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# Reform in California's Immigration Enforcement and Immigration Court

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**CLAREMONT McKENNA COLLEGE**  
**REFORM IN CALIFORNIA'S IMMIGRATION ENFORCEMENT AND**  
**IMMIGRATION COURTS**

SUBMITTED TO  
PROFESSOR KEN MILLER  
AND  
DEAN GREGORY HESS  
BY  
NELSON GIL

FOR  
SENIOR THESIS  
FALL 2010  
11/29/10

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## Introduction

On September 17, 2008, my mother received a call from her friend Danilo Cabrera asking her for help. Danilo explained to her that he had been arrested by ICE officials and was currently being detained in the Federal Building located in Downtown Los Angeles. The next day my mother and I went to the Federal Building to see what help he needed. At the Federal, officials led us to an underground facility where they housed all the detainees before moving them to other detention facilities. When I saw Danilo, he did not resemble the man I had come to know over the years. Danilo always appeared like nothing could phase his tough exterior, however that day at the Federal Building, I saw him cry for the first time in my life.

That day Danilo could not muster up the strength to put on a brave face because he was overwhelmed with fear of what would happen to him. Danilo was afraid of the jail that they were going to send him, afraid of being sent back to Guatemala and most importantly afraid of what would happen to his family if he got deported. Danilo begged my mother for help and to use what money he had accumulated so that she could find him a lawyer to prevent him from being deported. It took 45 days until he was released from federal custody so that he could argue his case before a judge and as of today Danilo is still arguing his case trying to attain permanent residency status. Danilo is one of a handful of individuals that are lucky enough to be allowed to stay in the United States because recently this has been a period of unmatched immigration enforcement.

According to the Department of Homeland Security, Office of Immigration Statistic, California accounts for approximately 2,600,000 illegal immigrants in 2009. This number represents about 25 percent of the entire estimated illegal immigrant

population in the United States, which is roughly 10.8 million. Between 2003 and 2008, the U.S. government removed 1,446,338 noncitizens<sup>1</sup> from the United States.<sup>2</sup> Never before had the United States removed so many noncitizens in such a short period of time. Some individuals choose to leave by their own free will after receiving their notice of removal because they believe they have no chance of attaining citizenship. Another factor that has led to the spike in deportation of noncitizens is the increase of federal prosecutions of immigration crimes in criminal courts. Over the past five years, immigration crimes have become a top priority for federal prosecutors and currently make up more than half of the federal criminal docket.<sup>3</sup> However, of the hordes of noncitizens that were sent back to their countries of origin, how many deserved to be removed?

In recent years, ICE and CBP have been delegating powers to law enforcement agents outside of the immigration enforcement bureaucracy - including the Federal Bureau of Investigation (FBI), the Drug Enforcement Agency (DEA), and numerous state and local law enforcement agencies - to increase the efficiency of apprehending illegal immigrants.<sup>4</sup> The procedures that immigration officers and other cooperating law enforcement officials engage in enforcing immigration laws are similar to the ones conducted during criminal investigations. For instance, they conduct brief stops of individuals suspected of immigration violations; full arrest upon probable cause of these violations; consensual questioning; and, with cause, interrogations concerning

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<sup>1</sup> A noncitizen is a foreign-born person who is not a naturalized U.S. citizen. Noncitizens may be in the country legally on a permanent or temporary visa (tourist, business, or student) or may be in the country illegally.

<sup>2</sup> Office of Immigration Statistics, U.S. Dep't of Homeland Sec., 2008 Yearbook of Immigration Statistics 95 (2008), available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois\\_yb\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf).

<sup>3</sup> John Schwartz, Immigration Enforcement Fuels Spike in U.S. Cases, N.Y. Times, Dec. 22, 2009,

<sup>4</sup> U.S. Immigration & Customs Enforcement, Border Enforcement Security Task Forces (BEST), [http://www.ice.gov/pi/news/factsheets/080226best\\_fact\\_sheet.htm](http://www.ice.gov/pi/news/factsheets/080226best_fact_sheet.htm)

immigration status.<sup>5</sup> However in the process of investigating immigration violations and detaining noncitizens, police officials have violated the rights of noncitizens.

During a criminal trial a noncitizen could raise allegations of constitutional rights violations, and if a violation was established, he might well be able to argue that evidence illegally obtained in violation of these constitutional protections need to be suppressed. However, of in hundreds of thousands of cases each year, noncitizens are processed not in criminal courts, but in civil courts.

Due to the changed that have been enacted by the federal government over the years it has transformed the nature of immigration enforcement. Today many of the interactions between police officials and noncitizens in the United States are not dealt in criminal courts but in immigration courts. However, even though the nature of immigration enforcement has evolved, immigration courts have not changed to deal with the “growing challenge of overseeing ongoing and widespread interagency immigration policing in the United States.” Not only do immigration judges face lack of resources to deal with the massive influx of immigration cases brought before their docket, but also they are limited as to what kinds of remedies they can provide in cases where an individuals rights have been violated. This thesis explores the California Immigration Enforcement system from the programs established to apprehend illegal aliens in the United States, the rights illegal aliens are granted, the detention facilities where they reside and the immigration courts that ultimately decide their fate. The question that is being asked is whether the current system established works or if reform is needed.

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<sup>5</sup> Stephen H. Legomsky & Cristina M. Rodriguez, *Immigration and Refugee Law and Policy* at 649-50 (5th ed. 2009).

## Chapter 1:

### Immigration Enforcement

#### A. Background

The U.S. Constitution says, that the authority to create laws as to which aliens may enter the United States and which aliens may be removed belongs solely with the federal

government, and in particular with Congress.<sup>6</sup> The federal government also has the power to proscribe activities that subvert this system and to establish penalties for those who undertake prohibited activities. These powers have primarily been implemented through the Immigration and Nationality Act of 1952 (INA).<sup>7</sup> The INA establishes a comprehensive set of requirements for legal immigration, naturalization, and the removal of aliens, as well as rules governing aliens' continued presence in the United States. Before the INA was enacted, immigration laws were mandated by a variety of statutes but were scattered through various laws and provisions. In 1952, the McCarran-Walter Bill of 1952, Public Law No. 82-414, collected and codified many existing provisions and reorganized the structure of immigration law. Although it stands alone as a body of law, the Act is also contained in Title 8 of the United States Code. To enforce the laws and provisions under this act, the INA created the Immigration and Naturalization Service (INS).

The INS served as the federal agency that enforced these laws for the remainder of the 20th century focusing on Interior Enforcement and Border Enforcement. Interior enforcement is focused on deterring illegal immigration, prevent immigration related crimes, and removing those illegally in the United States. The Departments that are responsible for immigration interior enforcement functions are the Office of Investigations (OI) and the Office of Detention and Removal (DRO).<sup>8</sup> OI is responsible for addressing smuggling and trafficking in aliens, benefit fraud, responding to community complaints of illegal immigrations, and worksite enforcement. DRO is responsible transporting aliens from point to point, to keep them in custody while their

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<sup>6</sup> U.S. CONST., Art. I, § 8, cl. 3-4.

<sup>7</sup> 8 U.S.C. §§ 1101

<sup>8</sup> Alison Siskin, Andorra Bruno, Blas Nunez-Neto, Lisa M. Seghetti, and Ruth Ellen Wasem. Immigration Enforcement Within the United States. CRS Report For Congress. April 6, 2006

cases are being processed and to remove them from the United States when so ordered. Border enforcement includes inspections at ports of entry (POEs) and the patrolling of areas between POEs. In 1994, the USBP strategy to deter illegal entry was “prevention through deterrence,”<sup>9</sup> meaning they would raise the risk of being apprehended to the point where aliens would find it futile to try to enter. The strategy called for placing USBP resources and personnel directly at the areas where illegal immigrants cross so that they can detect, deter, and apprehend aliens attempting to cross the border between official points of entry.<sup>10</sup>

On March 1, 2003, the Department of Homeland Security opened, replacing the INS. Within the Department, three different agencies now handle the responsibilities formerly held by the INS. Those agencies are the U.S. Customs and Border Enforcement (CBE), U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE). Currently, the CBE handles border patrol duties, the USCIS handles matters that concern with naturalization, asylum, and permanent residency, and ICE handles deportation, intelligence, and investigatory functions.<sup>11</sup>

## B. The Transformation of Immigration Enforcement

In the past century, efforts placed on Immigration enforcement have fluctuated back and forth but recently the U.S. government has seen it as a much higher priority and has given it much more resources than it has done so in the past. According to the Homeland Security’s 2009 Budget in Brief<sup>12</sup>, the U.S. government invested billions of

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<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> U.S.ID DEP’T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2009, at 19 (2009), available at [http://www.dhs.gov/xlibrary/assets/budget\\_bib-fy2009.pdf](http://www.dhs.gov/xlibrary/assets/budget_bib-fy2009.pdf).

dollars on immigration enforcement activities. Immigration and Customs Enforcement (ICE) had a budget of \$5,676,085,000<sup>13</sup>, Customs and Border Protection (CBP) had a budget of \$10,941,231,000<sup>14</sup> and in total, these two agencies had an operating budgets over \$15 billion in fiscal year 2009.<sup>15</sup> The \$15 billion budget for the two agencies represent a budget increase of over 500 percent in the past 10 years and more than a 1,500 percent increase since 1988.<sup>16</sup>

However, the figures in the DHS Budget do not represent all the federal costs of immigration enforcement. The budget only reflects the spending that is done on investigations, detention and removal but do not show the spending done on prosecuting and punishing immigration crimes in criminal court. The 2009 DHS Budget Brief shows that a very considerable amount of resources are still devoted to border enforcement, but over the past decade, interior enforcement has been given much more focus than it has gotten before. For instance, before the DHS took over and INS was in charge of immigration enforcement, they had fewer than two thousand agents to enforce immigration laws in the interior of the United States.<sup>17</sup> Today in 2010, ICE has 20,000 employees committed to internal enforcement endeavors.<sup>18</sup>

Along with an increase in size, the strategy for conducting interior enforcement has also changed. The new enforcement strategy has come to rely heavily upon thousands of state and local law enforcement agents who assist in interior immigration enforcement.

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<sup>13</sup>Id

<sup>14</sup> Id

<sup>15</sup> Id.

<sup>16</sup> JUSTICE MGMT. DIV., U.S. DEP'T OF JUSTICE, BUDGET TREND DATA: FROM 1975 THROUGH THE PRESIDENT'S 2003 REQUEST TO THE CONGRESS 104-08 (2002), available at [http://www.justice.gov/archive/jmd/1975\\_2002/2002/pdf/BudgetTrand.pdf](http://www.justice.gov/archive/jmd/1975_2002/2002/pdf/BudgetTrand.pdf)

<sup>17</sup> LISA M. SEGHELLI, STEPHEN R. VINA & KARMA ESTER, CONG. RESEARCH SERV., ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL ENFORCEMENT 6 (2005), available at <http://www.ilw.com/immigdaily/news/2005,1026-crs.pdf>.

<sup>18</sup> U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., ICE FISCAL YEAR 2010 ENACTED BUDGET 1 (2009), available at <http://www.ice.gov/doclib/pi/news/factsheets/2010budgetfactsheet.doc>.

As Julia Preston wrote in her article “No Need for a Warrant, You’re an Immigrant”, “over the last two years, ICE has grown more aggressive, entering factories and communities, hunting down foreign fugitives ranging from convicted criminals to workers whose visas have expired.”<sup>19</sup> This transformation has made immigration enforcement an addition to, if not a replacement for, criminal law enforcement in matters involving noncitizens.

### C. The Criminalization of Immigration

Historically, U.S. legal doctrines have classified deportation as a civil punishment and thus does not require the full spectrum of criminal procedural protection that are provided in criminal trials. However with the increase in focus on interior enforcement and the network of various law enforcement agencies that are aiding in immigration enforcement, it has brought questions regarding clarification between immigration law and criminal law enforcement.

Dan Kanstroom in his book “Deportation Nation: Outsiders in American History,” has noted that much has changed in the way the United States conducts immigration enforcement. Kanstroom notes that there used to be limitations on deportation, such as when a noncitizen was in the United States after a year, they were no longer able to be deported. Today deportation is being used as an addition to criminal punishment working as a means of “post-entry social control.”<sup>20</sup> Also, when an immigrant, even one that is here legally, commits certain offenses, they might face deportation along with criminal punishment. As a result of this change in the nature of

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<sup>19</sup> Julia Preston, No Need for a Warrant, You’re an Immigrant, N.Y. TIMES, October 14, 2007, available at <http://www.nytimes.com/2007/10/14/weekinreview/14preston.html>

<sup>20</sup> DANIEL KANSTROOM, DEPORTATION NATION, 243

immigration enforcement it has led for the need of clarification.

There are those that believe that immigration enforcement is overstepping its boundaries as it is being used increasingly in the interior as a way to achieve criminal law enforcement goals. The immigration penalties such as detention and removal are considered more of a criminal punishment but immigration enforcement is only designated to deal in civil matters. This blurred line between criminal law and immigration law has created what Juliet Stumpf in her article “The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power”, calls “Crimmigration” law, “in which immigration law and the criminal justice system are merely nominally separate.”<sup>21</sup> The overlap between the two systems have presented itself in forms of an increase in prosecution of immigration crimes, the use of civil removal system as a replacement for criminal punishment, and the use of criminal punishment in civil immigration affairs.<sup>22</sup>

In the past decade U.S., federal law enforcement has seen a rise in immigration prosecutions. According to recent data, immigration related crimes make up half of federal criminal cases.<sup>23</sup> The most common immigration crimes that are prosecuted are illegal and felony reentry but other immigration crimes such as documentation fraud and human smuggling are also increasing. Today immigration prosecutions have surpassed federal drug and weapons prosecutions, and making other forms of prosecutions seem not important.<sup>24</sup>

Recently state and certain districts of the U.S. are taking it upon themselves to create laws and statues to deal with immigration enforcement. Originally, it was intended

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<sup>21</sup> Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006).

<sup>22</sup> Jennifer M. Chacon, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment rights*, 59 Duke Law Journal, 1563

<sup>23</sup> Schwartz, *supra* note 5

<sup>24</sup> TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, *PROSECUTION OF IMMIGRATION CASES SURGE IN U.S. WHILE SENTENCES SLUMP* (2005), available at <http://trac.syr.edu/tracins/latest/131/>

for the federal government to be the only one to regulate immigration and enforce immigration laws but certain states feel that the federal government is not doing their job and therefore have a legitimate claim to fix the problems in their domain. Arizona and is one example where a state has took it upon themselves to deal with their immigration problems.

In April 23, 2010, Arizona enacted SB 1070 to deal with illegal immigrants. Their new law would make it a state misdemeanor crime for a noncitizen to be in Arizona without carrying the required documents, bars state or local officials or agencies from restricting enforcement of federal immigration laws, and cracks down on those sheltering, hiring and transporting illegal aliens. These laws have become the state and local governments solution to deal with their immigration problems.

Since 1990, Congress has been enacting numerous acts and statues that once any noncitizen has been convicted of certain types of criminal offenses, those criminal convictions become the basis for their removal from the U.S. in civil removal proceedings. When Congress passed the Immigration and Nationality Act it specified that noncitizens convicted of irritated felonies could be deported. Then in 1996 when congress passed the Illegal Immigration Reform and Immigrant Responsibility Act and the Antiterrorism and Effective Death Penalty Act, it greatly expand the definition of “aggravated felonies,”<sup>25</sup> and added to the list of offenses that would result in the deportation of a noncitizen and eliminated the ability of an immigration judge to provide relief from deportation in cases in which the equities favored that relief.

Finally, even when there is no need for criminal enforcement, the methods that

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<sup>25</sup> INA § 101(a)(43), 8 U.S.C. § 1101(a)(43)

the government employs to deal with civil immigration matters resemble criminal punishment. For instance, ICE officials perform militarized raids in both criminal and civil matters, “[ICE] home raids generally involve teams of heavily armed ICE agents making predawn tactical entries into homes, purportedly to apprehend some high priority target believed to be residing therein. ICE has admitted that these are warrantless raids and, therefore, that any entries into homes require the informed consent of residents. However, frequent accounts in the media and in legal filings have told a similar story of constitutional violations occurring during ICE home raids—a story that includes ICE agents breaking into homes and seizing all occupants without legal basis.”<sup>26</sup> The Department of Homeland Security also places many immigrants who are either trying to establish their claim for residency or contest their deportation orders, in detention facilities. Immigrants who are awaiting the completion-and in some cases, the start-of their civil removal proceedings are often placed in the same facilities as criminal offenders and are subjected to the same harsh treatment.

This combination of immigration law and criminal law and the manifestations that result from it has led to the criminalization of immigration in the United States. Also because the distinction between immigration enforcement and criminal enforcement continues to become harder to tell apart, the role of local law enforcement in immigration matters has increased. Today, local law enforcement officials who have previously had very little part in immigration enforcement, play a major role in immigration control efforts.

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<sup>26</sup> CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS (2009), available at [http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC\\_ICE-Home-Raid-](http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-)



## Chapter 2: Immigration Enforcement in California

### 1. The Rise of law enforcement in Immigration Control

In 1996, the Department of Justice issued a memorandum that outlined what that state and local officials could do to enforce civil immigration laws.<sup>27</sup> The memorandum declared it was not in the domain of state and local officials to detain any alien based on their status of citizenship without proper authorization because it is a civil offense, not criminal.<sup>28</sup> However, officials could arrest a noncitizen if the officials had probable cause to suspect that the noncitizen committed a criminal offense, such as illegal reentry or alien smuggling, because it is in their jurisdiction.<sup>29</sup>

Later that year, Congress expanded the power of state and local law enforcement agencies so they could have more powers to enforce immigration laws. The first expanded power was through the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 that gave police officials the authority to arrest and detain noncitizens who are unlawfully present in the U.S. and who had “previously been convicted of a

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<sup>27</sup> NAT'L IMMIGRATION FORUM, BACKGROUNDER: IMMIGRATION LAW ENFORCEMENT BY STATE AND LOCAL POLICE 1 (2004), available at <http://www.immigrationforum.org/images/uploads/Backgrounder-StateLocalEnforcement.pdf>.

<sup>28</sup> MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., CRIMINALIZING UNLAWFUL PRESENCE: SELECTED ISSUES 2 (2006), available at <http://trac.syr.edu/immigration/library/P585.pdf>

<sup>29</sup> Assistance by State and Local Police in Apprehending Illegal Aliens, 20 Op. Off. Legal Counsel 26, 32 (1996)

felony in the United States.”<sup>30</sup> Second, the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) allowed the then attorney general who is now the secretary of the Department of Homeland Security to authorize local police authorities to enforce civil immigration laws when “an actual or imminent mass influx of aliens...presents urgent circumstances requiring an immediate Federal response.”<sup>31</sup> Finally, the IIRIRA added Section 287 (g) to the Immigration Nationality Act that allowed the attorney general to empower state and local police with immigration enforcement authority.

After September 11, 2001, it became unclear what authority state and local agencies had in enforcing immigration laws, particularly in civil matters. For instance, The Office of Legal Counsel in the Justice Department under Attorney General John Ashcroft revised the 1996 memorandum that outlines state and local power in immigration enforcement and added that they had an “inherent authority” to arrest and detain immigration violators, including civil violators.<sup>32</sup> However, the revised memorandum was not immediately released because it was then changed by the then White House Counsel Alberto Gonzales saying that states and local police had not an “inherent authority,” but just an authority “to arrest and detain persons who are in violation of immigration laws and whose names have been placed in the National Crime Information Center [NCIC].”<sup>33</sup>

The ongoing debate concerning immigration policy, combined with the public's fear about immigrant involvement in criminal activity,<sup>34</sup> and the current correctional crisis in

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<sup>30</sup> AEDPA, 8 U.S.C. §1252c (2006)

<sup>31</sup> 8 U.S.C. § 1103(a)(10)

<sup>32</sup> Letter from Alberto R. Gonzales, Counsel to the President, to Demetrios G. Papademetriou, Migration Policy Institute (June 24, 2002), available at <http://www.migrationpolicy.org/files/whitehouse.pdf>;

<sup>33</sup> Letter from Alberto R. Gonzales, Counsel to the President, to Demetrios G. Papademetriou, Migration Policy Institute,

<sup>34</sup> Kristin F. Butcher et al., *Crime, Corrections, and California: What Does Immigration Have to Do with It?*,

California<sup>35</sup> - have led to the blending of federal immigration and national security policies with state and local correctional policies.<sup>36</sup>

## 2. ICE ACCESS Programs

ICE has grouped the major problems that merge immigration enforcement with the criminal justice system under an umbrella called Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS). The ICE ACCESS initiative was developed to promote the various programs that ICE offers to assist state, local and tribal law enforcement agencies.<sup>37</sup> Under this initiative, ICE works closely with other law enforcement agencies to identify an agency's specific needs and the local communities unique concerns. Before creating a ICE ACCESS partnership with a local agency ICE representative will meet with the agency the requests to be part of the partnership in order to asses each agencies local needs and decide what type of program will be most beneficial and sustainable. ICE has organized a number of operations under the spectrum of its ACCESS program, the three programs that are most employed in California are the Section 287 (g) Agreements, Criminal Alien Program (CAP), and Secure Communities.

### A. Section 287 (g) Agreements

One of the broadest grants of authority for state and local immigration enforcement activity stems from §133 of the Illegal Immigration Reform and Immigrant

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<sup>35</sup> Matthew Yi, Assembly OKs Stripped Down Prison Bill, S.F. Chron., Sept. 1, 2009, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/09/01/MN8219GELN.DTL>.

<sup>36</sup> Tom Barry, Helping Defenders Effectively Represent Noncitizens: Criminal Alien Funding and the Immigrant-Based Criminal Justice Complex (May 13, 2009) [http://defendingimmigrants.org/news/article.251252Criminal\\_Alien\\_Funding\\_and\\_the\\_ImmigrantBased\\_Criminal\\_Justice\\_Complex?print=1](http://defendingimmigrants.org/news/article.251252Criminal_Alien_Funding_and_the_ImmigrantBased_Criminal_Justice_Complex?print=1)

<sup>37</sup> Immigration Enforcement Within the United States Supra note 8

Responsibility Act of 1996 (IIRIRA), which amended INA § 287 to permit the delegation of certain immigration enforcement functions to state and local officers. According to the INA § 287(g), the Attorney General (now the Secretary of Homeland Security) is authorized

“to enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the [Secretary of Homeland Security] to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law”.<sup>38</sup>

This meant that any agreements entered into 287(g) agreements, enabled specially trained state or local officers to perform specific functions relative to the investigation, apprehension, or detention of aliens, during a predetermined time frame and under federal supervision. In order for state or local officers to perform functions according to a 287(g) agreement, they must “have knowledge of and adhere to” federal law governing immigration officers and be certified as having received “adequate training” regarding the enforcement of immigration laws. To prevent any lawsuits brought against the federal government, the 287 (g) agreements does not grant state and local police officials the status of federal employees but instead are to be considered as agents acting under the authority of the ICE.<sup>39</sup>

The program operates under one of three models. Under the jail model, correctional officers in state prisons or local jails screen those arrested or convicted of crimes by accessing federal databases in order to ascertain the arrestee’s immigration status. Under

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<sup>38</sup> INA § 287(g)(1),

<sup>39</sup> INA § 287(g)(7)-(8), 8 U.S.C. § 1357(g)(2)-(8).

the broader task force model, law enforcement officers participating in criminal task forces screen arrested individuals during the course of performing their regular policing duties. Finally, ICE has allowed some local law enforcement agencies to concurrently implement both models, in an arrangement referred to as the joint model. .<sup>40</sup>

Los Angeles County was the first county in California to sign a 287(g) Memorandum of Agreement (MOA) with ICE, on February 1, 2005.<sup>41</sup> As of 2008, Los Angeles, Costa Mesa, Orange, Riverside and San Bernardino Counties have 287(g) programs.<sup>42</sup> The agreements between each law enforcement agency and ICE vary slightly in terms of powers granted. The Los Angeles County MOA, as an example, addresses the enforcement of immigration in jail settings. Los Angeles sheriffs that have been trained under the agreement are able to question any detainee about their immigration status, consider evidence to support deportation, prepare detainers, administer immigration oaths, take sworn statements from detainees and prepare notice to appear applications. They can also notify ICE about the presence of any undocumented immigrant, legal permanent resident, or asylee that is in their custody or in the criminal justice system; ICE can then deport them.<sup>43</sup>

Almost all cities in Southern California have refrained from signing 287(g) agreements, and some cities have policies prohibiting excessive immigration enforcement (e.g. the Los Angeles Police Department's Special Order 40<sup>44</sup>). However, noncitizens who are detained by police in areas with more favorable immigration policies such as Los

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<sup>40</sup> Cynthia Buiza, The 287 (g) Program in Southern California. Coalition for Humane Immigrant Rights of Los Angeles. November 2008

<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> Special Order 40 is a policy established in Los Angeles in 1979. Special Order 40 prohibits police officers from "initiat(ing) police action with the objective of discovering the alien status of a person." This prevents officers from inquiring about the immigration status of an individual and from contacting federal immigration officials about an individual's immigration status.

Angeles are often moved to county-run jail facilities where immigrants are screened for immigration law violations. Thus, even when local police have strong relationships with immigrant communities, these bonds may be undermined by fears of being placed in a county facility.

According to the Los Angeles Times, from February 2005 to June 2008, the Los Angeles County Sheriffs interviewed 20,000 inmates and referred 10,840 people to Immigration and Customs Enforcement for possible deportation<sup>45</sup>. In addition, the Orange County Sheriff's Department (OCSD) reports that during fiscal year 2008, ICE officers and sheriffs' department personnel in the seven- county southern California region processed a total of 35,562 immigrants for deportation—12% higher than in the previous year. While not all of this figure can be attributed to the 287(g) program, OCSD suggests that roughly a third were identified by local sheriffs departments.

Officials working under 287(g) programs are allowed to refer people to ICE for any violation of the law. The 287(g) program makes no distinction between people who have committed serious felonies and people who have committed non-violent low level misdemeanor crimes. In San Bernardino County, officers have begun to report people who were trying to serve their community service time for misdemeanor crimes to ICE. This means that they are effectively punishing people for trying to rectify the minor crimes they may have committed, and who are cooperating with the system. Because an undocumented individual might be deported for any small or petty crime, there is increased fear of law enforcement and a disincentive for immigrants to collaborate with or contact local law enforcement to report crimes.

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<sup>45</sup> ELIZABETH VENABLE, COALITION FOR HUMANE IMMIGRANT RIGHTS OF LOS ANGELES, LOCAL LAW ENFORCEMENT AND IMMIGRATION: THE 287(G) PROGRAM OF SOUTHERN CALIFORNIA, FACTSHEET (2008), <http://chirla.org/files/287g%20Factsheet%2011-24-08.pdf>.

## B.Criminal Alien Program

The Criminal Alien Program focuses on identifying "criminal aliens"<sup>46</sup> who are detained in federal, state, and local facilities and seeks their removal prior to their release from criminal custody.<sup>47</sup> This program begins with local police and jails collecting place-of-birth information from individuals at arrest or upon booking into jail.<sup>48</sup> This information is shared with ICE's Office of Detention and Removal Operation ("DRO"), whose officers screen and interview the identified individuals.<sup>49</sup> Upon the initial suspicion that an individual may be a noncitizen, including a lawful permanent resident who may be subject to removal from the United States, a "detainer" or immigration "hold" is placed on the individual, preventing his or her release until custody is transferred ICE.<sup>50</sup> A person can be transferred to ICE at any point in the criminal process, even if they are not charged or convicted of an offense.<sup>51</sup> In California, individuals who are convicted and sentenced and have an ICE hold placed on him or her are transferred to ICE custody after completion of their California sentence.<sup>52</sup> Upon taking of custody, ICE

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<sup>46</sup> Nat'l Immigration Forum, Immigration Enforcement & Local Law Enforcement: The ABC's of State and Local Coordination Programs 2 (2009), available at [http://www.immigrationforum.org/images/uploads/ABCs\\_of\\_State\\_and\\_Local\\_Coordination\\_Programs.pdf](http://www.immigrationforum.org/images/uploads/ABCs_of_State_and_Local_Coordination_Programs.pdf)

<sup>47</sup> U.S. Immigration & Customs Enforcement, ICE Access: ICE Agreements of Cooperation in Communities to Enhance Safety and Security, [http://www.ice.gov/doclib/pi/news/factsheets/iceaccess\\_factsheet.pdf](http://www.ice.gov/doclib/pi/news/factsheets/iceaccess_factsheet.pdf);

<sup>48</sup> Immigrant Justice Network, Dangerous Merger: Corrupting the Criminal Justice System for Immigration Enforcement, available at <http://www.ilrc.org/immigrantjusticenetwork/HandoutFinal5.pdf>

<sup>49</sup> U.S. Immigration and Customs Enforcement, Criminal Alien Program, Nov. 19, 2008, [www.ice.gov/pi/news/factsheets/criminal\\_alien\\_program.htm](http://www.ice.gov/pi/news/factsheets/criminal_alien_program.htm)

<sup>50</sup> Christopher N. Lasch, Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers, 35 Wm. Mitchell L. Rev. 164, 167-8, 173 (2008)

<sup>51</sup> Immigrant Justice Network, *supra* note 17

<sup>52</sup> Cal. Dep't of Corr. & Rehab., Housing Inmates Out-of-State, <http://www.cdcr.ca.gov/news/oosPlacement.html> (last visited Oct. 24, 2009)

either transports the prisoner to a detention center pending immigration proceedings or immediately removes them from the country.<sup>53</sup>

### **C. Secure Communities**

In March 2008, ICE announced a new federal local joint immigration enforcement program Secure Communities: A comprehensive plan to identify and remove criminal aliens.<sup>54</sup> Secure communities is essentially a technology intensive version of the Criminal Alien Program that allows instantaneous information sharing among local jails, ICE and the FBI. The critical elements of the program is that during booking in jail, the arrestee's fingerprints will be simultaneously checked against DHS database and the FBI criminal databases to screen their criminal history and immigration record. If there is a fingerprint match then the system automatically notifies ICE and the locality where they have flagged the possible suspect. Local law enforcement must give ICE officials 48 hours notice before releasing a noncitizen that was flagged in the system. ICE then determines the appropriate actions that must be taken.

The initial purpose of the program was removing the "worst" criminal offenders who are in the country illegally. Los Angeles County joined the secure communities program in late August 2009. In the first two months secure communities were used, law enforcement agencies made 78,895 submissions resulting in 8,717 matches. From October 2009 until the end of February, immigration officials arrested or issued detainers against 21,556 people nationwide who were identified as being in the country illegally and charged or convicted of crimes. Of those individuals that were identified 4,523 were

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<sup>53</sup> B Riddhi Mukhopadhyay, Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States, 7 Seattle J. for Soc. Justice 693, 704 (2009)

<sup>54</sup> Press Release, U.S. Immigration & Customs Enforcement, ICE Unveils Sweeping New Plan to Target Criminal Aliens in Jails Nationwide <http://www.ice.gov/pi/news/newsreleases/articles/080414washington.htm> (last visited Oct.. 28, 2010).

arrested on suspicion of or convicted of violent crimes - such as murder, rape and kidnapping. About 14,741 have already been removed from the country. Some have been identified but not yet removed; they are completing their sentences.<sup>55</sup>

The new program is more accurate because all inmates, not just those who say they are foreign-born, are now screened for immigration status. As of March, 10, California counties were using the program to identify illegal immigrants in jails, including Imperial, Los Angeles and Sacramento counties. There are 119 other counties in the nation already using the system; Immigration and Customs Enforcement officials hope to launch the program in all counties by 2013.<sup>56</sup>

All modes of cooperation that directly involves state and local police officials in civil immigration matters, whether it is through the various programs of the ICE ACCESS Program, ultimately leads to the fundamental change of immigration enforcement. The changes in immigration enforcement not only affect law enforcement agencies but also affect other aspects of the immigration enforcement system such as the detaining of illegal immigrants and the immigration courts.

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<sup>55</sup> Andrew Becker, Federal Program to deport criminal immigrants expands in California. California Watch

<sup>56</sup> Id

## Chapter 3:

### Detention and Immigration Court

#### 1. Detention

##### A. ICE Hold

The California Department of Corrections and Rehabilitation (CDCR) is housing thousands of inmates for whom the ICE has placed a hold, a first step toward deporting these inmates when they have completed their sentences. According to the data compiled from the CDCR, it is currently housing 15,800 inmates identified as ICE hold (also known as “detainers” or “hold”). Of the inmates that have ICE holds on them, approximately 9,500 inmates are eligible for deportation. After an ICE hold is placed on a noncitizen, upon completion of the inmate's California sentence, ICE takes custody of the inmate and transports them to a deportation center. If the inmate has been previously

deported or has been convicted of an aggravated felony and does not contest the proceeding and the inmate is from a country with a Prisoner Transfer Treaty, then they are deported without a hearing. About 60-70 percent of the ICE cases meet these criteria. If the inmate contests the deportation then they are transferred to the deportation center.<sup>57</sup>

## B. Facilities

The conditions and terms of immigration detention centers are equivalent to prison, where freedom of movement is restricted, detainees wear prison uniforms, and are kept in a punitive setting. To house all the detainees, detention centers use a combination of facilities owned and operated by U.S. Immigration and Customs Enforcement (ICE), the enforcement bureau within DHS, along with prison facilities owned and operated by private prison contractors and local and county jails that ICE rents beds from on a reimbursable basis.<sup>58</sup> Only half of immigrants held in detention have actual criminal records yet the majority of them are held in jails where non-criminal immigrants are mixed with the prison's criminal population.<sup>59</sup>

Immigrants may remain detained for months or even years as they go through process to decide whether they are eligible to stay in the U.S. or until they are issued a final order of removal, as the U.S. arranges for their deportation. Immigrants in detention include asylum-seekers, torture survivors, victims of human trafficking, long-term permanent residents, the sick, the elderly, pregnant women, parents of US citizen children and families. For all immigrant detainees, ICE reported an average stay of 64 days in

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<sup>57</sup> Cal. Dep't of Corr. & Rehab., Housing Inmates Out-of-State, <http://www.cdcr.ca.gov/news/oosPlacement.html>

<sup>58</sup> "Treatment of Immigrant Detainees Housed at Immigration and Customs Enforcement Facilities," Office of Inspector General, Department of Homeland Security, December 2006, pp 2, available at [http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG\\_07-01\\_Dec06.pdf](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_07-01_Dec06.pdf).

<sup>59</sup> "Critics Decry Immigrant Detention Push," Associated Press, June 25, 2006

2003, with 32 percent detained for 90 days or longer.<sup>60</sup> Certain exceptions such as asylum-seekers, who are eventually granted asylum, spend an average of 10 months in detention, with the longest period being 3.5 years.<sup>61</sup> Some individuals who have final orders of removal, such as those from countries with whom the U.S. does not have diplomatic relations or those from countries that refuse to accept the return of their own nationals, may languish in detention indefinitely.<sup>62</sup> Before any immigrant can be removed from the United States they are taken to immigration court where they decide if they can remain in the United States or have to be sent back to their country of origin.

## 2. Immigration Court

### A. Background

Immigration Judges and Immigration Court do not operate as members of the Judicial Branch of the government. The federal government reasons that because many of the issues that are discussed in this courtroom often involve “especially sensitive political functions that implicate questions of foreign relations.”<sup>63</sup> Also, the courts recognize that the decisions permitting or preventing foreign nationals from immigrating are “frequently of a character more appropriate to either the Legislature or the Executive [Branch] than the Judiciary.”<sup>64</sup> Therefore the Executive Branch is responsible for the creation of policy and procedures relating to immigration proceedings.

The Executive Branch has entrusted the responsibility of immigration laws to the Department of Justice (DOJ) since 1940 and is delegated to the Attorney General. As of today, immigration judges are members of the Department of Justice’s Executive Office

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<sup>60</sup> US Detention of Asylum Seekers and Human Rights, By Bill Frelick, Amnesty International USA, March 1, 2005, <http://www.migrationinformation.org/Feature/display.cfm?id=296>

<sup>61</sup> Id.

<sup>62</sup> Neitz, Michele Benedetto, Crisis on the Immigration Bench: An Ethical Perspective. *Brooklyn Law Review*, Vol. 73, p. 467, 2008.

<sup>63</sup> Id.

<sup>64</sup> Id.

of Immigration Review (EOIR). From the authority granted by the DOJ, the EOIR “interprets and administers” immigration law by “conducting immigration court proceedings, appellate reviews, and administrative hearings.”<sup>65</sup> The spectrum of EOIR includes the Office of the Director, the Board of Immigration Appeals, the Office of the Chief Immigration Judge (OCIJ) and the Office of the Chief Administrative Hearing Officer. The OCIJ is in charge of the immigration courts located around the country.

## B. Due Process Rights

Regardless of status in the United States, immigrants have various rights protected under the U.S. Constitution and local, state, and federal laws. Some people assume that noncitizens have no rights under the U.S. Constitution because they lack citizenship but they are mistaken. due to provisions under the U.S. Constitution that refer to “persons” rather than “citizens” apply to individuals regardless of immigration status. As the Supreme Court has explained, “these provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.”<sup>66</sup> Immigrants in the U.S. are considered “persons” within the territorial jurisdiction for purposes of constitutional protections regardless of how they entered the U.S. or whether they have lawful immigration status.<sup>67</sup>

The U.S. Constitution bestows certain procedural protections for individuals that are subject to criminal investigations, prosecution and punishment. These protections are the one provided under the Fourth, Fifth, Sixth and Eight Amendments from the Bill of rights. The Fourth Amendment protects individuals from unreasonable searches and seizures, the Fifth Amendment protects individuals from self-incrimination and provides

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<sup>65</sup> Id

<sup>66</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

<sup>67</sup> *Plyer v. Doe*, 457 U.S. 202, 210-212 (1982).

them due process, the Sixth Amendment grants individual the right to counsel and finally the Eighth Amendment protects individuals against cruel and unusual punishment. These protection are provided to both citizens and non citizens during criminal procedures.

Because state action is involved in the enforcement of immigration law, both criminal and civil, constitutional protections apply. However, the protections available in civil proceedings have been distinguished from the protections available in criminal proceedings. So, although the Constitution's provisions apply to state officials enforcing immigration law, the extent of applicable rights and the remedies for violations of constitutional rights is much different in the civil immigration context than in the criminal context.<sup>68</sup>

In civil courts, the Fourth, Fifth, Sixth, and Eight Amendment still apply to noncitizens, except with some limitations. The Fourth Amendment still protects noncitizens against unreasonable searches and seizures, but the protections are much more narrower in immigration enforcement than in the criminal context. For instance, in immigration enforcement, remedies are not provided. The Fifth Amendment protections against self incrimination does not apply in civil proceedings because that rights is only limited to those who are accused in criminal courts. Noncitizens also do not have a constitutional right to counsel at the government's expense in civil removal proceedings because as it was decided in *Zakonaite v. Wolf* (1912), that proceedings to enforce immigration regulations do not involve Sixth Amendment Protections.<sup>69</sup> However, even though they are not provided counsel, noncitizens do have a statutory right, under the

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<sup>68</sup> Chacon Supra note 22

<sup>69</sup> *Zakonaite v. Wolf*, 226 U.S. 272, 275 (1912)

INA, to supply counsel at their own expense.<sup>70</sup> Finally, the Eighth Amendment protection from cruel and unusual punishment does not apply to deportation because as it was held in *Fong Yue Ting v. United States*, “deportation is not a punishment for crime.”<sup>71</sup>

### C. Court Procedures

The process of the immigration court begins when the Department of Homeland Security sends an individual a “notice to appear”. The “notice to appear” signifies that the individual is in the country illegally, their visa has expired, or they have committed a deportable criminal offense. Deportation proceedings can be initiated against legal permanent residents and illegal aliens. Unlike in criminal court proceedings, aliens who are being deported through an immigration court do not have a right to hire a free public defender and are usually recommended by the judge to acquire counsel to represent them. Gene Hays, immigration attorney in Los Angeles, expressed that it was very crucial for anybody that was going to immigration court to have an attorney represent them. The reason Mr. Hays said it is necessary for an individual to acquire an immigration attorney instead of self representation is because the immigration law and immigration court procedures are usually complex and difficult to understand, especially for immigrants who cannot even speak English fluently. Mr. Hays also said that by having a competent attorney that is well versed in immigration law, the individual would have a better chance of winning their case and either getting a green card returned or end up getting a green card through the court.

U.S. immigration law requires that the alien who has an appointment with

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<sup>70</sup> Immigration and Nationality Act at section 292. 8 U.S.C. § 1362 (2006)

<sup>71</sup> *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893)

immigration court, attend every one of their hearings regardless of whether the individual has an immigration attorney to represent them. If the individual fails to appear at their hearing without a valid excuse then the immigration court judge will issue a deportation order. Once the deportation order is issued, the immigration officer will have the authority to go into an individuals residence to arrest and deport them.

#### D. Seeking Relief

Once a noncitizen in proceedings is found to be removable, they may request one or more types of discretionary relief: Voluntary Departure, Cancellation of Removal, Asylum, Adjustment, or Adjustment of Status. The noncitizen has the burden of proving that they are eligible for relief under the law, and usually that they deserves such relief as an exercise of discretion.<sup>72</sup>

##### i. Voluntary Departure

Voluntary departure is the most common form of relief from removal and may be granted by Immigration Judges. Voluntary departure allows a noncitizen that would have eventually been removed from the U.S., to depart the United States at his or her own personal expense and return to his or her home country, or another country if the individual can secure an entry there. Immigration Judges will provide aliens information on the availability of this form of relief when taking pleadings.<sup>73</sup> It is important to note that aliens granted voluntary departure must depart within the time specified by the Immigration Judge. Although an Immigration Judge has the ability to set a shorter deadline, aliens granted voluntary departure prior to the completion of removal

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<sup>72</sup> Fact Sheet, Forms of Relief From Removal. U.S. Department of Justice. August 3, 2004 available at [www.justice.gov/eoir/press/04/ReliefFromRemoval.html](http://www.justice.gov/eoir/press/04/ReliefFromRemoval.html)

<sup>73</sup> Id

proceedings must depart within 120 days, and those granted such relief at the conclusion of removal proceedings must depart within 60 days.<sup>74</sup>

i. Cancellation of Removal

This form of discretionary relief is available to qualifying lawful permanent residents and qualifying non-permanent residents. For lawful permanent residents, cancellation of removal may be granted if the individual:

- Has been a lawful permanent resident for at least 5 years;
- Has continuously resided in the United States for at least 7 years after having been lawfully admitted; and
- Has not been convicted of an “aggravated felony,” a term that is more broadly defined within immigration law than the application of the term “felony” in non-immigration settings.<sup>75</sup>

Cancellation of removal for non-permanent residents may be granted if the alien:

- Has been continuously present for at least 10 years;
- Has been a person of good moral character during that time;
- Has not been convicted of an offense that would make him or her removable; and
- Demonstrates that removal would result in exceptional and extremely unusual hardship to his or her immediate family members (limited to the alien’s spouse, parent, or child) who are either U.S. citizens or lawful permanent residents.

iii. Asylum

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<sup>74</sup> Id

<sup>75</sup> Id

Under section 208(a) of the Immigration and Nationality Act, the Attorney General can grant asylum to an alien who qualifies as a “refugee.” The Refugee Act of 1980 and certain parts that were taken and modified and placed into the INA establishes that “Any alien who is physically present in the United States or who arrives in the United States...irrespective of such alien’s status, may apply for asylum. Political Asylum is an immigration benefit that if granted would lead to permanent residency in the United States and is based on the applicants ability to show that the they have a well founded fear of persecution in their country of origin on account of: race, religion, nationality, or membership in a particular social group or political opinion. Persecution is defined as a severe form of discrimination, harassment torture, or any other type of harm that’s being committed against the asylum applicant by the government of his country of origin. However, an alien may be ineligible for asylum under certain circumstances, including having failed to file an asylum application within an alien’s first year of arrival in the United States, being convicted of an aggravated felony, or having been found to be a danger to national security.”<sup>76</sup>

### iii. Adjustment of Status

This form of discretionary relief is available to change an alien’s status from a non-immigrant to a lawful permanent resident. Aliens who have been previously admitted into the United States can apply to DHS for adjustment of status, while aliens in removal proceedings apply before an Immigration Judge. Several conditions must be met, including that the alien is admissible for permanent residence and an immigrant visa is immediately available at the time of application. Aliens who qualify for visas allowing an adjustment of status are often petitioned for by a spouse, family member, or an

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<sup>76</sup> Id.

employer.<sup>77</sup>

#### E. Appeal

If an individual feels that there is new crucial evidence in their case that was previously unavailable or if the individual feels that the immigration judge or their lawyer made serious mistakes in the case that caused them to lose the case, then the individual may have reasons to appeal the judge's decision. An alien may move to reopen or to reconsider a previous decision by filing a timely motion with an Immigration Judge or the Board of Immigration Appeals (BIA). The central purpose of a motion to reopen is to introduce new and additional evidence that is material and that was unavailable at the original hearing. A motion to reconsider seeks a reexamination of the decision based on alleged errors of law and facts.<sup>78</sup>

Unless an exception applies, a party may file only one motion to reopen and one motion to reconsider. With a few exceptions, a motion to reopen proceedings must be filed within 90 days of the final removal order, while a motion to reconsider must be filed within 30 days of the date of the final order. The filing of such motions does not suspend the execution of the removal decision unless a stay is ordered by the Immigration Judge, the BIA, DHS, or the alien seeks to reopen an in absentia order (a decision made when the alien was absent at the proceeding).<sup>79</sup>

#### Chapter 4:

#### Problem With California's Immigration System

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<sup>77</sup> Id

<sup>78</sup> Id.

<sup>79</sup> Id.

## 1. Court System

Peter Levinson, wrote in his article, “A Specialized Courts for Hearing and Appeals” in 1981,

“The United States immigration adjudication system is beset with crippling problems. Immigration judges occupy positions of unhealthy dependence within the Immigration and Naturalization Service[,...]lack adequate support services, and frequently face debilitating conflicts with agency personnel. Board of Immigration Appeals members perform appellate functions without job security or statutory recognition. Long delays pervade the quasi-judicial hearing and appellate process. The availability of further review in federal courts postpones finality, encourages litigation, and undermines the authority of initial appellate determinations.”<sup>80</sup>

As this section will demonstrate, his words hold true today as it did in 1981.

The government’s decision to increase immigration enforcement has greatly effected the immigration court system. In 2008, immigration judges in the United States completed 274,469 removal proceedings.<sup>81</sup> Immigration judges have historically had to deal with fairly heavy dockets. As Sandra Day O’ Connor wrote in her majority opinion in *INS v. Lopez-Mendoza*, “the average immigration judge handles about six deportation hearings per day.” Recently, the adjudication of immigration cases have been subject of serious concerns. Having to deal with difficult caseloads, time constraints and many other constraints, it has created a cloud of doubt about the “quality of decision-making in the administrative tribunals”<sup>82</sup> that handle immigration cases.<sup>83</sup>

### A. Difficult Caseloads

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<sup>80</sup> Peter J. Levinson, A Specialized Court for Immigration Hearings and Appeals, 56 NOTRE DAME LAW. 644, 651–54 (1981)

<sup>81</sup> Executive Office for Immigration Review (EOIR), U.S. Dep’t of Justice, FY 2008 Statistical Year Book C4 tbl.4 (2009), available at <http://www.justice.gov/eoir/statspub/fy08syb.pdf>. The figure shown above for removal proceedings includes a small numbers of “exclusion” and “deportation” proceedings. Id.

<sup>82</sup> Lawrence Baum. Fortieth Annual Administrative Law Symposium: Judicial Specialization And the Adjudication of Immigration Cases

<sup>83</sup> Sydenham B. Alexander III, A Political Response to Crisis in the Immigration Courts, 21 GEO. IMMIGR. L.J. 1, 18–21 (2006) (describing working conditions in the courts that jeopardize the immigration adjudication system).

Immigration cases are unusually difficult due to the fact of the ambiguity of relevant facts. This difficulty creates a great burden for immigration judges and it affects the way they pass judgment in their cases. One example of an ambiguity that immigration judges deal with are vague legal standards. For instance, the rule that a deportable individual may avoid removal from the United States if “removal would result in exceptional and extremely unusual hardship” to a family member who is a lawful resident of the United States.<sup>84</sup> With certain vague legal standards such as the one mentioned, immigration judges face the burdening task of using their own judgement to decide when it is best appropriate to apply.<sup>85</sup>

Another example is when immigration judges have to decide whether to grant asylum. Individuals who are in the process of being removed from the United States, may avoid removal if they can establish that they are refugees. The Refugee Act of 1980 and certain parts that were taken and modified and placed into the INA establishes that “Any alien who is physically present in the United States or who arrives in the United States...irrespective of such alien’s status, may apply for asylum.”<sup>86</sup> Political Asylum is an immigration benefit that if granted would lead to permanent residency in the United States and is based on the applicants ability to show that the they have suffered “persecution”<sup>87</sup> or have a well founded fear of persecution in their country of origin because of: race, religion, nationality, or membership in a particular social group or

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<sup>84</sup> 8 U.S.C. § 1229b(b)(1)(D) (2006)

<sup>85</sup> David A. Martin, Reforming Asylum Adjudication: On Navigating the Coast of Bohemia, 138 U. PA. L. REV. 1247, 1280–82 (1990).

<sup>86</sup> 8 U.S.C. § 1158(b)(1)(A).

<sup>87</sup> Persecution is defined as a severe form of discrimination, harassment torture, or any other type of harm that’s being committed against the asylum applicant by the government of his country of origin. Examples of persecution that the United States government finds sufficient to grant political asylum are: Forced recruitment into the military, cruel and unusual punishment due to culture or religion and military operations against certain groups of individuals.

political opinion.<sup>88</sup> The facts of what happened in another country are often impossible to discover and there may be little basis for predictions about what would happen if an individual were returned to that country.<sup>89</sup> The lack of written evidence relevant to an asylum decision makes judges especially dependent on their assessment of an alien's testimony<sup>90</sup> and thus in the end have to rely on their own judgement whether to grant the individual asylum.

## B. Time Constraints

Immigration judges face extreme pressure to resolve their severe caseloads with only a limited amount of time.<sup>91</sup> From 2000 to 2005, the total immigration caseload grew substantially with little increase in the number of immigration judges.<sup>92</sup> The total caseload in 2009 was about the same as it was in 2005.<sup>93</sup> Judges have little staff support; even with an increase in the number of law clerks, there is still an average of only one clerk for every four judges.<sup>94</sup> The impact of putting judges in a position in which they have to balance their goal of making the best possible decision against the goal of simply getting through the cases. Judges cannot take all the time needed to fully consider the alternatives in a case.<sup>95</sup> And when caseload pressures are greatest, simply processing cases may become the dominant goal in decisionmaking.

However, as Michele Benedetto Neitz said in her article, *Crisis on the Immigration Bench: An Ethical Perspective*, “even if the reasons for bias or

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<sup>88</sup> 8 U.S.C. § 1101(a)(42)(A).

<sup>89</sup> Alexander, *supra* note 4, at 18–19

<sup>90</sup> Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 *STAN. L. REV.* 443 (2007).

<sup>91</sup> Stuart L. Lustig., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 *GEO. IMMIGR. L.J.* 57, 64–65 (2008)

<sup>92</sup> *Crisis on the Immigration Bench*. *Supra* note 62.

<sup>93</sup> *id*

<sup>94</sup> *id*

<sup>95</sup> *id*

incompetence on the part of immigration judges can be understood in the context of difficult cases and understaffed courts, such behavior violates the norms of judicial ethics. Judicial neutrality and competence must be prioritized over expedient resolution of cases.”

Another important shift in the immigration docket in recent years is the rise in the number of cases in which noncitizens raise allegations of government misconduct in the course of investigating immigration violations. Unfortunately, unlike state and federal courts, which have long overseen police activity, immigration courts were not designed to govern the police. As the Supreme Court noted in *INS v. Lopez-Mendoza*,<sup>96</sup> “a deportation hearing is intended to provide a streamlined determination of eligibility to remain in this country, nothing more.”<sup>97</sup>

## 2. Problems with Immigration Enforcement

Immigrant and civil rights advocates have voiced multiple concerns regarding the increased coordination between federal agencies and state and local authorities, arguing that the combination of immigration enforcement with the criminal justice system is problematic and fraught with error. From the outset, there has been much criticism that the process of identifying potential noncitizens is laden with racial and ethnic bias, and that appearance and last names are used as proxies for citizenship to determine who should be scrutinized.<sup>98</sup> In addition, critics argue that given the complexity of immigration law there is much room for error in the process of identifying potential noncitizens, and that many individuals who are actually U.S. citizens have had ICE holds

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<sup>96</sup> *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

<sup>97</sup> *INS v. Lopez-Mendoza*, 468 U.S. 1039 (1984).

<sup>98</sup> Trevor Gardner II & Aarti Kohli, Chief Justice Earl Warren Inst. on Race, Ethnicity & Diversity, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program* (2009), available at [http://www.law.berkeley.edu/files/policybrief\\_irving\\_FINAL.pdf](http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf)

placed on them.<sup>99</sup> In one poignant example, Mark Lyttle, an American citizen who is bipolar, was deported after signing statements that he was a Mexican citizen, although he had a valid Social Security number.<sup>100</sup> The growing involvement of immigration enforcement with the criminal justice system makes it increasingly difficult to track and challenge the treatments of immigrants.<sup>101</sup>

#### A. 287(g) Agreements

The practice of appointing state and local police to enforce federal immigration laws has proven to be highly ineffective and dangerous. No case illustrates this better than that of Pedro Guzman. Pedro Guzman was born in California and was deported to Mexico because the Los Angeles County Sheriff's Office, a 287(g) participant, believing that he was in the country illegally placed an immigration detainer on him in the local jail and then transferred him to ICE, which eventually deported him to Mexico. Pedro Guzman was cognitively impaired and living with his mother before being deported to Mexico, a country where he had never lived. During his time in Mexico, Pedro Guzman had no other alternative than to eat out of trash cans and bathe in rivers for several months. His mother, also a U.S. citizen, took leave from her job to travel to Mexico to search for her son in jails and morgues. After he was located and allowed to reenter the U.S., Pedro Guzman was so traumatized that he could not speak for some time. The illegal deportation of Pedro Guzman occurred in pursuant to the 287(g) MOA between Los Angeles County and ICE.

Several localities have been sued in recent years due to the arrest and detention of

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<sup>99</sup> Raha Jorjani, *Detention, Deportation, and the Immigration Consequences of Criminal Convictions: An Overview*, Iranian Am. B. Ass'n, Oct. 2008, at 2, available at <http://iaba.us/publications/Working%20Document%20%20Detention%20Deportation%20and%20the%20Immigration%20Consequences%20of%20Criminal%20Convictions%20-%20An%20Overview.pdf>.

<sup>100</sup> MELISSA KEANEY and JOAN FRIEDLAND, *OVERVIEW OF THE KEY ICE ACCESS PROGRAMS 287(g), the Criminal Alien Program, and Secure Communities*. National Law Center

<sup>101</sup> *Id.*

U.S. citizens, lawful permanent residents, and other immigrants with lawful status. Officers who make immigration arrests or detain individuals on the street, workplace, home, or jail will rarely have firsthand evidence of the status of a person. Instead, assuming there is a lawful basis for a stop or other questioning, the officers will make judgments about whether the person is a citizen, an immigrant with some other form of lawful status, or an individual who lacks status altogether.

Often officers will arrest individuals who are U.S. citizens and detain them for immigration violations or misidentify U.S. citizens in the local jail as noncitizens, holding and transferring them into immigration custody.

When a question about citizenship arises, however, there is no national database of citizens to resolve those questions. DHS can only answer questions about people who have been processed by that agency. Most citizens, however, have never had a file with DHS. DHS itself has reportedly detained and even deported U.S. citizens despite its own purported expertise in this area of law.<sup>102</sup> Similarly, local jails that attempt to engage in screening make the predictable error of issuing detainers on some citizens, improperly holding them for transfer into immigration custody instead of releasing them.

The structure of the 287(g) program, without careful and constant oversight, can create a serious risk of racial and ethnic profiling. As shown by Northeastern University researchers, who produced a resource guide on racial profiling data collection systems for the U.S. Department of Justice in November 2000, when police officials have a high degree of discretion in enforcing laws, it creates the incentive for them to indulge in race based prejudices. The data shows that “complexities of police discretion emerge more

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<sup>102</sup> Jacqueline Stevens, Thin ICE, THE NATION (June 5, 2008), available at <http://www.thenation.com/article/thin-ice>

often in the high-discretion stop category,” such as traffic stops.<sup>103</sup>“These high-discretion stops invite both intentional and unintentional abuses. Police are just as subject to the racial and ethnic stereotypes they learn from our culture as any other citizen. Unless documented, such stops create an environment that allows the use of stereotypes to go undetected.”<sup>104</sup>

## B. Criminal Alien Program

The Criminal Alien Program raises serious civil rights concerns. According to the study conducted by the Warren Institute on Race, Ethnicity and Diversity, using arrest data obtained from the CAP in Irving, Texas, it concluded that ICE is not following “Congress’ mandate to focus resources on the deportation of immigrants with serious criminal histories.”<sup>105</sup> From the arrest data collected, the study discovered that felony charges accounted for only 2% of ICE detainers issued, while 98% of detainers were issued for misdemeanor offenses. Thus the report concluded, “This study offers compelling evidence that the Criminal Alien Program tacitly encourages local police to arrest Hispanics for petty offenses.”<sup>106</sup> Put simply, the CAP does not focus its resources on serious offenses as it was originally designed.

The Criminal Alien Program has not accomplished its mission of enhancing public safety but instead tarnished the trust between immigrant communities and local law enforcement. As a result it creates a sense of fear in immigration neighborhoods when they become to afraid to report any crimes because of individual fear of deportation. The focus of the CAP is to apprehend violent criminals but the majority of the targets identified through the program are people who were arrested for mere misdemeanor

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<sup>103</sup> Overview of key ICE ACCESS Supre note 97

<sup>104</sup> Id

<sup>105</sup> Id

<sup>106</sup> Id

violations. Although undocumented immigration is a civil violation, immigrants are being treated and branded as criminals, with deportation as their punishment. CAP does not distinguish between the innocent and the guilty, between those who are traffic violators and those who are violent felons, or between victims and aggressors.<sup>107</sup>

### C. Secure Communities

Advocates have criticized the Secure Communities program because it took place at the beginning of the criminal process and therefore indiscriminately targeted people arrested for crimes of all magnitudes, rather than persons convicted of serious crimes.<sup>108</sup>

The program also casts too wide net with too few safeguards. By November 2009, 95 cities and counties in eleven states were participating in Secure Communities. In the first half of 2009, over 266,000 fingerprints were run through the Secure Communities system, resulting in 32,000 matches. Not every individuals that were identified are necessarily removable. For example, lawful permanent residents who commit many types of misdemeanors are not removable but they would come up as matches in the DHS database. Also, individuals who have been mistakenly arrested and have been put in the DHS database would also come up as a match. Many critics of the Secure Communities program have led them to argue that the reach of the program is not adequately tailored to achieve its primary objective of targeting noncitizens who pose a threat to the community.

While the stated goal of each of these programs is to target and remove from communities the most dangerous criminals, data from the 287(g), CAP, and Secure Communities programs document that, in reality, the majority of individuals targeted are

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<sup>107</sup> Id

<sup>108</sup> Id

identified because of their race or ethnicity and for crimes which do not pose a serious risk to public safety.

### III. Detention Centers

Immigrant rights advocates have expressed concern about the treatment of immigrant prisoners while in California facilities. First, immigrant prisoners are subjected to inadequate conditions of confinement. Many immigrants have to suffer with inadequate healthcare, overcrowding and lack of adequate telephone access, visitation hours, ventilation, food, clean quarters, and functioning showers and toilets, along with being put through verbal and physical abuse.<sup>109</sup> Inadequate healthcare has also been a serious concern. Second, many detainees endure due process violations and hardships arising from routine transfers to facilities far from where most detainees reside. Transfers have multiplied with ICE's expansion of its detainee population and network of facilities: Because of shortages of detention space in California and the Northeast, ICE transfers detainees to far-flung locations "where there are surplus beds."<sup>110</sup> Transfers exacerbate the problems that invariably arise in detention, disrupting detainees' ability to present effective arguments for release and against removal by interfering with attorney-client relationships, delaying and complicating proceedings, and even changing the applicable substantive law.<sup>111</sup> In many instances, attorneys and family members have been unable to locate detainees for extended periods.

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<sup>109</sup> Amnesty Int'l, *Jailed Without Justice: Immigration Detention in the USA 29-43* (2009); Immigrant Advocacy Ctr., *Dying for Decent Care: Bad Medicine in Immigration Custody* (2009), available at <http://www.fiacfla.org/reports/DyingForDecentCare.pdf>

<sup>110</sup> Immigration Transfers Add to System's Problems (NPR radio broadcast Feb. 11, 2009), transcript available at <http://www.npr.org/templates/story/story.php?storyId=100597565>

<sup>111</sup> Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States at 29-30.* (2009), available at <http://www.hrw.org/en/reports/2009/12/02/locked-far-away-0>

Danilo Cabrera, suffered first hand through unfair treatment in the detention facilities. Danilo describes his experience at the detention facilities as traumatic. He says that while he was detained it was almost impossible to contact his lawyer or loved ones because they kept transporting him from detention facilities to detention facilities. The first detention facility he was placed in was in Lancaster, California and then two weeks later he was moved to a detention center in Texas and his last stop was a detention center in New Mexico. Danilo proclaimed that inside the detention facilities you have no rights. You are mistreated, verbally abused, and are treated like a criminal. Danilo said that being locked up in a detention center is tremendous and is something that he would not even wish on his own enemies. He said for those 45 days that he spent detained will haunt him for the rest of his life.

Many of the issues surrounding state and local liability for immigration enforcement have yet to be resolved. Indeed, some of these issues may not be resolved for many years as immigration enforcement practices change and as cases work their way through the courts. But the risks for states and localities are very real. These risks must be considered as states and localities decide whether to take on enforcement of immigration law.

### Conclusion

The ongoing changes in immigration enforcement should not be ignored. This thesis seeks to show that the current immigration procedures in California is in need of reform. The current enforcement program encourages racial profiling and the

immigration courts are understaffed and overworked that it is hard for them to adjudicate proper rulings in cases. Although a full reform plan exceeds the extent of this thesis, I offer some recommendations in an attempt to fix a faulty system.

First, there needs to be more oversight in the ICE programs. Today, ICE is now the largest law enforcement agency in the country. By its own estimation, it also works with tens of thousands of state and local law enforcement officials throughout the country. It can initiate removal proceedings against over 10 percent of the U.S. population, and its actions affect countless others. However, ICE has no oversight mechanism that govern its actions. As ICE becomes a hub for a whole host of state and local law enforcement efforts, it seems increasingly important to consider the possibility that external oversight is needed to ensure that constitutional rights are not being violated.

Second, reform is needed in the immigration courts. Immigration courts should provide counsel to noncitizens because people who have access to immigration legal experts are better able to understand the types of documentation they need and thus making their time in court more productive and reducing the number of unnecessary court hearings. Also, there needs to be an increase in staff because although more cases are being filed by the DHS to the immigration courts, there are not enough judges or law clerks to deal with the massive influx. Creating a more effective oversight for immigration enforcement and changing the nature of the immigration courts are both necessary steps to ensure that the immigration enforcement in California will function properly.

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