



5-1-2018

Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime

Bill Ong Hing
bhing@usfca.edu

Follow this and additional works at: <https://scholarship.law.tamu.edu/lawreview>

 Part of the [Civil Law Commons](#), [Civil Rights and Discrimination Commons](#), [Common Law Commons](#), [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [Criminal Law Commons](#), [Cultural Heritage Law Commons](#), [Human Rights Law Commons](#), [Immigration Law Commons](#), [International Law Commons](#), [Jurisprudence Commons](#), [Law and Politics Commons](#), [Law and Race Commons](#), [Law and Society Commons](#), [Law Enforcement and Corrections Commons](#), [Legal Education Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [National Security Law Commons](#), [Nonprofit Organizations Law Commons](#), [Other Education Commons](#), [Other Law Commons](#), [President/Executive Department Commons](#), [Public Law and Legal Theory Commons](#), [Rule of Law Commons](#), [Social Welfare Law Commons](#), [State and Local Government Law Commons](#), [Supreme Court of the United States Commons](#), and the [Transnational Law Commons](#)

Recommended Citation

Bill O. Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 Tex. A&M L. Rev. 253 (2018).
Available at: <https://scholarship.law.tamu.edu/lawreview/vol5/iss2/5>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Texas A&M Law Review by an authorized editor of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

ARTICLE

ENTERING THE TRUMP ICE AGE: CONTEXTUALIZING THE NEW IMMIGRATION ENFORCEMENT REGIME

by: *Bill Ong Hing**

ABSTRACT

During the early stages of the Trump ICE age, America seemed to be witnessing and experiencing an unparalleled era of immigration enforcement. But is it unparalleled? Did we not label Barack Obama the “deporter-in-chief?” Was it not George W. Bush who used the authority of the Patriot Act to round up nonimmigrants from Muslim and Arab countries, and did his ICE not commonly engage in armed raids at factories and other worksites? Are there not strong parallels that can be drawn between Trump enforcement plans and actions and those of other eras? What about the fear and hysteria that seems to really be happening in immigrant communities? Is the fear unparalleled? Why is there so much fear? Is the fear justified? Why do things seem different, in spite of rigorous immigration enforcement that has occurred even in recent years?

This Article begins with a comparison of what the Trump Administration has done in terms of immigration enforcement with the enforcement efforts of other administrations. The Author then turns to the fear and hysteria in immigrant communities that has spread throughout the country. The Author asks why that fear has occurred and whether the fear has a reasonable basis. The Author closes with a personal reflection on the parallels the Author has seen and experienced since beginning to practice immigration law as a legal services attorney in 1975 and contemplates why enforcement and the resulting fear are different today.

TABLE OF CONTENTS

I. INTRODUCTION.....	254
II. COMPARING TRUMP POLICIES WITH PAST ENFORCEMENT.....	256
A. <i>The Muslim Ban</i>	257
1. Post-9/11 Ban.....	261
2. Iranian Student Roundup of 1979.....	263
B. <i>Trump’s Extreme Vetting</i>	265
C. <i>Expanding Expedited Removals</i>	266
D. <i>Criminal Immigrants: Obama’s Priorities</i>	269
E. <i>Raids and Mass Deportations</i>	273
1. The Bush Raids.....	274
2. The Palmer Raids.....	275

* Professor of Law and Migration Studies, University of San Francisco; Professor of Law *Emeritus*, University of California, Davis. Thanks to Eric Cohen, Mark Silverman, Kathy Brady, Zach Nightingale, Jon Blazer, and Paula Solorio for their helpful suggestions to early drafts of this Article.

- 3. Mexican “Repatriation” in the 1930s 276
- 4. Operation Wetback 277
- III. TRUMP’S BORDER WALL..... 277
 - A. *The Fence Act* 278
 - B. *Operation Gatekeeper* 279
- IV. 287(G) AGREEMENT EXPANSION 280
- V. DISCOURAGING ASYLUM APPLICANTS THROUGH CREDIBLE FEAR REVISIONS..... 282
 - A. *Discouraging Haitians*..... 283
 - B. *Discouraging Guatemalans and El Salvadorians* 284
- VI. SANCTUARY CITIES FUNDING AND SHAMING THREATS . 286
 - A. *Criminal Prosecution of Sanctuary Workers*..... 288
- VII. REINSTITUTING SECURE COMMUNITIES PROGRAM 290
- VIII. REPORTS OF WIDESPREAD FEAR 291
 - A. *Why the Fear?* 298
 - B. *Is the Fear Objectively Justified?* 310
- IX. CONCLUSION 316

I. INTRODUCTION

A week before the November 2016 general election, the Author was on a conference call with the Immigrant Legal Resource Center (“ILRC”) policy team. The team was planning how to push to have ILRC staff attorney Angie Junck named to Hillary Clinton’s transition team. Angie would be key to the immigration team. Someone needed to push Clinton to urge Congress to not throw so-called “criminal immigrants” under the bus during comprehensive immigration reform or expansion of prosecutorial discretion. Who Clinton might name as the new Deputy Attorney General to head the DOJ’s civil division—the key person who would lead the charge to defend the constitutionality of the President’s power to issue the Deferred Action for Parents of Americans (“DAPA”) prosecutorial discretion that Clinton pledged to stand behind—was also a topic of discussion.

A few days before the election, in typical activist academic fashion, the Author was assessing how to best strategize his approach and allocate his time, while on a partial sabbatical, to write and help supervise Immigration Clinic students. The Author’s writing projects include a book critical of the Obama Administration’s handling of the surge of unaccompanied children fleeing Central America since 2014 and an immigration law casebook with Jennifer Chacón and Kevin Johnson. The clinic students were working on asylum cases involving women and children who fled various forms of violence in Central America. At the time, the Author was also looking forward to Clinton’s pledge

that she would shut down the ICE family detention centers and not deport unaccompanied children.¹

The day before the general election, Monday, November 7, 2016, the Author was at a conference at UCLA—The Network for Justice Planning Summit. The convening involved a nation-wide, interdisciplinary research initiative of the American Bar Foundation. “This project is devoted to producing innovative scholarship on the Latino population in the United States and locating the sites of intervention that promise to be most impactful in promoting opportunity and mobility through law and policy. . . . [The] aim is to generate findings that can be utilized by organizations and individuals who work to advance justice for the Latino community.”² Much of the day is spent planning progressive work with the Latino community and partnering with academia and community based organizations over the next few years of the Clinton Administration.

Less than forty-eight hours later, Donald Trump was elected President of the United States. The Author recalls receiving a late morning call from Afra Afsharipour, a former colleague at UC Davis who lives in San Francisco. She reported that when she dropped off her children at Alvarado Elementary School that morning, immigrant parents arrived scared and in tears. They were concerned that they would be deported. They were not sure if they should bring their kids to school anymore. They were not sure if it was safe to leave their homes.

That call marked the beginning of the Trump age of Immigration and Customs Enforcement—the Trump ICE Age.³ As America witnesses the unfolding of President Trump’s ICE enforcement, embodied by Executive Orders, unleashed ICE agents, Border Wall construction proposals, and the President’s funding wish list, fear is spreading throughout immigrant communities. Allies and immigrants’ groups are watching and reporting every perceived ICE action, perhaps contributing to a state of hysteria through social media and listservs.

During the early stages of the Trump ICE age, America seemed to be witnessing and experiencing an unparalleled era of immigration en-

1. David Nakamura, *Clinton’s Stance on Immigration is a Major Break from Obama*, WASH. POST (Mar. 10, 2016), https://www.washingtonpost.com/politics/clintons-stance-on-immigration-is-a-major-break-from-obama/2016/03/10/6388a1f8-e700-11e5-a6f3-21ccdbc5f74e_story.html?utm_term=.c7c93d5e6570 [https://perma.cc/ZK69-XSUC].

2. *The Future of Latinos in the United States: Law, Opportunity, and Mobility*, AM. BAR FOUND., <https://futureoflatinos.org/> (last visited Feb. 13, 2018) [https://perma.cc/EW23-XQMS].

3. Since that first call, the Author received dozens of requests for immigration and know-your-rights presentations from countless individuals and organizations in response to President Trump’s immigration enforcement threats. They include calls from individuals at K–12 schools, colleges, churches, health care clinics, apartment complexes, libraries, community-based organizations, restaurants, and other businesses.

forcement. But is it unparalleled? Did we not label Barack Obama the “deporter-in-chief?”⁴ Was it not George W. Bush who used the authority of the Patriot Act to round up nonimmigrants from Muslim and Arab countries, and his ICE not commonly engage in armed raids at factories and other worksites?⁵ Are there not strong parallels that can be drawn between Trump enforcement plans and actions and those of other eras?

What about the fear and hysteria that seems to really be present in immigrant communities? Is the fear unparalleled? Why is there so much fear? Is the fear justified? Why do things seem different in spite of rigorous immigration enforcement that has occurred even in recent years?

This Article begins with a comparison of the Trump Administration immigration enforcement actions with the enforcement efforts of other administrations. For example, the Author compares (1) the attempted Muslim travel bans with post 9/11 efforts by George W. Bush and Iranian student roundups by Jimmy Carter; (2) the Border Wall proposal with the Fence Act of 2006 and Operation Gatekeeper in 1994; (3) restarting Secure Communities (fingerprint sharing program) with Obama’s enforcement program of the same name; (4) expanding INA § 287(g) agreements with Bush efforts under the same statute; (5) the threat of raids by an ICE deportation army with Bush gun-toting raids; (6) extreme vetting of immigrants and refugees with what already existed under Bush and Obama; (7) threatening to cut off federal funds to sanctuary cities with the prosecution of sanctuary workers in the 1980s; (8) prioritizing “criminal” immigrants with Obama’s similar prioritization; and (9) expedited removal in the interior with Bush and expedited removals along the border with Obama. Then the Author turns to the fear and hysteria in immigrant communities that has spread throughout the country. The Author asks why that fear occurred and whether the fear is reasonable. The Author closes with a personal reflection on the parallels he has seen and experienced since he began practicing immigration law as a legal services attorney in 1975 and contemplates why enforcement and the resulting fear are different today.

II. COMPARING TRUMP POLICIES WITH PAST ENFORCEMENT

Some pundits credit President Trump’s successful bid for the White House, at least in part, to his tough stance on immigration enforcement. His venomous attack on some Mexican immigrants, his pledge

4. Amanda Sakuma, *Obama Leaves Behind a Mixed Legacy on Immigration*, NBC News (Jan. 15, 2017), <http://www.nbcnews.com/storyline/president-obama-the-legacy/obama-leaves-behind-mixed-legacy-immigration-n703656> [https://perma.cc/4LVS-4NQ2].

5. See generally, Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307 (2009).

to build a “great, great wall” along the southern border, and his call for a “total and complete shutdown of the entry of Muslims to the United States” were among his most publicized campaign pledges.⁶ Combined with actual immigration enforcement actions that occurred after President Trump took office, his pre-election rhetoric undoubtedly contributed to the fear that flooded across the country in immigrant communities.⁷ The truth is, when Trump Administration actions and proposals are juxtaposed with those of other eras, many similarities surface—and in some cases are harsher than what President Trump has proposed.

A. *The Muslim Ban*

On January 27, 2017, President Trump issued Executive Order 13,769, titled “Protecting the Nation from Foreign Terrorist Entry into the United States” (“EO-1”).⁸ Two courses of action were attempted. First, under 8 U.S.C. § 1182(f), a travel ban was ordered to suspend the immigrant and nonimmigrant entry . . . of aliens” from Iraq, Libya, Sudan, Somalia, Syria, and Yemen for ninety days as “detrimental to the interests of the United States.”⁹ The second ordered a 120 day suspension of the Refugee Admissions Program, and imposed an indefinite ban on Syrian refugees; no more than 50,000 refugees were to be admitted in 2017, and a preference would be given to refugee claims based on “religious-based persecution, provided that the religion of the individual is a minority religion” in the country.¹⁰ Within hours, several federal courts enjoined EO-1 on a range of grounds, including: the due process clause, the equal protection clause, and the Establishment Clause.¹¹

Before courts issued the restraining orders of EO-1, the damage was already done. January 27, 2017, was a Friday, and that weekend,

6. *Here's Trump's Election Speech*, TIME (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/> [<https://perma.cc/VGX7-THAC>]. See Jenna Johnson, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States'*, WASH. POST (Dec. 7, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.8beb99a424e1 [<https://perma.cc/FU2E-GGRW>].

7. See *infra* notes 332–36 and accompanying text.

8. Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017). See also Office of the Press Secretary, *Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States*, WHITE HOUSE (Jan. 27, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states> [<https://perma.cc/WVY6-TWKJ>].

9. *Id.* at 8,978.

10. *Id.* at 8,979.

11. See, e.g., *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017); *Mohammed v. United States*, No. CV 17-00786 AB (PLAx), 2017 WL 438750 (C.D. Cal. Jan. 31, 2017); *Doe v. Trump*, No. C17-126, 2017 WL 388532 (W.D. Wash. Jan. 28, 2017); *Aziz v. Trump*, No. 1:17-cv-116, 2017 WL 386549 (E.D. Va. Jan. 28, 2017).

chaos ensued at various airports across the country.¹² Volunteer attorneys staked out arrival areas at international terminals in New York, Chicago, Newark, Washington, Los Angeles, and San Francisco.¹³ They quizzed relatives and friends awaiting the arrival of individuals from the seven countries.¹⁴ Access to Customs and Border Patrol (“CBP”) agents by attorneys on behalf of anticipated arriving passengers was limited and hampered.¹⁵ According to one list provided by the Government, “746 people . . . were detained or processed” under the executive order in the “turbulent 27 hours after a judge partially blocked enforcement of the executive order.”¹⁶

Given his bad luck with the courts on EO-1, President Trump revised his executive order. On March 6, 2017, President Trump issued a revised Executive Order (“EO-2”) and revoked EO-1.¹⁷ EO-2 reinstated the ninety-day ban on travel for six of the original seven countries, removing Iraq from the list.¹⁸ The ban was narrowed to respond to “judicial concerns” by applying only to individuals outside the United States who did not have valid visas, expressly exempting lawful permanent residents (“LPRs”) and refugees already admitted to the United States.¹⁹ The 120 day refugee suspension continued, but the

12. Michael D. Shear et al., *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, N.Y. TIMES, (Jan. 28, 2017), https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html?_r=0 [https://perma.cc/BFF7-AZTX].

13. Gene Johnson, *What Will the New Trump Travel Ban Look Like?*, U.S. NEWS (Feb. 28, 2017), <https://www.usnews.com/news/politics/articles/2017-02-28/airports-legal-volunteers-prepare-for-new-trump-travel-ban> [https://perma.cc/47VB-9TD9]; The World staff, *Volunteer Lawyers Come Forward to Assist Travelers Detained Under Trump Travel Ban*, PRI (Jan. 30, 2017), <https://www.pri.org/stories/2017-01-30/volunteer-lawyers-come-forward-assist-travelers-detained-under-trump-travel-ban> [https://perma.cc/CEW9-BTD6]; Ted Phillips, *JFK Airport Volunteer Attorneys Continue to Help Travel Ban Cases*, NEWSDAY (Feb. 5, 2017), <http://www.newsday.com/news/new-york/jfk-airport-volunteer-attorneys-continue-to-help-travel-ban-cases-1.13066591> [https://perma.cc/BGX6-M76L].

14. See Victoria Macchi, *Preparing for New Travel Ban, Lawyers Step Up to Help Immigrants*, VOA (Mar. 4, 2017), <https://www.voanews.com/a/immigrant-lawyers-prepare-for-travel-ban/3749414.html> [https://perma.cc/7D9Y-GA9D].

15. Edward Helmore & Alan Yuhas, *Border Agents Defy Courts on Trump Travel Ban, Congressmen and Lawyers Say*, THE GUARDIAN (Jan. 30, 2017), <https://www.theguardian.com/us-news/2017/jan/29/customs-border-protection-agents-trump-muslim-country-travel-ban> [https://perma.cc/GR3R-GJPM].

16. Larry Neumeister, *746 People Subjected to Travel Ban Jan. 28-29*, BOSTON GLOBE (Feb. 24, 2017). The supervising attorney of the University of San Francisco immigration law clinic, Jacqueline Brown Scott, and our law students, assisted with a half dozen cases at San Francisco International Airport, over a five day period.

17. Office of the Press Secretary, *Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States*, WHITE HOUSE (Mar. 6, 2017), <https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-from-foreign-terrorist-entry-united-states> [https://perma.cc/JC9F-8LW3].

18. Ariane de Vogue et al., *US President Donald Trump Signs New Travel Ban, Exempts Iraq*, CNN (Mar. 7, 2017), <http://www.cnn.com/2017/03/06/politics/trump-travel-ban-iraq/index.html> [https://perma.cc/2AED-32ND].

19. Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,212–13 (Mar. 9, 2017).

minority religion preferences in refugee applications and the complete ban on Syrian refugees were removed.²⁰ This time around, one federal court—the Eastern District of Virginia—refused to enjoin the new ban. Judge Anthony J. Trenga, a George W. Bush appointee, was the first federal judge to uphold the Trump travel ban.²¹ Interestingly, the same Eastern District of Virginia struck down EO-1. The EO-1 case enjoining portions of EO-1 was before a different judge, Leonie Milhomme Brinkema, a Bill Clinton appointee.²² This time, Judge Trenga understood that 1965 immigration laws prohibited nationality discrimination in the issuance of visas, however, he construed EO-2 as relying on the authority to deny entry even after the issuance of a visa.²³ Also, because EO-2 is “facially neutral,” Judge Trenga rejected plaintiffs’ arguments that the ban violated the Establishment Clause because it disfavored the religion of Islam.²⁴ He focused on what he regarded as EO-2’s secular purpose of protecting U.S. citizens from terrorist attacks and rejected plaintiffs’ references to the stream of anti-Muslim statements made by President Trump and his close advisors before and after the election.²⁵ Instead, Judge Trenga relied on a Supreme Court doctrine related to Congress’ vast power over immigration, often referred to as “plenary power,” and the Executive Branch’s authority to deny visas if there is a facially legitimate and non-discriminatory stated purposes, citing *Kleindienst v. Mandel*.²⁶

20. *Id.* at 13,210. See generally Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017).

21. Laura Jarrett, *Federal Judge Sides with Trump Administration in Travel Ban Case*, CNN (Mar. 24, 2017), <http://www.cnn.com/2017/03/24/politics/virginia-federal-judge-revised-travel-ban/index.html> [<https://perma.cc/YU3S-W8LP>]. (But Virginia-based US District Judge Anthony Trenga was not persuaded that Trump’s past statements automatically mean the revised executive order was unlawful, especially given the changes it made from the first version. “This court is no longer faced with a facially discriminatory order coupled with contemporaneous statements suggesting discriminatory intent, Trenga explained. And while the President and his advisers have continued to make statements following the issuance of EO-1 (the first executive order) that have characterized or anticipated the nature of EO-2 (the revised ban) the court cannot conclude for the purposes of the motion that these statements, together with the President’s past statements, have effectively disqualified him from exercising his lawful presidential authority.”) *Sarsour v. Trump*, 245 F. Supp. 3d 719, 742 (E.D. Va. 2017).

22. *Aziz v. Trump*, No. 1:17-cv-116, 2017 WL 386549 (E.D. Va. Jan. 28, 2017) (granting temporary restraining order preventing federal government agencies from removing individuals from Dulles International Airport in Virginia pursuant to EO 13769 and ordering respondents to “permit lawyers access to all legal permanent residents being detained at Dulles International Airport.”).

23. Rachel Welner, *Virginia Judge Sides with Trump Administration on New Travel Ban*, WASH. POST (Mar. 24, 2017), https://www.washingtonpost.com/local/public-safety/virginia-judge-gives-okay-to-new-trump-travel-ban/2017/03/24/a304be4c-0e60-11e7-ab07-07d9f521f6b5_story.html?utm_term=.838dbc6088fc [<https://perma.cc/6DVL-PVKA>].

24. *Sarsour*, at 734.

25. *Id.* at 735.

26. *Id.*

However, the U.S. Court of Appeals for the Fourth Circuit had a conflict on its hands over EO-2. Several days before Judge Trenga's decision in Virginia, on March 15, 2017, U.S. District Judge Theodore D. Chuang, of the District of Maryland, enjoined a major portion of the new Trump order.²⁷ In the Maryland District Court case, Judge Chuang, a Barack Obama appointee, saw things quite differently. He cited statement after statement by Trump and his advisors that revealed great animus toward Muslims.²⁸ Those statements were "highly relevant" to the intent behind EO-2, especially when "Stephen Miller, the Senior Policy Advisor to the President, described . . . [the changes to the EO-2 order] as 'mostly minor technical differences,'" and stated that the "basic policies are still going to be in effect."²⁹ The White House Press Secretary chimed in that "[t]he principles of [EO-2] remain the same."³⁰ To Judge Chuang, "the fact that [EO-2] is facially neutral in terms of religion is not dispositive."³¹ Remaining is an absolute ban on the entry of nationals from the designated countries.

Judge Chuang noted:

When President Trump discussed his planned Muslim ban, he described not the preference for religious minorities, but the plan to ban the entry of nationals from certain dangerous countries as a means to carry out the Muslim ban. These statements thus continue to explain the religious purpose behind the travel ban.³²

Judge Chuang was not impressed by the government's attempt to adorn EO-2 with more national security window dressing. "The question . . . is not simply whether the Government has identified a secular purpose for the travel ban."³³ "If the . . . secular purpose is secondary to the religious purpose, the Establishment Clause would be violated."³⁴ There was no interagency consultation process.

According to Judge Chuang:

[T]he fact that the White House took the highly irregular step of first introducing the travel ban without receiving the input and judgment of the relevant national security agencies strongly suggests that the religious purpose was primary, and the national security purpose, even if legitimate, is a secondary *post hoc* rationale.³⁵

27. *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 566 (D. Md.), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir.), *cert. granted*, 137 S. Ct. 2080 (2018).

28. *Id.* at 558.

29. *Id.* at 548–59.

30. *Id.* at 559.

31. *Id.* at 560.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

On the issue of whether the order was deserving of deference, the deference due to the executive on matters of an officer's decision to deny a visa was not appropriate here. That approach "does not apply to the promulgation of sweeping immigration policy at the highest levels of political branches."³⁶

President Trump's attempted travel ban that largely affected Muslims could draw immediate historical comparisons with Chinese and other Asian exclusion laws.³⁷ However, perhaps the most obvious comparisons are with the post-9/11 targeting of Muslims and Arabs as well as the roundup of Iranian students during the Carter Administration.

1. Post-9/11 Ban

On 9/11, the nation suffered one of its most severe tragedies in modern history. Two passenger airplanes were commandeered by terrorists that crashed into the Twin Towers of Manhattan's World Trade Center, causing their total destruction.³⁸ A third hijacked plane crashed into the Pentagon.³⁹ In all, almost 3,000 lives were lost that fateful day.⁴⁰

36. *Id.* at 563 (internal quotations omitted). In the Author's view, Judge Chuang is right. So is U.S. District Judge Derrick K. Watson of the Hawaii District who also enjoined EO-2 (noting that the populations of the six banned countries were over 90% Muslim and rejecting the government's argument that one can demonstrate animus toward any group of people only by targeting all of them). *Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1135 (D. Haw.) *aff'd in part, vacated in part, remanded*, 859 F.3d 741 (9th Cir.), *cert. granted*, 137 S. Ct. 2080 (2017). Even though Judge Chuang and Judge Watson focused on the Establishment Clause violation, the Author thinks more can be said about Trump's reliance on 8 U.S.C. § 1182(e) as statutory authority for the ban. That provision provides:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

How can the President actually assert that he found "that the entry of" all nationals from the six countries "would be detrimental to the interests" of the country? He cannot. This provision should be reserved for an actual "class of aliens," such as a terrorist group or entity that would be coming to do us harm. He does not have the factual basis to support his ban. He cannot even come close to providing that factual basis for the assertion that entry of any random person from the six countries would be detrimental to the United States.

37. *See generally*, BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850-1990* (1993).

38. N. R. Kleinfield, *U.S. Attacked, Hijacked Jets Destroy Twin Towers and Hit Pentagon in Day of Terror*, N.Y. TIMES (Sept. 12, 2001), <http://www.nytimes.com/2001/09/12/us/us-attacked-hijacked-jets-destroy-twin-towers-and-hit-pentagon-in-day-of-terror.html> [<https://perma.cc/2WY4-B4VW>].

39. *Id.*

40. Joanna Walters, *9/11 Health Crisis: Death Toll from Illness Nears Number Killed on Day of Attacks*, THE GUARDIAN (Sept. 11, 2016), <https://www.theguardian.com/us-news/2016/sep/11/9-11-illness-death-toll> [<https://perma.cc/3XLU-TLED>].

Quick and early suspicion of the attackers focused on Muslim and Arab terrorists.⁴¹ Although the swift “Islamophobic” impulse to blame Muslims was completely erroneous a few years earlier when the Mira Federal Building in Oklahoma City was bombed,⁴² subsequent evidence demonstrated that—this time—Muslim-extremist Osama Bin Laden trained the culprits.⁴³ The stage was set for the country’s “War on Terrorism” that consumes us to this day.

In truth, one of President George W. Bush’s first public actions suggested that he actually would work hard to not foment anti-Muslim sentiment in his search for justice and to find those responsible for the attacks. Six days after the attack, Bush visited a Washington mosque,⁴⁴ where he referred to Arab and Muslim Americans as “patriots” undeserving of intimidation and harassment.⁴⁵ He boldly proclaimed, “The face of terror is not the true faith of Islam.”⁴⁶ In the televised visit, he reminded the nation that American Muslims are “friends” and “tax-paying citizens.”⁴⁷

Unfortunately, it did not take long for that feel good, multicultural sentiment to be overcome by one that fomented hate.⁴⁸ In its investigation of the attacks, the Bush Administration detained more than 1,200 individuals, mostly of Arab and Muslim descent.⁴⁹

In February 2002, the INS announced that it would soon begin apprehending and interrogating thousands of undocumented Middle Eastern immigrants who apparently ignored deportation orders, seeking ways to prosecute anyone who had ties to terrorism. The

41. Jake Tapper, *Setback for Arab-Americans*, SALON.COM (Sept. 17, 2001), <https://www.salon.com/2011/04/04/muslims> [<https://perma.cc/CU3W-CEWS>].

42. Melinda Henneberger, *Terror in Oklahoma: Bias Attacks; Muslims Continue to Feel Apprehensive*, N.Y. TIMES (Apr. 24, 1995), <http://www.nytimes.com/1995/04/24/us/terror-in-oklahoma-bias-attacks-muslims-continue-to-feel-apprehensive.html> [<https://perma.cc/GV8T-UG9X>].

43. Brian Ross, *While America Slept: The True Story of 9/11*, ABC NEWS (Aug. 11, 2011), <http://abcnews.go.com/Blotter/ten-years-ago-today-countdown-911/story?id=14191671> [<https://perma.cc/AZ3V-HJMV>].

44. Samuel G. Freedman, *Six Days After 9/11, Another Anniversary Worth Honoring*, N.Y. TIMES (Sept. 7, 2012), <http://www.nytimes.com/2012/09/08/us/on-religion-six-days-after-9-11-another-anniversary-worth-honoring.html> [<https://perma.cc/YUV7-EB4F>].

45. David E. Sanger, *A Nation Challenged: The President; Bin Laden Is Wanted in Attacks, ‘Dead or Alive,’ President Says*, N.Y. TIMES (Sept. 18, 2001), <http://www.nytimes.com/2001/09/18/us/nation-challenged-president-bin-laden-wanted-attacks-dead-alive-president-says.html> [<https://perma.cc/4JTM-EZXJ>].

46. *Id.*

47. Freedman, *supra* note 44.

48. Eric Lichtblau, *Hate Crimes Against American Muslims Most Since Post-9/11 Era*, N.Y. TIMES (Sept. 17, 2016), <https://www.nytimes.com/2016/09/18/us/politics/hate-crimes-american-muslims-rise.html> [<https://perma.cc/4ZMP-QA3X>] (a record 481 documented hate crimes against Muslims were committed in 2001).

49. U.S. DEP’T OF JUST. OFF. OF INSPECTOR GEN., *THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 1, 14*, (Apr. 2003), <https://oig.justice.gov/special/0306/full.pdf> [<https://perma.cc/4JTM-EZXJ>].

results of these interviews would be compiled in a new computer database to facilitate future monitoring of these individuals.⁵⁰

Soon the strategy evolved into the National Security-Entry-Exit Registration System (“NSEERS”) targeting males from twenty-five Arab or Muslim majority countries, plus North Korea, which was maintained through the end of the Obama Administration.⁵¹ NSEERS did not net any terrorist convictions.⁵²

Perhaps the best-known piece of legislation that resulted from the 9/11 attacks is the USA PATRIOT Act (the “Patriot Act”). Without much opposition, the Act included a range of provisions authorizing the detention and exclusion of noncitizens based on speech or support of certain suspicious groups.⁵³ President Bush used the Patriot Act to close down Muslim charities with little notice or opportunity for the organizations to object.⁵⁴

2. Iranian Student Roundup of 1979

President Trump’s targeting of nationals from particular countries is also reminiscent of the Carter Administration’s roundup of Iranian students in the United States in 1979. In November of that year, President Jimmy Carter and the nation were shocked by the takeover of the U.S. embassy in Tehran by a band of militant students.⁵⁵ The militants supported the Iranian Revolution and were acting in opposition to the United States because of the United States’ support for the

50. BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 267 (2004).

51. Kevin Liptak & Shachar Peled, *Obama Administration Ending Program Once Used to Track Mostly Arab and Muslim Men*, CNN (Dec. 22, 2016), <http://www.cnn.com/2016/12/22/politics/obama-nseers-arab-muslim-registry/index.html> [<https://perma.cc/6SK3-NFK5>].

52. *Id.*

53. Claudia ‘15, *What Does the PATRIOT Act Allow the Government to Do?*, THE ULTRA VIOLET (Oct. 20, 2013), <http://www.theultraviolet.com/wordpress/2013/10/what-does-the-patriot-act-allow-the-government-to-do-2/> [<https://perma.cc/4DJG-DJMZ>]; *Surveillance Under the PATRIOT Act*, ACLU, <https://www.aclu.org/info-graphic/surveillance-under-patriot-act> (last visited Jan. 15, 2018) [<https://perma.cc/CLL3-6HEH>]; *The USA PATRIOT Act: Preserving Life and Liberty*, DEP’T OF JUST., <https://www.justice.gov/archive/ll/highlights.htm> (last visited Oct. 27, 2017) [<https://perma.cc/8VYF-USH2>].

54. Neil MacFarquhar, *As Muslim Group Goes on Trial, Other Charities Watch Warily*, N.Y. TIMES (July 17, 2007), <https://www.nytimes.com/2007/07/17/us/17charity.html> [<https://perma.cc/3JDW-7XJN>]; Eli Lake, *U.S. Stopped Blacklisting Domestic Terror Charities Under Obama*, BLOOMBERG (May 12, 2016), <https://www.bloomberg.com/view/articles/2016-05-12/u-s-stopped-blacklisting-domestic-terror-charities-under-obama> [<https://perma.cc/AKX8-XNRM>].

55. Stephen Kinzer, *Thirty-Five Years After Iranian Hostage Crisis, Aftershocks Remain*, BOSTON GLOBE (Nov. 4, 2014), <https://www.bostonglobe.com/opinion/2014/11/04/thirty-five-years-after-iranian-hostage-crisis-aftershocks-remain/VIEKSajEUvSmDQICGF8R7K/story.html> [<https://perma.cc/Q7H6-3H3R>].

Shah of Iran, whose regime was toppled in January 1979.⁵⁶ The conflict arose when President Carter allowed the Shah into the United States for cancer treatment, and the Iranian militants demanded his return.⁵⁷ Dozens of U.S. citizens working in the embassy were held hostage in a crisis that lasted more than a year.⁵⁸ Some observers opine that the embassy takeover and the ensuing attention that President Carter paid to the crisis cost him re-election.⁵⁹

The Carter Administration implemented a range of strategies in an attempt to resolve the hostage crisis.⁶⁰ Billions of dollars in Iranian assets located in the United States were frozen;⁶¹ diplomatic ties with Iran were cut off;⁶² a rescue attempt by an elite paramilitary group failed;⁶³ and Algeria was recruited to help mediate the situation without success.⁶⁴

With regards to immigration, the Carter Administration implemented executive actions similar to President Trump's recent executive actions. For example, shortly after the embassy takeover, President Carter ordered Attorney General, Benjamin Civiletti, "to identify all Iranian students in the United States who were not in compliance with their visas."⁶⁵ Iranian students were the largest group of foreign students in the United States at the time, and many of them spoke out in opposition to the Shah's regime.⁶⁶ By the end of the year, more than 54,000 students reported to local offices of the Immigration and Naturalization Service (INS), and thousands were found to be de-

56. Raymond H. Anderson, *Ayatollah Ruhollah Khomeini, 89, Relentless Founder of Iran's Islamic Republic*, N.Y. TIMES (June 5, 1989), <http://www.nytimes.com/1989/06/05/world/ayatollah-ruhollah-khomeini-89-relentless-founder-of-iran-s-islamic-republic.html?pagewanted=all> [<https://perma.cc/BYM2-VCYE>].

57. *Id.*

58. *Id.*

59. Harold Jackson, *How Jimmy Carter Squandered His Electoral Assets*, THE GUARDIAN (Nov. 5, 1980), <https://www.theguardian.com/world/1980/nov/06/usa.haroldjackson> [<https://perma.cc/XM5A-3NES>]; Martin Meenagh, *Why Did Jimmy Carter Fail to Gain Re-Election in 1980*, MARTIN MEENAGH BLOG (June 26, 2014), <http://martinmeenagh.blogspot.com/2014/06/why-did-jimmy-carter-fail-to-gain-re.html> [<https://perma.cc/BP4U-8B96>].

60. *Iran Hostage Crisis Fast Facts*, CNN (Oct. 29, 2016), <http://www.cnn.com/2013/09/15/world/meast/iran-hostage-crisis-fast-facts/index.html> [<https://perma.cc/6BK4-X7F6>].

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Joseph D. Whitaker, Art Harris & Phil McCombs, *U.S. Appeals Court Approves Iranian Student Deportation*, WASH. POST (Dec. 28, 1979), https://www.washingtonpost.com/archive/politics/1979/12/28/usappeals-court-approves-iranian-student-deportation/3930b354-c5c6-45be-8124-22cfd6cff296/?utm_term=.af5203675efb [<https://perma.cc/568T-XNJY>].

66. Andrea Nasrine Shahmohammadi, *Masked Resistance: The Iranian Student Movement in the United States, 1977–1979* (2008) (unpublished M.A. dissertation, University of Maryland, Baltimore County), <http://pqdtopen.proquest.com/doc/304415205.html?FMT=ABS> [<https://perma.cc/64AG-F455>].

portable.⁶⁷ The basis for deportation often was simply “small technical violations, such as changing from one college to another and failing to register this fact.”⁶⁸

The Carter Administration also ended a humanitarian program that was extended to Iranian students in the United States prior to the embassy takeover. In the spring of 1979, the INS commissioner announced that no enforcement actions should be taken against Iranians in the country who “indicate[d] an unwillingness to return to Iran because of the instability of the conditions.”⁶⁹ But, days after the hostage crisis began, the deferred departure order was rescinded, and previously-protected students fell within the general order to report to INS.⁷⁰

B. *Trump’s Extreme Vetting*

Many immigration experts were left puzzled by the fact that President Trump’s January 27th travel ban called for “extreme vetting” of immigrants.⁷¹ The “screening process is already rigorous” and “multi-layered.”⁷² In April 2017, Trump officials explained that extreme vetting might now include forcing visitors “to provide cellphone contacts and social-media passwords and answer questions about their ideology.”⁷³

Consider what an Iraqi national seeking a tourist visa to the United States goes through. The applicant completes an online visa application that is screened through a U.S. terrorism watch list and database.⁷⁴ After that, a trained State Department consular official in Iraq, who will have access to any questionable information that was found from the terrorism database screening, interviews the applicant.⁷⁵ DHS officials are also consulted in “high-risk countries” like Iraq, all with the purpose of ferreting out anyone who “poses a criminal or terrorist threat.”⁷⁶

If a visa is issued, biometric information—namely, photographs and fingerprints—is analyzed by officials in the embarking country for all airline passengers. This information is also checked at the National

67. Whitaker, et al., *supra* note 65.

68. *Id.*

69. *Yassini v. Crosland*, 618 F.2d 1356, 1358–59 (9th Cir. 1980).

70. *Id.* at 1359.

71. Rebecca Shabad, *Inside the U.S. Vetting System Trump Wants to Replace*, CBS NEWS (Feb. 27, 2017), <https://www.cbsnews.com/news/inside-u-s-vetting-for-visas-refugees-and-improvements-that-could-be-made/> [<https://perma.cc/JSK9-LSDY>].

72. *Id.*

73. Laura Meckler, *Trump Administration Considers Far-Reaching Steps for ‘Extreme Vetting’*, WALL STREET JOURNAL (Apr. 4, 2017), <https://www.wsj.com/articles/trump-administration-considers-far-reaching-steps-for-extreme-vetting-1491303602> [<https://perma.cc/9LWX-ANX4>].

74. Shabad, *supra* note 71.

75. *Id.*

76. *Id.*

Targeting Center in Virginia.⁷⁷ Then upon arrival in the United States, Customs and Border Protection (“CBP”) officers access the same data, check fingerprints, and pose questions again.⁷⁸ In addition to posting officers at airports to assist airline employees, CBP operates a preclearance program at airports in six high-risk countries.⁷⁹ In 2015, for example, over 22,000 “high-risk travelers” were intercepted.⁸⁰

Refugees face even greater scrutiny.⁸¹ They first go through refugee application and resettlement processes of the U.N. High Commission on Refugees.⁸² Their biometric data is forwarded to the U.S. State Department whose resettlement specialists thoroughly vet any applicant who seeks entry to the United States.⁸³ Verified State Department data is then forwarded for further background and security investigation to other U.S. agencies, including the National Counterterrorism Center, the FBI, the DHS, and the Defense Department.⁸⁴ Applicants’ social media accounts can be screened as well.⁸⁵ Syrian refugees receive “additional enhanced review,” by DHS, the U.S. State Department, CBP, and TSA.⁸⁶

Not surprisingly, many U.S. government employees who were involved in this vetting process were upset by President Trump’s “extreme vetting” proposal. In their view, extreme vetting was already in place, and by calling for greater vetting, President Trump showed that he did not value or recognize their work.⁸⁷

C. *Expanding Expedited Removals*

In his border enforcement memo of February 20, 2017, then-DHS Secretary John Kelly expanded the use of expedited removal under INA § 235(b)(1)(A)(iii)(I) to include anyone caught anywhere in the country who resided in the United States for less than two years.⁸⁸ This action is part of a long-standing enforcement trend of trying to deport undocumented immigrants more efficiently. In the Author’s view, this is a euphemism for providing fewer rights for immigrants.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. See *It’s Working Out Very Nicely*, THIS AMERICAN LIFE (Feb. 3, 2017), <https://www.thisamericanlife.org/radio-archives> [<https://perma.cc/SK6P-JJPR>].

88. John Kelly, *Enforcement of the Immigration Laws to Serve the National Interest*, U.S. DEP’T OF HOMELAND SECURITY (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [<https://perma.cc/4E7R-PMLR>].

Administration after administration sought ways to remove deportable immigrants as soon as possible.⁸⁹

“Expedited removal” involves the removal of undocumented immigrants without a hearing before an immigration judge.⁹⁰ During the Obama Administration, the use of expedited removal was limited to undocumented immigrants apprehended within 100 miles of the border who were in the United States for less than two weeks.⁹¹ But, under the Kelly memo, “expedited removal can now be applied nationwide to those who cannot produce documentation that they have been in the country continuously for at least two years.”⁹² DHS deported 176,752 immigrants through the expedited removal process in 2014.⁹³

For some time, many advocates have been concerned about how the impulse to close off full hearing rights affects asylum seekers. According to the ACLU in 2013, CBP officers often misused the credible-fear screening process to thwart immigrants’ access to immigration court hearings.⁹⁴

The proposed use of the expedited removal power far into the interior of the country is essentially an expansion of the authority that immigration authorities have at the border. An early example of this border expansion is the establishment and validation of fixed border patrol checkpoints located far away from the border, which began appearing in the 1970s.⁹⁵ Although DHS does not release information on the exact number of fixed checkpoints (some pop up and disappear on short notice), the number of interior checkpoints today likely exceeds 100.⁹⁶

89. Marc R. Rosenblum, *Shifts in the US Immigration Enforcement System*, PEREGRINE (July 14, 2015), <https://www.hoover.org/research/shifts-us-immigration-enforcement-system> [<https://perma.cc/3DS2-XVHB>] (“A primary goal of the 1996 law was to streamline the process by permitting immigration enforcement agents to execute removal orders themselves (i.e., without an immigration hearing)”).

90. *A Primer on Expedited Removal*, AM. IMMIGR. COUNCIL (Feb. 3, 2017), <https://www.americanimmigrationcouncil.org/research/primer-expedited-removal> [<https://perma.cc/LM2N-NWTR>].

91. *Id.*

92. Laura Smith, *Donald Trump Can Deport People Without Even Giving Them a Hearing*, MOTHER JONES (Feb. 27, 2017), <https://www.motherjones.com/politics/2017/02/trump-deportation-ice-border-patrol-expedited-removal/> [<https://perma.cc/Z3FB-ZM9Y>].

93. *Id.*

94. *Id.*

95. See generally Deborah Meyers, *From Horseback to High-Tech: US Border Enforcement*, MIGRATION POLICY INSTITUTE (Feb. 1, 2006), <http://www.migrationpolicy.org/article/horseback-high-tech-us-border-enforcement> [<https://perma.cc/SU8C-GBJ3>].

96. Amy Lieberman, *Arizona’s Checkpoint Rebellion*, SLATE (July 24, 2014), http://www.slate.com/articles/news_and_politics/politics/2014/07/arizona_immigration_checkpoint_criticism_border_patrol_harasses_people_and.html [<https://perma.cc/QDK8-5BMK>].

In 1976, the Supreme Court condoned fixed checkpoints by carving out a major exception to the Fourth Amendment's protection against search and seizure to accommodate the Border Patrol. In *United States v. Martinez-Fuerte*, the Court considered the constitutionality of a fixed checkpoint on the interstate between San Diego and Los Angeles.⁹⁷ The checkpoint was sixty-six miles north of the Mexican border.⁹⁸ A "point" agent stood between northbound traffic lanes, slowed down vehicles, and screened occupants.⁹⁹ In a small number of cases, the "point" agent directed cars to a secondary inspection area for further inquiry.¹⁰⁰ Some stops that were made were not based on articulable suspicion.¹⁰¹ The defendants argued that the routine stopping of vehicles at a checkpoint was unconstitutional because of the absence of reasonable suspicion.¹⁰² However, the Court recognized that maintenance of a traffic-checking program in the interior is necessary because "the flow of illegal aliens cannot be controlled effectively at the border." It held:

A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens.¹⁰³

Fixed checkpoints, even miles and miles away from the border, were now constitutional, even in the absence of reasonable suspicion. The Border Patrol's efforts to deal with the challenge of undocumented immigration were important to support.¹⁰⁴

The Supreme Court majority was not concerned with racial overtones even though the Border Patrol was basing secondary inspections on those who looked Mexican.¹⁰⁵ A dissenting opinion by Justice Brennan warned: "Every American citizen of Mexican ancestry and every Mexican alien lawfully in this country must know after today's decision that he travels the fixed checkpoint highways at [his own] risk."¹⁰⁶

The tendency to expand the use of expedited removal, however, was outdone by the Reagan Administration in its effort to stem the flow of Haitian refugees to our shores. At the time, poverty and infant mortality rates in Haiti ranked the highest in the Western Hemisphere, and the flow of refugees to the United States continued, de-

97. *Martinez-Fuerte v. United States*, 428 U.S. 543 (1976).

98. *Id.* at 545.

99. *Id.*

100. *Id.*

101. *Id.* at 547.

102. *Id.* at 550.

103. *Id.* at 556-57.

104. *Id.* at 562.

105. *Id.* at 563.

106. *Id.* at 573 (Brennan, J. dissenting).

spite procedures implemented to thwart asylum applicants.¹⁰⁷ However, instead of recognizing a true refugee crisis, U.S. officials formulated strategies to deny asylum. They theorized that turning Haitians away on the high seas outside U.S. territory would render them ineligible to apply for asylum.¹⁰⁸

In order to implement the plan, President Reagan ordered the interdiction of boats and rafts carrying Haitians on the high seas.¹⁰⁹ The action was premised on the reasoning that undocumented migration was a “serious national problem detrimental to the interests of the United States,” and that in order to enforce U.S. immigration laws, interdicting craft on the high seas was a critical strategy.¹¹⁰ The Coast Guard was ordered “[t]o return the vessel and its passengers to the country from which it came, when there is reason to believe that an offense is being committed against the United States immigration laws.”¹¹¹ These actions were restricted to waters of U.S. territory.¹¹²

President Reagan’s executive order was constitutional and critical to the need to deal with the harms of undocumented immigration, according to a federal court in *Haitian Refugee Center v. Gracey*.¹¹³ The fact that the program was implemented with the Haitian government’s permission added to the sense that matters of foreign affairs were involved.¹¹⁴ The federal court ruled that the President’s order and the ensuing interdiction of vessels did not violate United States’ obligations under the Refugee Act of 1980 or the 1967 United Nations Protocol Relating to the Status of Refugees.¹¹⁵

D. Criminal Immigrants: Obama’s Priorities

In April 2017, a reporter called the Author somewhat incredulous about a particular deportation story. How could this person be deported? Is this a new practice under Trump?

107. Barbara Crossette, *Asylum Policy for Haitian Refugees Stirs Debate on Fairness by the U.S.*, N.Y. TIMES (Dec. 2, 1991), <http://www.nytimes.com/1991/12/02/world/asylum-policy-for-haitian-refugees-stirs-debate-on-fairness-by-the-us.html?pagewanted=all> [<https://perma.cc/CK9X-QH2E>]; Gregory Jaynes, *U.S. is Remaining Adamant as Detained Haitians Press Appeals for Asylum*, N.Y. TIMES (Apr. 24, 1982), <http://www.nytimes.com/1982/04/24/us/us-is-remaining-adamant-as-detained-haitians-press-appeals-for-asylum.html> [<https://perma.cc/P49C-9J2B>].

108. See United Press International, *Reagan Orders Alien Stopped on the High Seas*, N.Y. TIMES (Sept. 29, 1981), <http://www.nytimes.com/1981/09/30/us/reagan-orders-aliens-stopped-on-the-high-sea.html> [<https://perma.cc/Y742-W2L5>].

109. 46 Fed. Reg. 48109 (Oct. 1, 1981) (codified at 8 U.S.C.A. § 1182).

110. *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396, 1398 (D.D.C. 1985) (internal quotations omitted); 46 Fed. Reg. 48109 (Oct. 1, 1981) (codified at 8 U.S.C.A. § 1182).

111. *Haitian Refugee Center*, 600 F. Supp., at 1398 (internal quotations omitted).

112. *Id.*

113. *Id.* at 1400.

114. *Id.* at 1398–99.

115. *Id.* at 1405–06.

He is a Christian and a former soldier who fought for America and supported Donald Trump. But Nahidh Shaou is also an Iraqi immigrant who was jailed for 35 years in 1983 for injuring a cop during an armed robbery. Now after completing his sentence he is facing deportation to Iraq in one of the most complicated such cases since Trump became President. Shaou, 55, fears that he will be tracked down and beheaded by ISIS because they are persecuting Christians in Iraq. He does not even speak Arabic and argues that his serving in the military including patrolling the demilitarized zone in Korea should allow him to stay here with his family.¹¹⁶

Shaou, the father of a U.S. citizen, believed that he would be a free man after being released from prison, but he was transferred to ICE custody instead.¹¹⁷ He faced removal to Iraq, despite the fact that he served in the U.S. military, was a model prisoner, earned degrees while in prison, and even supported Trump for president.¹¹⁸ As one of Shaou's supporters put it, "As we all know too well, our veterans do not receive enough support for PTSD, and this man committed a crime in the 80s when even less support was available. He's served his time honorably and should be granted a second chance for serving our country."¹¹⁹

The Author assured the reporter that this type of deportation—the removal of longtime lawful permanent residents with strong equities and ties to the United States—happens every day.¹²⁰ As for deportations to Iraq, it was not until recently that the United States persuaded Iraq to agree to start accepting deportees—especially aggravated felons.¹²¹ From time to time, ICE officials during the Obama administration would exercise discretion and place aggravated felons under orders of supervision.¹²² But Obama officials definitely deported longtime lawful permanent residents ("LPRs") with aggravated felony

116. Daniel Bates, *Iraqi Immigrant Who Fought for America but was Jailed for 35 Years in 1983 for Injuring a Cop During an Armed Robbery Now Faces Deportation and Beheading by ISIS in Iraq - Even Though he is a CHRISTIAN*, DAILY MAIL (Apr. 17, 2017), <http://www.dailymail.co.uk/news/article-4418812/Christian-Iraqi-refugee-fought-USA-faces-deportation.html> [<https://perma.cc/5R2T-Q9AT>].

117. *Id.*

118. *Id.*

119. *Id.* (internal quotations omitted).

120. See generally, Bill Ong Hing, *Re-examining the Zero-Tolerance Approach to Deporting Aggravated Felons: Restoring Discretionary Waivers and Developing New Tools*, 8 HARV. L. & POL'Y REV. 141 (2014).

121. Abigail Hauslohner, *A Charter Flight Left the U.S. Carrying 8 Iraqis. A Community Wonders Who Will be Next.*, WASH. POST (Apr. 28, 2017), https://www.washingtonpost.com/national/a-charter-flight-left-the-us-carrying-8-iraqis-a-community-wonders-who-will-be-next/2017/04/28/a4ce9418-293c-11e7-b605-33413c691853_story.html?utm_term=.68d4ebdb76d1 [<https://perma.cc/V9HH-GEAJ>].

122. Ala Amoachi, *A Glimmer of Hope for Immigrants on an Order of Supervision* (Oct. 29, 2011), <https://amjlaw.com/2011/10/29/a-glimmer-of-hope-for-immigrants-on-an-order-of-supervision/> [<https://perma.cc/LH7Y-ZJ9B>].

convictions—even those who likely were rehabilitated, remorseful, and, in the eyes of many, were deserving of a second chance.¹²³

Both Trump and Obama DHS Secretaries released enforcement memos emphasizing actions against criminal immigrants.¹²⁴ In his November 2014 enforcement memo, Obama’s DHS Secretary Jeh Johnson listed convictions for gang-related activities, felonies under state or federal laws, aggravated felonies under the INA, “significant” misdemeanors, and conviction of more than two misdemeanors as enforcement priorities.¹²⁵ However, the Trump enforcement executive order, released by Trump’s first DHS Secretary, John Kelly, encompassed more than those convicted of crimes. It included any undocumented immigrant who was simply charged with any criminal offense, as well as those who committed acts that “constitute a chargeable criminal offense.”¹²⁶ In practice, this means that anyone the authorities believe has broken any type of law—regardless of whether that person has been charged with a crime—is in trouble.¹²⁷

Although the Obama criminal immigration priorities presumably focused on those with convictions, Obama’s ICE often swept up non-criminal immigrants along the way. Consider Obama’s Criminal Alien Removal Initiative (“CARI”).¹²⁸

Under the CARI program, ICE officials would presumably target noncitizens who were convicted of crimes that rendered them deportable for arrest.¹²⁹ However, when the target was approached at home or at work, other individuals in the vicinity would be questioned about their immigration status.¹³⁰ Many of those individuals were also detained or arrested.¹³¹ A sharp increase in “collateral” arrests related to criminal enforcement was reported across the United States under

123. See generally, Bill Ong Hing, *Re-examining the Zero-Tolerance Approach to Deporting Aggravated Felons: Restoring Discretionary Waivers and Developing New Tools*, 8 HARV. L. & POL’Y REV. 141 (2014).

124. See, Camila Domonoske, *What’s New In Those DHS Memos On Immigration Enforcement?*, NPR (Feb. 22, 2017), <http://www.npr.org/sections/thetwo-way/2017/02/22/516649344/whats-new-in-those-dhs-memos-on-immigration-enforcement> [<https://perma.cc/SS9P-JSUM>].

125. Jeh Charles Johnson, *Memorandum: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, DEP’T OF HOMELAND SECURITY (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<https://perma.cc/Z4JX-2DKV>].

126. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

127. Jennifer Medina, *Trump’s Immigration Order Expands the Definition of ‘Criminal’*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/us/trump-immigration-deportation.html> [<https://perma.cc/LPP6-MUK7>].

128. Bill Ong Hing, *Civil Rights Abuse: Evil Nature of Obama Deportation Machine in New Orleans*, IMMIGRATION PROF BLOG (Aug. 7, 2014), <http://www.lawprofessors.typepad.com/immigration/2014/08/civil-rights-abuse-evil-nature-of-obama-deportation-machine-in-new-orleans.html> [<https://perma.cc/42HA-K5LZ>].

129. See *id.*

130. See *id.*

131. *Id.*

the Obama Administration.¹³² And CARI's collateral impact made life unpleasant for any noncitizen that was at the wrong place at the wrong time.

Under CARI, ICE squads—sometimes accompanied by local police—have . . . raid[ed] apartment complexes, grocery stores, laundromats, Bible study groups, parks, and anywhere else Latinos might gather. The officers made stop-and-frisk type arrests based on racial profiling and the indiscriminate mobile fingerprinting. The raids made daily routines such as going to buy groceries or bringing the car to get repaired a terrifying task that could lead to deportation.¹³³

So far, the criminal enforcement efforts under the Trump Administration—and its collateral consequences—strongly simulate that of the Obama Administration.¹³⁴ Regardless of whether criminal immigrants are or were the priority for Trump or Obama, the remarkable thing is that crime rates, even among undocumented immigrants, are not any worse (and some data even show that they are better) than that of the general population.¹³⁵ Historically, many immigrant groups—including Italians, Irish, and Chinese—were greeted with hostility.¹³⁶ But, a special link *between* immigrants and criminality has never been established.¹³⁷ Even undocumented immigrants do not commit crimes at rates that are any different from those of the general population.¹³⁸

132. *See id.*

133. *Id.*

134. *See generally* Camila Domonoske, *75 Percent Of Immigration Raid Arrests Were For Criminal Convictions, DHS Says*, NPR (Feb. 13, 2017), <https://www.npr.org/sections/thetwo-way/2017/02/13/515032423/75-percent-of-immigration-raid-arrests-were-for-criminal-convictions-dhs-says> [<https://perma.cc/ASD8-MQLM>] (“[L]ast week’s ICE arrests included ‘collateral damage,’ or people who were picked up despite not being targeted in the operations — because, for example, they were in the same place as a person who *was* targeted, and did not have documentation.”).

135. *See* Richard Perez-Pena, *Contrary to Trump’s Claims, Immigrants Are Less Likely to Commit Crimes*, N.Y. TIMES (Jan. 26, 2017), https://www.nytimes.com/2017/01/26/us/trump-illegal-immigrants-crime.html?_r=0 [<https://perma.cc/5TZN-8V6X>]; Rafael Bernal, *Reports Find that Immigrants Commit Less Crimes than US-based Citizens*, THE HILL (Mar. 19, 2017), <http://thehill.com/latino/324607-reports-find-that-immigrants-commit-less-crime-than-us-born-citizens> [<https://perma.cc/7BUR-Z52Z>].

136. Brian Resnick, *Racist Anti-Immigrant Cartoons From the Turn of the 20th Century*, THE ATLANTIC (Nov. 21, 2011), <https://www.theatlantic.com/national/archive/2011/11/racist-anti-immigrant-cartoons-from-the-turn-of-the-20th-century/383248/> [<https://perma.cc/G85P-M9H5>].

137. Robert Adelman, Lesley Williams Reid, Gail Markel, Saskia Weiss, & Charles Jaret, *Urban Crime Rates and the Changing Face of Immigration: Evidence Across Four Decades*, J. OF ETHNICITY IN CRIM. JUST. (Nov. 21, 2016), <http://dx.doi.org/10.1080/15377938.2016.1261057> [<https://perma.cc/6TPZ-KRLV>].

138. John Burnett, *Spotlight on Migrant Crimes Drums Up Support For Trump’s Immigration Dragnet*, NPR (Apr. 3, 2017, 4:55 PM), <http://www.npr.org/2017/04/03/522424593/immigration-dragnet-gains-support-after-migrants-are-arrested-for-crimes> [<https://perma.cc/4R6D-3R3A>].

During the presidential primaries, President Trump often talked about “the alleged murder of Kate Steinle in San Francisco by undocumented immigrant Juan Francisco Lopez-Sanchez.”¹³⁹ President Trump’s focus on criminal immigrants, and for that matter, President Obama’s similar focus, sends an ominous message about the link between immigration and crime. However, time and again, studies demonstrate that immigrants are less crime-prone than natives.¹⁴⁰ Relatedly, a macro-level analysis shows that “increased immigration does not increase crime and sometimes even causes crime rates to fall.”¹⁴¹ Additionally, “it also is important to note that immigrants convicted of crimes serve their sentences before being deported with few exceptions.”¹⁴²

E. Raids and Mass Deportations

The public has anticipated large-scale immigration enforcement and ICE raids by the Trump Administration.¹⁴³ Among his campaign promises, President Trump pledged to deport “millions and millions of undocumented immigrants.”¹⁴⁴ Early in his administration, his advisors pledged “more vigorous immigration enforcement activities.”¹⁴⁵ The arrests of hundreds of immigrants in the first week of February 2017 “marked the first large-scale raid under the Trump administration—and a crackdown was, by all indications, just the start of much more to come.”¹⁴⁶ If Trump’s ICE engages in regular, mass ICE raids, such operations will not be the first.¹⁴⁷

139. See Allison Weeks, *Donald Trump Says he Would Pass Law After Kate Steinle*, KRON (Aug. 31, 2016), <http://kron4.com/2016/08/31/donald-trump-says-he-will-pass-law-after-bay-area-native/> [<https://perma.cc/DC3Z-4TQ7>].

140. Alex Nowrasteh, *Immigration and Crime – What the Research Says*, CATO INSTITUTE (July 14, 2015), <https://www.cato.org/blog/immigration-crime-what-research-says> [<https://perma.cc/4MUP-W7PK>].

141. *Id.*

142. *Id.*

143. Ray Sanchez, *After ICE Arrests, Fear Spreads Among Undocumented Immigrants*, CNN (Feb. 12, 2017), <http://www.cnn.com/2017/02/11/politics/immigration-roundups-community-fear/index.html> [<https://perma.cc/4A45-4D2T>].

144. Amy B. Wang, *Donald Trump Plans to Immediately Deport 2 Million to 3 Million Undocumented Immigrants*, WASH. POST (Nov. 14, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/11/13/donald-trump-plans-to-immediately-deport-2-to-3-million-undocumented-immigrants/?utm_term=.7b4567313da0 [<https://perma.cc/HMC5-GTUY>].

145. Seung Min Kim & Ted Hesson, *Trump Just Getting Started with Immigration Raids*, POLITICO (Feb. 13, 2017), <http://www.politico.com/story/2017/02/trump-immigration-raids-234970> [<https://perma.cc/MPQ3-9CVF>].

146. *Id.*

147. Amy Choznick, *Raids of Illegal Immigrants Bring Harsh Memories, and Strong Fears*, N.Y. TIMES (Jan. 2, 2017), <https://www.nytimes.com/2017/01/02/us/illegal-immigrants-raids-deportation.html> [<https://perma.cc/42Z9-859B>].

1. The Bush Raids

President George W. Bush's ICE age began when DHS was established in 2003.¹⁴⁸ The enforcement and visa functions of the old Immigration and Naturalization Service ("INS") were removed from the Department of Justice and placed in DHS.¹⁴⁹ Repackaged, interior enforcement functions were channeled into the Immigration and Customs Enforcement agency.¹⁵⁰ Border enforcement remains in the hands of the Border Patrol.¹⁵¹

Immigration raids, including worksite operations, have been part of immigration enforcement for decades.¹⁵² However, the courts have placed constraints on INS and Border Patrol agent activities during raids. For example, in *INS v. Delgado*, even though the U.S. Supreme Court did not find the particular worksite operation in question unconstitutional, the Court held that INS agents cannot seize an entire worksite, must allow workers to remain silent, and must leave if agents have no reasonable suspicion that the workers are unauthorized to be in the United States.¹⁵³ In *Illinois Migrant Council v. Pilliod*, a federal court of appeals upheld a trial court opinion in Chicago that INS agents could not stop and question individuals simply because of Latin appearance.¹⁵⁴ Also, in *International Molders' and Allied Workers' Local Union No. 164 v. Nelson*, another federal court of appeals required INS' warrants to be very specific in naming suspected undocumented workers.¹⁵⁵

In spite of these restrictions, the Bush Administration engaged in aggressive, gun-wielding immigration raids that often resulted in large numbers of arrests.¹⁵⁶ For example, on the morning of December 12, 2006, hundreds of ICE agents in riot gear raided six Swift & Company meatpacking plants in Colorado, Texas, Nebraska, Utah, Iowa, and Minnesota.¹⁵⁷ In all, ICE detained 13,000 workers.¹⁵⁸ Earlier that fall, a midnight ICE raid in Stillmore, Georgia, resulted in the arrest and deportation of 125 workers, causing family members to flee into hid-

148. *Our History*, U.S. CITIZEN AND IMMIGR. SERVS. (last updated May 25, 2011), <https://www.uscis.gov/about-us/our-history> [<https://perma.cc/HBX5-FJBK>].

149. *Id.*

150. *Id.*

151. *Id.*

152. David Bacon, *Fire and ICE: The Return of Workplace Immigration Raids*, PROSPECT (Apr. 27, 2017), <http://prospect.org/article/fire-and-ice-return-workplace-immigration-raids> [<https://perma.cc/ZWB4-D6RX>].

153. *INS v. Delgado*, 466 U.S. 210, 218 (1984).

154. *Illinois Migrant Council v. Pilliod*, 548 F.2d 715 (7th Cir. 1977).

155. *Int'l Molders' and Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547 (9th Cir. 1986).

156. Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307, 310–11 (2009).

157. *Id.* at 311.

158. *Id.* at 311–12.

ing in nearby woods.¹⁵⁹ A 2008 raid in Postville, Iowa, included helicopters circling above and resulted in the arrest of 389 immigrants, many of whom were “held at a cattle exhibit hall.”¹⁶⁰ Children were absent from school the next day “because their parents were arrested or in hiding.”¹⁶¹ Time will tell whether we will witness these types of raids under the Trump Administration.

2. The Palmer Raids

The history of mass raids in the United States must include the Palmer Raids during the height of the Red Scare and fear of anarchists. In 1919, millions of workers went on strike as part of organizing efforts in industries such as steel work, meatpacking, and coal mining.¹⁶² Immigrants dominated much of these workforces, and the threat of deportation was viewed as a method of combating union organization by employers.¹⁶³ Immigration enforcement supporters gained new strength following bomb mailings to prominent Americans, including the Attorney General, A. Mitchell Palmer.¹⁶⁴ Palmer responded by establishing a special DOJ division devoted to exposing “aliens” and “Communists” and vowing to roundup “radicals.”¹⁶⁵ He began with eighteen violent raids on November 7, 1919, carried out in union meeting rooms, with many of the arrestees being sent to the Ellis Island immigration center.¹⁶⁶

Raids were waged in fifty-six cities on January 2, 1920, and resulted in the arrests of 3,000 individuals.¹⁶⁷ No warrants were issued, the detentions were arbitrary, and the detentions included severe questioning.¹⁶⁸

Eventually, a federal court criticized the basis and methods used for deportation during the Palmer Raids.¹⁶⁹ However, to many noncitizens, the damage was already done. Officials at Ellis Island already deported 249 individuals, which included noted activists Emma Goldman and Alexander Berkman.¹⁷⁰

159. *Id.* at 315.

160. Spencer S. Hsu, *Immigration Raid Jars a Small Town*, WASH. POST (May 18, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/17/AR2008051702474.html> [<https://perma.cc/7E7T-7H85>].

161. *Id.*

162. DEFINING AMERICA, *supra* note 50.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 217; see also *Attorney General A. Mitchell Palmer on Charges Made Against the Dept. of Justice by Louis F. Post and Others*, 66th Cong., 2d sess., 156–57 (1920) (statement of Attorney General A. Mitchell Palmer regarding action by the Radical Division in the Naugatuck Valley in Connecticut).

167. DEFINING AMERICA, *supra* note 50, at 217.

168. *Id.*

169. See *Colyer v. Skeffington*, 265 F. 17, 43–44 (D. Mass. 1920).

170. DEFINING AMERICA, *supra* note 50, at 215.

3. Mexican “Repatriation” in the 1930s

President Trump’s anti-Mexican immigrant rhetoric throughout his campaign and his continued call to build a wall along the United States-Mexico border is a stark reminder of the forced repatriation of about one million individuals of Mexican descent across the southern border in the 1930s.¹⁷¹

Scapegoating and the Depression set the stage for the “Repatriation.”¹⁷² There was no federal law mandating what happened; instead, Mexicans were simply targeted and removed—in part because they were the most recent immigrant group.¹⁷³ In a familiar tone, deportations were announced to “provide jobs for Americans,” and big industries like U.S. Steel, Ford Motor Company, and Southern Pacific Railroad told their Mexican workers that they might be better off in Mexico because of the crisis.¹⁷⁴ Local officials also hoped to save welfare dollars by cutting off Mexican families.¹⁷⁵ Some officials even encouraged those of Mexican descent to leave by offering free train tickets.¹⁷⁶

As Professor Kevin Johnson wrote:

The forced “repatriation” of an estimated one million persons of Mexican ancestry from the United States included the removal of hundreds of thousands of people from California, Michigan, Colorado, Texas, Illinois, Ohio, and New York during the Great Depression. It is clear today that the conduct of federal, state, and local officials in the campaign violated the legal rights of the persons repatriated, as well as persons of Mexican ancestry stopped, interrogated, and detained but not removed from the country. The repatriation campaign also terrorized and traumatized the greater Mexican-American community.

...

To assist in the round-up, police conducted raids of public places, including the church La Placita on Olvera Street in downtown Los Angeles, where persons of Mexican ancestry were known to frequent. Olvera Street was not a tourist spot in the 1930s like it is today; then it was simply a meeting place for working class Mexicans near a church serving the Mexican immigrant and Mexican-American community. The people rounded up were often herded onto trains and buses or driven by social workers to the border.

171. FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930s* 151 (1995).

172. Terry Gross, *America’s Forgotten History Of Mexican-American ‘Repatriation’*, FRESH AIR NPR (Sept. 10, 2015), www.npr.org/2015/09/10/439114563/americas-forgotten-history-of-mexican-american-repatriation [<https://perma.cc/ZQU7-KBEG>].

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

This was true for citizens by birth and those who had lawfully naturalized to become citizens.¹⁷⁷

The repatriation program is a sad reminder of anti-Mexican rhetoric and the targeting of Mexicans for removal.

4. Operation Wetback

Operation Wetback is another infamous chapter in the deportation of Mexicans from the United States. This time it was 1954 and President Dwight D. Eisenhower's turn to enact immigration policy; under his leadership, an estimated 1.1 million undocumented Mexican migrants were removed.¹⁷⁸ The deportations were directly related to the formal establishment of the Bracero program, a bilateral agreement with Mexico, which presumably would help U.S. growers maintain a stable, lawful workforce for their harvests.¹⁷⁹ However, to make the program work, undocumented farm workers had to be expelled, especially after Attorney General Herbert Brownell visited the border in 1953 and thought that the border was too open.¹⁸⁰

Operation Wetback was implemented by command teams of Border Patrol agents, buses, planes, and temporary processing stations, and its goal was locating and deporting Mexicans who illegally entered the United States.¹⁸¹ With little due process, teams focused on quick processing, and even used airplanes for some removals into the interior of Mexico.¹⁸² Although about 1.1 million arrests were made in the first year of Operation Wetback, many other undocumented immigrants fled to Mexico to avoid apprehension—about half a million from Texas alone.¹⁸³

III. TRUMP'S BORDER WALL

President Trump's signature campaign promise on immigration was the border wall. In his candidacy announcement speech in June 2015, President Trump first proposed the idea of building a wall along the southern border, adding that, due to his real estate experience, he was

177. Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror"*, 26 PACE L. REV. 1, 2 (2005).

178. Louis Hyman & Natasha Iskander, *What the Mass Deportation of Immigrants Might Look Like*, SLATE (Nov. 16, 2016), http://www.slate.com/articles/news_and_politics/history/2016/11/donald_trump_mass_deportation_and_the_tragic_history_of_operation_wetback.html [<https://perma.cc/3UQE-E8ER>].

179. DEFINING AMERICA, *supra* note 50, at 130.

180. *Id.*

181. MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 155 (2004).

182. *Id.* at 156.

183. *Id.* at 156–57.

uniquely qualified for the job.¹⁸⁴ “I will build a great wall—and nobody builds walls better than me, believe me—and I’ll build them very inexpensively. I will build a great, great wall on our southern border, and I will make Mexico pay for that wall. Mark my words.”¹⁸⁵

Many believe that everything about Trump’s “build a border wall” rhetoric and efforts is offensive. From the premise that “Mexico is not our friend” to calling some Mexican-immigrants rapists and criminals, President Trump’s behavior towards the United States’ southern neighbor has been controversial. Some people believe that the request for proposals for the wall construction contains offensive language.¹⁸⁶ The request for proposals reads: “The north side of wall (i.e. U.S. facing side) shall be aesthetically pleasing in color, anti-climb texture, etc., to be consistent with general surrounding environment.”¹⁸⁷

A. *The Fence Act*

As offensive as Trump’s wall proposal may be, we have seen equivalent grandstanding before in the form of the Fence Act of 2006, and in terms of venomous effect, it may take a backseat to Operation Gatekeeper. On October 26, 2006, President George W. Bush signed the Secure Fence Act of 2006 (Pub. L. 109–367) into law and stated, “This bill will help protect the American people. This bill will make our borders more secure. It is an important step toward immigration reform.”¹⁸⁸

Representative Peter King introduced the Fence Act on September 3, 2006.¹⁸⁹ On September 14, 2006, the House of Representatives passed the Act 283–138.¹⁹⁰ Two weeks later, on September 29, 2006,

184. *30 of Donald Trump’s Wildest Quotes*, CBS NEWS, <http://www.cbsnews.com/pictures/wild-donald-trump-quotes/14/> (last visited June 18, 2017) [<https://perma.cc/5HVW-RBYT>].

185. Dan Gundersman, *President-elect Donald Trump’s ‘Big, Beautiful Wall’ May End up just Being a Modest, Double-layered Fence*, N.Y. DAILY NEWS (Nov. 10, 2016), <http://www.nydailynews.com/news/politics/donald-trump-big-beautiful-wall-fence-article-1.2867648> [<https://perma.cc/K5BX-ZHHV>].

186. See Michelle Ye Hee Lee, *Donald Trump’s False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?utm_term=.63595cc16abe [<https://perma.cc/XHB5-5URR>].

187. Ron Nixon, *Trump Seeks Proposals for ‘Physically Imposing’ Wall With Mexico*, N.Y. TIMES (Mar. 18, 2017), <https://www.nytimes.com/2017/03/18/us/politics/trump-seeks-proposals-for-physically-imposing-wall-with-mexico.html> [<https://perma.cc/CZB2-9V7L>].

188. Press Release, The White House President George W. Bush, President Bush Signs Secure Fence Act (Oct. 26, 2006) <https://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061026.html> [<https://perma.cc/9PMZ-W43Y>]; see generally Secure Fence Act of 2006, Pub. L. No. 106–367, 120 Stat. 2638 (2006).

189. *H.R. 6061 (109th): Secure Fence Act of 2006*, GOVTRACK, <https://www.govtrack.us/congress/votes/109-2006/s262> (last visited June 18, 2017) [<https://perma.cc/FSM5-UXJ4>].

190. *Id.*

the Senate passed the Act 80–19.¹⁹¹ Both Barack Obama and Hillary Clinton, then-senators, voted for the Fence Act.¹⁹²

Although more than 600 miles of fencing and vehicle barriers along the border from California to Texas were constructed by April 2009, Congress never provided more than the initial \$1.2 billion to complete the fence.¹⁹³ A follow-up proposal in 2008 (H.R. 5124) that would have added 700 miles of two-layered fencing died in committee.¹⁹⁴ A proposal by Senator Jim DeMint (R-SC) to finish the fence suffered a similar fate.¹⁹⁵ The failure to complete the fence can largely be attributed to the high estimated cost of \$4.1 billion—an amount higher than the Border Patrol’s annual budget of \$3.55 billion.¹⁹⁶

B. *Operation Gatekeeper*

In the Author’s view, President Trump’s Wall and the Fence Act pale in comparison to the death trap of Operation Gatekeeper, instated by President Clinton’s regime that continues to this day. This militarization of the U.S.-Mexico border region has been the centerpiece of the immigration enforcement policies of the past three decades. “Reliance on border policing spiked in the mid-1990s with a series of military-style operations along the U.S.-Mexico border that ultimately resulted in a much bigger and better funded presence along that border.”¹⁹⁷

The Clinton Administration implemented Operation Gatekeeper in 1994 as a method to stop the flow of undocumented migration across the southern border.¹⁹⁸ The idea seemed simple enough—if parts of the border that are easier to cross are cut-off, then immigrants will stop coming.¹⁹⁹ Thus, the policy of “control through deterrence” was implemented by first building a fence along the fourteen-mile stretch from the Pacific Ocean eastward.²⁰⁰ Eventually, other parts of the bor-

191. *Id.*

192. *Id.*

193. Jerome R. Corsi, *Law to Build U.S. Border Wall Already Passed*, WORD NET DAILY (Nov. 15, 2016), <http://www.wnd.com/2016/11/1-main-reason-u-s-border-wall-hasnt-been-built/> [<https://perma.cc/26YS-TQ2D>].

194. *Id.*

195. *Id.*

196. Tyler Russo, *Problems With the U.S. – Mexico Border*, PREZI.COM (Nov. 5, 2014), <https://prezi.com/uxj3iwj0spwc/problems-with-the-us-mexico-border/> [<https://perma.cc/N4H3-DTPQ>].

197. BILL ONG HING ET AL, *IMMIGRATION LAW AND SOCIAL JUSTICE* 673 (Wolters Kluwer, 2018).

198. Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. OF INT’L L. & POL’Y 121, 126–27 (2001) (discussing the background of operation gatekeeper).

199. *Id.* at 128.

200. *Id.* at 124, 129.

der that were the easily traversed were fenced off or monitored more heavily with electronic equipment and Border Patrol units.²⁰¹

Unfortunately, the strategy failed. Driven by violence, social circumstances, and economic pressures, migrants continued to come.²⁰² But now that the easy paths were cut-off, the migrants were pushed to navigate treacherous terrain in their travels north.²⁰³ They faced the searing heat of the Sonoran Desert of southern Arizona in the summer and the freezing cold of the rugged Tecate Mountains in the winter.²⁰⁴ Not surprisingly, given the conditions, hundreds of these poor migrants died each year trying to reach the United States during Operation Gatekeeper.²⁰⁵ In the first seven months of 2017, 232 migrants died crossing the border from Mexico—a 17% increase over the same period in 2016.²⁰⁶ This number is significant, because unauthorized border crossings are actually decreasing.²⁰⁷

IV. 287(G) AGREEMENT EXPANSION

President Trump’s interior enforcement executive order and DHS Secretary Kelly’s first enforcement memo emphasized the intent to rely heavily on increasing “287(g)” agreements with local law enforcement officials.²⁰⁸ These agreements essentially deputize local law enforcement officers to double as federal immigration agents.²⁰⁹ Once trained, local officers are authorized to interview, arrest, and detain any person who may be in violation of immigration laws depending on the terms of the agreement.²¹⁰ Within six months of taking office, President Obama’s DHS also expanded 287(g) agreements.²¹¹ Although the Obama Administration eventually reduced the number of 287(g) agreements to thirty-two, at one time, the total number of

201. *See id.* at 129–130.

202. *Id.* at 146–51 (discussing the causes of continued border crossing); Amanda Holpuch, *Migrant Deaths at US-Mexico Border Increase 17% This Year, UN Figures Show*, THE GUARDIAN (Aug. 5, 2017), <https://www.theguardian.com/us-news/2017/aug/05/migrants-us-mexico-border-deaths-figures> [<https://perma.cc/L63U-ZQUF>].

203. Hing, *supra* note 198, at 158, 165.

204. *Id.* at 130, 135–37.

205. *Id.* at 135–37.

206. Holpuch, *supra* note 202.

207. *Id.*

208. Amanda Sakuma, *Donald Trump’s Plan to Outsource Immigration Enforcement to Local Cops*, THE ATLANTIC (Feb. 18, 2017), <https://www.theatlantic.com/politics/archive/2017/02/trump-immigration-enforcement/517071/> [<https://perma.cc/M596-3L6Z>].

209. *Id.*

210. *Id.*

211. Amy Goodman, *Obama Admin Expands Law Enforcement Program 287(g), Criticized for Targeting Immigrants and Increasing Racial Profiling*, DEMOCRACY NOW (July 29, 2009), https://www.democracynow.org/2009/7/29/obama_admin_expands_law_enforcement_program [<https://perma.cc/3T9S-5FCW>].

287(g) agreements exceeded seventy in the Obama and Bush eras.²¹² By July 31, 2017, the Trump Administration increased the number of agreements to sixty, including eighteen new agreements in Texas alone.²¹³

The terms of these agreements, authorized under INA § 287(g), 8 U.S.C. § 1357(g), vary. The agreements can authorize deputized officers to engage in a large range of federal immigration enforcement functions, such as interviewing individuals to determine immigration status, accessing DHS databases, issuing ICE detainers to hold individuals for ICE, bringing charges to initiate deportation proceedings, and making recommendations on detention and bond amounts.²¹⁴ In essence, the state or local officer becomes a federal employee.²¹⁵

Unfortunately, local enforcement under 287(g) agreements resulted in abuse—most notably racial profiling. Perhaps the most infamous example is the 287(g) escapades of Sheriff Joe Arpaio of Maricopa County, Arizona, who touted himself as “America’s toughest sheriff.”²¹⁶ An Obama-era Department of Justice investigation unearthed Arpaio’s improper profiling of Latino neighborhoods and drivers.²¹⁷ In May 2013, a federal judge agreed that Arpaio’s law-enforcement practices illegally targeted Latinos.²¹⁸ Then, in July 2017, Arpaio was convicted of criminal contempt of court for disregarding an order to stop detaining suspected undocumented immigrants, a misdemeanor

212. Mica Rosenberg & Reade Levinson, *Exclusive: Trump Targets Illegal Immigrants Who Were Given Reprieves from Deportation by Obama*, REUTERS (June 9, 2017), <http://in.reuters.com/article/usa-immigration-deportations/exclusive-trump-targets-illegal-immigrants-who-were-given-reprieves-from-deportation-by-obama-idINKBN1902IA> [<https://perma.cc/93FZ-3C6L>].

213. Dianne Solis & Ray Leszcynski, *18 Texas Sheriffs Sign Up to Join Forces with Federal Immigration Officers*, DALLAS MORNING NEWS (July 31, 2017), <https://www.dallasnews.com/news/immigration/2017/07/31/18-texas-sheriffs-sign-join-forces-federal-immigration-officers> [<https://perma.cc/Q92W-QHUX>].

214. *The 287(g) Program: An Overview*, AM. IMMIGR. COUNCIL (Mar. 15, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_287g_program_an_overview_0.pdf [<https://perma.cc/G8X5-J6SU>].

215. 8 U.S.C. § 1357(g)(7) (2017).

216. Joe Sterling, *Joe Arpaio, Once America’s Toughest Sheriff, to go on Trial*, CNN (June 26, 2017), <http://www.cnn.com/2017/06/26/us/arapaio-trial/index.html> [<https://perma.cc/TW3B-77V9>].

217. Mat Coleman & Sarah Horton, *Driving While Latino*, HUFFINGTON POST (Sept. 30, 2016), https://www.huffingtonpost.com/entry/driving-while-latino_us_57ed6ce4e4b07f20daa1052f [<https://perma.cc/JX5J-GVN2>].

218. Megan Cassidy, *Justice Dept. to Charge Arpaio with Contempt of Court*, AZCENTRAL (Oct. 11, 2016), <http://www.azcentral.com/story/news/nation-now/2016/10/11/sheriff-joe-arpaio-justice-department-contempt/91903488/> [<https://perma.cc/LCZ6-S43F>].

punishable by up to six months in jail.²¹⁹ President Trump stunned many observers by pardoning Arpaio before sentencing.²²⁰

Similarly, in 2011, the ACLU discovered that 287(g) agreements in two Georgia counties led to a “pattern of police inventing pretexts to stop and search immigrants.”²²¹ A 2012 Justice Department investigation in Alamance County, North Carolina, found that sheriff’s deputies focused on Latino neighborhoods to set up checkpoints.²²²

For that and other reasons, the Obama Administration severely reduced the number of 287(g) agreements.²²³ There was serious concern over the proper training of local officers and the lack of oversight to prevent racial profiling.²²⁴ Furthermore, immigrant communities tended to “fear and mistrust [local] authorities when they realized that local police could act as immigration agents.”²²⁵

V. DISCOURAGING ASYLUM APPLICANTS THROUGH CREDIBLE FEAR REVISIONS

Without a great deal of fanfare, the Trump Administration quietly made it more difficult for incoming asylum seekers to pass the “credible fear” screening standard. Asylum applicants must meet this standard in order to qualify for asylum in the United States.²²⁶ As the surge in unaccompanied immigrant children began in early 2014, United States Citizenship and Immigration Services (“USCIS”), whose asylum office handles asylum cases, revised its lesson plan to officers on how to determine whether asylum applicants who make it to the border meet the credible-fear screening standard.²²⁷ These

219. Matt Zapposky, *Former Arizona Sheriff Joe Arpaio Convicted of Criminal Contempt*, WASH. POST (July 31, 2017), https://www.washingtonpost.com/world/national-security/ex-sheriff-.572e-7620-11e7-8f39-eeb7d3a2d304_story.html?utm_term=.2a211166525d [https://perma.cc/9BJM-N7G7].

220. Julianne Hing, *Trump’s Pardon for Arpaio Is the Workings of the American Political System Laid Bare*, THE NATION (Aug. 27, 2017), <https://www.thenation.com/article/trumps-pardon-for-arpaio-is-the-workings-of-the-american-political-system-laid-bare/> [https://perma.cc/YYU2-YY4N].

221. Coleman & Horton, *supra* note 217.

222. *Id.*

223. AM. IMMIGR. COUNCIL, *supra* note 214.

224. Toby Talbot, *The Obama Administration is Starting to Shut Down a Program that Deputized Local Police Officers to Act as Immigration Agents*, USA TODAY (Feb. 17, 2012), <https://usatoday30.usatoday.com/news/nation/story/2012-02-17/immigration-enforcement-program/53134284/1#mainstory> [https://perma.cc/P7DS-9HAR].

225. *Id.* (internal citations omitted).

226. Tal Kopan, *Trump Admin Quietly Made Asylum More Difficult in the US*, CNN (Mar. 8, 2017), <http://www.cnn.com/2017/03/08/politics/trump-immigration-crackdown-asylum/index.html> [https://perma.cc/4XLM-GNDJ].

227. US CITIZENSHIP & IMMIGRATION SERV.’S, ASYLUM DIVISION OFFICER TRAINING COURSE: CREDIBLE FEAR 1 (Feb. 28, 2014), <http://cmsny.org/wp-content/uploads/credible-fear-of-persecution-and-torture.pdf> [https://perma.cc/U3AL-8MAZ]; USCIS Amends Credible Fear Lesson Plans, CATHOLIC LEGAL IMMIGRATION NETWORK, <https://cliniclegal.org/resources/uscis-amends-credible-fear-lesson-plans> (last visited Jan. 18, 2017) [https://perma.cc/QUJ9-PAVS].

credible fear standards were criticized as being misleading and inappropriate.²²⁸ The language and tone instructed asylum officers to impose a burden on applicants that surpassed the well-founded fear asylum standard established by the Supreme Court in *INS v. Cardoza-Fonseca*,²²⁹ when in fact the actual standard should be more deferential than the well-founded fear standard. Despite that critique, nearly 80% of credible fear cases filed in the United States were granted in 2016, and more than 73,000 persons fleeing persecution were allowed to apply for asylum.²³⁰

The number of people allowed to apply for asylum is expected to drop under the Trump Administration's revisions to the credible-fear lesson plan. The previous version, for example, stated that "if an asylum officer has reasonable doubt about a person's credibility, they should likely find credible fear and allow an immigration judge to hear the question at a full hearing." New guidance issued by the Trump Administration removes this passage.²³¹ Assessing "demeanor, candor, and responsiveness" to determine credibility also changed.²³² Previous versions recognized that cultural factors, such as language and native trauma, could affect demeanor.²³³ The Trump Administration's revisions downplay these factors in assessing credibility, so that asylum officers can cast doubt on the credibility of a person who is suffering from stress.²³⁴

A. Discouraging Haitians

Sadly, discouraging legitimate asylum seekers is not new in the United States. One of the most glaring examples involves thousands of Haitians who fled the social, economic, and violent repression of the "Baby Doc" Duvalier regime in the 1970s and 1980s.²³⁵ They faced an accelerated processing program dubbed the "Haitian program" that became the subject of federal litigation.²³⁶

INS introduced the Haitian program in response to the influx of Haitian asylum seekers in the late 1970s.²³⁷ Operating under the as-

228. See generally Bill Ong Hing, *Ethics, Morality and Disruption of U.S. Immigration Laws*, 73 KANSAS L. REV. 981 (2015).

229. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

230. Kopan, *supra* note 226.

231. *Id.*

232. *Id.* (internal quotations omitted).

233. *Id.*

234. *Id.*

235. Jim Wyss & Jacqueline Charles, *After Death of Jean-Claude 'Baby Doc' Duvalier, Calls for Justice Remain in Haiti*, MIAMI HERALD (Oct. 4, 2014), <http://www.miamiherald.com/news/nation-world/world/americas/haiti/article2510234.html> [<https://perma.cc/TD88-LRHZ>]; Jeff Hardy, *Haitian Refugees Celebrate Duvalier's Fall*, UPI (Feb. 7, 1986), <http://www.upi.com/Archives/1986/02/07/Haitian-refugees-celebrate-Duvaliers-fall/2584508136400/> [<https://perma.cc/MQM7-2QNH>].

236. *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1029 (5th Cir. 1982).

237. *Id.*

sumption that the asylum seekers were “economic” migrants rather than political refugees, officials decided to implement an accelerated program that would discourage a further influx.²³⁸

The features of the Haitian program constituted stark violations of due process.²³⁹ Immigration judges were instructed to increase productivity; accordingly, at peak productivity, immigration judges each held more than eighteen deportation hearings a day.²⁴⁰ Asylum officers were forced to increase their efficiency as well. Each officer conducted forty asylum interviews each day, severely reducing the time that could be spent with each applicant.²⁴¹ Although authorities knew that only about a dozen attorneys were available to represent Haitians, hearings were scheduled with little regard to attorneys’ availability; an attorney might have “three hearings at the same hour in different buildings.”²⁴² More than 4,000 Haitians were processed under the program and none received asylum.²⁴³

Ultimately, the federal courts ended the Haitian program, concluding that “the government created conditions which negated the possibility that a Haitian’s asylum hearing would be meaningful in either its timing or nature. Under such circumstances, the right to petition for political asylum was effectively denied.”²⁴⁴

B. *Discouraging Guatemalans and El Salvadorans*

Thousands of El Salvadorans and Guatemalans fled to the United States in the late 1970s and 1980s due to repression and violence caused by civil war.²⁴⁵ Although thousands applied for asylum, only about 2% of applications were granted due to discriminatory treatment.²⁴⁶ That discrimination is highlighted in two federal court cases.

In *Orantes-Hernandez v. Smith*,²⁴⁷ a class-action case was brought challenging the way El Salvadorans were processed when INS officers apprehended them. The federal court recognized that El Salvadorans fled their country due to “pervasive and arbitrary violence” and were

238. *Id.* at 1030.

239. *Id.* at 1041.

240. *Id.* at 1031.

241. *Id.*

242. *Id.*

243. *Id.* at 1032.

244. *Id.* at 1039–40.

245. Sarah Gammage, *El Salvador: Despite End to Civil War, Emigration Continues*, MIGRATION POLICY INST. (July 26, 2007), <http://www.migrationpolicy.org/article/el-salvador-despite-end-civil-war-emigration-continues> [<https://perma.cc/S2FW-JYG3>].

246. *Id.* According to some, the asylum approval rate for El Salvadorans was “fewer than 3%,” and “1% or less” for Guatemalans. See Carolyn Patty Blum, *The Settlement of American Baptist Churches v. Thornburgh: Landmark Victory for Central American Asylum-Seekers*, 3 INT’L J. REFUGEE L. 347, 349 (1991), available at: <http://scholarship.law.berkeley.edu/facpubs/1967> [<https://perma.cc/P9EE-Y2V9>].

247. *Orantes-Hernandez v. Smith*, 541 F.Supp. 351 (C.D. Cal 1982).

eligible to seek asylum and request a deportation hearing.²⁴⁸ However, most of those apprehended signed voluntary departure agreements forgoing their right to ask for asylum.²⁴⁹ After an evidentiary hearing, the court concluded “that the widespread acceptance of voluntary departure is due in large part to the coercive effect of the practices and procedures employed by the INS agent and the unfamiliarity of most Salvadorans with their rights under the immigration laws.”²⁵⁰ Government agents essentially used coercion and intimidation to get those apprehended to sign the voluntary departure forms.²⁵¹ Given the abuse, the court ordered authorities to affirmatively notify all apprehended El Salvadorans of their right to apply for asylum and give them a list of free legal services providers.²⁵²

American Baptist Churches v. Thornburgh,²⁵³ another class action, was an unusual case brought by more than eighty religious and refugee rights programs.²⁵⁴ Despite the government’s motion to dismiss, the court allowed the case to proceed on the issue of discriminatory treatment of the asylum seekers, “citing the low approval rate for applicants from El Salvador and Guatemala.”²⁵⁵ During the discovery phase of the case, the government announced the establishment of a new asylum officer corps that would begin handling affirmative asylum applications beginning in April 1991.²⁵⁶ Furthermore, in 1990, Congress passed new legislation that created a new category of protection—Temporary Protected Status—which eventually proved beneficial to many asylum seekers.²⁵⁷

The parties in the *American Baptist Churches* case thereafter reached a settlement that provided all Guatemalans and El Salvadorans who were denied asylum, withholding or extended voluntary departure the right to a new asylum application before an asylum officer.²⁵⁸ They would be given a list of free legal service providers.²⁵⁹ The settlement also created limitations on whether class members could be detained and employment authorization should be afforded to the class members.²⁶⁰

248. *Id.* at 358–59.

249. *Id.*

250. *Id.* at 359.

251. *Id.* at 359, 372–73.

252. *Id.* at 386.

253. *American Baptist Churches, et al v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal 1991).

254. Blum, *supra* note 246, at 351.

255. *Id.* at 351–52.

256. *Id.* at 352–53.

257. *Id.* at 353–54.

258. *American Baptist Churches*, 760 F. Supp. at 799.

259. *Id.* at 803.

260. *Id.* at 804–05.

VI. SANCTUARY CITIES FUNDING AND SHAMING THREATS

Throughout his campaign, President Trump promised that he would block federal funding for sanctuary cities: “Block funding for sanctuary cities. We block the funding. No more funds. . . . Cities that refuse to cooperate with federal authorities will not receive taxpayer dollars.”²⁶¹ Then within the first week of his administration, President Trump’s January 25, 2017, executive order announced that the Attorney General would “ensure that . . . sanctuary jurisdictions [would not be] eligible to receive Federal grants.”²⁶² On top of that, President Trump’s Administration announced that it would “shame sanctuary cities” in a weekly report by listing localities that do not cooperate with immigration detainer requests.²⁶³

Like President Trump’s Muslim bans, the sanctuary funding threat and the shaming strategy have run into legal and technical problems. Seattle, San Francisco, Santa Clara County (California), and Richmond (California) all filed lawsuits challenging the funding threat.²⁶⁴ After hearing arguments on the matter, a federal judge in San Francisco imposed a nationwide injunction on the threat to withhold federal funding.²⁶⁵ The shaming reports were halted after local police agencies complained the reports were “filled with errors.”²⁶⁶ Examples include confusing the three different counties of Franklin located in Iowa, New York, and Pennsylvania; incorrectly accusing the coun-

261. Tom LoBianco, ‘Sanctuary Cities’ Gird for Trump White House, CNN (Nov. 15, 2016), <http://www.cnn.com/2016/11/14/politics/donald-trump-sanctuary-cities-white-house/index.html> [<https://perma.cc/WMC7-M28V>] (internal quotations omitted).

262. David Post, *The ‘Sanctuary Cities’ Executive Order: Putting the Bully Back into ‘Bully Pulpit’*, WASH. POST (May 11, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/05/02/the-sanctuary-cities-executive-order-putting-the-bully-back-into-bully-pulpit/?utm_term=.873042bc0c49 [<https://perma.cc/9VQ9-J3S5>].

263. Olivia Beavers, *Trump Administration Seeks to Shame Sanctuary Cities*, THE HILL (Mar. 20, 2017), <http://thehill.com/homenews/administration/324796-trump-administration-seeks-to-shame-sanctuary-cities> [<https://perma.cc/BF9B-N4DU>].

264. Katy Steinmetz, *California Lawyers Say President Trump’s Sanctuary City Order is a ‘Gun to your Head,’* TIME (Apr. 14, 2017), <http://time.com/4740823/donald-trump-sanctuary-city-california-san-francisco-santa-clara/> [<https://perma.cc/867G-M3GC>]; Bill Chappell, *Seattle Sues Trump Administration Over ‘Sanctuary City’ Threat*, NPR (Mar. 30, 2017), <http://www.npr.org/sections/thetwo-way/2017/03/30/522030259/seattle-sues-trump-administration-over-sanctuary-city-threat> [<https://perma.cc/R3GW-JZW3>]; *Richmond Sues President Trump Over Sanctuary City Funding Block*, CBS SF BAY AREA, (Mar. 22, 2017), <http://sanfrancisco.cbslocal.com/2017/03/22/richmond-sues-president-trump-over-sanctuary-city-funding-block/> [<https://perma.cc/BM38-244L>].

265. Post, *supra* note 262; Maria Sacchetti, *Trump Blasts Federal Court Ruling that Blocks His ‘Sanctuary City’ Order*, WASH. POST (Apr. 26, 2017), https://www.washingtonpost.com/local/social-issues/2017/04/25/c9e212c8-29f7-11e7-b605-33413c691853_story.html?utm_term=.602f138374bd [<https://perma.cc/H8RM-ZTY2>].

266. See Alan Gomez, *Errors Prompt Trump to Halt Reports Shaming ‘Sanctuary Cities,’* USA TODAY (Apr. 10, 2017), <https://www.usatoday.com/story/news/world/2017/04/11/trump-halt-reports-shaming-sanctuary-cities/100319964/> [<https://perma.cc/UV9R-7CFE>].

ties of Williamson and Bastrop in Texas of refusing ICE detainers, even though the suspects were no longer located within those jurisdictions; and incorrectly accusing Chester County, Pennsylvania, and Richmond County, North Carolina, of failing to comply with various detainer requests, although neither county had the suspects in custody.²⁶⁷

Of course, one thing that the Trump ICE machine could probably do without legal consequence is to expend more time and effort on enforcement in self-declared sanctuary jurisdictions. For example, reports state that ICE deliberately targeted Austin, Texas, after city officials refused to comply with new federal guidelines. Although Austin is generally referred to as a sanctuary city, officials reported at least fifty ICE arrests in February 2017.²⁶⁸ Twenty-eight of the arrestees had no criminal record.²⁶⁹ Judge Andrew Austin, a federal magistrate judge in Texas, stated that ICE officials told him to “expect a big operation [as] a result of the [Travis County] sheriff’s new policy.”²⁷⁰ And in January 2018, reports emerged that ICE was planning a “major sweep” in San Francisco—a sanctuary city—and other parts of northern California with the goal of arresting more than 1,500 deportable noncitizens.²⁷¹

President Trump’s efforts to shame and defund sanctuary jurisdictions are unique. But, the idea of sanctuary has not been popular with other enforcement-minded administrations. In the 1980s, when the sanctuary movement over Central American refugees was in full swing, individual supporters of the sanctuary movement were targeted by federal authorities.²⁷² In many respects, the sanctuary cities phenomenon grew out of the sanctuary movement led by many religious

267. *Id.*

268. Chris Riotta, *ICE Raids Target Austin, Texas*, YAHOO NEWS (Mar. 29, 2017), <https://www.yahoo.com/news/ice-raids-target-austin-texas-163840314.html> [<https://perma.cc/63Z3-685H>].

269. Tony Plohetski, *Austin No. 1 in U.S. —for Non-Criminals Arrested in ICE Raids*, STATESMAN (Feb. 22, 2017), <http://www.statesman.com/news/austin-for-non-criminals-arrested-ice-raids/R8suKsN9kUIjnpz10S2DII/> [<https://perma.cc/DY3N-CZKZ>].

270. Sam Knight, *Pattern of Deportation As Retaliation Emerging in Trump Era*, DISTRICT SENTINEL (Mar. 21, 2017), <https://www.districtsentinel.com/pattern-deportation-retaliation-emerging-trump-era/> [<https://perma.cc/GZK4-8RY9>] (internal quotations omitted).

271. Sarah Ruiz-Grossman, *California Leaders Slam Trump Administration Over Report Of Planned ICE Raids*, HUFFINGTON POST (Jan. 17, 2018), https://www.huffingtonpost.com/entry/ice-raids-northern-california-trump_us_5a5fcdce4b046f0811ccfc7 [<https://perma.cc/7GXT-436X>].

272. Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POL’Y INST. (Apr. 1, 2006), <https://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era> [<https://perma.cc/E8D5-VAMW>].

leaders.²⁷³ The Reagan Administration targeted some of those leaders.²⁷⁴

A. *Criminal Prosecution of Sanctuary Workers*

The Author practiced immigration law for about a decade and was running a law school immigration clinic when the Author first heard of Jack Elder and Stacey Lynn Merkt. In 1982, Catholic Bishop John Joseph Fitzpatrick opened Casa Oscar Romero in San Benito, Texas, as a shelter for increasing numbers of Central Americans crossing the Rio Grande into Texas.²⁷⁵ Jack Elder became the director of the Casa Romero, named in honor of the assassinated Roman Catholic Archbishop of El Salvador.²⁷⁶ Stacey Lynn Merkt was a volunteer at the shelter.²⁷⁷ They often knowingly drove migrants to bus stops where the migrants would continue their migration.²⁷⁸ These acts ultimately resulted in criminal convictions.

On February 17, 1984, near Guerra, Texas, Border Agents stopped and arrested Merkt, Dianne Muhlenkamp, a Catholic Nun, and Jack Fischer, a Dallas Times Herald reporter, on alien transportation charges. An undocumented man, woman, and baby, all fleeing El Salvador, were found inside their car.²⁷⁹ The two adult immigrants claimed to have fled El Salvador after witnessing murders, fearing their lives were at risk. On May 4, 1984, Merkt was convicted of the felony charge, Muhlenkamp agreed to a deferred adjudication, and charges against Fischer were dropped. On June 27, 1984, Merkt was sentenced to ninety days in jail, although the sentence was suspended and replaced with two years of probation.²⁸⁰

Similarly, on March 12, 1984, Border Agents alleged that Jack Elder was seen dropping off three Salvadorian men five miles from a shelter.²⁸¹ On April 13, federal agents arrested Elder and charged him with three felony charges.²⁸² Elder faced up to fifteen years in prison.²⁸³

Before a decision was made regarding the charges against Elder, a federal grand jury indicted Merkt and Elder of conspiracy and alien

273. *See id.*

274. *See id.*

275. *Chronology of Sanctuary Movement Members Stacey Lynn Merkt and Jack Elder*, UPI (Mar. 27, 1985), <http://www.upi.com/Archives/1985/03/27/Chronology-of-Sanctuary-Movement-members-Stacey-Lynn-Merkt-and-Jack-Elder/9771480747600/> [<https://perma.cc/7B7G-M9E9>].

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

transportation charges.²⁸⁴ On February 21, 1985, the trial court found Elder guilty of both conspiracy and illegal transportation, while Merkt was convicted only on the conspiracy charges.²⁸⁵

Elder and Merkt both spent time in jail. Initially, Elder was offered two years on probation. But the offer had several conditions. Elder would move out of Casa Romero, he would have to stop aiding Central American refugees, and he would have to stop publicly discussing the refugees' problems.²⁸⁶ Elder refused those conditions, and was sentenced to a year in prison.²⁸⁷ Merkt was sentenced to 179 days in prison and put on similar restrictions.²⁸⁸ Overall, the judge was lenient because the charges against Elder carried a potential \$28,000 fine and thirty-year prison sentence, and Merkt faced a potential \$10,000 fine and a five-year prison sentence.²⁸⁹

The experiences of Elder and Merkt are only two examples of the Reagan Administration's attack on sanctuary workers. On January 14, 1985, more than sixty arrests were made in a crackdown on church groups.²⁹⁰ According to indictment records, four federal agents attended church meetings in Tucson, Arizona, where they gathered evidence using concealed tape recorders.²⁹¹ While the workers argued that they were helping to provide sanctuary to refugees fleeing persecution and death squads in El Salvador and Guatemala, the Reagan Administration contended that most asylum applicants from Central America were fleeing poverty, not persecution.²⁹² Sixteen individuals were named in a seventy-one-count indictment that included: Rev. John M. Fife of the Tucson Southside United Presbyterian Church, the first clergymen in the United States to declare his church a sanctuary for refugees from Central America; James A. Corbett, a retired rancher in Tucson, and Philip M. Conger, director of the Tucson Ecumenical Council Task Force on Central American Activity; Antonio Clark, a Catholic priest at the Sacred Heart Church in Nogales, Arizona; Ramon Dagoberto Quinones, a Catholic priest and Mexican citizen from Nogales, Sonora, Mexico; Darlene Nicgorski of Phoenix, a member of the School Sisters of St. Francis in Milwaukee; Ana Priester and Mary Waddell of Phoenix, members of the Sisters of

284. *Id.*

285. *Id.*

286. Storer Rowley, 2 *Sentenced In Sanctuary Case*, CHI. TRIB. (Mar. 28, 1985), http://articles.chicagotribune.com/1985-03-28/news/8501170545_1_sanctuary-case-sentenced-sanctuary-movement [<https://perma.cc/FXW5-35YJ>].

287. *Id.*

288. *Id.*

289. *Id.*

290. Stuart Taylor, 16 *Indicted by U.S. in Bid to End Church Smuggling of Latin Aliens*, N.Y. TIMES (Jan. 15, 1985), <http://www.nytimes.com/1985/01/15/us/16-indicted-by-us-in-bid-to-end-church-smuggling-of-latin-aliens.html> [<https://perma.cc/8V56-8DAJ>].

291. *Id.*

292. *Id.*

Charity of the Blessed Virgin Mary; and Mary Kay Espinosa of Nogales, Arizona, secretary of the Association of Educational Reform of Sacred Heart Church.²⁹³

VII. REINSTITUTING SECURE COMMUNITIES PROGRAM

President Trump's interior executive order of January 25, 2017 revived the controversial "Secure Communities" program that first expanded and then ended during the Obama Administration. The program requires local authorities to share fingerprints and other arrest data to help track down removable immigrants.²⁹⁴

The Secure Communities program works very simply. When someone is arrested by a local law enforcement official and fingerprinted, those officials send the fingerprints to the FBI in case the person is a fugitive or an ex-convict.²⁹⁵ Under Secure Communities, the FBI then shares the fingerprints with ICE, and ICE runs its own check, which can lead to the deportation of individuals who have no convictions.²⁹⁶

[T]he vast majority of individuals removed [during the Obama administration] as a result of Secure Communities referrals were non-criminal or low-level offenders. And DHS took the strict position on Secure Communities that it could access all fingerprints submitted to the FBI by local law enforcement officials even without the permission of state and local officials. In fact, Secure Communities casts a wide net and scoops up the fingerprints of everyone not born in the United States, whether or not they pose a criminal risk. For example, an abused woman in San Francisco worked up the courage to call police, but she was arrested as well because the police saw a "red mark" on the alleged abuser's cheek. The charges against her were dropped, but her fingerprints were already forwarded to ICE under the Secure Communities program, and she faced deportation. This case was an exact replica of one that occurred in Maryland.²⁹⁷

Thus, the Secure Communities program represents a super-sized immigration enforcement effort by roping in state and local law enforcement without their consent.²⁹⁸ As Professor Jennifer Chacón pointed out during the Obama administration's operation of the program:

293. *Id.*

294. Tal Kopan & Catherine E. Shoichet, *Key Points in Trump's Immigration Executive Orders*, CNN (Jan. 26, 2017), <http://www.cnn.com/2017/01/25/politics/donald-trump-immigration-executive-orders/index.html> [<https://perma.cc/WF78-K9ZD>].

295. Elise Foley, *Obama Faces Growing Rebellion Against The Secure Communities Deportation Program*, HUFFINGTON POST (Apr. 24, 2014), https://www.huffingtonpost.com/2014/04/24/secure-communities_n_5182876.html [<https://perma.cc/7VT3-PJ25>].

296. *Id.*

297. *Ethics, Morality and Disruption of U.S. Immigration Laws*, *supra* note 228, at 990–91.

298. Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 603 (2012).

From a federal perspective, the advantage of Secure Communities is that it expands federal enforcement capacity by processing information about local arrest without bestowing the increased enforcement powers on sub-federal agents required by the 287(g) program. At least in theory, if not in practice, discriminatory power concerning enforcement is shifted back to the federal government. The first appropriations for the program were authorized in December 2007 [during the Bush Administration]. Currently, the program is operating in more than 3,000 jurisdictions across the country, including all jurisdictions along the United States-Mexico border.²⁹⁹

After being reactivated by President Trump, the ICE website boasts that through the second quarter of fiscal year 2017, “more than 43,300 convicted criminal aliens have been removed as a result of Secure Communities.”³⁰⁰ The site is silent with respect to how many noncriminal aliens have been removed under the revival of Secure Communities.

VIII. REPORTS OF WIDESPREAD FEAR

Since President Trump’s election, reports of widespread fear in immigrant communities have been common. On February 12, 2017, CNN headlined: “Fear Spreads Among Undocumented Immigrants” and reported:

Across the United States, some unauthorized immigrants are keeping their children home from school. Others have suspended after-school visits to the public library. They have given up coffee shop trips and weekend restaurant dinners with family. Some don’t answer knocks on their doors. They’re taping bedsheets over windows and staying off social media. Nervous parents and their children constantly exchange text messages and phone calls. From New York to Los Angeles, a series of immigration arrests this week have unleashed waves of fear and uncertainty across immigrant communities.³⁰¹

A few days later, The Guardian warned: “‘Psychological warfare’: immigrants in America held hostage by fear of raids” and wrote:

[An] 11-page [draft enforcement] memo has compounded fears among immigrant communities that Trump’s campaign promise of a hardline clampdown on immigration, dismissed by some at the time as little more than heated rhetoric, is about to be realized.

“It’s almost like it’s psychological warfare that’s being waged against people of color to create a constant feeling of fear and un-

299. *Id.*

300. *Secure Communities*, U.S. IMMIGRATION & CUSTOMS ENF’T (last updated Jan. 3, 2018), <https://www.ice.gov/secure-communities> [<https://perma.cc/8W6W-63L7>].

301. Roy Sanchez, *After ICE Arrests, Fear Spreads Among Undocumented Immigrants*, CNN (Feb. 12, 2017), <http://www.cnn.com/2017/02/11/politics/immigration-roundups-community-fear/index.html> [<https://perma.cc/2CEA-GT8J>].

certainty,” said Juanita Molina, the executive director of Border Action Network, a human rights organization in Tucson, Arizona.

...
 “I’ve had border patrol ask me for my documents just going for a jog by my house. I’d go to get a gallon of milk at the store and have officers stop me and say ‘Well, what are you doing?’”, she said. . . .
 “We don’t have just basic freedom of movement.”³⁰²

Then the New York Times chimed in: “Immigrants Hide, Fearing Capture on ‘Any Corner.’” The article describes immigrants’ fears:

No going to church, no going to the store. No doctor’s appointments for some, no school for others. No driving, period—not when a broken taillight could deliver the driver to Immigration and Customs Enforcement.

It is happening on Staten Island, where fewer day laborers haunt street corners in search of work; in West Phoenix’s Isaac School District, where 13 Latino students have dropped out in the past two weeks; and in the horse country of northern New Jersey, where one of the many undocumented grooms who muck out the stables is thinking of moving back to Honduras.

If deportation has always been a threat on paper for the 11 million people living in the country illegally, it rarely imperiled those who did not commit serious crimes. But with the Trump administration intent on curbing illegal immigration—two memos outlining the federal government’s plans to accelerate deportations were released Tuesday, another step toward making good on one of President Trump’s signature campaign pledges—that threat, for many people, has now begun to distort every movement.³⁰³

Six months into the Trump presidency, the Center for American Progress reported: “Trump’s Immigration Policies Are Harming American Children.” The report reads:

On top of an increased threat of deportation, immigrants and their children are also becoming targets of heightened racism and discrimination. Teachers have reported cases of children adopting Trump’s rhetoric to bully their peers in school, telling Latino children that they will be deported and saying they should go back to where they came from.

For the nearly 6 million U.S.-citizen children living with at least one unauthorized family member, life in Trump’s America is frightening. Since the election, adults across the country have reported spikes in fear and distress among young children from immigrant

302. Julia Carrie Wong, ‘Psychological Warfare’: Immigrants in America Held Hostage by Fear of Raids, THE GUARDIAN (Feb. 18, 2017), <https://www.theguardian.com/us-news/2017/feb/18/us-immigration-raids-fear-trump-mexico> [<https://perma.cc/2D8E-ZVBY>].

303. Vivian Yee, *Immigrants Hide, Fearing Capture on ‘Any Corner’*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/immigrants-deportation-fears.html> [<https://perma.cc/VL44-XWC2>].

families. Now more than ever, citizen children are worried that they could be separated from their parents or forced to leave their communities.³⁰⁴

As the reports disclose, fear is manifested in a variety of disturbing ways. According to one attorney in New York, “There are people that I work with who essentially want to go dark. . . . They don’t want to be public in any way whatsoever. They spend less time on the street. They go to work and go straight back home. They don’t go on Facebook. They put curfews on themselves.”³⁰⁵ Some families avoid the local park while others have stopped participating in previously-common soccer games.³⁰⁶ One woman, Meli, who arrived in Los Angeles from El Salvador more than twelve years ago, lives “in a state of self-imposed house arrest, refusing to drive, fearing to leave her home, wondering how she will take her younger son, who is autistic, to doctor’s appointments.”³⁰⁷ [She stated] ‘I don’t want to go to the store, to church—they are looking everywhere, and they know where to find us. . . . They could be waiting for us anywhere. Any corner, any block.’”³⁰⁸

Reports from North Carolina, Maryland, New York, and California demonstrate that immigrants are forgoing medical care and not picking up medication out of fear of immigration enforcement.³⁰⁹ According to Mary Clark, the executive director of Esperanza Immigrant Legal Services in Philadelphia: “There’s a real fear that their kids will get put into the foster care system People are asking us because they don’t know where to turn.”³¹⁰ Stories abound of immigrants who qualify and already participate in social support programs—to feed themselves and their families or to provide health insurance for their qualified children—withdrawing from the programs out of fear of deportation or of hurting their chances of citizenship.³¹¹ Non-profit

304. Leila Schochet, *Trump’s Immigration Policies Are Harming American Children*, CTR. FOR AM. PROGRESS (July 31, 2017), <https://www.americanprogress.org/issues/early-childhood/reports/2017/07/31/436377/trumps-immigration-policies-harm-immigrant-american-children/> [<https://perma.cc/S3W3-GK6J>].

305. Sanchez, *supra* note 301.

306. Yee, *supra* note 303.

307. *Id.*

308. *Id.*

309. Jan Hoffman, *Sick and Afraid, Some Immigrants Forgo Medical Care*, N.Y. TIMES (June 26, 2017), <https://www.nytimes.com/2017/06/26/health/undocumented-immigrants-health-care.html> [<https://perma.cc/D82X-7JGL>].

310. Yee, *supra* note 303.

311. See Caitlin Dewey, *Immigrants Are Going Hungry so Trump Won’t Deport Them*, WASH. POST (Mar. 16, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/03/16/immigrants-are-now-canceling-their-food-stamps-for-fear-that-trump-will-deport-them/?utm_term=.934c2928c4de [<https://perma.cc/4QHY-8GLK>]; see Greg Kaufman, *Why Immigrants in California Are Canceling Their Food Stamps*, THE NATION (Mar. 17, 2017), <https://www.thenation.com/article/why-immigrants-in-california-are-canceling-their-food-stamps/> [<https://perma.cc/DY3J-WB6E>]; see *Trump’s Immigration Policy Causing Some To Withdraw Kids From Medi-Cal*, HEALTHLINE (Mar.

groups have noticed a decline in the number of immigrant families seeking assistance.³¹² Because they fear being caught, many immigrant families have cancelled the benefits they receive from the government, such as food stamps.³¹³ A food center in Maryland, for example, “report[ed] that about 20 percent of the 561 families they have helped apply for food stamps or SNAP benefits, in the past few months have asked that their cases be closed.”³¹⁴

Although their fears are often unfounded, the Trump Administration’s stance on immigration has caused many families to become isolated.³¹⁵ Even in San Francisco, an outspoken sanctuary city, fewer eligible residents are using food stamps because of fears about immigration crackdowns under the Trump Administration.³¹⁶ Police departments across the country have reported a decrease in crime reporting in predominantly Latino neighborhoods, which some officials believe is related to the fear of immigration enforcement; for example, the Houston police chief reported a 13% decrease in violent crime reporting by Latinos during the first three months of 2017.³¹⁷ To avoid a run-in with authorities, some parents have chosen to abandon driving their children to school, and instead send them by bus.³¹⁸

One minister in Columbus, Georgia, had a similar observation. The Rev. Ivelisse Quiñones, director of Hispanic ministries at St. Luke United Methodist Church in Columbus, Georgia, observed the worry and fear among his congregation. “Yes, people are very concerned,” said the associate pastor at St. Luke and lead pastor of the Hispanic ministry, which has about fifty congregants.³¹⁹ We are transporting many of our members because they’re afraid of driving And every Sunday, I make sure I’m abreast of the news that happens during the week. Before I start preaching, I give them 15 minutes of train-

14, 2017), <https://californiahealthline.org/morning-breakout/trumps-immigration-policy-causing-some-to-withdraw-kids-from-medi-cal/> [https://perma.cc/98HP-5VVQ].

312. Pam Fessler, *Deportation Fears Prompt Immigrants to Cancel Food Stamps*, NPR (Mar. 28, 2017), <https://www.npr.org/sections/thesalt/2017/03/28/521823480/deportation-fears-prompt-immigrants-to-cancel-food-stamps> [https://perma.cc/KPS8-4NF4].

313. *Id.*

314. *Id.*

315. *Id.*

316. Tara Duggan, *Immigrants’ Fear Cited in Declining Food Stamp Use in SF*, SF CHRONICLE (May 17, 2017), <http://www.sfchronicle.com/food/article/Fewer-eligible-San-Franciscans-taking-advantage-11151203.php> [https://perma.cc/9A4P-WLMV].

317. Lindsey Bever, *Hispanics ‘are Going Further into the Shadows’ Amid Chilling Immigration Debate, Police Say*, WASH. POST (May 12, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/05/12/immigration-debate-might-be-having-a-chilling-effect-on-crime-reporting-in-hispanic-communities-police-say/?utm_term=.fe8877cd005e [https://perma.cc/SN3J-TJTU].

318. Elise Foley & Roque Planas, *Immigration Officers Test Boundaries Of Rules Discouraging Arrests At Schools, Churches*, HUFFINGTON POST (Mar. 22, 2017), https://www.huffingtonpost.com/entry/immigration-enforcement-churches-schools_us_58d2bae5e4b0b22b0d191b21 [https://perma.cc/J44J-CN86].

319. *Id.*

ing, teaching and counseling, because there are a lot of worries here.”³²⁰

One mother of four, who has been a resident of Phoenix, Arizona, since 2004, has a plan in place for her children if she is forced to return to Mexico. Her younger daughters, ages thirteen and fourteen, will be sent to live with her twenty-four-year-old daughter.³²¹ She said that she “want[s] them to be able to finish their studies, but she won’t be able to handle them for very long.”³²² “She has two kids of her own, and it’s a lot to ask her. I’ve got to be prepared to take them back with me.”³²³ Although Graciela has a plan, she is also distraught by the idea of leaving the United States. “I can’t imagine not seeing my grandkids grow up,” she says.³²⁴ “Since Trump became president, I’m so depressed. I’m eating out of control, and I wake up in the middle of the night and can’t go back to sleep. I have bags under my eyes. It’s really starting to wear on me.”³²⁵

In the auditorium of the Benjamin Franklin Health Science Academy in Brooklyn, a parent coordinator, Christian Rodriguez, noted: “I have children crying in the classroom, crying in my office When I ask them, ‘Why are you crying?’ They have expressed to me that they don’t want their moms to be apprehended and taken away from them.”³²⁶ The effect on some high school students is tragic in a different way, as noted in this email request:

Dear Professor Hing,

We are wondering if one of you (or the USF students) could do a KYR [know-your-rights] talk in Spanish at [] School in the [. . . neighborhood] on 4/25 at 6pm.

The teachers and principal there are worried because the high school students and families have expressed a lot of anxiety. In addition many of the undocumented students are now feeling discouraged and don’t want to keep studying hard or apply for college. We are having a talk for the students on 4/19 at 10:30am with a DACA-mented lawyer to give some encouragement and perspective.

But we need to do a KYR on how to defend and prepare families for the parents on 4/25 at 6pm. . . .

320. Alva James-Johnson, *Columbus Undocumented Immigrants Fear Raids, Deportations*, LEDGER-ENQUIRER (Mar. 12, 2017), <http://www.ledger-enquirer.com/news/local/article138032038.html> [<https://perma.cc/7KZW-4WY8>].

321. Sarah Elizabeth Richards, *How Fear of Deportation Puts Stress on Families*, THE ATLANTIC (Mar. 22, 2017), <https://www.theatlantic.com/health/archive/2017/03/deportation-stress/520008/> [<https://perma.cc/5A6Q-VTPN>].

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. Anya Kamenetz, *‘I Have Children Crying In The Classroom,’* NPR (Mar. 9, 2017), <https://www.npr.org/sections/ed/2017/03/09/518996780/i-have-children-crying-in-the-classroom> [<https://perma.cc/Q584-348G>].

Let me know either way.
 Thank you so much
 Lorena³²⁷

Undocumented domestic abuse victims are worried that, by seeking help, they will be seized and deported.³²⁸ The concern spiked following the Trump Administration's executive actions.³²⁹ Staff at clinics and domestic violence shelters in cities with high populations of undocumented immigrants said they have seen a large drop in the number of women coming in for services. "Even people who work with these issues are saying they have not seen this level of fear," said Sandra Henriquez, executive director of the California Coalition Against Sexual Assault.³³⁰ The Travis County, Texas, District Attorney's office had to grapple with how to move forward in at least one felony domestic violence case in which a victim stopped cooperating with investigators out of fear that ICE will deport her.³³¹ "Our office has worked for a long time over many years to try to build up our credibility with the immigrant community," said Mack Martinez, chief of the domestic violence division at the Travis County District Attorney's office.³³² "When someone is arrested in the courthouse, it makes it very difficult for these people to trust that they will be safe if they make an outcry of abuse."³³³

Even lawful permanent residents are afraid. According to a veteran private immigration lawyer, "The problem is that Trump and his policies have sown real fear and panic into the hearts and souls of our clients, whether they are undocumented or documented We have long-term LPR's who are afraid to leave the US, fearing detention upon their return."³³⁴ In a twist, the fear engendered by President Trump among LPRs has resulted in an uptick in naturalization applications as well.³³⁵

327. Email to Bill Hing, Professor of Law and Migration Studies, University of S.F. from Lorena Melgarejo, S.F. Catholic Archdiocese's Department of Public Policy and Social Concerns (Apr. 15, 2017) (on file with Author).

328. Tyler Kingkade, *Domestic Abuse Victims Aren't Coming Forward Because They're Scared Of Being Deported*, BUZZFEED (Mar. 16, 2017), https://www.buzzfeed.com/tylerkingkade/under-trump-domestic-abuse-victims-are-more-afraid-of-being?utm_term=.lorezrPrY#.hpj03DmDN [<https://perma.cc/SQ9Z-XKE6>].

329. *Id.*

330. *Id.*

331. Philip Jankowski, *Travis DA: Witness' Deportation Fears Stall Domestic Violence Case*, MY STATESMAN (Mar. 8, 2017), <http://www.mystatesman.com/news/crime—law/travis-witness-deportation-fears-stall-domestic-violence-case/rmFepwrRlWKYJFUjAUz50N/> [<https://perma.cc/EH5J-GCDK>].

332. *Id.*

333. *Id.*

334. Email from Paula Solorio, Partner, Law Offices of Fellom & Solorio, to Bill Hing, Professor of Law and Migration Studies, University of S.F. (Mar. 30, 2017, 9:11 AM) (on file with Author).

335. Steven Riznyk, *Citizenship Applications Are On The Rise, And The Reasons Are Interesting*, INDIA NEW ENGLAND NEWS (May 14, 2017), <http://indianewengland>

The increased level of fear is measurable. A UCLA social science poll in Los Angeles found that 37% of respondents said they were afraid that they, a family member, or a friend would be deported because of their immigration status.³³⁶ Of those, 80% said the risks of deportation increased if a friend or family member enrolled in any kind of governmental health, education, or housing program.³³⁷ Additionally, 56% of Latinos expressed fear of a friend or family member being deported, and 31% of Asians expressed the same fear.³³⁸ But many whites expressed concern as well. For example, 19% of the Anglos were worried, perhaps concerned about a maid, gardener, or office co-worker.³³⁹ Younger respondents were more likely to express fear, with 56% between the ages of eighteen and twenty saying they were concerned. Similarly, younger Latinos share the same fear, understandably, with 83% expressing concerns about participating in government programs.³⁴⁰

The fear appears pervasive even in the states and localities that have done the most to allay fear through sanctuary or other protective policies. California Dream Act scholarship applications for undocumented college students are down significantly despite repeated assurances from the state that it will do everything within its power to protect the privacy of student information.³⁴¹ Reports by Latinos of sexual assault have dropped 25% in Los Angeles, the city with the longest standing police policy (special order 40, enacted in 1979) prohibiting the reporting of immigrant victims to ICE, and the city whose current police chief and mayor have clearly expressed support and protection for undocumented immigrants since the election.³⁴²

.com/2017/05/us-citizenship-applications-rise-reasons-interesting/ [https://perma.cc/GW6N-JNY9].

336. George Foulsham, *Deportation, Loss of Health Care Raise Concerns in L.A. County, According to UCLA Survey*, UCLA NEWSROOM (Apr. 4, 2017), <http://newsroom.ucla.edu/releases/deportation-loss-of-health-care-raise-concerns-in-l-a-county-according-to-ucla-survey> [https://perma.cc/4DER-DLD6].

337. *Id.*

338. *Id.*

339. *Id.*

340. Mike McPhate, *California Today: Worries Over Immigration*, N.Y. TIMES (Apr. 5, 2017), <https://www.nytimes.com/2017/04/05/us/california-today-worries-over-deportation.html> [https://perma.cc/M7TN-6EZK].

341. Joyce Tsai, *Torkelson Urges Undocumented Students to Apply for 'Dream Act'*, EAST BAY TIMES (Mar. 22, 2017), <https://www.eastbaytimes.com/2017/02/24/californias-undocumented-immigrants-are-urged-to-apply-for-dream-act-college-financial-aid-by-state-schools-superintendent-despite-fears-about-trump/> [https://perma.cc/U9JT-H8MD].

342. James Queally, *Latinos Are Reporting Fewer Sexual Assaults Amid a Climate of Fear in Immigrant Communities, LAPD Says*, L.A. TIMES (Mar. 21, 2017), <http://www.latimes.com/local/lanow/la-me-ln-immigrant-crime-reporting-drops-20170321-story.html> [https://perma.cc/B4TB-TDG9]. See also Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 UC IRVINE L. REV. 247 (2012).

Whatever one might say about comparative ICE enforcement efforts from administration to administration or President Trump's specific strategies, fear has increased in immigrant communities since he became president.

A. *Why the Fear?*

As noted in the introduction, fear in the immigrant community started the moment that President Trump was elected. His round-them-up-and-deport-them rhetoric pervaded the media throughout the primary and general elections, along with his build-a-wall-make-Mexico-pay and anti-Syrian refugee corollaries.³⁴³ The rhetoric was difficult to ignore—for everyone, including immigrants—because the coverage reached ethnic and social media, as well as mainstream outlets.³⁴⁴ As one writer reported from Brownsville, Texas:

[The] news here on the border with Mexico travels fast. Most of it is, in fact, 'fake news' — conjecture and unverifiable gossip exchanged over "el Feisbuk," which is what people here in the Rio Grande Valley call the social network. Instead of snapshots and emojis, it now disseminates warnings. People are frightened, and frightened people repeat things that frighten them more:

Stay at home tomorrow. Immigration and Customs Enforcement is conducting raids in the kitchens.

Don't send your kids to school on Wednesday. The border patrol is looking for kids with no papers.

Don't drive down 802 on Fridays anymore.

There's a checkpoint at the grocery store. They arrested 100 people last night at 10.³⁴⁵

It turns out that "some of the stock images . . . on the news are from long before the last election, or instances in which warrants are being served after months of investigation."³⁴⁶ But, the damage has already been done.

If you are a noncitizen or care about the well-being of a noncitizen, being on edge about ICE enforcement is easy to understand. Reports of apprehensions and removals of individuals—some who were allowed to stay by the Obama administration—have become common. Consider this range of examples from across the country of arrests and removals that received media attention in the first few months of the Trump Administration:

343. *Trump's Promises Before and After the Election*, BBC (June 16, 2017), <http://www.bbc.com/news/world-us-canada-37982000> [<https://perma.cc/C34C-MH4E>].

344. *Id.*

345. Domingo Martinez, *How Scared Should People on the Border Be?*, N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/opinion/sunday/how-scared-should-people-on-the-border-be.html> [<https://perma.cc/BUY3-TQQ3>].

346. *Id.*

1. **Restaurant owner, husband of U.S. citizen, resident for seventeen years deported—Indiana.** Roberto Beristain, the owner of a popular restaurant in Granger, Indiana, was deported to Mexico. Beristain resided in the United States for seventeen years and had a clean criminal record.³⁴⁷ His wife, Helen, voted for President Trump and thought that President Trump would deport only those with criminal records and would not separate families.³⁴⁸
2. **Grandfather with no criminal record—California.** Carlos Ortiz, the parent and grandfather of U.S. citizens, was living peacefully in Pasadena, California.³⁴⁹ However, when ICE agents came to his home looking for someone else, Ortiz admitted to agents that he was living in the country without papers and was taken into deportation custody.³⁵⁰
3. **Twenty-six-year-old with no criminal record—North Carolina.** When Edwin Guillen saw ICE agents approaching his home in Durham, NC, he ran.³⁵¹ The twenty-six-year-old was a house painter with no criminal record, who may have been targeted because “he is brown or [because] he does not speak English.”³⁵² His attorney argued that he was simply “at the wrong place at the wrong time.”³⁵³
4. **U.S. resident for seventeen years and father of three U.S. citizens—New York.** Jose Perez, the father of three United States citizens, worked on a dairy farm in Livingston County, New York, for seventeen years.³⁵⁴ In September 2016, during the Obama administration, his deportation case was administratively closed, and he was given a work permit.³⁵⁵ However, after the change in administrations, Perez reported to the local ICE office for a routine check-in and was detained for removal.³⁵⁶
5. **Parents of two citizens, one battling cancer—Arkansas.** Amanda and Juan Aristondos, residents of Fort Smith, Arkansas, fled Guatemala in 2008 and unsuccessfully sought asylum in

347. Joseph Dits, *Granger Restaurant Owner Roberto Beristain Deported*, SOUTH BEND TRIBUNE (Apr. 6, 2017), https://www.southbendtribune.com/news/local/granger-restaurant-owner-roberto-beristain-deported/article_77635bc8-1a58-11e7-a694-1741825be474.html [<https://perma.cc/B59A-5KYW>].

348. *Id.*

349. *Activists Call For Release Of Grandfather Detained By ICE*, CBS L.A. (Mar. 16, 2017), <http://losangeles.cbslocal.com/2017/03/16/activists-call-for-release-of-grandfather-detained-by-ice/> [<https://perma.cc/6JWT-5LNG>].

350. *Id.*

351. *ICE Agents Arrest Man in Durham*, ABC11 (Mar. 30, 2017), <http://abc11.com/news/ice-agents-arrest-man-in-durham/1826686/> [<https://perma.cc/35J2-MEBZ>].

352. *Id.*

353. *Id.*

354. Katie Shepherd, *Tales of Deportation in Trump’s America: Week Three*, BBC (Mar. 31, 2017), <http://www.bbc.com/news/world-us-canada-39461852> [<https://perma.cc/4MRE-LPJQ>].

355. *Id.*

356. *Id.*

the United States.³⁵⁷ However, because they had two children who were United States citizens—one battling cancer—Obama ICE officials regularly stayed their deportation.³⁵⁸ That all changed when President Trump issued his executive orders, after which the couple's request to further stay their deportation was denied.³⁵⁹

6. **Married to citizen father of two—Iowa.** Andres Tadeo Alvarez is the father of two children who are U.S. citizens. Alvarez and his domestic partner, Marielda Moreno, a U.S. citizen, live in Des Moines.³⁶⁰ Alvarez was arrested by ICE agents when he was riding to work with another person who was the actual target of the ICE operation.³⁶¹ He fled Mexico ten years earlier, at the age of twenty-two, to escape violence, and his only record is a traffic ticket.³⁶² Moreno is trying to raise money for legal fees, and said, "I want to believe that something good will come of this. I don't want to believe that things will get worse."³⁶³
7. **Mother of eighteen-year-old with cerebral palsy and epilepsy deported—Utah.** "Isabel," a pseudonym, was an undocumented mother from Colombia who lived in Draper, Utah, for twenty-five years.³⁶⁴ She lived with her eighteen year-old son, who suffers from cerebral palsy. Throughout the George W. Bush and Obama administrations, Isabel was granted permission to stay under a "deferred action" program.³⁶⁵ However, her luck ran out when President Trump took office, and she was deported even though she had strong community support from the Mormon Church, Utah residents, and Senator Orrin Hatch.³⁶⁶
8. **Ten-year resident, father of two U.S. citizens—Pennsylvania.** ICE arrested a man on his way to work at a pizzeria in Harrisburg, Pennsylvania, along with three other men. Out of fear, the man's wife asked the reporter to not use their names.³⁶⁷ They

357. Beraiah Baker, *Family Faces Possible Deportation Due To New Executive Orders*, 5NEWSONLINE.COM (Mar. 14, 2017), <http://5newsonline.com/2017/03/14/family-faces-possible-deportation-due-to-new-executive-orders/> [https://perma.cc/AZ6Q-W99R].

358. *Id.*

359. *Id.*

360. Grant Rodgers & MacKenzie Elmer, *Family "Hoping We Are Going to be OK" Amid Dad's Deportation*, DES MOINES REGISTER (Mar. 10, 2017), <http://www.desmoinesregister.com/story/news/2017/03/10/he-entered-u-s-legally-but-has-stayed-crime-free-now-he-faces-deportation/98897138/> [https://perma.cc/3T3T-KG4H].

361. *Id.*

362. *Id.*

363. *Id.*

364. Annie Knox, *Draper Mother Deported Despite Last-Minute Push*, KSL.COM (Apr. 6, 2017), <https://www.ksl.com/?sid=43773540&nid=148> [https://perma.cc/VG7J-EAER].

365. *Id.*

366. *Id.*

367. Ivey DeJesus, *ICE Raids Causing Fear and Anxiety Among Harrisburg's Latino Community, Advocate Says*, PENN LIVE (Mar. 11, 2017), http://www.pennlive.com/news/2017/03/ice_raids_illegal_immigrants_u.html [https://perma.cc/AQ9C-9V49].

have two children who are U.S. citizens. Her husband is the “sole breadwinner” for the family.³⁶⁸ They are both from Jalisco, Mexico, and have no criminal records. Her husband has lived in the United States for ten years, and she has resided in the United States for eight.³⁶⁹

9. **Fifty-year-old mother of six ordered deported—Illinois.** Francisca Lino is also an example of someone who, while deportable, was not considered a deportation priority under the Obama Administration. Instead, the Administration simply ordered her to check-in on a regular basis.³⁷⁰ When Lino reported for the first time after President Trump was inaugurated, she was fearful.³⁷¹ Her fear turned out to be well-founded. Her experience was particularly excruciating, because after she first went in for the check-in, she exclaimed, “Thank God! . . . They gave me a year until I have to come back.”³⁷² But, in an unbelievably nightmarish experience, she was immediately called back. The first officer she spoke with made a mistake. The actual officer in charge of her case denied an extension and ordered Lino to return on July 11th, plane ticket in hand, to be deported.³⁷³
10. **Small business owner, father of two U.S. citizens—Maryland.** Segundo Paucar, a native of Ecuador, lived in Highlandtown, Maryland, with his wife and two children who are U.S. citizens.³⁷⁴ He owned a construction business and employed eight workers that specialized in rehabbing properties around the city.³⁷⁵ Nonetheless, ICE agents arrested him for entering the country without inspection when he was fifteen years old.³⁷⁶
11. **Father of four-year-old citizen facing deportation after he was stopped for a vehicle violation—Texas.** Department of Public Safety officers stopped Jesus Vasquez for driving a car with dark window tint in El Paso, Texas.³⁷⁷ When the authorities discovered that the twenty-two-year-old Vasquez did not have a

368. *Id.*

369. *Id.*

370. Sarah Jorgensen & Laura Dolan, *Mother of Four Residing in Church as Lawyers Seek to Stay Her Deportation*, CNN (July 22, 2017), <http://www.cnn.com/2017/07/21/us/ct-woman-deportation-church-refuge/index.html> [<https://perma.cc/9H5F-SMKL>].

371. *Id.*

372. *Id.*

373. *Id.*

374. Luke Broadwater, Sarah Gantz, & Lorraine Mirabella, *Arrests of Immigrants in Baltimore Leave Many Fearful*, THE BALT. SUN (Mar. 8, 2017), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-immigration-impact-20170307-story.html> [<https://perma.cc/SM5G-86YF>].

375. *Id.*

376. *Id.*

377. Lorena Figueroa, *US Citizen’s Dad Stopped by DPS Faces Deportation*, EL PASO TIMES (Mar. 6, 2017), <http://www.elpasotimes.com/story/news/immigration/2017/03/06/us-citizens-dad-stopped-dps-faces-deportation/98830484/> [<https://perma.cc/P2X4-HG9S>].

driver's license, they turned him over to the Border Patrol.³⁷⁸ Vasquez, who has lived in the United States since he was a child, has a four-year-old daughter who is a U.S. citizen, and was saving money to marry his girlfriend who is also a U.S. citizen.³⁷⁹

12. **Married to U.S. citizen with two children—West Virginia.** In Beaver, West Virginia, ICE agents arrested two employees at El Mariachi Restaurant. One of the employees resided in the United States for twenty years.³⁸⁰ One of the workers was the breadwinner for his wife and two children.³⁸¹ Previously, one ACLU representative stated that he had “never heard of raids on any places of work here in West Virginia,” but recently raids of Latino-owned businesses increased dramatically in the state after President Trump’s inauguration.³⁸²
13. **Father-to-be LPR with no violent criminal record—New York.** Joel Guerrero, a lawful resident, was from the Dominican Republic. For seven years, Guerrero was told to routinely check-in with ICE in New York City every six months.³⁸³ But Guerrero fell prey to new restrictions under the Trump administration’s policies. Under the Obama administration, the fact that he missed a court date on January 6, 2011, and had a ten-year-old misdemeanor charge for marijuana possession did not matter.³⁸⁴ But the rules changed under President Trump, and when he went in for a check-in with his wife Jessica, who was six months pregnant, he was arrested.³⁸⁵
14. **Father of three citizens with no violent criminal record—Arizona.** Juan Carlos Fomperosa Garcia is “a forty-four-year-old construction worker from Mexico” who was also arrested after he went in for a routine check-in with ICE in Phoenix.³⁸⁶ Such check-ins were so uneventful in the past that his family expected him home for a birthday celebration dinner for his son.³⁸⁷ Instead, the single father of three children who are U.S. citizens was in ICE detention.³⁸⁸
15. **Father of two citizens with no violent criminal record—Texas.** Jose Escobar was married to a U.S. citizen, and helped run a paint store in Houston. Escobar was also arrested and deported

378. *Id.*

379. *Id.*

380. Jessica Farrish, *ICE Detains Two Local Men*, THE REGISTER-HERALD (Mar. 7, 2017), http://www.register-herald.com/news/ice-detains-two-local-men/article_04903437-4164-53e8-b11f-3af9b677ba86.html [https://perma.cc/BF72-T22N].

381. *Id.*

382. *Id.*

383. Esther Yu Hsi Lee, *Meet 3 Dads Detained by ICE This Week*, THINKPROGRESS (Aug. 31, 2017), <https://thinkprogress.org/meet-3-dads-whose-ice-detentions-you-havent-heard-about-this-week-9bc6c92f226a/> [https://perma.cc/52B7-8T7L].

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

after going in for a routine ICE check-in.³⁸⁹ Five years earlier, the Obama administration granted him work permission because he was a low-priority undocumented immigrant.³⁹⁰ By the time the Trump ICE officials deported him to El Salvador, Escobar was paying off a mortgage on a home, paying his property taxes, and had two children who are U.S. Citizens.³⁹¹ He had no criminal problems and apparently lost his legal status through a “clerical error.”³⁹²

16. Father of two citizens with no violent criminal record—Ohio.

Leonardo Valbuena lived and worked in Akron, Ohio, for eleven years. He applied for asylum years earlier. He fled Colombia in 2006 after being threatened by guerrilla freedom fighters, and he received a work permit.³⁹³ But his status was never cleared up. He was forced to self-deport to Colombia even though he was married and the father of two U.S.-citizen children.³⁹⁴ He was accused of no crimes.³⁹⁵

17. Grandmother of military veteran’s children—California.

ICE agents arrested Clarissa Arredondo “outside her house in an unmarked SUVs on Valentine’s Day.”³⁹⁶ She lived in Mira Mesa, California, and her daughter’s husband is a U.S. Navy veteran.³⁹⁷ The forty-three year old grandmother of two U.S. citizens was deported to Mexico within two weeks, apparently for lying on public assistance paperwork a decade earlier.³⁹⁸

18. Father of five American citizens, lived in the United States for sixteen years, no criminal record—Oregon.

ICE also arrested Roman Zaragoza-Sanchez, a resident of Sandy, Oregon, on Valentine’s Day.³⁹⁹ Zaragoza-Sanchez’s wife, who regarded her husband as a “homebody” who liked to take his kids to the park, planned on celebrating the day at dinner with their five

389. Lomi Kriel, *Deported Immigrant Trying to Adjust to Life Alone in the Foreign Land of His Birth*, HOUS. CHRONICLE (Oct. 17, 2017), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Deported-immigrant-trying-to-adjust-to-life-alone-10995268.php> [<https://perma.cc/HUZ5-D5QV>].

390. *Id.*

391. *Id.*

392. *Id.*

393. Doug Livingston, *Akron Immigrant Shackled by ICE ‘Self-Deports’ to Avoid Prosecution*, AKRON BEACON JOURNAL (Mar. 5, 2017), <https://www.ohio.com/akron/news/akron-immigrant-shackled-by-ice-self-deports-to-avoid-prosecution> [<https://perma.cc/4L2G-A2NH>].

394. *Id.*

395. *Id.*

396. Kate Morrissey, *Grandmother, “Backbone” of Veteran’s Family Sent Back to Mexico*, THE SAN DIEGO UNION-TRIBUNE (Mar. 4, 2017), <http://www.sandiegounion-tribune.com/news/immigration/sd-me-military-deportation-20170303-story.html> [<https://perma.cc/T3CN-FB64>].

397. *Id.*

398. *Id.*

399. Amelia Templeton & Roxy De La Torre, *ICE Plans To Deport Oregon Immigrant With 5 Children, No Criminal Background*, OR. PUB. BROAD. (Mar. 2, 2017), <http://www.opb.org/news/article/oregon-immigrant-deport-criminal-background-children/> [<https://perma.cc/5N7X-684V>].

children, all U.S. citizens.⁴⁰⁰ But ICE agents stopped Zaragoza-Sanchez within an hour of leaving for work, and he ended up in the Northwest Immigration Detention Center in Tacoma, Washington.⁴⁰¹ ICE confirmed that Zaragoza-Sanchez and four others without criminal records were arrested as part of a raid.⁴⁰²

19. **Mother of two, with no violent criminal record—Arizona.** Guadalupe García de Rayos, a thirty-six-year-old mother of two children who are U.S. citizens, complied with ICE check-ins for years, following a conviction for using a false social security number to work.⁴⁰³ After entering the country as a fourteen-year-old, she settled in Phoenix.⁴⁰⁴ However, her first check-in after President Trump took office turned into a nightmare; she was arrested and separated from her husband and children, who were waiting outside.⁴⁰⁵ García de Rayos’s fourteen-year-old daughter, Jacqueline, complained as her mother was deported to Mexico. “I don’t think it’s fair that she was taken away from us[;]. . . [h]er only crime was to work here so she could support us. . . . She hasn’t done anything to harm anyone.”⁴⁰⁶
20. **Father of a U.S. citizen, lived in the United States for twelve years, no criminal record.** In 2014, Gilberto Velasquez, a “38 year-old house painter from El Salvador,” was granted permission to stay in the United States after President Obama’s orders to de-prioritize non-criminal aliens with strong ties in the United States and posed no threat to public safety.⁴⁰⁷ He was a resident for twelve years and a father to a child who is a U.S. citizen. But in May, he faced deportation again after his deportation was re-calendared.⁴⁰⁸ President Trump’s priorities differed from those of his predecessor, and the new administration “moved to reopen the cases of hundreds” of deportable immigrants whose cases used to be low priority.⁴⁰⁹ Between March 1 and May 31, 2017, 1,329 of these cases were reopened.⁴¹⁰
21. **Deportation of DACA recipient—California.** The deportation of a DACA recipient with no criminal problems was particularly

400. *Id.*

401. *Id.*

402. *Id.*

403. Griselda Nevarez, *Arizona Woman Deported to Mexico Despite Complying with Immigration Officials*, THE GUARDIAN (Feb. 9, 2017), <https://www.theguardian.com/us-news/2017/feb/09/arizona-guadalupe-garcia-de-rayos-deported-protests> [<https://perma.cc/M2RL-EBR7>].

404. *Id.*

405. *Id.*

406. *Id.*

407. Mica Rosenberg & Reade Levinson, *Exclusive: Trump Targets Illegal Immigrants Who Were Given Reprieves from Deportation by Obama*, REUTERS (June 9, 2017), <http://in.reuters.com/article/usa-immigration-deportations/exclusive-trump-targets-illegal-immigrants-who-were-given-reprieves-from-deportation-by-obama-idINKBN1902IA> [<https://perma.cc/93FZ-3C6L>].

408. *Id.*

409. *Id.*

410. *Id.*

surprising. In April, ICE agents deported twenty-three-year-old Juan Manuel Montes to Mexico. At the time, President Trump was still committed to maintaining the DACA program.⁴¹¹ Montes, who lived in the United States since age nine was waiting for a ride after visiting his girlfriend in Calexico, California.⁴¹² A Border Patrol agent questioned Montes, who did not have his DACA papers because he forgot his wallet.⁴¹³ Not only did authorities deny Montes's request to retrieve his papers, but he was deported within three hours.⁴¹⁴ Referring to DACA recipients in January, President Trump said, "They shouldn't be very worried . . . I do have a big heart."⁴¹⁵ Despite these claims, Montes was removed. In Mexico, he reported, "I thought that if I kept my nose clean nothing would happen."⁴¹⁶ When President Trump finally rescinded DACA on September 5, 2017, his actions immediately struck fear in the minds of hundreds of thousands of DACA recipients across the country.⁴¹⁷

- 22. ICE activity at sensitive locations.** A 2011 agency memo instructed ICE agents to stay away from "sensitive locations," namely, churches, hospitals, and schools, but there has been some confusion over whether ICE continues to adhere to that protocol.⁴¹⁸ Some officials say ICE agents are told to refrain from activities at "schools, hospitals, places of worship and public ceremonies or demonstrations."⁴¹⁹ However, in May, an immigration agent showed up at an elementary school in New York looking for a fourth-grader.⁴²⁰ In February, "a group of Latino men were apprehended and some of them arrested by

411. Alan Gomez & David Agren, *First Protected DREAMer is Deported Under Trump*, USA TODAY (Apr. 18, 2017), <https://www.usatoday.com/story/news/world/2017/04/18/first-protected-dreamer-deported-under-trump/100583274/> [<https://perma.cc/6862-P7PX>].

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.*

417. See, e.g., Mark Schultz, *Trump Administration DACA Announcement Leaves Area Recipients Fearful*, ILL. PUB. MEDIA (Sept. 5, 2017), <https://will.illinois.edu/news/story/trump-administration-daca-announcement-leaves-area-recipients-fearful> [<https://perma.cc/GF8B-KU25>].

418. Dara Lind, *The First Immigration Raids of the Trump Era, Explained*, VOX (Feb. 14, 2017), <https://www.vox.com/policy-and-politics/2017/2/14/14596640/immigration-ice-raids> [<https://perma.cc/QXE5-4GDK>]; Manya Brachear Pashman, *Cupich to Priests: No Entry for Immigration Agents Without Warrants*, CHI. TRIBUNE (Mar. 1, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-cardinal-cupich-immigration-directive-20170301-story.html> [<https://perma.cc/D95Q-NC6K>].

419. Jason McGahan, *L.A. Health Clinic Protects Immigrants Against Illness — and Deportation*, LA WEEKLY (Mar. 15, 2017), <http://www.laweekly.com/news/health-clinic-declares-itself-a-sanctuary-amid-rising-fear-of-deportations-8026443> [<https://perma.cc/CAC5-S6UH>].

420. Alex Eriksen, *ICE Agent Tried to Apprehend a 4th-Grader but Was Turned Away by the School*, YAHOO BEAUTY (May 14, 2017), <https://www.yahoo.com/beauty/ice-agent-tried-apprehend-4th-grader-turned-away-school-224058706.html> [<https://perma.cc/DF7J-5V5X>].

ICE agents as they were leaving a church shelter in Alexandria, Virginia.”⁴²¹ In late January, ICE agents visited a preschool next door purportedly by mistake while looking for an undocumented immigrant in San Francisco’s Mission District.⁴²² In June, Border Patrol agents raided the desert camp of the humanitarian organization “No More Deaths” and arrested four migrants.⁴²³ The camp provides medical aid to migrants crossing the desert, and the organization had a separate 2013 agreement that border officials would not interfere with its operations.⁴²⁴ In October, ICE agents stalked a ten-year-old girl with cerebral palsy who had gallbladder surgery at a hospital in Corpus Christi, Texas.⁴²⁵ Courthouses are not on the sensitive locations list, but in March, the Chief Justice of the California Supreme Court wrote to Trump administration officials to stop immigration agents from “stalking” California’s courthouses to make arrests.⁴²⁶ Attorneys and judges in California report encountering immigration agents near courts.⁴²⁷ However, DHS officials refused to back down and warn that ICE agents may arrest crime victims and witnesses at courthouses: “Just because they’re a victim in a certain case does not mean there’s not something in their background that could cause them to be a removable alien. . . . Just because they’re a witness doesn’t mean they might not pose a security threat for other reasons.”⁴²⁸

23. Collateral arrests of two men at the wrong place at the wrong time. Antonio Valenzuela and Jose Salgado were leaving for work at 6 a.m. in Hayward, California, when they were appre-

421. Julie Carey, *ICE Agents Arrest Men Leaving Fairfax County Church Shelter*, NBC WASH. (Feb. 15, 2017), <http://www.nbcwashington.com/news/local/ICE-Agents-Arrest-Men-Leaving-Alexandria-Church-Shelter-413889013.html> [<https://perma.cc/5QWR-5ZXD>].

422. Joe Fitzgerald Rodriguez, *ICE Agents Appear at Family Center in SF’s Mission District*, S.F. EXAM’R (Jan. 26, 2017), <http://www.sfexaminer.com/ice-agents-appear-family-center-sfs-mission-district/> [<https://perma.cc/7RMZ-8LGL>].

423. Paul Ingram, *Border Patrol Raids No More Deaths Camp, Arrest Migrants Seeking Medical Care*, TUCSON SENTINEL (June 15, 2017), http://www.tucsonsentinel.com/local/report/061517_no_more_deaths/border-patrol-raids-no-more-deaths-camp-arrest-migrants-seeking-medical-care/ [<https://perma.cc/5M2C-Y5M3>].

424. *Id.*

425. Jenn Gidman, *ICE Agents Swoop In, Take Child From Hospital Post-Surgery*, NEWSE.COM (Oct. 26, 2017), <http://www.newser.com/story/250672/child-with-cerebral-palsy-taken-by-ice-agents-post-surgery.html> [<https://perma.cc/62X4-9S4G>].

426. Maura Dolan, *California to Trump: Keep ICE out of our courthouses*, LA TIMES (Mar. 16, 2017), <http://www.latimes.com/local/lanow/la-me-ln-chief-justice-trump-20170316-story.html> [<https://perma.cc/QE72-PTWT>].

427. *Id.*

428. Devlin Barrett, *DHS: Immigration Agents May Arrest Crime Victims, Witnesses at Courthouses*, WASH. POST (Apr. 4, 2017), https://www.washingtonpost.com/world/national-security/dhs-immigr-.6d8-196d-11e7-9887-1a5314b56a08_story.html?utm_term=.2ddc915260c4 [<https://perma.cc/7BJ8-TCG2>] (quoting DHS spokesman David Lapan).

hended by ICE agents.⁴²⁹ The agents were actually looking for a different undocumented man at the apartment complex, but decided to stop and question Valenzuela and Salgado while the agents were there.⁴³⁰ It just so happened that both men were undocumented. Valenzuela and Salgado were both residents of the United States for more than ten years, both had children who were U.S. citizens, and both had stable jobs and no criminal records.⁴³¹

President Trump's nativist rhetoric and belligerence toward immigrants encourages and emboldens vigilantes to step forward, exacerbating the fear.⁴³² For example, given Congress's hesitance to fund the border wall construction, two U.S. military veterans stepped forward to create the America First Foundation and raise \$21 billion to build the "great wall of America."⁴³³ The organization was started after Trump's presidential victory, founded on the idea of "getting American citizens together for a common cause."⁴³⁴ The group's website proclaims:

Let's Build The Wall! Are You Concerned About Illegal Immigration And Drugs Pouring Across Our Southern Border? Now Is The Time To Take Action! America Has A Front Door And We Expect All Immigrants To Respect Our Country And Be Vetted Properly. If You Agree, Please Do Your Part And DONATE. . .To Help Support The Funding For Our WALL. Every Dollar Gets Us Closer To A More Secure America!⁴³⁵

Trump supporters were also emboldened to disrupt meetings designed to provide immigration information and "Know Your Rights" lessons to immigrants. A "Know Your Rights" presentation for immigrants in El Monte, California was interrupted by protestors who were wearing gear indicating support for President Trump, including "Make America Great Again" hats.⁴³⁶ The host of the event was Congresswoman Grace Napoliitano, D-El Monte, who claimed that the group

429. Tatiana Sanchez, *ICE Shows up to Apartment Complex Looking for Undocumented Hayward Man, Arrests Two Others Instead*, THE MERCURY NEWS (July 29, 2017), <http://www.mercurynews.com/2017/07/29/ice-shows-up-to-apartment-complex-looking-for-undocumented-hayward-man-arrests-two-others-instead/> [<https://perma.cc/J655-KEG7>].

430. *Id.*

431. *Id.*

432. Thomas Phippen, *Group Wants to Crowd-Source Money For Trump's Border Wall*, DAILY CALLER (Mar. 22, 2017), <http://dailycaller.com/2017/03/22/this-group-wants-to-crowd-source-money-for-trumps-border-wall/> [<https://perma.cc/T77H-G3GY>].

433. *Id.*

434. *Id.*

435. *Let's Build the Wall*, AM. FIRST FOUND., <https://www.americafirstus.org/event/americans-funding-the-wall-together/> (last visited Jan. 20, 2018) [<https://perma.cc/8S32-GD2J>].

436. Christopher Yee, *Illegal Immigration Protesters Interrupt 'Know Your Rights' Forum in El Monte*, SAN GABRIEL VALLEY TRIB. (Apr. 16, 2017),

was “trying to intimidate our residents.”⁴³⁷ One protestor complained that the event was “offensive [and that Napolitano was] sponsoring a town hall that teaches illegal aliens about rights they don’t have.”⁴³⁸

Then there are the scam arrests, preying on immigrant fears. An immigrant rights attorney in Oakland, California sent this email:

Hello all,

I met a man last week at a clinic in Livermore who received threatening phone calls from people claiming to be from U.S. immigration. The callers told him he needed to pay them several thousand dollars in order to avoid deportation.⁴³⁹

This is not an isolated incident. USCIS has put out information for reporting these types of scams.⁴⁴⁰

Disturbingly, although ICE is known to lie about who they are when conducting enforcement operations, officials apparently are not always truthful with local law enforcement departments either.⁴⁴¹ In Santa Cruz, California, police were misled by ICE into helping make immigration arrests during a raid on suspected gang members.⁴⁴² The local police chief said that federal officials “lied” about a joint operation involving a raid of an El Salvador-based gang.⁴⁴³ The police were told that the operation would not include immigration-related arrests.⁴⁴⁴ But in fact, immigration arrests were made.⁴⁴⁵

As a result of the Trump threats and reports of arrests, “Know Your Rights” presentations for immigrant groups put on by immigrant rights organizations have become very common.⁴⁴⁶ Although the

tribune.com/2017/04/16/illegal-immigration-protesters-interrupt-know-your-rights-forum-in-el-monte/ [https://perma.cc/5FY9-RR4J].

437. *Id.*

438. *Id.*

439. E-mail from Alisa Whitfield, Immigration Staff Attorney, SFILDC, to SFILDC group (Mar. 23, 2017, 06:29 PM) (on file with Author).

440. *Avoid Payment Scams: USCIS Does Not Accept Fees by Phone or Email*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/news/alerts/avoid-payment-scams-uscis-does-not-accept-fees-phone-or-email> (last visited Jan. 18, 2018) [https://perma.cc/9NNTK-QTME].

441. David Marks, *Santa Cruz Police: ICE Lied to Us About Immigration Arrests*, KOED NEWS (Feb. 24, 2017), <https://ww2.kqed.org/news/2017/02/24/santa-cruz-police-ice-lied-to-us-about-immigration-arrests/> [https://perma.cc/9YBW-LSDR].

442. *Id.*

443. *Id.*

444. *Id.*

445. Michael Todd, *Santa Cruz Police: Homeland Security Misled City with ‘Gang’ Raids that were Immigration Related*, MERCURY NEWS (Feb. 23, 2017), <http://www.mercurynews.com/2017/02/23/santa-cruz-police-homeland-security-raids-immigration-status-not-gang-related/> [https://perma.cc/ERY7-BZ8X]. Police say they were misled by the Department of Homeland Security into helping make immigration arrests during a raid on suspected gang members. Because of that experience, the Santa Cruz department will no longer work with the federal agency because they cannot be trusted. *Id.*

446. See generally *Know Your Rights: A Guide to Your Rights When Interacting with Law Enforcement*, CATHOLIC LEGAL IMMIGRATION NETWORK INC.,

presentations are principally focused on how undocumented immigrants can exercise their right to remain silent when confronted with an ICE agent, family emergency plans have become part of many curriculums.⁴⁴⁷ The trainings now include getting documents ready in case a parent is deported.⁴⁴⁸

For example, one report discusses two brothers, ages fourteen and fifteen, who are prepared to act if they return home and their mother is gone.⁴⁴⁹ “I would immediately just grab the binder and just call my family here,” says the older brother.⁴⁵⁰ The brothers, along with their other four siblings, are U.S. citizens, but their mother immigrated without proper documents almost two decades ago.⁴⁵¹

Similarly, another parent packs a charged cell phone with her oldest daughter’s lunch every morning before school.⁴⁵² Although only eleven, she knows what to do if she and her eight-year-old sister return home to an empty house: “she’s supposed to call [her mother’s] friend who will come get them.”⁴⁵³ Additionally, the family has hidden an ATM card and power-of-attorney giving the family friend custody of the children. “These are things an 11-year-old shouldn’t have to think about,” says the mother.⁴⁵⁴ But, this is the harsh reality many undocumented immigrants face.⁴⁵⁵

So, given the loud and constant noise of President Trump’s enforcement plans and efforts that began even before his election, the resulting widespread fear is not surprising. As the examples demonstrate, much of the enforcement is real. He has taken off the gloves in attacking immigrants and does so in a very public way that receives wide attention. But, even the efforts that have been curtailed, such as the Muslim bans and sanctuary funding threats, have created confusion and chaos that can contribute to the fear. One could argue that Trump and his advisors are intentionally reckless with how they rolled out the enforcement efforts, and this creates an even scarier scene.

In a sense, immigrants and their allies may also be contributing to the hysteria. They have built up a great network of community-based organizations, activists, experts, and service providers. This means that

iclegal.org/resources/know-your-rights-law-enforcement (last visited Jan. 20, 2018) [<https://perma.cc/AUT9-E775>].

447. *Id.*

448. *Id.*

449. Jennifer Guerra, *Fearing Deportation, Families Plan For The Worst*, NPR (Mar. 13, 2017), <http://www.npr.org/2017/03/13/519015044/fearing-deportation-families-plan-for-the-worst> [<https://perma.cc/PH78-WGQM>].

450. *Id.*

451. *Id.*

452. Sarah Elizabeth Richards, *How Fear of Deportation Puts Stress on Families*, THE ATLANTIC (Mar. 22, 2017), <https://www.theatlantic.com/health/archive/2017/03/deportation-stress/520008/> [<https://perma.cc/G8LE-EBFJ>].

453. *Id.*

454. *Id.*

455. *Id.*

each little thing said or done by President Trump or ICE gets noticed, called out, and responded to right away.⁴⁵⁶ In turn, President Trump is less likely to get away with something (for long). This also plays into the fear in the community, as each incident is misunderstood as perhaps carrying more importance than it should.

In the end, President Trump's unwillingness to clarify that he is not trying to be anti-Muslim or anti-Mexican in any meaningful way speaks the loudest. Maybe it is the hypocrisy of his statements that makes it stand out. Since President Trump holds great power over immigration policy, yet may not know how to wield it, some feel it makes a mockery of the institution of the Presidency that many immigrant rights groups were just beginning to trust after eight years of Obama.

B. *Is the Fear Objectively Justified?*

During the presidential campaign, President Trump promised a "deportation force" to round-up the more than 11 million immigrants in the country illegally.⁴⁵⁷ Logistically and resource-wise, the realistic deportation of 11 million immigrants is hard to imagine. Even Republican leaders in Congress have made clear that the prospect of massive deportations is not high.⁴⁵⁸ So, one might reasonably conclude that the chances that a typical undocumented person who avoids criminal problems will get deported are small.

An objective basis for greater fear among immigrants is undeniable. As noted, individuals previously not likely to be deported under the Obama Administration—like Juan Manuel Montes, Guadalupe Garcia de Rayos, and Roberto Beristain—have been removed.⁴⁵⁹ These are not necessarily random acts by rogue ICE agents, but rather enforcement decisions made under the interior enforcement framework that has been installed.⁴⁶⁰

The Obama Administration created a list of detailed enforcement priorities with strict hierarchy, and removable immigrants who did not fall within the narrow priorities had a chance of being protected from any enforcement.⁴⁶¹ For example, under enforcement memos issued in 2011 and 2014, the top priority was individuals who posed threats to

456. See generally *Community-Based Organizations*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/avoid-scams/community-organizations/community-based-organizations> (last visited Jan. 20, 2018) [<https://perma.cc/5V4H-ZLVB>].

457. Tom LoBianco, *Donald Trump Promises 'Deportation Force' to Remove 11 million*, CNN (Nov. 12, 2015), <http://www.cnn.com/2015/11/11/politics/donald-trump-deportation-force-debate-immigration/index.html> [<https://perma.cc/S8GS-DSTC>].

458. Paulina Firozi, *Ryan on Trump's Mass Deportation Plan: 'It's Not Happening'*, THE HILL (Jan. 13, 2017), <http://thehill.com/latino/314132-ryan-on-trumps-mass-deportation-plan-its-not-happening> [<https://perma.cc/66Y6-MS94>].

459. See *supra* text accompanying notes 337–401.

460. *Id.*

461. Bill Ong Hing, *The Failure of Prosecutorial Discretion and the Deportation of Oscar Martinez*, 15 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 437, 452–53 (2013).

national security, border security, and public safety (e.g., terrorists, gang members, and persons apprehended at the border attempting to enter unlawfully).⁴⁶² The second priority included those who committed misdemeanors and immigration violators (including convictions for domestic violence, gun use, or DUIs), as well as those who recently entered the country unlawfully (after January 1, 2014).⁴⁶³ The final priority group included persons with a final order of removal after January 1, 2014.⁴⁶⁴ Factors to consider, such as family ties, length of residence, and community involvement, were to be used in determining whether to exercise favorable discretion.⁴⁶⁵

Most undocumented immigrants were not considered enforcement priorities under the Obama enforcement memos.⁴⁶⁶ Researchers estimated that under Obama's 2011 enforcement memo, about 27% of the undocumented population were priorities for enforcement, while only 13% were prioritized under the 2014 memo.⁴⁶⁷ The effect of the prioritization on the demographics of those deported was clear:

The 2014 priorities had a significant impact on both the number and criminal make up of ICE removals from [sic] the interior of the country. . . . In FY2016, 98 percent of all interior removals met one of the priorities . . . , and 92 percent (or about 60,000 out of 65,000 total interior removals) were convicted of a crime. Strict adherence to the priorities by ICE agents and the use of prosecutorial discretion significantly reduced overall interior removals, from 224,000 in FY2011 to 65,000 in FY2016.⁴⁶⁸

President Trump's interior enforcement order and the subsequent DHS memo by then-Secretary Kelly rescind all previous policy related

462. Memorandum from the Director of U.S. Immigration and Customs Enforcement to Field Office Directors, Special Agents in Charge, and Chief Counsel for U.S. Immigration and Customs Enforcement (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<https://perma.cc/CXM7-9FZA>] [hereinafter Morton Memo]; Memorandum from the Secretary of the Department of Homeland Security to the Acting Director, Commissioner, Director, and Acting Assistant Secretary for Policy of the Department of Homeland Security (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<https://perma.cc/UR5R-39MA>] [hereinafter Johnson Memo].

463. *See id.*

464. *See* Johnson Memo, *supra* note 462.

465. *See* Johnson Memo and Morton Memo, *supra* note 462.

466. Lazaro Zamora, *Comparing Trump and Obama's Deportation Priorities*, BIPARTISAN POLICY CTR. (Feb. 27, 2017), <https://bipartisanpolicy.org/blog/comparing-trump-and-obamas-deportation-priorities/> [<https://perma.cc/94Q2-CL7Z>].

467. Marc R. Rosenblum, *Understanding the Potential Impact of Executive Action on Immigration Enforcement*, MIGRATION POLICY INST. (July 2015), <http://www.migrationpolicy.org/research/understanding-potential-impact-executive-action-immigration-enforcement> [<https://perma.cc/W8V6-9FP6>].

468. Zamora, *supra* note 466.

to the priorities for removal (except for DACA and the DAPA orders).⁴⁶⁹

The new priorities target a much broader set of unauthorized persons for removal and empowers individual enforcement officers with broad discretionary authority to apprehend and detain any immigrant believed to be in violation of immigration law and start removal proceedings for any immigrant who is subject to removal under any provision of the Immigration and Nationality Act (INA)—this essentially includes any and all unauthorized immigrants in the country.

The executive order calls on DHS to prioritize individuals for removal based on criminal, security, and fraud grounds that make foreign nationals inadmissible or deportable under the INA. The order also references persons described in INA §§ 235(b) and (c) of the INA, which addresses the inspection and removal of all persons in the country who have not been lawfully admitted or paroled and are subject to expedited removal [deportation without the right to a deportation hearing]. In addition, the EO specifically targets unauthorized immigrants who:

- a) have been convicted of any criminal offense
- b) have been charged with any criminal offense
- c) have committed acts that constitute a chargeable criminal offense
- d) have willfully committed fraud in any official matter before a government agency
- e) have abused public benefits programs
- f) have final orders of removal
- g) are otherwise considered a public safety or national security risk by an immigration officer.⁴⁷⁰

The priorities that are listed in President Trump’s order differ from the 2014 priorities in that there is “no inherent hierarchy” of immigrant priority categories.⁴⁷¹ Rather, each of the priorities are “equally important for removal.”⁴⁷² Also, the President’s order does not define “criminal offenses.”⁴⁷³ This means that the term could include offenses that were not a priority under Obama’s immigration policies, including minor offenses, which encompass traffic violations or even “immigration status like illegal entry or reentry.”⁴⁷⁴

469. See *DHS Released a Memo Implementing President Trump’s Executive Order on Interior Enforcement*, AM. IMMIGRATION LAWYERS ASS’N (Feb. 20, 2017), <http://www.aila.org/infonet/leaked-dhs-memo-implementing-president-trump> [<https://perma.cc/AZ6E-SJP6>].

470. Zamora, *supra* note 466.

471. See *2014 Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/immigrationaction> (last visited Nov. 5, 2017) [<https://perma.cc/6T2T-JRY9>].

472. *Id.*

473. See AM. IMMIGRATION LAWYERS ASS’N, *supra* note 469.

474. See *id.*

Previous orders focused on convictions. President Trump's order does not share this focus. Instead, people who have been "charged or believed to have committed acts that constitute a chargeable offense" are a focus of President Trump's order. Those categories do not follow the innocent-until-proven-guilty mantra that is the center of our justice system.⁴⁷⁵

There are concerns that jurisdictions will use the shift in focus and resurgence of 287(g) agreements to "make individuals priorities for deportation by first arresting and charging them with a crime."⁴⁷⁶

Lazaro Zamora of the Bipartisan Policy Center argues that the new directives give ICE agents greater authority with little oversight.⁴⁷⁷ The Obama policy was about discretion to "get a reprieve," while Trump's approach is more a "disclaimer that . . . priorities do not constrain agents from enforcement."⁴⁷⁸ The likely result is that the most convenient person to apprehend will be the target for ICE agents.⁴⁷⁹ The language of the memos shows that any undocumented immigrant is at risk for apprehension and removal.⁴⁸⁰

Data released by ICE on May 17, 2017, showed a marked increase in interior enforcement during Trump's first 100 days compared with the same period in 2016. The first 100 days after President Trump signed the Executive Orders on immigration enforcement priorities, ICE increased arrests by "37.6 percent over the same period in 2016."⁴⁸¹ Deportation officers under the Trump Administration arrested 11,000 more individuals during this time compared to a similar three-month period during the Obama Administration.⁴⁸²

In that time period, "ICE's immigration enforcement activity . . . resulted in more than 400 arrests per day."⁴⁸³ However, at its height, the Obama ICE enforcement resulted in more arrests per day. In October 2012, about 700 arrests per day were made; the figure declined to about 300 per day after the Jeh Johnson memo on enforcement priorities went into effect in late 2014.⁴⁸⁴ A further baseline to quantify increased enforcement under Trump is available from the Transac-

475. Zamora, *supra* note 466.

476. *Id.*

477. *Id.*

478. *Id.*

479. *Id.*

480. *Id.*

481. Paul Bedard, *ICE Arrests 41,000 Illegals in Trump's First 100 Days, Up 37 Percent*, WASH. EXAM'R (May 17, 2017), <http://www.washingtonexaminer.com/ice-arrests-41000-illegals-in-trumps-first-100-days-up-37-percent/article/2623357> [<https://perma.cc/4E2Y-Z5WA>].

482. *ICE ERO Immigration Arrests Climb Nearly 40%*, IMMIGRATION & CUSTOMS ENFT, <https://www.ice.gov/features/100-days> (last updated Nov. 2, 2017) [<https://perma.cc/6FVG-TR4R>].

483. *Id.*

484. Email from Lena Garber to Bill Hing, Professor of Law and Migration Studies, Univ. of S.F. (May 17, 2017) (on file with Author).

tional Records Access Clearinghouse. The Clearinghouse reports that in 2016, the Obama Administration apprehended and removed an average of 1,250 individuals each week from the interior. Importantly, only a small portion of weekly apprehensions and removals in 2016 were direct arrests by ICE itself. Most occurred when ICE simply assumed custody of individuals arrested or detained by local, state, and other federal law enforcement agencies.⁴⁸⁵

An increasing number of interior removals can be expected after new Trump Administration orders and such things as threats to defund those jurisdictions who do not cooperate.⁴⁸⁶ Other signs that point to a future increase of removals are the reinstatement of the Secure Communities fingerprinting-sharing program, the re-expansion of 287(g) agreements between ICE and local officials, and the widespread reports of ICE arrests without local assistance.⁴⁸⁷

Furthermore, two parts of ICE Homeland Security Investigations (“HSI”) and Enforcement and Removal Operations (“ERO”)—should be kept in mind.⁴⁸⁸ ERO focuses on enforcement, while HSI enforces things like human rights violations, human smuggling, and trafficking.⁴⁸⁹ However, under the Trump Administration, when HSI makes an arrest of someone who is legitimately targeted, those agents must now make collateral arrests of deportable immigrants who happen to be at the wrong place at the wrong time.⁴⁹⁰

While difficult to quantify, President Trump’s election “unleashed” ICE officers bent on greater enforcement who could have felt held back under the Obama Administration.⁴⁹¹ One veteran ICE agent admitted “[w]e used to look at things through the totality of the circumstances when it came to a removal order—that’s out the window.”⁴⁹² He was frustrated and felt “micromanage[d]” under the Obama Ad-

485. TRAC Reports, Inc., *ICE Immigration Raids: A Primer*, TRANSACTIONAL REPORTS ACCESS CLEARINGHOUSE (Feb. 13, 2017), <http://trac.syr.edu/immigration/reports/459/> [<https://perma.cc/LW49-TZ7U>].

486. See, e.g., Alan Gomez, *Miami-Dade Commission Votes to End County’s ‘Sanctuary’ Status*, USA TODAY (Feb. 17, 2017), <https://www.usatoday.com/story/news/nation/2017/02/17/miami-dade-county-grapples-sanctuary-city-president-trump-threat/98050976/> [<https://perma.cc/BAE7-QKW2>].

487. See *supra* text accompanying notes 203–20.

488. *Who We Are*, IMMIGRATION. & CUSTOMS ENF’T, <https://www.ice.gov/about> (last visited Nov. 3, 2017) [<https://perma.cc/MLU8-QC52>].

489. *Id.*

490. Hamed Aleaziz, *Police Alliance Strained by Raids*, S.F. CHRONICLE (Apr. 30, 2017), <https://www.pressreader.com/usa/san-francisco-chronicle/20170430/281496456181820> [<https://perma.cc/B42Z-9BQS>].

491. Email from Mark Silverman to Bill Hing, Professor of Law and Migration Studies, Univ. of S.F. (Mar. 30, 2017) (“It’s the ‘Doberman [dog] effect. Many ICE Dobermans feel that they are no longer on the leash. There have been very, very few raids, but there have been actions by rogue Doberman ICE agents.”).

492. Jonathan Blitzer, *A Veteran ICE Agent, Disillusioned with the Trump Era, Speaks Out*, THE NEW YORKER (July 24, 2017), <https://www.newyorker.com/news/news-desk/a-veteran-ice-agent-disillusioned-with-the-trump-era-speaks-out> [<https://perma.cc/AKQ3-6LL3>].

ministration, but now important standards and protocols are ignored.⁴⁹³ He sees open “contempt” toward aliens among the ranks, and even hears resentment voiced, such as, “Why don’t they speak English?”⁴⁹⁴

Clearly, ICE agents resented Obama’s prosecutorial discretion instructions.⁴⁹⁵ Their union sued the Obama administration after the DACA order, but a court dismissed the complaint that their duty to enforce the law was being hampered.⁴⁹⁶ Even the border patrol union—an organization that has never before endorsed a presidential candidate—threw its support behind Trump during the primaries, stating that it believed Trump would “embrace the ideas of rank-and-file Border Patrol agents . . . a refreshing change that we have not seen before—and may never see again.”⁴⁹⁷ Thus, the fact that many immigration agents welcome President Trump’s enforcement regime provides another objective basis for the fear that immigrants feel. For example, consider the phenomenon of “collateral arrests” of non-criminals. A review of raids that took place in February 2017, early in the Trump Administration, shows that arresting non-targeted bystanders was much more prevalent than it was during the Obama era.⁴⁹⁸ All of the sudden, the threat of being a “collateral” victim of a raid for being at the wrong place at the wrong time became real.⁴⁹⁹ DHS also claimed that it was arresting primarily “criminal aliens,” but the public could be misled by the nomenclature, because many arrestees were likely guilty of the minor crime of illegal entry.⁵⁰⁰ One was left with the sense that neighborhood raids and random stops were now possible.⁵⁰¹

There is an objective basis for immigrants who are fearful under the Trump Administration. Although the likelihood of an ICE encounter may still be small, immigration enforcement since the election of Pres-

493. *Id.*

494. *Id.*

495. See Jason Howerton, *ICE Union Boss Blasts Obama Admin. for Making U.S. Immigration Law ‘Essentially’ Unenforceable*, THE BLAZE (Feb. 5, 2013), <http://www.theblaze.com/stories/2013/02/05/ice-union-boss-blasts-obama-admin-for-making-u-s-immigration-law-essentially-unenforceable/> [<https://perma.cc/XQQ7-XRYU>].

496. See Elizabeth Llorente, *Judge Dismisses ICE Agents’ Lawsuit Challenging Obama’s Deferred Action*, FOX NEWS (Aug. 1, 2013), <http://www.foxnews.com/politics/2013/08/01/judge-dismisses-immigration-agents-lawsuit-against-obama-program-to-suspend.html> [<https://perma.cc/36RD-KXNG>].

497. Joe Davidson, *Border Patrol Agents Union Endorses Trump*, WASH. POST (Mar. 30, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/03/30/border-patrol-agents-union-endorses-trump/?utm_term=.a9bf4e5c34f0 [<https://perma.cc/D78R-Y233>].

498. See America’s Voice, *Cutting Through Confusion Around the Immigration Raids*, YUBANET (Feb. 14, 2017), <https://yubanet.com/usa/cutting-through-confusion-around-the-immigration-raids/> [<https://perma.cc/B4QA-D2NC>].

499. *Id.*

500. *Id.*

501. *Id.*

ident Trump is up.⁵⁰² ICE is following the new enforcement priorities and making collateral arrests along the way. President Trump has likely struck a positive chord with eager, enforcement-minded ICE agents as well.

IX. CONCLUSION

On a Saturday night in March 2017, the Author sat in the large waiting room of a Redwood City, California car wash long after it closed. About fifty car wash workers from three local car wash businesses were gathered in the room. They were there to listen and participate in a “Know Your Rights” presentation being conducted by the Author and a few of his students. The students were trained by the Author in his basic law school immigration law class. Jazmin Preciado led the presentation and discussion. Because this was the third “Know Your Rights” presentation that Jazmin participated in, the Author was confident that she could lead the talk without a problem.

As Jazmin and another student, Lorena Caldera, were role playing in Spanish, the Author gazed around the room. There was laughter at some of the antics that Jazmin and Lorena employed, but the workers were thoroughly attentive to the seriousness of the lesson. Those who were undocumented realized that exercising the right to remain silent in the contexts presented could mean the difference between deportation and being able to remain in the United States with their loved ones. The workers’ questions were insightful. They pressed the Author and his students on a variety of circumstances that they imagined might occur—at work, at home, on the street, and at their child’s school. After the three-hour session, the Author and his students drove back to San Francisco feeling inspired by the lives of everyday workers who are in America to make a better life for themselves and their families. Those workers, along with many others, are here to do what they can to continue a peaceful life.

For reasons not that complex, President Trump and his ICE army want to disrupt the lives of these workers and their families. The President wants to create confusion and chaos even when it may not be legally justified, and it is working. The Trump White House instilled a get-tough attitude among the ICE officers and made the whole world think that it was normal and permissible. That made President Trump and his troops harsher than the “mainstream” Republican approach to immigration, which was strict, but not purposefully spiteful. Combine this attitude with President Trump’s immigration-savvy advisors’ approach of using old dormant immigration law provisions (like expan-

502. Maya Rhodan, *Arrests of Undocumented Immigrants Went Up During President Trump’s First 100 Days*, TIME (Apr. 28, 2017), <http://time.com/4759713/trump-100-days-arrests-undocumented-immigrants/> [<https://perma.cc/2BTQ-3WMJ>].

sion of expedited removal), sometimes beyond the constitutionally permitted boundaries, and the nightmare is complete.

Although unconstitutional actions proposed by the Trump administration can be stopped, including aspects of the travel ban and racial-profiling, it may be too late to stop the impact the policies had on individual perceptions. The anti-immigrant message became the leading story many times throughout 2017 and the first months of 2018. First, it was reported that President Trump was banning Muslims. Then, he sought bids to construct a wall at the U.S.-Mexico border. Next, many random DACA/Dreamers were arrested, even though these individuals would not have been arrested under Obama's policies. For example, Guadalupe García de Rayos, who has two U.S.-born children, was deported, even though she lived in the United States for twenty-plus years. Next, sanctuary cities were threatened with funding cuts by President Trump and Attorney General Sessions. Then there was the comment that many immigrants come from "shithole" countries.⁵⁰³ The array of enforcement headlines seems endless. The resulting fear is real.⁵⁰⁴ And although the travel ban was stalled in court, the number of refugee arrivals from Syria, Somalia, and Iraq has plummeted.⁵⁰⁵

In all honesty, we have already lived through the anti-Muslim aspect of the Trump Administration. America continues to feel the consequences of the policies imposed following 9/11, and President Trump's immigration policies may just be an extension of this aftermath. In fact, the anti-Mexican/undocumented rhetoric is not a new phenomenon in the United States. The Author recalls the anti-Mexican/undocumented era of the 70s when he practiced as a legal aid attorney and the Proposition 187 era in California in the 90s.

Remember, President Trump's anti-immigrant message struck a populist chord with many voters. These voters supported President Trump throughout the primaries due to his stance on mass deportation, further resulting in President Trump securing a number of key states in the elections.⁵⁰⁶ About half of Republican voters support the removal of undocumented immigrants and favor restrictions on Syrian

503. Eli Watkins & Abby Phillip, *Trump Decries Immigrants from 'Shithole Countries' Coming to US*, CNN POLITICS (Jan. 12, 2018), <https://www.cnn.com/2018/01/11/politics/immigrants-shithole-countries-trump/index.html> [<https://perma.cc/3RGQ-NBYZ>].

504. See *supra* text accompanying notes 290–482.

505. *Declines in U.S. Resettlement of Muslim Refugees Under the Trump Administration*, HUMAN RIGHTS FIRST (June 11, 2017), <http://www.humanrightsfirst.org/sites/default/files/hrffactsheet-declines-in-us-resettlement-muslim-refugees.pdf> [<https://perma.cc/TWQ7-Q4Z7>].

506. Ronald Brownstein & Leah Askarinam, *Can Trump Afford to Betray Anti-Immigrant Voters?*, THE ATLANTIC (Aug. 29, 2016), <https://www.theatlantic.com/politics/archive/2016/08/will-trump-break-with-the-anti-immigrant-voters-who-helped-him-win-the-primary/497816/> [<https://perma.cc/Q6AS-7YT2>].

refugees.⁵⁰⁷ Yet, the Author still chooses to believe that a majority of Americans can be motivated to at least care—if not demonstrate outrage over the ICE enforcement strategies that are causing fear in the minds of many immigrants.

When contemplating whether the basis for the fear within the immigrant community is well-founded, we must keep in mind that reactions will always be stronger when something viewed as positive is taken away. The immigration policy promulgated by the Obama administration allowed immigrants without criminal records to rest easy. They were no longer afraid to leave their homes and felt like they could lead normal lives. However, many immigrants now feel as though this sense of relief has been taken away. Such relief has been replaced with fear, which has been worsened by the stark contrast between the day-to-day policies of the Obama and Trump Administrations. The fact that there is no viable possibility of a federal fix, such as a broad legalization plan, on anyone's horizon feeds into a sense of hopelessness and despair, especially when it seemed close or at least a priority to the candidate that most pundits in 2016 predicted would be in the White House today.

Today, being undocumented is a constant state. This was not always true. In fact, being undocumented, even in the 1970s and 1990s typically did not last longer than several years. This was because immigrants had ways to become documented. People were able to become documented through a variety of different procedures including deportation suspension, registration, and 212(c) relief. But these methods of becoming documented have been cut-off via immigration law changes. Operation Gatekeeper had a lot to do with this shift. Sadly, for many people in America, living with the status of “undocumented immigrant” is now a way of life rather than just a phase. This means that immigration law and policies are a bigger concern than ever before because there is more at stake. The consequences of being caught and deported are scarier than ever. Thus, people are very sensitive about an increase in border security, including the construction of a wall. The rhetoric around the border wall and massively increased border enforcement signal to migrants that if they are caught and deported, they may never be able to return. In that sense, especially for people with family here who need to return, the consequences of deportation appear higher than before.

When President Trump's actions are combined with anti-Trump activist protests, fear ensues. People now are under the false impression that mass deportation is occurring in America. It is possible that Presi-

507. Jim Tankersley & Scott Clement, *It's Not Just Donald Trump: Half of Republicans Share His Views on Immigrants and Refugees*, WASH. POST (Nov. 24, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/11/24/its-not-just-donald-trump-half-of-republicans-shares-his-views-on-immigrants-and-refugees/](https://www.washingtonpost.com/news/wonk/wp/2015/11/24/its-not-just-donald-trump-half-of-republicans-shares-his-views-on-immigrants-and-refugees/?utm_term=.b34605f7d216) [https://perma.cc/PW2U-2WB4].

dent Trump's executive orders are just the map that provides instructions for how to institute mass deportation in America. However, the map is useless without the tools needed to make massive deportation happen. Congress would have to act on the instructions by funding for more CBP and ICE officials. Also, enforcement agencies at the state and local level would need to agree to act as force multipliers under INA § 287(g). However, even though more actions would need to be taken, the media still continues to report that raids and deportations are occurring at an unprecedented rate.

In fact, President Trump may not have a long-term plan for instituting his ideological vision. Even though some people may believe that President Trump does not know what he is doing, his policies have left an impression on immigrants. Beyond enforcement, President Trump's anti-immigrant message was heightened when he embraced a proposal "to slash legal immigration to the United States in half within a decade" by eliminating family reunification categories.⁵⁰⁸ President Trump's critics noted that his announcement was further evidence of his desire "to tear apart communities and punish immigrant families that are making valuable contributions to our economy."⁵⁰⁹ He doubled down on that proposal by making the elimination of family immigration one of the conditions for helping DACA recipients to budget negotiations in early 2018.⁵¹⁰

The Author recently invited a former student, Matt Gonzalez, to speak with the Author's clinic students about a piece on his blog only half facetiously supporting the construction of "The Wall."⁵¹¹ He had three primary points about the effects of building a wall. First, the resulting impact on food prices would inspire immigration reform because the need for cheap labor would be realized; second, social conservatives would be prevented from entering; and finally, the wall would be protective of Mexicans from unfair re-entry criminal laws. The Author and his students challenged Gonzalez on grounds such as how he failed to see the enormous effect on migrants fleeing violence.

The Author and his students also challenged Gonzalez on the symbolism of the wall. To the Author, the symbolism is significant. Its message of exclusion is clear. Latinos—primarily Mexicans—are not wanted. But the message of exclusion reaches communities on *both*

508. Peter Baker, *Trump Supports Plan to Cut Legal Immigration by Half*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/us/politics/trump-immigration.html> [<https://perma.cc/C2CS-Z9NR>].

509. *Id.*

510. Julianne Hing, *The 4 Most Shocking Proposals in the White House Immigration Plan*, THE NATION (Jan. 26, 2018), <https://www.thenation.com/article/the-four-most-shocking-proposals-in-the-white-house-immigration-plan/> [<https://perma.cc/J7DZ-57LU>].

511. Matt Gonzalez, *Build the Wall*, THE MATT GONZALEZ READER (Nov. 7, 2017), <https://themattgonzalezreader.wordpress.com/2016/11/07/border-wall/> [<https://perma.cc/EX6L-BMSN>].

sides of the border—Latinos are not wanted on either side of the border. This is a message not simply intended for undocumented immigrants. The Wall’s message is one of de-legitimizing Latinos already in the United States.

This message of de-legitimacy is in essence a message of de-Americanization: Latinos and Muslims are not and cannot be “true Americans.” Haitians, Africans, and El Salvadorans are not welcome, because they come from “shithole” countries.⁵¹² Recall President Trump’s message about the Federal Court Judge of Mexican descent who was hearing a lawsuit that was brought against former Trump University for fraud.⁵¹³ President Trump often alluded to Indiana-born Judge Gonzalo Curiel as “of Mexican heritage” or as “Mexican.”⁵¹⁴ The message was always the same, that there was “a conflict” because of the judge’s ethnicity.

This is not only Donald Trump’s message. In the Author’s opinion, it is also a view that is held by many who supported President Trump. This is a longtime message of the Republican Party; some members have used similar strong language, and others are suspected of seeking to keep individuals out of the United States who could be attracted to the Democratic Party. This historical attitude of the Republican Party toward Latinos is part of the foundation for the idea that President Trump is in fact the Republican Party’s own making—its own Frankenstein.

Diversity is at an all-time high in America today. This trend of diversity is essential to the identity of the country. The significance of any increase in diversity during the first 150 years following the founding of our country was due to the immigration of Europeans, except for the millions of Africans transported to the United States as slaves.

The Author is of the opinion that America’s Euro-centric culture created a narrow sense of who is an American. Many different groups have been victimized by de-Americanization. Muslims, Arabs, and individuals of South Asian descent suffered in the aftermath of 9/11. This de-Americanization showed that many people have a sense of privilege which has created a perpetual foreigner image in the eyes of the majority against people of color. These individuals are seen in the eyes of many as unworthy of the “American” title.

De-Americanization has a way of re-inventing itself with every generation. The term “De-Americanization” includes more than just xenophobia. There is much more to the process than a simple fear of foreigners. The origins of what is occurring today stem from a Euro-

512. Watkins & Phillip, *supra* note 503.

513. Nina Totenberg, *Trump Presses Case That ‘Mexican’ Judge Curiel Is Biased Against Him*, NPR (June 4, 2016), <http://www.npr.org/2016/06/04/480714972/trump-presses-case-that-mexican-judge-curiel-is-biased-against-him> [https://perma.cc/9699-BSKQ].

514. *Id.*

centric view of America. It is a mixture of racial profiling combined with hate. Those who are not in the majority are considered to be “others.” When de-Americanization occurs, young Americans seem to learn that the hate that they see around them is normal. They begin to believe that those Americans who can hold the title of “full-American” is narrow. Tragically, these young Americans learn that profiling others is acceptable. This leads to implicit bias and institutional racism that haunts our country.

America is divided today. Part of our country embraces people of all different backgrounds. The other part of the country excludes people who are different. This latter version of America emerged in the aftermath of 9/11 and tends to exclude individuals who are not of European descent. People who are of African, Latin, or Asian descent are looked down on, as well as people who are Muslim or of Arab descent.

Our nation is a proud multi-cultural nation. As a nation, we have taken steps forward toward inclusion, but we have taken steps backwards as well.⁵¹⁵ Actions taken by our leaders, including President Trump, often single out minorities. These actions create the ideology that immigrants are not full Americans who serve a vital role in our community. Welcome to the Trump ICE age.

515. Niall McCarthy, *The United States Is a Nation Of Immigrants*, FORBES (Jan. 23, 2017), <https://www.forbes.com/sites/niallmccarthy/2017/01/23/the-united-states-is-a-nation-of-immigrants-infographic/#6d2840b47e02> [<https://perma.cc/E8F3-LDG6>].

