

## The Troubling Case(s) of Noncitizens: Immigration Enforcement Through the Criminal Justice System and the Effect on Families

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POLICY NOTE

**THE TROUBLING CASE(S) OF NONCITIZENS:  
IMMIGRATION ENFORCEMENT THROUGH THE CRIMINAL  
JUSTICE SYSTEM AND THE EFFECT ON FAMILIES<sup>1</sup>**

*By: Juan C. Quevedo*

**I. Introduction**

Close your eyes and imagine yourself a homeless mother, moving from one place to another every six months. Imagine how you would feel, alone with no friends or family to ask for help. You—in this imaginary world—are “undocumented” to people, and no matter how much you try, no one is reaching out to help you.<sup>2</sup> Instead, your first name becomes “illegal” and your last name becomes “alien.” Worse still, the United States government is enacting laws designed to separate you from your family, because you are a scapegoat for both local and national problems.

Now open your eyes and realize that your imagination is the reality of millions of noncitizens living in the shadows of American society. Nearly 40 million United States residents were born abroad.<sup>3</sup> About 11

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<sup>1</sup> This paper was presented at the *5th National Conference of Immigration to the U.S. South: Immigration Reform and Beyond?* on October 25, 2014 at the University of Florida.

<sup>2</sup> Although I use the term “undocumented” in the introduction, I will use the term “noncitizen” for the remainder of this article. The term noncitizen includes anyone not a U.S. citizen, such as immigrants (persons granted the right to permanently reside in the U.S.), nonimmigrants (persons granted the right to temporarily reside in the U.S.) and undocumented immigrants (persons that either lost their immigration status, by overstaying their visa, or persons that entered the U.S. without inspection).

<sup>3</sup> United States Census Bureau, <http://www.census.gov/population/foreign/files/cps2012/2012T1.pdf> (last visited Aug. 30, 2014).

million of them are undocumented.<sup>4</sup> The federal government has greatly escalated the rate at which it removes noncitizens from the U.S.<sup>5</sup> For example, United States Immigration and Customs Enforcement (“ICE”) removes about 400 thousand noncitizens per year, or about 1,000 per day.<sup>6</sup>

Despite the large number of noncitizens removed, federal courts have held that it is not the government’s role to remove every noncitizen. For example, in *Kang v. United States*, Jinyu Kang, a citizen of China, fled to the United States and sought asylum.<sup>7</sup> After finding that the record “compels the conclusion that if Kang is removed to China it is more likely ... that she will be beaten, suffocated, deprived of sleep, shocked with electrical current, and/or forced to stand for long periods of time,” the court granted Kang Convention Against Torture (“CAT”) relief.<sup>8</sup> In doing so, the court noted that the government’s role is to “seek justice rather than victory,” and the court was in “distress” when the government failed to live up to that duty in this case.<sup>9</sup> And the problem, according to Jill E. Family, a professor at Widener University School of

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<sup>4</sup> Pew Research Hispanic Trends Project, <http://pewhispanic.org/files/reports/133.pdf#page=24> (last visited Aug. 30, 2014).

<sup>5</sup> Removal proceedings include deportation and exclusion. After the enactment of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, both, deportation and exclusion proceedings were combined into one unified proceeding now known as “removal.” See IIRAIRA, Pub. L. 104-208 (1996); 8 U.S.C. § 1229(a)(2)-(3) (defining “removal proceedings” as the procedure for determining whether a noncitizen may be excluded from the United States under 8 U.S.C. § 1182(a) or, whether the noncitizen may be deported under 8 U.S.C. § 1227(a)).

<sup>6</sup> U.S. Immigration and Customs Enforcement, *ERO Annual Report*, <http://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf>.

<sup>7</sup> *Kang v. United States*, 611 F.3d 157, 167 (3d Cir. 2010).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

Law, is that “the government views as a victory a denial of relief accompanied by a removal order; in other words, a ‘guilty’ verdict.”<sup>10</sup>

Further, numerous courts of appeals have held that “family unification is one the highest goals of American immigration law [and policy].”<sup>11</sup> For example, in *Mufti v. Gonzalez*, Farzan Mufti, a lawful permanent resident of the United States, attempted to cross the U.S.-Canada border with his noncitizen wife.<sup>12</sup> U.S. Customs and Border Protection detained Mr. Mufti.<sup>13</sup> And the immigration court denied Mr. Mufti’s admission into the United States.<sup>14</sup> The Board of Immigration Appeals affirmed.<sup>15</sup> In reversing the immigration court’s decision, the United States Court of Appeals for the Sixth Circuit noted that “family unification [is] the cornerstone of American immigration law and policy . . . . American immigration law [is] based upon a desire for pursuing the time-honored American tradition of encouraging family unity.”<sup>16</sup>

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<sup>10</sup> Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 KAN. L. REV. 541, 556 (2011) (citing the U.S. Immigration and Customs Enforcement, ICE Fiscal Year 2008 Annual Report: Protecting National Security and Upholding Public Safety 28 (2008)).

<sup>11</sup> *Mufti v. Gonzalez*, 174 F. App’x 303, 306 (6th Cir. 2006); *see also* *Duarte-Ceri v. Holder*, 630 F.3d 83, 90 (2d Cir. 2010) (discussing that “[i]t is consistent with Congress’s remedial purposes . . . to interpret the statute’s ambiguity . . . in a manner that will keep families intact.”); *Morel v. INS*, 90 F.3d 833, 841 (3d Cir. 1996) (discussing that “[v]arious provisions of the INA reflect Congress’s intent to prevent the unwarranted separation of parents from their children.”); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) (discussing that “[t]he [INA] was indented to keep families together and should be construed in favor of family units.”).

<sup>12</sup> *Id.* at 304.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 304-05.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 306.

Therefore, against the backdrop of justice and family unity, the purpose of this paper is to outline how the federal government has unreasonably turned the criminal justice system into an immigration removal system by sharing information between ICE and law enforcement agencies (“LEAs”). Residing in America is a privilege; a privilege extended to some, and not to others. Accordingly, Congress originally did not extend the privilege to noncitizens convicted of three crimes: murder, illicit trafficking in firearms, and drug trafficking.<sup>17</sup> The list, however, now includes twenty-eight offenses.<sup>18</sup> We now have a system that is unreasonable because it removes noncitizens that pose no danger to American society. Congress has strayed so far from the original intent of the U.S. removal system. The government now removes people that have lived in the United States most of their lives, have U.S. citizen family members, but lack a way to become legal residents or citizens of the United States. And although the cornerstone of American immigration law and policy is family unification, the sharing of information between ICE and LEAs has had an adverse effect on both noncitizen and mix-status families.

Therefore, in this paper, I endeavor to provide a critique on how the criminal and immigration system are working together to remove noncitizens that pose no danger to American society, separating families along the way. Part I will discuss how ICE shares information with LEAs. Part II will discuss the expansion of the “aggravated felony” definition and the lack of clarity on determining when a crime involves moral turpitude. Part III will discuss the lack of proportionality in immigration law. Finally, part IV will discuss the effects on both noncitizen and mix-status families.

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<sup>17</sup> Cesar Cuauhtemoc & Garcia Hernandez, *Creating Crimigration*, 2013 BYU L. REV. 1457, 1468 (2013).

<sup>18</sup> 8 U.S.C. § 1101(a)(43)(A)-(U) (2014).

## II. Secure Communities

In appropriations legislation for 2008, the U.S. Congress appropriated \$200 million “to improve and modernize efforts to identify noncitizens convicted of a crime, sentenced to imprisonment, and who may be [remov]able, and remove them from the U.S. once they are judged [remov]able.”<sup>19</sup> To accomplish the goal set out in 2008, Congress directed the secretary of the Department of Homeland Security (“DHS”) to develop a plan to “presents a strategy for [ICE] to identify every criminal noncitizen, at the prison, jail, or correctional institution in which they are held.”<sup>20</sup> As a result, Secure Communities (“S-COM”)—a comprehensive plan to identify and remove criminal noncitizens—was born.<sup>21</sup> At its core, S-COM is a “data-sharing scheme that cross references biometric data, such as fingerprints obtained at the booking of an arrested individual, between ICE, the Federal Bureau of Investigations (“FBI”), states, and localities.”<sup>22</sup>

Before S-COM, many law enforcement agencies (“LEAs”) did not determine an individual’s immigration status because the FBI’s Criminal Justice Information Service Division’s (“CJIS”) Integrated Automated Identification System (“IAFIS”)<sup>23</sup> and ICE’s Automated Biometric Identification System (“IDENT”) could not

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<sup>19</sup> Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 2050-51 (2007).

<sup>20</sup> *Id.*

<sup>21</sup> U.S. Immigration and Customs Enforcement, *Secure Communities Quarterly Report*, [http://www.ice.gov/doclib/foia/secure\\_communities/congressionalstatusreportfy101stquarter.pdf](http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy101stquarter.pdf).

<sup>22</sup> Anil Kalhan, *The Second Wave of Global Privacy Protection: Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105 (2013).

<sup>23</sup> This database contains records of over 100 million people. See Cuauhtemoc, *supra* note 17.

exchange data.<sup>24</sup> For example, “when [LEAs] made an arrest and booked a[n individual] into custody, the agency submits the [individual]’s biographic and biometric information to the CJIS/IAFIS to determine the [individual’s] criminal history.”<sup>25</sup> Then, to determine an individual’s immigration status, the LEA had to manually submit biographical information to ICE’s Law Enforcement Support Center (“LESC”).<sup>26</sup>

Through S-COM, however, CJIS/IAFIS automatically forwards both biographic and biometric information to IDENT. ICE provides the following description of the process:

1. When a[n individual] is arrested and booked into custody, the arresting LEA sends the [individual’s] fingerprints and associated biographical information to the appropriate State Identification Bureau (“SIB”) [(e.g., the Tennessee Bureau of Investigation)];
2. The SIB then sends the fingerprints and associated biographical information to CJIS/IAFIS;
3. CJIS electronically [forwards the individual’s] biometric and biographic information to IDENT to determine if there is a fingerprint match;<sup>27</sup>

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<sup>24</sup> “Despite having come online in 1994, the IDENT database is quite large. By late 2013, IDENT held records on approximately 150 million subjects and was growing at a rate of ten million entries per year.” Cuauhtemoc, *supra* note 17.

<sup>25</sup> U.S. Immigration and Customs Enforcement, *supra* note 12, at 2.

<sup>26</sup> *Id.*

<sup>27</sup> When used in the immigration detainer context, a “match” usually means an alert that a person is potentially removable from the United States. This might be because the ICE database lists a prior immigration law violation or because it lists the person as lacking

4. [If there is a match] with data in IDENT, CJIS generates and sends an Immigration Alien Query (“IAQ”) to the LESC;
5. The LESC queries law enforcement and immigration databases<sup>28</sup> to make an initial immigration status determination and generates and Immigration Alien Response (“IAR”) to prioritize enforcement actions;<sup>29</sup>
6. The LESC sends the IAR to CJIS, which routes it to the appropriate [SIB] to send to the originating LEA. The LESC also sends the IAR to the local ICE field office, which [lodges immigration detainees].<sup>30 31</sup>

Therefore, S-COM “shifted to a system of universal and automated screening such that *every single person* arrested

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United States citizenship. In the criminal law enforcement context, “match” usually means a prior conviction.

<sup>28</sup> U.S. Immigration and Customs Enforcement, *Secure Communities: Monthly Statistics through August 31, 2014: IDENT/IAFIS Interoperability*, [http://www.ice.gov/doclib/foia/sc-stats/nationwide\\_interop\\_stats-fy2014-to-date.pdf](http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2014-to-date.pdf)

(describing that the LESC queries the Student & Exchange Visitor Information System (“SEVIS”); U.S. Visitor and Immigration Status); and the National Crime and Information Center database.

<sup>29</sup> *Id.* (describing ICE’s three tier priority system; Level 1 includes convictions of “aggravated felonies,” or two or more crimes punishable by more than one year, commonly known as “felonies”; Level 2 includes convictions of offenses punishable by less than one year, commonly referred to as “misdemeanors”; and level 3 includes convictions of all other offenses. ICE also prioritizes the removal of individuals that entered the United States without inspection, or have violated their visa).

<sup>30</sup> An immigration detainer is a notice to law enforcement agencies to hold a noncitizen for up to forty-eight hours, not including weekends or holidays.

<sup>31</sup> U.S. Immigration and Customs Enforcement, *supra* note 12, at 2.



by a local law enforcement official *anywhere in the country* [is] screened by the federal government for immigration status and [removal] eligibility.”<sup>32</sup> A match with data in IDENT, however, is not required for an individual to come to the attention of the LESC. According to Anil Kalhan, professor of law at Drexel University School of Law, “even where there is no match, but the individual has an unknown or non-U.S. place of birth [IDENT] automatically flags the [individual’s] record and notifies the LESC. . . .”<sup>33</sup>

LEAs also cannot avoid sharing information with ICE, or “choose to have the fingerprints it submits to the [CJIS/IAFIS] processed only for criminal history checks.”<sup>34</sup> As mentioned above, under S-COM, once a LEA forwards the fingerprints and associated biographical information of an individual to the appropriate SIB, the information is automatically forwarded to IDENT. LEAs can, however, choose not to send fingerprints to the CJIS/IAFIS. But “from a practical standpoint, LEAs have no choice but to . . . forward[] arrestees’ fingerprints to the [CJIS/IAFIS] in order to obtain information that is critically important for crime-fighting purposes.”<sup>35</sup> In this sense, ICE “extracts identification and criminal history information from state and local law enforcement agencies when they routinely transmit that information to the FBI for purposes that are unrelated to civil immigration enforcement . . .”<sup>36</sup>

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<sup>32</sup> Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from “Secure Communities,”* J.L & ECON (2014).

<sup>33</sup> Kalhan, *supra* note 22, at 1.

<sup>34</sup> U.S. Immigration and Customs Enforcement, *Protecting the Homeland*, <http://www.ice.gov/doclib/secure-communities/pdf/hsac-sc-taskforce-report.pdf>.

<sup>35</sup> Kalhan, *supra* note 22, at n.115.

<sup>36</sup> *Id.*

### A. Problems for Noncitizens

S-COM allows LEAs to assume an indirect immigration-policing role. S-COM empowers police “to arrests individuals for the very purpose of booking them and having their immigration status screened-without regard to whether that arrest leads to any criminal prosecution.”<sup>37</sup> For example, “[e]vidence to date suggests that in some jurisdictions, this is precisely what has happened, as police officers have, disproportionately “target[ed] Lat[in Americans] for minor violations and pretextual arrests with the actual goal of initiating immigration checks through the S-COM system, rather than for prosecution.”<sup>38</sup> Even DHS’s own Office of Civil Rights and Civil Liberties (“CRCL”) identified criminal arrests that served as a pretext for an immigration investigation.<sup>39</sup>

S-COM also creates other problems for noncitizens that come in contact with the criminal justice system. Through S-COM, ICE often detects noncitizens during the jail booking process or while awaiting trial (custody incident to arrest). And “[t]hese presumptively [removable] noncitizens will face removal proceedings regardless of the outcome of their criminal cases...”<sup>40</sup> As a result, noncitizens “often believe it futile and not worth the cost to contest minor criminal charges while detained, even if they are innocent, have strong defenses, or were arrested through racial profiling or other constitutional rights violations.”<sup>41</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Maureen A. Sweeney, *Shadow Immigration Enforcement and its Constitutional Dangers*, 104 J. CRIM. L. & CRIMINOLOGY 227, 251 (2014) (Discussing that because of this pretext, the CRCL prepared a training video for local officers on how to avoid racial profiling).

<sup>40</sup> Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013).

<sup>41</sup> *Id.*

S-COM, therefore, influences the plea-bargain incentives of noncitizens that ICE has not detected but cannot make bail; “[t]hose who cannot make bail often must choose between any plea that offers an end to detention [and allows them to return to their family], and detection by ICE if they . . . defend against their charges.”<sup>42</sup> And “[b]ecause prosecutors often make plea offers at the defendant’s first appearance . . . , noncitizens willing to take the deal may be able to exit the system without ICE detection.”<sup>43</sup> Nonetheless, accepting a plea to avoid ICE detection may trigger removal proceedings.<sup>44</sup>

Despite the immigration consequences of accepting a plea bargain, noncitizens do take pleas motivated by avoiding ICE detection. In *People v. Cristache*, for example, the court found that the defendant, a noncitizen, received effective assistance of counsel where his counsel advised him to plead guilty rather than proceed to trial.<sup>45</sup> The court noted that defense counsel negotiated “a disposition [that] conditionally guaranteed that defendant would have remained ‘out of jail’—i.e., Rikers Island—where ICE agents routinely engage in a concerted effort to identify criminal noncitizens for [removal].”<sup>46</sup> In addition, the court noted that remaining out of jail, as the plea negotiated by counsel anticipated, reduces the risk of removal (or the risk of detection for removal).<sup>47</sup> Thus, the court concluded that defense counsel “effectively placed defendant in the best position to avoid actual [removal].”<sup>48</sup>

Noncitizen’s strategies to avoid ICE detection do not always work. For example, some noncitizen defendants

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> For a discussion on how accepting a guilty plea triggers removal proceedings see Part II.

<sup>45</sup> *People v. Cristache*, 29 Misc. 3d 720 (Crim. Ct. 2010).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

agree to probation to avoid time<sup>49</sup> are still detected by ICE because “[p]robation and parole officers at both state and federal levels are frequently in communication with ICE.”<sup>50</sup> And because ICE’s priorities are subject to change, there are often nationwide “sweeps” at state probation offices.<sup>51</sup> In addition, probation or parole officers have the discretion to report an individual to ICE.<sup>52</sup>

### **B. Other Ways Noncitizens Come In Contact With “ICE”**

Other than S-COM, there are many other ways sharing a person’s information with ICE can trigger removal proceedings. For example, submitting an application for adjustment of status may trigger removal proceedings. Currently, “background checks (through biometrics procedure) are concluded for almost every immigration application.<sup>53</sup> When a noncitizen applies for adjustment of status, an applicant for an immigration benefit receives notice to report to a DHS substation for “biometrics,” which includes fingerprinting and photos, as well as a name check. As a result, applying for naturalization and adjustment of status guarantees the bringing of old convictions to light and, if applicable, the commencement of adverse action (i.e., removal proceedings and possible detention).<sup>54</sup>

ICE also detects noncitizens while serving a prison sentence. When a noncitizen “is serving a prison sentence,

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<sup>49</sup> Cade, *supra* note 40, at 1.

<sup>50</sup> MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: A GUIDE TO REPRESENTING FOREIGN-BORN DEFENDANTS, 168 (Richard J. Link ed., 5<sup>th</sup> ed. 2014).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

ICE will lodge a detainer,<sup>55</sup> and often interview the person while in custody to obtain facts and information, and later serve a notice to appear in immigration court (“NTA”).<sup>56</sup> This process is often done through the Criminal Alien Program (“CAP”).<sup>57</sup> And where ICE has not detected a noncitizen, “[i]t is not unheard of for a prison official to communicate with ICE if the institution is poised to release a non-American citizen and, for whatever reason, [ICE has not placed an immigration detainer].”<sup>58</sup>

### III. How Shared Data Affects Noncitizens

ICE receives data concerning removable noncitizens via S-COM. But what type of data does ICE receive, and how is this data used to determine whether a person is eligible for removal from the United States? Title 8 of the U.S. Code subjects noncitizens to removal for convictions of an “aggravated felony,”<sup>59</sup> which includes some misdemeanors.<sup>60</sup> Title 8 of the U.S. Code also subjects immigrants to removal for convictions of a “crime of moral turpitude.”<sup>61</sup>

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<sup>55</sup> “According to 8 CFR § 287.7(d), a law enforcement agency may hold a non-American citizen for up to 48 hours, not including Saturdays, Sundays, and holidays, pursuant to an ICE detainer. By regulation, after 48 hours, if ICE does not assume custody, the individual should be released.”

<sup>56</sup> KRAMER, *supra* note 50.

<sup>57</sup> U.S.C. Immigration and Customs Enforcement, *Criminal Alien Program*, <http://www.ice.gov/criminal-alien-program> (CAP “provides ICE-wide direction and support in the biometric and biographic identification, arrest, and removal of priority [noncitizens] who are incarcerated within federal, state, and local prisons and jails”).

<sup>58</sup> *Id.*

<sup>59</sup> 8 U.S.C. § 1227(a)(2)(A)(iii) (2008).

<sup>60</sup> *United States v. Graham*, 169 F.3d 787 (3d Cir. 1999) (holding that petty theft with a one-year suspended sentence, a misdemeanor under New York law, is an aggravated felony for immigration purposes).

<sup>61</sup> 8 U.S.C. § 1227(a)(2)(A)(i) (2008).

### A. The “Aggravated Felony”

The Anti-Drug Abuse Act of 1988 added the “aggravated felony” into the world of immigration law and provided that a conviction of an “aggravated felony” would result in removal proceedings.<sup>62</sup> At that time, only three crimes were aggravated felonies: murder, illicit trafficking in firearms, and drug trafficking.<sup>63</sup> The list now includes twenty-eight offenses.<sup>64</sup> Some even create sub categories.<sup>65</sup>

Two years after the creation of the “aggravated felony” definition, Congress expanded the aggravated felony definition to include “any crime of violence.”<sup>66</sup> And four years later, Congress added non-violent crimes such as theft (including receipt of stolen property), trafficking in fraudulent documents, fraud, and tax evasion to the “aggravated felony” definition.<sup>67</sup> Congress designed these additions to make “a major stride toward expediting the removal of criminal noncitizens . . . .”<sup>68</sup>

But in 1996, Congress enacted two public laws that have gained notoriety because of the expansion of the “aggravated felony” definition. First, Congress enacted the Antiterrorism and Effective Death Penalty Act (“AEDPA”) of 1996 to include more non-violent crimes as aggravated

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<sup>62</sup> Anti-Drug Abuse Act of 1988, 102 Stat. 4181, 4469-70.

<sup>63</sup> Cesar Cuauhtemoc Garcia Hernandez, *Creating Crimigration*, 2013 BYU L. REV. 1457, 1468 (2013).

<sup>64</sup> 8 U.S.C. § 1101(a)(43)(A)-(U) (2014).

<sup>65</sup> 8 U.S.C. § 1101(a)(43)(F) (2014) (providing that the aggravated felony deportability ground now includes “any crime of violence”).

<sup>66</sup> 18 U.S.C. § 16 (2006). (defining a “crime of violence” as an offense that includes as an element either the use or threatened use of physical force against the person or property of another, or a felony offense that involves the “substantial risk” of such force”).

<sup>67</sup> Immigration and Nationality Technical Corrections of 1993, 108 Stat. 4305, 4320-22 (1993).

<sup>68</sup> 140 Cong. Rec. H11291-01 (1994) (statement of Rep. Betty McCollum).

felonies.<sup>69</sup> Among those are forgery, counterfeiting, prostitution, certain gambling offenses, vehicle trafficking, obstruction of justice, perjury, bribery of witness, and offenses related to skipping bail.<sup>70</sup> Opposing the 1996 amendment, Patsy Mink, member of the U.S. House of Representatives for the state of the Hawaii testified: “I regret that [the House is using the AEDPA] . . . as a vehicle to advance anti-immigrant attitudes. This bill increases the number of criminal activities that [trigger removal proceedings]. Most of the additional offenses require no link to terrorism.”<sup>71</sup> In contrast, Lamar Smith, a member of the U.S. House of Representatives of Texas testifies that: “the U.S. removes too few criminal noncitizens today. The [removal] process can be years in length. [The AEDPA] streamlines the [removal] process by eliminating frivolous challenges to [removal] orders; expanding the list of aggravated felonies [that trigger removal proceedings]; and closing the gap between the end of a noncitizen’s criminal sentence and the date the [U.S. removes the noncitizen] from the United States.”<sup>72</sup>

Second, Congress enacted the Illegal Immigration Reform and Immigration Responsibility Act (“IIRIRA”)<sup>73</sup> redefined the term “conviction” to mean: “where the judge or jury has found the [noncitizen] has . . . admitted sufficient facts to warrant a finding of guilt, and the judge has ordered some form of punishment, penalty, or restraint on the [noncitizen]’s liberty . . .”<sup>74</sup> Therefore, the

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<sup>69</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 440, § 242(a)(2), 110 Stat. 1214 (codified as amended at 8 U.S.C. § 1252 (2006)).

<sup>70</sup> 8 U.S.C. § 1252 (2006).

<sup>71</sup> 142 Cong. Rec. E645-04, 1996 WL 200107 (1996) (statement of Rep. Patsy Mink).

<sup>72</sup> 142 Cong. Rec. H3605-04, 1996 WL 185581 (1996) (statement of Rep. Lamar Smith).

<sup>73</sup> IIRIRA Pub. L. No. 104-208, § 321. 110 Stat. 3008, 3009-627.

<sup>74</sup> *Id.* (codified in 8 U.S.C. 1101(a)(48)(A)(2014)).

commission—rather than conviction—of such an offense is sufficient to constitute a conviction under immigration law. Furthermore, punishment can include Alford pleas,<sup>75</sup> probation,<sup>76</sup> house arrest,<sup>77</sup> community service, anger management, drug/substance abuse programs, fines, and restitution.<sup>78</sup> In addition, IIRIRA reduced the term of imprisonment from five years to one. Therefore, crimes of violence, theft offenses, and offenses relating to bribery for which the term of imprisonment is at least one year constitute “aggravated felonies.”

In practice, the “aggravated felony” removes many noncitizens from the U.S. for crimes that are neither “aggravated” nor “felonies.” For example, a year of probation with a suspended sentence for pulling hair is an aggravated felony.<sup>79</sup> Mary Anne Gehris, who arrived to the United States at the age of one, pulled another woman’s hair in a quarrel over a man.<sup>80</sup> Gehris was twenty-one

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<sup>75</sup> An “Alford plea is ‘an arrangement in which a defendant maintains his innocence but pleads guilty for reasons of self-interest. *United States v. Taylor*, 659 F.3d 339, 347 (4th Cir. 2011) (citing *North Carolina v. Alford*, 400 U.S. 25, 37 (1970); *Abimbola v. Ashcroft*, 378 F.3d 173, 181 (2d Cir. 2004) (describing that “[a]n Alford plea is a guilty,” and thus is included as a conviction” of an “aggravated felony” under 8 U.S.C. § 1101(a)(48)(A) (2014).

<sup>76</sup> *Gil v. Ashcroft*, 335 F.3d 574, 576 (7<sup>th</sup> Cir. 2003) (describing that “probation satisfies part (ii) [of 8 U.S.C. § 1101(a)(48)(A)], so [the petitioner] has been ‘convicted’ even though ‘adjudication of guilt has been withheld’”).

<sup>77</sup> *McKenzie v. Attorney General of the United States*, 452 F. App’x 88 (3d Cir. 2011) (describing that petitioner was convicted of an aggravated felony because her sentence to house arrest without electronic monitoring constituted imprisonment under 8 U.S.C. § 1101(a)(43)(B) (2014).

<sup>78</sup> *De Vega v. Gonzales*, 503 F.3d 45 (1st Cir. 2007) (describing that restitution constitutes punishment and thus, constitutes a “conviction” under 8 U.S.C. § 1101(a)(48)(A) (2014).

<sup>79</sup> Anthony Lewis, *This Got Me in Some Kind of Whirlwind*, N.Y. TIMES, Jan. 8, 2000 at A13.

<sup>80</sup> *Id.*



when the incident occurred.<sup>81</sup> Later, Gehris pleaded guilty to a charge of misdemeanor battery, and received a suspended one-year-jail sentence.<sup>82</sup> Thirteen years later, at age thirty-four, Gehris sought to become a United States citizen.<sup>83</sup> But after honestly answering the questions on her citizenship application, the government initiated removal proceedings against her.<sup>84</sup> Under the AEDPA and IIRAIRA, minor misdemeanors, are retroactively defined as an “aggravated felony,” a ground for removal.<sup>85</sup> In other words, “Gehris is removable for having committed a misdemeanor in 1988 that Congress redefined in 1996 as an ‘aggravated felony’ for immigration purposes.”<sup>86</sup>

Stories like Gehris’ are not uncommon. This is in part due to the fact that some aggravated felonies include crimes that are neither “aggravated” or “felonies” under criminal law.<sup>87</sup> For example, theft of a ten-dollar video game, shoplifting fifteen dollars worth of baby clothes, and forging a check for less than twenty dollars have all been held as aggravated felonies.<sup>88</sup>

Lastly, aggravated felonies trigger mandatory detention, removal proceedings without the possibility of almost all forms of discretionary relief, including asylum,<sup>89</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Lea McDermid, *Deportation Is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 CALIF. L. REV. 741, 742 (2001) (citing INA 101(a)(43)).

<sup>86</sup> *Id.*

<sup>87</sup> Andrew Moore, *Criminal Deportation, Post-Conviction Relief And The Lost Cause Of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 673-75 (2008).

<sup>88</sup> Brief for Asian American Justice Center et al., as amici curiae supporting petitioner at 8-9, *Padilla v. Kentucky*, 130 S. Ct. 1473-75 (2010).

<sup>89</sup> 8 U.S.C. § 1158(b)(2)(B) (2009) (describing that a conviction of an aggravated felony bars a refugee from applying for asylum); *see* 8

the cancellation of removal,<sup>90</sup> and it bars the immigrant's return to the United States for life.<sup>91</sup> The latter is particularly troubling because American immigration law has one goal: family unity.<sup>92</sup> Yet, as in the case of Mrs. Gheris, the U.S. removes noncitizens for minor misdemeanors that are considered aggravated felonies under immigration law. Worse still, after the ten year ban, "[f]amily members who are eligible for visas must wait up to 20 years to reunite with their family in the United States."<sup>93</sup> Thus, a person can wait up to 30 years. If that

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U.S.C. § 1158 (2009) (describing asylum as the process that allows refugees to apply to live and work in the United States); *see also* 8 U.S.C. § 1101(A)(42) (2014) (defining refugee is any person who is outside any country of such person's nationality and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion"); *see also* 8 U.S.C. §1231(b)(3) (2014) (describing that the Attorney General of the United States may not remove a noncitizen if that person is eligible for relief under the United Nations Convention Against Torture).

<sup>90</sup> 8 U.S.C. §1229b(a)(3) (2008) (describing that the Attorney General of the United States may cancel removal in the case of a noncitizen that is excludable or deportable but only if that person has not been convicted of an aggravated felony).

<sup>91</sup> 8 U.S.C. § 1182(a)(9)(A)(i) (2013) ("any [noncitizen] . . . who again seeks admission . . . at any time in the case of an [noncitizen] convicted of an aggravated felony is inadmissible").

<sup>92</sup> In support of the Immigration Act of 1990, Hamilton Fish, a member of the U.S. House of Representatives stated that "family unification [is] the cornerstone of American law and policy." 136 CONG. REC. H12358-03 (1990).

<sup>93</sup> Immigration Policy Center, *Focusing on the Solutions: Key Principles of Comprehensive Immigration Reform*, [http://www.immigrationpolicy.org/sites/default/files/docs/Solutions\\_Paper\\_032310.pdf#page=18](http://www.immigrationpolicy.org/sites/default/files/docs/Solutions_Paper_032310.pdf#page=18).

person decides to enter without inspection, that person is subject to imprisonment of a maximum of 20 years.<sup>94</sup>

### **B. The Crime of Moral Turpitude**

According to Juliet Stumpf, professor of law at Lewis & Clark Law School, “[b]efore the mid-1980’s, removal of noncitizens for criminal offenses was largely limited to convictions for serious ‘crimes of moral turpitude,’ drug trafficking, and certain weapons offenses. Now a crime of moral turpitude carrying a potential sentence of one year is a removable offense.”<sup>95</sup>

Section 1227(a)(2)(A)(i) of Title 8 of the U.S. Code provides removal of individuals convicted of crimes involving moral turpitude.<sup>96</sup> Under current law, a noncitizen convicted of a crime involving moral turpitude committed within five years (or ten years for “Green Card” holders) after the date of admission, and who is convicted of a crime and incarcerated at least one year, is removable.<sup>97</sup> Residing in the United States for five years, however, does not prevent removal for a person convicted of at least two crimes involving moral turpitude.<sup>98</sup>

Although section 1227(a)(2)(A) may sound effective in theory, it is difficult to apply in practice. At the root of the problem is the fact that determining what is a crime of moral turpitude is no simple task, because Congress has never defined the term “crime of moral turpitude.” And “[f]or more than a century, the government has [remov]ed millions of [noncitizens for

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<sup>94</sup> 8 U.S.C. § 1326(b)(2) (describing that if removal was subsequent to conviction for an aggravated felony, the maximum term of imprisonment is 20 years).

<sup>95</sup> Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1723 (2011).

<sup>96</sup> 8 U.S.C. 1227(a)(2)(A) (2008).

<sup>97</sup> 8 U.S.C. §1227(a)(2)(A)(i) (2008).

<sup>98</sup> 8 U.S.C. § 1227(a)(2)(A)(ii) (2008).

convictions of] crime[s] involving moral turpitude, [and] it has done this without any statutory definition of what constitutes a crime involving moral turpitude.” The only guidance comes from federal court and Board of Immigration Appeals (“BIA”) decisions. For example, one BIA decision states that a crime of moral turpitude

Refers generally to conduct which is inherently base, vile, or depraved, and contrary to the rules of morality and the duties owed between persons or to society in general. Moral turpitude has been defined as an act that is per se reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.<sup>99</sup>

Therefore, because Congress has not defined what crime of “moral turpitude” means, both, immigration and federal courts lack objective criteria necessary to determine what crimes involve moral turpitude.<sup>100</sup> This lack of objectivity, thus, leads courts to hold that minor crimes involve moral turpitude. For example, courts have held that the following relatively minor offenses are crimes involving moral turpitude for immigration purposes: issuing bad checks, attempted bribery, disorderly conduct (loitering for lewd soliciting), false statement (on firearm application or passport application), forgery mail fraud,

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<sup>99</sup> In re Fualuaau, 21 I. & N. Dec. 475, 477 (BIA 1996).

<sup>100</sup> McDermid, *supra* note 85, at 216.

mayhem, possession of stolen mail, receiving stolen property, and petty theft.<sup>101</sup> Theft of services has also been held to involve moral turpitude. For example, in *Mojica v. Reno*, the court classified turnstile jumping in the New York City subway system, a misdemeanor offense, as a theft of services conviction, and therefore, crime involving moral turpitude.<sup>102</sup> Another court stated that “it is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude.”<sup>103</sup>

### C. S-COM Statistics

Evidence indicates that via S-COM and the expansion of crimes that trigger removal proceedings, ICE has removed 375,031 noncitizens.<sup>104</sup> A recent study by ICE found that since the creation of S-COM, five percent, or 2,162,636 people, of all interoperability transmission have resulted in IDENT matches.<sup>105</sup> Of these matches, twenty-eight percent of them identified noncitizens charged or convicted of an aggravated felony.<sup>106</sup> The other seventy-two percent of the IDENT matches resulted in the identification of noncitizens charged or convicted of a crime other than an aggravated felony.<sup>107</sup> Of these numbers, ICE removed 375,031 noncitizens from the United States. Thirty-two percent had “aggravated felony”

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<sup>101</sup> *Id.* at 775.

<sup>102</sup> *Mojica v. Reno*, 970 F. Supp. 130, 137 (E.D.N.Y. 1997).

<sup>103</sup> *In re Scarpulla*, 15 I. & N. Dec. 139, 140-41 (BIA 1974).

<sup>104</sup> U.S. Immigration and Customs Enforcement, *Secure Communities: Monthly Statistics through August 31, 2014: IDENT/IAFIS Interoperability*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT 1, 2, <http://www.ice.gov/doclib/f> oia/sc-stats/nationwide\_interop\_stats-fy2014-to-date.pdf (describing that the LESC queries the Student & Exchange Visitor Information System (“SEVIS”); U.S. Visitor and Immigration Status).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

convictions, or two or more crimes punishable by more than one year.<sup>108</sup> Twenty percent had convictions of any felony or three or more offenses punishable by less than one year, commonly known as misdemeanors.<sup>109</sup> The remaining 48 percent had either no criminal conviction or convictions of the lowest level misdemeanor.<sup>110</sup>

ICE's "report containing these numbers is [full of] ominous yet cryptic references to 'convicted criminals'"<sup>111</sup> An analysis of the convictions proves that most of the "criminal aliens" are not exactly the "worst of the worst" or a danger to American society.<sup>112</sup> Furthermore, as outlined above, even the highest priority on ICE's list are not necessarily violent or dangerous.

#### **IV. Lack of Proportionality**

The formal proceedings (known as "removal proceedings") that the United States utilizes to remove a noncitizen from the United States or exclude him or her from lawful admission are not proportional. According to Juliet Stumpf, professor of law at Lewis & Clark Law School, immigration law makes use of removal as an "on-off switch," rather than employing a graduated sanctions scheme found in criminal penology.<sup>113</sup> Therefore, "[r]egardless of whether the violation of immigration law is grave or slight, removal from the country is the statutory

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Misplaced Priorities: Most Immigrants Deported by ICE in 2013 Were a Threat to No One*, IMMIGRATION POLICY CENTER 1, (2014), <http://www.immigrationpolicy.org/just-facts/misplaced-priorities-most-immigrants-deported-ice-2013-were-threat-no-one>.

<sup>112</sup> *Id.*

<sup>113</sup> Stumpf, *supra* note 95, at 1690.

consequence.”<sup>114</sup> For example, “[a] college student with a student visa who works an hour over the maximum mandated by law is removable from the United States for violating the terms of her visa to the same extent that a serial killer on a tourist visa is removable as an ‘aggravated felon.’”<sup>115</sup>

In contrast, “[c]riminal punishment reflects the principle of proportionality, such that less serious crimes result in milder punishment and vice versa.”<sup>116</sup> For example, in *Weems v. United States*,<sup>117</sup> the court convicted the defendant for falsifying a public document and sentenced him to 15 years of “*cadena temporal*,” a form of imprisonment that included hard labor in chains and permanent civil disabilities.<sup>118</sup> The Court, however, noted that, “it is a precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense,”<sup>119</sup> and held the sentence violated the Eight Amendment of the U.S. Constitution.

Removal, however, is not a form of criminal punishment. Instead, removal constitutes a civil remedy aimed at excluding unwanted noncitizens.<sup>120</sup> Despite this characterization, many immigration violations now constitute crimes. For example, unlawfully reentering the United States after removal carries a penalty of ten or twenty year imprisonment.<sup>121</sup> As a result, “[a]s recently as 2011 there were more federal criminal immigration cases . . . than prosecutions for violent crimes, drug offenses, or

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1691 (citing 8 U.S.C. § 1227(a)(1)(C)(i) and 8 U.S.C. § 1227(a)(2)(A)(iii) (2008)).

<sup>116</sup> *Id.* at 1691.

<sup>117</sup> *Weems v. United States*, 217 U.S. 349 (1910).

<sup>118</sup> *Id.* at 364.

<sup>119</sup> *Id.* at 367.

<sup>120</sup> *Knauff v. Shaughnessy*, 338 U.S. 537, 543-44 (1950).

<sup>121</sup> 8 U.S.C. § 1326(b) (2012).

any other type of federal crime.”<sup>122</sup> Not surprisingly, Immigration Customs Enforcement (“ICE”) now operates the largest detention system in the country.<sup>123</sup>

Consequences exist for violating our immigration laws. But other consequences are often in addition to removal, and not alternatives. Under our immigration laws, removal remains the baseline sanction.<sup>124</sup> Some of the other sanctions available for immigration violations include: (1) incarceration,<sup>125</sup> (2) fines,<sup>126</sup> and (3) bars to reentry.<sup>127</sup> Like a criminal defendant on trial for his liberty, immigrants face high stakes in removal proceedings. According to the Supreme Court of the United States, removal may result in the loss of “all that

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<sup>122</sup> Hernandez, *supra* note 17, at 1473.

<sup>123</sup> Dr. Dora Schriro, *Immigration Detention Overview and Recommendation*, UNITED STATES DEPARTMENT OF HOMELAND SECURITY 1, 2 (2009), <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> (last visited Aug. 30, 2014).

<sup>124</sup> See Stumpf, *supra* note 95, at 1691.

<sup>125</sup> 8 U.S.C. § 1325(a) (2012) (providing that improperly entering the United States may result in criminal fine or imprisonment for up to six months, or both, for the first offense).

<sup>126</sup> 8 U.S.C. § 1324(c) (2012) (imposing civil penalties for fraudulent immigration documents); 8 U.S.C. § 1325(b) (2012) (imposing a civil penalty upon a noncitizen apprehended while entering the United States at a time or place other than as designed by immigration officers); 8 U.S.C. 1325(c) (2012) (imposing a fine of up to \$ 250,000 for entering into a sham marriage to evade immigration laws).

<sup>127</sup> 8 U.S.C. § 1182(a)(9)(B)(i)(I) (what year statute is being cited?) (applying a three-year bar to reentry to a noncitizen who has accrued more than 180 days but less than one year of unlawful presence and who voluntarily departed prior to the commencement of removal proceedings); 8 U.S.C. 1182 (a)(6)(G) (what year statute is being cited?) (applying a five-year bar to reentry to a noncitizen who violates the terms of a student visa); 8 U.S.C. § 1182(a)(9) (what year statute is being cited?) (creating five-year and ten-year bars for unlawful presence and reentry after a previous removal or departure under a removal order).



makes life worth living.”<sup>128</sup> The Court also recognizes that removal “may result also in loss of both property and life.”<sup>129</sup>

In response to the harsh immigration consequences of contact with the criminal justice system, “the Supreme Court recognized that [removal] ‘is now virtually inevitable for a vast number of noncitizens convicted of crimes’— so much so that a defendant’s right to the effective assistance of counsel in a criminal case can be violated if her lawyer fails to advise her about the likelihood that a guilty plea could get her expelled.”<sup>130</sup>

The *Padilla v. Kentucky*<sup>131</sup> decision, wherein the United States Supreme Court decided that criminal defense attorneys must advise noncitizen clients about the immigration consequences of accepting a guilty plea, is a step in the right direction because convictions of either an aggravated felony or a crime of moral turpitude subjects a noncitizen to removal. Further, once hauled into immigration court, noncitizens do not receive the constitutional protections found in the criminal justice system.<sup>132</sup> Some absent constitutional protections include: the right to trial by a court established under Article III of the Constitution,<sup>133</sup> the right to counsel at government expense,<sup>134</sup> the right to not incriminate oneself,<sup>135</sup> and protection against retroactive changes in the law.<sup>136</sup>

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<sup>128</sup> *Ng. Fung Ho. v. White*, 259 U.S. 276, 285 (1922).

<sup>129</sup> *Id.*

<sup>130</sup> David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 *NEW CRIM. L. REV.* 157, 176-77 (2012) (citing *Padilla v. Kentucky*, 559 U.S. 356, 359 (2010)).

<sup>131</sup> *Padilla*, 559 U.S. at 360.

<sup>132</sup> *Fong Yue Ting*, 149 U.S. 698, 730 (1893) (holding that noncitizens facing deportation were not entitled to the constitutional safeguards protecting criminal defendants).

<sup>133</sup> U.S. CONST. art. III, § 2, cl. 3 (what is the date of the code edition cited?); *Knauff*, 338 U.S. at 543-44.

<sup>134</sup> *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) (describing removal proceedings as a labyrinth character of modern immigration law—a

## V. Effect on Families

In 2011, the Chief Justice Earl Warren Institute on Law and Policy (the “Institute”) conducted a study of data provide by the federal government to the National Day Labor Organization pursuant to a Freedom of Information Act lawsuit.<sup>137</sup> The study based its findings on a random national sample of 375 individuals who S-COM identified via IDENT.<sup>138</sup>

### A. U.S. Citizens

ICE acknowledges that that there might be IDENT matches for U.S. citizens.<sup>139</sup> ICE, however, has never

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maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike).

<sup>135</sup> U.S. CONST. amend. V; *United States v. Balsys*, 524 U.S. 666, 671 (1998) (noting that the “risk that [a resident alien’s] testimony might subject him to deportation is not a sufficient ground for asserting [the fifth amendment] privilege [against self-incrimination], given the civil character of a deportation proceeding”).

<sup>136</sup> *Perez v. Elwood*, 294 F.3d 552, 557 (3d Cir. 2002) (stating that an argument derived from the ex post facto clause is not available to petitioner because deportation is a civil proceeding).

<sup>137</sup> Aarti Kohli, Peter L. Markowitz & Lisa Chavez, *Secure Communities By the Numbers: An Analysis of Demographics and Due Process*, THE CHIEF JUSTICE EARL WARREN INSTITUTE ON LAW AND SOCIAL POLICY 1, 2 (2011), available at <http://ccrjustice.org/files/4-8-11%20Sampling%20Stipulation.pdf>.

<sup>138</sup> *Id.* at 4.

<sup>139</sup> *Communities: Monthly Statistics through September 30, 2013*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT 1, 58 (2013), [http://www.ice.gov/doclib/foia/sc-stats/nationwide\\_interop\\_stats-fy2013-to-date.pdf](http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2013-to-date.pdf) (describing the two types of U.S. citizens that appear in the IDENT database. The first are U.S. citizens are have active warrants provide by CJIS, adopted children from abroad, or have participated in DHS’s trusted traveler program. The

published any data indicating the number or percentage of U.S. citizens it apprehends through S-COM. According to the Institute, U.S. citizen matches should never result in the apprehension of those individuals because the government cannot remove U.S. citizens.<sup>140</sup> The Institute, however, estimates that ICE has apprehended approximately 3,600 U.S. citizens from the beginning of the program to April 2011.<sup>141</sup>

S-COM is also responsible for removing U.S. citizens. For example, S-COM removed Mark Lyttle to Mexico; he was subsequently sent to Honduras, Nicaragua and Guatemala.<sup>142</sup> Lyttle was serving a sentence for a misdemeanor assault when ICE served him with a Notice to Appear in immigration court.<sup>143</sup> The notice stated that Lyttle was “not a U.S. citizen but rather a native [of] Mexico and deemed him [removable] pursuant to 8 U.S.C § 1227(a)(2)(A)(iii) as a noncitizen who is convicted of an aggravated felony.”<sup>144</sup> To Lyttle’s surprise, he was faced with removal proceedings, despite his status as a U.S. citizen.<sup>145</sup> Once in Mexico, Mexico removed Lyttle to Honduras. Thereafter, Honduras sent Lyttle to Nicaragua and then to Guatemala.<sup>146</sup>

Many noncitizens identified for removal also had U.S. citizen family members. The Institute found that thirty-nine percent of the people identified for removal had U.S. citizen family members.<sup>147</sup> Thirty-seven percent had a U.S. citizen child and five percent had a U.S. citizen

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second are U.S. citizens who were not U.S. citizens when prints were collected).

<sup>140</sup> Kohli, *supra* note 137, at 4.

<sup>141</sup> *Id.*

<sup>142</sup> Lyttle v. United States, 867 F. Supp.2d 1256, 1266 (M.D. Ga. 2012).

<sup>143</sup> *Id.* at 1269-70.

<sup>144</sup> *Id.* at 1270.

<sup>145</sup> *Id.* at 1272.

<sup>146</sup> *See id.* at 1273.

<sup>147</sup> Kohli, *supra* note 137, at 5.

spouse.<sup>148</sup> These numbers are alarming because the more noncitizens the U.S. places in removal proceedings, the more families encounter adverse effects.<sup>149</sup> Researchers note that, “[t]he implications of growing up in an [mix status] family span a variety of developmental contexts . . . including psychological well-being, mental health, physical health, education, and employment.”<sup>150</sup> In total, S-COM affected approximately 88,000 families with U.S. citizen members from its inception through April 2011.<sup>151</sup>

## B. Non-U.S. Citizens

Discrepancies exist between the demographics of those detected by S-COM. For example, although research shows that 57% of noncitizens in the U.S. are male, “93% of the sample arrested through S-COM . . . [are] males.”<sup>152</sup> According to Maureen A. Sweeney, professor of law at the University of Maryland Francis King Carey School of Law, “[e]ven assuming that men may be more likely to commit crime than women, this number far surpasses the 75% of arrests tracked by the FBI nationwide that involve men.”<sup>153</sup> Similarly, Latin Americans are disproportionately impacted by S-COM. For example, although 77% of noncitizens are from Latin American countries, 93% of noncitizens identified by S-COM are Latin American.<sup>154</sup>

### *Families*

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<sup>148</sup> *Id.*

<sup>149</sup> *See id.* at 5.

<sup>150</sup> Carola Suárez-Orozco, et al., *Growing Up in the Shadows: The Developmental Implications of Unauthorized Status*, 81 HARV. EDUC. REV. 438, 462 (2011), available at <http://her.hepg.org/content/g23x203763783m75/?p=0aca47a0575b4334aa31d64350701086&pi=2>.

<sup>151</sup> Kohli, *supra* note 137, at 5.

<sup>152</sup> Sweeney, *supra* note 39, at 249.

<sup>153</sup> *Id.*

<sup>154</sup> Kohli, *supra* note 135, at 5-6.

Removing noncitizen from the U.S. has devastating effects on families. Removing noncitizen males, for example, leaves single mothers struggling to make ends meet.<sup>155</sup> In addition, the “tenuous legal status of many [mother]s left behind adds a double burden on these [mother]s to provide for their families while also raising their children.”<sup>156</sup> And this burden often leaves women—more so than men—in vulnerable conditions. For example, according to American Progress, “[t]he poverty rate for single-mother families is 40.7 percent, compared to just 24.2 percent for single-father families.”<sup>157</sup>

Removing noncitizens from the U.S. also leaves many of their children in foster care. According to Race Forward, approximately 5.5 million children in the U.S. have a noncitizen parent.<sup>158</sup> About 4.5 million of these children are U.S. citizens.<sup>159</sup> Although it is not clear how many children are currently in foster care, in 2012 at least 5,100 such children lived in foster care, and more than 15,000 children could face similar circumstances by 2017.<sup>160</sup>

Although removals create many single-parent households and leave children in foster care, an equally likely scenario is that the U.S. citizen child or other family member “self-deports.” This is possible because many persons live in mix-status families. According to Dreby,

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<sup>155</sup> See Joanna Dreby, *How Today’s Immigration Enforcement Policies Impact Children, Families, and Communities: A View From the Ground* 1, 5 (2012), <http://cdn.americanprogress.org/wp-content/uploads/2012/08/DrebyImmigrationFamiliesFINAL.pdf>.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 9-10.

<sup>158</sup> Seth Freed Wesler, *The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, APPLIED RESEARCH CENTER 1, 10 (2011), <https://www.raceforward.org/research/reports/shattered-families>.

<sup>159</sup> *Id.* at 9.

<sup>160</sup> *Id.* at 6.

16.6 million people live with at least one noncitizen family member in 2012.<sup>161</sup> Therefore, many U.S. citizen children “self-deport” to reunite with their families. According to the Pew Hispanic Center, about 300,000 U.S. children have migrated to Mexico since to 2005 for this purpose.<sup>162</sup>

## VI. Conclusion

Implicit in the creation of S-COM is the belief that noncitizens commit more crimes than native-born people. This belief is not new; “first [it was the] Irish and Chinese immigrants, then Italians and others from southern and eastern Europe, and today Mexicans and others from Latin America.”<sup>163</sup> However, the belief that noncitizens commit more crimes than native-born citizens is erroneous, as “academic research generally finds that immigrants are no more prone (and may be less prone) to engage in crime than native-born people.”<sup>164</sup> Despite the evidence, Congress cranked up the machine (“S-COM”) designed to keep the logs (“noncitizens”) rushing along the flumes as friction-free as possible while they hurtle toward the big blade waiting for them at the sawmill downstream (“immigration courts”), destroying families along the way. Therefore, as long as ICE and LEAs continue to share data via S-COM, crimes that are neither “aggravated” or “felonies” will continue to trigger removal proceedings and unreasonably separate families.

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<sup>161</sup> Dreby, *supra* note 155, at 1.

<sup>162</sup> Jeffrey S. Passel, D’vera Cohn & Ana Gonzalez-Barrera, *Net Migration From Mexico Falls to Zero—and Perhaps Less*, PEW RESEARCH CENTER (Apr. 23, 2012), <http://www.pewhispanic.org/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less/>.

<sup>163</sup> Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from “Secure Communities,”* 57 J. L. ECON. 937, 937 (2014).

<sup>164</sup> *Id.* at 938.

### ADDENDUM

After the completion of this paper, President Obama used his executive powers to direct Jeh Johnson, director of DHS, to end S-COM and replace it with the Priority Enforcement Program (“PEP”).<sup>165</sup> PEP will continue to rely on fingerprint-based biometric data submitted during bookings by LEAs to the FBI for criminal background checks.<sup>166</sup> Due to limited resources, however, Johnson acknowledges that ICE cannot respond to all immigration violations or remove all noncitizens.<sup>167</sup> For that reason, ICE’s priorities are national security, border security, and public safety.<sup>168</sup> To meet those priorities, ICE will only seek the transfer of a noncitizen in the custody of LEAs when the noncitizen has a conviction of an offense listed in Priority 1 (a), (c), (d), and (e) and Priority 2 (a) and (b) of November 20, 2014.<sup>169</sup> PEP and the new Priorities became effective on January 5, 2015.<sup>170</sup>

But PEP’s priorities are not new.<sup>171</sup> Indeed, PEP’s priorities include many of S-COM’s priorities. For example, PEP’s Priority 1(e) describes that “[noncitizens] convicted of an ‘aggravated felony,’ as that term is defined in section 101(a)(43) of the Immigration Nationality Act at

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<sup>165</sup> Jeh C. Johnson, *Secure Communities*, DEPARTMENT OF HOMELAND SECURITY, 1, 2-3 (2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf)

<sup>166</sup> *Id.* at 2.

<sup>167</sup> Jeh C. Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, DEPARTMENT OF HOMELAND SECURITY, 1, 2 (2014) [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_p\\_osecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_p_osecutorial_discretion.pdf)

<sup>168</sup> *Id.*

<sup>169</sup> Johnson, *supra* note 167.

<sup>170</sup> Johnson, *supra* note 165, at 6.

<sup>171</sup> See footnote 29 for S-COM’s priorities.

the time of conviction,”<sup>172</sup> are the top priority for removal. Indeed, President Obama stated that he aims his executive action at removing “felons, not families.” Therefore, PEP has the potential to attract S-COM’s criticism, misunderstanding, and litigation, by removing noncitizens for crimes that are neither “aggravated” nor “felonies.”

PEP, however, appears to give ICE greater prosecutorial discretion. For example, PEP requires ICE to exercise discretion based on individual circumstances, such as compelling and exceptional factors that clearly indicate the noncitizen is not a threat to national security, border security, or public safety.<sup>173</sup> In making those judgments, ICE should consider factors such as: extenuating circumstances involving the offense of conviction, length of time in the United States, and family or community ties to the United States.<sup>174</sup> In addition, this list is not dispositive or exhaustive.<sup>175</sup> Moreover, PEP directs ICE to exercise prosecutorial discretion based on the totality of the circumstances.<sup>176</sup>

The discretion mentioned above applies not only to the decision to issue, serve, file, or cancel a Notice to Appear in immigration court, but also to a broad range of other enforcement decisions, including deciding: whom to stop, question, arrest, detain or release.<sup>177</sup> Additionally, although ICE may exercise discretion at any time, PEP notes that discretion should be used as early as possible in the case or proceedings.<sup>178</sup> Furthermore, DHS will monitor PEP at the state and local level, including through the collection and analysis of data, to detect inappropriate use

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<sup>172</sup> Johnson, *supra* note 167, at 3.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 6.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 2.

<sup>178</sup> *Id.* 2.



to support or engage in biased policing, and DHS will establish measures to stop any such misuses.<sup>179</sup>

In conclusion, PEP appears to attempt to strike a balance between noncitizens that are a threat to national security, border security, or public safety, and humanitarian concerns. Therefore, PEP appears to be much better than S-COM. However, it is too soon to tell what PEP will mean for those living in the U.S. without documentation and their families.

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<sup>179</sup> Johnson, *supra* note 165, at 3.

