available at <http://www.laweekly.com/2007-08-09/news/pedro-guzman-s-return/>.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

from him again.¹⁸⁷ Panicked, his mother took leave from work and she searched for him alone in Tijuana. “She went to Tecate and Rosarito, to jails, morgues, hospitals, and halfway houses, and down into the dank ditches of the Tijuana River.”¹⁸⁸ After two months of no success, she went back to take care of her family in California but continued returning to Tijuana on the weekends to continue her search.¹⁸⁹

During this time, Guzman’s plight was far worse. Because of his disabilities, Mr. Guzman also has difficulty with memory, and did not know the phone numbers of his friends or family. He had a small piece of paper with his brother’s phone number on it, and after speaking briefly with his sister-in-law on May 11, 2007, he lost the piece of paper.¹⁹⁰ Mr. Guzman had no way of getting in touch with his family and was missing in Tijuana for 85 days.¹⁹¹ When he was dropped in Tijuana, all he had in his possession were three dollars and the clothes on his back. Neither ICE nor the LASD returned to him his driver’s license or wallet.¹⁹² Mr. Guzman survived by begging, eating food out of trash cans, bathing in rivers and canals, sleeping outdoors during the day to avoid the intense heat, and wandering aimlessly at night in order to avoid danger from remaining in one place.¹⁹³ He tried to cross back into the United States on several occasions, but was turned away and told to “stop playing games.”¹⁹⁴ By the time Mr. Guzman made it into the United States, he was attempting to cross the border near the city of

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Pedro Guzman Complaint

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Supra*, note 184.

Calexico.¹⁹⁵ At that point he was detained and returned to LASD custody before being allowed to return home with his family.¹⁹⁶

The experience had been so traumatizing for Mr. Guzman, that when the LASD medical personnel examined him after returning back to the U.S., they believed him to be mentally retarded and mute.¹⁹⁷ Upon returning he was “trembling, fearful of people, shuttering and unable to communicate in English, one of his two languages.¹⁹⁸ His mother, Ms. Carbajal said “he left complete, but they took half of my son.”¹⁹⁹

The lawsuit filed by Mr. Guzman and his mother, Ms. Carbajal, complained that the defendants had violated Guzman’s First, Fifth, and Fourteenth Amendment rights. Beginning in 2005, the County of Los Angeles Sheriff’s Department (LASD) had an MOA with ICE that permitted LASD officers to perform a number of federal immigration enforcement activities, including preparing immigration detainers and Notice to Appear applications to be signed by ICE officers.²⁰⁰ LASD officers were to be trained, supervised, and directed by ICE agents.²⁰¹

According to his complaint, after serving his allotted prison sentence, Mr. Guzman was questioned by LASD officers about his place of birth, despite paperwork that clearly stated his birthplace as California.²⁰² Eventually he was transferred to ICE custody where he was coerced into signing a voluntary departure agreement even though he was unable to read the agreement and even though his medical records had a notation that he was incapable of

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Pedro Guzman Complaint.

²⁰¹ *Id.*

²⁰² *Id.*

knowingly and voluntarily waiving his legal rights.²⁰³ The complaint alleges that “ICE failed to undertake prudent efforts to train, supervise, or otherwise reasonably ensure that the LASD custodial assistant interviewing and processing inmates were adequately trained and knowledgeable as to the complexities of immigration law.”²⁰⁴ Additionally, the complaint alleged that Guzman was interviewed while in LASD custody “solely on the basis of his perceived race, ethnicity and national origin. No reasonable basis existed to suspect or otherwise conclude that Mr. Guzman was not a United States citizen.”²⁰⁵ Essentially, this incident and subsequent lawsuit highlight exactly what opponents of 287(g) fear: ICE’s lack of supervision, LASD’s incompetence, and racial profiling with devastating results.

c. CASA de Maryland, Inc.

Another lawsuit stemming from the 287(g) program was filed in the Montgomery County Circuit Court of Maryland by CASA de Maryland (CASA), a community organization founded by Central American refugees with a focus in responding to the needs of other Central Americans as they arrive to the Washington, D.C. area, against the Frederick County Sheriff’s Office (FCSO).²⁰⁶ In February 2008, FCSO entered into an MOA with ICE, and almost immediately CASA had “very strong anecdotal evidence of constitutional violations and racial profiling and the ultimate goal is to make sure the Sheriff’s Office is being held accountable.”²⁰⁷ According to Justin Cox, a CASA attorney, the organization filed the lawsuit because it is “trying

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ CASA de Maryland Website, available at <http://www.casademaryland.org/>.

²⁰⁷ Erica Green, *Casa of Maryland Ready to See Lawsuit “All the Way Through,”* GAZETTE.NET, Mar. 5, 2009. available at http://www.gazette.net/stories/03052009/frednew161521_32480.shtml.

to shine a light on this program,” which they “feel has been kind of operating in the shadows.”²⁰⁸

According to the complaint, the documents are necessary because they contain “records that could confirm or dispel the widely-suspected possibility that [FCSO] is engaging in the racial profiling of individuals who are, or appear to be, of Hispanic or Latino origin.”²⁰⁹ The complaint also contends that while the FCSO was stalling in the production of documents, that “members of the affected communities have repeatedly expressed concerns that [the FCSO] is engaging in the racial profiling of Hispanics, Latinos, and others that officers of the FCSO suspect are undocumented immigrants, based on nothing more than the color of their skin.”²¹⁰ Again, this lawsuit attacks the implementation of the 287(g) program and strives to expose the human rights and constitutional violations the program is feared to encourage.

CASA brought the action under the Maryland Public Information Act (PIA) in an effort to compel the production of documents related to FCSO’s participation in the 287(g) program.²¹¹ In March 2008, shortly after the FCSO entered into an MOA with ICE, CASA requested that they produce the MOA and other public documents.²¹² After a series of exchanges where the FCSO denied CASA access to the documents and where CASA repeated its request for those documents on three other occasions, CASA filed the lawsuit in November 2008.²¹³ The lawsuit attacks the implementation of the 287(g) program and strives to expose the human rights and constitutional violations the program is feared to encourage.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ CASA Complaint.

²¹² *Id.*

²¹³ *Id.*

d. Manuel de Jesus Ortega, et al.

Probably one of the most outspoken and controversial proponents of the 287(g) program is Joseph Arpaio, the sheriff from Maricopa County, Arizona. The Maricopa County Sheriff's Office (MCSO) entered into an MOA with ICE in January 2007, and since then Sheriff Arpaio has been heralded as the example "delegating neglected federal immigration duties to local authorities . . . run amok."²¹⁴ Under the shield of the 287(g) agreement that MCSO has with ICE, Sheriff Arpaio has recruited volunteer citizens to be part of his "posse" and participate in "community immigration sweeps;" has expanded the sweeps to include most major cities in Maricopa County, including Phoenix, Guadalupe, and Mesa; and made more than 200 shackled detainees march through Phoenix while being filmed by TV cameras.²¹⁵ Not surprisingly, Sheriff Arpaio has been accused of abusing the power that the federal government has allotted him through the 287(g) agreement.

In July 2008, a class action lawsuit was amended against Arpaio, MCSO, and Maricopa County, Arizona. The lawsuit seeks to enforce the Fourth and Fourteenth Amendments of the Constitution, the Civil Rights Act of 1964, and the Arizona State Constitution.²¹⁶ According to the complaint, the defendants "engaged in a widespread pattern and practice of racially profiling and other racially and ethnically discriminatory treatment in an illegal, improper and unauthorized attempt to 'enforce' federal immigration laws against large numbers of Latino persons in Maricopa County without regard for actual citizenship or valid immigration

²¹⁴ Editorial, *Who's Running Immigration*, THE NEW YORK TIMES, Mar. 3, 2009, available at http://www.nytimes.com/2009/03/04/opinion/04wed2.html?_r=1&ref=opinion.

²¹⁵ Editorial, *Arpaio's America*, THE NEW YORK TIMES, Feb. 5, 2009, available at <http://www.nytimes.com/2009/02/06/opinion/06fri2.html>.

²¹⁶ Ortega Complaint.

status.”²¹⁷ The complaint points out comments made by Sheriff Arpaio as evidence of the systematic racial-profiling that occurs under his watch.²¹⁸ For example, Arpaio said of his “zero-tolerance traffic sweeps” covering the Phoenix area, that his teams are “hitting this illegal immigration on all aspects of it. We know how to determine whether these guys are illegal, the way the situation looks, how they are dressed, where they are coming from,” clearly evidencing systematic racial profiling.²¹⁹ Arpaio essentially “permitted volunteers untrained in immigration enforcement to support his 287(g) sweeps,” sweeps that targeted “day laborers and drivers of color.”²²⁰

According to an independent report issued in February 2009 by Justice Strategies, a non-profit nonpartisan research group based in Brooklyn, N.Y., this litigation should not come as a surprise considering that ICE essentially failed Maricopa County in its duty to Maricopa County to oversee Arpaio and to comply with the MOA. Even when Phoenix Mayor Phil Gordon pled with ICE to audit Maricopa County for alleged abuse of the 287(g) authority, ICE determined that there were no violations despite evidence to the contrary.²²¹ ICE allowed Arpaio to continue with the 287(g) agreement and to racially profile during sweeps with untrained volunteers.²²² This inaction by ICE led to the propagation of human rights and constitutional violations under the color of authority given Arpaio in the 287(g) agreement. These violations led to the humiliation of immigrants in Maricopa County, this class action lawsuit, which is one

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Howard Witt, CHICAGO TRIBUNE, May 26, 2008, available at http://www.chicagotribune.com/news/nationworld/chi-profiling_wittmay26,0,4678882.story.

²²⁰ *Id.*

²²¹ Justice Strategies, *Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement*, February 2009, available at, <http://www.justicestrategies.org/sites/default/files/JS-Democracy-On-Ice.pdf>.

²²² *Id.*

among many lawsuits filed against Arpaio,²²³ elected officials calling for a Department of Justice investigation of Sheriff Arpaio, and a general dislike and distrust among the residents of Maricopa County for law enforcement officers.

D. CONCLUSION

As is previously discussed, by abdicating its federal authority in immigration matters to state and local law enforcement, whether it be through 287(g) MOAs or ICE ACCESS, ICE is allowing untrained personnel the power to enforce extremely complicated laws. This results in a number of human rights and constitutional violations, including racial profiling, insufficient due process, and even the shackling of pregnant women while in labor. These alliances between ICE and the local law enforcement agencies have numerous costs to the communities where such agreements exist, including the marginalization of immigrant populations, increased vulnerability to crime of the general population, cultivation of a racist mentality, and an increase in litigation that exhausts federal and local resources. Essentially the benefits do not outweigh the costs, and through these agreements ICE is indeed not only failing the residents of Maricopa County, but all residents with such agreements in their communities.²²⁴

²²³ *Id.*

²²⁴ *Id.*

DETENTION

The numbers of immigrants detained in the United States has increased dramatically over the past fifteen years. The surge in the number of detainees began with the passage of 1996 laws AEDPA and IIRAIRA. The numbers of detainees has steadily increased due to more aggressive immigration enforcement involving home raids, workplace raids, and 287(g) agreements.²²⁵ In 2001, the United States detained approximately 95,000 individuals and by 2007, that number had increased to over 300,000 individuals in detention in the U.S. annually.²²⁶ According to a report issued by the Seattle University School of Law, “the average daily population of detained immigrants has grown from approximately 5, 000 in 1994, to 19,000 in 2001, to 30,000 by the end of 2007.”²²⁷

Unfortunately, this number does not show any signs of decreasing. Detention capacity will increase from 40,000 to 80,000 by 2010 due to a bed increase authorized by Congress in 2005.²²⁸ ICE boasts that it has increased the amount of detention beds by 78% from 2005 to 2008, and will expand to include another 1,000 detention beds with the 2009 Homeland Security Appropriations.²²⁹ Because of Operation Endgame and the goal to deport all removable aliens by 2012, the Seattle report anticipates that the number of detentions will actually grow without any change in policy at the federal level.²³⁰

²²⁵ Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, Mar. 25, 2009, available at <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf>.

²²⁶ Detention Report, *supra* note 13.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ United States Department of Homeland Security, *DHS Announces \$12.14 Billion for Border Security & Immigration Enforcement Efforts*, available at http://www.dhs.gov/xnews/releases/pr_1201803940204.shtm.

²³⁰ Detention Report, *supra* note 13.

As the number of people in detention for immigration violations has risen, so has the opportunity for human rights violations within the immigration detention system. The following is a brief overview of a sampling of the types of human rights violations that are occurring and the cost that it is having on immigrants and the country generally.

A. HUMAN RIGHTS VIOLATIONS

1. INHUMANE CONDITIONS

Detainee complaints about detention conditions include a number of other human rights violations. For example, in the report by the University of Washington School of Law, when detainees in NWDC were interviewed about the condition of the detention center, they complained that they did not have access to their attorneys, were denied legal materials, had to endure verbal and physical abuse by officers, sexual harassment, strip searches, and inadequate food and nutrition, among others.²³¹ In a lawsuit recently filed by a legal team including the ACLU of Southern California, detainees are suing ICE for being detained “in egregious, unsanitary conditions . . . without soap, drinking water, toothpaste, toothbrushes, sanitary napkins, changes of clothing or showers.”²³² The lawsuit further claims that immigration officials do not notify detainees of their right to obtain release on bond while their cases are pending, deny detainees mail correspondence, writing materials, and other supplies that would help in their legal defense, all of which are required by law.²³³ As evidenced by these two examples, the conditions in detention facilities give cause for alarm and indicate persistent

²³¹ *Id.*

²³² American Civil Liberties Union, *Immigration Officials Sued for Holding Detainees in Appalling Conditions at L.A. Detention Facility*, (April 2, 2009) available at, <http://www.aclu.org/immigrants/detention/39271prs20090402.html>.

²³³ *Id.*

violations of human rights. The following paragraphs discuss only a portion of the human rights violations occurring in immigration detention facilities throughout the United States.

2. OVERCROWDING

One of the growing problems evident in detention facilities is overcrowding. A recent report released by the ACLU of Massachusetts highlighted overcrowding in Massachusetts detention facilities.²³⁴ According to the report, “despite new construction, overcrowding remains a problem in Massachusetts, where every county jail is currently beyond its capacity, some housing more than twice the number of persons they were built to house.”²³⁵ According to the report, “some persons detained by ICE slept on mattresses on the floor of a converted gymnasium with no access to recreation and with one toilet for approximately 70 persons.”²³⁶ Additionally, those held in the gymnasium were not allowed showers daily, and when showers were available, they were offered on a first come first serve basis.²³⁷ In fact, according to the Massachusetts Department of Corrections, of the seven Massachusetts correction facilities housing ICE detainees, all were at least at 139% capacity, with one being as high as 261% capacity.²³⁸

A second study examined detention conditions in the Northwest Detention Center (NWDC) located in Tacoma, Washington. There detainees are held in “pods” or holding areas which consist of cells with bunk beds, showers, toilets, tables, and microwaves.²³⁹ Seventy-five percent of detainees interviewed from the detention center “complained about the

²³⁴ ACLU Report, *supra* note 42.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ Detention Report, *supra* note 13.

overcrowding, noise, lack of privacy, and unsanitary bathrooms in their pods.”²⁴⁰ The detainees claimed that their pods were filled to capacity, with extra beds added in order to keep up with the number of detainees entering and exiting the facility.²⁴¹ One detainee held in NWDC reported that his pod had 40 cells with bunk beds, with 120 men living in the pod.²⁴² A woman being held in the facility commended that after a workplace immigration raid in Portland Oregon that “the population doubled” and described living conditions as “horrendous.”²⁴³

3. INSUFFICIENT HEALTHCARE

Detention facilities also have failed to provide adequate healthcare, a deficiency that violates the rights of detainees, and jeopardizes their health. At a hearing held on June 4, 2008 entitled “Problems with Immigration Detainee Medical Care,” Dr. Homer Venters, an attending physician at the Bellevue/NYU Program for Survivors of Torture and a Public Health Fellow with New York University, testified before the House Judiciary Committee’s Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law.²⁴⁴ As a result of his independent analysis of the ICE healthcare system Dr. Venters determined that “contrary to public statements by ICE . . . this health system and the care it allows for detainees, is getting worse not better.”²⁴⁵

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Homer D. Venters, Statement on Immigration Detainee Health Care, House Judiciary Committee’s Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, Hearing on Problems with Immigration Detainee Medical Care, June 4, 2008, available at <http://judiciary.house.gov/hearings/pdf/Venterso80604.pdf>.

²⁴⁵ *Id.*

Dr. Venters found that “ICE relies on inappropriate use of basic epidemiologic terms and inaccurate comparisons between populations known to be radically different.”²⁴⁶ ICE, when determining the mortality rate of its detainees, did not adjust for length of detention. By failing to make the adjustment, ICE was able to claim that from 2006-2007 there was a 49% decrease in detention mortality, while in actuality there was a 29% increase.²⁴⁷ Additionally, ICE made a comparison between the mortality statistics between ICE detainees and the general prison population without making time adjustments. ICE detainees spend considerably less time in detention than the general prison population spends in prison, and without the adjustment, ICE was able to report inaccurately low numbers.²⁴⁸ ICE’s misleading and inaccurate statistical analysis led Dr. Venters to conclude that ICE’s methods provoke “grave concern for the welfare of ICE detainees and the ability of ICE to monitor the quality of its own health care system.”²⁴⁹

The Washington Post did a series of articles related to insufficient healthcare in detention centers across the United States.²⁵⁰ Among the documents collected in preparation for the articles were journal entries from detainee Young Sun Harvill. She described her experiences while attempting to obtain necessary health care while in detention. Mrs. Harvill explained that when she was finally taken into her medical appointment, the doctor expressed concern because ICE’s delay in scheduling the appointment endangered her health. She stated:

The doctor was glad to see me because she had been waiting for me to come in for a long time. She had called ICE to inquire why I had not been taken in sooner

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ Washington Post Series

as was told that I was being deported to Korea. She wanted this biopsy done two months ago because she found a cyst in my uterus.²⁵¹

She also explained that the doctor made a follow-up appointment for her to return to get the biopsy results after two weeks. Three weeks later she had still not heard about her results and when a nurse practitioner called to ask what the results were, she was told “that they were very very busy and that it would be a while before [she] could go see the doctor.”²⁵² Mrs. Harvill also had blood in her stools, arthritis that was so bad that she had to seek help from the other detainees in transcribing her journal. Her leg was swollen so much that she states “there was liquid coming out of it.” Her journal indicates the mental and emotional distress caused by her untreated medical problems while she was in detention.²⁵³

Despite her serious medical condition, Mrs. Harvill was denied a request for release from detention and a request for immediate humanitarian parole.²⁵⁴ ICE maintained that “the Division of Immigration Health Services (DIHS) [was] ... able to meet Mrs. Harvill’s current medical needs.”²⁵⁵ However, when an independent physician, board certified by the American Board of Internal Medicine in Medical Oncology and Internal Medicine reviewed her file, he recommended that she visit a series of specialists, including an oncologist, pain specialist, dermatologist, and psychologist.²⁵⁶ He also recommended that she should have “the presence and care of loving family and friends” as a means of overcoming her emotional strain. The

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* This was denied because she had been found guilty of felony drug charges, even though she had served jail time and had made a full recovery.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

physician ended by warning that “the consequences of incomplete care could include chronic infections, disability, recurrence of tumors that could lead to her death. Please assist her in getting the proper care.”²⁵⁷ Yet, she did not receive this care while in detention, even after the physician sent the letter. Mrs. Harvill only received Tylenol for her pain and Motrin for her severe swelling.²⁵⁸ In fact, as Mrs. Harvill documented, seven months after being transferred to a detention center that was supposed to be more adequately suited to address her medical needs, she had never seen a medical doctor. Yet ICE claimed to be adequately assessing her medical needs, for which she needed to see a series of medical specialists.²⁵⁹

4. INDEFINITE STAYS

Another human rights violation occurring as a result of current detention conditions in the United States is the violation of due process through indefinite detention. According to the INA, immigrants who are found removable from the United States must be deported within 90 days, and ICE has authority to detain immigrants during this time period.²⁶⁰ The U.S. Supreme Court determined that an immigrant may be held longer than 90 days only after ICE has conducted a custody hearing and determined that the individual is either a flight risk or a risk to national security.²⁶¹ If the immigrant is then held another six months, ICE is to conduct another custody review, at which time the detainee must be released unless they are either a flight risk or national security risk and removal is “reasonably foreseeable.”²⁶² In practice however, custody review hearings are not taking place and immigrants are left to languish in detention.²⁶³

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ INA § 241 (a)(1)(A)

²⁶¹ Amnesty report

²⁶² *Id.*

²⁶³ *Id.*

In its recent report about immigration detention in the United States, Amnesty International expressed its concern that “immigrants and asylum seekers who have been through removal proceedings and ordered deported from the United States are languishing indefinitely in immigration detention, in contravention of domestic and international law standards.”²⁶⁴

The report indicates that this is a valid concern and one that highlights the follies of the current immigration detention system. The report discussed the case of Saluja Thangaraja, a Sri Lankan national who came to United States after fleeing her native country in an effort to escape the brutal beatings and torture she experienced during a civil war.²⁶⁵ Despite being granted asylum twice, Ms. Thangaraja remained in detention for nearly five years before being released through a unanimous court order by the Ninth Circuit Court of Appeals.²⁶⁶ Ms. Thangaraja’s attorney felt, as was substantiated by the decision of the Appeals Court, that, “the government kept her locked up for no reason simply because it was appealing her case. She did nothing wrong; she just came to this country seeking asylum from persecution.”²⁶⁷

Unfortunately Ms. Thangaraja’s situation is not isolated. Other instances of such treatment include a Burmese woman was detained for nearly two years in a detention facility in Texas and a human rights worker from Cameroon was remained in detention facilities in New York and New Jersey for sixteen months before being granted asylum and released.²⁶⁸ Those who are held in detention include asylum seekers, torture survivors, victims of human

²⁶⁴ *Supra*, note 225.

²⁶⁵ *Id.*

²⁶⁶ ACLU of Southern California, *Sri Lankan Torture Victim Released After Nearly Five Years*, (March 28, 2006), available at <http://www.aclu-sc.org/releases/view/101728>.

²⁶⁷ *Id.*

²⁶⁸ Human Rights First, *The Detention of Asylum Seekers in the United States: Arbitrary under the ICCPR*, (January 2007) available at <http://www.humanrightsfirst.info/pdf/061206-asy-bac-un-arb-det-asy-us.pdf>

trafficking, longtime permanent residents, and the parents of children who are US citizens.²⁶⁹ It is when the United States does not have a diplomatic relationship with their native country or when the native country will not accept their return that they are indefinitely detained because they cannot be removed.²⁷⁰ These individuals should be released, unless there are national security reasons indicating otherwise.²⁷¹ Because ICE ignores the standards set forth in the INA and the decisions made by the Supreme Court and does not release detainees who present no flight risk, no national security risk, and who have no possibility for deportation, ICE violates basic human rights norms and constitutional rights.

5. TRANSFERS OF DETAINEES

Another problem with immigration detention in the United States involves the transfer of detainees. Beginning in 2006, the federal government began transferring detainees to different detention facilities around the country, often far away from their homes, lawyers, and families.²⁷² This ability to transfer detainees allows ICE to balance detention population and plan various enforcement operations.²⁷³ According to an Los Angeles Times article, “when more than 1,300 fugitives and criminals were arrested in the Los Angeles area this fall, immigration agents prepared for the influx by locating open beds around the country.”²⁷⁴

²⁶⁹ *Supra* note 225.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Rights Working Group, *Night of 1,000 Conversations: Detention and Due Process*, available at <http://www.nightof1000conversations.org/detention>.

²⁷³ Anna Gorman, *Rise in Detainees Straining System*, LOS ANGELES TIMES, Nov. 5, 2007, available at http://articles.latimes.com/2007/nov/05/local/meimmig5?s=g&n=n&m=Broad&rd=www.google.com&tnid=1&sesid=e183b00959055c82ed349d09332996283a92efe6&uuiid=bb2bf1c0880c0e09181c792e326f6e90e70fca05&pg=2&pgtp=article&eagi=&cat=society&page_type=article&exci=2007_11_05_local_me-immig5.

Standard procedure is for these transfers to occur without notice to the family members or the attorneys for alleged security reasons.

²⁷⁴ *Id.*

These transfers cause significant consequences for the detainees, their attorneys, and their families. Because of these transfers, which often mean the detainees are sent to different states, Rep. Zoe Lofgren, D-Calif., who is an immigration lawyer and chairman of the House Judiciary Committee’s Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, said that she “has had lawyers wringing their hands in [her] office because they couldn’t find their clients.”²⁷⁵ For example, Fernando Cabrera was an LPR when he was detained after spending time in prison for a criminal conviction.²⁷⁶ He had hired an attorney and was pursuing his options for remaining in the country when he was suddenly transferred in December of 2006 from California to Alabama.²⁷⁷ He was then sent back to California and ultimately ended up in a detention center in Texas.²⁷⁸ Some of Mr. Cabrera’s legal papers, which were pertinent to his case, were lost during his transfers.²⁷⁹

According to a report released by Amnesty International, “being detained in close proximity to attorneys is imperative in order to adequately prepare for court. Also [*sic*] family members may possess or be able to acquire documents necessary for immigration court, including birth certificates or passports.”²⁸⁰ ICE’s ability to transfer detainees without notice and without limitations further illustrates how the current immigration detention policies create a climate amenable to human rights violations, policies which stem from overly aggressive national immigration enforcement policy rooted in anti-immigrant sentiment.

²⁷⁵ Helen O’Neill, *Another View: Immigration Detention System Criticized As Cruel*, THE NORTH COUNTY TIMES, Jan. 29, 2009, available at:

<http://www.northcountytimes.com/articles/2009/01/25/perspective/z900b840360f4e0b58825753000119541.txt>

²⁷⁶ *Supra* note 273.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Supra*, note 225.

B. CASE STUDY: HIU LUI NG

Since October 2003, ICE has reported that ninety-two immigrants have died while being held in detention.²⁸¹ Often the circumstances and conditions of the deaths are questionable.²⁸² One such case of a man by the name of Hiu Lui Ng who died in detention is illustrative of how detention in the United States is dangerous for the detainees and contrary to human right and constitutional standards and norms.

Mr. Ng arrived in the United States when he was seventeen years old on a tourist visa with his parents and sister from his native China. He overstayed that visa, and later applied for asylum. After his asylum was denied, he was sent a notice to appear by INS (now ICE), but that document was sent to a nonexistent address and Mr. Ng never learned of his summons to immigration court. Consequently he failed to appear at his immigration court hearing and a deportation order was placed against him, again without his knowledge. Years later, after studying to become a computer engineer, securing employment in the Empire State Building in New York City, marrying a LPR who later became a naturalized citizen, and having two American-born children, Mr. Ng's wife filed for him to get a green card based on her citizen status. When he arrived at his interview for a green card, he was arrested by ICE and placed in detention.²⁸³

After his arrest on July 19, 2007, Mr. Ng was held in two jails that were under contract with federal immigration authorities, and in April of 2008, he began experiencing severe back pain and a severe skin condition.²⁸⁴ Despite being transferred to a facility with a medical staff, Mr. Ng was repeatedly refused the medical care that he was in need of and was told by medical personnel to

²⁸¹ *Immigration Agency's Revised List of Deaths in Custody*, THE NEW YORK TIMES, Apr. 2, 2009, <http://www.nytimes.com/2009/04/03/nyregion/03detainlist.html?ref=nyregion>.

²⁸² Washington Post Series.

²⁸³ *Id.*

²⁸⁴ *Id.*

“stop faking.”²⁸⁵ Upon transfer, he was placed in isolation where he was forced to suffer alone and then given a top bunk that he had to climb off of at least three times a day for head counts, which exaggerated his pain.²⁸⁶ Eventually, he required help from other detainees to reach the toilet, to get his food, and to call his family.²⁸⁷ Because he could no longer stand in line for his medications due to the severity of his pain, he was not receiving his pain killers.²⁸⁸ Mr. Ng became too frail to walk to meet his attorney when he came to visit, and the facility denied him access to a wheelchair, essentially denying him access to legal counsel.²⁸⁹ Mr. Wong, who was serving as Mr. Ng’s attorney wrote in an affidavit that a deportation officer named Larry Smith, that Mr. Ng was even threatened in the attorney’s presence that he would never be allowed access to an outside doctor, that he would not be given a wheelchair, and that before he would receive adequate treatment from the detention facility he would “first have to withdraw all appeals.”²⁹⁰

Mr. Ng filed a petition for writ of habeas corpus against Michael Chertoff, then Secretary of the Department of Homeland Security and John Torres, Director of ICE Office of Detention and Removal among others.²⁹¹ He asked that the court find the defendants’ treatment of Mr. Ng and their blatant disregard for his medical condition in violation of the Due Process Clause of the Constitution, as well as to allow Mr. Ng to be released and be immediately provided with adequate medical treatment and diagnosis by a qualified medical professional.²⁹² Instead of the

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Supra* note, 282.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ Ng Complaint.

²⁹² *Id.*

immediate release, the judge in the case demanded that Mr. Ng be taken to a hospital immediately for an M.R.I.²⁹³ It was then confirmed that Mr. Ng had cancer in his liver, lungs and bones, as well as a fractured spine.²⁹⁴ After diagnosing Mr. Ng., the doctors warned that if his family were to come and visit, he would probably be transferred to another hospital.²⁹⁵ It took three days after his diagnosis for his family to be given permission to visit, and only four days for him to pass away.²⁹⁶

C. COSTS

The current immigration detention policies in the United States are not only in violation of human rights and constitutional norms, but they are also costly. The costs include the increased litigation that has occurred due to the offences committed against detainees, the monetary costs of maintaining the detention facilities, and the cost of human life that resulting from insufficient medical care.

1. INCREASED LITIGATION

Mr. Ng's case offers evidence of the increase in litigation that has occurred due to the immigration detention policies. His attorney filed a number of petitions with the court seeking his release from detention so that Mr. Ng could obtain the care that he needed. Since his death, his family has filed a wrongful death action aiming at the federal government. Each of these suits could have been avoided had Mr. Ng been allowed to remain with his family while awaiting a final determination in his case.

²⁹³ *Supra*, note 281.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

Since ICE was formed in 2003, approximately 681 cases have been appealed in federal court with ICE as the defendant.²⁹⁷ Of those 681 cases, roughly 466 included a writ of habeas corpus. A detainee files a writ of habeas corpus so that the court will compel ICE to release the detainee from detention. While these numbers are not conclusive or other factors may determine why these lawsuits were filed, presumably litigation against ICE and the federal government would decrease if detention were not longer mandatory, thereby eliminating some of the costs associated with the current detention situation in the United States.

2. COST OF MAINTAINING DETAINEES

Immigration detention is also an expensive practice. According to Amnesty International, because of the increase in the use of immigration detention, the United States has had to contract with approximately 350 state and county criminal jails across the United States so that the detainees may be held.²⁹⁸ Sixty-seven percent of all immigrant detainees are held in these facilities. The other 33% are then kept in facilities that are maintained by either the federal government or private contractors.²⁹⁹ The average cost of detaining immigrants is \$95 per person, per day. Alternatives to detention can cost significantly less. Supervised released, for example, costs on average \$12 per immigrant, per day, and has a 91% appearance rate. Immigration detention is not only inhumane and unnecessary, but it is undoubtedly expensive, particularly in light of the effective alternatives.

3. QUESTIONABLE DEATHS

Another cost is that of the lives of detainees who have died in detention, often in questionable circumstances. Mr. Ng is unfortunately not the only detainee who perished while in

²⁹⁷ This is determined after doing a Boolean search on Westlaw.

²⁹⁸ *Supra*, note 225.

²⁹⁹ *Id.*

detention. While doing research for an article that was later published, The Washington Post used confidential medical records and other sources to identify eighty-three immigrant detainee deaths. Of those eighty-three deaths, The Washington Post concluded that thirty of those deaths were questionable.³⁰⁰ Immigration detention in the United States is costly and in some cases, deadly.

C. CONCLUSION

Mr. Ng's tragic experience outlines a number of issues with immigration detention in the United States. He was an unassuming, educated and employed member of the U.S. economy, married to an American citizen and the father of two American children, who overstayed his visa, which is a civil violation. He was not properly served for his deportation hearing and was consequently arrested and detained years later due to an error on the part of USCIS. Throughout his time in detention, he was treated as a liar, he was ignored despite obvious ailments, he was punished for his physical limitations resulting from his cancer, he was denied access to his attorney, and was forced to live with a broken back and cancer without relief from doctors or medications. His due process rights were continuously and systematically violated, provoking a number of appeals, a petition for a writ of habeas corpus, and a wrongful death action filed by his wife following his demise. His situation highlights the costs involved due to the current climate of immigration detention in the United States. These costs include increased litigation, inhumane treatment of individuals, many of whom are innocent of any criminal wrongdoing, unwarranted separation of families, a general distrust for the system, and death. Detention in the United States must change.

³⁰⁰ Washington Post Series.

INTERNATIONAL MECHANISMS AND THEIR ASSOCIATED COSTS

Our analysis of the costs incurred by the policies and practices of ICE has so far been confined to the domestic realm. This has been appropriate, because domestic laws and venues offer the most direct avenues of redress for U.S. immigrants. But if immigrants are stymied at every domestic level in their pursuit of justice, there are further avenues available through international mechanisms and venues, and these avenues are worth exploring. The most promising among them are the Inter-American Commission on Human Rights (IACHR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the International Covenant on Civil and Political Rights Committee (ICCPR Committee). An examination of the ways that immigration injustices have been pursued through these venues will offer an idea of the costs incurred by the government in its defense of its policies and practices. This section, then, is intended to serve as a kind of icing on the cake: while U.S. immigration policies and practices have cost immigrants and taxpayers alike more than enough in the domestic realm, the costs are even greater when international law is considered.

A. INTERNATIONAL MECHANISMS

1. IACHR

The IACHR is a part of the inter-American system, which is itself the creation of the Organization of American States (OAS). Called by some the “engine” of the inter-American human rights system,³⁰¹ it performs several functions. It prepares reports on the human rights

³⁰¹ Tara J. Melish, “The Inter-American Commission on Human Rights” in *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, M. Langford, ed. (New York: Cambridge Univ. Press, 2008), p. 1.

conditions of particular countries. It also prepares thematic reports, which address the way in which OAS states handle certain subject areas (e.g., the rights of immigrants could be such a subject area). It conducts on-site visits to places where evaluations of the human rights situation are deemed necessary. It also develops specialized work in certain thematic areas through rapporteurs and other mechanisms.

Finally, and perhaps most significantly, the Commission receives and analyzes individual complaints regarding human rights violations. One scholar has stated that “international human rights regimes like the one set up in the American Convention are intended to address primarily violations occurring at the individual level,”³⁰² and the Commission’s power to analyze individual complaints is perhaps its most powerful illustration of this. The Commission reads the complaints, receives evidence, and issues determinations regarding the complaints. It then conducts follow-up to verify that liable states are complying with its determinations. Most matters end at this stage, with the Commission publishing its final report on the merits and, where appropriate, continuing to monitor compliance.³⁰³ Though the Commission has the authority to refer many matters to its companion court, the Inter-American Court for Human Rights, such referrals cannot currently be made regarding matters in which the United States is a party.

2. ICCPR COMMITTEE

The ICCPR Committee is a body created by the ICCPR treaty. The United States has signed and ratified the ICCPR treaty and is thus answerable to the Committee. Among the most

³⁰² Arturo Carillo, “Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past.”

³⁰³ Tara J. Melish, “The Inter-American Court of Human Rights” in *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, M. Langford, ed. (New York: Cambridge Univ. Press, 2008), p. 12.

salient rights guaranteed by the ICCPR that the Committee upholds are guarantees concerning the liberty and security of the person, the right of the accused to humane treatment, freedom of movement, due process for aliens subject to deportation proceedings, and due process for those accused of a crime.

In its enforcement of these and other rights the ICCPR Committee that has three main functions. First, states that have ratified the ICCPR are required to periodically send reports on measures taken to give effect to the provisions of the treaty.³⁰⁴ These official state reports are often accompanied by “shadow reports” submitted by NGOs who have monitored the state’s compliance. The shadow reports are welcomed by the ICCPR Committee, since they are often more objective and penetrating than the state’s own reports. The Committee receives and studies the country reports and shadow reports and the involvement of NGOs in this process has become extensive. Second, the Committee transmits its response to the states in question via its “concluding observations.” The state’s compliance with these recommendations will be noted in the state’s next report—or, more likely as a practical matter, in shadow reports. Third, via an Optional Protocol to the treaty (which must be signed and ratified separately), the Committee can consider “communications” from individuals claiming to be victims of violations by state parties to the treaty, and forward its views about them to the relevant individuals and states. This Optional Protocol has not been signed and ratified by the U.S., so at the present time, immigrant petitioners must rely on the state and shadow reporting process alone.

³⁰⁴ Steiner and Alston, “Comment on the Formal Organization of the ICCPR Committee” in *International Human Rights in Context*, 2nd Ed., Steiner and Alston, eds. (New York: Oxford University Press, 2000), p. 706.

3. CERD

The Committee on the Elimination of Racial Discrimination (CERD) is the committee that oversees matters concerning the ICERD. The United States has signed and ratified the ICERD, and is thus answerable to the CERD in matters concerning the ICERD. The ICERD guarantees several human rights that are particularly relevant to immigrants in the United States and elsewhere. For example, states cannot engage in discrimination and must change existing policies if those policies are discriminatory. States must also guarantee the right to freedom of movement and residence with the border of the State; the right to leave and return to any country, including one's own; the right to peaceful assembly and association; the rights to work, to free choice of employment, to just and favorable conditions of work; and the right to public health, medical care, social security, and social services.

CERD reviews country reports as well as shadow reports submitted by NGOs. In addition, CERD also offers "general recommendations" concerning the ICERD whereby it elaborates on the content of the rights protected by the treaty. A particularly salient example is its General Recommendation on the Rights of Non-Citizens, regarding Article 2 of the ICERD, which requires that "any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping." States must actively "[c]ombat ill-treatment of and discrimination against non-citizens by police and other law enforcement agencies and civil servants."³⁰⁵ Given the tone and content of this General Recommendation, immigrants pursuing justice against ICE in the current political environment

³⁰⁵ Id. at 7.

can expect to have a good chance of receiving a favorable view of their plight in CERD's reports on U.S. progress.

B. CASE STUDY: WAYNE SMITH

An instructive recent immigration-related U.S. petition to come before the IACHR is that of Wayne Smith.³⁰⁶ On the same day the Commission ruled on the admissibility of Smith's petition, it also ruled on the admissibility of the petition of Hugo Armendariz,³⁰⁷ which it treated as a companion petition based on its very similar fact pattern. Smith, an immigrant from Trinidad and Tobago, was denied his right to seek judicial relief in a manner that he claimed to be contrary to constitutional principles. He was subsequently deported back to Trinidad and Tobago.

On December 27, 2002 the Commission received a petition on behalf of Smith against the US government from the Center for Justice and International Law, the firm of Gibbs Houston Pauw, and the Center for Human Rights and Justice. Smith claimed that the United States was responsible for violating Articles I, V, VI, VIII, XVII, IX, and XXVI of the American Declaration. The substantive violations claimed were the right to life, liberty and security of the person; the right to protection against abusive attacks on family life; the right to establish a family; the right to protection for mothers and children; the right to inviolability of the home; the right to resort to the courts; and the prohibition against cruel, infamous, or unusual punishment.

³⁰⁶ Admissibility Petition 8-03, *Wayne Smith v. United States*, Report No. 56/06, Inter-American Commission on Human Rights, July 20, 2006.

³⁰⁷ Admissibility Petition 526-03, *Hugo Armendariz v. United States*, Report No. 57/06, Inter-American Commission on Human Rights, July 20, 2006.

The Commission held that the rights enshrined by the American Declaration are a source of international obligation for the US and all other OAS member states. These obligations, the Commission held, flow from the human rights commitments of member states under the OAS Charter, as well as from the customary legal status of the rights protected under some of the Declaration's most central provisions.

The Commission next determined that Smith had, as required, exhausted domestic remedies before petitioning the Commission. Upon being denied a chance to seek to avoid removal, Smith unsuccessfully appealed to the Board of Immigration Appeals. He then petitioned for a writ of habeas corpus in the federal courts. He made a second petition for a writ of habeas corpus and a corresponding appeal to the Fourth Circuit Court of Appeal after his first deportation order was reinstated in 2001. The circuit court held that it did have jurisdiction to hear his case, but denied Smith's constitutional challenge because he failed to establish that he had a "personal or liberty interest" at stake in the right to 212(c) relief. The Commission held that this was sufficient for the exhaustion of domestic remedies.³⁰⁸

The Commission determined that Smith's petition was admissible with respect to Article V (the right to protection of honor, personal reputation, and private and family life), Article VI (the right to a family and the protection thereof), Article VII (the right to protection for mothers and children), Article XIII (the right to the benefits of culture), and Article XXVI (the right to due

³⁰⁸ It was crucial to the Commission that Smith petitioned for writs of habeas corpus, because the failure to do so was the reason the petitioner in a previous U.S. deportation case before the Commission was found not to have exhausted domestic remedies. See *Mario Alfredo Lares-Reyes et al. v. United States*, Admissibility Petition 12.379, Report No. 19/02, February 27, 2002.

process of law). The aforementioned Armendariz petition was held admissible on similar grounds. Further consideration of both petitions is pending.

C. COSTS

1. FINANCIAL COSTS

When the United States defends itself before the IACHR, it costs American taxpayers money, because it is ultimately the taxpayers who fund the Justice Department. We can get a rough idea of the costs involved by examining the extended procedure that Justice Department officials go through in a petition like those of Smith and Armendariz. First, a petition is submitted alleging discrete human rights violations. The Commission then determines whether the petition *prima facie* meets the applicable admissibility requirements.³⁰⁹ It must then establish that it has jurisdiction over the subject matter, the location of the matter, and the time frame in which the alleged violation occurred.³¹⁰ It must also determine that the petitioner has first exhausted all domestic remedies.³¹¹ The Commission then proceeds to the merits by considering written briefs, observations, and other information submitted by the parties, supplemented as appropriate by oral presentations, witness testimony, onsite visits, and the Commission's independent investigations.³¹²

The involvement of the state accused of a violation is at this stage extensive—and, inevitably by extension, expensive. The United States has poured considerable resources into defending itself before the IACHR, even while making claims that the IACHR has no jurisdiction

³⁰⁹ Melish, "Commission," p. 11.

³¹⁰ *Id.* at 13.

³¹¹ Global Rights, p. 62.

³¹² Melish, "Commission," p. 15.

over it.³¹³ In *Smith* the government offered a vigorous and extensive defense, making three primary arguments. First, that the American Declaration is no more than a recommendation to the American States and does not create legally binding obligations. Second, that petitioner failed to exhaust domestic remedies as required by Article 31 of the Commission's Rules of Procedure. Third, that the petition does not state facts that would constitute a violation of the American Declaration even if the Declaration could be the subject of violations. The government's lack of success with these arguments does not impact the point that the arguments were extensive and carefully crafted.

The financial cost to the U.S. taxpayer with regard to the ICCPR Committee and the CERD, meanwhile, is found largely in the reporting process before both committees. This process requires extensive time and effort on behalf of Justice Department officials. The process becomes more extensive and complicated when a greater number of matters are raised before the committees. This is important because the number of immigration-related matters raised is likely to increase in the future absent a change of policy from ICE, due to increasing awareness of these committees as a viable option of achieving some redress.

2. OTHER COSTS

The political costs of IACHR resolutions may be difficult to quantify, but they are undeniably real. IACHR resolutions gain their force precisely from the political pressures that can result from them. For example, the resolutions provide leverage for NGOs, making their

³¹³ The reason for this is a matter of speculation. Perhaps U.S. officials have hoped to foreclose the possibility of precedents that establish more clearly and firmly the IACHR's authority over the United States. As we have seen, though, this is just what cases like *Smith* and *Armendariz* do. For a similar affirmation of the IACHR's authority in an earlier immigration-related case, see Report No. 63/05, Petition 4618/02, *Hossein Alikhani v. United States*, October 12, 2005.

policy arguments more persuasive and helping them to obtain justice in future cases.³¹⁴ More generally, “the final resolution of a case within the inter-American system has not only a possible immediate effect on those persons, but also on the larger human rights culture within the country.”³¹⁵ This simply illustrates a general point about public international law: much of its effectiveness is found in the political pressures it creates rather than in more traditional and cruder methods of enforcement such as police forces and prisons.

There are also political costs to having human rights violations in the realm of U.S. immigration policy aired before the ICCPR Committee and the CERD. Immigrants and the NGOs who submit shadow reports on their behalf must hope that the U.S. is adequately motivated to avoid the cost of bad publicity, and to address the injustice at issue in order to avoid embarrassment. If it does not do so as the reporting process is unfolding, then it may be motivated to do so by a public outcry upon the release of either committee’s conclusions. Cases of injustice in the U.S. discussed by CERD may well increase in the future, especially given the General Recommendation it has issued regarding Article 2, and if this happens then the issue of cost may move those on the fence toward a view of immigration reform that would render appeals to CERD unnecessary.

Shining an international spotlight upon injustices in the U.S. immigration system also inevitably incurs costs to bilateral diplomacy. This is true for two reasons. First, various aspects of U.S. immigration policy are revealed to all as substantively problematic, and perhaps even indefensible. Nations worthy of U.S. attention with regard to bilateral diplomacy are likely to

³¹⁴ Id. at 61.

³¹⁵ Id. at 63.

be hesitant to engage with a nation whose immigration policies violate human rights. Second, any hesitancy that the United States demonstrates concerning the redress of such matters after they have been publicized may smack of hypocrisy given the strong rhetoric the United States often employs regarding human rights violations of other nations. This may lead other nations to become more wary of whether the United States can ever be taken at its word.

D. CONCLUSION

There can be little question that domestic remedies have been, and should continue to be, the primary ones sought by immigrants against ICE's policies and its carrying out of those policies. It is unquestionable that they allow for the most direct redress of injustice, and of course, exhaustion of domestic remedies is anyway a precondition of utilizing forums such as the inter-American system. Nonetheless, our analysis of international avenues of redress has attempted to make three points. First, some such avenues do exist and serve as practicable options for immigrants and the NGOs and firms who represent them. Second, one can reasonably expect these avenues to yield some sort of justice, even if the redress takes the indirect form of offering leverage for the exertion of political pressure on U.S. immigration policy. Third, there is some reason to think that the use of these international forums is likely to increase in the coming years absent serious immigration reform in the United States, leading to greater involvement of the government in such petitions—and greater costs to taxpayers, immigrants, and the United States itself.

CONCLUSION

This project has been an attempt to analyze the many and varied costs associated with the policies and activities of ICE. Taking into account how immigration enforcement came to its present state, the analysis has focused on the discrete subjects of worksite raids, home raids, local enforcement efforts, detentions, and the implications of ICE's activities for international legal mechanisms. The analysis has necessarily focused piecemeal on these different elements, but that structural necessity should not obscure the fact that these are different chapters in a coherent story. It is a story, at bottom, of opportunism and power politics. Since the 1996 changes in immigration policy, and especially since the Al Qaida terrorist attacks in 2001, U.S. immigration policy has been based at its core on a cultivation and exploitation of fear.

With post-9/11 innovations like the PATRIOT Act, the Homeland Security Act, and the creation of ICE, U.S. immigration policy was essentially put on a war footing consistent with the militaristic thinking that has brought us the fiasco that is the Iraq War. There is a kind of sad logic to this. Militarism is always tempting to those who feel themselves threatened; the war room elicits a more boisterous rallying cry than the classroom. Hence the conflation of immigration with terrorism. If our 9/11 attackers were, however briefly, immigrants in the United States, how can we trust any immigrants? Immigrants are, after all, so . . . un-American. When in doubt, better to round them up and deport them. This kind of thinking has been as pervasive as it has been narrow-minded.

It is only in this light that we can understand the policies and practices of ICE: the paramilitary-style worksite raids disallowing detainees any food or water for sixteen hours, the

pre-dawn home raids based on a pretext of looking for “fugitives” who are not there, the widespread racial profiling of work farmed out through 287(g), the indefinite detentions in unsanitary conditions with inadequate nutrition. Such activities, carried out on behalf of the government, are incomprehensible to those who read the Declaration of Independence and the Constitution, but they are all too easily understood to those who are aware of waterboarding and Guantanamo Bay. They invite legal challenges and legal costs, not only domestically but even in international fora. ICE’s activities cost money. They waste money. In the meantime, ICE boasts of its ever-increasing budget.

Yet this project is only a snapshot in time. It was begun in the waning days of the Bush Administration and finished in the first hundred days of the Obama Administration. Words on a page are static, but the machinations of politics grind on. The new administration has already declaratively expressed a new ethos that would suggest that we can expect to have a more circumscribed and chastened ICE. We can expect to have an ICE that will refrain from rejoicing in pseudo-military exercises performed under the banner of videogame-like labels such as “Operation Endgame.” This dawning, though, is not without its complications. The recent eruptions of violence in Mexico between the drug cartels and the government, and among the drug cartels themselves, have resulted in renewed calls to close the border entirely. As DHS Secretary Janet Napolitano engages in a comprehensive review of ICE’s policies and practices, she now has the unenviable task of deciding what to do about immigration from Mexico given the widespread murder and mayhem.

Yet among the various case studies of this project, a consistent theme emerges, whether one is considering the case of *Perez-Cruz*, *Guzman*, *Aguilar*, *La Paz*, *Arias*, *Ortega*, or

others. It is that the immigrants at the center of these stories are exactly the kind of humble, family-oriented, hard workers who the average American would unhesitatingly describe as embodying the American Dream. They leave their countries for a better life, often because their countries are unable to provide a decent life due at least in part to U.S. economic exploitation. They are lured by U.S. practitioners of the very free market principles that conservatives roundly claim to cherish, only to be ambushed after a time by an ICE that has embodied an unholy alliance between neo-conservative militarism and social conservative myopia. They then beg to be deported immediately, but in raids such as Postville, many are held in jail for months on needless criminal charges.

One can only hope that this analysis has come at the end of an era and may soon be of largely historical significance. The authors would enjoy nothing more. With a president who is himself the son of an immigrant, one has reason to hope the change in immigration policy may be more fundamental than we could have imagine just a few years ago. With storm clouds always looming on the horizon, be they from isolationist U.S. politicians, self-aggrandizing sheriffs, or the bloodshed in Mexico, one has reason to temper that hope with caution. Still, hope is upon us and for that we are grateful.



Immigration & Human Rights Policy Clinic

University of North Carolina at Chapel Hill

School of Law

Van Hecke-Wettach Hall

160 Ridge Road

CB# 3380

Chapel Hill, NC 27599

Phone: 919-962-5106

<http://www.law.unc.edu/centers/programs/clinic/ihrp>