SEVERING A LIFELINE:
The Neglect of Citizen Children in America's Immigration Enforcement Policy

A Report by Dorsey & Whitney LLP
to The Urban Institute

Dorsey & Whitney LLP is a full-service law firm offering services in more than 50 different areas of legal practice, including immigration law. Headquartered in Minneapolis, Minnesota, Dorsey employs 650 lawyers and 850 support staff in 18 offices throughout the United States, Europe and Asia. Dorsey represents more than one-third of the companies listed on the Fortune 100, and more than half of Minnesota's public companies. Since its founding in 1912, Dorsey has maintained a strong commitment to serving the unmet legal needs of disadvantaged individuals, non-profit entities, and other organizations who cannot afford to pay for legal services. Dorsey lawyers and staff devote tens of thousands of hours each year to pro bono activities in a wide variety of areas of the law, including children's rights, political asylum/human rights, legal clinics, domestic abuse, and others. As a charter signatory to the ABA's 1993 Law Firm Pro Bono Challenge, Dorsey has contributed at least 3% of billable hours to pro bono work for 15 consecutive years. Further information regarding Dorsey can be found at www.Dorsey.com.

The Urban Institute is a nonprofit, nonpartisan policy research institute and educational organization established in Washington, DC, in 1968. Its staff investigates the social, economic, and governance problems confronting the nation and evaluates the public and private means to alleviate them. The Institute disseminates its research findings through publications, its web site, the media, seminars, and forums.

SEVERING A LIFELINE: The Neglect of Citizen Children in America's Immigration Enforcement Policy

Authored by:

James D. Kremer
Kathleen A. Moccio
Joseph W. Hammell

Editorial Advisory Committee:

Prof. Katherine Fennelly,
Hubert H. Humphrey Institute of Public Affairs
University of Minnesota

Prof. David B. Thronson
William S. Boyd School of Law
University of Nevada, Las Vegas

Prof. Esther Wattenberg
Center for Advanced Studies in Child Welfare
University of Minnesota

Benjamin Johnson
Executive Director of the American Immigration Law Foundation

A Report by Dorsey & Whitney LLP

to The Urban Institute

Contents

Acknowledgments

This report is the culmination of an 18-month investigation by Dorsey & Whitney LLP of the affect of U.S. immigration law and enforcement policy on U.S. citizen children of undocumented immigrants. The principle authors of this report are Dorsey partners James D. Kremer and Joseph W. Hammell, and University of St. Thomas Adjunct Professor and immigration attorney Kathleen A. Moccio.

The authors are indebted to the many community leaders and officials, religious leaders, community outreach organizations, and affected family members who gave their time for interviews and otherwise assisted our efforts to gather information for this report. Special thanks are extended to John Keller, Executive Director of the Immigrant Law Center of Minnesota, who provided invaluable assistance in the formative stages of this project, and the immigrant support and outreach community of Worthington, Minnesota, particularly Nelson Bonilla and Jerry Fiola of Community Connectors, Mike Potter of Local Union 1161 UFCW, Sharon Johnson of the Nobles County Integration Collaborative, and Sister Karen Thien of Saint Mary's Catholic Church.

The authors thank Randy Capps, former Senior Research Associate at the Urban Institute and currently a Senior Policy Analyst for the Migration Policy Institute, for his guidance and support throughout the course of this project, and his contributions to our investigation and the preparation of this report. The authors also thank Katherine Fennelly of the Humphrey Institute, David Thronson of the UNLV School of Law, Esther Wattenberg of the Center for Advanced Studies of Child Welfare, and Ben Johnson of the American Immigration Law Foundation for their service as members of our Editorial Advisory Committee and their significant contributions to the shaping of this report. Finally, the authors thank The Urban Institute, particularly Ajay Chaudry and Stu Kantor, for their efforts in bringing this report to fruition.

Dorsey attorneys and staff who contributed to the investigation and analysis underlying the report include:

Partners: Michael Piazza, Carllene Placide, Kimton Eng, and Mary Streitz;

Associates: Kahla Bunde, Megan MacKenzie, Charisa Tak, Rebecca Molloy, Bart Torvik, and Matthew Ralph; and

Summer Associates: Daniel Hammer, Tim Droske, Jose Hernandez, Jill Hammerbeck, Christopher Amundson, Pamela Marentette, Bryan McGarry, Lisa Ellingson, Elizabeth Rozon, Erin Collins, Kari Bomash, Jennifer Kim, Laura Hammargren, Vallerie Mauler, Ryan Fortin, Monica McNeally, Ieva Butkute, Ambrea Bigley, Lauren Hemingway, Eric Waters, and John Messerly.

In addition, Taya Schmid, Senior Graphics Specialist, devoted countless hours to the preparation and revisions of the report. Finally, the authors are grateful to William Kremer for his copy editor services.

This report is a product of Dorsey & Whitney LLP, which is solely responsible for its content. Its authors consulted with researchers at the Urban Institute, a nonprofit, nonpartisan policy research and educational organization that examines the social, economic, and governance problems facing the nation. The views expressed are those of the authors and should not be attributed to the Urban Institute, its trustees, or its funders.

"Each child represents either a potential addition to the protective capacity and enlightened citizenship of the nation or, if allowed to suffer from neglect, a potential addition to the destructive forces of a community. . . . The interests of the nation are involved in the welfare of this array of children no less than in our great material affairs."

— *Theodore Roosevelt*

"No one is born a good citizen; no nation is born a democracy. Rather, both are processes that continue to evolve over a lifetime. Young people must be included from birth. A society that cuts off from its youth severs its lifeline."

— *Kofi Annan*

"The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and 'rights far more precious than property rights.'"

— *U.S. Supreme Court, Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)

I. Executive Summary

Of the approximately 5 million children of undocumented immigrants residing in the United States, more than 3 million are U.S. citizens. Born here, these children derive their citizenship from the Fourteenth Amendment to the Constitution. Current immigration law and enforcement policy is marginalizing what it means for these children to be U.S. citizens.

Increased interior immigration enforcement action by ICE, in the form of high-profile worksite raids and home raids, has resulted in the arrest, detention and deportation of record numbers of undocumented immigrants over the past several years. In the process, tens of thousands of children of undocumented immigrants, including citizen children, have seen their families torn apart, or experienced the effective deportation of the entire family to countries as foreign to them as they are to other American children. The harm threatened or visited upon the citizen child in these circumstances is palpable and long-lasting.

U.S. citizen children are the victims of immigration laws that are out of step with the manner in which we address child welfare issues in other areas of the law. The "best interests" of the child find little or no hearing in the process of detaining and deporting undocumented parents. The harm suffered by the citizen child who loses a parent to deportation, or the citizen child who loses his or her prospective future in the United States in the interest of maintaining family unity, is thus the natural consequence of systemic shortcomings in U.S. immigration law and policy.

The primary goal of this report is to reveal, and to prompt meaningful and reasoned debate regarding, the deficiencies in this country's immigration laws and enforcement scheme relative to the interests of our citizen children. Our hope is that this discussion will lead to a more humane immigration policy that does not dismiss the harm to the citizen child as unavoidable, collateral damage.

In preparing this report, the authors have researched the events surrounding, and impact of, recent worksite and home raids conducted by ICE across the nation. In addition to reviewing available literature and published reports regarding immigration enforcement actions nationally, the authors gathered data and information directly from several Minnesota communities that have been the sites of recent enforcement actions, including Worthington (site of one of the December 12, 2006, Swift plant raids), Willmar and Austin, Minnesota (both sites of several

home raids). The authors interviewed local government officials, religious leaders, representatives of immigrant community support organizations, school personnel, union representatives, and affected family members. In addition, the authors undertook extensive research into historic and current immigration law and policy, and the manner and extent to which the "best interests of the child" have become a hallmark of state laws in areas implicating child welfare issues.

Demographic Background: Often lost in the heated debate surrounding immigration enforcement and reform is recognition of the conditions giving rise to an undocumented population of some 12 million. With little or no meaningful avenue for lawful entry to the U.S., undocumented immigrants have come to this country over the past several decades in pursuit of economic opportunity all but absent in their countries of origin. Service sector and other low-paying jobs that native-born workers do not want or cannot fill have drawn immigrant labor to the U.S. economy. Undocumented immigrants have settled in large and small communities across the nation, working for wages that most native-born workers scoff at, but that often represent a tenfold or greater increase in potential earnings in their impoverished countries of origin. In the process they have established homes, they have reinvigorated and enriched the communities in which they live and work, and they have become mothers and fathers. Their U.S.-born citizen children, who now number some 3.1 million, have been raised, socialized and schooled as Americans. It is these children – American children – who are bearing the brunt of enforcement actions targeted at the detention and deportation of their parents. According to estimates from The Urban Institute, one citizen child is affected for every two adults arrested in ICE enforcement actions. With deportations numbering greater than 1.9 million in this decade, it is safe to conclude that hundreds of thousands of citizen children have suffered the loss of one or both parents, or effective deportation to a foreign land, as a consequence of enforcement actions over the past several years.

The Non-Existent Queue for Lawful Entry: Some may seek to dismiss, or downplay, the harm to citizen children as a necessary consequence of the "sins" of their parents. The choice of the parent to enter unlawfully, they say, mitigates governmental and societal responsibility for adverse consequences visited upon the innocent child when the parent is detained and deported. In reality, however, the avenues for lawful entry into the U.S. by the lower-skilled, lower educated immigrant that makes up the vast majority of the undocumented population are

virtually non-existent. Despite the clear demand of U.S. business for relatively low-skilled, immigrant labor that cannot be met by native-born workers, the number of permanent visas available for the lawful entry of less-skilled workers is limited to 5,000 per year. Similarly, the ability of lower-skilled workers to obtain temporary works visas is constrained by numerical caps and substantive limitations. Family-sponsored admissions are also limited and plagued by bureaucratic delays often decades in length. Moreover, a U.S. citizen child under age 21 has no ability to seek legal immigration status for a parent or other family member. In short, the oft-stated refrain that the undocumented immigrant should have simply "gotten in line" for a visa and entered lawfully is based on a false premise – there was and is no meaningful line for the immigrant to "get in."

The Threat to the Welfare of Citizen Children: Innocent children have been the unintended victims of increasingly aggressive enforcement efforts by ICE. The harm visited upon children of undocumented immigrants stems from the immediate and longer term detention of one or both parents, the tactics employed by ICE in carrying out enforcement actions (particularly home raids), and an immigration law that fails to consider the "best interests" of the child in detaining and deporting his or her parent.

Worksite Raids: Although ICE appropriately recognizes childcare responsibilities as a ground for release with monitoring and/or reporting in lieu of detention, it has failed to implement protocols promoting the effective and timely identification of child welfare issues at the time of the raids. Asking the undocumented parent who has just been arrested and restrained to disclose whether he or she has children in need of care is not effective. Given the intimidating nature of enforcement actions, and the uncertainty within the undocumented community regarding the impact of a parent's undocumented status on his or her children, persons arrested in worksite raids are understandably reluctant to disclose whether they have children in need of care. Despite its awareness of this reticence, ICE has been reluctant to provide advance notification of planned raids to state and local social service agencies who could serve as intermediaries for the purpose of identifying arrestees with primary childcare responsibilities. In addition, current immigration law mandating the detention of certain undocumented immigrants (e.g., those who have outstanding orders of deportation and/or who failed to appear for immigration proceedings, as well as immigrants characterized as "aggravated felons" as a result of convictions for even petty offenses) precludes ICE and immigration judges from

releasing undocumented parents on humanitarian grounds. As a consequence, ICE raids have left children without parents and feeling abandoned, separated nursing babies from their mothers, separated pregnant wives from their husbands, and compelled local communities and organizations to scramble to address child welfare crises in their wake.

Home Raids: The manner in which ICE has conducted "home raids" is equally pernicious relative to the safety and well-being of children. The practice of "knock and talk" searches (i.e., forced entry into homes without information that the target of a fugitive warrant is present in the home), in addition to its questionable constitutional validity, has harmed children who have encountered ICE agents (at times with guns drawn) in their homes, experienced the aggressive questioning of occupants regarding their immigration status, and witnessed loved ones not identified in any arrest warrant led away in handcuffs.

Coercive Detention Practices: ICE has further impeded the timely identification of child welfare and other humanitarian concerns that might warrant release of the arrested parent in lieu of detention by transporting arrested immigrants to detention facilities often hundreds of miles from the enforcement site. In many instances, days or weeks have gone by before concerned family and community members have been able to determine the location of an arrested loved one, let alone address humanitarian requests for release to government officials. Although the use of remote detention facilities is, in part, a consequence of the absence of sufficient detention space nearer the raid sites, it is clear that ICE has utilized the tactic of isolation and threats of extended detention to extract voluntary removal agreements from undocumented immigrants. Needless to say, the message to a concerned parent that he or she can remain in detention and fight deportation for six or more months, or agree to voluntary deportation and potentially reunite with his or her family outside the U.S. in a matter of weeks, is a powerful tool in the hands of government agents seeking to convince an undocumented immigrant to waive his or her rights under U.S. immigration law. In addition to raising a host of moral issues, such tactics call into question the true voluntariness and validity of deportations effected through "voluntary removal" agreements.

ICE took the coercive use of detention to a new level in connection with the large-scale raid of Agriprocessors in Postville, Iowa in May 2008. Employing dubious criminal charges and threats of extended incarceration to an unprecedented

extent, and a "fast track" system of "justice" entailing group arraignments and court proceedings, ICE obtained plea agreements from some 300 undocumented immigrants resulting in their imprisonment for at least five months followed by their immediate deportation.

Long Term Harm to Children: The adverse impacts of increased enforcement on children are not limited to the trauma experienced in the immediate aftermath of the enforcement action. The separation of the family due to the detention and ultimate removal of a parent visits devastating and long-lasting financial and emotional harm on the children left behind. Families left without their primary breadwinner, many consisting of stay-at-home mothers who themselves are undocumented and cannot work, have encountered significant difficulties providing even the basic necessities to their children. While the financial struggles have been taxing, they pale in comparison to the emotional harm that children, including citizen children, have experienced with the sudden loss of a mother, father, or both. Psychologists, teachers, and family members have reported significant increases in instances of anxiety, depression, feelings of abandonment, eating and sleeping disorders, post-traumatic stress disorder, and behavioral changes among children who have experienced the loss of a loved one or who witnessed ICE in action. Once well-adjusted children who were doing well in school have become withdrawn and suffered serious setbacks in their educational progress. In a country that emphasizes the importance of family unity in the socialization and upbringing of its children, an immigration system that promotes family separation is a broken system.

The Effective Deportation of Citizen Children: There is, of course, an alternative to family separation. The child can join his or her deported parent in the parent's country of origin. For the citizen child of the undocumented parent, however, this is an exceedingly harsh and life-altering trade-off. For the citizen child, born and raised in the United States, a parent's country of origin is as foreign as it would be to any American child. In addition to uprooting the child from the only life he or she has ever known, effective deportation of the undocumented immigrant family exposes the child to economic and educational deprivation, and in many instances physical harm. An American child of an undocumented immigrant parent deported to Mexico, Guatemala, Honduras, Haiti and other countries that are the origins of the vast majority of the undocumented population will find himself or herself living in abject poverty, experiencing substandard (if any) schooling, and witnessing

(if not experiencing) gang and criminal violence of a degree and nature that is completely foreign to the streets of Worthington, Minnesota; Postville, Iowa; Greeley, Colorado; New Bedford, Massachusetts and other American communities where undocumented immigrants have been swept up in ICE raids. The effective deportation of the citizen child in the interest of family unity deprives the child of the opportunities presented by life in the United States that is his or her birthright. An immigration system that compels the choice between family unity and the American dream marginalizes what it means for these children to be U.S. Citizens.

The Neglected Child Under Current U.S. Immigration Law: Current U.S. immigration law neglects the citizen child of undocumented immigrants and the tenets of family unity that it is supposed to promote. Undocumented parents of citizen children do not have a meaningful path to legal status that would permit them to remain a full family in the United States. An undocumented immigrant who initially entered the U.S. unlawfully cannot seek readjustment of his immigration status without first leaving the country. In that circumstance, however, the immigrant's unlawful presence in the U.S. will serve as a bar to re-entry for up to 10 years, regardless of the presence of one or more citizen children in the family. Moreover, the law does not permit a citizen child under the age of 21 to petition for the admission of a parent, or to provide a parent with a path to lawful status in the U.S.

U.S. immigration law includes a mechanism through which undocumented immigrants can seek cancellation of removal (i.e., deportation). However, the standards under the current law are such that obtaining relief from removal based on the harm that will be experienced by the citizen child who will be separated from his or her parent or effectively deported with the parent is virtually impossible. In short, the "best interests" of the citizen child – a concept deeply imbedded and often controlling legal determinations in other areas of the law – is all but irrelevant under U.S. immigration law.

Conclusions and Recommendations: Current U.S. immigration law and enforcement policy is failing its most vulnerable citizens – the U.S.-born children of undocumented immigrants. With the hope of prompting a reasoned debate and the development of a more humane U.S. immigration policy that protects, rather than dismisses, the interests of citizen children, this report makes recommendations designed to (1) address the systemic barriers to lawful entry

and/or presence in the United States that have led to the large, undocumented population; (2) afford the undocumented, immigrant parent of a citizen child a reasonable opportunity to make his or her case for remaining in the United States based on consideration of the "best interests" of the citizen child, bringing immigration law and policy into conformity with other areas of the law where the interests of children are recognized; and (3) minimize the harm to children in the aftermath of enforcement actions by suggesting changes to arrest and/or detention practices without compromising law enforcement.

The following is a condensed list of recommendations addressed in detail in Section X, "Conclusions and Recommendations":

- Congress should address and eliminate the systemic barriers to lawful immigration status by amending the INA to (1) recapture visa numbers that have gone unused as a consequence of bureaucratic delays, increase the number of annual visas available to lower-skilled, less educated immigrants to meet the continued demand for low-cost labor in the U.S. economy, and eliminate restrictions that impede family unity; (2) allow a U.S. citizen child under age 21, or the legal guardian of such a child, to petition for the lawful admission and/or residency of a parent; (3) permit parents and their citizen children to remain in the United States while awaiting the issuance of a visa; (4) provide a humanitarian mechanism that promotes family unity and allows undocumented immigrants an opportunity to seek "adjustment" of their immigration status while remaining in the United States with their children; and (5) impose reasonable standards and provide for judicial review of re-entry bar waiver determinations.

- Congress should recognize the "best interests of the citizen child" as a factor to be considered in deportation proceedings, amending the INA to (1) grant immigration judges the discretion to consider the "best interests" of the citizen child in deportation and removal proceedings; (2) provide for consideration of the "best interests" of the citizen child in considering petitions for relief from removal (i.e., deportation) or, alternatively, returning to the standard for "suspension of removal" in place prior to the 1996 amendments to the INA; (3) eliminate the prohibition of relief from removal applicable to undocumented immigrants characterized as "aggravated felons" when such persons have U.S. citizen children and relief from removal would be in the "best interests" of the citizen child, and redefine "aggravated felon" to exclude convictions for petty and other offenses that do not result in any jail time; (4) provide for judicial

review of cancellation of removal determinations in U.S. District Courts where the interests of citizen children are involved; (5) provide for the appointment of a guardian ad litem to protect and advocate for the interests of the citizen child in all immigration proceedings involving the child's parent; and (6) eliminate the mandatory detention of undocumented immigrants where childcare and similar humanitarian issues are involved, and encourage the release of undocumented immigrants with monitoring and/or reporting in lieu of detention pending deportation proceedings.

- Congress should exercise increased oversight of immigration enforcement and its impact on citizen children by (1) appropriating funds to enable states and local governments to meaningfully assess and address the impact of current immigration law and enforcement policies on citizen children; and (2) requiring ICE to gather demographic and other data regarding citizen children affected by immigration enforcement actions, to document specific actions taken to minimize harm to children, and to report such data annually to Congress.

- ICE's "Guidelines for Identifying Humanitarian Concerns Among Administrative Arrestees When Conducting Worksite Enforcement Operations" should be made mandatory in all enforcement actions and modified to promote the timely and effective identification of childcare and other humanitarian issues warranting release with monitoring and/or reporting in lieu of detention, and to discourage detention whenever the same would be contrary to the best interests of a minor child of the arrestee.

- ICE should develop guidelines for conducting home raids that ensure that such enforcement actions are truly "targeted" and minimize the prospect of potential harm to children.

- ICE should develop detention guidelines that favor the release of undocumented immigrant parents of minor children with appropriate monitoring and/or reporting in lieu of detention.

- Immigration judges should be required to consider the "best interests" of the citizen child in rendering detention and deportation decisions, and the citizen child and/or the child's guardian ad litem should be permitted to appear and present argument and evidence in all immigration judicial proceedings.

- State and Local Social Service Agencies should establish and train

Humanitarian Response Teams to serve as an intermediary in connection with ICE enforcement actions for the purpose of timely and effectively identifying and addressing child welfare and other humanitarian issues warranting release of arrested immigrants in lieu of detention.

- State and local governments should assess whether the participation of local law enforcement personnel in immigration enforcement actions complies with state child welfare, due process and detention standards, and whether such participation jeopardizes public safety or otherwise interferes with the performance of traditional local child welfare and law enforcement activities.

- States and local governments should assess the educational, health, and economic impact which raids have upon children and affected communities.

II. Introduction

"I want to remind people that family values do not stop at the Rio Grande River. People are coming to our country to do jobs that Americans won't do, to be able to feed their families."
George W. Bush

Miguel (a pseudonym) was a second-grade student attending elementary school in Worthington, Minnesota. His mother, an undocumented immigrant from El Salvador, was employed at the Swift & Company plant in Worthington. Miguel was described by his teacher as a "happy little boy," making real progress in school … until December 12, 2006. On that day, armed agents from U.S. Immigration and Customs Enforcement ("ICE") raided the Swift plant in Worthington, detaining Miguel's mother and more than 200 other immigrants who came to this rural community in southwestern Minnesota seeking a better life for themselves and their children. Returning home after school, Miguel discovered his mother and father missing, and his two-year-old brother alone. For the next week, Miguel stayed at home caring for his brother, not knowing what had become of his parents. Not until a week after the raid, when his grandmother was able to make her way to Worthington to care for her frightened grandchildren, was Miguel able to return to school. According to his teacher, this previously "happy little boy" had become "absolutely catatonic." His attendance became spotty at best. His grades plummeted. At the end of the school year, Miguel was not able to advance to the third grade with the rest of his class.

Current immigration laws and enforcement policy are out of step with the way we treat children in other areas of our laws, the approach of most western democracies, and even our immigration laws themselves, with their long-standing, fundamental goal of family unity.

Miguel and his brother—citizens born in the United States—are but two of the millions of citizen children of undocumented immigrants placed at risk by increasingly aggressive immigration policy and enforcement. They are our children—American children. In the politically charged atmosphere of immigration reform the citizenship of these American children has been discounted, marginalized or ignored all too often. The best interests of the child—an overriding concern imbedded in our laws and jurisprudence for decades—find little or no place in our current system of immigration enforcement. As a consequence, citizen children of undocumented immigrants swept up in immigration raids are themselves facing effective deportation to countries they have never known, thereby depriving them of the educational and economic opportunity that is their birthright as U.S. citizens. The alternative, of course, is breaking up the family—deporting the undocumented

mother and/or father, with the citizen child remaining in the U.S. An enforcement-only scheme that compels such an untenable choice at the direct expense of the most vulnerable members of society—its children—is clearly a broken system.

Current immigration laws and enforcement policy are out of step with the way we treat children in other areas of our laws, the approach of most western democracies, and even our immigration laws themselves, with their long-standing, fundamental goal of *family unity*. This fundamental disconnect was the premise of the Bush Administration's failed immigration reform initiative. President Bush shined a light on the economic and human conditions driving undocumented immigration in 2005, stating: *"I want to remind people that family values do not stop at the Rio Grande River. People are coming to our country to do jobs that Americans won't do, to be able to feed their families."*[1]

The "five main pillars" of reform identified by the Bush Administration included "bringing illegal aliens who are now in the U.S. out of the shadows," establishing a "lawful mechanism so that in the future, foreign workers can come into the United States on a temporary basis to fill jobs that U.S. workers do not want," and "promoting assimilation of new immigrants into our society."

Undocumented immigrants, drawn to this country by the promise of safety, economic opportunity, and/or family unity often lacking in their countries of origin but with little or no means of establishing lawful residence in the United States, have lived, worked, and raised families among us for years — some for a decade or more. Despite increasingly aggressive enforcement efforts, the undocumented immigrant population in the United States remains large. According to recent estimates, there are between 11.4 and 12.4 million undocumented immigrants residing in the United States.[2] The vast majority work hard in low-paying jobs to provide for their families. There are currently some 8.1 million undocumented in the U.S. labor force, making up 5% of the total U.S. workforce.[3]

1 *Source:* http://www.whitehouse.gov/news/releases/2005/01/20050126-3.html. *See also* Testimony of Michael Chertoff, Secretary of the Department of Homeland Security, before the Senate Judiciary Committee, February 28, 2007, available at http://judiciary.senate.gov/testimony.cfm?id=2555&wit_id=66.

2 *See* Passel, Jeffrey S., *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey*. Washington, D.C.: Pew Hispanic Center, March 7, 2006. *See also,* Appendix A – Hoffer, Michael, Rytina, Nancy and Cambell, Christopher, *Estimates of the Unauthorized Immigrant Population Residing in the United States*: January 2006; Population Estimates, August 2007, Office of Immigration Statistics, U.S. Department of Homeland Security.

3 *See* Hanson, Gordon H., *The Economic Logic of Illegal Immigration*, Council on Foreign Relations, April 2007; Perryman, M. Ray, *An Essential Resource: An Analysis of the Economic Impact of Undocumented Workers on Business Activity in the US with Estimated Effects by State and by Industry*, The Perryman Group, April 2008.

Undocumented immigrants have settled in our communities, done work that the native-born population shuns, and raised families. There are more than five million children of undocumented immigrants, *three million* of whom are U.S. citizens.[4]

President Bush's immigration reform initiative endeavored to address the dilemma of the undocumented immigrants who live and work within our communities. The "five main pillars" of reform identified by the Bush Administration include "bringing illegal aliens who are now in the U.S. out of the shadows," establishing a "lawful mechanism so that in the future, foreign workers can come into the United States on a temporary basis to fill jobs that U.S. workers do not want," and "promoting assimilation of new immigrants into our society."[5] Unfortunately, the near-term prospects for meaningful reform died in Congressional debate in July 2007.

As a consequence, we are left with an enforcement-only approach epitomized by increasing numbers of worksite and home raids, the detention and deportation of undocumented immigrants (including mothers and fathers) in record numbers, and the promise of much more to come. The roundup and removal of immigrants who are contributing members of our communities is unprecedented in recent times, with significant unintended consequences for our nation's children. Current immigration enforcement policy ignores and thereby threatens families and children, including the many children who are U.S. citizens by birth.

In his April 2007 testimony before the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, Professor Hiroshi Motomura (currently at UCLA Law School) succinctly framed the troubling shortcomings of an enforcement-only approach in relation to the effects on U.S. citizen children and other family members of undocumented immigrants:[6]

> Perhaps it would be enough to say that our American system of justice is based on the rule of law, and anything that undermines the rule of law is fundamentally corrupting of American justice as a whole. But there is even more at stake. When we decide how seriously we take the rule of law in the immigration context, the real question is: what mistakes are we willing to tolerate? . . .

4 *See* Passel, Jeffrey S., *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey*. Washington, D.C.: Pew Hispanic Center, March 7, 2006.

5 Testimony of Michael Chertoff, Secretary of the Department of Homeland Security, before the Senate Judiciary Committee, February 28, 2007, http://judiciary.senate.gov/testimony.cfm?id=2555&wit_id=66.

6 Testimony of Hiroshi Motomura, Keenan Distinguished Professor of Law, University of North Carolina School of Law, before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, Committee on the Judiciary, United States House of Representatives, Hearing on Shortfalls of the 1996 Immigration Reform Legislation, April 20, 2007.

> If noncitizens of the United States are the only ones who suffer, that might seem to make the outcome less troubling. It is tempting to think that justice in immigration law can be justice on the cheap. But the real world of immigration law doesn't divide neatly into citizens and aliens. An enforcement-only approach to the rule of law leads to mistakes that cause devastating harm to many U.S. citizens who may be a noncitizen's husband or wife, father or mother, or child. When our immigration law system doesn't adhere to the rule of law, then we diminish and devalue what it means for them to be American citizens.

This report provides an in-depth legal analysis of the treatment of citizen children of undocumented immigrants under current immigration law and enforcement policy. The report addresses the central significance of the "best interests of the child" in American law and jurisprudence on child welfare, as well as international human rights norms and law. It is our conclusion that the treatment of citizen children under current immigration law and enforcement policy is out of step with these well-established legal standards. The interests of the citizen child, let alone the "best interests" of the child, find little or no hearing in the current system. As a consequence, citizen children increasingly find themselves separated from one or both parents, or effectively deported with their parents. The system imposes an untenable choice for the undocumented parent facing deportation – keep the family together by removing the citizen child to a foreign land, or break up the family to preserve the child's educational and economic opportunity as a birthright citizen. In short, current immigration law and enforcement policy marginalizes what it means for these children to be citizens of the United States.

"An enforcement-only approach to the rule of law leads to mistakes that cause devastating harm to many U.S. citizens who may be a noncitizen's husband or wife, father or mother, or child. When our immigration law system doesn't adhere to the rule of law, then we diminish and devalue what it means for them to be American citizens."

To provide appropriate context for the legal analysis, the authors have researched the events surrounding, and impact of, worksite and home raids conducted by ICE across the nation. In addition to reviewing available literature and published reports regarding immigration enforcement actions nationally, the authors gathered data and information directly from several Minnesota communities that have been the sites of enforcement actions, including Worthington (site of one of the December 2006 Swift plant raids), Willmar, and Austin, Minnesota (both sites of several home raids). These efforts included interviews of local government officials, religious leaders, immigrant community support organizations, school

officials, and affected family members in Worthington, as well as government and community leaders in Willmar and Austin, Minnesota. In addition, the authors focused on the high-profile enforcement action undertaken in Postville, Iowa in May 2008. The reader will see qualitative data gathered from these communities interspersed throughout the report.

Our goal is to reveal, and to prompt meaningful and reasoned debate regarding, the shortcomings in this country's present immigration laws and enforcement scheme relative to the interests of our citizen children. Our hope is that this discussion will lead to a more humane immigration policy that does not dismiss harm to the citizen child, the nation's future, as unavoidable, collateral damage.

III. Demographic Background

A. The Undocumented Population

Undocumented immigrants, drawn to the United States by economic and social opportunities often lacking in their countries of origin, have settled in large and small communities across the country. According to the Pew Hispanic Center, there were approximately 11.9 million undocumented immigrants living in the United States as of March 2008.[7] Approximately 44% of this population arrived in the U.S. in this decade, including some 3.7 million from 2000 to 2004.[8] The undocumented population includes approximately 5.1 million persons who came to the U.S. in the 1990s, more than half of whom have now lived and worked here for more than 13 years.[9] Undocumented Mexican immigrants make up the largest portion (59%) of the undocumented population by far, numbering some 7 million as of March 2008.[10] Although the growth of the undocumented population has slowed in recent years, the Pew Hispanic Center estimates that approximately 275,000 undocumented immigrants have come to the U.S. annually in the period since 2005.[11]

The influx of undocumented immigrants correlates with a demand for workers to fill lower-skilled jobs. The Bureau of Labor Statistics projects that there will be some 25 million job openings for workers with a high-school diploma or less—amounting to 45% of all job openings—in the period from 2004 through 2014.[12] At the same time, the interest of native-born workers in filling these positions has diminished as the native-born workforce ages and becomes better educated.[13] "The total demand will far exceed the rate of growth in the workforce that will occur from natural expansion and the entry afforded by current immigration policy, leaving a potential gap of tens of millions of laborers."[14] Immigrant workers thus fill a pressing need in the U.S. economy that, in recent times, has not been met by the native-born workforce.

---

7 Passel, J. and Cohn, D., *Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow*, Pew Hispanic Center, October 2, 2008, p.1.

8 *Id.,* p.3

9 *Id.*

10 *Id.*, pp. 3-4.

11 *Id.*, p.2.

12 Ewing, Walter A. and Johnson, Benjamin, *Dollars without Sense: Underestimating the Value of Less-Educated Workers*, Washington, D.C.: Immigration Policy Center, American Immigration Law Foundation, May 2007. pp. 4-5.

13 *Id.* (noting that "the share of native-born adults age 25 and older with less than a high-school diploma dropped from about 23 percent in 1990 to 11 percent in 2006"); Perryman, M. Ray, *An Essential Resource: An Analysis of the Economic Impact of Undocumented Workers on Business Activity in the US with Estimated Effects by State and by Industry*, The Perryman Group, April 2008, pp. 30-32 ("In 1960, about 50% of men in this country joined the low-skilled labor force without completing high school; the number is now less than 10%.") (http://www.americansforimmigrationreform.com/files/Impact_of_the_Undocumented_Workforce.pdf).

14 Perryman, M. Ray, *An Essential Resource: An Analysis of the Economic Impact of Undocumented Workers on Business Activity in the US with Estimated Effects by State and by Industry*, The Perryman Group, April 2008, p. 31.

The impact of the current economic recession on the population of undocumented immigrants is uncertain. Data suggests that growth of this population is slowed in periods of economic downturn, reflecting a correlation between undocumented immigration and the demand for lower-skilled workers in the U.S. economy.[15] However, notwithstanding some anecdotal reports, there is little evidence to suggest that the recession is prompting return migration of undocumented immigrants in statistically significant numbers. A recent report from the Migration Policy Institute assessing the effect of the economic crisis on immigration concludes that the current downturn is unlikely to foster above-normal return migration "unless the U.S. economic downturn turns out to be particularly prolonged or severe, economic conditions show consistent improvement in origin countries (which appears unrealistic in the near term), and potential leavers are guaranteed that they would be allowed to return to the United States when economic conditions change."[16]

The debate among economists regarding the economic impact of the undocumented population is a heated one with little area of general agreement.[17] While the economics of undocumented immigration is beyond the scope of this report, recent studies suggest that elimination of the undocumented workforce could have significant economic consequences. In an April 2008 report, The Perryman Group concluded that "the immediate effect of eliminating the undocumented workforce would include an estimated $1.757 trillion in annual lost spending, $651.511 billion in annual lost output, and 8.1 million job losses."[18] After market adjustments, the sustained loss to the U.S. economy through "foregone economic activity (based on the size of the national economy in 2008) would include some $551.569 billion in annual spending, $244.971 billion in annual output, and more than 2.8 million lost jobs."[19]

---

15 Passel, J. and Cohn, D., *Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow*, Pew Hispanic Center, October 2, 2008.

16 Papademetriou, D. and Terrazas, A., *Immigrants and the Current Economic Crisis: Research Evidence, Policy Challenges and Implications*, Migration Policy Institute, January 2009, pp 9, 21.

17 Compare Rector, R. and Kim, C., The Fiscal Cost of Low-Skilled Immigrants to the U.S. Taxpayer, Washington, DC: Heritage Foundation, 2007, and Perryman, M. Ray, *An Essential Resource: An Analysis of the Economic Impact of Undocumented Workers on Business Activity in the US with Estimated Effects by State and by Industry*, The Perryman Group, April 2008; Ewing, W., *Enforcement Without Reform: How Current U.S. Immigration Policies Undermine National Security and the Economy*, Washington, D.C.: Immigration Policy Center, March 2008; Congressional Budget Office, *The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments*, December 2007; (noting that while the taxes and fees paid by undocumented immigrants to state and local governments do not offset the costs for providing services related to education, health care and law enforcement, the net impact on state and local budgets is "most likely modest"); Ewing, W. and Johnson, B., *Dollars without Sense: Underestimating the Value of Less-Educated Workers*, Washington, D.C.: Immigration Policy Center, American Immigration Law Foundation, May 2007; Peri, G., *Rethinking the Effects of Immigration on Wages: New Data and Analysis from 1990-2004*, Washington, D.C.: Immigration Policy Center, American Immigration Law Foundation, October 2006.

18 *See* Perryman, M. Ray, *An Essential Resource: An Analysis of the Economic Impact of Undocumented Workers on Business Activity in the US with Estimated Effects by State and by Industry*, The Perryman Group, April 2008, p. 40.

19 *Id.*, p. 41.

The economic benefits derived from the currently undocumented labor force, and the potential adverse consequences of strict enforcement in lieu of meaningful reform, are significant at both a macro and micro level. In rural communities such as Worthington, Minnesota, where native population growth has been stagnant at best and economic opportunity waning over the past several decades, the relatively recent influx of immigrant workers and their families has revitalized local economies.[21] According to The Perryman Group, removal of the approximately 69,000 undocumented workers from Minnesota—a state with a growing but comparatively small immigrant population—would result in billions of dollars of immediate and long-term economic losses and the permanent loss of more than 24,000 jobs.[22]

> *"The minority community … has revitalized our downtown. … We welcome that diversity, and we're not going to go backwards."* Alan Oberloch, Mayor of Worthington, Minnesota.[20]

The May 2008 high profile raid of Agriprocessors in Postville, Iowa (discussed further in Section V.B.4.) – a rural community with a population of approximately 2,300 in northeast Iowa – provides recent and compelling evidence of the costs of worksite raids to relatively small commmunities. The consequences of the Postville raid have been far-reaching, extending beyond the humanitarian problems created. The raid itself cost the U.S. taxpayer more than $5.2 million.[23] Notably, this figure includes only ICE's expenditures. It does not include the costs of the court and U.S. Attorney's office, nor does it capture the costs of imprisoning hundreds of immigrants for several months.[24]

> *"The impact of this immigration raid on Postville's community is similar to what would have happened if the town had been hit by a natural disaster. As a result of the raid, families have been separated, children are traumatized and a once thriving community is devastated. Our immigration law is badly broken and in desperate need of reform."* The Reverand Mark S. Hanson, ELCA Presiding Bishop, May 20, 2008, Statement to Congress

The costs to the small community of Postville have been significant and cannot be measured in dollars alone. Approximately one-half of Postville's population of roughly

20 Minneapolis Star Tribune, "*Raids Aftershocks still Reverberate*," January 2, 2007

21 Based on data from the 2000 Census, Dr. Bruce Corrie (Professor of Economics, Concordia University—St. Paul, Minnesota) estimated that the buying power of Latinos in Worthington, Minnesota was $27 million.

22 In a September 2000 report, economist James Kielkopf concluded that undocumented labor in six segments of the Minnesota workforce (eating/drinking, hotels/lodges, building services, roofing/residential maintenance and repair, agriculture, and meat/poultry processing) "accounts for at least $1.56 billion, and more likely $3.8 billion, of value added in the Minnesota economy each year." Keilkopf, J., *The Economic Impact of Undocumented Workers in Minnesota*, Hispanic Advocacy and Community Empowerment through Research, September 2000, p.2. This study further estimates that the removal of undocumented workers from the Minnesota economy would reduce economic growth by 40% and result in one job loss elsewhere in Minnesota for each undocumented worker removed. *Id*.

23 Petroski, W., *Taxpayers' Costs Top $5 Million for May Raid at Postville*, The Des Moines Register, October 14, 2008.

24 *Id*.

2,300 worked at Agriprocessors prior to the May 12, 2008, raid.[25] The community lost roughly one-third of its population virtually overnight, with the bulk of the population loss consisting of families with school-age children.[26] School attendance plummeted following the raid with the loss of one-third of elementary and middle school students, and children of U.S. natives experienced nightmares and other trauma as a result of the government's show of force and the sudden absence of friends and classmates.[27] School superintendent David Strudthoff described the raid and its affects as "just like having a tornado that wiped out an entire part of town."[28] Postville Mayor Bob Penrod similarly reported that the raid "literally blew our town away."[29]

> *"They say this is the largest single raid that's happened in U.S. history, and imagine that raid happening in a town that is less than 3,000 people. We are in the process of losing one-third to one-half of our population almost overnight."* **Rev. Steve Brackett, St. Paul Lutheran Church, Postville, Iowa** (video interview at http://fairimmigration.wordpress.com/)

More than two months after the raid, Postville continued to struggle to deal with the raid fallout. As reported by the Des Moines Register in a July 27, 2008, article, the Postville of today is a vastly different and less safe place than it was before the raid:[30]

> Ten weeks after the largest workplace immigration raid in U.S. history, this is the new Postville:
>
> Drunken brawls. A food pantry that is almost bare. Women afraid to walk alone at night.
>
> Postville is now home to hundreds of men and women from tough towns and tough lives, brought to this northeast Iowa community by recruiters who entered homeless shelters in dusty Texas border towns offering $15 and a one-way bus ticket.
>
> The impact is evident: New laborers are changing Postville. The Agriprocessors Inc. meatpacking plant, the site of the immigration raid, once employed men and women with families. Now, its workers are mostly young, single people with no stake in the community and nothing to lose.

25 *See* Duara, N., *New Hires Bring New Problems to Postville*, Des Moines Register, July 27, 2008; Dr. Erik Camayd-Freixas, *Interpreting after the Largest ICE Raid in US History: A Personal Account*, p. 3.
26 *See* Dr. Erik Camayd-Freixas, *Interpreting after the Largest ICE Raid in US History: A Personal Account*, p. 3.
27 *Id.*; Basu, R., *After show of raid, what next?*, Des Moines Register, May 18, 2008 (available at http://www.alipac.us.ftopics-115969-0-days0-orderasc-.html).
28 Basu, R., *After show of raid, what next?*, Des Moines Register, May 18, 2008.
29 *Id.*
30 Duara, N., *New Hires Bring New Problems to Postville*, Des Moines Register, July 27, 2008 (available at http://www.desmoinesregister.com/apps/pbcs.dll/article?AID=/20080727/NEWS/807270335/1001).

> The rise in crime rate has strained Postville's tiny police department. ...
>
> [The workers brought in by Agriprocessors to fill the void left by the raid] brought with them the promise of helping the plant get back on its feet. They also brought the dangers associated with an influx of uprooted people from the margins of society to the fragile ecosystem of this small, agrarian town.

Although the initial and long-term impact of the Postville raid is magnified by its occurrence in a relatively small community whose population was employed predominantly by one entity, it provides valuable insight into the harmful humanitarian and economic consequences of a strict-enforcement approach to addressing the undocumented immigrant issue.

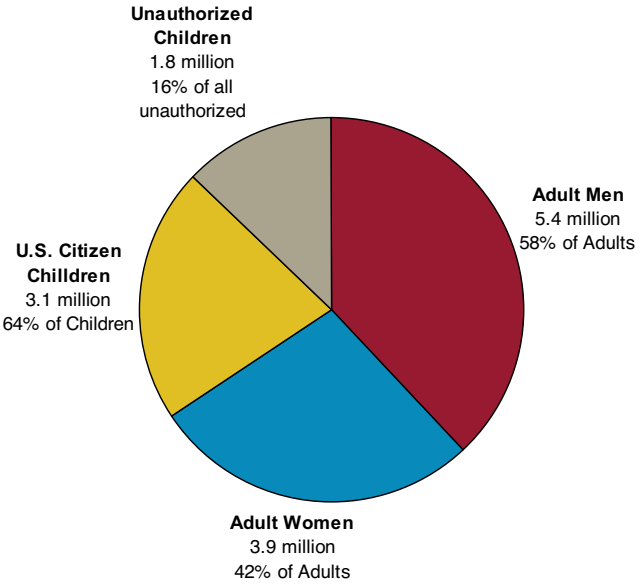
B. The Citizen Children Population

As discussed at length later in this report, the escalation of worksite and other interior enforcement activities has resulted in record numbers of arrests, detentions and deportations. Immigrant families, many with U.S. citizen children, have been split apart as a consequence. The threat to family unity and the welfare of American children as a result of current immigration law and enforcement policy is significant. A full appreciation of the actual and potential harm to citizen children of undocumented immigrants requires an understanding of the large number of children exposed to the very real prospect of losing a parent to detention and deportation, and losing their place in American Society – and rights as U.S. citizens – through their effective deportation to maintain family unity.

Hard data on the population of potentially impacted children is not available, and ICE statistics on the number of children of immigrants arrested, detained, and/or deported are woefully inadequate. Researchers have estimated that there are 4.9 million children of undocumented immigrants in the United States, 3.1 million (approximately 64%) of whom are U.S.-born citizens.[31]

31 *See* Passel, Jeffrey S., *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey*. Washington, D.C.: Pew Hispanic Center, March 7, 2006, pp.7-8.

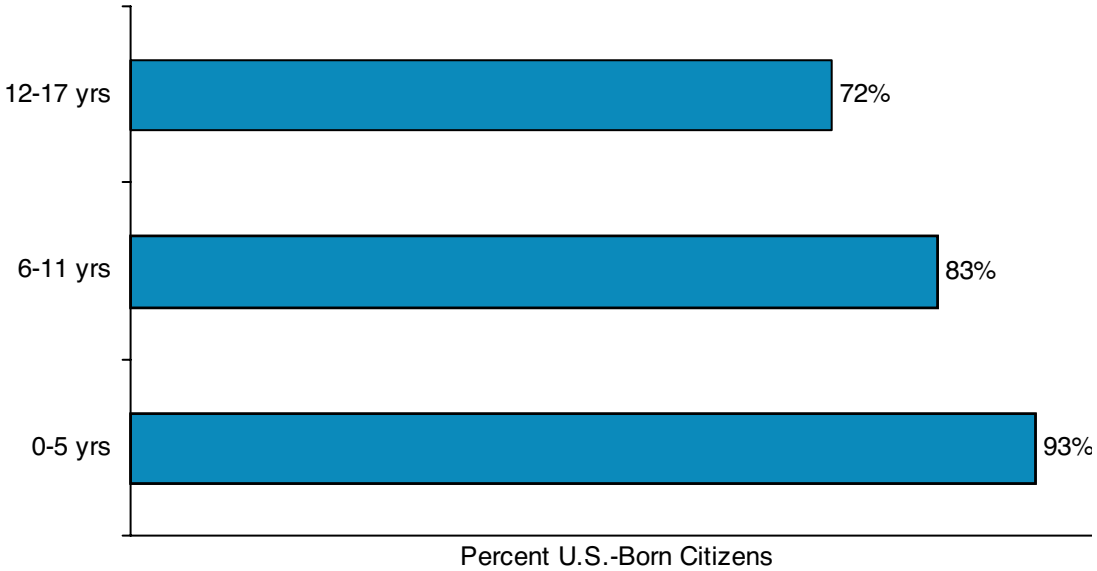
Undocumented Immigrant Family Composition: March 2005



Source: Passel, J., Size and Characteristics of the Unauthorized Migrant Population, March 2006.

Virtually all of the younger, more vulnerable children of immigrants are U.S.-born citizens. According to national data analyzed by The Urban Institute, over 90 percent of children under age 6 with immigrant parents are U.S.-born citizens. For adolescents ages 11-17, the share that are U.S.-born drops to 72%.

Citizen Children of Immigrants By Age



Source The Urban Institute, Washington D.C., March 2004 Current Population Survey

This pattern holds for children of undocumented immigrants—the vast majority of young children of undocumented immigrants are U.S.-born citizens, while a smaller percentage of older children are U.S. citizens. Based on national data and an analysis of three large-scale worksite raids, The Urban Institute estimates that one U.S.-born citizen child is affected by ICE enforcement actions for every two adults arrested.[32]

The Urban Institute found that the 900 immigrants arrested in the three worksite raids studied had 500 children among them, approximately two-thirds of whom were U.S.-born citizens.[33] Notably, these figures and estimates do not include children living in extended households (*e.g.*, with aunts, uncles, etc.) who experienced the loss of the head of the household as a consequence of the raids.[34] Extrapolating from this data and information regarding the number of undocumented immigrants deported from the U.S., one can safely conclude that tens of thousands – perhaps hundreds of thousands – of U.S. citizen children have been adversely affected by the detention and/or deportation of one or both parents in this decade.

In a recent report, the U.S. Department of Homeland Security Office of Inspector General cited data from ICE reflecting that 108,434 undocumented parents of U.S. citizen children were removed from the U.S. between FYs 1998 and 2007.[35] This data is admittedly incomplete because ICE does not require the collection of data regarding the status or age of an undocumented immigrant's children and ICE's data collection systems do not include information regarding undocumented immigrants who depart without an order of removal (i.e., voluntary returns after apprehension).[36] The report concludes that "[a] more complete data set is paramount in evaluating proposed legislative and policy options to reduce or prevent parent removal in specific circumstances," including "[n]ew data on children's age [which would] help establish the effect of alien parent removals on

32 The National Council of La Raza and The Urban Institute, *Paying the Price: The Impact of Immigration Raids on America's Children*, October 2007, pp. 16-18.

33 *Id.*

34 *Id.*

35 Department of Homeland Security, Office of Inspector General, *Removals Involving Illegal Alien Parents of United States Citizen Children*, January 2009, pp 5-6. This report stemmed from a Congressional directive to report on detentions and removals involving U.S. citizen children and their parents over the past 10 years. *Id.*, p.1. The requested data included: (1) the total number of aliens removed from the United States; (2) the number of instances in which one or both parents of a U.S. citizen child were removed; (3) the reason for the parents' removal; (4) the length of time the parents lived in the United States before removal; (5) whether the U.S. citizen children remained in the U.S. after the parents' removal; and (6) the number of days a U.S. citizen child was held in detention.

36 *Id.*, p. 6. Several government reports have noted deficiencies in ICE's data collection systems and practices, including untimely and inconsistent data entries, insufficient user training and oversight, and lack of written standards to ensure data quality. *Id.*, p.3.

U.S. citizen children who are minors."[37] ICE has agreed to initiate a study to assess the feasibility of collecting this data.[38]

37 *Id.*, p. 7.
38 *Id.*, p. 8.

IV. The Non-Existent Path to Lawful Status in the "Enforcement Only" Era

The inequities of our current approach to immigration policy, particularly in light of the harm to citizen children stemming from today's "enforcement only" approach, are self-evident. Having tacitly invited the undocumented immigrant to our communities and workplaces, we now seek to turn him out – depriving his citizen children of alternatively a unified family life or the economic, educational and social opportunities of a life in the United States.

This section of the report addresses (1) the systemic barriers to lawful entry and legal status affecting the vast majority of the undocumented immigrant population; and (2) the escalation of interior immigration enforcement efforts.

A. The Disconnect: Immigration Law, Instead of Facilitating Family Unity and Lawful Status, Creates Systemic Barriers

Proponents of increased enforcement of current immigration laws assign blame for the adverse effects visited upon children and families to the parent or parents who made the decision to enter the United States unlawfully. They dismiss the collateral harm to children as an unfortunate consequence of the undocumented parent's decision to shun lawful avenues for admission to the U.S. However, the premise of this argument – that there are meaningful paths to lawful admission by the lower skilled immigrant making up the vast majority of the undocumented population – ignores reality.

The paths to lawful entry for the vast majority of the undocumented population are virtually non-existent. Plagued by arbitrary caps on visas that are out of step with the demands of the U.S. economy, as well as extensive backlogs of a decade or more in length, immigrants seeking to come to the United States to join other family members or improve the lives of their children are faced with an untenable choice. They can wait in line to obtain a visa that, if it is ever granted, will not be received for 10, 15 or 20 years, or they can enter the country without documentation. In light of the economic and educational deprivation, as well as the threats to safety and well-being, that are often prevalent in their countries of origin, it is not surprising that so many immigrants have concluded that the needs of their families leave them with no meaningful choice but to enter the U.S. illegally.

1. Family-Based Immigration

Despite the large number of undocumented immigrants that are part of U.S. families, family-sponsored admission categories offer few meaningful paths for the parent of a citizen child to lawfully enter the United States. U.S. immigration law permits a U.S. citizen to petition for the admission of certain eligible, foreign-born family members to the United States.[39] However, citizen children are precluded from petitioning for their parents. Under current immigration law, children—*i.e.*, anyone younger than 21—have no ability to seek legal status for a parent or other family member.[40] Adult lawful permanent residents may petition for their spouse and unmarried children. However the number of available visas is extremely limited.[41]

> *"[T]he family immigration provisions of immigration law turn a blind eye to families in which only children hold legal immigration status. Children's interests in family integrity do not serve as a basis for possible extension of immigration status."*
> Source: Thronson, D., *You Can't Get Here From Here: Toward A More Child-Centered Immigration Law*, The Virginia Journal of Social Policy and the Law, Vol. 14, Number 1, Fall 2006, p. 72.

The hurdle to lawful entry stemming from the limited number of visas allotted to family-sponsored preference categories becomes an almost insurmountable obstacle when one considers the extensive backlog of petitions in the system. An approved preference petition for a family member merely affords the opportunity to join a waiting line for a visa number that is years—and sometimes decades—long. For example, the September 2008 Visa Bulletin issued by the State Department shows that visas for the Mexican spouse and children of a lawful permanent resident were unavailable. Thus, no matter how long they have been waiting in line, *no* spouses, even those with small, U.S. citizen children, were unable to immigrate in this category.[42] The current cut-off date for unmarried, adult children of lawful permament residents is 1992 – reflecting a waiting time of as much as16 years.[43] The paltry number of available visas and long wait times are exacerbated by bureaucratic ineffeciencies that have resulted in hundreds

39 *See* 8 U.S.C. § § 1151 and 1153. An adult citizen can apply for a visa for a spouse, parent or unmarried child under the age of 21, and there are no numeric limitations on visas in their circumstances.

40 *See* 8 U.S.C. § 1151(b)(2)(A)(i).

41 Family preference visas are limited to a base of 226,000 per year divided between four categories, three of which limit visa issuance to relatives of U.S. citizens. *See* Visa Bulletin for September 2008 at Appendix B.

42 *See* Family 2A Category, September 2008 Visa Bulletin (available at http://travel.state.gove/visa/fmt/bulletin/bulletin_4328.html). The March 2009 Visa Bulletin reflects a priority date of October 15, 2001, for Mexican Nationals in Family Category 2A.

43 *See March 2009 VISA Bulletin*. (available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4428.html); Immigration Policy Center, *Why Don't They Just Get in Line? The Real Story of Getting a "Green Card" and Coming to the U.S. Legally*, March 2008 (available at http://www.immigrationpolicy.org/images/File/factcheck/WhyDontTheyGetInLine03-08.pdf).

of thousands available visa numbers going unused.[44] Wait times of this duration, compounded by governmental processing delays or inefficiencies, cannot be reconciled with the family-reunification goals of our immigration laws and the needs of our children.

2. Employment-Based Immigration

The shortcomings of the family-based immigration system are mirrored in the employment-based admission system. The path to lawful entry to the United States by the less skilled, lower educated immigrant is virtually non-existent.[45] The claim that immigrants seeking to fill unmet, low-skilled labor demands in the United States can and should "get in line for a green card" rings hollow—there is no meaningful "line" for them to "get in."

Under the Immigration and Nationality Act's (INA) preference system, the number of non-citizens who may be admitted to the United States as lawful permanent residents based upon their prospective employment is limited to 140,000 individuals per year.[46] Further, the INA additionally limits the number of preference admissions to no more than 25,620 individuals from any given country.[47]

The number of permanent visas available for the lawful entry of less-skilled workers is limited to 5,000 per year *worldwide*, rendering the path to lawful entry illusory for the vast majority of those who comprise the undocumented population.[48] In addition, the ability of lower-skilled immigrants to obtain temporary work visas is constrained by numerical caps and substantive limitations. H-2A temporary visas are restricted to agricultural workers, and the program is plagued by bureaucratic complexities and delays that have impeded the ability of agricultural employers to meet their labor demands with temporary immigrant workers.[49] H-2B temporary visas are capped at 66,000 annually and limited to "seasonal" or otherwise "temporary" work that is defined so restrictively as to

---

44 According to State Department data reported by the Citizenship and Immigration Services Ombudsman, there were more than 200,000 unused family preference visa numbers and more than 500,000 unused employment preference numbers from FY 1992 to FY 2006. Citizenship and Immigration Services Ombudsman, 2007 Annual Report to Congress, p. 34 (available at www.gov/cisombudsman). On August 1, 2008, The House Judiciary Subcommittee on Immigration approved H.R. 5882, a bi-partisan bill that would recapture unused visa numbers from the 15-year period from 1992-2007. The bill also seeks to prevent the future loss of visa numbers due to governmental delay.

45 *See* Hanson, Gordon H., *The Economic Logic of Illegal Immigration*, Council on Foreign Relations, April 2007; Perryman, M. Ray, *An Essential Resource: An Analysis of the Economic Impact of Undocumented Workers on Business Activity in the US with Estimated Effects by State and by Industry*, The Perryman Group, April 2008; Parel, R., *No Way In: U.S. Immigration Policy Leaves Few Legal Options for Mexican Workers*, Immigration Policy in Focus, July 2005.

46 *See* 8 U.S.C. § 1153(b).

47 *See* 8 U.S.C § 1152; September 2008 Visa Bulletin.

48 *See VISA Bulletin for September* 2008; Parel, R., *No Way In: U.S. Immigration Policy Leaves Few Legal Options for Mexican Workers*, Immigration Policy in Focus, July 2005, p. 4.

49 *See* American Immigration Lawyers Association, *Making the Case for Comprehensive Immigration Reform*, p. 28 (available at http://www.aila.org/content/fileviewer.aspx?docid=21713&linkid=157219).

disqualify workers from positions in industries, such as meat processing, with chronic labor shortages.[50]

These systemic barriers to lawful entry, together with the demand for low-skilled labor and years of tacit complicity by the government in the influx of undocumented workers to meet that demand, have created the significant, undocumented population in this country. The moral, ethical and legal questions the era of strict enforcement presents is whether the shortcomings of our system should be visited upon its most innocent victims – the American children of undocumented parents.

B. The Escalation of Interior Enforcement Efforts

The "country's unrealistic immigration law is responsible for the current situation, in which agencies like ICE and the U.S. Border Patrol must grapple with some eight million undocumented workers who fill the vacuum in the labor market. We're trying to enforce an unenforceable law, and that by definition leads to draconian and inhumane actions."
Tamar Jacoby, Executive Director of America Works USA.

The immigration enforcement activities most directly impacting citizen children of undocumented immigrants are the responsibility of U.S. Bureau of Immigration and Customs Enforcement ("ICE"). ICE was established in March 2003 within the Department of Homeland Security for the stated purpose of "closing down our nation's vulnerabilities by targeting the people, money and materials that support terrorism and other criminal activities."[51] Since then, initiatives to bolster interior enforcement of immigration laws have included the hiring of thousands of additional agents and other personnel involved in the apprehension, detention and removal of undocumented immigrants; significant expansion of detention capacity; and increased emphasis on the training and delegation of enforcement authority to local and state law enforcement officers.[52] The ICE budget has grown from $3.67 billion in FY 2004 to $5.9 billion in FY 2009.[53]

50 *Id.*, p. 37; Parel, R., *No Way In: U.S. Immigration Policy Leaves Few Legal Options for Mexican Workers*, Immigration Policy in Focus, July 2005, p. 4

51 *See* U.S. Immigration and Customs Enforcement, *Fact Sheets: ICE Immigration Enforcement Initiatives*, June 23, 2006, http://www.ice.gov/pi/news/factsheets/immigration_enforcement_initiatives.htm.

52 *See* U.S. Immigration and Customs Enforcement, Budget Fact Sheets for fiscal years 2005 (http://www.ice.gov/doclib/pi/news/factsheets/2005budgetfactsheet.pdf), 2006 (http://www.ice.gov/doclib/pi/news/factsheets/2006budgetfactsheet.pdf), 2007 (http://www.ice.gov/doclib/pi/news/factsheets/2007budgetfactsheet.pdf), 2008 (http://www.ice.gov/doclib/pi/news/factsheets/2008budgetfactsheet.pdf), and 2009 (http://www.ice.gov/doclib/pi/news/factsheets/2009budgetfactsheet.pdf); U.S. Immigration and Customs Enforcement, *Fiscal Year 2007 Annual Report*, p. 26.

53 U.S. Department of Homeland Security, *Budgets-in-Brief* for fiscal years 2005 (p. 13), 2006 (p. 15), 2007 (p. 17), 2008 (p. 19), and 2009 (p. 19); ICE 2009 Budget Fact Sheet, http://www.ice.gov/doclib/pi/news/factsheets/2009budgetfactsheet.doc.

ICE Budgets, FY 2004-2009

Source: ICE Fact Sheets

With the stated goal of "removing all removable aliens" by 2012,[54] ICE has significantly escalated interior enforcement efforts. According to ICE, on any given day it makes more than 200 arrests, prepares 2,462 cases for removal, and obtains 450 final orders of removal.[55] ICE's increased interior enforcement efforts have taken the form of high-profile worksite raids, as well as home raids, that sweep undocumented immigrants from the families and communities in which they live and work.

1. Worksite Investigations and Raids

The number of worksite investigations initiated by ICE has increased rapidly, more than doubling from FY 2004 to FY 2007.[56] High-profile worksite raids, often involving hundreds of ICE agents and other law enforcement personnel have become commonplace.[57] For example:

- On December 12, 2006, in an enforcement action dubbed "Operation Wagon Train," ICE simultaneously raided six facilities operated by Swift & Company in Worthington, Minnesota; Greeley, Colorado; Grand Island, Nebraska; Cactus, Texas; Hyrum, Utah; and Marshalltown, Iowa. ICE arrested 1,297 employees on administrative immigration violations, and criminally charged 274 of those arrested for the possession and/or distribution of fraudulent identity documents, re-entry after deportation, or entry without inspection.

54 *See* U.S. Immigration and Customs Enforcement, Office of Detention and Removal, *Endgame: Office of Detention and Removal Strategic Plan*, 2003-2012, August 2003.
55 *Id.* at ix.
56 *See* Detention Watch Network, *Tracking ICE's Enforcement Agenda*, April 18, 2007, p. 5; U.S. Department of Homeland Security, *Budget-in-Brief: Fiscal Year 2009*, p. 34.
57 *See* U.S. Immigration and Customs Enforcement, *Fact Sheets: Worksite Enforcement*, September 27, 2007 and April 16, 2008.

- On March 6, 2007, ICE raided Michael Bianco, Inc. in New Bedford, Massachusetts, arresting 360—more than half the company's workforce—on administrative charges.
- In what was then the largest worksite enforcement action in history, ICE raided AgriProcessors, Inc. in Postville, Iowa on May 12, 2008, arresting 389 undocumented workers. As discussed later in this Report, the Postville raid was unique in its use of criminal prosecutions and threats of extended imprisonment to facilitate group plea bargains in which individuals waived any available defenses to deportation.

Worksite raids continue to occur with frequency. Since October 1, 2007, more than 4,000 people have been arrested in worksite enforcement actions across the country. The following is an illustrative listing of some of these raids:

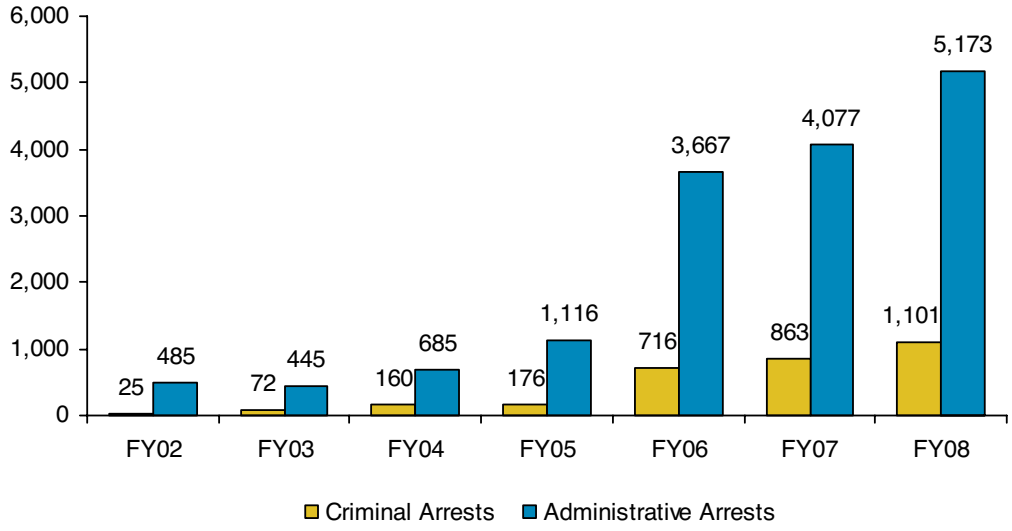
DATE	EMPLOYER	LOCATION(S)	ARRESTS
10/23/07	Nanack Hotel Group	Burlington, Vermont	10
10/31/07	ANNA II Inc.	Joliet, Illinois	23
11/7/07	Ideal Staffing Solutions	Chicago, Illinois	23
11/14/07	Chinese Restaurants	Louisville, Kentucky	15
2/7/08	Micro Solutions Enterprises	Van Nuys, California	138
2/8/08	Universal Industrial Sales Inc.	Lindon, Utah	57
3/25/08	Contractor	(Memphis Int'l Airport) Memphis, Tennessee	34
4/2/08	Specialty Inc. Wood Products	Homedale, Idaho	13
4/16/08	Pilgrim's Pride	Mount Pleasant, Texas Live Oak, Florida Chattanooga, Tennessee Batesville, Arkansas Moorefiled, West Virginia	311
4/25/08	Nash Gardens	West El Paso, Texas	28
4/30/08	Naylor Concrete	Little Rock, Arkansas	24
5/2/08	El Balazo Restaurants	San Francisco, California	63
5/2/08	Cheeseburger Restaurants	Maui, Hawaii	22
5/7/08	Construction Contractor	Richmond, Virginia	33
5/12/08	Agriprocessors Inc.	Postville, Iowa	389
5/15/08	French Gourmet Restaurant	San Diego, California	18
6/4/08	Boss 4 Packing (farm labor contractor)	Heber, California	32
6/25/08	Action Rags USA	Houston, TX	160
6/26/08	Aerospace Mfg. Technologies Inc.	Arlington, WA	32
6/30/08	Painting Co.	Baltimore, MD	45

7/16/08	Colorado Precast Concrete, Inc.	Loveland, CO	18
7/21/08	The Farms	Waipahu, HI	43
7/23/08	Cosa Fiesta Restaurants	Northern Ohio	58
7/28/08	Waco Mfg.	Little Rock, AK	13
8/12/08	Mills Mfg. Co.	Asheville, NC	57
8/13/08	Dulles Airport	Virginia	42
8/25/08	Howard Indus., Inc.	Laurel, MS	595
9/2/08	Sun Valley Group	Arcata, CA	23
9/10/08	Palm Springs Bakery Co.	Palm Springs, CA	51
9/17/08	Chinese Restaurants	Sacramento, CA	21
9/22/08	Honua Kai Construction	Lahaina, HI	21
10/8/08	Columbia Farms	Greenville, SC	331
12/4/08	Idaho Truss	Nampa, ID	16
2/24/09	Yamato Engine Specialists	Bellingham, WA	28

*Source: U.S. Immigration and Customs Enforcement, News Releases and Fact Sheets (available at www.ice.gov).

Not surprisingly, more aggressive enforcement efforts have led to increased arrests. Worksite enforcement arrests have escalated sharply to more than 4,900 in FY 2007 and 6,200 in FY 2008.[58] Over the last six years, worksite administrative arrests have increased more than tenfold – from 485 arrests in FY 2002 to 5,173 arrests in FY 2008 (which ended September 30, 2008).[59]

Worksite Enforcement Arrests



Source: ICE Fact Sheet, October 23, 2008

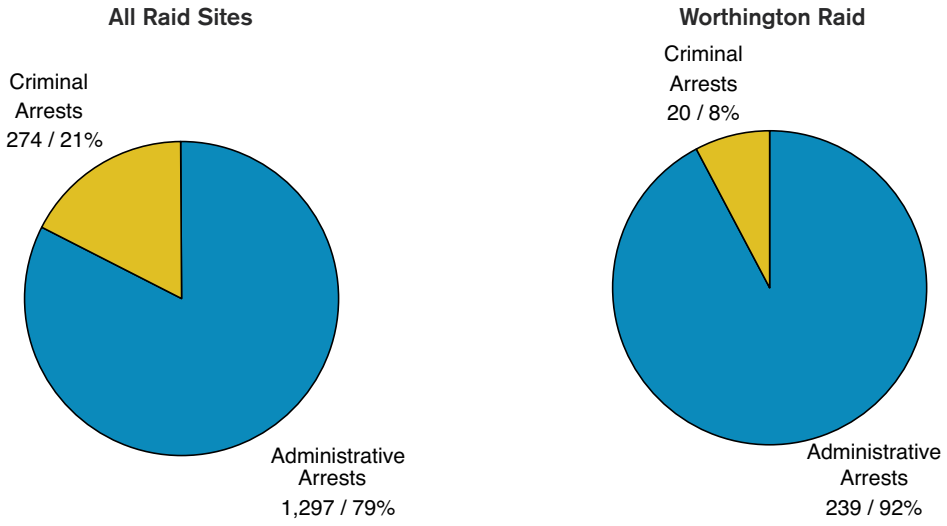
58 See U.S. Immigration and Customs Enforcement, Fact Sheet, October 23, 2008.
59 *Id.*

Significantly, the vast majority of arrests made by ICE in worksite raids are administrative arrests for civil law immigration violations, *not* criminal arrests. In other words, most of those detained in worksite enforcement actions have not been charged with crimes such as identity theft. Absent other circumstances, presence in the United States without appropriate documentation is not a crime.

Of the 18,761 worksite enforcement arrests made by ICE from FY 2002 through FY 2008, 83% (15,648) were administrative arrests while only 17% (3,113) were criminal arrests.[60] The number of criminal arrests can be misleading and does not reflect criminal activity by immigrants. A significant portion of the criminally charged are U.S. citizens who allegedly committed crimes ranging from harboring to knowingly hiring undocumented workers.[61]

For example, the raid in Worthington and at the other Swift plants was the culmination of a 10-month investigation of what ICE characterized as a large-scale identity theft scheme.[62] However, the vast majority of those detained—1,023 of the 1,297 arrestees—were arrested on civil administrative charges for immigration status violations.[63] In Worthington, only 20 immigrants were criminally arrested with 19 ultimately indicted for identity-related theft.[64]

Swift Plant Raids: Administrative v. Criminal Arrests



Source: ICE Fact Sheet, Worksite Enforcement: Operation Wagon Train, March 1, 2007

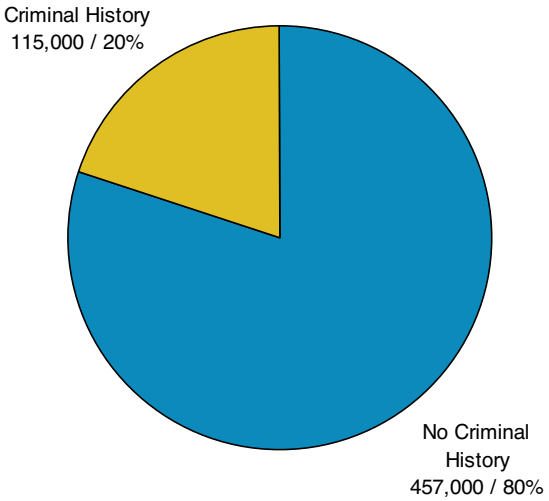
60 ICE Fact Sheet, October 23, 2008.
61 *See* http://ice.gov/pi/nr/0807/080728littlerock.htm.
62 U.S. Immigration and Customs Enforcement, Worksite Enforcement, Fact Sheet, April 3, 2007.
63 U.S. Immigration and Customs Enforcement, *Worksite Enforcement: Operation Wagon Train*, Fact Sheet, March 1, 2007.
64 *See* Minneapolis Star Tribune, "19 Held In Raid Face Charges Of ID Theft," December 18, 2006.

2. Home Raids

The increasing number of workers arrested at their jobs is just a portion of those swept up in ICE enforcement actions. ICE also has ratcheted up the number of its home raids conducted without search warrants, what ICE refers to euphemistically as "knock-and-talk searches."

Home raids are typically conducted by ICE Fugitive Operations Teams charged with the responsibility of locating, arresting and removing "fugitive aliens." Fugitive aliens should not be confused with "criminal aliens," who are typically lawful immigrants who face removal for criminal activity that includes both serious and petty crimes.[65] "An ICE fugitive is defined as an alien who has failed to depart the United States based upon a final order of removal, deportation, or exclusion from a U.S. immigration judge, or who has failed to report to ICE after receiving notice to do so."[66] The vast majority of fugitive aliens—457,000 of the estimated 572,000 "ICE fugitives" in the United States—have no criminal histories and are simply persons who remained in the U.S. following a removal order or failed to appear for an immigration hearing.[67]

"Fugitive Alien" Population



Source: ICE News Release, July 31, 2008.

Since the first Fugitive Operations Teams (FOTs) were established in 2003, arrests stemming from home raids and community sweeps have increased dramatically

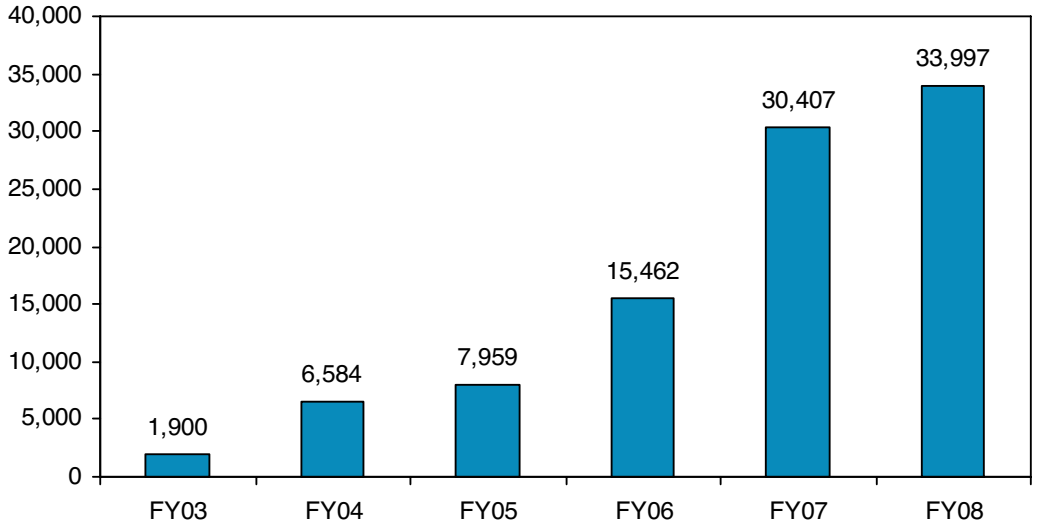
65 *See ICE Fiscal Year 2007 Annual Report*, pp. 4-5.

66 U.S. Immigration and Customs Enforcement, News Release: New ICE Program Gives Non-Criminal Fugitive Aliens Opportunity to Avoid Arrest and Detention, July 31, 2008 (available at http://www.ice.gov/pi/nr/0807/080731washington.htm).

67 Some "fugitive" aliens never received notice of their immigration hearing and, therefore, are unaware they were required to appear or that an order of removal was entered against them.

from just 1,900 in FY 2003 to 33,997 in FY 2008.[68] As of the end of FY 2008, there were more than 100 FOTs deployed nationwide.[69]

Fugitive Operations Team Arrests by Fiscal Year



Source: ICE News Release, October 23, 2008.

Although ICE maintains that its FOTs "give top priority to cases involving aliens who pose a threat to national security and community safety, including members of transnational street gangs, child sex offenders, and aliens with prior convictions for violent crimes,"[70] many of those arrested by such Teams are persons who are not "fugitive aliens" at all—they are undocumented immigrants who just happen to be at a home, often with U.S. citizen children, or other locations that ICE agents raid. According to an April 6, 2007, report from the Associated Press, ICE data reflects that 37% of the 18,149 arrests by FOTs between May 26, 2006 and February 23, 2007 were such "collateral" arrests—including more than 50 percent of arrests in Dallas and El Paso, Texas (59%), New York (54%), and San Diego (57%).[71]

Since the Associated Press obtained this data from ICE, "collateral" arrests have continued to account for a substantial percentage of arrests made in supposedly targeted fugitive alien operations. Of the 30,048 immigrants arrested in "fugitive" raids in 2007, more than 8,000 were collateral, undocumented immigrants.[72] For

68 U.S. Immigration and Customs Enforcement, *Fact Sheets: ICE Fugitive Operations Program*, December 4, 2007 (available at http://www.ice.gov/pi/news/factsheets/NFOP_FS.htm).

69 U.S. Immigration and Customs Enforcement, News Release, October 23, 2008 (available at http://www.ice.gov/pi/nr/0810/0081023washington.htm).

70 U.S. Immigration and Customs Enforcement, Fact Sheets: *ICE Fugitive Operations Program*, December 4, 2007 (available at http://www.ice.gov/pi/news/factsheets/NFOP_FS.htm).

71 Spagat, E., Immigration *Raids Net Many Not on the Radar*, The Associated Press, April 6, 2007 (available at http://oneoldvet.com/?page_id=856); Hendricks, T., *The Human Face of Immigration Raids: Arrests of Parents Can Deeply Traumatize Children Caught in the Fray, Experts Say*, The San Francisco Chronicle, April 27, 2007.

72 Barry, T., *The Dragnet for "Fugitive Aliens,"* June 20, 2008 (available at http://americas.irc.org/am/5315).

example, a two-week sweep in San Diego in March and April 2007 that targeted 300 fugitive aliens resulted in the arrests of 297 non-fugitive immigrants and just 62 fugitives.[73] After a recent sweep in Chattanooga, Tennessee, resulted in the arrest of 48 undocumented immigrants, an ICE official acknowledged that persons, including children, who are not the specific target of administrative warrants of deportation and arrest are routinely restrained and questioned regarding their immigration status when the target is not at the address or known to the occupants of the home. "If someone is detained even though they're not the original target, 'they just happened to be at the wrong address,'" said Phillip Miller, deputy field office director for the detention and removal program for ICE for the Southeast Region.[74]

In addition to an acknowledged lack of reliable identity and address information as the basis for truly "targeted" enforcement operations, the tactics employed in conducting home raids raise serious constitutional questions. Under current law, ICE agents have the right to question anyone "believed to be an alien" about his or her immigration status, and to enter homes without judicial warrants when consent is given. With this authority, and under the guise of targeting "fugitive aliens," armed ICE agents announcing themselves as "police" have entered homes, restrained and questioned anyone present who looks like an immigrant, and frightened children. Although ICE maintains that its entry to homes and subsequent collateral arrests are lawful, legal experts have questioned whether informed consent is being obtained in light of the tactics being employed—such as the massive show of armed force and announcing themselves as "police."[75] Moreover, reports abound of ICE agents breaking down or pushing their way through doors in circumstances that could not possibly be construed as informed consent to enter.[76] For example:

73 *Id*.

74 Trevizo, Perla, *Immigration Arrests Continue in Chattanooga Area*, The Chattanooga Times Free Press, May 22, 2008 (available at http://tfponline.com/news/2008/may/22/immigration-arrests-continue-chattanooga-area/?local).

75 *See* Hendricks, T., *The Human Face of Immigration Raids in Bay Area: Arrests of Parents Can Deeply Traumatize Children Caught in the Fray, Experts Say*, The San Francisco Chronicle, April 27, 2007.

76 *See also* Berstein, N., *Raids Were a Shambles, Nassau Complains to U.S.*, The New York Times, October 3, 2007 (ICE agents conducted home raids wearing cowboy hats and brandishing shotguns and automatic weapons at home occupants including U.S. citizens and lawful residents); Nicodemus, A., *Illegal Aliens Arrested in Raids; Feds Nab 15 in Milford*, Sunday Telegram (Massachusetts), December 9, 2007 (ICE agents broke through front door of home in the early morning hours with guns drawn); Llorente, E., Suits: *Feds Play Dirty; Immigration Officials Say Raids on Illegals are Within the Law*, The Record (Hackensack, NJ), January 2, 2008 (armed ICE agents showed up at homes at 5:00 a.m., banged on doors, kicked in doors or used ruses to gain entry, then went room-to-room ripping covers off people in their beds and questioning them); Hernandez, S., *ICE Increases Use of Home Raids*, Daily Journal, March 26, 2008 (ICE agents came to a home of an immigration attorney looking for another person; when the attorney closed his door and asked them to leave the premises because they could not produce a search warrant, the agents threatened to break his door down); Bernstein, N., *Immigrant Workers Caught in Net Cast for Gangs*, The New York Times, November 25, 2007 (Nassau County police commissioner describes the "cowboy mentality" of ICE agents who raided Long Island homes, including armed raids on the wrong homes); Forester, S., *Immigration Raids Spark Anger in Sun Valley Area: One Family of Legal Residents Say they were Terrorized*, The Idaho Statesman, September 21, 2007.

- "Doors were smashed in, glass was shattered and guns were thrust in the faces of whole families last Monday when Immigration and Customs Enforcement agents backed by county police officers raided at least 15 Annapolis (Maryland)-area homes, arresting 46 undocumented immigrants. … ICE, which sent 75 agents on the raids, justifies the tactics used in the raids. Breaking down doors, carrying guns and using handcuffs is necessary to protect police and the community, said Scot R. Rittenberg, an assistant special agent for ICE. … But the people whose doors were forced open—and their families—think differently. Their only crime is working without papers, yet they were served with violence, they say."[77]

- In New Haven, Connecticut, "[e]yewitness reports describe federal agents pushing their way into houses; brusquely ordering men, women and children to common areas, and leading family members and loved ones away in handcuffs."[78] "The City has sighted a number of areas in which DHS violated protocol including constitutional violations, entry into homes without warrants, search of homes without warrants, no proof of identification, racial profiling and coercion and duress."[79]

- ICE agents raided several homes and arrested 20 undocumented immigrants during a May 30-31, 2007, sweep in Austin, Minnesota. ICE stated that the raids were targeted at locating and arresting 5 criminal aliens ("This is a targeted enforcement action. We're looking for specific individuals."), but "came across" about 15 others without documentation in the course of carrying out the raid. According to Ramiro Castillo, a worker at Hormel who has lived in the United States for 20 years, ICE agents knocked on his door, "forced their way in" when he had barely opened the door. "They twisted my arm and kept pushing me, telling me to put my hands over my head." ICE agents handcuffed and arrested two people in the apartment, a father and his son who had been asleep in the living room. At no time did the ICE agents inform Castillo that they were looking for someone specific. The Austin raids in May 2007 followed home raids in December 2006 in both Austin, Minnesota, and Albert Lea, Minnesota, resulting in the arrest of 45 undocumented immigrants.[80]

77 Hulette, E., Tactics Questioned in Immigrant Raids, The Capitol Online, July 9, 2008 (available at http://hometownannapolis.com/cgi-bin/readne/2008/07_09-31/PRI).

78 June 6, 2007, Press Release, Office of the Mayor of New Haven, Connecticut (available at http://www.cityofnewhaven.com/Mayor/PressReleases.asp).

79 June 11, 2007, Press Release, Office of the Mayor of New Haven, Connecticut; see also Office of the Mayor of New Haven, Connecticut, New Haven Raids—Fact Sheet (available at http://newhavenindependent.org/archives/upload/2007/06/RAID%20Fact%20Sheet3.doc)

80 Forrestal, F. and Fiske, M., Workers Outraged at Minnesota Raid, The Militant, June 3, 2007 (available at http://www.themilitant.com/2007/7124/712401.html).

- As part of an "antigang sweep" on Long Island in September 2007, more than a dozen ICE agents pushed their way into the home of Peggy Delarosa-Delgado after her 17-year-old son answered the knock at the door. Ms. Delarosa-Delgado, an immigrant from the Dominican Republic, has been a U.S. citizen since 1990 and has three minor, citizen children. After forcing their way into Ms. Delarosa-Delgado's home, agents herded her three children and other persons in the home—including a family friend staying in the basement aroused at gunpoint—into the living room. Only then did the agents discover that they had raided the wrong house—for the second time. In the summer of 2006, ICE agents looking for a deportable immigrant named Miguel had "stormed" into her home before dawn, only to learn that no one named Miguel had lived at the residence since Ms. Delarosa-Delgado purchased the home in 2003.[81]

- ICE agents and local law enforcement authorities conducted a series of home raids in Willmar, Minnesota, between April 10 and 14, 2007.[82] This operation and the tactics employed by agents prompted the filing of a lawsuit in the U.S. District Court for the District of Minnesota.[83] A July 27, 2007, Amended Complaint alleges that "ICE agents entered and searched Plaintiffs' private homes without warrants, without probable cause or exigent circumstances, and without the consent of the Plaintiffs, then detained, interrogated and in some cases arrested Plaintiffs in their homes. ... In addition, [ICE agents] conducted a campaign of intimidation in and around the city of Willmar by identifying locations such as trailer parks and apartment buildings with known concentrations of Latino residents, then conducted unconstitutional stops and detentions of individuals based solely on the individual's race or apparent national origin."[84] The Amended Complaint further alleges that ICE agents loudly banged on windows and doors, falsely identified themselves as the "police," and either broke in or forced their way through doors that were opened slightly by residents seeking to determine the identity of those outside.[85] Finally, the Amended Complaint details a litany of derogatory and insensitive actions by agents, including waking up and interrogating frightened children.[86] "Plaintiff children now suffer from waning appetites, disrupted sleep, nightmares, and behavioral difficulties from the loss of a parent and/or from the aggressive encounter with Defendants."[87]

81 Bernstein, N., *Citizens Caught Up in Immigration Raid*, The New York Times, October 4, 2007.
82 *See* Hopfensperger, J., *Were Illegal Tactics Used in Willmar Raids?*, Minneapolis Star Tribune, May 19, 2007.
83 *See Arias et al. v. U.S. Immigrations and Customs Enforcement et al.*, Civil No. 07-CV-1959 ADM/JSM (D. Minn. 2007).
84 *See* Amended Complaint, ¶¶ 2-3.
85 *Id.*, ¶¶ 70-78.
86 *Id.*, ¶¶ 84-90.
87 *Id.*, ¶ 90.

- On April 3, 2008, a lawsuit was filed against ICE and others stemming from eight home raids in New Jersey between August 2006 and January 2008.[88] "The raids follow a similar pattern, in which immigration agents forced their way into each plaintiff's home in the early morning hours with a judicial warrant or the occupants' consent. Most of the plaintiffs were awakened by loud pounding on their doors and answered the door, fearing an emergency. ICE agents subsequently either lied about their identity or purpose to gain entry, or simply shoved their way into the home. During each raid the agents swept through the house and, displaying guns, rounded up all the residents for questioning. In some cases they ordered children out of their beds, shouted obscenities, shoved guns into residents' chests, and forbade detained individuals from calling their lawyers. In at least half the raids, the officers purported to be searching for a person who did not even live at the address raided."[89]

In addition to those noted above, several other lawsuits have been filed challenging the constitutionality of ICE's practices relating to home raids.[90] Although few of these cases have as yet resulted in any substantive decisions regarding the propriety of ICE's "knock and talk" tactics, a recent decision by the U.S. Court of Appeals for the Fifth Circuit is highly critical of the practice. In *United States v. Gomez-Moreno*, 479 F.3d 350 (5th Cir. 2007), the Court suppressed evidence obtained in an ICE warrantless knock-and-talk search, stating:

> The purpose of a "knock and talk" is not to create a show of force, nor to make demands on occupants, nor to raid a residence. Instead, the purpose of a "knock and talk" approach is to make investigatory inquiry or, if officers reasonably suspect criminal activity, to gain the occupants' consent to search. [citation omitted.] Here, the officers did not engage in a proper "knock and talk" but instead created a show of force when ten to twelve armed officers met at the park, drove to the residence, and formed two groups-one for each of the two houses-with a helicopter hovering overhead and several officers remaining in the general area surrounding the two houses. When no one responded to the officers' knocking, the officers impermissibly checked the knob on the door to the front house to determine if it would open, and simultaneously, at the back house, announced their presence while demanding that the occupants open the door. When officers demand entry into a home without a warrant,

88 *See Maria Argueta et al. v. Julie L. Myers et al.*, Civil Action No. 2:08-cv-1652 (D. New Jersey 2008) (complaint and amended complaint available at http://www.ailf.org/lac/clearinghouse_122106_ICE.shtml).

89 Press Release: *Department of Homeland Security, Immigration Officers Sued for Constitutional Violations in Pre-Dawn Home Raids Practices*, Seton Hall Law School, April 3, 2008 (available at http://law.shu.edu/administration/public_relations/press_releases/2008/shl_filed_suit_dept_homeland_security.htm).

90 *See* Litigation Relating to ICE Raids at http://www.ailf.org/lac/clearinghouse_122106_ICE.shtml.

> they have gone beyond the reasonable "knock and talk" strategy of investigation. To have conducted a valid, reasonable "knock and talk," the officers could have knocked on the front door to the front house and awaited a response; they might have then knocked on the back door or the door to the back house. When no one answered, the officers should have ended the "knock and talk" and changed their strategy by retreating cautiously, seeking a search warrant, or conducting further surveillance. Here, however, the officers made a show of force, demanded entrance, and raided the residence, all in the name of a "knock and talk." The officers' "knock and talk" strategy was unreasonable . . . .[91]

In addition to the questionable legality of the home raids, the tactics ICE uses in conducting such actions raises serious questions regarding the potential adverse impacts of such raids on children.

3. Detention and Removal in the Escalated Enforcement Environment

Not surprisingly, more aggressive enforcement efforts have led to record numbers of immigrants held in detention facilities and removed from the United States.[92] In its five-year existence, more than 1 million persons have been detained by ICE. The detainee population has increased by more than 30 percent from a total of 227,000 detainees in FY 2003 to more than 332,000 detainees in FY 2007.[93] ICE reports that on any given day in FY 2007, it "housed" an average of 29,786 undocumented immigrants in facilities nationwide.[94] This represents a more than 500 percent increase in the average daily population of undocumented immigrants in detention since the mid-1990s.[95]

91 479 F.3d at 355-56.

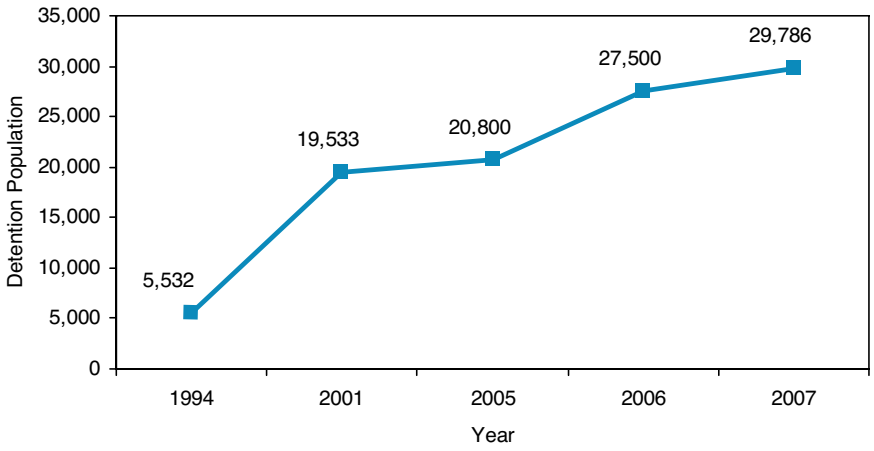
92 The majority of those held in detention facilities have not been charged with any crimes, but rather are subject to removal for civil law immigration violations. The General Accountability Office reported that as of December 31, 2006, 58% of the detained undocumented immigrant population—more than 16,000 persons—were "noncriminal aliens." *See* U.S. Government Accountability Office, *Alien Detention Standards*, July 2007, p. 48.

93 *See* Statement of Julie L. Myers, Assistant Secretary of U.S. Immigration and Customs Enforcement, before the House Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, June 4, 2008; Statement of Gary E. Mead, Deputy Director, Office of Detention and Removal Operations, U.S. Immigration and Customs Enforcement, before the House Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, February 13, 2008.

94 U.S. Immigration and Customs Enforcement, *Fiscal Year 2007 Annual Report* at ix.

95 *See* National Immigrant Justice Center, "Detention Center Documentation Collection", September 19, 2007. Available at http://www.immigrantjustice.org/detentioncenterdocuments.html.

Daily Detention Statistics

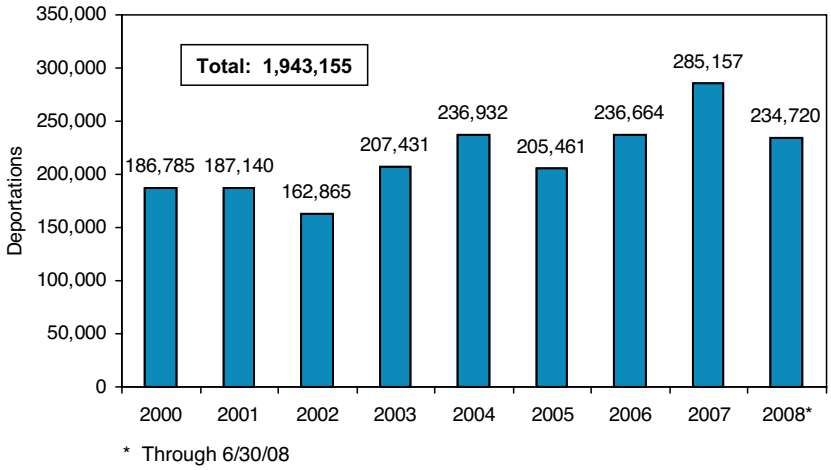


Source: National Immigrant Justice Center

In its FY 2009 budget, ICE received $71.7 million to fund "1,400 new detention beds, removal costs, and support personnel" to meet the "demand generated by increased enforcement activities."[96]

Removals (*i.e.*, deportations) of undocumented immigrants have increased more than 50% in this decade, from approximately 187,000 in FY 2001 to more than 285,000 in FY 2007.[97] Through June 30, 2008, approximately 235,000 undocumented immigrants have been removed in 2008 alone.[98]

Total Deportations
FY 2000 - June 30, 2008



Source: July 11, 2008 ICE News Release; 2006 Yearbook of Immigration Statistics, Tables 38 and 39 (available at http://www.dhs.gov/ximgt/statistics/publications/YrBk06En.shtm

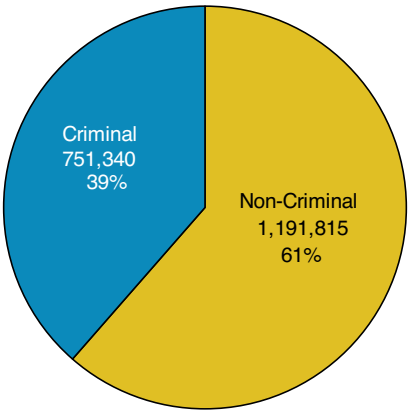
96 U.S. Immigration and Customs Enforcement, *2009 Budget Fact Sheet* (http://ice.gov/doclib/pi/news/factsheets/2009budgetfactsheet.doc).

97 *See* U.S. Department of Homeland Security, *Report to the U.S. House of Representatives, Committee on Appropriations, Subcommittee on Homeland Security: Bimonthly Status Report on the Department of Homeland Security's Border Security Performance and Resources*, November 1, 2007; U.S. Immigration and Customs Enforcement, *Fiscal Year 2007 Annual Report*, p. 4.

98 *See* Immigration and Customs Enforcement, *ICE Deports Record Number of Illegal Aliens from Pacific Northwest States*, News Release, July 11, 2008 (available at http://ice.gov/pi/nr/0807/080711seattle.htm).

Here, again, the majority of removal orders—more than 60%—stem from administrative arrests for civil immigration violations where the undocumented immigrant is not charged with any crime.[99]

Non-Criminal v. Criminal Deportations
FY 2000 - June 30, 2008



Source: ICE News Release, July 11, 2008.

99 *See* July 11, 2008, ICE News Release; 2006 Yearbook of Immigration Statistics, Tables 38 and 39 (available at hppt://www.dhs.gov/ximgtn/statistics/publications/YrBk06En.shtm).

V. Collateral Damage: The Impact of Interior Enforcement on Citizen Children

> "[O]ur government effectively deports their United States citizen children and denies those children their birthrights. … The government's conduct violates due process by forcing the children to accept de facto expulsion from their native land or give up their constitutionally protected right to remain with their parents." — *Cornelio Arcos Memije and Maria Del Rosario Rendon Velez v. Gonzales,* 481 F.3d 1163 (9th Cir. 2007) (Judge Harry Pregerson, dissenting)

A fundamental tenet underlying U.S. law and policy is that our collective, societal interests are advanced by promoting family unity. U.S. immigration law is no exception. Keeping families together has long been a fundamental pillar of U.S. immigration law. Since its inception in 1952, the Immigration and Nationality Act (INA) reflected an awareness of the familial value and underlying concern for the family unit. For instance, the House Committee Report pertaining to the INA emphasized the "well-established policy of maintaining the family unit whenever possible."[100]

However, the value of family unity has been marginalized in today's environment of increased interior immigration enforcement. The detention and deportation of undocumented parents of citizen children has alternatively torn families apart or effectively forced the removal of U.S. citizen children from their home country to foreign lands, depriving these children of the economic, educational and social opportunity represented by their U.S. citizenship.

In this section, we address (1) the child welfare crisis in the immediate aftermath of raids; (2) detention practices that unnecessarily separate parents from children; (3) the longterm harm to children threatened by current immigration law and enforcement policy; and (4) the callousness of an immigration law and policy that gives little or no consideration to the "best interests" of the citizen child in deporting one or both of the child's parents.

100 House Report No. 1365 (1952); 1952 U.S. Code Congressional and Administrative News1653, 1689.

A. The Child Welfare Crisis in the Immediate Aftermath of Raids

1. Worksite Raids

The December 12, 2006, Swift plant raid in Worthington, like those at other Swift locations the same day, was distinguished by an overwhelming show of force and a notable lack of appreciation and preparation for the humanitarian crisis that would ensue. Dozens of armed ICE agents entered the plant in the early morning hours, shut down plant operations, rounded up workers, and proceeded to question employees aggressively—some repeatedly over several hours—regarding their immigration status.[101] According to several people interviewed for this report, ICE agents went out of their way to intimidate and frighten workers, restraining persons for hours, ignoring requests to use the restroom (and then accompanying women into restroom stalls when they were allowed to go to the bathroom), and repeatedly banging on tables and hollering at persons being questioned. By the end of the day, 239 persons were arrested on administrative charges for immigration status violations.[102]

ICE maintains that it took "extraordinary steps" to respect the rights of those arrested, including "unprecedented steps to determine if arrestees had minor dependents and to ensure that children were not separated from their parents."[103] Agents purportedly asked arrestees about "dependent obligations prior to transporting any arrestees away from the location of the arrest," worked with Swift human resources personnel to ascertain whether arrestees had minor children at home, and "took steps to ensure that the children were cared for."[104] ICE also reports making phones available for use by undocumented immigrants at the arrest locations, processing centers and detention facilities.[105] As a result of these efforts, ICE states that it "released more than 100 aliens after administrative processing for humanitarian reasons" at the 6 Swift raid sites.[106]

Given the show of force and aggressive tactics in questioning detainees such as those employed in Worthington, however, it is not surprising that many undocumented immigrants did not disclose to ICE that they had children out of

101 *See* Minneapolis Star Tribune, *Display of Force at Swift Plants Scrutinized*, December 25, 2006.
102 U.S. Immigration and Customs Enforcement, *Worksite Enforcement: Operation Wagon Train*, Fact Sheet, March 1, 2007.
103 U.S. Immigration and Customs Enforcement, *Operation Wagon Train: Coordination and Communication*, Fact Sheets, December 12, 2006.
104 *Id.*
105 *Id.*
106 *Id.*

fear that their children would be detained or placed into foster care.[107] With no trusted intermediary at raid sites with whom parents feel comfortable addressing child welfare issues, ICE wound up detaining numerous undocumented immigrants with primary childcare responsibilities.

In Worthington, for example, while some of those arrested were released on site because of child care issues,[108] many more parents were detained. School officials, churches and other community organizations, union officials, friends, neighbors and relatives were caught unaware and unprepared to identify and attend to the needs of children left without caregivers in the immediate aftermath of the raid. In an interview for this report, Sharon Johnson, Coordinator of the Nobles County Integration Collaborative, stated that an estimated 60 students were without parents the night of the raid. Similar problems stemming from the separation of children from their immigrant parents have been reported across the country.[109]

Worthington school officials confirmed that the raid caught them by surprise, and that the inability to get accurate information from ICE regarding the identity of detainees created significant confusion and increased stress among staff and students (a problem identified in many raids). "For us, this came out of nowhere," said John Langaard, Worthington's school superintendent. "There's no manual for something like this. The question is, is it fair to the kids? They're the ones getting hurt in this deal."[110] At the end of the school day, children were sent home with phone numbers provided by teachers and instructions to call if they found themselves without a parent. Teachers remained at the school late into the evening to field calls and provide assistance to students, if necessary.

Ultimately, students did not use these resources, as immigrant community organizations and local churches mobilized to assist affected family members and facilitate the placement of children with relatives or other community members.[111]

---

107 *See* Youth Today, *ICE'd Out: When Immigration Cops Nab Parents, Should Child Welfare Be There?*, May 2007; The National Council of La Raza and The Urban Institute, *Paying the Price: The Impact of Immigration Raids on America's Children*, October 2007, pp. 28-29.

108 *See* Minneapolis Star Tribune, *Display of Force at Swift Plants Scrutinized*, December 25, 2006 (reporting that an ICE official stated that "about 24 people, mainly parents with child care issues, were allowed to leave on humanitarian ground").

109 *See* The National Council of La Raza and The Urban Institute, *Paying the Price: The Impact of Immigration Raids on America's Children*, October 2007, pp. 33-40 (discussing worksite raids in Greeley, Colorado, New Bedford, Massachusetts, and Grand Island, Nebraska); The Oregonian, *Children of the Raids: Fear and Chaos Explode for Latino Families as the News Spreads*, June 21, 2007.

110 Reinan, Mckinney, Meryhew, *Workers Say 400 Detained in Minnesota Raid*, Minneapolis Star Tribune, December 14, 2006.

111 *Id.*

Communidad Cristiana de Worthington Church and St. Mary's Catholic Church were particularly instrumental in avoiding a larger humanitarian crisis, serving as places of gathering, refuge, and support for hundreds of children and other affected family members on December 12, 2006, and the days that followed. Those working on the front line saw the impact firsthand. Paster Hector Andrade stated:

> **Families have been torn apart. Children were left behind; some of them came back after school to find themselves locked out and nowhere to go. We have five children completely alone because both their parents were detained. The most serious case we saw is the case of a 4-month-old baby who was brought by a desperate babysitter and asked us to look after her because she feared to be detained. This is a very tough situation for them. Most of them are citizens and now they are helpless. We still don't know how many of them are out there all by themselves waiting for someone to come help them.**[112]

A similar avoidable child welfare crisis accompanied the New Bedford raid. There, requests by State Department of Social Services personnel to be "on the ground as the raid was happening, so we could have IDed [identified] caretakers and children immediately" were rejected by ICE.[113] Concerned about the effect of the raid on families and the efforts being taken by ICE to address post-raid family care issues, the office of Massachusetts public safety inspector Kevin Burke was regularly in contact with ICE officials over the course of two months leading up to the raid.[114] "I raised this on every occasion and [ICE] assured me they had done this before, they would be compassionate, and there wouldn't be any unnecessary separation of children and mothers," said Burke. "I knew [the problems] could expand beyond what they may have anticipated, but they did not want DSS directly involved."[115]

Burke's instincts proved prescient. The March 6, 2007, New Bedford raid left children stranded and without caregivers, and local social service agencies,

112 Fernandez Landoni. M., Worthington *Raid Hits Workers, Businesses Hard*, La Prensa De Minnesota, December 17, 2006 (available at http://www.tcdailyplanet.net/node/3154&print=1#).

113 *Id.*; *See also* Testimony of Simon Romo, Chief Counsel of New Mexico Child Protective Services, before the Subcommittee on Workforce Protections of the Education and Labor Committee, U.S. House of Representatives, May 20, 2008 ("[The New Mexico Children, Youth and Families Department] is not informed of enforcement operations before they happen, and so is not able to respond to children and assess for their safety in a timely manner. Instead, relatives, neighbors, friends, and community agencies have been absorbing the responsibility of caring for children left without parents. This lack of initial involvement of the state agency responsible for assuring the safety, permanency and well-being of children places those who are separated from their parents at an additional risk of entering into the system later, as they are often shuffled around unstable situations with minimal supports/resources.").

114 Abraham, Y., *Patrick Says Promises Broken on Raid*, Boston Globe, March 15, 2007.

115 *Id.*

community organizations and churches scrambling to fill the void.[116] "Many [of those detained] … were women whose detention separated them from their children, some of whom were stranded at day-care centers, schools, or friends' or relatives' homes."[117] Approximately 60 detainees were released because they were sole or primary caregivers, but only after several days in detention.[118]

ICE officials are undoubtedly sincere in their desire to avoid leaving children without caregivers. However, ICE has failed to recognize and meaningfully address the understandable reluctance of arrestees to disclose the existence and whereabouts of their children. The presence of state and local social service agencies at raid sites to act as third-party intermediaries in the identification and assessment of child welfare needs would promote disclosure. However, notwithstanding its awareness of the reluctance of detainees to disclose whether they have children in need of care, ICE has been disinclined to notify and involve child welfare agencies in advance of planned raids, purportedly for fear that doing so might jeopardize the law enforcement operation.[119]

2. Home Raids

ICE's home raid tactics raise considerable public policy concerns relative to the welfare of children, including citizen children, who have experienced the sudden invasion of their homes by armed agents. "Child psychology experts say children suffer most from the disruption of armed agents coming into their homes and taking away their parents—and sometimes themselves. Children can experience stress, depression and anxiety disorders, … [and] children who witness their parents being taken into custody lose trust in the parents' ability to keep them safe and begin to see danger everywhere."[120]

One notable example is the case of Kebin Reyes, a seven-year-old citizen child of an undocumented immigrant whose father—his sole caregiver—was arrested in a

116 *See* Henry, R., *Children Stranded After Immigration Raid*, The Washington Post, March 7, 2007; Abraham, Y., *As Immigration Raids Rise, Human Toll Decried*, Boston Globe, March 20, 2007; Ngowi, R., *Federal Judge Orders Halt to Moving of Detainees*, Boston Globe, March 9, 2007; The National Council of La Raza and The Urban Institute, *Paying the Price: The Impact of Immigration Raids on America's Children*, October 2007, pp. 27-30, 33-40.

117 Shulman, R., *Immigration Raid Rips Families*, The Washington Post, March 18, 2007.

118 *See* The National Council of La Raza and The Urban Institute, *Paying the Price: The Impact of Immigration Raids on America's Children*, October 2007, pp. 28-29; Belluck, P., *Lawyers Say U.S. Acted in Bad Faith after Immigration Raid in Massachusetts*, The New York Times, March 22, 2007 ("Federal officials said that at least 60 of the immigrants were released on humanitarian grounds soon after they were arrested, largely because they needed to care for children."); U.S. Immigration and Customs Enforcement, "Timeline for the Worksite Enforcement Operation at Michael Bianco, Inc.," Fact Sheets, March 16, 2007.

119 *See* Youth Today, *ICE'd Out: When Immigration Cops Nab Parents, Should Child Welfare Be There?*, May 2007.

120 Hendricks, T., *The Human Face of Immigration Raids in Bay Area: Arrests of Parents Can Deeply Traumatize Children Caught in the Fray, Experts Say*, The San Francisco Chronicle, April 27, 2007 (quoting Dr. Alicia Lieberman, director of the Child Trauma Research Project at UCSF, and Dr. Amana Ayoub, a psychologist at the Center for Survivors of Torture).

home raid in San Rafael, California in the early morning hours of March 6, 2007. In a press release announcing the filing of a lawsuit, the events of that day were described as follows:[121]

> On March 6, 2007 ICE agents came to the apartment where Kebin and his father, Noe were living. Agents pounded on the door and stormed into the apartment, where they rounded up all the occupants, demanding their immigration papers and passports. Noe immediately gave the ICE agents his son's U.S. passport, identifying Kebin as a U.S. citizen. An ICE agent then told Noe to wake up his son and said they would take them in for only an hour or two. Noe asked several times to make a phone call so that he could arrange for a family member or family friend to care for Kebin. Each of these requests was denied, and Kebin was forced to watch as his father was handcuffed and taken away. The immigration officers then told Kebin to place his own hands behind his back, like his father's.
>
> At the ICE processing center in San Francisco, Noe's additional requests to make a phone call were denied and ICE agents made no efforts to seek alternative care for his son. Kebin and his father were placed in a locked room and for the remainder of the day were only provided with bread and water. Kebin was finally released that evening, only after Kebin's uncle learned about the incident from neighbors. Kebin's uncle rushed to the ICE office and had to wait several hours before Kebin was finally released.

According to the complaint filed in the resulting lawsuit, "Kebin thought he was in jail. … Kebin was hungry and crying. He did not know when he would be free to leave."[122] More than six weeks after his ordeal, Kebin continued to suffer from nightmares.[123]

Although the government denied the factual allegations underlying Kebin Reyes' lawsuit, it entered into a settlement agreement resolving the case.[124] According to the June 20, 2008, Joint Motion Seeking Approval of Settlement, the government agreed to pay $30,000 to settle the case.[125] In addition, the government agreed that Kebin's father "shall receive a two-year period of deferred action status,

121 April 26, 2007, Press Release available at http://www.ailf.org/lac/clearinghouse_122106_ICE.shtml.

122 *Kebin Reyes v. Nancy Alcantar et al.*, Case No. C07-2271-SBA, United States District Court, Northern District of California, First Amended Complaint for Violations of the Fourth and Fifth Amendments to the United States Constitution, and for False Imprisonment, Intentional Infliction of Emotional Distress, and Negligence, ¶ 15 (available at http://www.ailf.org/lac/clearinghouse_122106_ICE.shtml).

123 April 26, 2007, Press Release available at http://www.ailf.org/lac/clearinghouse_122106_ICE.shtml.

124 The terms of the settlement (outlined in a June 20, 2008, Joint Motion Seeking Approval of Settlement) and the June 25, 2008, court order approving the settlement are available at http://www.ailf.org/lac/clearinghouse_122106_ICE.shtml.

125 The January 2009 report of the Department of Homeland Security Office of Inspector General states ICE has no records of holding U.S. citizen children in detention, and that "ICE officials said that there were no instances of detaining U.S. citizen children." Department of Homeland Security, Office of Inspector General, *Removals Involving Illegal Alien Parents of United States Citizen Children,* January 2009, p. 11. ICE described Kebin Reyes as "a U.S. citizen child who accompanied his alien father during an immigration apprehension." *Id.*

subject to biennial reviews for extension of such status, if a final order of removal is ultimately entered against [him]."[126] The purpose of this settlement, which effectively permits Noe Reyes to remain in the United States with his young, citizen son, is further explained with reference to Kebin's rights as a U.S. citizen and the adverse impact that immediate removal of his father (and hence him) would have on his educational advancement and ability to adjust to life in the U.S. if he elects to return without his father later in life:

> This will directly benefit Kebin Reyes because it means that Kebin can continue to live in the United States and be educated here during the period of deferred action status. Even if Kebin's father is ultimately required to leave the United States (and Kebin leaves with him), having been educated for several more years in the United States will make it easier for Kebin, a United States citizen, to adjust to life here, if he later chooses to return to the United States.[127]

The manner in which the government agreed to resolve the Kebin Reyes case, particularly the agreement to defer action on any removal of Noe Reyes, is an appropriate acknowledgment by the government that the best interests of a citizen child are not served by the immediate deportation of an undocumented parent.

Unfortunately, it took a rather extreme deprivation of liberty that violated the rights of a citizen child, and more than a year of litigation, to reach this end. Moreover, it is likely that the government will dismiss the Reyes outcome as the product of unusual circumstances; choosing to continue its tactics rather than exercise its prosecutorial discretion to limit the collateral harm caused by the raids.[128] ICE's failure to use its discretion to ease the humanitarian crisis created by raids demands that others, such as immigration judges, be provided with discretion to protect the interest of children.[129]

In response to increasing criticism of its "fugitive alien" enforcement practices, including warrantless home raids and the separation of families, ICE announced on

126 Joint Motion, ¶ 3.

127 *Id.*

128 Prosecutorial and law enforcement discretion is the "authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone." In the context of immigration, these decisions apply at almost every stage of the process. For example, discretion may be exercised in deciding whether to: issue, serve or file a Notice to Appear ("NTA"); allocate investigative resources to focus on particular offenses or conduct; stop, question and arrest particular individuals; hold aliens in custody; seek expedited removal; settle or dismiss a proceeding; stay a final order of removal; allow voluntary departure; pursue an appeal; or execute a removal order. See Meisner, D., memorandum to Regional and District Directors, Chief Patrol Agents, Regional and District Counsel re Exercising Prosecutorial Discretion (November 17, 2000); Howard, W.J., Memorandum for All OPLA Chief Counsel re Prosecutorial Discretion (October 24, 2005). Memoranda on Prosecutorial Discretion available at Appendix C & D.

129 The 1996 statutory amendments limited the ability of immigration jedges to provide relief in many cases. *See* Meisner Memorandum re Prosecutorial Discretion (Appendix C) at 1.

July 31, 2008, the launch of a pilot program called "Scheduled Departure."[130] The program allowed "fugitive aliens" who have no criminal history and pose no threat to the community an opportunity to remain out of custody while they coordinate their removal with ICE, and to arrange for their families to depart together. According to Julie Myers, Homeland Security Assistant Secretary for ICE:

> This program addresses concerns raised by aliens, community groups, and immigration attorneys who say ICE unnecessarily disrupts families while enforcing the law. By participating in the Scheduled Departure Program, those who have had their day in court and have been ordered to leave the country have an opportunity to comply with the law and gain control of how their families are affected by their removal.

ICE maintained that participation in the program would end the risk of sudden arrest and detention for certain non-criminal fugitives. Upon its announcement, "Scheduled Departure" was assailed by critics as little more than a thinly disguised justification for continued home raids, and an effort to deflect congressional inquiries and action designed to reveal and address ICE's tactics. As stated succinctly by the National Immigration Forum in a press release addressing this pilot program:[131]

> We are not going to deport our way out of our current immigration mess, nor is it likely that most or even many of the estimated 12 million undocumented immigrants here will choose to leave on their own. …
>
> This new policy is a tacit recognition on the part of ICE and Ms. Myers that raids in homes and businesses are terrorizing immigrant communities and families. … But even as we escalate police-state tactics, the majority of immigrants are not going to give up on their American Dream, nor the dreams they have for their children. The majority of the undocumented have been here for years, have careers, friends, mortgages, and children—often U.S. citizens—that bind them to their American communities.

The folly of "Scheduled Departure" was revealed through a two and a half week "test run" in five cities: Charlotte, NC, Chicago, Phoenix, San Diego and Santa Ana. Of an estimated 30,000 eligible immigrants in these areas, only eight availed themselves of the "self deportation" option.[132] On August 22, 2008, ICE scrapped

130 U.S. Immigration and Customs Enforcement, News Release: *New ICE Program Gives Non-Criminal Fugitive Aliens Opportunity to Avoid Arrest and Detention*, July 31, 2008.

131 National Immigration Law Forum, Press Release: *Report to Deport: Another Distraction from Fixing Our Broken Immigration System*, July 29, 2008 (available at http://www.immigrationforum.org/DesktopDefault.aspx?tabid=956).

132 Taxin, A, *Immigration Agency Vows More Enforcement*, Associated Press, August 22, 2008 (available at http://license.icopyright.net/uses/viewfreeuse.acx?fund=MTQ1MTKzNQ%3D%3D).

the program and its sensitivity to families and children while vowing to "continue our enforcement of immigration law whether it is convenient for people, or whether it's not convenient."[133]

Just three days later, ICE made good on its promise. In a worksite raid conducted at Howard Industries, Inc. in Laurel, Mississippi, ICE arrested 595 undocumented immigrants in the largest worksite raid to date.[134]

B. ICE Detention Practices Exacerbate The Child Welfare Crisis

The practices employed by ICE relative to the detention and removal of undocumented parents have not been effective in preventing or addressing child welfare issues in the immediate and short-term aftermath of enforcement actions. Children have been left without their primary caregivers as a consequence of a system that has failed to recognize and address the lack of trust inhibiting detainees from disclosing child care issues to government officials. The problem has only been exacerbated by the detention of undocumented parents in remote locations, often without meaningful notification of who is being held and where for days following enforcement actions.

1. Those Left Behind Struggle to Locate Detainees and Secure Releases on Humanitarian Grounds

The problem of timely identifying and addressing child care issues of undocumented immigrants arrested in worksite raids is exacerbated by the transportation of those arrested to detention facilities often hundreds of miles from raid sites, typically within 24 hours of the enforcement action, and ineffective communication by ICE as to the identity and location of detainees. For example, many detainees from the Worthington raid were sent to Fort Dodge, Iowa, and some then on to detention facilities in Georgia and other remote locations. Often there are few, if any, resources available to provide legal services to immigrants in these remote locations.

In New Bedford, many detained workers – including parents of small children – were flown out of state to detention facilities, including many to a facility in Texas, in the day or two following the raid. ICE's almost immediate actions to remove detainees out of state prevented Massachusetts social service officials from meeting with detainees and identifying child welfare issues for several days

133 *Id.*
134 *See* ICE Press Release, August 26, 2008 (available at www.ice.gov)

following the raid.[135] This action, which ICE attributed to insufficient local bed space for detainees, was decried by Massachusetts Governor Deval Patrick as "a race to the airport" and prompted legal action to halt the practice.[137] On March 9, 2007, a Massachusetts federal judge issued an order precluding ICE from moving New Bedford detainees out of the state.[138] The next day, Massachusetts Department of Social Services personnel traveled to Texas, to interview detainees regarding their children. The release of twenty of these immigrants—mostly single parents with young children—occurred only after strong protests by Massachusetts elected officials and the extaordinary efforts by DSS personnel to gain access to and interview detainees in Texas regarding child welfare issues—and only after a week or more in detention, separated from their children.[139]

> *"[The raid] left kids and families in a position of potential danger. The moral rudder was somehow lost in this. There was more concern getting these folks out of state than there was concern at making sure mothers and children … had a chance to connect with each other."*[136]

STORIES FROM NEW BEDFORD:

- One single mother was located in Texas after her 7-year-old child called a hotline that state officials had created to reunite families.[140]
- Marta Escoto, a single mother of two young *citizen* children, was detained and flown to the Texas detention center. "Daniel, 2, asked for her constantly, while relatives worried about the care of frail 4-year-old Jessie—who cannot walk and suffers from an illness that prevents her from absorbing enough nutrition. Both children were in day care when their mother was arrested, leaving Escoto's sister scrambling to care for them along with her own two children. … Escoto was quickly flown to Texas and held at Port Isabel , near the border. For three days she was not allowed to make phone calls, she said. On the third day, she was allowed a five-minute call to tell her family where she was. Jessie had missed an appointment with a gastroenterologist to discuss inserting a feeding tube." Escoto was released after more than one week in detention.[141]
- 8-month-old Keylan Zusana Lopez Ayala, a U.S. citizen infant, was hospitalized for pneumonia and possible dehydration after her mother was detained in the New Bedford raid and unable to breast-feed her.[142]

135 Abraham, Y., *Patrick Says Promises Broken on Raid*, Boston Globe, March 15, 2007; Abraham, Y., *As Immigration Raids Rise, Human Toll Decried*, Boston Globe, March 20, 2007; Youth Today, *ICE'd Out: When Immigration Cops Nab Parents, Should Child Welfare Be There?*, May 2007.

136 Kevin Burke, Massachusetts Public Safety Secretary (reported in the Boston Globe, *Patrick Says Promises Broken in Raid*, March 15, 2007).]

137 Belluck, P., *Lawyers Say U.S. Acted in Bad Faith after Immigration Raid in Massachusetts*, The New York Times, March 22, 2007.

138 Ngowi, R., *Federal Judge Orders Halt to Moving of Detainees*, Boston Globe, March 9, 2007.

139 *Id.*; The National Council of La Raza and The Urban Institute, *Paying the Price: The Impact of Immigration Raids on America's Children*, October 2007, pp. 35-36.

140 Ngowi, R., *Federal Judge Orders Halt to Moving of Detainees*, Boston Globe, March 9, 2007; Shulman, R., Immigration Raid Rips Families, The Washington Post, March 18, 2007.

141 Shulman, R., *Immigration Raid Rips Families*, The Washington Post, March 18, 2007.

142 *Id.*; Editorial, *Hypocrisy on Immigration—A Raid in New England Reveals a Broken System*, The Washington Post, March

Worthington school and community leaders interviewed for this report said they encountered substantial difficulty in their efforts to assist non-detained family members determine the whereabouts of their loved ones arrested by ICE. In several instances, it took several days to determine where individuals were being held. Many were simply unable to track down a detained family member and had no knowledge of the family member's well-being and location until the arrested family member was able to make contact with them – often a week or more after his or her arrest and, on some occasions, after the family member already had been deported.

Even when detainees were located and humanitarian reasons for release were brought to the attention of government officials, securing a detainee's release was neither simple nor quick. For example, a 25-year-old Guatemalan woman arrested in the Worthington raid was detained for almost a week following the raid while the babysitter of her 13-month-old citizen son struggled to discover the mother's whereabouts.[143] A prayer vigil outside the Nobles County Jail brought attention to her situation, and she was finally released from custody shortly thereafter. In another case, the young mother of a 4-year-old citizen son informed ICE officials about her child care obligations, but was held in jail for more than 24 hours before being released on her own recognizance at 10:00 p.m. on December 13.

2. ICE's Humanitarian Guidelines Fall Short

In an effort to facilitate the more timely and effective identification of child welfare and other humanitarian concerns that might prompt the release, rather than detention, of immigrants arrested in worksite raids, ICE promulgated "Guidelines for Identifying Humanitarian Concerns among Administrative Arrestees When Conducting Worksite Enforcement Operations" in November 2007.[144] The Guidelines provide for several measures aimed at identifying humanitarian issues, including the following:

- In any worksite enforcement operation "targeting the arrest of more than 150 persons," the development of a "comprehensive plan to identify, at the earliest possible point, any individuals arrested on administrative charges who may be sole care givers or who have other humanitarian concerns, including those

17, 2007. In a similar incident, a Honduran woman was arrested and detained in Ohio for 11 days, separated from her 9-month-old, breast-fed daughter. The child did not eat for three days, refusing to take formula from a bottle. Preston, L., *Case of Mother Torn from Baby Reflects Immigration Quandry*, The New York Times, November 17, 2007.

143 Minneapolis Star Tribune, "19 Held in Raid Face Charges of ID Theft," December 19, 2006.

144 Preston, J., *Immigration Rules Tackle Issue of Parents with Citizen Children*, The New York Times, November 17, 2007.

with serious medical conditions that require special attention, pregnant women, nursing mothers, parents who are the sole caretakers of minor children or disabled or seriously ill relatives, and parents who are needed to support their spouses in caring for sick or special needs children or relatives."

- Coordination with, and the involvement of personnel from, the Department of Health and Human Services, Division of Immigration Health Services (DIHS), to provide same-day assessments of humanitarian issues. "DIHS should be given prompt access to all arrestees under safe and humane conditions on the day of the action. … DIHS personnel should be given the time necessary to assess each arrestee's individual circumstances. … To the greatest extent possible, the information provided in the course of the assessments should be used exclusively for humanitarian purposes."

- Where DIHS support is not possible, "ICE should consider coordinating with an appropriate state or local social service agency (SSSA) or utilizing contracted personnel to provide humanitarian screening."

- ICE is to take humanitarian issues raised by DIHS or an SSSA into consideration, although these concerns are to be "weighed against other factors, including the arrestee's criminal record, an existing removal order and other factors that would normally mandate detention."

- Detainees should not be transferred out of the general area until the humanitarian assessments have been completed.

- Notice to nongovernmental organizations (NGOs) "once an operation is underway," with a request that the NGOs assist in identifying humanitarian issues not brought to the attention of ICE and providing the NGOs with the name and contact information of an ICE representative. "In compelling cases, ICE may consider the possibility of release on humanitarian grounds" based on information provided by NGOs.

- Giving detainees "adequate notice and access (by phone at a minimum) to relatives so that s/he may make plans for dependents."[145]

In recent testimony before the House Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, ICE's Director of Office of Investigations (Marcy M. Forman) asserted that ICE takes "extraordinary

145 The Guidelines are included in Appendix E.

steps to identify, document, and appropriately address humanitarian concerns of all those we encounter during law enforcement operations and in particular during [ICE's] worksite enforcement operations."[146] She emphasized that the above-described "guidelines" were "developed to ensure that parents who have been arrested and who have unattended minors or family members with disabilities or health concerns are identified at the earliest point possible," that "ICE takes this responsibility very seriously," and that "humanitarian factors are carefully taken into account when ICE makes custody decisions."[147] Forman characterized the consideration ICE gives to "identifying and resolving personal family issues" as "unparalleled and unique in law enforcement," and specifically cited the Postville raid as an example of the extraordinary care and effectiveness of ICE's "humanitarian plan" in conducting worksite raids.[148]

Empirical data is not available to permit analysis of the implementation and impact of the new ICE Guidelines because ICE does not gather or maintain such information. This is indeed one of the important changes in the law that is sorely needed—a requirement that ICE gather and maintain sufficient data regarding its actions to permit Congress to exercise its oversight responsibilities effectively. Despite the dearth of data presently available, information regarding actions by ICE in connection with more recent worksite raids suggests that the Guidelines are not being applied consistently or effectively.

In Congressional testimony on May 20, 2008, before the House Subcommittee on Workforce Protections, the President and CEO of the National Council of La Raza (Janet Murguia) described several shortcomings with ICE's application of the guidelines:[149]

> There are … significant concerns about ICE officials failing to fully implement the ICE guidelines regarding nursing mothers. NCLR has learned that some nursing mothers were released for humanitarian reasons, however, in at least a couple of cases, there were substantial delays and inadequate nutrition provided to a mother in detention.
>
> In addition, two major provisions of ICE humanitarian guidelines specifically intended to protect children appear not to have been followed in Postville:

146 Statement of Mary M. Forman, ICE Director of Office of Investigations, before the House Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, July 24, 2008, p. 1.
147 *Id.*, p. 2.
148 *Id.*, pp. 2, 4.; *See also* Statement of James C. Spero, Deputy Assistant Director of Office of Investigations before the House Subcommittee on Workplace Protection, May 20, 2008, included in Appendix F.
149 Testimony of Janet Murguia, President and CEO of National Council of La Raza, before the U.S. House of Representatives Committee on Education and Labor, Subcommittee on Workforce Protections, "Hearing on ICE Workplace Raids: Their Impact on U.S. Children, Families, and Communities," May 20, 2008, pp. 8-9.

- Access to intermediaries: ICE has said that it will allow for third-party intermediary entities—either federal health officials, or state and local social services, or other contracted third-party groups—to screen detainees for humanitarian reasons. This is important because many immigrants are reluctant to reveal to ICE that they are parents for fear that their children will also be detained. NCLR's contacts in Iowa have been unable to substantiate that any intermediary party assisted in screening of detainees.
- Communication: ICE has said that it will facilitate access to free telephones. According to NCLR contacts in Iowa, very few families have been able to communicate with a detained family member. This complicates the ability of parents in detention to make alternative arrangements for their children and considerably increases the stress on non-detained family members, including children. Similarly, it adds a layer of uncertainty for school systems, child care centers, and social service agencies that are dealing with issues of finding appropriate adult supervision for children whose parents have been detained.

> *"We have kids without dads and pregnant mothers who got their husbands taken away. It was like a horror story. They were handled like they were criminals."* Robert Velez, Youth Pastor, Iglesia Cristiana, Peniel, Laurel, Miss.

More significantly, the aftermath of the May 2008 Postville raid (discussed at greater length in Section V.B.4.) reveals that the new ICE Guidelines have done little to ameliorate the significant, immediate child welfare issues that have been a persistent feature of large-scale, worksite raids. As confirmed through numerous reports, despite the release by ICE of some 60 parents and minors on humanitarian grounds, chaos reigned in Postville as children flocked to St. Bridget's Catholic Church for assistance. Approximately 150 children, most of whom are U.S. citizens and had loved ones detained, spent the night at the church. More than 400 children were fed by the church during the first 24 hours following the raid. More than 24 hours after the raid, there were still at least 150 people at the church attempting to match up children with a relative.[150]

Similarly, the August 25, 2008, raid of Howard Industries in Laurel, Mississippi, resulting in the arrest of 595 undocumented workers, has separated parents from their citizen children. Although ICE states that 106 workers "were identified as being eligible for an alternative to detention based on humanitarian reasons,"[151] community leaders and immigrant attorneys report the widespread separation of

150 *Id.*, p. 9.
151 *See* August 26, 2008, ICE Press Release (available at www.ice.gov).

parents and children.[152] Most of those released in lieu of detention appear to be mothers, with their husbands and the fathers of their children detained.[153]

> *"Minnesota and its residents suffer the tragic consequences that stem from a lack of appropriate federal guidelines, oversight and accountability in immigration enforcement. Widespread fear has gripped communities of color and immigrants – isolating both immigrants and their U.S. citizen families and friends. This marginalization of individuals within our communities is injurious to the State's social cohesion and well-being"* February 5, 2009, Bipartisan Letter to Obama Administration from Minnesota State Senators and Representatives.

Although the ICE Guidelines represent a step in the right direction, their potential benefits are limited by the fact that they are both nonbinding and self-limiting. They only apply to worksite enforcement actions "targeting the arrest of more than 150 persons"[154] and vest ICE with complete discretion to determine what constitutes a humanitarian circumstance warranting release, including the authority to detain an individual notwithstanding the identification of humanitarian issues. Moreover, by not requiring advance notification to and planning with state and local social service agencies, a repetition of the kind of immediate, community crisis conditions that attended the Worthington, New Bedford, and other raids is inevitable. "The guidelines … fail to address the undue burden placed on schools, early childhood centers, child welfare agencies, churches, and community-based organizations that are left to play the role of first responder in the aftermath of a raid."[155]

3. Reasonable Alternatives to Detention and Removal Are Not Adequately Pursued

The more extensive use of alternatives to detention, such as release on own recognizance (ROR) without a bond, release with a reasonably-priced bond, and monitored release, would help minimize the considerable disruption and harm to children stemming from the detention of immigrant parents.

Ironically, ICE has recognized the importance of "[k]eeping families together" in detention facilities when the entire family is undocumented and subject to deportation.[156] According to ICE, family detention "ensures that illegal alien

152 *See* Mohr, H., *Fear Grips Immigrants After Mississippi Plant Raid*, Associated Press, August 26, 2008 (available at http://ap.google.com/a7zle/ALegM5j09wZomijd4rzonKDKV40abjtjkgD92Qjc600).
153 *Id*.
154 The Guidelines provide for their application to smaller enforcement actions, but only "where practical" and "at the direction of the Assistant Secretary."
155 Testimony of Janet Murguia, President and CEO of National Council of La Raza, before the U.S. House of Representatives Committee on Education and Labor, Subcommittee on Workforce Protections, "Hearing on ICE Workplace Raids: Their Impact on U.S. Children, Families, and Communities," May 20, 2008, p.7.
156 New York Times, "Facing Trial, Government Agrees to Improve Conditions at Immigrant Centers," August 28, 2007.

children remain with parents, their best caregivers."[157] In the context of worksite enforcement actions involving the arrests of undocumented parents with citizen children, however, ICE has not consistently recognized that the best interests of the children are served by alternatives to detention that permit these "best caregivers" to remain with their children. Rather, all too frequently, parents "rounded up in immigration raids disappear into detention far from home and family."[158]

Current immigration law ties the hands of ICE and immigration judges by mandating the detention of certain immigrants.[159] Even when release on bond is available, however, the setting of bonds at levels beyond the financial means of immigrants has prevented or delayed the release of immigrants detained in enforcement actions. Although the IIRIRA specifies a minimum bond of $1,500, ICE has requested and obtained significantly higher bond amounts—in some cases as much as $10,000.[160] In some detention locations, immigrants otherwise eligible for release on bond have been detained for extended periods before being released or denied release altogether by immigration judges. According to The Urban Institute, one immigration judge held almost all detainees for at least four months, ultimately releasing only 16% of those who were eligible for release on bond.[161]

Faced with the prospect of months in detention away from their families, and often before they have had an opportunity to obtain legal advice or other third-party assistance, many detained immigrants have acceded to ICE requests to accept voluntary removal. An immigrant accepting voluntary removal agrees to leave the country without an order of removal, foregoing the assertion of any defenses to deportation or rights he or she may have in the deportation process. Voluntary removal is an expedited process, often resulting in the transfer of an immigrant out of the country within days of his or her arrest. ICE reports that 40,534 undocumented immigrants agreed to voluntary removal in FY 2007.[162]

The deportation of undocumented immigrants through the voluntary removal mechanism was prevalent in the December 2006 Swift plant raids. According to ICE, 50% of the undocumented immigrants arrested in these raids had been

157 *Id*.
158 February 5, 2009, Bipartisan Letter from Minnesota Legislators to Obama Administration.
159 The Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) compels the detention of certain immigrants without bond, including immigrants subject to removal on the basis of an expanded list of criminal convictions, immigrants posing a national security risk, and persons under final orders of removal who have been illegally present in the country.
160 The Urban Institute, *Paying the Price: The Impact of Immigration Raids on America's Children*, October 2007, p. 29.
161 *Id*.
162 U.S. Immigration and Customs Enforcement, *Fiscal Year 2007 Annual Report*, p. 4.

removed from the United States by March 1, 2007.[163] In its study, The Urban Institute found that of the 128 Mexicans arrested in the Swift plant raid in Greeley, Colorado, 86 signed "voluntary" removal papers and were flown to the southwestern border within 48 hours of their arrest. These immigrants were removed from the country before they had access to counsel or officials from the Mexican Consulate. In addition, most of the 94 Guatemalan immigrants arrested in Greeley signed "voluntary" removal papers and were deported within 40 days of the enforcement action.[164] Similarly, 72 of the 105 Mexican immigrants arrested during Swift raid in Grand Island, Nebraska signed "voluntary" removal papers.[165] As discussed below, the more recent tactic employed in Postville of using inflated criminal charges as a means of pressuring undocumented immigrants into agreeing to judicial orders of deportation serves to move individuals through the judicial system even faster and with little or no consideration to their rights under immigration law. Ironically, this speedy "justice" meant that many of the Postville arrests had to stay in the U.S. longer than they would have had they been given the opportunity to take voluntary departure, as most were required to serve 5-month prison sentences.

"Mandatory detention operates as a coercive mechanism, pressuring those detained to abandon meritorious claims for relief in order to avoid continued or prolonged detention and the onerous conditions and consequences it imposes. …"[165]

Questions have been raised about the coercive effects of ICE's detention practices, particularly the transfer of detainees to remote detention facilities with limited access to counsel and other support services. From data collected though a Freedom of Information Act request, the National Immigrant Justice Center found that 94% of the 80,844 stipulated orders of removal signed between April 1997 and February 2008 were by immigrants who spoke primarily Spanish, suggesting that immigrants in detention face language barriers that prevent them from fully understanding what they are being asked to consider and sign when presented with voluntary removal papers.[167] Recognizing the potential for misunderstandings and/or coercion in the detention environment, one federal court afforded detainees from the Swift plant raid in Greeley, Colorado, an opportunity to contest the legitimacy of voluntary removal papers that had been signed.[168]

163 U.S. Immigration and Customs Enforcement, *Worksite Enforcement: Operation Wagon Train*, Fact Sheets, March 1, 2007.
164 As discussed above, ICE does not collect and track data permitting assessment of the number of parents of citizen children who voluntarily depart the U.S. without an order of removal, let alone the number and disposition of the affected U.S. citizen children.
165 The Urban Institute, *Paying the Price: The Impact of Immigration Raids on America's Children*, October 2007, p. 24.
166 *See supra*, Note 179.
167 National Immigrant Justice Center, *Language Barriers May Lead Immigrants to Waive Right to Hearing Before Deportation*, June 3, 2008.
168 The United Food and Commercial Workers Union filed a petition for habeas corpus and a complaint seeking

A recent report to the United Nations Human Rights Council by the Special Rapporteur on the Human Rights of Migrants (attached at Appendix I) also highlights the impact of present detention policies and practices on detainee rights.[169] Addressing the affects of detention practices and the pressure on immigrants to accept voluntary removal, the report states:

> Faced with the prospect of mandatory and prolonged detention, detainees often abandon claims to legal relief from removal, contrary to international standards that require non-citizens to be able to submit reasons against their deportation to the competent authorities. Mandatory detention operates as a coercive mechanism, pressuring those detained to abandon meritorious claims for relief in order to avoid continued or prolonged detention and the onerous conditions and consequences it imposes. ...
>
> In addition to the devastating effect that mandatory detention has on detained individuals, the policy has an overwhelmingly negative impact on the families of detainees, many of whom are citizens of the United States. ... Children can suffer trauma and severe loss from the sudden, prolonged, and sometimes permanent absence of that parent. The absence of a family member can result in irreparable economic and other injury to an entire family structure. ... Mandatory detention and deportation policy, therefore, has significant effects on United States citizens and the children of permanent residents, and other family members. Families consistently bear many of the psychological, geographic, economic, and emotional costs of detention and deportation.[170]

4. Postville: A Study in the Coercive Use of Detention

Although criminal arrests have been the exception rather than the norm in most worksite enforcement actions the past several years, recent experience suggests that ICE has shifted its tactics to increase the frequency and number of criminal arrests. The May 12, 2008, raid at Agriprocessors Inc. in Postville, Iowa, resulted in the arrest of 389 undocumented immigrants, including some 290 Guatemalans and 93 Mexicans.[171] Approximately 77% of those arrested in the Postville raid—306 of

declaratory and injunctive relief on behalf of all employees detained by ICE during the raid of the Swift plant in Greeley, Colorado. *See Yarrito v. Meyers*, 06-CV-2494 (D. Colo. 2006). Among other things, this action challenged the voluntariness of "voluntary" removal orders obtained by ICE. In early January 2007, the court ordered that bond hearings for the detainees be held within 48 hours and ruled that any of the detainees who claimed that their agreement to a voluntary removal order had been fraudulently or wrongfully obtained could withdraw their agreement to voluntary removal.

169 United Nations Human Rights Council, "Report of the Special Rapporteur on the Human Rights of Immigrants, Jorge Bustamante," March 5, 2008, ¶¶ 68-77.

170 *Id.*, ¶¶ 71, 74, 76 and 77.

171 *See* Statement of Deborah J. Rhodes, Senior Associate Deputy Attorney General, before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International, July 24, 2008, p. 4 (available at http://judiciary.house.gov/hearings/pdf/rhodes080724.pdf) Statement of Marcy M. Forman, Director of ICE Office of Investigations, Immigration and Customs Enforcement,

389 undocumented immigrants—were charged with criminal offenses for working with false papers, including Social Security Fraud under 42 U.S.C. § 408(a)(7)(B) and Aggravated Identity Theft under 18 U.S.C. § 1028(a)(1).[172] Within approximately ten days of the raid, 297 of those criminally charged had pleaded guilty to criminal charges and been sentenced (most to prison terms of five months).[173]

The remarkable speed with which almost all of the Postville detainees were criminally arraigned, pleaded guilty and sentenced stemmed from a "Fast Tracking" system developed and implemented by ICE, the Office of the U.S. Attorney for the Northern District of Iowa, and the U.S. District Court for the Northern District of Iowa. Under the guise of conducting a training exercise, ICE converted the 60-acre National Cattle Congress grounds in Waterloo, Iowa, into a makeshift detention and processing center, and the U.S. District Court for the Northern District of Iowa temporarily relocated to the facility to conduct criminal proceedings.[174] On the day of the raid, approximately 18 criminal defense attorneys from the federal panel for the Northern District of Iowa were called to the Federal Courthouse to meet with representatives of the U.S. Attorney's Office.[175] The defense attorneys were informed of the procedures that would be implemented to process detainees who were suspected of being undocumented immigrants and were also being charged with violations of federal criminal statutes.[176] The attorneys were given a procedures manual, advised that they would be representing groups of detainees rather than individuals, told of the potential pleas their potential clients would be offered, and informed that they and

before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International, July 24, 2008, p. 4 (available at http://judiciary.house.gov/hearings/pdf/forman080724.pdf); Immigration and Customs Enforcement News Release, May 23, 2008 (available at http://www.ice/gov/pi/news/newsreleases/articles/080515waterloo.htm).

172 *See* July 24, 2008, Statement of Deborah J. Rhodes, p. 4; Statement of David Wolfe Leopold, American Immigration Lawyers Association, before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International, July 24, 2008, p. 3 (available at http://judiciary.house.gov/hearings/pdf/leopold080724.pdf).

173 In a May 23, 2008, News Release, ICE reported that 230 defendants were sentenced to five months in prison and three years of supervision for using false identification belonging to another person to obtain employment; 30 defendants were sentenced to five months in prison and three years supervision for falsely using a social security number or card belonging to another person; eight defendants were sentenced to five months in prison and three years supervision for illegally re-entering the United States after being deported; two defendants were sentenced to 12 months and a day in prison, and three years of supervision, for using false identification belonging to another person to obtain employment; 21 defendants were sentenced to five years of probation for using false identification to obtain employment using fraudulent documents that did not belong to an actual person; two defendants were sentenced to five years of probation for falsely using a social security number or card where the number did not belong to an actual person; and four defendants were sentenced to five years of probation for illegally re-entering the United States after being deported. Immigration and Customs Enforcement News Release, May 23, 2008 (available at http://www.ice/gov/pi/news/newsreleases/articles/080515waterloo.htm).

174 *See* Quad-City Times, *Immigration Officials Raid Agriprocessors in Postville*, May 12, 2008 (available at http://ads.qctimes.com/articles/2008/05/12/news/state/doc48287747a7cda637005821.prt); July 24, 2008, Statement of Deborah J. Rhodes, pp. 5-9.

175 *See* Statement of Professor Robert R. Rigg, Director of the Criminal Defense Program at Drake University Law School, before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International, July 24, 2008, p. 2; July 24, 2008, Statement of Deborah J. Rhodes, p. 6.

176 *See* July 24, 2008, Statement of Professor Robert Rigg, p. 1.

their clients would have a limited number of days to make a decision to accept or reject the plea offers.[177]

At the makeshift facility in Waterloo, detainees were assigned criminal defense counsel and arraigned in groups of ten. Defense counsel were given files on each of their clients along with the plea agreement being offered to their client groups. Detainees and their counsel were given just seven days from the detainee's first court appearance to accept or reject the non-negotiable plea agreement.[178] All of the detainees facing criminal charges accepted the plea agreement. They were brought before a magistrate judge for a plea hearing and then a U.S. District Court judge for sentencing—again in groups of ten.[179]

Serious questions have been raised regarding the "assembly line justice" meted out in the immediate aftermath of the Postville raid. Indeed, the fact that each of the 300 or so persons charged criminally, represented by a mere 18 criminal defense lawyers collectively, accepted the government's plea offers within such an abbreviated period of time is itself cause for concern regarding the degree to which individual due process rights were recognized and respected in this unprecedented process.

> *"[T]he expedited justice or 'Fast Tracking' system concocted by the government, with the willing assistance of the U.S. District Court for the Northern District of Iowa, was a conviction/deportation assembly line which could not be burdened with protecting the fundamental rights of the defendants, mostly poor uneducated Guatemalan farmers who came to the U.S. to feed their families."*[180]

Due process was marginalized by the fact that defense counsel were overburdened and generally lacked the expertise necessary to advise their clients properly on the immigration implications of the plea agreements, let alone meaningfully consider and explore any defenses to deportation available to individual detainees in the limited, 7-day timeframe imposed by the government. Criminal defense counsel were assigned at a ratio of 17 detainees to one lawyer, affording counsel minimal time to meet with and develop the cases of their individual clients.[181] Moreover, assigned defense counsel were not expert in immigration law and

177 *Id.*
178 *See* July 24, 2008, Statement of Deborah J. Rhodes, pp. 6, 8-10.
179 *Id.*
180 *See* July 24, 2008, Statement of David W. Leopold before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law.
181 *See* July 24, 2008, Statement of David Leopold, p. 4; July 24, 2008, Statement of Deborah J. Rhodes, p. 6 (noting that "[a]pproximately 18 defense counsel were present at the fairgrounds to meet with the detainees").

immigration lawyers were initially denied access to detainees.[182] In his July 24, 2008, testimony before Congress, Professor Robert Rigg, Director of the Criminal Defense Program at Drake University Law School, noted that a "strong case can be made that the procedures adopted [for the Postvilled raid] are flawed" and "call into question … [the] constitutional guarantee of due process," citing as examples (1) the limited amount of time the lawyers were given to adequately investigate client cases and perform necessary research associated with criminal cases with immigration issues; (2) the appointment of groups of individuals to attorneys rather than individual clients which, together with the compressed time frame, resulted in lawyers spending an hour or less with clients; (3) the absence of attorneys with immigration law expertise and insufficient time for defense counsel to become more familiar with immigration issues; and (4) having groups of detainees appearing before judges for the purpose of entering guilty pleas, creating "the appearance of assembly-line justice not associated with the decorum of Federal courts."[183]

Equally pernicious was the decision to charge detainees with Aggravated Identity Theft under 18 U.S.C. § 1028A(a)(1). This criminal statute imposes a mandatory two-year term of imprisonment for certain enumerated felonies if, "during and in relation to" the felony, the perpetrator "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." The propriety of leveling this charge against the Postville detainees is questionable. Although there is a split among federal circuit courts of appeal, several courts have concluded that a defendant must *know* that the means of identification transferred, possessed or used during the commission of an enumerated felony *belonged to another person*, not merely that the number or means of identification was not properly the defendant's and might belong to another person.[184] The information

182 *See* July 24, 2008, Statement of Professor Robert Rigg, pp. 5-6; July 24, 2008, Statement of David W. Leopolid, pp. 5-6; Dr. Erik Camayd-Freixas, *Interpreting after the Largest ICE Raid in US History: A Personal Account*, p. 7; The Minnesota Independent, *Local Immigration Attorneys and Advocates Say Postville Raid Refelcted "A Complete Lack of Due Process"* (available at http://www.minnesotaindependent.com/view/local-immigration). ICE maintains that immigration attorneys were afforded an opportunity to meet with their clients as and when clients were located, and were able to advise their clients before any guilty pleas were entered. *See* July 24, 2008, Statement of Deborah J. Rhodes, p. 5. Although some detainees may have received the benefit of advice from immigration attorneys, the fact remains that the compressed time frame imposed by the government effectively precluded detainees and their counsel from fully and reasonably exploring any defenses to deportation.

183 July 24, 2008, Statement of Professor Robert Rigg, pp. 5-6.

184 Three Circuit Courts of Appeal—the First, Ninth, and D.C. Circuits—have held that the knowledge requirement of § 1028A(a)(1) extends to the "of another person" element of the offense, requiring the Government to prove that the defendant did not simply invent a false identification number but knew that he was using the means of identification belonging to another actual person. *See U.S. v. Godin*, 2008 WL 2780646, at *1 (1st Cir. July 18, 2008) ("[W]e hold that the 'knowingly' *mens rea* requirement extends to 'of another person.' In other words, to obtain a conviction under § 1028A(a)(1), the government must prove that the defendant knew that the means of identification transferred, possessed, or used during the commission of an enumerated felony belonged to another person."); *U.S. v. Miranda-Lopez*, 2008 WL 2762393, at *5 (9th Cir. July 17, 2008) ("[W]e thus hold that the government was required to prove that Miranda-Lopez knew that the identification belonged to another person); *U.S. v. Villanueva-Sotelo*, 515 F.3d 1234, 1235 (D.C. Cir. 2008) ("[W]e hold that section 1028(a)(1)'s mens rea requirement extends to the phrase 'of another

underlying the criminal charges against the Postville detainees, as reflected in the May 9, 2008, Application and Affidavit for Search Warrant filed by the government, is devoid of evidence that detainees had knowledge that any social security or other identification numbers they were using belonged to another actual person.[185]

Information that has surfaced following the Postville raid and criminal proceedings suggests that the inflated, Aggravated Identify Theft charges were asserted as a means of pressuring detainees to accept the government's non-negotiable plea offers. In a June 13, 2008, essay describing his first-hand observations and experience as a federally certified interpreter during the "Fast Tracking" process, Dr. Erik Camayd-Frexias described the inordinate pressure on detainees to accept the government's "offer" without regard to their actual guilt or innocence. Dr. Camayd-Frexias recounted jail interviews between criminal defense counsel and frightened clients forced to choose between pleading guilty to crimes they may not have committed, and facing prolonged incarceration and absence from families dependent on them for life's necessities:[186]

> *"Many of these workers were sole earners begging to be deported, desperate to feed their families, for whom every day counted. "If you want to see your children or don't want your family to starve, sign here"—that is what their deal amounted to. Their Plea Agreement was coerced."*
> Dr. Erik Camayd-Frexices

> It came to my first jail interview. The purpose was for the attorney to explain the uniform Plea Agreement that the government was offering. The explanation, which we repeated over and over to each client, went like this. There are three possibilities. If you plead guilty to the charge of "knowingly using a false Social Security number," the government will withdraw the heavier charge of "aggravated identity theft," and you will serve 5 months in jail, be deported without a hearing, and placed on supervised release for 3 years. If you plead not guilty, you could wait in jail 6 to 8 months for a trial (without a

person,' meaning that the government must prove the defendant actually knew the identification in question belonged to someone else."). The Fourth, Eighth and Eleventh Circuits have held to the contrary. *See U.S. v. Mendoza-Gonzales*, 520 F.3d 912, 915 (8th Cir. 2008), *petition for cert. filed*, (U.S. July 15, 2008) (No. 08-5316); *U.S. v. Hurtado*, 508 F.3d 603, 610 (11th Cir. 2007) (per curiam), *cert. denied*, 128 S. Ct. 2903 (2008); *U.S. v. Montejo*, 442 F.3d 213, 217 (4th Cir. 2006). On July 22, 2008, a Petition for Writ of Certiorari was filed with the Supreme Court in *Ignacio Flores-Figueroa v. U.S.*, seeking review of the affirmance by the Eighth Circuit of a conviction under § 1028A(a)(1) absent evidence of the defendant's knowledge that the identification in question belonged to another person (following the Eighth Circuit's precedent in *Miranda-Lopez*).

185 The Application and Affidavit for Search Warrant states that in February 2008 ICE agents received social security "no match" information from the SSA for leading them to conclude that "about 737 current Agriprocessors employees are believed to be using a social security number not lawfully issued to that person," including 147 SSNs confirmed by the SSA as being invalid (*i.e.* never issued) numbers and about 590 valid SSNs. ¶¶ 80-83. However, a search of the Federal Trade Commission's Consumer Sentinel Network database revealed that just one person "who was assigned one of the social security numbers being used by an employee of Agriprocessors has reported his/her identity being stolen." ¶ 86. The Application and Affidavit for Search Warrant is available at http://eyeonagriprocessors.org/docs/Application%20and%20Affidavit%20for%20Search%20Warrant.PDF.

186 Dr. Erik Camayd-Freixas, *Interpreting after the Largest ICE Raid in US History: A Personal Account*, pp. 5-7 (available at http://graphics8.nytimes.com/images/2008/07/14/opinion/14ed-camayd.pdf). *See also* Testimony of Dr. Erik Canayd Freixas before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, July 24, 2008 at Appendix J.

> right to bail since you are on an immigration detainer). Even if you win at trial, you will still be deported, and could end up waiting longer in jail than if you just pled guilty. You would also risk losing at trial and receiving a 2-year minimum sentence, before being deported. Some clients understood their "options" better than others.
>
> That first interview, though, took three hours. The client, a Guatemalan peasant afraid for his family, spent most of that time weeping at our table, in a corner of the crowded jailhouse visiting room. How did he come here from Guatemala? *"I walked."* What? *"I walked for a month and ten days until I crossed the river."* We understood immediately how desperate his family's situation was. He crossed alone, met other immigrants, and hitched a truck ride to Dallas, then Postville, where he heard there was sure work. He slept in an apartment hallway with other immigrants until employed. He had scarcely been working a couple of months when he was arrested. … "The Good Lord knows that I was just working and not doing anyone any harm." This man, like many others, was in fact *not* guilty. "Knowingly" and "intent" are necessary elements of the charges, but most of the clients we interviewed did not even know what a Social Security number was or what purpose it served. This worker simply had the papers filled out for him at the plant, since he could not read or write Spanish, let alone English. But the lawyer still had to advise him that pleading guilty was in this best interest. He was unable to make a decision. "You all do and undo," he said. "So you can do whatever you want with me." To him we were part of the system keeping him from being deported back to his country, where his children, wife, mother, and sister depended on him. He was their sole support and did not know how they were going to make it with him in jail for 5 months. None of the "options" really mattered to him. Caught between despair and hopelessness, he just wept. … Before he signed with a scribble, he said: "God knows you are just doing your job to support your families, and that job is to keep me from supporting mine." …
>
> Many of the Guatemalans had the same predicament. One of them, a 19-year-old, worried that his parents were too old to work, and that he was the only support for his family back home. …
>
> Many of these workers were sole earners begging to be deported, desperate to feed their families, for whom every day counted. "If you want to see your children or don't want your family to starve, sign here"—that is what their deal amounted to. Their Plea Agreement was coerced.

Detainees were thus presented with a stark choice—plead guilty to social security fraud with a five month prison sentence and a stipulated judicial order of deportation; or plead not guilty and face six or seven months of mandatory

incarceration awaiting a criminal trial and the prospect of at least two additional years of imprisonment if ultimately convicted, followed by deportation. As aptly described by David Leopold in his July 24, 2008, Congressional testimony:

> Stated simply, the "Fast-Tracking" system depended on threatening the workers with a two (2) year prison sentence, their inability to receive adequate attention from counsel, and their ignorance of the charges leveled against them. The government made the undocumented workers an offer they couldn't refuse. Faced with the choice of 5 months in prison and deportation, or 6 months in prison waiting for a trial which could lead to 2 years in prison and deportation, what choice did the workers really have? Needless to say the scheme left little room for the fundamental protections offered by the Constitution. The spectacle was a national disgrace.[187]

In the environment manufactured by the government, immigration law and defenses to deportation took a backseat to the criminal charges and the attendant threat of extended imprisonment. By criminalizing conduct that previously had been addressed through civil administrative removal proceedings, assigning defense counsel with little or no immigration law expertise, employing an unusually expedited criminal law process, and imposing a 7-day time limit on consideration of plea agreements, the government effectively coerced detainees to forego their rights. As a consequence, every one of the detainees charged criminally pled guilty and stipulated to a judicial order of deportation within approximately ten days of the Postville raid.[188] The coerced nature of pleas in an artificially compressed time period effectively precluded immigration relief, denying defendants the opportunity for protection from harm and children an opportunity to remain united with their parents. Given the long and well-documented history of human rights abuses in Guatemala, it is likely that many detainees—the vast majority of whom were Guatemalans—could have

> *"The workers were essentially coerced into giving up procedural and substantive rights under the immigration law, including the right to a full hearing before an immigration judge which would have required the government to meet its statutory burden and afforded the defendants an opportunity to apply for relief from deportation."* July 24, 2008, Statement of David W. Leopold.

187 July 24, 2008, Statement of David Leopold, p. 4.

188 The propriety of the government's tactic of demanding a judicial order of deportation as a non-negotiable term of every plea agreement is questionable. In his July 24, 2008, statement before Congress, David Leopold noted that the "stipulated orders of deportation may have been improperly used against many of the defendants in the Agriprocessors cases." July 24, 2008, Statement of David Leopold, pp. 7-8. Leopold points out that a statutory condition to judicial orders of deportation based on criminal convictions is that the alien have been "lawfully admitted to the United States." *Id.* at 7 (citing 8 U.S.C. § 1227(a)(2)(A). The uniform plea agreement, however, alleged that the "Defendant entered the United States *illegally* without admission or parole and is unlawfully present in the United States." *Id.* (emphasis added).

made out a case for asylum and withholding of removal. "The government clearly understood that many of the impoverished workers in Postville may have suffered persecution or have had well founded fear of future persecution or faced a threat to their life or liberty if they were forcibly returned to Guatemala."[189] Moreover, detainees may have been eligible for other forms of immigration relief. In his essay, Dr. Camayd-Frexias described how workers abandoned immigration relief when faced with the impossible dilemma imposed upon them by the government's "Fast Tracking" process and non-negotiable position:

> Another client, a young Mexican, had an altogether different case. He had worked at the plant for ten years and had two American born daughters, a 2-year-old and a newborn. He had a good case with Immigration for an adjustment of status which would allow him to stay. But if he took the Plea Agreement, he would lose that chance and face deportation as a felon convicted of a crime of "moral turpitude." On the other hand, if he pled "not guilty" he had to wait several months in jail for trial, and risk getting a 2-year sentence. After an agonizing decision, he concluded that he had to take the 5-month deal and deportation, because as he put it, "I cannot be away from my children for so long. His case was complicated; it needed research in immigration law, a change in the Plea Agreement, and, above all, more time. There were other similar cases in court that week.[190]

The shift in tactics reflected by the events of the Postville raid evince an intent on the part of the government to criminalize immigration violations as a means of forcing undocumented workers to forego their rights under immigration law. As reflected by the story of the young Mexican worker recounted above, such an approach further marginalizes the need and interests of citizen children of undocumented workers. Indeed, it ignores the best interests of the citizen child and ensures that such interests have no hearing in the deportation process. This heavy-handed approach to enforcement of our immigration laws cannot be reconciled with fundamental notions of due process, the family reunification goals underlying immigration law, and the constitutional rights and benefits accorded citizen children of undocumented immigrants as their birthright. Although the prevention and prosecution of social security fraud and identity theft is certainly important, criminalizing undocumented workers who are supplied with false identification papers—many by or through unscrupulous employers—and whose sole intent is to earn a modest wage to support their families is, at best, bad policy and, at worst, unconscionable.[191]

189 July 24, 2008, Statement of David Leopold, p. 9.
190 Dr. Erik Camayd-Freixas, *Interpreting after the Largest ICE Raid in US History: A Personal Account*, pp. 6-7.
191 Leadership of the Evangelical Lutheran Church in America designated Postville a "domestic disaster" and issued a

C. The Threat of Longterm Harm to American Children of Undocumented Immigrants

The adverse effects of increased enforcement on children are not limited to the trauma experienced in the immediate aftermath of the enforcement action. The separation of the family due to the detention and ultimate removal of a parent visits devastating and long-lasting financial and emotional harm on those left behind.

1. The Financial Struggle of Separated Families

The arrest, detention and/or deportation of undocumented immigrant parents as a result of worksite enforcement actions has caused significant financial hardship for immigrant families, including their citizen children members. In many instances, the detained immigrant is the family's sole breadwinner. According to analysis of the migrant population by the Pew Hispanic Center, only 54% of undocumented women were in the U.S. labor force as of March 2005, a participation percentage 18 points lower than native-born women.[192] The lower representation of undocumented women in the workforce can be attributed to the greater prevalence of marriage and the presence of young children in this population.[193]

In the aftermath of the Worthington raid, immigrant families struggled to make ends meet in the absence of a steady paycheck.[194] Having lost their jobs at Swift, and without documentation permitting them to work, even those undocumented immigrants who were not detained and/or deported soon after the raid were left with no means to provide financially for their families pending their removal from the United States.[195]

The struggle to provide for their families has been particularly acute for women whose husbands were detained and deported. Community leaders interviewed for this report described the continuing difficulties of wives/mothers left without their husbands, including the lack of any means of support because they have remained at home raising their children, lack of means of transport because they do not drive, and lack of familiarity with bank accounts and financial obligations because those responsibilities had been their husbands'. In addition, some 15-20 pregnant

Resolution on Immigration reform. *See* Appendix K.

192 Passel, Jeffrey S., *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey*. Washington, D.C.: Pew Hispanic Center, March 7, 2006, p. 10.

193 *Id*.

194 *See* Minneapolis Star Tribune, *Fear Beginning to Give Way to Hope After Plant Raid in Worthington*, January 8, 2007; *Raid's Aftershocks Still Reverberate,* January 2, 2007; *Donations Gathered for Families in Wake of Raids*, December 16, 2006.

195 A lack of resources significantly limits the opportunity for legal representation in removal proceedings, making the right to counsel and relief from removal hollow protections beyond the reach of most immigrants.

women found themselves alone and without support as a consequence of the detention and/or deportation of their husbands.

The Worthington community did much to help the families of undocumented workers meet their immediate needs following the raid. Basic necessities, such as food and diapers were sent to Worthington by concerned Minnesota citizens and distributed to families by the local union and community organizations. In addition, monetary donations totaling approximately $110,000 (including $25,000 from Swift) were made available through Community Connectors (a United Way organization) to assist affected families in paying rent, utility bills and the like. Ultimately 110 individuals received financial assistance through Community Connectors, although available funds limited the amount a person or family could receive to a maximum of $1,200.[196]

> *"The horrific pain that people witnessed during the ordeal of the raid has not gone away. That raid still tears away at our community in New Bedford. Families are torn apart, and mothers and children are suffering, in some ways more than ever."*[197]

Although the considerable community efforts in Worthington provided invaluable assistance to affected families in the immediate aftermath of the raid, such efforts have not been a viable substitute for a paycheck in the longer term. In an interview for this report more than six months after the raid, a Guatemalan woman with two citizen children reported that she was struggling to feed her children following the deportation of her husband and in light of her own undocumented status and consequential inability to work. Another woman—a native-born American married to an undocumented immigrant—similarly reported extreme financial hardship stemming from her husband's inability to work pending removal. Adding to this family's difficulties was their loss of health insurance or other financial means to provide their son with a needed kidney transplant.

In addition to relatively limited resources, persistent fear within the immigrant community proved to be a considerable impediment to furnishing aid to families in need. News of the Swift raid prompted many immigrant families in Worthington to go into hiding. For example, one mother of several small children (including an

196 Massachusetts Immigrant and Refugee Advocacy Coalition, *Immigrant Raids Create Emotional Trauma and Economic Distress for Children, Report Finds*, Press Release, October 31, 2007 (available at http://www.miracoalition.org/press/press-releases/press-release-immigration-raids-create-emotional-trauma-and-economic-distress-for-children-new-report-finds).

197 Corinn Williams, Executive Director of the Community Economic Development Center in New Bedford, Massachusetts, commenting on the lasting impact of the March 2007 Micheal Bianco raid in New Bedford. Massachusetts Immigrant and Refugee Advocacy Coalition, *Immigrant Raids Create Emotional Trauma and Economic Distress for Children, Report Finds*, Press Release, October 31, 2007 (available at http://www.miracoalition.org/press/press-releases/press-release-immigration-raids-create-emotional-trauma-and-economic-distress-for-children-new-report-finds).

infant) remained hidden in her home with her children for several days following the raid. When Sister Karen Thein from the local Catholic Church attempted to deliver diapers and food for the baby, she found a dark home and no answer to her knocks at the door. When the mother answered the door after several delivery attempts, she was "absolutely petrified."

2. The Emotional Trauma Caused By Family Separation

With increased worksite and home raids has come a pervasive and heightened sense of isolation and fear within the undocumented immigrant population. Although some may say that this is a natural consequence of an undocumented immigrant's decision to enter and remain in the United States unlawfully, this ignores the emotional trauma and long-term harm visited upon citizen children whose parents are suddenly and dramatically absent from their everyday lives as a consequence of detention pending removal and/or deportation.

"Increasing workplace and household raids by ICE agents have terrorized immigrant communities. Besides their frequent disregard of due process, these raids have left an indelible mark by forcibly separating many families. In practically every state in the country, ICE raids have separated children from their parents. Testimonies from children and parents, as well as from social service providers, faith leaders, and elected officials, speak of the widespread social devastation caused by ICE raids."[199]

In *Paying the Price: The Impact of Immigration Raids on America's Children*, the National Council of La Raza and The Urban Institute identified and described the psychological trauma experienced by children of undocumented immigrants detained in raids in New Bedford, Massachusetts, Greeley, Colorado, and Grand Island, Nebraska:

> Although children can be resilient under difficult and unstable circumstances, the severe disruptions caused by the raids in the three study sites led to behavioral problems and psychological distress for some children. Separation from arrested parents caused emotional trauma in some children, especially because it happened suddenly and unexpectedly. The trauma of separation was greater when it continued for an extended period of time. Community-wide fear and social isolation accentuated the psychological impact on children. Yet, few parents sought or received mental health care for themselves or their children. …

198 Report of the Special Raporteur on the Human Rights of Immigrants, March 5, 2008, pp. 16-17.

> Even if the parent returned within a day or soon thereafter, the period of separation remained current in the child's memory and created ongoing anxiety in many cases. Psychologists interviewed for the study associated this pervasive sense of insecurity and the anxiety it produced in children with conditions ranging from separation anxiety to attachment disorder and post-traumatic stress disorder. Children—as well as some parents—felt "the ongoing stress that any day things can change, [that there is a] constant chance of separation." … Some parents said that, months after the raids, their children still cried in the morning when getting dropped off at school or day care, something that they rarely used to do. Children were said to obsess over whether their parents were going to pick them up from school or if—like on the day of the raid—someone else would show up. Even children whose parents were not arrested developed many of these same fears. …
>
> Some children said things to parents, other caregivers, or teachers which revealed how they had begun to personalize the cause of the separation. Especially among very young children, who could not understand the concept of parents not having "papers," sudden separation was considered personal abandonment. In some cases, separation triggered sadness; in others, it led to anger toward the parent who left or the one who remained. … Psychologists were concerned that [statements made by children in the aftermath of the raids and family separation] could indicate the onset of depression and other mental health challenges for children. …
>
> Psychologists and other mental health professionals interviewed for the study suggested that social exclusion and isolation following the raids might induce depression and accentuate psychological distress among some parents and children. Many children absorbed the feeling of being outcasts from the broader community, even from their own previous social networks. Some children were warned not to identify who their parents were to anyone. Children's social networks in some cases exacerbated social exclusion, for instance, when they were harassed by other children or branded as criminals because their parents were arrested.[199]

Parents, teachers and other caregivers reported troublesome behavioral changes among children indicative of emotional and psychological harm following the raids:

> Many children exhibited outward signs of stress. For instance, some lost their appetites, ate less, and lost weight. Others became more aggressive or increasingly displayed "acting out" behaviors. Some children also had more trouble than usual falling asleep or sleeping through the night. While impossible to evaluate in the context of

199 The National Council of La Raza and The Urban Institute, *Paying the Price: The Impact of Immigration Raids on America's Children*, October 2007, pp. 50-52.

> this study, mental health professionals suggested that many of these symptoms can lead to or are consistent with depression, post-traumatic stress disorder, or separation anxiety. One ten-year-old boy whose mother was briefly detained was diagnosed with major depression. … [Another eight-year-old boy whose mother was released on the evening of the raid] experienced repeated nightmares from which he sometimes awoke with uncontrollable shaking and loss of breath. He was taken to the hospital twice, and doctors diagnosed him with major anxiety disorder resulting from post-raid stress.[200]

Reports of the emotional trauma and harm experienced by children in the immediate and longer-term aftermath of raids, such as that described by The Urban Institute, have been widespread. For example, in testimony before the House Subcommittee on Workforce Protections of the Education and Labor Committee on May 20, 2008, Kathryn Gibney, principal of the San Pedro Elementary School in San Rafael, California, noted the continuing adverse impact of ICE home raids on the emotional well-being of students more than *one year* after ICE agents raided homes in San Rafael on March 6, 2007:

> My school serves 400 kindergarten through fifth-grade students, 96% of whom are Latino, with the largest cultural groups coming from Guatemala, El Salvador, and Mexico. These children, and other students in our district have suffered severe trauma as the result of ICE raids in the low-income Canal neighborhoods of San Rafael. … The impact of these raids has been devastating. Absentee rates have soared. Test scores have dropped. Students who do make it to school remain distracted as they worry about whether their families will be at home when they return. Families lose sleep at night as they worry about possible home interrogations. Families whose breadwinners have been seized are struggling to survive. Even when family members were successful in proving their right to be in this country and were allowed to return home, the memories of the children remain—the memories of U.S. agents banging on their doors at dawn, shining flashlights in their faces and taking their parents away in handcuffs. Mental health services have been substantially increased to address the on-going emotional fragility of San Pedro students.[201]

Just two days after Ms. Gibney's testimony, ICE conducted another raid in San Rafael. "ICE vans parked near school bus stops terrified children as they left their parents and boarded their school buses. Absentee rates at the schools increased dramatically. One of the schools canceled its Open House planned for that night

200 *Id.*, pp. 52-53.

201 Testimony of Kathryn M. Gibney, San Pedro Elementary School Principal, before the Subcommittee on Workforce Protections of the Education and Labor Committee, May 20, 2008 (available at http://edlabor.house.gov/hearings/wp-2008-05-20.shtml).

out of fear for the safety of parents and children."[202] ICE's decision to conduct enforcement activities near schools, including pre-schools, conflicts with state and federal goals for early childhood education.[203]

In a June 2008 article, the Los Angeles Times reported that a 12-year-old U.S. citizen child could barely sleep for weeks and lived in constant fear that her mother (an undocumented immigrant) would be taken from her after she witnessed ICE agents handcuff and arrest her pajama-clad father in their home. Another 12-year-old and her 7-year-old brother, both U.S. citizens, began sleeping in their mother's bed and were afraid to go to school after their father, who had been missing for three days during which their mother (an epileptic) was ill and needed help, called to say that he had been arrested by immigration authorities.

> *"The raid in Willmar had a profound impact on children: fear of leaving home; anxiety due to uncertainty of parents' whereabouts; need to care for younger children. Absences from school were notable."*[205]

In interviews conducted for this report, family members, as well as community and school leaders, noted the psychological trauma experienced by children who witnessed the arrest of a loved one or experienced the loss of a parent as a consequence of immigration enforcement actions. For example, the undocumented mother of an 8-year-old who saw friends and family handcuffed and led away by ICE agents in Willmar reported that her son lives in constant fear that she will be taken from him, experiencing significant separation anxiety whenever he is not with her. Willmar school and community officials similarly reported a significant drop in school attendance by minority students following the home raids, and stated that fear among this student population was palpable. A clinical psychologist who met with affected families in Willmar concluded that the level of post-traumatic stress disorder and anxiety rivaled that seen in war torn countries like Bosnia. "The kids can't concentrate, and are being mistakenly diagnosed as having behavioral problems when their symptoms are actually caused by stress, depression and anxiety resulting from the raids. Younger children are having frequent nightmares, are wetting their beds because they are so afraid."

202 Testimony of Rep. Lynn Woolsey before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, July 22, 2008.
203 *See* Appendix H (May 16, 2008 letter from Senator Edward Kennedy to ICE).
204 Wattenberg, E., *New Populations in Rural Counties: Implications for Child Welfare,* Center for Advanced Studies in Child Welfare, School of Social Work, Center for Urban and Regional Affairs, University of Minnesota, June 17, 2008, p. 8.

The emotional trauma experienced by children of detained and/or deported immigrants is perpetuated (and likely exacerbated) by cultural and systemic barriers to the delivery of needed social services to immigrant children. Children of immigrants who have been detained do not receive the social services to which they are entitled and which other children receive because of a fear to come forward and/or a "hesitancy" by some "understaffed and under-funded" rural social service agencies to open files for "immigrant children."[205] Pre-existing reticence among the immigrant population to seek out and obtain needed assistance from social service agencies has only increased with more aggressive enforcement efforts and the fear and isolation it engenders. In a recent report addressing the child welfare system's under service of immigrant children, University of Minnesota Professor Esther Wattenberg stated:

> The unequal treatment of children in immigrant families is a striking and troubling phenomenon. Citizen status determines to a significant extent the availability of health, financial, and social services. In the case of mixed-status families (most often the child, born in the USA has citizen status and the parents are undocumented), the child suffers in direct and indirect ways: living in households with scarce resources and in an environment of fear and anxiety intensified by the threat of escalating raids.[206]

As the foregoing examples show, separation of parent and child as a result of increased detention and removal threatens the emotional well-being of the citizen child in the short-term and portends long-term emotional harm in the absence of meaningful access to social services.

205 *Id.*

206 *Id.*, p. 11. The differential treatment of the citizen children of immigrant parents may constitute unlawful discrimination or violation of Constitutional equal protection rights. *See, e.g., Plyer v. Doe*, 457 U.S. 202 (1982) (Supreme Court held that it Texas statute withholding state funds from public schools for undocumented students violated the Equal Protection Clause of the U.S. Constitution; "Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of fairness."); *Lewis v. Thompson*, 252 F.3d 567 (2nd Cir. 2001) (denial of Medicaid eligibility to citizen children of undocumented immigrants violated Equal Protection; court noted that the "highly deferential" standard that typically applies in immigration matters was inapplicable when the claim was asserted on behalf of a citizen and further noted that "a disadvantage need not be especially onerous to merit assessment under the Equal Protection Clause").

VI. Removal Proceedings and the Neglected Child

As discussed above, a foundational element of our immigration law is the notion that societal well-being is promoted by family unity. The reality, however, is that this laudable principle is being roundly disregarded in practice and in our legal framework. In particular, the interests of citizen children and the goal of maintaining family unity is given little to no consideration in the context of removal proceedings against the undocumented parents of these American children.[207]

Immigration judges generally are not permitted under the law to give consideration to the interests of citizen children in determining whether the parent should be deported. In the few instances in which the interests of the children are considered, the legal standards applied in determining whether relief from deportation should be granted are inconsistent with the best interests standard prevalent in U.S. jurisprudence. "By denying undocumented parents cancellation of removal, our government effectively deports their United States citizen children and denies those children their birthrights. … The government's conduct violates due process by forcing the children to accept de facto expulsion from their native land or give up their constitutionally protected right to remain with their parents."[208]

A review of several prominent forms of relief illustrates the failure of immigration law to adequately protect the interests of citizen children whose parents face deportation.

1. Adjustment of Status

U.S. immigration law provides a mechanism for immigrants who entered the country lawfully to seek adjustment of their immigration status. For example, an immigrant in the U.S. under a temporary work visa can apply for lawful permanent residency. Such immigrants may remain in the U.S. pending a determination of their status adjustment request.

Undocumented immigrants, however, have no ability to seek adjustment of their status while remaining in the U.S. with their citizen children. Because they initially entered the U.S. unlawfully, undocumented immigrants may only seek an immigrant

207 For a thorough, detailed examination of the general disregard for the rights of U.S. citizen children under U.S. immigration law, *See* Thronson, D., *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 Nev. L.J. 1165 (2007).

208 Dissenting Opinion of Judge Harry Pregerson, *Cornelio Arcos Memije and Maria Del Rosario Rendon Velez v. Gonzales*, 481 F.3d 1163 (9th Cir. 2007).

visa through U.S. consulates in their countries of origin.[209] In other words, the only way for undocumented immigrants to attain legal status is to first leave the U.S.

Departure from the U.S., however, presents additional barriers to obtaining lawful status and reuniting with family in the U.S. Immigrants typically become undocumented because they enter the U.S. without inspection or fall out of status.[210] Time spent in the U.S. without status can result in the accrual of "unlawful presence". Those who were unlawfully present in the U.S. for more than 180 days before departing to obtain an immigrant visa are barred from re-entering the U.S. for three years.[211] If the immigrant was unlawfully present in the U.S. for more than 365 days prior to departure, the bar to re-entry is ten years.[212] Since the vast majority of undocumented immigrants entered the U.S. without inspection and remained here unlawfully for more than one year, the law precludes them from seeking to return to the U.S. lawfully for 10 years following their departure.

There is also a permanent bar to admission that, while neutral on its face, disparately impacts the undocumented from Mexico and Central America. It provides that immigrants who were unlawfully present in the U.S. for an aggregate period of more than one year or who have been ordered removed, and who subsequently enter or attempt to enter the U.S. without being lawfully admitted, are precluded from lawfully entering.[213] Such an immigrant can request a waiver of the permanent bar, but only after he or she has been out of the U.S. for more than 10 years.[214]

The system as currently structured thus places the undocumented immigrant in a Catch-22 situation:

- He must enter the U.S. unlawfully, if at all, because there is no meaningful path to lawful entry for the lower-skilled, less educated immigrants.
- Regardless of his length of stay, community ties, law-abiding and productive conduct, and family bonds and responsibilities in the U.S., he cannot seek to adjust his immigration status without first leaving the country and re-entering lawfully.

209 An immigrant must be lawfully admitted to the U.S. to adjust his or her status to permanent resident. *See* INA 245(a).
210 *See* http://pewhispanic.org/files/reports/61.pdf on p. 2
211 The 3 year bar also applies to individuals, such as detainees entering into voluntary return agreements, who depart prior to the commencement of removal proceedings. *See* INA 212(a)(9)(B)(i)(I).
212 *See* INA 212(a)(9)(B)(i)(I) and (II).
213 *See* INA 212(a)(9)(C).
214 *See* INA 212(a)(9)(C)(ii). There is an extremely limited exception for victims of domestic abuse. *See* INA 212(a)(9)(B)(iii).

- If he has been in the U.S. for any appreciable period of time, he will be barred from seeking re-entry for 3 or 10 years, depending on the length of his unlawful presence. If he happens to have travelled back and forth across the U.S. border while undocumented, he faces a permanent re-entry bar that can be waived only after he has been out of the U.S. for 10 years.

- Even when there is no bar to entry, he may need to wait 10-20 years to receive a visa, assuming he is lucky enough to ever receive a visa.

While there is a limited waiver available to excuse the 3 and 10 year bars, it provides a poignant example of the lack of consideration for citizen children in enforcement actions against a parent. The INA permits the Attorney General at his sole discretion to waive the 3/10 year bar in the case of an immigrant who is the spouse or son or daughter of a United States citizen but only if the refusal of readmission would result in extreme hardship to the U.S. citizen or LPR spouse or parent.[215] The hardship to a U.S. citizen child, even hardship that threatens the child's life, is not a grounds for waiving the bar to admission. Furthermore, the discretionary nature of the waiver presents another opportunity for the government to make decisions that are not subject to legal standards or meaningful administrative or judicial review.[216]

The notion, therefore, that leaving the U.S. and returning lawfully is a viable option for undocumented immigrants with U.S. citizen children, obviating the need for reform to address the issue of undocumented immigrants in the U.S., is folly.

The automatic bars to readmission accompanying departures and removals, together with the disregard for the interests of the citizen children of such immigrants under the re-admission waiver provision, promotes extended family separation and/or the effective deportation of citizen children. The thousands of parents of citizen children swept up in ICE raids who have been ordered removed or opted for voluntary removal in the face of threats of extended incarceration – a level of duress that, as discussed previously, calls into question the voluntariness of such decisions – have little or no recourse or effective means of reuniting with their citizen children in the U.S. or returning with their citizen children to the U.S. for years following deportation. While some will say that this is the price an

215 *See* INA 212(a)(9)(B)(v).
216 Testimony of Hiroshi Motomura, before the House Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, concerning Hearing on Shortfalls of 1996 Immigration Reform Legislation, April 20, 2007, at 3.

undocumented immigrant parent must pay for the decision to enter and/or remain in the United States unlawfully, this is an extraordinarily harsh penalty visited upon the citizen child – one which could doom the citizen child to psychological harm and, if effectively deported with the parent, a lifetime of educational and economic deprivation.

Prior to 1996, the INA provided a limited way for immigrants, who were not lawfully admitted, to obtain lawful permanent resident status without leaving the United States. In such instances, the immigrant was required to meet all other admission criteria and pay a significant fine for his or her unlawful entry.[217] This humanitarian provision provided a way for families to remain united while allowing their children to retain ties to the U.S. and continue their education and life here. The reintroduction of this statutory section would go far in easing the crisis facing many citizen children.

2. Cancellation of Removal

The INA permits certain undocumented immigrants facing deportation to seek "cancellation of removal." If granted, cancellation of removal permits the deportable immigrant to remain in the U.S. as a lawful permanent resident.[218] To qualify for relief, an undocumented immigrant must establish each of the following four requirements:

1. he/she "has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application";
2. he/she "has been a person of good moral character during such period";
3. he/she has not been convicted of certain crimes; and
4. he/she "establishes that removal would result in *exceptional and extremely unusual hardship to the alien's spouse, parent, or child*, who is a citizen of the United States or an alien lawfully admitted for permanent residence."[219]

217 *See* INA 245(i).
218 *See* INA § 240A(b), 8 U.S.C. §1229b(b).
219 *Id.* (emphasis added). In addition to cancellation of removal under INA § 240A(b), relief is available under INA § 240A(a) to immigrants who have been lawful permanent residents for at least five years, have lived in the U.S. for a minimum of seven years, and have not been convicted of an "aggravated felony." As a practical matter, the lawful permanent residency requirement eliminates this relief option for most undocumented immigrants. Even when that criteria is satisfied, many are excluded as a result of the broad definition of "aggravated felony." See INA § 101(a)(43). Disqualifying convictions include petty crimes such as misdemeanor offenses for which the individual did not receive a prison sentence.

A grant of relief is discretionary with an immigration judge, and the law prohibits appellate or other judicial review of denials.[220]

The requirements for cancellation of removal are much stricter now than they were prior to 1996, when the INA was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Prior to 1996, cancellation of removal (or what was referred to as "suspension of deportation") only required that the person lived in the United States for seven continuous years (rather than ten), the Attorney General was permitted to consider the hardship to the person applying for a waiver, and (most importantly for purposes of this report) the impact upon the child (or spouse or parent) of the person being deported needed only to be "extreme hardship." Apparently Congress did not believe that "extreme hardship" was a sufficiently narrow criterion, changing the law to require "exceptional and extremely unusual hardship." A return to the pre-1996 standard would at least afford immigration judges some reasonable ability to consider the harm to children in makeing cancellation determinations.[221]

The painfully narrow standard of "exceptional and extremely unusual hardship" is illustrated by the following cases in which relief was denied:

***In re Monreal*, 23 I. & N. Dec. 56 (BIA 2001):**

> This "sad" case, as characterized by the Board of Immigration Appeals ("BIA"), reflects how the change in the law to require "exceptional and extremely unusual" hardship has stripped immigration judges of the discretion to cancel deportation of an undocumented parent based

220 Federal courts have generally concluded that they lack jurisdiction to review "hardship" decisions of the Board of Immigration Appeals. *See, e.g., Romero-Torres v. Ashcroft*, 327 F.3d 887 (9th Cir. 2003) ("Because the BIA, acting for the Attorney General, is vested with the discretion to determine whether an alien has demonstrated the requisite hardship, we are without jurisdiction to review the BIA's hardship determinations under IIRIRA.").

221 The legislative history makes clear that Congress "deliberately changed the required showing of hardship from 'extreme hardship' to 'exceptional and extremely unusual hardship' to emphasize that the alien must provide evidence of harm... substantially beyond that which ordinarily would be expected to result from the alien's deportation." (Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure* § 63.04[3][a] (2006).) The House of Representatives Report on this legislative change states that the intent was to "limit[ ] the categories of illegal aliens eligible for...relief and the circumstances under which it may be granted." 104 H. Rpt. 828. The legislative history also notes that cancellation of removal is available "in truly exceptional cases," (Bruce A. Hake, *Hardship Standards,* 7 Bender's Immigr. Bull. 59 at 72 (Jan. 15, 2002).) and the House Report further clarified that the hardship under the new statute must be "beyond that which ordinarily would be expected to result from the alien's deportation." *Id*. It also expressly concluded that U.S. "immigration law and policy clearly provide that an alien parent may not derive immigration benefits through his or her child who is a United States Citizen." *Id*. For a discussion generally of hardship standards and various cases applying such standards, *See* Bruce A. Hake, *Hardship Standards,* 7 Bender's Immigr. Bull. 59 (Jan. 15, 2002) *and* Bruce A. Hake and David L. Bank, *The Hake Hardship Scale: A Quantitative System for Assessment of Hardship in Immigration Cases Based on a Statistical Analysis of AAO Decisions*, 10-5 Bender's Immigr. Bull. 1 (Mar. 1, 2005). *See, also*, Testimony of Paul W. Virtue before the House Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, concerning Hearings on Shortfalls of 1996 Immigration Reform Legislation, April 20, 2007.

on harm to his or her citizen child. It demonstrates that the economic, educational and social harm visited upon the citizen child effectively deported with an undocumented parent is all but irrelevant under current immigration law.

Monreal was a 34-year old native and citizen of Mexico, who had been living in the United States for over twenty years. He was employed and had three U.S. citizen children, ages 12, 8, and an infant. Monreal'swife had been deported from the U.S., taking the infant child with her. Monreal's parents, who maintained a close relationship with their son and grandchildren, were lawful permanent residents of the U.S. Additionally, seven of Monreal's siblings were living lawfully in America. Only one brother remained in Mexico.

Monreal's two older citizen children, ages 12 and 8, had been socialized and had lived their entire lives in the U.S., had learned American values, and were enrolled in school in the United States. If sent to Mexico with their father, the children faced "a dramatic change in their day-to-day lives. Even putting the potential change in their economic circumstances and standard of living aside, they faced a change of geography, climate, cuisine, culture, language, and social mores. They faced a loss of their home, their childhood roots, their friends, and their customary family circle. They faced separation from their grandparents. They face(d) a completely different school system and classes taught in a completely different language."[222]

The BIA concluded that the hardship the children would experience in Mexico did not rise to the level of "exceptional and extremely unusual hardship" required for cancellation of removal. The BIA recognized that this "sad" result was dictated by the statutory change that raised the standard of harm children must suffer from "extreme hardship" to "exceptional and extremely unusual hardship." It stated:

> "Were this a suspension of deportation case [under the pre-1996 statutory scheme], where only extreme hardship is required and where hardship to the respondent himself could be considered, the respondent might well have been found eligible for that relief. The hardship to the respondent, particularly in view of his 20 years of residence after his entry at age 14, his loss of long-standing

222 *Id*. at 71.

> employment, the adverse effect of his forced departure from this country on his two school-age United States citizen children, and the separation from his lawful permanent resident parents would likely have been found to rise to the level of "extreme" hardship by a majority of this Board."

***In re Andazola-Rivas*, 23 I. & N. Dec. 319 (BIA 2002):**

In *Andazola-Rivas*, the undocumented mother had lived in the U.S. for over 15 years. She had a job, a house, two cars, and other assets. She had two U.S. citizen children, ages 6 and 11. She was not married but was living with her children's father, who was supporting them financially. All of her family members were living in the United States, but only her mother had legal immigration status.

The BIA concluded that the more limited economic and educational opportunities for the children in Mexico did not satisfy the hardship requirement. For a different result, the BIA indicated, Andazola-Rivas would have had to show that her children would be deprived of *all* schooling or an opportunity to obtain *any* education. The BIA refused to consider the fact that Andazola-Rivas's entire family was living in the U.S., since only her mother was documented. The BIA also relied upon the fact that Andazola-Rivas had financial resources that would help her in Mexico. She could receive money from her relatives in the U.S., rely on her accumulated assets, turn to the father of her children for support, and apply the job skills she learned in the U.S. to a new job in Mexico, the BIA said.

One judge disagreed with the decision, emphasizing that subjecting the citizen children to a lower standard of living and education would cause "a lifetime hardship." Another, noting that the undocumented mother was a single parent with no means of support in Mexico, concluded that her deportation would create significant hardship for the citizen children warranting relief from removal.

3. Seeking Protection from Persecution

Some parents facing removal legitimately fear that citizen children, who are expected to accompany the parent abroad, will face persecution. Individuals who fear persecution are eligible to apply for protection in the U.S.[223] Notably, however,

223 *See* INA Sections 208 and 241(b)(3).

current immigration law does not extend asylum protection to instances where U.S. citizen children face the threat of persecution upon effective deportation with their parent(s).

Ironically, the rights of noncitizen children and their parents to seek relief from removal on persecution grounds are better than the rights of citizen children and their parents. The anomaly in the law that extends more protection to the noncitizen child than the citizen child is reflected in immigration court decisions concerning the practice of female genital mutilation ("FGM").[224]

In *In re A-K*, 24 I&N Dec. 275 (BIA 2007)), the BIA *reversed* the decision of an immigration judge granting cancellation of removal premised on the prospect that the father's two minor U.S. citizen daughters would be subjected to FGM if he was deported to Senegal and his children accompanied him. The Board premised its decision first and foremost on the fact that the citizen children had the legal right to remain in the United States with their mother (who was not then subject to removal proceedings), stating:

> [T]here is no dispute that the two minor children in question are both United States citizens and have a legal right to remain in this country. … [T]he children in the instant matter could avoid [the risk of FGM] altogether by remaining in the United States, which they are legally entitled to do, either by staying with the parent who is not currently in removal proceedings, or through the appointment of a guardian to ensure their welfare until such time as they reach majority.

The BIA distinguished other cases in which the threat of FGM to *non-citizen children* was held sufficient to warrant relief from removal. In this circumstance, therefore, the U.S. citizenship of the affected children was a hindrance to cancellation of removal of their father.

Even when citizen children are without another parent in the U.S., courts have denied relief finding that a parent cannot derive protection through a child.[225] Instead of receiving a grant of protection, parents are given the choice of abandoning their citizen child, which can have lifelong consequences for the child, or subjecting the child to threatened harm that causes permanent disfigurement and suffering.

---

224 FGM involves the removal of part or all of external female genitalia. See World Health Organization, Female Genital Mutilation at http://www.who.int/mediacentre/factsheets/fs241/en/. U.S. Asylum law appropriately recognizes that the practice of [FGM], which results in permanent disfigurement and poses a risk of serious, potentially life-threatening complications, "can be the basis for protection from persecution." *See Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

225 *See Gumaneh v. Mukasey* 515 F.3d 872, 881 (8th Cir. 2008)

The foregoing review of relief from removal shows the untenable choice facing undocumented immigrant parents of citizen children imbedded in U.S. immigration law and policy. The opportunity to obtain relief from deportation based on the potential consequences of the effective deportation of citizen children or permanent break-up of the family is virtually non-existent.

VII. The Effective Deportation of Citizen Children

The effective deportation of citizen children of undocumented immigrants is a troubling consequence of immigration law and policy that does not consider the best interest of children in removal proceedings. According to the Urban Institute, approximately half of all working-age undocumented adults have at least one child, and, on average, one child is likely to be affected for every two workers arrested.[226] In FY 2007, ICE removed more than 275,000 undocumented immigrants from the U.S.[227] We can conclude, therefore, that deportations in FY 2007 alone affected tens of thousands of children, if not well over 100,000 children.[228]

Undocumented immigrant parents of citizen children facing deportation are presented with a wrenching choice—keep the family together by taking the children with them to their native land, or leave the children behind in the care of friends, relatives or the state. This choice is neither an easy nor simple one. In many cases, parents of citizen children came to the United States to escape impoverishment, lack of meaningful economic and educational opportunities, and physical violence in their native lands. Keeping the family together following deportation entails subjecting their American children to these conditions.

Interviews of several parents facing deportation, or who have had a spouse deported, as a consequence of the Worthington raid spoke of the emotional dilemma they face with respect to the future of their citizen children:

- A young mother facing deportation noted a strong emotional desire to take her 2-year-old citizen son with her to Mexico, but acknowledged that the significantly greater economic and educational opportunities for him in the United States may require her to leave him behind with relatives in California.

- A Salvadoran mother of a 4-year-old citizen child noted at the time of the interview that she was struggling to decide what to do with her child when she is deported. Her son is already involved in schooling in Worthington, and the

226 The Urban Institute, *Paying the Price* at 15-16
227 U.S. Immigration and Customs Enforcement, *Fiscal Year 2007 Annual Report*, p. 4.
228 Concrete and verifiable data regarding the number of affected families are not available. Human rights Watch estimates that since 1997 "1.6 million family members, including husbands, wives, sons and daughters, have been separated from loved ones by deportations." including an estimated 540,000 of these affected family members who are U.S. citizens by birth or naturalization. Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, July 2007, p.44. The New York Times estimates that "at least 13,000 American children have seen one or both parents deported in the past two years after round-ups in factories and neighborhoods." This number is expected to grow as a consequence of the fact that most immigrants who are deported take their children with them, even if the children are U.S. citizens. New York Times, *Immigration rules Tackle issue of Parents with Citizen Children,* November 17, 2007.

only life he has known is here. While she believes it is important for a child to be with his or her mother, she stated that there would be no educational opportunities for her son if he returned with her to El Salvador.

- A young Guatemalan woman and her husband came to the United States several years prior to the Swift plant raid. They came to the United States after floods destroyed their home in Guatemala. They established a home in Worthington, and have since had two children—both boys, now 2- and 3-years-old. Her husband, who was working at Swift, was arrested and detained during the raid. Within one month, he had been returned to Guatemala. Following the raid, she remained in Worthington without documentation and unable to work. The family separation has had a significant emotional toll on her and her children, and they continue to live in fear that she will soon be arrested by ICE. She and the children have continued to remain here rather than joining her husband because there are no educational opportunities for the children in Guatemala.

Similar instances of the actual or potential separation of families, and the effective deportation of citizen children, have occurred across the country in the aftermath of ICE's increased enforcement efforts:

- In Palo Alto, California, four citizen children—ages 6, 10, 12 and 16—face leaving their country, schools, and friends after their undocumented immigrant parents were arrested by ICE and ordered to be deported to Mexico. "The Ramirez children are among thousands of U.S. citizen children of undocumented parents who are facing deportation and have to decide whether to bring their children with them—taking them away from the educational opportunities they have a right to in the United States—or let them stay and be forced into foster care."[229] Notwithstanding the significant emotional trauma that will accompany the separation of the children from their American life, and their worries about enrolling their children (who cannot write in Spanish) in Mexican schools, the family will reportedly go to Mexico together.[230]

- The undocumented parents of four citizen children—ages 5, 8, 12 and 13—residing in Liberal, Kansas, were arrested and charged with filing fraudulent documents, the victims of attorneys who advised them to remain in the United States and seek political asylum when their visas expired. The father, a

229 New America Media, *U.S.-born Kids Face Deportation As Well*, March 6, 2007; The Washington Post, *Deported Immigrants' Kids Face Dilemma*, April 4, 2007.
230 *Id.*

resident of the United States for 18 years, was deported to Mexico after an immigration judge rejected a request for cancellation of removal based on the hardship that deportation of him and his wife would have on their four citizen children. The children, who have never been to Mexico and neither read nor write Spanish well, will accompany their parents to Mexico to keep the family together. "They and other parents agonize over whether to leave their U.S. citizen children in this country, or take them to Mexico, where they will likely face impoverished conditions."[231]

- After his wife was deported to Honduras following her arrest in the New Bedford raid, the husband—himself an undocumented immigrant facing deportation—was faced with the choice of splitting the family or subjecting his two citizen children to impoverished and dangerous living conditions in Honduras. "He must decide, he said, whether to press his case in the United States or declare defeat and take the boys to rejoin their mother in Honduras. If forced to depart, he will weigh whether to leave his sons with friends in New Bedford to get a quality of schooling he believes they will not have in Honduras. Mr. Mancia said he and his wife had decided to leave their home in San Pedro Sula, Honduras, for their safety, because criminal gangs used the streets as a combat zone. [His wife's] sister was on a public bus returning from Christmas shopping on Dec. 23, 2004, when gang gunmen shot it up, killing her and 27 other passengers, he said."[232]

- A 23-year-old senior at the University of Texas was forced into the role of mother for her three, younger siblings—ages 13, 15 and 16, all U.S. citizens—after her mother was deported in March 2007 as a "criminal alien." The mother lost her residency and was sentenced to 4 months for transporting illegal immigrants in her car. The children, living on their sister's wages from a part-time job and $400 a month in food stamps, have suffered in the absence of their mother.[233]

- Eight-year-old Leslee Acuitlapa, her 13-year-old brother Justin and 3-year-old sister Sarah were born in the U.S. to a U.S. citizen mother and an undocumented father (José Acuitlapa). The family lived in a 3-bedroom home in Georgia, where José worked as a golf course groundskeeper. After José was detained and then deported to Malinalco, Mexico – a town of about 8,000 some 80 miles south of Mexico City – his wife went to the U.S. consulate in

231 The Southwest Kansas Register, *Do the children go or stay behind? Deportation orders split families,* December 27, 2006.
232 The New York Times, *As Deportation Pace Rises, Illegal Immigrants Dig In*, May 1, 2007.
233 The Chicago Tribune, *Illegal Immigrants' American-Born Kids Have A Right To Stay—But Doing So Can Often Mean Great Hardship*, April 29, 2007.

Cuidad Juárez hoping to obtain approval for her husband's green card based on her status as a U.S. citizen. She discovered that he was barred from re-entry into the U.S. for 10 years because he had entered the U.S. illegally. Unwilling to split up the family, mom and the children moved to Malinalco in October 1007. José is struggling to support his family in Mexico, working in construction and making a fraction of what he did in Georgia. Where they once lived in a 3-bedroom home, the entire family now sleeps in a single room. The children, uprooted from the only life they had ever known in the U.S., are struggling to adjust to life in impoverished conditions in a foreign land. "[The kids] miss Georgia . . . We were forced to come to a place we didn't know . . . I hope the laws change in the U.S."[234]

- Jorge Barraza, a 5-year-old U.S. citizen, now lives in Mesquite, Texas with his mother, but without his father, Juan Carlos Barraza. Juan Carlos, an undocumented immigrant, was detained and deported to his hometown of Recodo, Mexico. Because of the substandard schools and extensive drug trade in the Mexican state of Sinaloa, Jorge's parents decided to keep their son in school in Mesquite. Juan Carlos now makes $25/week in Mexico, a fraction of the $600/week he sometimes earned as a chimney cleaner in Texas. His wife (a U.S. citizen) has been forced to give up the $70,000 home she had purchased as well as the family car, and she and Jorge now live with an aunt. Ms. Merano-Barraza works to support her husband in Mexico, sending him $100-200/month. She now takes medication for depression and insomnia.[235]

The deprivations and dangers facing citizen children who are effectively deported with their parents are reflected in the Country Reports on Human Rights Practices prepared and published by the U.S. State Department. In countries that frequently have been the destination of immigrant families who have faced deportation—Mexico, Guatemala, Haiti, El Salvador, Honduras and the Dominican Republic—the State Department has identified problems in areas impacting the safety and well-being of children, including violence against women; poor educational opportunities, conditions, and/or attainment levels; child labor; inadequate employee wages; and little or no economic opportunity for advancement.[236]

234 Solis, D., *Deportations Create Dilemma for Families with Young U.S. Citizens*, The Dallas Morning News, October 22, 2008.
235 *Id*.
236 *See* U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices*, March 11, 2008.

In the countries of origin of the majority of undocumented immigrants, the State Department consistently reports that wages are woefully inadequate to support a decent standard of living for a worker and family:

- **Mexico**: "The minimum wage (slightly over $4 a day) did not provide a decent standard of living for a worker and family, and only a small fraction of the workers in the formal workforce received the minimum wage."

- **Guatemala**: "The daily minimum wage was $5.94 . . . per day for agricultural work and $6.10 . . . for nonagricultural work. The National Statistics Institute estimated that the minimum food budget for a family of five was $221.97 . . . per month, 10.8 percent higher than in 2006. Labor representatives noted that even when both parents worked, the minimum wage did not allow the family to meet its basic needs. The minimum wage did not provide a decent standard of living for a worker and family. Noncompliance with minimum wage provisions in the informal sector was widespread."

- **El Salvador**: "The minimum monthly wage was $182.05 for service employees, $178.79 for industrial laborers, and $161.97 for maquila workers. The agricultural minimum wage was $85.59, except for seasonal coffee harvesters ($93.56), sugarcane workers ($79.35), and cotton pickers ($71.38). The minimum wage did not provide a sufficient standard of living for a worker and family."

- **Haiti**: "The legal minimum daily wage, which was approximately $2.00, . . . did not provide a decent standard of living for a worker and family . . . The majority of citizens worked in the informal sector and subsistence agriculture, where minimum wage legislation does not apply and daily wages of $0.42 . . . were common."

- **Honduras**: "On March 18, [2007] the government announced a 9.7 percent general increase in the minimum wage retroactive to January 1. On December 26, [2007] the government announced an 11 percent general increase in the minimum wage to be effective January 1, 2008. According to government statistics, the minimum wage with the increases covered only 64 percent of the cost of feeding a family of five. The daily minimum wage scale is divided into 10 sectors based on the size of the worker's place of employment. The scale ranged between $2.88 . . . for unskilled labor and $7.13 . . . for workers in financial and insurance companies."

- **Dominican Republic:** The minimum monthly salary ranged from approximately $139 to $200 in the private sector, and $81/month in the public sector. For hourly workers, the daily minimum wage was $4.70 based on a 10-hour day, with cane workers receiving only $2.50/day. "The national minimum wage did not provide a decent standard of living for a worker and family."

Given the poor economic conditions and low wage rates in these countries, it is not surprising that child labor is a persistent problem. The inability of parents to earn even a nominal subsistence wage rate compels the family to remove children from school and put them to work. The State Department reports, for example, that "[c]hild labor was a widespread and serious problem" in Guatemala in 2007, and that "during the year almost one quarter of children had to work to survive." Similar comments were made regarding children in El Salvador, Honduras, Haiti, and the Dominican Republic. In Mexico, 16% of children age five to 14 were involved in child labor activities, with the main sectors of child labor consisting of sexual exploitation of children (including trafficking for underage prostitution) and agriculture.

Similarly, the State Department reports that educational opportunities for children are lacking and/or accompanied by prohibitive costs, resulting in low participation and/or advancement rates in the courntries of origin of undocumented immigrants:

- **Mexico:** "Although the government maintained programs to support maternal and infant health, provide stipends for educating poor children, subsidize food, and provide social workers, problems in children's health and education remained pervasive." While 91 percent of children between the ages of six and 14 attend school, only 68% of all children entering the first grade complete all nine years of compulsory education. The average educational attainment among the population 15 years of age and older is just 7.9 years.

- **Guatemala:** Although the constitution and law provide for free compulsory education for all children up to the sixth grade, less than half the population had completed primary education. The average nonindigenous child received 4.2 years of schooling, while the average indigenous child received just 1.3 years.

- **Haiti:** Although public primary education is free and compulsory, 40% of children never attend school due to an insufficient number of public schools.

Of those children attending school, fewer than 15% graduated from secondary school. More than 500,000 children ages six to 11 were not in school, and nearly 75% of adolescents were not in school.

- **El Salvador:** "Education is free, universal, and compulsory through ninth grade and nominally free through high school. In reality, children on average attended school for approximately 5.5 years. The law prohibits persons from impeding children's access to school due to inability to pay fees or buy uniforms. Some public schools, however, continued to charge students fees, preventing poor children from attending school."

- **Honduras:** "The education system . . . faced fundamental problems, including high dropout rates, low enrollment at the secondary level, unbalanced distribution of government spending, teacher absenteeism and low quality classroom education. Although the law provides for free, universal and compulsory education through the age of 13, . . . as many as 368,000 of the 1.7 million children ages five to 12 did not receive schooling during the year. In rural areas these were very few schools, some without books or other teaching materials for students. Most children in rural areas attended school only until the third grade and then began work in agricultural activities."

- **Dominican Republic:** "Education is free, universal, and compulsory for all minors through the eighth grade, but legal mechanisms provide only for primary schooling, which was interpreted as extending through the fourth grade . . . [A] government study estimated that the average grade level achieved by children in public schools was the fifth grade in rural areas and the sixth grade in urban areas."

In addition to economic and education deprivations, citizen children subject to effective deportation to their parents' countries of origin often find themselves in environments marked by extreme and escalating violence. Mexico, in particular, has seen a sharp increase in gruesome killings in 2008 as drug cartels battle each other for lucrative turf and distribution channels, and the government to maintain their criminal enterprises.[237] The drug war death toll in 2008 is already at 3,725, double the number of drug killings in 2006.[238] Innocent persons, including children, have been caught in the crossfire. "[D]ozens if not hundreds of innocents have

237 *See* Miller, M., *The age of Innocents*, Newsweek, November 3, 2008; Marosi, R., *For Tijuana Children, Drug War Gore Is Part Of Their School Day*, Los Angeles Times, October 25, 2008; Lacey, M., *Drug Killings Haunt Mexican Schoolchildren*, The New York Times, October 20, 2008; Caldwell, A., *Children Increasingly Caught in Crossfire of Mexican Drug Violence,* Associated Press, July 10, 2008.

238 Miller, M., *The Age of Innocents*, Newsweek, November 3, 2008.

been killed in the past year. Among them: a little girl in Cuidad Juarez; six people in front of a recreation center, also in Juarez; a 14-year-old girl in Acapulco; two small children in Tijuana."[239] According to newspaper reports, some 50 children have been killed in the first half of this year.[240]

Twelve-year-old Alexia Belen Moreno was afraid of living in her father's house in Cuidad Juarez, where drug cartels are fighting a bloody war. She begged to move in with her mother just across the border in El Paso, Texas. Her parents agreed – but asked her to stay a few more weeks to finish school. Three days later, Alexia was shot in the head blocks from her home in broad daylight. Authorities believe she was caught in crossfire when gunmen killed two men riding with her in the car.[245]

Mexican schoolchildren are being exposed to almost unimaginable scenes of gore and violence. On September 29, 2008, schoolchildren came across the bodies of 11 men and one woman in an abandoned lot across from their elementary school in Tijuana. The victims were bound and partially dressed, and each had their tongues cut out.[241] Tijuana schools have had to resort to enclosing playgrounds with razor-wire fencing, and gun battles have forced school evacuations on several occasions.[242] "Across Mexico, the carnage is impossible to hide, with severed heads and decapitated bodies turning up on streets of towns from Chihuahua to Sinaloa, sometimes nearly a dozen at a time."[243]

In addition to the threat to physical safety, the scenes of death and violence in Mexican streets threatens the emotional well-being of children. According to the Los Angeles Times, psychologists report significant fear and anxiety among children in Mexico, with anxieties increasingly manifesting themselves in eating and sleeping disorders.[245] "Experts say the atrocities that young people are hearing about – and witnessing – are hardening them, traumatizing them, filling their heads with awful images that are hard to shake."[246]

In light of the increasing violence and crime in Mexico, the U.S. State Department has cautioned U.S. citizens traveling to Mexico to be vigilant and alert to safety and security concerns, to limit their travels to well-known tourist destinations and areas, to avoid traveling alone, and to limit travel to main roads during daylight hours.[247] The State Department warns that the security situation in Mexico, particularly in

239 *Id.*
240 Caldwell, A., *Children Increasingly Caught in the Crossfire of Mexican Drug Violence*, Associated Press, July 10, 2008.
241 Lacey, M. *Drug Violence Traumatizes Mexico's Children,* New York Times, October 20, 2008.
242 Marosi, R., *Tijuana's Children Face Wave of Violence*, Los Angeles Times, November 2, 2008.
243 Lacey, M. *Drug Violence Traumatizes Mexico's Children,* New York Times, October 20, 2008.
244 Caldwell, A. *Children Increasingly Caught in the Crossfire of Mexican Drug Violence*, Associated Press, July 10, 2008.
245 Marosi, R., *Tijuana's Children Face Wave of Violence*, Los Angeles Times, November 2, 2008.
246 Marosi, R., *Tijuana's Children Face Wave of Violence*, Los Angeles Times, November 2, 2008.
247 U.S. Department of State, Travel Alert – Mexico, October 14, 2008.

the northern border area, "remains fluid; the location and timing of future armed engagements cannot be predicted.[248] The dangers to U.S. citizens in northern Mexico has prompted the U.S. military to declare Cuidad Juarez off-limits to off-duty U.S. soldiers.[249]

Clearly, the U.S. government is acting responsibly in warning citizens of the increasing dangers and risks of travel to Mexico. At the same time, however, the government is exposing citizen children of undocumented Mexican immigrants to these dangers through the deportation of their parents and the effective deportation of the family. Current immigration law and enforcement policy thus not only disregards the "best interests" of the citizen child by compelling family deportation, it is placing the citizen child who returns to Mexico with his or her undocumented parents in harm's way.

Similar threats to safety and well-being await citizen children who return with their undocumented parents to other countries. A recent report commissioned by the United Nations Health Commissioner for Refugees, Status Determination and Protection Information section noted widespread subjugation and exploitation of, and violence against, children in Guatemala, El Salvador, Honduras and Nicaragua.[250] Among the findings in this report were the following:

- **Guatemala:** In part because of the impunity with which the "self-help" death squads operate, Guatemala has the highest rate of violent death among young people in Central America. In 2006, for example, 395 children suffered violent deaths; in 2007 the number increased to 417. Moreover, the death squad executions are usually accompanied by torture. Yet, the authorities do nothing to stop the killings and, like the murders of women and girls, they dismiss them as simply revenge killings between the members of warring gangs. Thousands of children living in Guatemala's streets have faced routine beatings, thefts and sexual assaults at the hands of the National Police and private security guards.[251]

- **El Salvador:** Child abuse remains a serious and widespread problem in El Salvador. In addition to the malnutrition and inadequate education suffered by up to one-third of all Salvadoran children, many children are physically and

248 *Id.*
249 Caldwell, A., *Drug Violence's Staggering Toll*, Associated Press, October 16, 2008.
250 Manz, B., *Central America (Guatemala, El Salvador, Honduras, Nicaragua): Patterns of Human Rights Violations*, August 2008 (available at http://www.unhcr.org/refworld/docid/48ad1eb72.html).
251 *Id.* at 12

psychologically abused, are forced into low paid employment at a young age and are even forced into child prositution.[252]

- **Honduras:** "Large numbers of Honduran children are victims of violence and other human rights violations. The country's extreme poverty magnifies the problems of its children. Children are sick and dying due to a lack of medicines, oxygen, vehicles, and timely care. . . Both the police and members of the general population engage in violence against poor youth and children. The U.S. State Department reported in 2007 that Casa Alianza found that '66 percent of street children had been assaulted by police. . .' Casa Alianza started monitoring violent deaths and extra judicial executions of children and youth under 23 years of age in Honduras in February 1998. Between February 1998 and June 2006, 3,674 children and youth were killed; some 1,255 of them (34 percent) were under the age of 18. Moreover, an increasing number of the victims showed signs of torture and characteristics of unlawful executions. By the end of 2007, the number killed had grown to 3,943."[253]

"Several organizations working directly with gang members have asserted that the combination of poverty, social exclusion, and lack of educational and job opportunities for at-risk youth are perpetuating the gang problem. . . In the absence of familial and community support, many marginalized youth have turned to gangs for social support, a source of livelihood, and protection."[259]

The growth in gangs and gang violence in Central America was the subject of a recent Report for Congress by the Congressional Research Services (CRS).[254] The CRS reports that Latin America's average rate of 27.5 homicides per 100,000 people is three times the world average of 8.8 homicides per 100,000 people.[255] In 2005, the estimated murder rate per 100,000 people was roughly 56 in El Salvador, 41 in Honduras, and 38 in Guatemala.[256] The CRS also reports that impoverished conditions and lack of educational opportunities in these countries increases the risk that children will be drawn to gang life.[257]

The harsh conditions children face when effectively deported with their undocumented parents jeopardize not only their current well-being but also their

252 *Id.* at 20
253 *Id.* at 27-28
254 CRS Report to congress: Gangs in central America, October 17, 2008.
255 *Id.*, p. 2.
256 *Id.*
257 *Id.*, p. 5.
258 *Id.*

future. Current U.S. immigration law and policy is creating a large class of citizens who are denied not only basic opportunities this country offers – education, health care, relative safety and security, economic opportunities – but also the more fundamental opportunity to develop ties to their homeland.

The best interests of U.S. society are not served by the creation of a disaffected class of citizens forced from their homes and country during their formative childhood years. This portends long term harm to the peace and stability of all U.S. citizens. As a U.S. citizen, the child who is effectively deported with his parents is free to return to the U.S., and many undoubtedly will as adults. By depriving these citizens of the educational, economic and social benefits of America while they are children, we only increase the likelihood of antisocial behavior when they return to the U.S. as adults.

VIII. State Law Recognition of the "Best Interests" of the Child

In its almost complete disregard of the "best interests" of the citizen child, U.S. immigration law stands in stark contrast to the way U.S. society treats children in comparable circumstances when confronting issues and decisions regarding separation of children from their parents. Nearly every state specifically takes into account the best interests of the children when making custody decisions, protecting the relationship between parent and child. Rather than drawing a fictional line between parents and children and considering them separately, the rights of children are expressly considered under these state laws.

In addressing child custody issues, states consider various factors when determining the best interests of children, including:

- the wishes of the child's parent;[259]
- the wishes of the child;[260]
- the interaction and relationship of the child with the child's parents, siblings, and other important people in the child's life;[261]
- the child's adjustment to home, school and community;[262]
- the mental and physical health of the parents and children;[263]
- the ability of one parent to allow frequent and meaningful contact with the other;[264]

259 *See, e.g.* Ariz. Stat. § 25-403(a); Colo. Stat. § 14-10-116; Conn. Stat. § 46b-56; Del. Stat. Tit. 13 § 721; DC Code § 16-914; Idaho Stat. § 32-717; Ill. Stat. Ch. 750 § 5/60; Ind. Stat. § 31-17-2-8; Ken. Stat. § 403.270; Minn. Stat. § 518.17; Mo. Stat. § 452.375; Mt. Stat. § 40-4-212; N.M. Stat. § 40-4-9; Ohio Stat. § 3107.161; Ore. Stat. § 107.137; Wis. Stat. § 767.41

260 *See, e.g.* Ariz. Stat. § 25-403(a); Colo. Stat. § 14-10-116; Conn. Stat. § 46b-56; Del. Stat. Tit. 13 § 721; DC Code § 16-914; Ga. Stat. § 19-9-1; Idaho Stat. § 32-717; Ill. Stat. Ch. 750 § 5/60; Ind. Stat. § 31-17-2-8; Iowa Stat. § 598.41; Ken. Stat. § 403.270; La. Civ. Code art. 134; Maine Stat. Tit. 19A § 1653; Mich. Stat. § 722.23; Minn. Stat. § 518.17; Mo. Stat. § 452.375; Mt. Stat. § 40-4-212; Neb. Stat. § 42-364; Nev. Stat. § 125.480; N.M. Stat. § 40-4-9; N.D. Stat. § 14-09-06.2; Ohio Stat. § 3107.161; S.D. Code § 25-4-45; Tenn. Stat. § 36-6-106; Va. Code § 20-124.3; Wis. Stat. § 767.41

261 *See, e.g.* Ariz. Stat. § 25-403(a); Colo. Stat. § 14-10-116; Conn. Stat. § 46b-56; Del. Stat. Tit. 13 § 721; Idaho Stat. § 32-717; Ill. Stat. Ch. 750 § 5/601; Ind. Stat. § 31-17-2-8; Ken. Stat. § 403.270; Maine Stat. Tit. 19A § 1653; Minn. Stat. § 518.17; Mt. Stat. § 40-4-212; Nev. Stat. § 125.480; N.M. Stat. § 40-4-9; Ohio Stat. § 3107.161; Ore. Stat. § 107.137; 15 Vt. Stat. § 665; Va. Code § 20-124.3; Wis. Stat. § 767.41

262 *See, e.g.* Ariz. Stat. § 25-403(a); Colo. Stat. § 14-10-116; Conn. Stat. § 46b-56; DC Code § 16-914; Idaho Stat. § 32-717; Ind. Stat. § 31-17-2-8; Ken. Stat. § 403.270; Maine Stat. Tit. 19A § 1653; Mich. Stat. § 722.23; Minn. Stat. § 518.17; Mo. Stat. § 452.375; Mt. Stat. § 40-4-212; N.M. Stat. § 40-4-9; N.D. Stat. § 14-09-06.2; Ohio Stat. § 3107.161; Tenn. Stat. § 36-6-106; 15 Vt. Stat. § 665; Wis. Stat. § 767.41

263 *See, e.g.* Ariz. Stat. § 25-403(a); Colo. Stat. § 14-10-116; Conn. Stat. § 46b-56; Del. Stat. Tit. 13 § 721; DC Code § 16-914; Ill. Stat. Ch. 750 § 5/601; Ind. Stat. § 31-17-2-8; Ken. Stat. § 403.270; La. Civ. Code art. 134; Mich. Stat. § 722.23; Minn. Stat. § 518.17; Mo. Stat. § 452.375; Mt. Stat. § 40-4-212; Nev. Stat. § 125.480; N.M. Stat. § 40-4-9; N.D. Stat. § 14-09-06.2; Ohio Stat. § 3107.161; Tenn. Stat. § 36-6-106; Va. Code § 20-124.3; Wis. Stat. § 767.41; Wyo. Stat. § 20-2-201

264 *See, e.g.* Ariz. Stat. § 25-403(a); Colo. Stat. § 14-10-116; DC Code § 16-914; Ill. Stat. Ch. 750 § 5/601; La. Civ. Code art. 134; Maine Stat. Tit. 19A § 1653; Mich. Stat. § 722.23; Mo. Stat. § 452.375; Nev. Stat. § 125.480; Ohio Stat. § 3107.161; Ore. Stat. § 107.137; Tenn. Stat. § 36-6-106; Utah Code § 30-3-10; Va. Code § 20-124.3

- which parent has provided primary care for the child;[265]
- the nature and extent of any duress used in obtaining an agreement regarding custody, the health, safety, and welfare of the child generally;[266]
- the developmental needs of the child;[267]
- the capacity of the parent to take into account and meet the needs of the child;[268]
- the length of time the child has spent in a stable environment;[269]
- and potential disruption of the child's life.[270]

In fact, forty-two of the fifty states consider the child's interest at some point in proceedings bearing upon child welfare and custody issues.[271]

Similarly, state law takes into account the best interests of the child when a custodial parent wants to remove a child from the jurisdiction over the objection of a noncustodial parent.[272] In order for a custodial parent to remove a child from the jurisdiction, in some states there needs to be a "real advantage" for the best interests of the child.[273] In those states, there must be a "substantial improvement" in the quality of life for the child.[274] Other states consider the age, developmental needs, and impact on the child;[275] the child's preference;[276] and the improvement of quality of life for both the parent and the child.[277] In the end, the primary goal is to maximize "the child's prospects of a stable, comfortable and happy life."[278]

In short, the states typically take into account the child's stated interests, stability, contact with relatives, proximity to the parent, developmental needs, and

265 *See, e.g.* Ariz. Stat. § 25-403(a); Minn. Stat. § 518.17
266 *See*. e.g., Cal. Fam. Code § 3100; Neb. Stat. § 42-364; N.C. Stat. § 50-13.2; 43 Okla. Stat. § 109; S.D. Code § 25-4-45; Wash. Code 26.09.002
267 *See, e.g.*, Conn. Stat. § 46b-56; Iowa Stat. § 598.41; Mt. Stat. § 40-4-212; Nev. Stat. § 125.480; N.D. Stat. § 14-09-06.2; Ohio Stat. § 3107.161; 15 Vt. Stat. § 665; Va. Code § 20-124.3; Wis. Stat. § 767.41
268 *See, e.g.*, Colo. Stat. § 14-10-116; Conn. Stat. § 46b-56; 15 Vt. Stat. § 665; Wyo. Stat. § 20-2-201
269 *See, e.g.*, Conn. Stat. § 46b-56; La. Civ. Code art. 134; Maine Stat. Tit. 19A § 1653; Mich. Stat. § 722.23; Minn. Stat. § 518.17; Mt. Stat. § 40-4-212; Ohio Stat. § 3107.161; Tenn. Stat. § 36-6-106; Wash. Code 26.09.002
270 *See, e.g.*, DC Code § 16-914; Idaho Stat. § 32-717;
271 Leiter, R., *Family Law: Child Custody and Support*, Thomson Gale 50 State Surveys (2005).
272 *See, e.g. Gilbert v. Gilbert*, 730 N.W.2d 833, 836 (N.D. 2007); *Ireland v. Ireland*, 717 A.2d 676, 685 (Conn. 1998).
273 *Abbott v. Virusso,* 862 N.E.2d 52, 59 (Mass. Ct. App. 2007).
274 *Gruber v. Gruber,* 583 A.2d 434, 439 (Penn. 1990).
275 *See, e.g.*, Minn. Stat. § 518.175; Fla. Stat. § 61.13001; Colo. Stat. § 14-10-129 (including educational opportunities); La. Rev. Stat. § 9:355.12; Wash. Code § 26.09.520; *Regan v. Regan*, 2006 WL 2604987, at *3 (Conn. Super. Ct. 2006); *Benedix v. Romeo,* 2006 WL 633782 at *6 (Ark. Ct. App. 2006)
276 *See, e.g.*, Minn. Stat. § 518.175; Fla. Stat. § 61.13001; La. Rev. Stat. § 9:355.12; *Benedix v. Romeo*, 2006 WL 633782 at *6 (Ark. Ct. App. 2006)
277 *See, e.g.*, Minn. Stat. § 518.175, *Gilbert*, 730 N.W.2d 833 at 836, *In re Marriage of Matche*n, 866 N.E.2d 683, 690 (Ill. App. Ct. 2007), Mich. Stat. § 722.31; Fla. Stat. § 61.13001; La. Rev. Stat. § 9:355.12; Wash. Code § 26.09.520; Cal. Fam. Code § 3011 (considering the health, safety, and welfare of the child"); D'Onofrio v. D'Onofrio, 365 A.2d 27, 30 (N.J. Super. Ch. 1976).
278 *Tropea v. Tropea*, 665 N.E.2d 145, 151 (N.Y. 1996).

educational opportunities when dealing with custody between two parents that are frequently geographically close. Similar factors, such as the child's preference, quality of life, developmental needs, and educational and economic opportunities, are taken into account when the custodial parent is moving away.

However, when the parent's immigration status is at issue, and the child faces a decision about whether to leave the country or leave his or her family unit, our immigration laws ignore the best interests of the child—including developmental, economic, and educational interests. The INA permits consideration of the interests of the child in only very narrow, discretionary circumstances ("exceptional and extremely unusual hardship.") that, as discussed above, are rarely met.[279]

There also is a disconnect in procedural protections between family law and immigration law. In order to determine the "best interest" of the child, the vast majority of states provide, in varying circumstances, for the appointment of a guardian ad litem ("GAL") to determine and advocate for the best interests of the child[280] or separate legal counsel to advocate for the child's interests directly.[281] Similarly, the federal government has adopted the use of guardians ad litem in the Child Abuse Prevention and Treatment Act (CAPTA). In that law, Congress made the payment of funds to states dependent on the states' use of GALs to promote the best interests of children in child abuse proceedings.[282] Between CAPTA and state family law, guardians ad litem are widespread when it comes to protecting the best interests of children—protection that does not exist in the immigration setting.

The Federal government has on various occasions considered adopting a GAL program or something similar for unaccompanied child immigrants. Such a proposal became law on December 23, 2008, when the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457; "TVPRA") went into effect. It authorizes the Secretary of Heath and Human Services to appoint independent child advocates for vulnerable unaccompanied children.[283] These child advocates are intended to be a powerful voice for children.

279 *See* § 240A(b).
280 *See, e.g.*, Alaska Stat. 25.24.310; Colo. Stat. § 14-10-116; Del. Stat. Tit. 13 § 721; DC Code § 16-914; Ga. Stat. § 19-9-1; Haw. St. § 571-46; Ill. Stat. Ch. 750 § 5/601; Ind. Stat. § 31-17-6-3; Iowa Stat. § 598.12; Maine Stat. Tit. 19A § 1507; Mich. Stat. § 722.24; Minn. Stat. § 518.17; Miss. Stat. § 43-21-121; Mo. Stat. § 452.402; Nev. Stat. § 128.100; N.J. Stat. § 9:2-4; N.M. Stat. § 40-4-8; N.D. Stat. § 14-08-06.4; 43 Okla. Stat. § 107.3; Or. Rev. Stat. § 418.770; R.I. Gen. Laws § 15-5-16.2; S.C. Code § 20-7-1545; Tex. Fam. Code § 107.021; Utah Stat. § 30-3-10.8; 15 Vt. Stat. § 669; Wash. Code § 26.09.220; Wis. Stat. § 767.407.
281 *See, e.g.*, Alaska Stat. 25.24.310; Ct. Stat. § 46b-54; DC § 16-914; Iowa Stat. § 598.12; Neb. Stat. § 42-358; Nev. Stat. § 128.100; N.J. Stat. § 9:2-4; R.I. Gen. Laws § 15-5-16.2; Tex. Fam. Code § 107.021
282 42 U.S.C. § 5106.
283 *See* Section 235(c)(6).

The statute specifically provides that child advocates receive "access to materials necessary to effectively advocate for the best interest of the child and protects the child advocate from being forced to testify or provide evidence received from the child.[284] Despite the Child Advocate requirement and various GAL proposals for unaccompanied immigrant children, such a proposal has not yet been made for citizen children, who are excluded completely from the proceedings of their immigrant parents.

The same principles and values at work in the context of domestic family law proceedings can and should be applied in U.S. immigration law, policy, and enforcement. The best interests of the U.S. citizen children are no less important or deserving of protection in the immigration setting than in state family law proceedings. U.S. immigration law should be revised to give due consideration to the best interests of U.S. citizen children, including provisions for GALs and/or separate legal counsel to advocate for their interests in deportation proceedings against their undocumented parents.

284 *Id.*

IX. International Norms and Law on The Rights Of Citizen Children

The United States has long played a leading role on the international stage promoting the recognition of, and respect for, international law on human rights. The U.S. government often touts its efforts in this regard, as reflected in public statements by the U.S. Department of State:[285]

> The protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago. Since then, a central goal of U.S. foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights. The United States understands that the existence of human rights helps secure the peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises.

The U.S. has expressed its commitment to norms of international human rights law as a signatory to several international conventions, including the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the American Convention on Human Rights, the Convention on the Rights of the Child.[286] This section of the report analyzes the extent to which current U.S. immigration law and policy comports with international human rights standards and law. It is our conclusion that the almost complete disregard of the best interests of the child and a penchant toward family separation under current U.S. immigration law and enforcement policy falls well short of compliance with international law.

A. International Law on the Protection of Family and Rights of Children

International law declares that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[287] Central to recognition of the family as the foundation of society is protection of the right of the family to live together and to be free from arbitrary, abusive or unlawful interference.[288] The UN Human Rights Committee has emphasized:[289]

285 *See* http://www.state.gov/g/drl/hr/.
286 The United States ratified the ICCPR on June 8, 1992, and signed the American Convention on Human Rights on June 1, 1977. The United States signed the CRC on February 16, 1995, but has not ratified the CRC.
287 *See* ICCPR, Art.23, Para. 1; UDHR, Art. 16, Para. 3; ACHR, Art. 17, Para. 1.
288 *See* ICCPR, Art. 17, Para. 1, and Art. 23; UDHR, Art. 12; ACHR, Art. 11, Para. 2.
289 *See* UN Human Rights Committee, "General Comment 19: Protection of the Family," U.N. Doc. HRI/GEN/1/Rev. 1 at 28 (1994). *See also* Declaration of the Rights and Duties of Man, Arts. V (right to protection of private and family life) and VI (right to a famly and protection thereof).

> [T]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State. … The right to found a family implies, in principle, the possibility to procreate and live together. … Similarly, the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.[290]

In keeping with these principles, international law imposes limits on states' powers to deport non-citizens. In at least two cases, the UN Human Rights Committee concluded that a state's decision to deport the parent of a citizen child violated international conventions.[291]

The promotion and protection of the best interests of children, find special recognition in the Convention on the Rights of the Child (CRC) which among other, things states:

> [T]he family, as the fundamental group of society and the natural environment for the growth and well-being of all of its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community; [and]
>
> [T]he child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding[.][292]

The CRC goes on to specify measures for the recognition of, and respect for, the interests of the child:

- In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration.*[293]

---

290 The U.S. Supreme court similarly has recognized that the "right to live together as a family" is an "enduring American tradition" meriting protection by the Constitution. *See Moore v. City of East Cleveland*, 431 U.S. 494, 500, 503 n. 12 (1977) (plurality).

291 *See Winata v. Australia*, Communication No. 930/2000, U.N. Doc. CCPR/C/72/D/930/2000 (2001) (finding that Australia's efforts to deport the Indonesian parents of a citizen child arbitrarily interfered with the family's right to unity under the ICCPR, rejecting Australia's argument that deportation of the parents did not force the citizen child to leave Australia with his parents); *Madaferri v. Australia*, Communication No. 1011/2001, U.N. Doc. CCPR/C/81/D/1011/2001 (2004) (holding that the deportation of the parent of a citizen child violated the ICCPR, even though the parent was deportable due to a prior criminal conviction in his native Italy).

292 *See* CRC, Preamble, Paras. 5 and 6. The ICCPR also provides that "[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." ICCPR, Art. 24, Para. 1. *See also* ACHR, Art. 19 ("Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state."); UDHR, Art. 25 ("Motherhood and childhood are entitled to special care and assistance.").

293 *Id.*, Art. 3, Para. 1 (emphasis added).

- States Parties shall undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.[294]

- States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.[295]

- States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. … For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.[296]

- No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.[297]

- States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents, or as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.[298]

The CRC (as well as other sources of international law) also notes the importance of educational and economic opportunity to the well-being of family and children, and recognizes a child's "right to education" and a "standard of living adequate for the child's physical, mental, spiritual, moral and social development."[299]

294 *Id.*, Art. 8, Para. 1.
295 *Id.*, Art. 9, Para. 1. Article 9 goes on to state that in the event of separation of a child from one or both parents as a result of State action, such as the detention, imprisonment or deportation of the parent, the State "shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child." *Id.*, Para. 4.
296 *Id.*, Art. 12.
297 *Id.*, Art. 16, Para. 1.
298 *Id.*, Art. 18, Para. 1.
299 *Id.*, Arts. 27 and 28; *see also* American Declaration of the Rights and Duties of Man, Arts. VII (right to protection for children), XII (right to education), and XIV (right to work and to fair remuneration); UDHR, Art. 26 ("Everyone has the right to education. … Education shall be directed to the full development of the human personality and to strengthening of respect for human rights and fundamental freedoms.").

The CRC (and other international laws protecting the rights of children) was invoked by the Canadian Supreme Court and recognized as imposing limits on the government's deportation authority in *Baker v. Canada (Minister of Citizenship and Immigration)*.[300] In *Baker*, the court held that when immigration authorities make decisions about the deportation of a non-citizen parent of citizen children, they must give "attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision."[301] The court concluded that, although the CRC and other international laws on children's rights had not been incorporated into Canadian law by Parliament, the values and principles of international law reflected therein nevertheless should be respected in "humanitarian and compassionate" decisions under Canadian immigration law.[302]

Similarly, judicial and administrative bodies of the European Union, applying the European Convention on Human Rights, have recognized that a Member State's interest in enforcement of its immigration laws must be balanced against (and may be superceded by) the rights to family unity recognized under the Convention.[303] The Council of the European Union has determined that a state's immigration laws must "take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin."[304]

B. U.S. Immigration Law and Policy Does Not Comply with International Law

In contrast to its sister nations to the north and in Europe, current U.S. immigration law and enforcement policies continue to diverge from widely-recognized standards of international human rights law in several respects. First and foremost, U.S. immigration law largely ignores the best interests of the child in the removal and deportation process. Not only is there no meaningful opportunity for

300 *See Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 Can. Sup. Ct. Lexis 44 (July 9, 1999).
301 *Id.*, ¶ 74.
302 *Id.*, ¶¶ 69-71. Decisions since *Baker* was decided in 1999 have emphasized the "best interests" of the child, although the child's "best interests" have not become a trump card for the parent seeking relief from deportation. S*ee, e.g., Legault v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 315 (affirming immigration officer's determination that criminal history of non-citizen father prevailed over any H&C factors because the child would not suffer "disproportionate hardship" from father's deportation); *Alexander v. Canada (Solicitor General)*, 2005 FC 1147, ¶¶ 3-4 (Court rejected argument by non-citizen mother of two citizen children seeking a stay of her removal proceedings concluding that the mother could be deported without violating the rights of her children).
303 *See, e.g., Ciliz v. Netherlands,* App. No. 29192/95, European Court of Human Rights (11 July 2000); *Yousef v. United Kingdom*, App. No. 14830/89, European Commission on Human Rights (30 June 1992); *Berrehab v. Netherlands,* Series A no. 138 (21 June 1988).
304 Council of the European Union, "Council Directive 2003/86/EC of 22 September 2003 on the right to family unification," Art. 6(2).

the child to be heard in the administrative and judicial process, the best interests of the child are deemed irrelevant in most instances.

In addition, the widespread separation of parents and children as a consequence of lengthy detention, as well as removal/deportation of parents, cannot be reconciled with the fundamental family unity goals underlying international human rights law and, ironically, U.S. immigration law. Finally, the effective deportation of citizen children – *i.e.,* the departure of citizen children with their deported parent(s) – subjects the child in his or her formative years to clearly inferior educational opportunities (and, in some cases, no meaningful educational opportunity), economic impoverishment and significant health and safety risks, contrary to the letter and spirit of international human rights pronouncements.

The non-compliance of U.S. immigration law and policy with international human rights principles was highlighted in a March 5, 2008, Report of the Special Rapporteur on the Human Rights of Immigrants to the United Nations Human Rights Council:

> In recent history, governments have allowed limits to be placed on their power regarding immigration policy, recognizing that it may only be exercised in ways that do not violate fundamental human rights. Therefore, while international law recognizes every State's right to set immigration criteria and procedures, it does not allow unfettered discretion to set policies for detention or deportation of non-citizens without regard to human rights standards. …
>
> Moreover, the rights of children to live together with their parents are violated by the lack of deportation procedures in which the State's interest in deportation is balanced against the rights of the children. United States mandatory deportation laws harm the human rights of children of non-citizen parents. [305]

The concerns expressed regarding mandatory deportation also hold true for all deportations that fail to consider the rights of children. Changes in U.S. immigration law and policy are clearly warranted if U.S. actions to protect children and advance human rights are to live up to the country's ideals and rhetoric.

305 United Nations Human Rights Council, "Report of the Special Rapporteur on the Human Rights of Immigrants, Jorge Bustamante," March 5, 2008, ¶¶ 9, 10, 15 and 19.

X. Conclusions and Recommendations

The policy decisions and legislative choices made during our current immigration crisis have generated heated debate. The advocates on both sides of the issues present reasoned and sincerely felt arguments. There are some basic principles, however, on which the most ardent advocates on both sides ought to be able to agree. One such area of agreement should be to protect and promote the best interests for children who are Constitutionally vested with the rights and privileges of U.S. citizenship.

Through this report, we have endeavored to examine the various harms visited upon U.S. citizen children of undocumented immigrants as a consequence of worksite and home raids that have, quite simply and clearly, torn families apart. The humanitarian crises that have stemmed from the unprecedented escalation of interior immigration enforcement over the last several years reveals the U.S. immigration for what it is – a clearly broken system. Interior immigration enforcement, conducted through worksite and home raids, clearly and directly harms children who are citizens of the United States and therefore have certain basic rights which presently are being disregarded. Our current immigration laws, policies, and enforcement scheme clash violently with the deep-seated and fundamental aim of protecting the best interests of our children in other areas of our law and society, as well as fundamental principles of human rights our nation champions and holds dear.

We offer the following recommendations to prompt meaningful and reasoned debate on the issues, with the hope that this will lead to a more humane immigration policy that does not dismiss the harm to citizen children as little more than collateral damage. We do so cognizant of the concern that the citizen child not be transformed into a *per se* ticket to lawful residency in the United States by the undocumented parent. These recommendations are designed to (1) address the systemic barriers to lawful entry and/or presence in the United States that have led to the large, undocumented population; (2) afford the undocumented, immigrant parent of a citizen child a reasonable opportunity to make his or her case for remaining in the United States based on consideration of the "best interests" of the child, bringing immigration law and policy into conformity with other areas of law where the interests of children are recognized; and (3) minimize the harm to children in the immediate aftermath of enforcement actions by suggesting changes to arrest and/or detention practices without compromising law enforcement.

Recommendations to Congress

Address Systemic Barriers to Lawful Status:

- Correct systemic problems with the lack of visa numbers available to meet the needs of U.S. employers and families by adopting a system that is responsive to labor market needs and promotes the goal of family unity.

- Enact legislation that recaptures visa numbers that have gone unused because of governmental delays and inefficiencies. Such legislation should include oversight to ensure the timely and fair adjudication of benefit petitions.

- Amend the INA to allow a citizen child to petition for the lawful admission and residency of a parent when such child is under 21 years of age. In the case of a citizen child under age 18, a legal guardian, acting in the best interests of the child, should be allowed to petition for a parent.[306]

- Amend the INA to permit the temporary admission of the parent of a citizen child to enable the parent to pursue immigration processing in the U.S. This will promote family unity and afford the citizen child an opportunity to pursue his or her education and integration in the U.S. during the period the parent is waiting for a visa number to become available. Currently, the lack of available visa numbers and bureaucratic delays in processing keep the parent seeking admission and, in cases where the parent is unwilling to split up the family, the citizen child out of the U.S. for an extended period of time.

- Congress should provide a humanitarian mechanism that promotes family unity and allows undocumented immigrants an opportunity to seek "adjustment" of their immigration status without first departing the U.S. Current immigration law operates to deprive undocumented immigrants of a meaningful opportunity to obtain lawful status by requiring them to leave the U.S. and apply for an immigrant visa at a U.S. consulate in their home countries. The majority of undocumented immigrants who leave the U.S. to obtain a visa, however, are barred from returning to the U.S. The law thus places the undocumented immigrant with family obligations in the U.S. in a "Catch 22" situation – he cannot adjust his status without leaving, but if he leaves he is barred from returning to the U.S. for up to 10 years. Congress should amend the INA to address this situation, promote family unity and afford undocumented immigrants with citizen children a meaningful path to lawful residence that

306 In particular, the family-based "immediate relative" definition (INA Section 201(b)(2)(A)(i)) should be amended to provide that "the term 'immediate relatives' means the children, spouses, and parents of a citizen of the United States."

does not compel the break-up or effective deportation of the family.[307] Such a mechanism could include a "fine" for unlawful entry.

- Under current immigration law, the authority to waive the 3- or 10-year-bar to readmission to the U.S. (discussed in the immediately preceding bullet) rests entirely within the discretion of the Attorney General. There are inadequate legal standards governing the exercise of this discretion, and the law prohibits judicial review of waiver determinations. Congress should amend the law to require the exercise of the waiver authority reasonably and in good faith, with due regard for the best interests of the U.S. citizen children of the undocumented immigrant. In addition, Congress should amend the law to allow for judicial review of waiver determinations. Finally, Congress should afford the citizen child and/or his lawful guardian the ability to petition for a waiver on behalf of the parent, and provide the citizen child with legal standing to challenge an adverse determination by the Attorney General in U.S. federal courts.[308]

Meaningfully Address the "Best Interests" of Citizen Children in the Removal Process:

- Congress should grant immigration judges the discretion to consider the "best interests" of the citizen child in deportation or removal proceedings. Under current immigration law, the best interests of the child – an overriding concern in other areas of the law – find no hearing and are accorded no weight. The amendment of the INA to at least permit immigration judges to consider child welfare issues in the deportation or removal process would restore the discretion available to immigration judges prior to the 1996 INA amendments.[309]

- The provisions of the INA relating to relief from removal (*i.e.*, deportation) should be amended to provide for consideration of the "best interests" of a child who is a citizen or lawful permanent resident of the United States. Current immigration law permits cancellation of removal only where the removal would result in "exceptional and extremely unusual hardship to the alien's spouse, parent or child who is a citizen of the United States or an

307 This can be accomplished by amending INA Section 212(a)(9) to eliminate bars that preclude families from remaining in the United States while seeking adjustment of status. Alternatively, Congress should amend INA Sections 212(a)(9)(b)(v) and 212(a)(9)(C)(iii) to provide for a reasonable waiver of the bar to readmission to the United States – one that incorporates consideration of the best interests of citizen children of an immigrant who is inadmissible due to the accrual of unlawful presence.

308 These proposed changes would require the amendment of INA Section 212 and INA Section 242.

309 The INA should be amended to provide that: "In the case of an alien deportable under section 237 who is the parent of a child who is a citizen of the United States, the immigration judge may exercise discretion to decline to order the alien removed from the United States if the judge determines that such removal is clearly against the best interests of the child."

alien lawfully admitted for permanent residence." This heightened standard of hardship, enacted with the 1996 INA amendments, makes it virtually impossible to obtain relief from deportation based on the hardship to the citizen child. It thus serves as another barrier to family unity in the U.S. and promotes the effective deportation of citizen children with their undocumented parent(s).[310]

- Current immigration law precludes undocumented immigrants who are "aggravated felons" from obtaining relief from removal (*i.e.,* deportation). However, the definition of an "aggravated felon" is extremely broad, encompassing persons convicted of petty offenses, including offenses that do not entail any jail time. The additional penalty of removal visited upon both undocumented and legal immigrants labeled an "aggravated felon" as a result of a minor offense cannot be reconciled with promoting the "best interests" of the citizen child. By amending the INA to permit such immigrants to seek relief from removal, Congress will afford immigration judges the discretion to make removal determinations based on the relevant facts and circumstances of each individual case, including consideration of the severity of the criminal offense, present danger to the community, and the "best interests" of affected citizen children.

- Current immigration law effectively prevents the review of cancellation of removal determinations made by immigration judges. Congress should amend the INA to provide for meaningful judicial review in U.S. federal courts of removal decisions adverse to the undocumented immigrant where the interests of citizen children are involved.[311]

- Unlike other areas of law involving child welfare issues, current immigration law does not provide for an appointment of a guardian ad litem to attend to and advocate for the best interests of affected children. To bring immigration law in line with child welfare laws, and to promote the full and fair consideration of the "best interests" of the citizen child in deportation proceedings, Congress should amend the INA to allow for participation of a guardian ad litem for a citizen child in any immigration proceeding against the child's parent(s). In particular, the guardian ad litem should have standing to protect and advocate for the best interests of the citizen child in all immigration detention and removal proceedings.

310 Congress should amend INA Section 240A(b)(1)(D) to expressly provide for consideration of the "best interests" of the citizen child. Alternatively, this section of the INA should be amended to revert to the prior "suspension of removal" standard in place prior to the 1996 INA amendments.

311 INA Section 242 should be amended to provide for *de novo* review in U.S. federal courts of cancellation of removal determinations that are adverse to the interests of citizen children.

- Amend the INA to allow parents to derive asylum through their citizen children. In particular, the threat of persecution of the citizen child in the undocumented parent's country of origin should be recognized as a basis for granting asylum to the parent.

- Amend the INA to eliminate mandatory detention of arrestees in circumstances involving child care issues, thereby affording ICE discretion to release undocumented immigrant parents of minor children with appropriate monitoring and/or reporting in lieu of detention. Mandatory detention of certain immigrants, regardless of primary child care responsibilities, should be eliminated.

Effective Congressional Oversight of Immigration Enforcement and Its Impact on Citizen Children:

- The potential for a child welfare crisis created by increased interior enforcement actions could shift a significant portion of raid costs to state and local governments. Congress should appropriate funds to enable state and local governments to meaningfully assess and address the impact of current immigration law and enforcement policies on citizen children.

- ICE should be required to gather demographic and other data regarding citizen children affected by immigration enforcement actions, and document specific actions undertaken to minimize the harm to children. ICE should be required to report such data annually to Congress.

Recommendations to U.S. Immigration and Customs Enforcement

ICE Enforcement Practices:

- ICE's "Guidelines for Identifying Humanitarian Concerns Among Administrative Arrestees When Conducting Worksite Enforcement Operations" should be modified and made mandatory in all enforcement actions. The Guidelines should be modified as follows:

    1. State and Local humanitarian response teams must be given sufficient advance, confidential notice of a worksite enforcement action so that the teams can deploy and be present at the raid site at the time of the enforcement action to assess and address humanitarian issues warranting release rather than detention (hereafter, a "Humanitarian Assessment");

2. ICE must provide interpreters capable of communicating with detainees in their native languages, and/or ICE must arrange to have federally certified interpreters available at the raid site to assist in communications between detainees and humanitarian response team members;

3. ICE must give reasonable consideration to the release recommendations of the humanitarian response team, and the rationale for rejecting any such recommendation must be documented;

4. Except in exigent circumstances where the safety of arrestees or law enforcement personnel is subject to imminent threat, no arrestee shall be removed from the site of the enforcement action until a Humanitarian Assessment and determination on any release recommendation has been completed;

5. If the parent of a minor child is to be detained, and care arrangements for the child are unknown or unsatisfactory to the humanitarian response team, ICE must take appropriate action to provide the parent and humanitarian response team with resources necessary to ensure that suitable arrangements are made for the care of the child while the parent is detained (including, without limitation, making care arrangements with local NGOs and community organizations, and/or arranging with state and/or local authorities to provide for the care of the child), and document the arrangements made with respect to each such child;

6. Before any arrestee subject to detention is removed from the site of the enforcement action, the individual must be afforded prompt, reasonable, confidential access to a telephone to make necessary arrangements for the care of children or other family members;

7. In the event it becomes necessary to transfer a detainee from the original detention facility to another detention facility, on the date of the transfer ICE must notify a designated representative of the humanitarian response team of the name of the detainee being moved, the date of transfer, and complete contact information for the new detention facility, and such information must be made immediately available to the public by the humanitarian response team;

8. In order to ensure that the immigration rights of the detainee, as well as the "best interests" of any citizen child, are adequately addressed and protected in the removal and deportation process, ICE must afford

detainees prompt access to immigration counsel (not merely criminal defense counsel);

9. In keeping with the immediately preceding paragraph, ICE may not ask detainees to consent to voluntary removal from the United States within 72 hours of their arrest and until detainees have been afforded a reasonable opportunity to consult an immigration lawyer, nor may ICE or other authorities exert pressure on detainees to agree to voluntary removal through threats of extended incarceration or other coercive means;

10. Any request by ICE or authorities that a detainee consider voluntary removal must explain to the detainee the immigration consequences of accepting voluntary removal, be presented in plain, understandable language in the detainee's native language, and read to the detainee in his or her native language, and the detainee must be afforded a reasonable opportunity to consult with counsel and his family in the United States before consenting to voluntary removal; and

11. If a detainee is removed or deported, on the date of removal or deportation ICE shall notify the designated representative of the humanitarian response team of the name of the detainee, the date of removal, the departure location, and the removal destination, and such information must be made immediately available to the public by the humanitarian response team.

- ICE should develop guidelines for conducting home raids that ensure that such enforcement actions are truly "targeted" and minimize the prospect of potential harm to children, as follows:

1. Except in the case of exigent circumstances implicating the safety of law enforcement personnel or other persons, raids of homes where children are or may be present should be discouraged and reasonable efforts should be made to identify and arrest the target of a warrant outside the home and the presence of children;

2. Random stops of persons at or near schools, school bus stops, and other locations where children are or may be present should be precluded, as should random checks of persons based on racial or ethnic profiling;

3. "Knock and talk" searches should be precluded absent a clear demonstration of probable cause to believe that the target of a home

enforcement action is present at the subject location, such as observation of the subject of an arrest warrant in or about the premises;

4. Denial of entry to a home by a resident, including closing an answered door, shall not be deemed adequate probable cause to permit forced entry to the home;

5. In the absence of demonstrable probable cause to believe that the subject of an arrest warrant is physically present at a location (such as by observation of the subject of the warrant in or about the premises), entry to the home must be premised on informed consent by an adult resident of the home with the right to provide such consent;

6. Except in the case of exigent circumstances implicating the safety of law enforcement personnel or other persons, reasonable efforts should be made to serve arrest warrants at a home at times when the potential harm or trauma to children is minimized, such as when children are more likely to be outside the home; and

7. Whenever an individual is arrested during a home raid, reasonable efforts must be undertaken to assess whether the detainee has child care responsibilities that cannot or may not be met by others, consistent with the ICE Guidelines for worksite raids (as modified above) and assessment of the best interest of the child, and ICE should give reasonable consideration to electronic monitoring of the arrestee in lieu of detention pending removal proceedings.

Detention/Prosecutorial Discretion:

- ICE should develop guidelines favoring the release of undocumented immigrant parents of minor children with appropriate monitoring and/or reporting in lieu of detention. The guidelines favoring release with monitoring and/or reporting in lieu of detention should extend to all parents of minor children, not only single parents, including the arrested father of children whose mother remains with the children and vice versa.

- ICE should be flexible and use their best judgment – in other words, use prosecutorial discretion – when making decisions about whether to arrest and detain parents. Where the presence of an undocumented immigrant with citizen children poses no immediate or identifiable threat to the safety

and welfare of others, and strict enforcement threatens harm to children, ICE should consider the harm to children in prioritizing enforcement activities.

Recommendations to Immigration Courts

- Upon amendment of the INA as recommended above, immigration judges should be required consider the "best interests" of the citizen child in rendering removal and deportation decisions, and the citizen child and/or his or her guardian ad litem shall be permitted to appear and present argument and evidence relating to the same in all immigration judicial proceedings.

- The immigration judiciary should establish mandatory guidelines favoring the release of detained parents of minor children present in the United States in lieu of continued detention. These guidelines should allow for the release of detained parents subject to electronic monitoring and/or regular reporting to immigration authorities, and/or the establishment of a reasonable bond that meaningfully takes into account the financial resources of the detainee.

Recommendations to State and Local Governments/Agencies

- Humanitarian Response Teams, consisting of state and local social service agency personnel and/or legal rights organizations, should be formed and trained to identify and respond to humanitarian issues in the course and aftermath of immigration enforcement actions. Immigration enforcement arrestees should be considered for release in lieu of detention due to humanitarian issues, including child care issues, at the time of enforcement actions. Wherever possible, the Team should include persons capable of communicating with potential targets of enforcement actions in the native language of such persons.

- Humanitarian Response Team members must not act in a law enforcement capacity, and arrestees must be informed that any information shared with a team member will not be communicated to ICE agents or other law enforcement personnel except with the written consent of the arrestee and as may be appropriate for ICE to assess the possible release of the arrestee on humanitarian grounds.

- State and local communities should assess the educational, health, and economic impact raids have upon children and affected communities.

- State and local social service agencies should take steps to ensure that citizen children who are eligible for social services are not precluded from receiving benefits due to fear of removal of a parent.

- State and local governments should assess whether the participation of local law enforcement personnel in immigration enforcement actions complies with state child welfare, due process and detention standards, and whether such participation jeopardizes public safety or otherwise interferes with the performance of traditional child welfare and local law enforcement activities.