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Speech: Latinas and Their Families in Detention: The Growing Intersection of Immigration Law and Criminal Law

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SPEECH: LATINAS AND THEIR FAMILIES IN DETENTION:
THE GROWING INTERSECTION OF IMMIGRATION LAW
AND CRIMINAL LAW

SANDRA GUERRA THOMPSON*

ABSTRACT

In this article, Professor Sandra Guerra Thompson explores the growing enforcement of immigration law within the interior of the United States and the growing intersection of the criminal justice system and immigration law. Through the use of worksite enforcement sweeps and immigration screening by state and local law enforcement, growing numbers of undocumented persons are being taken into custody by federal immigration officials. She examines the plight of women and families held in detention centers under what are often deplorable conditions. Ironically, immigration detention centers offer fewer resources than those available in most state prisons. The immigration law judicial system also fails to offer immigrants the same due process rights available to defendants in criminal courts. The article also sheds light on the increasingly growing trend for immigrants to be deported only to attempt to re-enter illegally so as to be reunited with their families. Unfortunately, the attempt to re-enter the U.S. is leading to a boom in the numbers of Latinos prosecuted for this federal criminal offense and incarcerated in the Federal Bureau of Prisons.

* * *

I was intrigued when I received the invitation to participate in this symposium. Although it's been many years since I have taught a course in prisoners' rights, I decided to use this as an opportunity to add a different dimension to today's discussions. I will leave it to the other preeminent experts speaking today to talk about women in

* University of Houston Law Foundation Professor of Law and Director of the Criminal Justice Institute of the University of Houston Law Center. I owe a debt of gratitude to my colleague, Anne Chandler, of the University of Houston Law Center's Immigration Clinic, for her invaluable assistance in arranging visits to the immigration detention center in Houston, for her research assistance, and for her compassionate insights on the humanitarian crisis of immigration detention. I am also grateful to Joe Vail and Jennifer Cordova for all of their research assistance. Mostly, I am forever grateful to the women in the detention center who candidly told their stories during interviews as part of my research for this speech.

prisons at the state or federal levels. Instead, I will discuss a different, but related, topic.

For many years now I have been noticing out of the corner of my eye that there seems to be a parallel universe out there. It is a universe that I really didn't know much about. As a criminal law professor, I have taught my students about criminal codes, criminal procedure and law enforcement, sentencing and, as I said, I have even taught a course on prisoners' rights. But this other body of law, this other universe, called "immigration law," I knew relatively little about. Yet I started hearing about detention centers and an increase in people being arrested for immigration law violations. This symposium has given me an opportunity to learn more about this parallel universe and to talk about what I see as a growing intersection between the criminal justice system and the immigration enforcement system. Throughout my talk, I will refer to "Latinas" because that is primarily what we're talking about — Latinas and their families — which is the principal group affected by these law enforcement efforts.

Just to begin, there are millions of immigrants in the United States without proper documentation. You've probably heard a lot about it because we've had national protests in the past couple of years over this, and it was much in the news. It was estimated that about eleven million people in the United States are not legally authorized to be in this country.¹ Of those, about 1.7 million are under the age of eighteen.² In 1986, there was a large scale legalization of long-term undocumented persons.³ It was part of a package of laws that was enacted as a compromise. On the one hand, it legalized long-term undocumented people, giving about 2.7 million people legal residency status.⁴ On the other hand, it increased the penalties for people entering the country without documentation⁵ and for the employers who would employ them.⁶ Twenty-one years later we have not had any other legalization.⁷ We have people who have been in the country since 1986, and even in 1986 a lot of people did not gain legalization at that

1. JEFFREY S. PASSEL, PEW HISPANIC CTR., ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION 1 (2005).

2. *Id.*

3. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3394-3404 (1986) [hereinafter IRCA].

4. Edwin Meese III, Op-Ed., *An Amnesty by Any Other Name*, N.Y. TIMES, May 24, 2006, at A27.

5. IRCA §§ 101-103.

6. IRCA §§ 111-115.

7. Meese, *supra* note 4. But see RUTH ELLEN WASEM, CONGRESSIONAL RES. SERV., IMMIGRATION LEGALIZATION AND STATUS ADJUSTMENT LEGISLATION 1-2 (2002) (discussing the Nicaraguan Adjustment and Central American Relief Act of 1997 as a legalization program).

time for various reasons.⁸ In other words, there are many long-term residents without legal residency status.

I focus my talk today on this group of long-term residents who until recently had lived their lives in this country without fear of apprehension by the authorities. Most of these people are hard working. We've seen them. They've worked for us all in hotels and restaurants, construction, and agriculture.⁹ They live among us and have families here. They raise their children in this country (and their children are typically American citizens, having been born in the United States).¹⁰ These immigrants are entrepreneurial and often start small businesses within thriving communities of immigrants.¹¹

Even though most of these immigrants are far from wealthy by American standards, they nonetheless support their families both here *and* in their native countries.¹² In fact, Mexicans sent twenty billion dollars to Mexico in 2005 alone.¹³ In total, immigrants sent about fifty-two billion dollars to Latin American and Caribbean countries in 2005.¹⁴

There are many fallacies about undocumented persons. One is that they do not pay taxes on the income they earn for their work.¹⁵ Clearly, there are some payments made "under the table" to immigrant laborers.¹⁶ This does not prevent many undocumented persons

8. Douglas Ian Bagby, *Selective Effects of the Immigration Reform and Control Act of 1986 on Farmworker Living and Working Conditions in the U.S.* (2003) (unpublished M.A. thesis, University of Florida), available at http://etd.fcla.edu/UF/UFE0001208/bagby_d.pdf (discussing the significant number of immigrants who arrived after 1982 and were therefore ineligible for amnesty); see also Seth Mydans, *Immigrants Face Threat to Amnesty*, N.Y. TIMES, Aug. 1, 1989, at A1 (discussing low levels of awareness of the law among immigrants).

9. RAKESH KOCHHAR, PEW HISPANIC CTR., *LATINO LABOR REPORT 2004: MORE JOBS FOR NEW IMMIGRANTS BUT AT LOWER WAGES 15-16* (2005) (showing high levels of employment in those fields).

10. THE URBAN INST., *CHILDREN OF IMMIGRANTS: FACTS AND FIGURES 1* (2006), available at http://www.urban.org/uploadedpdf/900955_children_of_immigrants.pdf.

11. KOCHHAR, *supra* note 9, at 15-16. For a comprehensive study of the economic impact of immigration on a state with a high population of immigrants, see KEVIN F. MCCARTHY & GEORGES VERNEZ, *IMMIGRATION IN A CHANGING ECONOMY: CALIFORNIA'S EXPERIENCE* (1997).

12. Geri Smith, *Channeling the Remittance Flood*, BUS. WK., Dec. 28, 2005, available at http://www.businessweek.com/bwdaily/dnflash/dec2005/nf20051228_4272.htm.

13. *Id.*

14. *Id.*

15. Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 1-3 (2006).

16. See, e.g., Karin Brulliard, *Study: Immigrants Pay Tax Share*, WASH. POST, June 5, 2006, at B1 (reporting immigration researchers estimate that between forty and fifty percent of illegal immigrants are paid under the table); Dominika Maslikowski, *Growing Problem: Keeping Labor Legal*, MOHAVE DAILY NEWS, Aug. 28, 2006, at 1 (reporting on the prevalence of paying illegal immigrants under the table in the construction industry).

from paying income taxes.¹⁷ The IRS has a system by which people can obtain individual taxpayer numbers so people without Social Security numbers are able to pay taxes.¹⁸ Undocumented persons are often advised by their immigration lawyers to pay income taxes because it is a step toward naturalization.¹⁹ Proof of these payments can help their applications for residency in the immigration process.²⁰ In 2001, \$184 million in income taxes were paid by persons without Social Security numbers using these individual taxpayer numbers.²¹

The *Boston Globe* also reported that undocumented people pay approximately seven billion dollars a year into the Social Security system.²² They do this because they use other people's Social Security numbers in gaining employment.²³ At a later time when there are claims on those accounts, the federal government reconciles the accounts and discovers that a lot of that money doesn't belong to the person with that number.²⁴ At that point, the money goes into the general Social Security system. Undocumented persons also pay \$1.5 billion into the Medicare system.²⁵ Between the two government programs, undocumented persons add over eight billion dollars per year that they never collect.²⁶

Non-citizens, both undocumented and documented, also serve in the military.²⁷ As of 2006, there were 68,711 non-citizens enlisted in the U.S. military forces.²⁸ Non-citizens have served in the U.S. military

17. Brian Grow, *Embracing Illegals*, BUS. WK., July 18, 2005, at 58 (recounting how a Mexican couple who illegally crossed the U.S. border applied to the Internal Revenue Service for tax identification numbers so they could pay taxes); see also Derrick Z. Jackson, *Undocumented Workers Contribute Plenty*, BOSTON GLOBE, Apr. 12, 2006, at 13 (pointing out that undocumented workers paid over seven billion dollars in Social Security taxes in 2003 alone).

18. Grow, *supra* note 17, at 58; Lipman, *supra* note 15, at 20-22.

19. Lipman, *supra* note 15, at 25.

20. *Id.*

21. *Social Security Number and Individual Taxpayer Identification Number Mismatches and Misuses: Hearing Before the Subcomm. on Oversight and Subcomm. on Social Sec. of the H. Comm. on Ways and Means*, 108th Cong. at 50 (2004) (statement of Pamela J. Gardiner, Acting Inspector Gen. for Tax Admin., U.S. Dep't of Treasury).

22. Jackson, *supra* note 17.

23. Lipman, *supra* note 15, at 23. Doing so is, of course, punishable as a federal offense. 42 U.S.C. § 408 (2007). It is not conduct that I condone. The point here is simply that undocumented persons in these cases are in fact contributing to the government's treasury.

24. Lipman, *supra* note 15, at 23-26; see also Dean Calbreath, *Undocumented Workers Carry Big Stick: Experts Say Exodus of Illegal Immigrants Could Stagger Economy*, SAN DIEGO UNION-TRIB., Sept. 5, 2006, at A1.

25. Calbreath, *supra* note 24.

26. *Id.*

27. Laura Barker & Jeanne Batalova, *The Foreign Born in the Armed Services*, MIGRATION INFO. SOURCE, Jan. 15, 2007, available at <http://www.migrationinformation.org/USfocus/display.cfm?ID=572>.

28. *Id.* People of Hispanic origin comprise more than ten percent of the armed services.

in Iraq and Afghanistan.²⁹ In fact, non-citizens have served in every major U.S. conflict since the Civil War.³⁰ Many of these are permanent legal residents, but not all of them.³¹ A person well-known in the Hispanic community is Army Staff Sergeant Garcia who was a native of Mexico.³² During World War II, he was a real hero who saved his whole squadron during a conflict against the Germans.³³ While injured, he single-handedly killed six enemy soldiers and rounded up four more.³⁴ President Truman awarded him the Congressional Medal of Honor in 1945.³⁵

One of the difficulties when talking about immigration is that the conversation can go in so many different directions. Today, I do not propose to address immigration policy at the border, the building of "the wall," the use of technology, or the deployment of military personnel. I am not talking about terrorism, securing the airports or seaports, Abu Ghraib, or Guantanamo. Nor am I addressing immigrants claiming political asylum or the large number of minors who are entering the country unaccompanied by adults.³⁶ Rather, today I will focus on the current law enforcement crackdown on undocumented workers and the conditions of confinement that these workers face upon arrest. The persons being rounded up by federal immigration enforcement officials often have been living and working among us for many years.³⁷ They may even be married to American citizens and have American citizen children.³⁸ But today they live with fear.

29. Donna Miles, *Posthumous Citizenships on Fast Track, Include Family Benefits*, AM. FORCES PRESS SERV., Mar. 5, 2004, available at http://www.defenselink.mil/news/Mar2004/n03052004_200403052.html. Non-citizens are among the casualties of the current conflicts in Iraq and Afghanistan. As of March 2004, six soldiers, ten Marines, and one sailor who were not American citizens had lost their lives in Operation Iraqi Freedom. *Id.*

30. Darlene C. Goring, *In Service to America: Naturalization of Undocumented Alien Veterans*, 31 SETON HALL L. REV. 400, 401-02 (2000) (discussing the role undocumented immigrants have played in conflicts from the Civil War onward).

31. *Id.*

32. History & Heritage: Hispanic American Congressional Medals of Honor, http://www.hispaniconline.com/hh02/history_heritage_hisp_medal_of_honor_garcia.html (last visited Nov. 10, 2007).

33. *Id.*

34. *Id.*

35. *Id.*

36. See generally Carolyn J. Seugling, Note, *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*, 37 VAND. J. TRANSNAT'L L. 861, 863 (2004).

37. See, e.g., Thelma Gutierrez & Wayne Drash, *U.S. Sailor: Don't Deport My Wife*, CNN.COM, Oct. 3, 2007, <http://www.cnn.com/2007/US/10/03/military.deportation/index.html#cnSTEText>.

38. *Id.*

The situation affects people from all parts of the world.³⁹ Yet it is primarily a Latino problem, as this is the population overwhelmingly affected.⁴⁰

There are two primary ways that Latinos are being captured by the criminal system.⁴¹ The first way is through criminal conviction. The second is through work site enforcement raids the U.S. Immigration and Customs Enforcement (ICE) is now using. Both of these ways of getting caught point to a growing overlap between criminal law and enforcement and immigration law.⁴²

I want to use a few examples. I started reading about how immigration enforcement affects Latina women, but I quickly realized this was not a very satisfactory way to really learn about this system. I asked my colleagues in the immigration clinic at the University of Houston Law Center to take me with them to a detention center and arrange for me to talk to some of the detainees. They are not technically inmates. We went to an immigration detention center, and I was able to meet a few of the detainees there, women who were willing to share their stories with me. This is a story about a woman named Nellie.⁴³ Louisa Nellie Ortiz is sixty-eight-years-old and one of the three women I met at the women's detention center in Houston. Nellie came to the United States in 1989 when she was about fifty-years-old. She traveled alone to the U.S. by bus from her birth country of El Salvador. At that time, El Salvador was suffering from civil war. She talked about looting on the streets and violence. She decided she needed to leave because she did not feel safe anymore. She had been to the U.S. once before on a tourist visa. She liked it, so she came back.

Nellie made her way to Houston and settled in southwest Houston where many immigrants live. She had brought some money with her, got a job, saved some more money, and after a while, she was able to rent a space to open a little store. She sold everything from piñatas and garden supplies to dresses and shoes, whatever she could get her hands on. She saved her money and purchased a little house, and then continued saving money until she was able to buy a second little house, which she rented out to tenants.

39. JEFFREY S. PASSEL, RANDY CAPPS & MICHAEL FIX, URBAN INST. IMMIGRATION STUDIES PROGRAM, UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES (2004), available at <http://www.urban.org/toolkit/issues/immigration.cfm>.

40. *Id.* (stating that Mexicans make up fifty-seven percent of undocumented immigrants and another twenty-three percent are from other Latin American countries).

41. See Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. INT'L L. & COM. REG. 639, 653-53 (2004).

42. There is also a growing intersection of family law and both criminal law and immigration law, but this is well beyond the scope of my talk.

43. The detainee's name and some minor details of her story have been changed to protect her privacy.

Nellie has a lot of problems. She need not be in the detention center and that is the saddest part of her story. Back in 1997, Congress passed a law that made it possible for Nicaraguans and other Central Americans to obtain legal status.⁴⁴ Nellie filed some paperwork at that time, but failed to complete the process. She could have had legal residency under that law, but she did not avail herself of the opportunity (for reasons unknown to her current immigration lawyer).

Nellie never had any trouble with the law until 2004. In 2004, her cousin asked her to sell a diamond ring for her. According to Nellie, the cousin told her to pawn the ring if she could not sell it. She pawned it, and her cousin became very angry and wanted the ring back. When she could not get the ring back, Nellie's cousin went to the police. She insisted the ring was worth ten thousand dollars. That fact was never established, and it is hard to imagine the ring was worth that much because of the drastic depreciation of jewelry. Even if Nellie's cousin had originally paid ten thousand dollars, it would not be valued today at that price. It would probably be worth more like \$2500.

The claim was not filed in small claims court, where it really belonged. Instead, theft charges were filed against Nellie. In most cases, when a person is accused of a first offense such as theft, an attorney could work out some sort of favorable plea agreement. The person would be able to pay restitution, and the process would come closer to having the effect of a civil law suit. The victim would get her money back, and that would be that.

In Nellie's case, after a fifteen minute discussion with her court-appointed attorney, she plead guilty to a felony and agreed to pay ten thousand dollars in restitution. The judge sentenced her to a term of probation and required her to pay two hundred fifty dollars per month in restitution until she paid back the full amount. Nellie was unable to pay the two hundred fifty dollars a month, so in May 2006, she was picked up for violating the terms of her probation. She then spent the next four months in county jail, pending a hearing on her violation

44. Congress granted legal residency to refugees from Nicaragua and other Central American countries suffering from civil unrest. The Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. No. 105-100, 111 Stat. 2193 (1997). In addition, she might have applied for asylum as a refugee of war upon entry to the United States, but she did not pursue that avenue. See Jonathan Moore, U.S. Coordinator for Refugee Affairs, Developing Solutions for Central American Refugee Problems, Address Before the International Conference on Central American Refugees (May 30, 1989), in *DEPT ST. BULL.*, Aug. 1989, at 87. Had she arrived three years earlier, she could have been eligible to obtain legal residency status under the Immigration Reform and Control Act. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3394-3404 (1986).

of probation. Ultimately, that charge was dismissed when it was discovered she was an undocumented person.

Following this discovery, Nellie was transferred to the immigration system. She has now been in the detention center for three months, so she has been locked up for a total of seven months. People without legal residency are in a much more precarious situation, as Nellie's case shows. It is hard to exaggerate the severity of the consequences of any kind of run-in with the criminal law for an undocumented person. For people with legal residency status, a case like this would not normally result in any severe punishment. For an undocumented person like Nellie, the prospect of spending any time in a county jail means it is very likely she will be transferred to the immigration system, ultimately resulting in her detention and removal from the country.⁴⁵ Today, local law enforcement is much more actively involved in federal immigration enforcement. Individuals held by local authorities today are much more likely to be screened to determine their immigration status, and non-citizens are being reported to Immigration and Customs Enforcement (ICE).⁴⁶

Nellie has an immigration lawyer who is working on a *pro bono* basis on her behalf. Many people who are in immigration detention do not have lawyers.⁴⁷ It is not a criminal proceeding, so they have no constitutional right to appointed counsel, and most of them cannot afford lawyers.⁴⁸ Less than fifty percent of these individuals appear before immigration judges with lawyers.⁴⁹ They also do not have the right to due process or Fourth and Fifth Amendment protections, and no Miranda rights; none of these rights apply to them.⁵⁰

Nellie is lucky that she at least has a lawyer, but she was unlucky in so many more important ways. As I said, she could have had legal status under the law that Congress passed in 1997. Her cousin could

45. Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1891 (2000).

46. See, e.g., Michael M. Hethmon, *The Chimera and the Cop: Local Enforcement of Federal Immigration Law*, 8 D.C. L. REV. 83, 85-86, 96 (2004); Kanstroom, *supra* note 41, at 666; Teresa Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 91-93 (2005); Nina Bernstein, *Policy Report Noncitizens to U.S., Officials Say*, N.Y. TIMES, Apr. 23, 2005, at B3.

47. *Crossing the Border: Immigrants in Detention and Victims of Trafficking: Hearing Before the Subcomm. on Border, Maritime and Global Counterterrorism and Comm. on Homeland Sec.*, 110th Cong. (2007) (statement of Christina Fafilis, Am. Bar Assoc.).

48. THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP: PROCESS & POLICY* 639 (5th ed. 2003).

49. OFFICE OF PLANNING, ANALYSIS, & TECH., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, STAT. Y.B. 2006, at G1 (2007).

50. For discussions about the lack of rights to due process, see generally David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003 (2002); Kanstroom, *supra* note 41, at 1928-31.

have handled the matter as a civil case, but often poor people do not know how to get a small claim filed, so they just call the police. Nellie's criminal lawyer could have done a better job if he had known anything about immigration law (or criminal law for that matter). She had such poor representation, which is typical for poor people.⁵¹ Court-appointed lawyers are all too often dreadfully incompetent. Thus, Nellie, a sick, elderly woman, ended up in immigration detention spending seven months behind bars for a non-violent, first offense and now facing the prospect of deportation.⁵²

Prior to her conviction, Nellie may have qualified for legal residency status. Now, she will no longer be able to gain legal status because of the conviction. In immigration law, theft convictions are considered crimes of "moral turpitude," and one does not qualify for legal residency status if one has been convicted of a crime of moral turpitude.⁵³ Nellie entered the country legally under a tourist visa, but then she overstayed, which is yet another ground for removal.⁵⁴

Nellie has a lot of medical conditions, being an elderly person. She has diabetes which has not been treated properly while in detention. She is not taking any medication because the medication she received from the doctor in the detention center had side effects. Her lawyer believes that Nellie also has Alzheimer's disease. There are huge areas of her life that she does not recall, and she lapses in and out of discussions on different topics. Her mental condition might also be a ground to prevent her deportation because persons with mental disabilities are protected by extra rights and safeguards.⁵⁵ The problem is that

51. Stephen B. Bright, *Equal Justice Under Law: A Landmark Supreme Court Decision 40 Years Later*, 3 IDEAS FOR AN OPEN SOC'Y 2, 3 (Mar. 2003) (discussing *Gideon v. Wainwright*, 372 U.S. 335 (1963) and the ongoing lack of competent representation for the poor).

52. The immigration detention process almost always ends in deportation of the individual held. See Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism*, 51 EMORY L.J. 1059, 1063 (2002) (noting that expanded grounds for deportation has led to dramatic increases in numbers of people deported reaching more than seventy thousand in 2001); Kanstroom, *supra* note 41, at 652 ("Deportation is now often a virtually automatic consequence of a non-citizen's criminal conviction for even a minor state misdemeanor.").

53. Immigration & Nationality Act § 212, 8 U.S.C. § 1182 (2007).

54. BRYAN LONEGAN & THE IMMIGRATION LAW UNIT OF THE LEGAL AID SOC'Y, IMMIGRATION, DETENTION, & REMOVAL: A GUIDE FOR DETAINEES AND THEIR FAMILIES 11 (2004). As it turns out, the conviction disqualifies her for legal residence, but it does not make her subject to removal because the crime occurred more than five years after her legal admission into the country. Immigration & Naturalization Act § 237, 8 U.S.C. § 1227 (2007). However, the fact that she overstayed her tourist visa and committed a crime does make her subject to removal. *Id.*

55. Immigration & Nationality Act § 240, 8 U.S.C. § 1229a ("If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.").

her attorney cannot prove that Nellie has Alzheimer's disease. He cannot find a psychologist who will treat her and testify on her behalf. That requires money. There is no national system in place for *pro bono* provision of psychiatric or medical services, so poor people, who are unable to pay doctors to testify, are not usually able to get doctors to testify.⁵⁶ Although he has tried to obtain testimony from doctors all over the country, he cannot find anyone willing to testify on her behalf. Being unable to prove that she has Alzheimer's disease, he holds out little hope of being able to prevent her deportation.

Her story speaks volumes about the issues of this intersection between the criminal justice system and the immigration system. It is now routine practice in some places for criminal justice officials to screen people for their citizenship when they are admitted to jails.⁵⁷ Police departments and criminal court bureaucracies are taking up the task of enforcing federal immigration law.⁵⁸ This is a fairly new development.⁵⁹ Traditionally the police did not want to get involved in immigration enforcement because they wanted to have a good relationship with all the people in their communities.⁶⁰ They need the Latino community to cooperate with them to report crimes⁶¹ and to testify against criminals.⁶² Law enforcement wants to be able to help all the people in their jurisdiction. Latinos are the same people who are very often victimized.⁶³ Because they are undocumented, they are often paid in cash, making them targets for thieves who rob them as they

56. There are some local assistance programs but they are rare. See Minnesota Advocates for Human Rights, Refugee, and Immigrant Program Home Page, http://www.mnadvocates.org/Refugee_and_Immigrant_Program.html (describing the program's services to immigrants, including psychiatric treatment).

57. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEETS: SECTION 287(G), IMMIGRATION & NATIONALITY ACT; DELEGATION OF IMMIGRATION AUTHORITY (2007), <http://www.ice.gov/pi/news/factsheets/070622factsheet287gprogoover.htm>.

58. Peter Whorisky, *States, Counties Begin to Enforce Immigration Law*, WASH. POST, Sept. 27, 2006, at A1.

59. See *id.* (discussing the transition in the Mecklenburg County, N.C. sheriff's office from ignoring the immigration status of people in the county to enforcing immigration laws).

60. See, e.g., Elaine Aradillas, *Sheriff, Top Cop Blast INS Proposal; Lopez Points to Racial Profiling, Ortiz Cites Lack of Resources*, SAN ANTONIO EXPRESS-NEWS, Apr. 5, 2002, at A1 (describing the police chief's concerns about the potential chilling effects on the relationship between the police and immigrants of enforcing immigration law).

61. *Id.*

62. See, e.g., Jane Meinhardt, *Tired of Being Victims, Illegal Immigrants Speak Up*, ST. PETERSBURG TIMES, Feb. 13, 2000, at 1 (describing the story of an immigrant who reported a crime to police and expressed a willingness to testify at the suspect's trial).

63. See, e.g., NATIONAL CRIME VICTIMIZATION SURVEY, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2005 STATISTICAL TABLES, tbl.7 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus05.pdf> (showing the rate of personal crimes against Hispanic persons as higher than the rate against non-Hispanic persons).

leave their workplaces.⁶⁴ Federal immigration officials and the federal government generally have started applying pressure and giving incentives to local law enforcement to get involved in immigration enforcement. We now see a lot more people like Nellie getting caught by means of minor criminal offenses and subsequently transferred into the immigration system,⁶⁵ which will ultimately result in their removal.⁶⁶

In 2006, the U.S. government removed approximately 186,600 people through a removal procedure.⁶⁷ These are people picked up in the interior of the United States. The numbers at the border are much higher. These are people who are going through immigration hearings and getting deported from the country by ICE. The immigration enforcement effort looks a lot like police activity. I was struck by the jackets that they wear, as seen on the ICE website, that say "POLICE ICE" across the back.⁶⁸

The second avenue is worksite enforcement.⁶⁹ Worksite enforcement efforts have been stepped up across the country.⁷⁰ It looks like criminal law enforcement activity. For example, ICE agents have recently raided a waste management company in Houston.⁷¹ There was a helicopter flying overhead at 6:00 a.m. when the workers showed up to work.⁷² The ICE agents rounded up fifty-four undocumented people.⁷³ These can be very large police actions. The largest raid took

64. See, e.g., Jean-Francois Macollvie, *Broward Sheriff's Deputies Arrest Five in Theft from Laborers*, S. FLA. SUN-SENTINEL, Sept. 20, 2006, at B3; Maria Sacchetti, *Laborers Lining Up on Mass. Streets: Worker Markets Spread to the East*, BOSTON GLOBE, Aug. 4, 2007, at A1.

65. See Paul Vitello, *Path to Deportation Can Start with a Traffic Stop*, N.Y. TIMES, Apr. 14, 2006, at A1.

66. *Id.* Removal is the new terminology for deportation. See ALEINIKOFF ET AL., *supra* note 48, at 621.

67. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FISCAL YEAR 2006 ANNUAL REPORT: PROTECTING NATIONAL SECURITY & UPHOLDING PUBLIC SAFETY 11, available at <http://www.ice.gov/doclib/about/ICE-06AR.pdf>.

68. U.S. Immigration & Customs Enforcement Home Page, <http://www.ice.gov> (last visited Oct. 6, 2007).

69. See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEETS: WORKSITE ENFORCEMENT (2007), <http://www.ice.gov/pi/news/factsheets/worksite.htm> (discussing ICE's "dramatically enhanced" worksite enforcement program).

70. See, e.g., Kevin Moran & Susan Carroll, *Feds Detain 53 Workers in Immigration Roundup*, HOUS. CHRON., Feb. 1, 2007, at B1 (describing a raid on undocumented immigrants at a waste management company); Jennifer Talhelm, *Senators Meet on Recent Immigration Raid*, ASSOC. PRESS, Jan. 23, 2007 (describing the largest-ever raid by ICE); U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEETS: OPERATION WAGON TRAIN (2006), <http://www.ice.gov/pi/news/factsheets/061212wagontrainfs.htm> (describing the largest-ever raid by the ICE) [hereinafter Operation Wagon Train].

71. See Moran & Carroll, *supra* note 70.

72. *Id.*

73. *Id.*

place at the Swift and Co. Meatpacking plants in six different states simultaneously.⁷⁴ They rounded up 1297 undocumented workers.⁷⁵ According to ICE, the worksite enforcement raids are being done because of national security concerns, among other reasons.⁷⁶ After the September 11, 2001 attacks, there was real alarm that the terrorists had been living in the United States, taking classes, and working here.⁷⁷ They had entered legally but were out of status.⁷⁸ There was a determination to clean up the immigration system in the interest of national security.⁷⁹ ICE says it "considers worksite enforcement part of an effective and ongoing effort to keep our homeland safe. ICE's Worksite Enforcement Unit fights illegal immigration to mitigate possible threats posed by unauthorized workers employed in secure areas of our nation's critical infrastructure."⁸⁰

Some of these raids have occurred at airports;⁸¹ in one instance, undocumented workers painting military planes for defense contractors at a military base were taken into custody.⁸² With all the fears of bioterrorism or poisoning the food supply, you can understand the impetus to conduct worksite enforcement raids on the meatpacking industry.⁸³ But waste management is more of a stretch,⁸⁴ as are those working in the roofing business.⁸⁵ Then there are the janitors at

74. See Talhelm, *supra* note 70.

75. *Id.*

76. See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 69.

77. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 215-53 (2004) (describing the entry of the 9/11 hijackers into the United States).

78. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., STAFF STATEMENT NO. 1: ENTRY OF THE 9/11 HIJACKERS INTO THE UNITED STATES, available at http://www.9-11commission.gov/staff_statements/staff_statement_1.pdf (describing the means by which the 9/11 hijackers were able to enter the United States).

79. See Karin Brulliard & Paul Duggan, *55 Illegal Immigrants Arrested at Dulles Site*, WASH. POST, June 15, 2006, at B1 (describing the arrests of illegal immigrants as "part of a government campaign to root out illegal workers" nationally).

80. U.S. Immigration & Customs Enforcement, Public Information: Topics of Interest, <http://www.ice.gov/pi/topics/index.htm> (last visited Nov. 10, 2007).

81. See Brulliard & Duggan, *supra* note 79.

82. See News Release, U.S. Immigration & Customs Enforcement, ICE Arrests 48 Illegal Aliens Performing Contract Work at Seymour Johnson Air Force Base (July 6, 2006), available at <http://www.ice.gov/pi/news/newsreleases/articles/050706goldsboro.htm> (describing the arrest of illegal aliens working at an Air Force base); News Release, U.S. Immigration & Customs Enforcement, ICE Arrests 15 Aliens in Roswell Working for U.S. Military Contractor (Aug. 29, 2006), available at <http://www.ice.gov/pi/news/newsreleases/articles/060829roswell.htm> (describing a raid on a defense contractor site where aliens were painting military aircraft).

83. See Operation Wagon Train, *supra* note 70; Moran & Carroll, *supra* note 70.

84. *Immigration Raid Nets 53 in Texas*, ASSOC. PRESS, Jan. 31, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/31/AR2007013101931.html>.

85. News Release, U.S. Immigration & Customs Enforcement, Roofing Companies

Wal-Mart. Wal-Mart recently paid eleven million dollars in fines for hiring contractors to clean their stores because the contractors had used some undocumented workers.⁸⁶ I just don't see the connection between our nation's critical infrastructure and protecting the homeland when you're talking about the janitors at Wal-Mart.

The other thing that ICE has said is that the raids are a way of protecting immigrants,⁸⁷ which is more than a little ironic:

[I]f we do not make greater strides in this area, immigrants will continue to risk their lives for the prospect of a well-paying job in this country, often by turning to smugglers who exploit and force them to live in the shadows once they arrive To be clear, the magnet of employment is fueling illegal immigration⁸⁸

They are trying to protect the immigrants from the temptation of wanting to come to this country for well-paying jobs. There's a lot of rhetoric that gets tossed around. Are they "well-paying" jobs or are they jobs that pay too little? Very often immigrants are blamed for lowering the market for wages.⁸⁹ Maybe the jobs are well-paying by their standards, but not by ours.⁹⁰

In any case, these kinds of justifications have nothing to do with any kind of threat of criminality or terrorism. It's purely an effort to combat illegal immigration by stopping people who are tempted to come to this country to find work. That seems to be what's really going on, not national security. Besides losing their jobs, these people are going to be deported back to their home countries, often after living and working here for a number of years. People get caught in these raids and taken away into detention.

Indicted for Money Laundering, Conspiring to Hire Illegal Aliens (June 18, 2007), available at <http://www.ice.gov/pi/news/newsreleases/articles/070618kansascity.htm>.

86. See Press Release, U.S. Immigration & Customs Enforcement, Wal-Mart Stores, Inc. Agrees to Pay A Record \$11 Million to ICE To Settle Nationwide Worksite Enforcement Investigation (Mar. 18, 2005), available at <http://www.ice.gov/pi/news/newsreleases/articles/walmart031805.htm>.

87. See *Hearing on Impacts of Border Security and Immigration on Ways and Means Programs Before H. Comm. on Ways and Means*, 109th Cong. (2006) (statement of Julie L. Myers, Ass't Secretary, U.S. Immigration & Customs Enforcement, Dep't Homeland Sec.).

88. *Id.*

89. See, e.g., Federation for American Immigration Reform, What's Wrong With Illegal Immigration, http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters7443 (last visited Jan. 15, 2008) (noting illegal immigrants depress wages).

90. See, e.g., Sarah Beth Coffey, *Undocumented Immigrants in Georgia: Tax Contribution and Fiscal Concerns*, GA. REVENUE ANALYSIS 1, 2 (Jan. 2006), available at <http://www.gbpi.org/pubs/garevenue/20060119.pdf>.

Detention is a really terrible existence. For all the horror stories we may hear about American prisons, it is far worse in detention.⁹¹ It's ironic too because the occupants are not called "inmates," and they're not in jails or prisons.⁹² This is a civil process, not a criminal process.⁹³ (This is also why they have few legal rights, which is yet another irony of the whole thing.) They're in immigration detention simply to await their civil immigration hearing to determine whether they should be removed or not.⁹⁴ They're not there because of a crime. Yet the conditions they suffer in detention are worse than those faced by convicted criminals.⁹⁵ One author has called it the "American gulag" and has written a book detailing the terrible conditions in American detention centers.⁹⁶ I believe what happened is a dramatic growth in the use of detention for undocumented persons. There has not been enough regulation and supervision of this process. There have not been enough lawsuits. The people in detention have few legal rights because they are not citizens, and they are not legally in the country. This is a humanitarian crisis.

Very often families travel together to the United States and are picked up together. The *Houston Chronicle* recently had a series of articles about families being held together in detention centers.⁹⁷ ICE considers this to be a humanitarian gesture on their part.⁹⁸ The

91. See generally MARK DOW, *AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS* (2004) (describing the conditions in U.S. immigration detention centers).

92. See U.S. Immigration & Customs Enforcement, Office of Detention and Removal (DRO) Home Page, <http://www.ice.gov/pi/dro> (last visited Jan. 7, 2008) (describing how non-citizens in custody are placed in detention facilities).

93. See *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 285 (1966) ("To be sure, a deportation proceeding is not a criminal prosecution.").

94. See U.S. Immigration & Customs Enforcement, Office of Detention & Removal, *supra* note 92.

95. See generally DOW, *supra* note 91 (describing the disturbing conditions of detention centers).

96. *Id.*

97. See Lisa Falkenberg, *A Look Inside Family Detention Center: Facility's Doors Opened in a Bid to Counter Claim of Substandard Care*, HOUS. CHRON., Feb. 10, 2007, at B1 (describing the T. Don Hutto Residential Center in Texas) [hereinafter *A Look Inside*]; Lisa Falkenberg, *Pregnant Detainee Leaves Center: Honduran Family Seeking Asylum Spent 3 Months in Remodeled Prison*, HOUS. CHRON., Feb. 17, 2007, at B2 (describing the experience of a pregnant Honduran woman in the T. Don Hutto Residential Center) [hereinafter *Pregnant Detainee*]; Lisa Falkenberg, *Awaiting Their Future: Is Facility for Detainees Best Place for Children?*, HOUS. CHRON., Feb. 7, 2007, at A1 (describing the experience of a three-year-old Somali and his mother in the T. Don Hutto Residential Center) [hereinafter *Awaiting Their Future*].

98. *Awaiting Their Future*, *supra* note 97 ("ICE officials say the 'state of the art' facility . . . is a humane alternative to severing immigrant families . . . awaiting either asylum or deportation.").

Chronicle followed the story of Mustafa, who is a native of Somalia, and here's what was reported:⁹⁹

Within two weeks [of arriving to the U.S.] he was transported to a Central Texas facility wrapped in a high, razor-wire fence and overseen by an arm of the U.S. Department of Homeland Security. The Somali Muslim was fingerprinted, photographed and issued a uniform. Surveillance cameras eyed him. Guards timed his meals on wrist watches. He was counted, along with the others three times a day. And if he stepped out of line, his mother was there to shush him into submission. Mustafa is 3 years old.¹⁰⁰

These kids are behind bars with their parents in this facility.¹⁰¹ They're all issued uniforms.¹⁰² The parents complained bitterly about the conditions.¹⁰³ Apparently, a lot of these for-profit facilities¹⁰⁴ are run by people who have previously worked in prisons and who do not know the difference between a detention center and a prison.¹⁰⁵ They can treat the people rather cruelly.¹⁰⁶ These children are obviously innocent of any kind of wrongdoing; they are just going with their parents. The parents complain of a lack of physical activity or outdoor recreation. The women I spoke with also said one of their biggest problems is boredom. There is no work for them and no hobbies. They are refused any kind of outdoor recreation.¹⁰⁷ They are supposed to be given one hour a day, five days a week.¹⁰⁸ It does not usually happen. Other than television, there is just nothing for them to do.

The "[p]arents say their children have gone weeks, even months, without feeling the sun on their faces."¹⁰⁹ I do not know if that is true, but they are saying they are not allowed to go outdoors. Inside the facility the parents say their children are "not allowed to run, jump or laugh too loudly indoors. They get an hour a day to play in a spare

99. *Id.*

100. *Id.*

101. *Id.*

102. See *A Look Inside*, *supra* note 97; *Awaiting Their Future*, *supra* note 97.

103. See *Awaiting Their Future*, *supra* note 97.

104. See Meredith Kolodner, *Immigration Enforcement to Benefit Detention Companies*, N.Y. TIMES, July 19, 2006, at C4.

105. See *A Look Inside*, *supra* note 97 (describing the allegations of guards interviewed anonymously who stated that "most of the problems at Hutto are caused by a small minority of guards . . . who think they're still running a prison").

106. See *id.*

107. See *A Look Inside*, *supra* note 97; *Awaiting Their Future*, *supra* note 97; *Pregnant Detainee*, *supra* note 97.

108. DEPT OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES 22 (2007).

109. See *Awaiting Their Future*, *supra* note 97.

gym.”¹¹⁰ There are reports of rashes or sores attributable either to unsanitary uniforms or harsh detergents.¹¹¹ The women I spoke to complained about the laundry situation. They have one uniform, and whenever it is time to wash the uniform, they are told to remove their clothes. They have to wait without clothes until the laundry comes back.

The food is unfit for human consumption according to the women I interviewed, and this is a pretty common complaint. They say that the food has no flavor and is improperly heated. There are no flavored drinks. They get one glass of milk in the morning and just water otherwise. Even in 2005 with a Republican majority in Congress that is not known for knee jerk liberal issues like conditions for prisoners, a Congressional committee resolution called on ICE to detain children only as a last resort and only in “non-penal, homelike environments.”¹¹² The conditions are just so dramatically bad.

I have visited many prisons with my students and the immigration detention center was far worse. If I could get Nellie into a Texas prison, I would feel good about doing it. Other criminal law professors worry when I make statements like that for fear that I will give the impression that Texas prisons are good places to be. They are not pleasant by any stretch of the imagination, but they are much better than immigration detention centers.¹¹³ They offer good food and drinks,¹¹⁴ changes of clean clothes and linens,¹¹⁵ work,¹¹⁶ educational and recreational opportunities,¹¹⁷ good medical and dental care,¹¹⁸ and more resources than the abysmal immigration detention centers currently in operation. Even the Inspector General of Homeland Security recently released a report that was highly critical of the conditions in immigration detention centers across the country.¹¹⁹

The second part of this story is that after people are caught up in ICE proceedings through some run-in with the law or a worksite enforcement raid, they get deported.¹²⁰ They’re sent back to their

110. *Id.*

111. *Id.*

112. *Id.*

113. Press Release, American Civil Liberties Union, ACLU Challenges Illegal Detention of Immigrant Children Held in Prison-Like Conditions (Mar. 6, 2007), *available at* <http://www.aclu.org/immigrants/detention/28865prs20070306.html>.

114. TEXAS DEP’T OF CRIMINAL JUSTICE, OFFENDER ORIENTATION HANDBOOK 14 (2004), *available at* <http://www.tdcj.state.tx.us/publications/cid/OffendOrientHbkNov04.pdf>.

115. *Id.* at 11-12.

116. *Id.* at 30.

117. *Id.* at 16, 27.

118. *Id.* at 33.

119. See DEP’T OF HOMELAND SEC. *supra* note 108, at 36.

120. See ALENIKOFF ET AL., *supra* note 48, at 554.

native countries.¹²¹ Nellie has been in the U.S. for eighteen years, and she has nothing left in El Salvador. Her sons are in Houston; there's no one in El Salvador who would care for her. This is typical for long-term residents who have their homes and their families in the U.S. They return to their native countries where they have absolutely nothing. They are desperate to return to the United States, and so they do.¹²² There are legal bars to reentry upon deportation with varying conditions.¹²³ Even if someone like Nellie had any ability to gain legal status, there would be a bar on her application for re-admission.¹²⁴ She would not be allowed to return legally for many years, yet many deported immigrants come back anyway.¹²⁵ Their children and their families are here. Eventually they get intercepted, and now they are subject to federal prosecution.¹²⁶ This has caused a dramatic increase in the use of federal law enforcement resources for immigration offenses.¹²⁷ The numbers are skyrocketing.¹²⁸ There is a strong emphasis on prosecuting immigration crimes.¹²⁹

From 1992 to 2006 there was a 187% increase in immigration charges.¹³⁰ From a small number to a bigger number, the numbers are still not overwhelming but the increase is quite dramatic. Today, 11.2% of the total federal inmate population — or 20,970 of the 187,241 inmates — consists of immigration offenders.¹³¹ Most of these inmates are not smugglers or terrorists. They are mostly people who came initially looking for work and then established their homes and families in this country. In addition to a large percentage of the corrections budget, significant federal prosecution resources have been used to target this group of people. As of 2004, immigration crimes represented the single largest group of all federal prosecutions at thirty-two percent.¹³² I don't think people realize this. Immigration

121. *Id.*

122. *Id.* at 551.

123. *Id.* at 581. If Nellie were deported, she would be ineligible for reentry for ten years. Immigration & Nationality Act § 240, 8 U.S.C. § 1229a (2007).

124. See ALEINIKOFF ET AL., *supra* note 48, at 581.

125. *Id.* at 551.

126. Most non-immigrants would be prosecutable for illegal reentry after deportation. Immigration & Nationality Act § 276, 8 U.S.C. § 1326 (2007).

127. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, REPORT ON DHS CRIMINAL IMMIGRATION ENFORCEMENT (2005), available at <http://trac.syr.edu/tracins/latest/131>.

128. *Id.*

129. *Id.*

130. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, INDIVIDUALS CHARGED IN IMMIGRATION COURT WITH ONLY IMMIGRATION VIOLATIONS FY 1992-2006 (2006), available at http://trac.syr.edu/immigration/reports/178/include/only_immigration_charges.html.

131. U.S. DEPT OF JUST., FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2005, at 51, available at <http://bop.gov/news/PDFs/sob05.pdf> [hereinafter State of the Bureau 2005].

132. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, *supra* note 127.

has surged past drug crimes. Drug crimes represent twenty-seven percent of all federal prosecutions.¹³³ These numbers reflect a real shift in the allocation of resources that we're throwing at these kinds of offenses, as well as a shift in priorities.

A lot of the people who are getting caught up in the cycle of deportation, reentry and subsequent federal prosecution are not the type that we're really concerned about for purposes of securing our homeland. They are not involved in terrorist activity. A lot of the people enter the immigration system initially after being prosecuted for things like theft, minor drug crimes, or driving under the influence of alcohol ("DUI"); some are apprehended while working without proper documentation. They often use other people's Social Security numbers because otherwise they are unable to work. They have to resort to using false documents in order to get jobs, which can result in prosecution.¹³⁴ People are being prosecuted for using other people's Social Security numbers, and they're charged with document fraud.¹³⁵ These prosecutions do not involve allegations that the immigrants have taken money to which they are not entitled.¹³⁶ Yet, there were some pretty melodramatic statements made by the U.S. Attorney for the Northern District of Texas about a worksite enforcement effort: "[i]t is a serious federal crime to hijack and steal a citizen's good name and credit to illegally stay in the United States. These federal indictments demonstrate federal law enforcement's commitment to address rampant identity theft and immigration fraud."¹³⁷ This statement makes it sound like immigrants are profiting by stealing someone else's identity, but they're doing no such thing. They're using other people's numbers to be able to get a job. Their earnings are then going into the Social Security and Medicare systems, and they don't collect any of that money in the end.¹³⁸ But they're getting prosecuted for it and then being deported after they serve out their criminal punishments.¹³⁹ If they reenter illegally after being deported, they will face severe punishment on account of having been deported after conviction for a federal offense.¹⁴⁰

133. *Id.*

134. See News Release, U.S. Immigration & Customs Enforcement, Fifty Three Former Employees at Swift & Company Meat Processing Plant in Cactus, Texas, Charged in Federal Indictments (Jan. 10, 2007), available at <http://www.ice.gov/pi/news/newsreleases/articles/070110amarillo.htm> [hereinafter Fifty Three Former Employees].

135. *Id.*

136. *Id.*

137. *Id.*

138. See Jackson, *supra* note 17.

139. Fifty Three Former Employees, *supra* note 134.

140. Immigration and Nationality Act § 276, 8 U.S.C. § 1326 (2007).

I took my class to federal court a few years ago, and we watched the sentencing of a Latino man. The federal probation officers arranged for us to observe some sentencing hearings when we visited the courthouse. The young man being sentenced that day was in his mid-twenties, and he was being prosecuted for reentry after deportation. There was some discussion about the case in court that day. The defendant had been brought to the United States by his parents from Mexico when he was a month old. He had grown up in Houston, attended the city's public schools, graduated from high school and had pretty regular employment. In the last few years he had a few run-ins with the law. He had two DUI convictions and one conviction for assaulting his girlfriend during a dispute that got out of hand. For most people, these are misdemeanors. They are punished by jail time, counseling, or probation. For this guy, the punishment also included deportation. He had never really ever been to Mexico other than the one month as a newborn before he came to the United States. Not surprisingly, he returned to Houston after deportation. The day we saw him in court, he was being sentenced to about five years in a federal prison. His prior misdemeanor offense was considered an "aggravated felony" for the purposes of immigration law.¹⁴¹ He was thus sentenced to approximately five years in prison.

The numbers of Latino people being convicted for immigration offenses is quite high. Of the total inmate population, 20,970 inmates were convicted of immigration offenses¹⁴² and most of these

141. The complicated law of sentencing in immigration cases permits the addition of eight "levels" to one's "base offense level" for purposes of the Federal Sentencing Guidelines calculation of a crime's seriousness if the offender illegally reentered the country having previously been deported for the commission of an "aggravated felony." See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(1)(c) (2003). "Aggravated felony" is defined by reference to its definition for purposes of immigration law. The circuit courts have defined the term "aggravated felony" to include state misdemeanor convictions if the underlying conduct is included in the list of types of crimes that Congress defined as "aggravated felonies" for purposes of immigration law. See Immigration and Nationality Act § 101, 8 U.S.C. § 1101 (2007).

Thus, it matters not that a person may have been convicted of a misdemeanor in state court. For purposes of an immigration law determination of deportability or sentencing upon illegal reentry after deportation, some misdemeanors are considered "aggravated felonies." See, e.g., *United States v. Toledo-Flores*, 2005 U.S. App. LEXIS 17891, at *2 (5th Cir. Aug. 17, 2005) (per curiam) (upholding sentencing increase for illegal reentry after deportation following aggravated felony based on state misdemeanor for cocaine possession), *cert. dismissed*, 127 S. Ct. 638 (2006). Nevertheless, the Supreme Court has decided that a state felony does not become an "aggravated felony" for purposes of immigration law unless it is also a felony under federal law. In this case, the conduct underlying a drug-related state felony would be considered a misdemeanor under the federal Controlled Substances Act. 21 U.S.C. § 801 et seq. Thus, it did not qualify as an aggravated felony for immigration law purposes. See *Lopez v. Gonzales*, 127 S. Ct. 625, 627 (2006).

142. See *State of the Bureau 2005*, *supra* note 131, at 51.

convictions involve Latinos.¹⁴³ The percentage increases in the past few years is staggering, and there is every reason to think that these inmates do not reflect the normal criminal demographic. There are many more women in the system because we're talking about people whose route to prison began initially by being apprehended for working without proper documentation or for committing minor crimes. I predict that we'll see an increase in the number of women and young people entering federal prison as a result of immigration enforcement activity.

I offer no grand solutions, but simply suggest that this is an area in need of study. I suggest that, when we do talk about prison issues and women in prison, there is a need for us to discuss immigration detention and the ultimate path to federal prison experienced by so many Latinos today.

143. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, PUBL'N NO. 191745, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: IMMIGRATION OFFENDERS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 2000, at 1 (2002), *available at* <http://www.ojp.usdoj.gov/bjs/oub/pdf/iofcjs00.pdf>.