

U.S. GOVERNMENT UNLAWFULLY DETAINING AND
DEPORTING U.S. CITIZENS AS ALIENS

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ABSTRACT

This Article presents original research on the rate at which Immigration and Customs Enforcement (ICE) is detaining and deporting U.S. citizens, even though ICE has no jurisdiction over U.S. citizens. The article provides legal, historical, constitutional, and public policy analyses of these actions, and presents several case studies. The penultimate section evaluates, through a historical analysis of family law, the jurisprudence of recent Ninth Circuit decisions on acquired U.S. citizenship claims. The conclusion offers recommendations for changes in policy and procedures to end the unlawful practice of deporting and detaining U.S. citizens.

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This article was written with the support of the Leslie Center for the Humanities at Dartmouth College and would not have been possible without the time and patience of dedicated immigration law practitioners, scholars of immigration law enforcement, impact litigation attorneys, state and local law enforcement employees, federal government staff, and, especially, the U.S. citizens and their families who took the time to talk to me about their experiences of detention and deportation. I am deeply grateful for the advice, information, and legal analyses shared with me by Michelle Fei, Lee Gelernt, Mario Guerrero-Cruz, Helen Harnett, Kara Hartzler, Philip Hwang, Daniel Kanstroom, Mark Lyttle, Jeanne Lyttle, Calvin Morrill, Hiroshi Motomura, Jennifer Mnookin, Nancy Morawetz, Brittney Nystrom, and Neil Rambana. Special thanks to Dan Kowalksi and Rachel Rosenbloom for their ongoing assistance in educating me on immigration law and to Juliet Stumpf for her comments on an earlier draft. Thanks to Mark Kelley for assistance preparing this manuscript for publication.

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There’s an old joke—um . . . two elderly women are at a Catskill mountain resort, and one of ‘em says, “Boy, the food at this place is really terrible.” The other one says, “Yeah, I know; and such small portions.” Well, that’s essentially how I feel about life—full of loneliness, and misery, and suffering, and unhappiness, and it’s all over much too quickly.¹

I. INTRODUCTION

Woody Allen’s sentiments in *Annie Hall* about resort food in the Catskills and life also apply to immigration and citizenship law: the procedures, regulations, and statutes are poorly conceived, and they are improperly enforced. Because agencies ignore the scant protections immigration law provides respondents in deportation proceedings, the government of the United States has been misclassifying its own citizens as aliens and deporting them for over 100 years.² The U.S. Constitution

¹ ANNIE HALL (Charles Joffe & Jack Rollins 1977).

² The following works provide one entrance into the extensive body of historical research documenting the statutes and immigration enforcement policies in the

and the civil rights laws in effect since the 1960s suggest that the senseless and cruel practice of profiling U.S. citizens for deportation because of their skin color, foreign birth, or Hispanic last names would reside only in legal history textbooks, alongside descriptions of legally-segregated railroad cars³ and the poll tax.⁴ The truth is that the banishment, and in some cases kidnapping,⁵ of U.S. citizens by immigration law enforcement agencies is continuing with an alarming albeit underreported frequency. Recent data suggests that in 2010 well over 4,000 U.S. citizens were detained or deported as aliens, raising the total since 2003 to more than 20,000,⁶ a figure that may strike some as so high as to lack credibility. But the deportation laws and regulations in place since the late 1980s have been mandating detention and deportation for hundreds of thousands of incarcerated people each year⁷

United States. For a history of the colonial and new republic's founding thoughts and policies on citizenship, see DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2010); JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870* (1978); ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997). For an overview of nineteenth- and twentieth-century statutes directed toward immigrants and residents of Chinese ancestry, see ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943* (2003); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 *UCLA L. REV.* 405 (2005). For policies on the immigration and especially the deportation of residents of Mexican ancestry, see FRANCISCO BALDERRAMA & RAYMOND RODRIGUÉZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S* (2006). For an analysis of U.S. immigration policies focusing on the first third of the twentieth century, see MAI NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004).

³ See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁴ See U.S. CONST. amend. XXIV, § 1; *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

⁵ See Andrew Becker, *Observe and Deport*, *MOTHER JONES*, Apr. 23, 2009, <http://www.motherjones.com/politics/2009/04/observe-and-deport> (quoting Rep. Zoe Lofgren (D-Cal.) as saying: “There’s no jurisdiction for the government to arrest or detain, or let alone deport, citizens. That’s otherwise known as kidnapping.”). See generally *Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law of the H. Comm. on the Judiciary*, 110th Cong. (2008) [hereinafter *Rept.*], available at <http://judiciary.house.gov/hearings/printers/110th/40742.PDF>.

⁶ See *infra* Part II and Appendix.

⁷ Peter Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 *HARV. J.L. & PUB. POL’Y* 367 (1999) (discussing the legislative history of mandatory deportation and detention policies).

without attorneys or, in many cases, administrative hearings.⁸ It would be truly shocking if this did not result in the deportation of U.S. citizens.

Part II characterizes the rate at which the U.S. government has been unlawfully detaining and deporting its own citizens as aliens, as well as accusing and even convicting them as felons under immigration laws. Part III establishes criteria for evaluating whether the rate at which the government is deporting U.S. citizens is legally acceptable. Section A reviews Supreme Court opinions on the subject; section B compares the Department of Homeland Security's (DHS) law enforcement practices with those of the Internal Revenue Service (IRS)—also a large federal bureaucracy charged with administering and enforcing complex laws and regulations; and section C looks to the literature on false criminal convictions as well as the Supreme Court's view on confessions obtained while in custody prior to an arraignment. Part IV describes in detail the policies and procedures leading to U.S. citizens being detained and deported as aliens, including case studies of U.S. citizens who have been deported since 2006. Part V explains why some U.S. citizens may be rendered stateless permanently. Part VI reviews recent Ninth Circuit appellate court decisions adjudicating derived and acquired claims to U.S. citizenship. Finally, part VII offers recommendations designed to prevent the detention and deportation of U.S. citizens going forward. This last part draws on other precedents in administrative law to argue that citizenship rights are too precious to leave to the contingencies of the immigration court system and require assigned counsel and other protections to prevent deprivation of these rights in violation of the Fifth and Fourteenth Amendments.

This Article's empirical research focuses on the unlawful deportation of so-called aliens who at a later point were deemed U.S. citizens by an Executive Office of Immigration Review (EOIR) adjudicator,⁹ the federal government, or a federal judge.¹⁰ This avenue of

⁸ See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 20301(a), 108 Stat. 1823, 2023 (1994) (repealed 1996) (requiring partial per diem compensation for nonreviewable reclassifications of inmates as "illegal criminal aliens"); Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208, § 302(a), 110 Stat. 3009, 3009-579-84 (1996) (amending Immigration and Nationality Act § 235, 8 U.S.C. § 1225) (requiring expedited administrative removal without administrative appeal, and depriving aliens of a hearing before a Department of Justice attorney); *see also* Immigration and Nationality Act §§ 235, 236, 8 U.S.C. §§ 1225, 1226 (2006) (eliminating administrative and judicial review for aliens deemed inadmissible or putatively entered without inspection); Immigration and Nationality Act § 242, 8 U.S.C. § 1252 (2006) ("[N]o court shall have jurisdiction to review . . . any judgment regarding the granting of relief under [Immigration and Nationality Act] section[s] [212(h), 212(i), 240A, 240B, or 245] . . .").

⁹ See 8 C.F.R. § 1003.10 (2007) ("The immigration judges are attorneys whom the Attorney General appoints as administrative judges . . ."). The EOIR only

selectively follows the American Bar Association's Model Code of Judicial Conduct. For instance, the Model Code states: "A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice." Federal and other Article 3 judges regularly grant media interviews, especially to discuss procedural matters, such as an overburdened Supreme Court or sentencing guidelines. *See, e.g.*, Jeffrey Toobin, *After Stevens*, NEW YORKER, Mar. 22, 2010, at 39. The EOIR, however, prohibits adjudicators from granting interviews. *E.g.*, Telephone Interview with Elaine Komis, Public Affairs Officer, EOIR (Apr. 11, 2008). Likewise, courts in the judiciary are open to the public, but immigration courts are often de facto if not de jure closed to the public and hence the conduct of the adjudicators escapes public scrutiny. *See* Jacqueline Stevens, *Secret Courts Exploit Immigrants*, NATION, June 29, 2009, available at <http://www.thenation.com/article/secret-courts-exploit-immigrants>; Jacqueline Stevens, *Lawless Courts*, NATION, Nov. 8, 2010, available at <http://www.thenation.com/article/155497/lawless-courts>. The EOIR also invokes the immigration judges' status as administrators to shield them from inquiries and oversight to which Article III judges are subject, including pressuring the federal courts to omit naming the adjudicators whose decisions the federal judges overturn. *See* Marcia Coyle, *Bad Behavior by Judge Reverses Asylum Ruling*, NAT'L L.J., Jan. 26, 2010, available at <http://www.law.com/jsp/article.jsp?id=1202439486052> ("The Executive Office does make public disciplinary actions taken against [private] attorneys, but not judges. The office does not publish disciplinary actions taken against immigration judges 'because of Privacy Act protections,' said a spokeswoman."); *List of Currently Disciplined Practitioners*, U.S. DEP'T OF JUSTICE (Dec. 9, 2010), <http://www.justice.gov/eoir/profcond/chart.htm> (including practitioner names and locales); E-mail from Elaine Komis, Public Affairs Officer, EOIR, to author (Oct. 28, 2009) (on file with author) ("Discipline imposed upon federal employees is protected information under the Privacy Act."). An EOIR FOIA officer agreed to release redacted reports but nine months later the reports still have not been produced. Moreover, the statutory basis for protecting the privacy of adjudicators and not practitioners is not evident. *See* 5 U.S.C. § 552(2) (2006) ("Each agency, in accordance with published rules, shall make available for public inspection and copying (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases."). Thus, the government regularly releases non-redacted findings of misconduct by federal employees. *See* INSPECTOR GENERAL, DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (July 28, 2008), available at <http://www.justice.gov/oig/special/s0807/final.pdf>. The Privacy Act also might be read as deterring the release of confidential disciplinary decisions for private practitioners: "To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction, staff manual, instruction, or copies of records referred to in subparagraph (D)." *See* 5 U.S.C. § 552(2) (2006). The EOIR has invoked the fact that DHS attorneys and EOIR adjudicators are both employees of the federal government to prohibit EOIR adjudicators from filing misconduct complaints against DHS attorneys or

holding them in contempt. Interview with Adjudicator (Sept. 2009) (notes on file with author) (name withheld to avoid disciplinary actions). Due to the many discrepancies between Article III judges and Article II immigration judges, this Article refers to the latter as “adjudicators.” In November 2010, I reported in *The Nation* on various unlawful actions in immigration courts and called for “a new director for the EOIR, ideally someone who will run this law enforcement agency according to the rule of law.” Jacqueline Stevens, *Lawless Courts*, *NATION*, Nov. 8, 2010, available at <http://www.thenation.com/article/155497/lawless-courts>. In December 2010, the Department of Justice announced the replacement of acting director Thomas Snow by appointing Juan Osuna, then in the Department of Justice, as the agency’s acting director. On May 17, 2011, he was named the agency’s director. See Press Release, U.S. Dep’t of Justice, Attorney General Announces Appointment of Juan Osuna as Director for the Executive Office for Immigration Review (May 17, 2011), available at <http://www.justice.gov/opa/pr/2011/May/11-ag-636.html>; Press Release, U.S. Dep’t of Justice, Attorney General Eric Holder Announces Acting Director for Executive Office for Immigration Review (Dec. 23, 2010), available at <http://www.justice.gov/opa/pr/2010/December/10-ag-1477.html>.

¹⁰ The deportation of U.S. citizens is distinct from expatriation. When a U.S. citizen is detained, deported, or issued a deportation order but allowed to remain in the country because the target country refuses to issue travel documents, government agencies have made false statements that incorrectly change an individual’s legal status. The rights to citizenship and full due process protections remain intact, but the bearer of these rights is unrecognized as holding them. The only means for the government to terminate citizenship is through expatriation. See 8 U.S.C. § 1481 (2006); see also *Rivera v. Ashcroft*, 394 F.3d 1129, 1136–37 (9th Cir. 2004) (“The Constitution does not permit American citizenship to be so easily shed. Under the Fourteenth Amendment, all people born in the United States are citizens of the United States.”) (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898)). The citizenship defined by the Fourteenth Amendment is one “which a citizen keeps unless he voluntarily relinquishes it.” *Afroyim v. Rusk*, 387 U.S. 253, 262 (1967). This rule has its root in the fact that “[i]n our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship.” *Id.* at 257. In *Vance v. Terrazas*, 444 U.S. 252, 260 (1980), the Supreme Court explained that its holding in *Afroyim* precluding involuntary relinquishment of citizenship meant that a person losing citizenship must intend to do so, “whether the intent is expressed in words or is found as a fair inference from proved conduct.” The Court held that it was therefore not sufficient for the government to prove that, by making a formal declaration of allegiance to a foreign state, the defendant Terrazas had voluntarily committed an act designated by Congress as expatriating. *Terrazas*, 444 U.S. at 255, 261. For Terrazas to lose his U.S. citizenship, the government had to prove that, in swearing allegiance to Mexico, he “also intended to relinquish his citizenship.” *Id.* at 261. When U.S. citizens sign documents asserting their alienage to escape confinement or out of ignorance, this is not the same as expatriation, which, when initiated by the citizen, requires intentionally relinquishing citizenship.

inquiry is important for two reasons. First, the mistaken deprivation of citizenship rights effects a legal death,¹¹ the political equivalent of an execution or wrongful death at the hands of the police. Every time a U.S. citizen is treated at law as an alien, the government triggers a series of events that include a range of extremely serious harms, from the loss of political rights to brutal physical and emotional hardships lasting months or years. Left in these circumstances, U.S. citizens who previously had been housed and self-sufficient or cared for by their families have been found bathing in the Tijuana River and eating garbage;¹² drifting among Latin American shelters and obtaining nourishment and liquid from roadside soda cans in El Salvador;¹³ and, in a somewhat surreal reversal, eking out livings as day laborers in Mexico or telemarketing in the Dominican Republic.¹⁴ In other cases, a U.S. citizen may remain in the United States illicitly or in legal limbo, awaiting deportation to a country that will not issue travel papers.¹⁵ For the physically and mentally ill who find themselves disproportionately in this condition, these cases result in the loss of necessary medical and other social security benefits and may even lead to a wrongful criminal conviction and imprisonment.¹⁶

¹¹ See *Batista v. Ashcroft*, 270 F.3d 8, 14 (1st Cir. 2001) (“[T]he right in question—American citizenship—is one of the most precious imaginable.”) (quoting *Alexander v. INS*, 74 F.3d 367, 370 (1st Cir. 1996)).

¹² Jacqueline Stevens, *Thin ICE*, NATION, June 23, 2008, available at <http://www.thenation.com/article/thin-ice>.

¹³ Interview with Mark Lyttle, deported U.S. citizen, in Kennesaw, Ga. (June 22, 2009).

¹⁴ Telephone Interview with Mario Guerrero-Cruz, deported U.S. citizen wrongfully convicted of violating 8 U.S.C. § 1326 (May 26, 2009) (construction work); Interview with “William,” deported U.S. citizen by birth, in a Boston suburb (Dec. 17, 2010) (telemarketing). (Individuals from whom I did not obtain permission for their names to appear in this article are referred to by pseudonyms that appear first in quotation marks.) See also Lyttle Interview, *supra* note 13 (Lyttle picked up occasional odd jobs from a work circle near the Reynosa camp); *infra* Part IV.C.

¹⁵ Stevens, *supra* note 12. “Anna,” for example, had been declared legally incompetent. She said she was born in France, and that JFK was her father and the Pope was her father. Anna’s file also includes an application for a U.S. passport in which she claimed birth in Tehran, Iran. An EOIR adjudicator issued an order for her to be deported to France. France refused to issue travel papers because she is not a French citizen. *Id.*

¹⁶ See, e.g., Telephone Interviews with “Alonzo,” deported U.S. citizen (May and June 2009); trial record of Alonzo (1993–2007) (on file with author). Alonzo had acquired U.S. citizenship by birth but was incorrectly classified on admission to the United States as a legal permanent resident when he was four years old. When he was fourteen years old, he was wrongfully deprived of this status by Border Patrol agents in San Ysidro, who forced him to sign a statement abandoning his right to legal residence. After Alonzo did not avail himself of the opportunity to appeal this determination, he was deported. Alonzo has mental disabilities and other health problems he had managed with

In addition, the ease with which the Immigration and Customs Enforcement agency (ICE)¹⁷ is deporting U.S. citizens underlines endemic problems with the country's immigration laws and their enforcement. This has an impact not only on noncitizens, but also on the U.S. citizens who are their spouses, children, parents, siblings, friends, co-workers, and neighbors.¹⁸ The Supreme Court has granted broad discretion to Congress and administrative agencies implementing immigration policies,¹⁹ but affirmed due process rights for citizens held as enemy combatants.²⁰ At the same time, however, federal judges have

state assistance. However, after he returned to the United States, these were no longer available to him due to his lack of legal status. He was not able to survive without the social services he had received as a legal resident and pled guilty to a burglary he did not commit so he could access a toilet twenty-four hours per day. He said of living on the streets, "It was too humiliating to have diarrhea and have to go into a McDonalds." Alonzo realized he was a U.S. citizen because a cellmate born in Germany had the same kinship status as Alonzo (born abroad to U.S.-born father married to his mother), but the immigration attorney Alonzo's family hired proved incompetent. Two years into his sentence, Alonzo's defense attorneys had filed the relevant documents proving his innocence, including evidence from a 911 recording, and arranged a hearing for the judge to overturn the conviction. Alonzo's courtroom outburst—for the purpose of remaining in prison—dissuaded the judge, and Alonzo served the entirety of a six-year sentence. In narrating these events, Alonzo repeatedly attempted to exonerate the police, criminal prosecutor, and judge for his false confession and prison time: "It's all Immigration's fault; they're the ones who did this." After serving his sentence, Alonzo was deported again, arrested for illegal reentry, and imprisoned awaiting trial. Acting without an immigration attorney, he finally obtained a certificate of U.S. citizenship in 2007. This account sounds illogical and strange, but the documents in Alonzo's criminal file on PACER confirm his narrative, one that reflects the constraints of U.S. citizens with limited internal and external resources and profiled as noncitizens. It is a testament to Alonzo's fortitude that he persevered and obtained his citizenship rights.

¹⁷ ICE is an agency under the DHS. It was created to take on the law enforcement functions of its predecessor, the Immigration and Naturalization Service, which was housed in the Department of Justice until March 1, 2003. U.S. DEP'T OF HOMELAND SECURITY, HISTORY: WHO BECAME PART OF THE DEPARTMENT?, http://www.dhs.gov/xabout/history/editorial_0133.shtm (last modified April 11, 2008).

¹⁸ See *infra* Table 4.

¹⁹ See generally James M. Czaplak, *Removal of Judicial Review Under the Illegal Immigration Reform and Immigrant Responsibility Act: The Different Interpretations of 8 U.S.C. 1252(b)(3)(B)*, 38 SUFFOLK U. L. REV. 603 (2005).

²⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507, 508 (2004) (affirming that even assertions of national security may not trump U.S. citizens' due process rights: "[D]ue process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker"). Those being held as enemy combatants have more due process rights than U.S. citizens held by ICE. The absence of full due process protections in deportation proceedings follows from their being

episodically chastised these same agencies, including ICE and the immigration courts, for systematically abusing this authority.²¹ That U.S. citizens, for whom the Constitution always provides full due process rights, are being unlawfully detained, deported, and imprisoned as a result of the low due process protections provided de jure and de facto to those in ICE custody indicates profound systemic flaws in this country's immigration laws and their enforcement.

The U.S. Constitution's Fifth and Fourteenth Amendments require the government to follow due process in encounters with U.S. citizens. The Court, however, does not always apply this standard to noncitizens, and it has withheld the due process protections for those subject to immigration and citizenship laws that it applies to those in criminal

administrated under civil and not criminal law. *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581 (1889); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 647; *see also* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889 (2000) (contending that deportation of criminal aliens is a punishment and should be adjudicated according to rules from criminal, not civil, law). For other decisions limiting due process rights for immigration proceedings due to their civil nature, *see* Peter Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 290 n.9 (2008); Allison Wexler, *The Murky Depths of the Entry Fiction Doctrine: The Plight of Inadmissible Aliens Post-Zadvydas*, 25 CARDOZO L. REV. 2029, 2037–38 nn.57–63, 2053–55 (2004). Wexler highlights the ambiguity of *Zadvydas*, in particular how U.S. Courts of Appeals vary in how they apply the precedent to non-resident aliens. For a review of key decisions proscribing rights in immigration hearings, *see* Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990). Markowitz points out decisions that, even in light of the plenary prerogatives afforded Congress, recognize due process rights for legal permanent residents in particular, and argues for heightened due process protections for legal permanent residents, as opposed to immigrants who were never admitted into the country. The problem with this analysis resembles the problem with parsing the rights of immigrants from citizens: the initial classification may be precisely what is at issue, and hence this bifurcated approach may allow ICE and CBP agents to treat as new entrants those who have been legal residents or U.S. citizens.

²¹ Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, <http://www.nytimes.com/2005/12/26/national/26immigration.html>. In a widely quoted decision, Republican-appointed federal judge Richard Posner wrote of EOIR adjudicators: "[T]he adjudication of cases at the administrative level has fallen below the minimum standards of legal justice." *Benslimane v. Gonzalez*, 430 F.3d 828, 830 (7th Cir. 2005).

proceedings,²² resulting in not only the detention and deportation of U.S. citizens, but even their permanent banishment.²³ This occurs because of initially incorrect assignments of alienage to U.S. citizens in regulations, in laws, and by law enforcement agents. For example, the regulation for issuing an Expedited Removal Order, 8 C.F.R. § 235.3(b)(5), states:

When an alien whose status has not been verified but who is claiming under oath or under penalty of perjury to be a lawful permanent resident, refugee, asylee, or U.S. citizen is ordered removed pursuant to section 235(b)(1) of the Act, the case will be referred to an immigration judge for review of the expedited removal

²² There are three rationales for the disparity between due process standards for immigration and citizenship proceedings and those for criminal proceedings. One is that immigration proceedings are civil; since the government is not using its authority for punishment, individuals require fewer protections, a position that holds for other administrative proceedings as well. *See* *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 1043 (1984) (5-4 decision holding that an illegal search does not invalidate a deportation order because “protections that apply in the context of a criminal trial do not apply in a deportation hearing”); the majority premises its decision on an empirical claim that is now untrue, namely that “only a very small percentage of arrests of aliens are intended or expected to lead to criminal prosecutions”). In the last few years, immigration crimes premised on administratively-ordered deportations comprise the plurality of federal prosecutions, which are illegal reentry charges. *See* Transactional Records Access Clearinghouse, *FY 2009 Federal Prosecutions Sharply Higher* (Dec. 21, 2009), <http://trac.syr.edu/tracreports/crim/223>. For other precedents, see Markowitz, *supra* note 20, at 290 n.9. A second rationale is that aliens at the border do not have due process protections. *See* *Zadvydas v. United States*, 533 U.S. 678, 693 (2001) (“The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.”); *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (despite nine years’ presence in the United States, an ‘excluded’ alien ‘was still in theory of law at the boundary line and had gained no foothold in the United States”). Third, the Supreme Court has invoked Congress’ plenary powers over citizenship and immigration. *See* *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) (holding that while aliens in the United States have due process rights, Congress may limit the substance of these in ways they may not for U.S. citizens: “In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government’s power to regulate the conduct of its own citizenry. The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is ‘invidious’”); *see also* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). *But see* *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that because children did not choose their status as undocumented aliens, discrimination against them based on place of origin violates the Fourteenth Amendment).

²³ *See infra* Part V.

order If the immigration judge determines that the alien . . . is a U.S. citizen . . . the immigration judge will terminate proceedings and vacate the expedited removal order.²⁴

The regulation assumes a fact yet to be determined, that individuals claiming to be U.S. citizens are aliens, i.e., “*an alien whose status has not been verified.*” The so-called alien may turn out to be a U.S. citizen, and yet an alien who is a U.S. citizen is logically and legally impossible. More accurate language would refer to an “individual.” The regulation uses different and absurd wording to avoid the legal implications of acknowledging that some of those detained pending administrative hearings that may take months or years prior to a final determination may be U.S. citizens, a situation ICE acknowledges is unlawful.²⁵

In addition to the self-contradictory language of 8 C.F.R. § 235.3(b)(5), the statutes on false personation of U.S. citizens, 18 U.S.C. § 911,²⁶ and regulation of inadmissible aliens, 8 U.S.C. § 1182,²⁷ weaken if not altogether nullify 8 C.F.R. § 235.3(b)(5). Law enforcement agents confronting people asserting U.S. citizenship are authorized under 8 C.F.R. § 235.3(b)(5) to refer them to an immigration court,²⁸ under 8 U.S.C. § 1182 to allow them to enter the United States, and under 18 U.S.C. § 911 to arrest them for the felony of falsely personating a U.S.

²⁴ Authorized by 8 U.S.C. § 1228, expedited review orders mean that anyone can be removed on the authority of an ICE agent, without a hearing before an immigration judge. The grant of executive authority without judicial review is premised on certain fact patterns recorded on a local, state, or federal arrest record, including the one produced by DHS, e.g., criminal convictions or immigration status, that may be mistaken or even falsified; the absence of review means no legal venue is available for correcting ICE errors.

²⁵ See *Rept.*, *supra* note 5 (statement of ICE: “ICE bears the burden to prove that an individual is an alien. See 8 C.F.R. §1240.8(c). If the government cannot prove the individual is an alien, the individual may not be detained and removal proceedings may not be initiated.”).

²⁶ 18 U.S.C. § 911 (2006) (“Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years, or both.”).

²⁷ 8 U.S.C. § 1182(a)(6)(C)(ii)(II) (2006). § 1182(a)(6)(C)(ii) states that aliens are inadmissible for “falsely claiming citizenship” but includes the following exception: “In the case of an alien making a representation described in subclass (1), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.” *Id.*

²⁸ 8 C.F.R. § 235.3(b)(5)(iv) (2004); see *Rept.*, *supra* note 5.

citizen.²⁹ In 1961, Congress added language to the Aliens and Nationality Act, stating that a deportation order not judicially determined may be appealed by a criminal defendant, following arrest by local or state law enforcement for an immigration law violation premised on a previously recorded infraction, e.g., presence in the United States in violation of a removal order.³⁰ The 1996 Illegal Immigration Reform and Immigrant Responsibility Act repealed this,³¹ although in the last few years and episodically before that the Ninth Circuit has ruled that eliminating the right of judicial review violates the Due Process Clause.³² The overall effect of these laws and their implementation not only deprives U.S. citizens of their due process rights, but also subjects them to cruel and unusual punishments for which they committed no

²⁹ See *supra* notes 26–28.

³⁰ *United States v. Mendoza-Lopez*, 481 U.S. 828, 834 n.7 (1987) (indicating that 8 U.S.C. § 1105a(a)(6) permitted individuals to appeal a non-judicial deportation order under 8 U.S.C. § 1252(e) (local and state law enforcement of immigration violations)). However, local and state law enforcement officials may and do charge individuals for violating 8 U.S.C. § 1326 (2006). Deference to Congressional authority in immigration matters notwithstanding, it would seem to raise due process questions if individuals, especially U.S. citizens, may have access to an adjudicative body for challenging an administrative order if arrested for the same crime by one branch of government (non-DHS law enforcement officers) and not another.

³¹ INA §§ 235 and 236, 8 U.S.C. §§ 1225, 1226 (2006), eliminate any administrative or judicial review for aliens deemed inadmissible or who entered without inspection, but of course the absence of any process for adjudicating challenges to these orders means no oversight and hence misclassifications. INA § 242 states: “no court shall have jurisdiction to review any judgment regarding the granting of relief under section [212(h), 212(i), 240A, 240B, or 245].” 8 U.S.C. § 1252(a)(2)(B) (2006).

³² *United States v. Gonzalez-Valerio*, 342 F.3d 1051, 1054 (9th Cir. 2003) (stating that the immigration judge’s duty to inform an alien of his eligibility for relief is mandatory, and the failure to do so constitutes a violation of the alien’s due process rights); *United States v. Francisco Chipres-Madriz*, No. CR 09-00676, slip op. (N.D. Cal. Jan. 28, 2010) (referencing Ninth Circuit opinions as early as 2000 affirming the Constitutional prerogative to challenge, on due process grounds, deportation orders triggering criminal arrests). Section V of this Article discusses citizenship cases in which Ninth Circuit judges ruled otherwise. See, e.g., *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 928–29 (9th Cir. 2005) (noting that generally, federal district courts lack the power to review removal orders). Federal judges are generally reluctant to review deportation orders, including when a case is pending review and the underlying claim is U.S. citizenship. See *Johnson v. Whitehead*, No. 09-1981, slip op. (4th Cir. Oct. 9, 2009) (“Upon consideration of the submissions relative to the motion to hold this case in abeyance pending the ruling by the Board of Immigration Appeals on David Johnson’s appeal of an order of removal, the Court grants the motion.”); *Johnson v. Whitehead*, No. PJM-08-187, slip op. (D. Md. May 14, 2009).

underlying crime.³³ The Supreme Court has recognized Congress' broad plenary powers to regulate immigration, but the Court has never authorized Congress or the Executive Branch to deprive U.S. citizens of their due process rights, effectively rendering them stateless. This Article suggests that only by affording so-called aliens the rights of U.S. citizens is it possible to ensure that U.S. citizens receive the full protections of the Fifth and Fourteenth Amendments.³⁴

II. DATA ON ICE DETENTION AND DEPORTATION OF U.S. CITIZENS

The federal government claims not to maintain records of U.S. citizens ICE has detained or deported.³⁵ Each time the media reports that ICE detained or deported a U.S. citizen, an ICE public affairs spokesperson refuses to comment on the particular case,³⁶ ignores the

³³ See Kanstroom, *supra* note 20 (discussing Congressional debate on whether law authorizing a "punishment" of permanent banishment is too harsh); *Briseno v. INS*, 192 F.3d 1320, 1323 (9th Cir. 1999) ("The BIA's denial of discretionary relief did not violate Briseno's rights under the Eighth Amendment because deportation is not criminal punishment."); see also Leo Zaibert, *Uprootedness as (Cruel and Unusual) Punishment*, 11 NEW CRIM. L. R. 384, 402 ("The Supreme Court of the United States has declared denationalization to be so cruel as to be illegal, and there exists no principled, reasonable way to distinguish the cruelty that denationalization brings to its citizens from the cruelty that deportation brings to some noncitizens. The United States, however, continues to remain indifferent to the cruel treatment that it inflicts on throngs of human beings.").

³⁴ Sara Martin, *Postcards from the Border: A Result-Oriented Analysis of Immigration Reform Under the AEDPA and IIRIRA*, 19 B.C. THIRD WORLD L.J. 683, 705 (1999) (noting that the Ninth Circuit has allowed for a habeas corpus review of deportation orders in federal court when the appellee had raised "substantial constitutional questions") (citing *American-Arab Anti-Discrimination Comm. v. Reno*, 119 F.3d 1367 (9th Cir. 1997), *vacated*, 170 F.3d 1264 (1999)). *But see Flores-Torres v. Mukasey*, 548 F.3d 708, 712 (9th Cir. 2008). In *Flores-Torres*, the district court, claiming it lacked jurisdiction, had refused to hear a habeas petition challenging an immigration detention. The Ninth Circuit ordered the district court to hear the petition on the grounds that the petitioner, who had been detained by ICE for over four years, had a "non-frivolous claim of citizenship." On second remand, the district court found that the petitioner was a U.S. citizen. See *infra* Part VI.

³⁵ Telephone Interviews with Brandon Alvarez-Montgomery, Public Affairs Officer, ICE (2008); Telephone Interviews with Virginia Kice, Public Affairs Officer, ICE (2008); Telephone Interviews with Barbara Gonzalez, Public Affairs Officer, ICE (2009).

³⁶ See Robert Zullo, *Despite Citizenship Claims, Woman Shipped to Honduras*, DAILY COMET (La.), June 14, 2009, <http://www.dailycomet.com/article/20090614/ARTICLES/906141011?Title=Despite-citizenship-claims-woman-shipped-to-Honduras>.

evidence on hand and denies the incident occurred,³⁷ or responds as though the example at hand is a freakish fluke among ICE's entire caseload of millions.³⁸ A 2008 survey of private immigration attorneys produced evidence falsifying ICE's position. Of the fifteen attorneys from the Department of Justice's list of *pro bono* attorneys in southern California³⁹ who were randomly selected and interviewed by telephone, seven reported representing one to four U.S. citizens who had been detained in the last three years.⁴⁰ Furthermore, ICE memoranda issued since 2008 suggest that U.S. citizens are especially likely to be unlawfully held by ICE as a result of so-called 287(g) programs.⁴¹ These

³⁷ Andrew Becker & Patrick McDonnell, *U.S. Citizens Caught Up in Immigration Sweeps*, L.A. TIMES, Apr. 9, 2009 (quoting Richard Rocha, ICE Spokesperson, who said "ICE does not detain U.S. citizens"); Gonzales, *supra* note 35 (claiming "ICE never detains U.S. citizens"). Staff questions following a Congressional hearing, which included testimony by U.S. citizens arrested and detained by ICE, triggered a similar denial: "Question: Does detaining one of our witnesses Mr. Mike Graves, and hundreds of his co-workers in the Swift plant in Marshalltown, Iowa for eight hours constitute a 'brief' period? Response: ICE is unaware of any instances where United States citizens or lawful permanent residents were detained for eight hours during the worksite enforcement operation at the Swift & Company plant in Marshalltown, Iowa." *Rept.*, *supra* note 5, at 130–31. The Committee had heard extensive, first-hand accounts on and by U.S. citizens detained by ICE, including from James Brosnahan, Marie Justeen Mancha, Michael Graves, Kara Hartzler, and Rachel Rosenbloom. *Rept.*, *supra* note 5, at 30–78. In its follow-up written response to a question asking how often ICE had detained U.S. citizens, ICE stated: "ICE does not keep track of how many U.S. citizens have been detained." *Rept.*, *supra* note 5, at 139. If ICE does not track the number of U.S. citizens it detains, then public affairs officers who deny this occurs are demonstrably generating propaganda, rather than reporting on government data.

³⁸ Stevens, *supra* note 12.

³⁹ *Free Legal Services Providers—California*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/eoir/probono/freelglchtCA.htm> (last visited Jan. 22, 2011).

⁴⁰ Stevens, *supra* note 12.

⁴¹ See Memorandum from James Hayes, Jr., Director, ICE, to Field Officer Directors on Superseding Guidance on Reporting and Investigating Claims to United States Citizenship (Nov. 6, 2008) [hereinafter Hayes Memo II] (on file with author) ("In the course of exercising authority under section 287g of the Immigration and Nationality Act §1357D DRO officers may encounter individuals who either assert claims to U.S. citizenship or may be unsure of their citizenship. Prior to making a warrantless arrest of such an individual DRO officers must ensure s/he has reason to believe the individual is in the United States in violation of a law or regulation governing the exclusion, expulsion or removal of aliens. Note 1: Some U.S. courts have equated the 'reason to believe' standard found in 8 U.S.C. §1357(a)(2) with a 'probable cause' standard. See *United States v. Cantu* 519 F.2d 494 (7th Cir. 1975), *cert. denied*, 423 U.S. 1035 (1975); see also *Babula v. INS*, 665 F.3d 293 (3rd Cir. 1981); *Au Yi Lou v. INS*, 445 F.2d 217 (D.C. Cir. 1971), *cert. denied* 404 U.S. 864

memoranda, produced through requests filed under the Freedom of Information Act (FOIA), describe procedures law enforcement agents are supposed to follow when arresting people who assert U.S. citizenship.⁴² They had been designated “Law Enforcement Sensitive,” a classification used to prohibit their dissemination to the media and attorneys.⁴³

The government is not the only source of information on deported and detained U.S. citizens. The data below come from case studies of U.S. citizens who have been detained or deported, as well as a survey of files compiled by the country’s largest legal orientation program (LOP).⁴⁴ The additional information on thirty-two cases of U.S. citizens who were deported and the 160 U.S. citizens who were detained as aliens comes from thousands of pages of private and public personal legal documents, court papers, and judicial decisions, as well as interviews with prison guards, jail guards, probation officers, ICE agents, ICE public affairs officers, EOIR staff at immigration courts, EOIR public affairs officials in Washington, D.C., immigration court observers, privately contracted guards at immigration courts, private immigration attorneys, immigration attorneys at federally contracted

(1971).”). *See also* Memorandum from John Morton, Assistant Sec’y, ICE, to Field Office Directors, Special Agents in Charge, and Chief Counsels on Superseding Guidance on Reporting and Investigating Claims to United States Citizenship (Nov. 19, 2009) [hereinafter Morton Memo], available at <http://centerforinvestigativereporting.org/files/ICEcitizenmemo.pdf>; Memorandum from James Hayes, Jr., Acting Director, ICE, to Field Office Directors on Superseding Guidance on Reporting and Investigation of Claims to United States Citizenship (July 18, 2008) [hereinafter Hayes Memo I] (on file with author). Materials obtained through FOIA Production No. ICE.10.0808.000003 (Dec. 29, 2009).

⁴² I received three memoranda in response to two requests under the FOIA in 2009. *See supra*, note 41.

⁴³ Hayes Memo I and Hayes Memo II are stamped “LAW ENFORCEMENT SENSITIVE FOR OFFICIAL USE ONLY.” Hayes Memo II was distributed on July 18, 2008 from “DRO Taskings” with an e-mail to ICE agent recipients, and states that the Memo “is not to be released to the public or other personnel who do not have a valid ‘need-to-know’ without prior approval of an authorized DHS official. **No portion of this report should be furnished to the media, either in written or verbal form.**” *See supra*, note 41.

⁴⁴ *See* Vera Institute for Justice, *Center on Immigration and Justice: Partners*, <http://www.vera.org/centers/73/center-immigration-and-justice-partners> (last visited Jan. 22, 2011). LOP practitioners generally do not appear in immigration court on behalf of the respondents, but provide workshops in the detention centers, brief consultations, and, in some cases, legal support, e.g., calling family members and procuring legal documents. Interviews with LOP attorneys in Atlanta, Boulder, Florence, and EOIR staff (2008–2010) (on file with author); *see also* Exec. Office for Immigration Review, *The EOIR Legal Orientation and Pro Bono Program*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/eoir/probono/probono.htm> (last visited Jan. 22, 2011).

LOPs, federal public defenders, attorneys at impact litigation clinics, attorneys at nonprofit immigration clinics, State Department legal staff in Washington, D.C., State Department consular services staff in Honduras and Guatemala, Honduran immigration agents in San Pedro Sula and Tegucigalpa, Honduras, employees at state vital statistics offices, Mexican citizens in refugee camps in Reynosa, Mexico, who were unlawfully held by ICE and illegally deported, U.S. citizens who were detained or deported, and relatives of U.S. citizens who were detained or deported.⁴⁵ The penultimate section reviews several case studies at length to demonstrate the bureaucratic routines through which ICE and federal prosecutors have been systematically and unlawfully prosecuting—and even persecuting—U.S. citizens.⁴⁶

A. FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT DATA

Several large immigrant rights centers maintain case files recording the legal status of individuals ICE detains pursuant to their deportation. The largest is the Florence Immigrant and Refugee Rights Project (FIRRP). FIRRP attorneys run an LOP for detention centers in southern Arizona, an area that in 2006–2008 housed about ten percent of the country's detainees.⁴⁷ Between March 23 and March 25, 2009, I tracked data on successful U.S. citizenship claims from among over two thousand of FIRRP's detainee files. These files are for individuals held by ICE at the Eloy Detention Center, the Florence Service Processing Center, and nearby jails from which ICE leases space.⁴⁸ The Appendix provides information about the FIRRP files, how I tracked their data, and the extent to which these findings are representative of U.S. citizens in ICE custody nationwide.⁴⁹

⁴⁵ All non-public materials cited in this article are on file with author.

⁴⁶ See *infra*, Part IV (describing unsuccessful ICE appeals of EOIR adjudicator decisions terminating deportation proceedings on grounds of U.S. citizenship).

⁴⁷ *Rept., supra* note 5, at 40 (testimony of Kara Hartzler, Att'y, Florence Immigrant and Refugee Rights Project).

⁴⁸ The Eloy Detention Center is owned by the Corrections Corporation of America, and the Florence Processing Center is owned by the federal government. The "service processing" center nomenclature derives from when these facilities were established under the auspices of the ICE predecessor agency, the Immigration and Naturalization Service. E-mail from Vincent Picard, Public Affairs Officer, ICE, to author (Nov. 17, 2009) (on file with author).

⁴⁹ Special thanks to FIRRP's staff and especially Legal Director Kara Hartzler. Ms. Hartzler's congressional testimony and her interviews have been invaluable to my research. Ms. Hartzler has also provided extensive information on additional cases of detainees who appeared to have valid claims to U.S. citizenship but who were nonetheless deported. These cases do not appear in the FIRRP tables in this Article but helped inform my understanding of how U.S. citizens might be deported.

The FIRRP tables below do not include the detainees who had claims to U.S. citizenship the attorneys thought valid, but who were nonetheless deported. Most of the individuals who were deported despite asserting seemingly valid claims to U.S. citizenship signed false sworn statements indicating they were aliens, and had no legal claim to remain in the United States. In two cases, the respondents had copious documentation of their U.S. citizenship, but EOIR adjudicators deemed the evidence insufficient.⁵⁰

The results in the tables below show that of the 6,775 detainees in the Eloy Detention Center meeting with FIRRP attorneys between 2006 and 2008, and the 1,252 detainees meeting with FIRRP attorneys from other facilities in the area in 2008, an EOIR adjudicator decided that eighty-two (one percent) could not be deported because the detainees were U.S. citizens.⁵¹ Among the sixty-five U.S. citizens by birth or by automatic operation of law⁵² held at Eloy, twenty-eight had acquired citizenship,⁵³ thirty had derived citizenship,⁵⁴ and four were citizens by birth in the United States.

Table 1
U.S. Citizens as Percent of All FIRRP Detainee Files

Files by Detainee Location and Year	Total Number of FIRRP Detainee Files	Cases Terminated Due to U.S. Citizenship
Eloy 2006–2008	6,775	65
Florence 2008	1,252	17
Combined	8,027	82 (1%)

⁵⁰ See Raymond's story, *infra* notes 223–26 and accompanying text. In a second case, "Humphrey" received a certificate of citizenship after his parents naturalized when he was four at a ceremony in the Phoenix federal building he specifically recalled for an EOIR adjudicator. The immigration agents and the judge failed to contact the U.S. Citizenship and Immigration Services ("USCIS"), and Humphrey was deported once in 2003 and once in 2005. Case documents are on file with author.

⁵¹ The EOIR collects and publishes data indicating respondents' countries of citizenship or nationality. However, the agency relies on the designations of the Department of Homeland Security, and not their own adjudicators, so the agency's official number of U.S. citizens in immigration courts is zero and hence inaccurate. Telephone Interview with Elaine Komis, Public Affairs Officer, EOIR (April 2009).

⁵² In other words, the cases here exclude naturalized citizens, individuals who typically enter the United States as legal residents and then achieve citizenship after they apply for this status and are approved. For a discussion on the criteria for derived and acquired U.S. citizenship, see *infra* Part III.A.

⁵³ See *infra* Table 3.

⁵⁴ *Id.*

Table 2

Time of U.S. Citizens Held In Captivity as Aliens by U.S. Government

	1 wk.	1 mo. < 3 mo.	3 mo. < 6 mo.	6 mo. < 1 yr.	1 yr. <	N/A	Total
Eloy	6	21	13	2	4	19	65
Florence	1	10	1	1	1	3	17

Table 3

Acquired, Derived, Born in United States (Eloy)

Acquired	28
Derived	30
Born in U.S.	4
Unknown	3
Total	65

*B. OTHER CHARACTERISTICS OF FIRRP DETAINEES**1. Criminal Background*

The sixty-five U.S. citizens detained at Eloy were there because of the mandatory criminal alien deportation provision of the federal 1994 Crime Bill, later incorporated into the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).⁵⁵ The underlying criminal offenses triggering the mandatory detention and deportation of noncitizens were largely drug-related,⁵⁶ the plurality marijuana-related.⁵⁷

⁵⁵ See 5 U.S.C. § 552(2). The initial paperwork generating an ICE interview with an inmate tended to be produced by a custodial assistant or other staff member at a jail or prison, some operating with an explicit Memorandum of Understanding delegating the assignment of immigration status to correctional institution staff. The staff typically send designations of foreign origin to the nearest ICE subfield office responsible for the Criminal Alien Program. For these cases, such information indicated that the inmate in state custody was a citizen of Mexico, although a few other countries were also listed, including Guatemala, Belize, and, in one case that gained national attention, Russia. See Marisa Taylor, *Immigration Officials Detaining, Deporting American Citizens*, MCCLATCHY PAPERS (Jan. 24, 2008), <http://www.mcclatchydc.com/2008/01/24/25392/immigration-officials-detaining.html>.

⁵⁶ Tabulation of underlying crimes on file with author.

⁵⁷ *Id.*

Of the eighty-two U.S. citizens in deportation proceedings, only four had notations on their files indicating convictions for violent crimes.⁵⁸

2. Family Ties Between Detainees and U.S. Citizens

In reviewing the 1,252 Florence files from 2008, I tracked the respondents' family ties to U.S. citizens. The prevalence of family ties between U.S. citizens and those who are in detention centers and then sent to Mexico reveals the extent to which the State Criminal Alien Assistance Program (SCAAP), incentivizing jails and prisons to report foreign inmates to ICE,⁵⁹ is causing substantial suffering for U.S. citizens. Such citizens are permanently deprived of the companionship and economic support of family members, a phenomenon I have documented through other case studies.⁶⁰

⁵⁸ *Id.* These included one case each of attempted murder, manslaughter, assault in jail, and aggravated assault. The information in some of the files was incomplete. There may have been more cases of violent crimes, but I do not believe they would change the overall picture of the U.S. citizen detainee population as one profiled for deportation based on skin color, ethnicity, last name, and foreign birth, and not the seriousness of their crimes.

⁵⁹ See *infra* Part IV.C.

⁶⁰ Interviews conducted in 2009 with the U.S. citizen relatives of longtime U.S. residents who have been deported and are living in refugee camps along the Mexican border reveal tremendous grief and hardship resulting from the residents' banishment from their homes and families. Although all of the U.S. citizens whose files I read were in detention because of encounters with law enforcement, most of the non-U.S. citizens had no criminal record and were in detention centers because they had entered or remained in the country without documentation and could not pay the \$10,000 bond to remain free while awaiting their hearing in an immigration court. ICE data confirm this. The Criminal Alien Program accounted for 48% of ICE arrests in 2009, but 57% of those arrested were not criminals. See DORA SCHRIRO, DEP'T OF HOMELAND SECURITY, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 12–13 (2009), <http://documents.nytimes.com/immigration-detention-overview-and-recommendations>.

Table 4
 Detainees with U.S. Citizen Relative(s)⁶¹

	Children	Parent(s)	Sibling(s)	Spouse	2 or more
C (n = 78)	20	9	9	6	11
E (n = 20)	6	0	3	1	7
F (n = 35)	12	4	4	7	11
H-K (n = 64)	34	11	13	8	30
M (n = 101)	37	7	12	20	32
Total (n = 298)	109	31	41	42	91

The information in Table 4 is to document the impact of immigration law enforcement on U.S. citizens, not to suggest that these detainees are themselves U.S. citizens.⁶² When these individuals are deported, U.S. citizens are either permanently deprived of their spouses, parents, children, and siblings, or they must move to a foreign country.⁶³

C. NATIONAL DATA ON U.S. CITIZENS DETAINED AND DEPORTED

In addition to the eighty-two detainees whose U.S. citizenship was verified by an EOIR adjudicator in the Eloy and Florence immigration courts, I have recorded on an ad hoc basis more than eighty additional cases of individuals who were detained or deported since 2003 and who were determined to be U.S. citizens by an EOIR adjudicator, the federal government, a federal appellate judge, or a jury. I have also documented

⁶¹ The letters in the left column are the first letters of respondents' last names, the basis of my random selection of cases for this more detailed analysis from the Florence files. For further discussion, see Appendix.

⁶² An individual might have a close relative who is a U.S. citizen but has a different status for several reasons. These include amassing previous immigration or criminal violations, thereby precluding application for legal residency; a parent's naturalization when siblings were older and younger than eighteen; and applications for naturalization pending with USCIS.

⁶³ The shelters in Reynosa, Mexico include U.S.-born citizens who have followed deported loved ones. For example, Erica, age nineteen, was born in Edinburgh, Texas, but lives in Mexico with her fiancée, who was picked up by ICE while they were sharing a picnic dinner in a McAllen, Texas park. Erica described frequent ICE sweeps through their neighborhood and no discernible difference after Obama assumed the Presidency. Erica's mother is also a U.S.-born citizen and lives in Ciudad Rio Bravo just east of Reynosa with Erica's step-father, who also was deported. Interview with Erica, in Reynosa, Mexico (June 24, 2009).

data on individuals who have seemingly valid claims to U.S. citizenship but remain in detention or have been deported.⁶⁴

Table 5

Selected Non-FIRRP Cases Reviewed: Individuals Convicted of Immigration Crimes, Deported, or Detained as Aliens Determined to be U.S. Citizens by an EOIR adjudicator, Federal Agency, Federal Judge, or Jury

U.S. Citizens Convicted of 8 U.S.C. § 1326 ⁶⁵ or 18 U.S.C. § 911 Violation Since 2003	19
U.S. Citizens Deported/Returned Since 2003	32
U.S. Citizens in ICE Detention Since 2003 (Non-FIRRP)	73

⁶⁴ These cases were encountered through interviews with criminal and immigration attorneys, media reports, and the Lexis-Nexis database of Ninth Circuit appellate decisions reversing or remanding on grounds of U.S. citizenship from 2003 to 2008 convictions under 8 U.S.C. § 1326 and 18 U.S.C. § 911. Both of these crimes are predicated on alienage.

⁶⁵ Reentry of Removed Aliens, 8 U.S.C. § 1326 (2006) (criminally punishing “any alien who . . . has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter . . . enters, attempts to enter, or is at any time found in, the United States . . .”). Those convicted are subject to prison sentences of up to two years in general, up to ten years if they were removed after being convicted of one felony or three of more misdemeanors involving drugs, and up to twenty years if they were removed after being convicted of an aggravated felony. *Id.* § 1326(a), (b)(1), (b)(2).

Table 6
Reasons Deported U.S. Citizens Sign Removal Orders

Leave Detention w/o Hearing (Escape Confinement) ⁶⁶	21
Leave Detention After Hearing and Adjudicator Orders Removal (Appeal Waived)	10
ICE or CBP Bullying to Sign Removal Order (Forceful Intimidation)	8
ICE or CBP Threat of Criminal Arrest or Indefinite Detention	6
Initially Unaware of U.S. Citizenship	5
Unknown	3
Mental Illness Induces Assertions of Foreign Birth ⁶⁷	2
Total Individuals*	32
Known Events	52
Total Events*	55

*The total number of events associated with deportation is higher than the number of individuals because some U.S. citizens were deported more than once.

Unlike the FIRR data, Tables 5 and 6 do not reveal the rate at which ICE is detaining and deporting U.S. citizens, or the number of U.S. citizens wrongfully convicted of immigration crimes. These cases and their respective legal documents, court records, interviews, and third party accounts are reviewed because they offer detailed information on the procedures resulting in the classification of U.S. citizens as aliens. Table 6 shows that of the fifty-two known events leading to the deportation of a U.S. citizen, eighty-six percent resulted from threats by ICE or Customs and Border Protection (CBP) agents (n = 8), or coercion from the threat of indefinite detention (n = 37).⁶⁸ The balance resulted from detainees who were unaware of their citizenship (n = 5) or had a

⁶⁶ The experiences of people in this category could also be classified as capitulation to ICE bullying. Many of these U.S. citizens were classified as Entering Without Inspection and given administrative removal orders, both of which specifically preclude an EOIR hearing. The citizens' signatures on these orders result from following ICE agent instructions and from ICE agents' failure to provide them an opportunity to sign a sworn statement indicating U.S. citizenship, which would trigger either their release or at least a hearing. *See infra* Part IV.

⁶⁷ *See* discussion *infra* note 69.

⁶⁸ Twenty-one U.S. citizens signed statements admitting they were not U.S. citizens to leave custody without a hearing, and an additional ten signed these statements after an EOIR adjudicator ordered removal and the respondent agreed to waive appeal.

mental illness that led them to initiate false claims of alienage ($n = 2$).⁶⁹ That the actions resulting in the deportation of U.S. citizens are so consistent means the deportations are not the result of random errors.⁷⁰ Under current conditions, then, U.S. citizens will be deported at a persistent (even if unknowable) rate.

The Fifth Amendment states, “No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law”⁷¹ ICE has no authority over U.S. citizens.⁷² Thus, the agency’s detention and even banishment of U.S. citizens, depriving them of their liberty and property, and possibly their lives,⁷³ violate the Due Process Clause. Not only false statements of alienage made under the duress of confinement and threats by law enforcement agents, but also statements of alienage based on errors by the federal government—e.g., initially classifying U.S. citizens as legal permanent residents—derive from laws or actions inconsistent with even the thinnest interpretation of procedural due process rights.⁷⁴

D. U.S. CITIZENS WRONGFULLY CLASSIFIED AS NON-U.S. CITIZENS

Tables 5 and 6 indicate that people who are U.S. citizens are being deported. However, individuals in ICE custody who are U.S. citizens but

⁶⁹ There were additional cases in which cognitive or psychological disabilities played a role in the deportations, but I did not count these as caused by mental illnesses because the underlying trigger for the deportations were not self-initiated false statements of alienage. The more common pattern in these additional cases involved individuals who might show less resistance to the coercion of ICE or CBP agents than people more mentally and psychologically competent. The causal role of their mental and psychological capacities, however, seems impossible to discern because about a third of the U.S. prison population is psychologically ill and because the pattern of deporting those without obvious signs of mental illness seems similar for most of the cases to the pattern of deporting those with obvious signs.

⁷⁰ If one person were deported because of illiteracy, another because the ICE agent was tired, and another because rain made the form hard to read, then there would be no discernible pattern. But when the same process appears across cases, as is the case in Table 6, and such events portrayed are inherent to immigration law, regulations, and their implementation, then it is necessary to infer that as long as these laws and practices exist, they will cause the deportation of U.S. citizens.

⁷¹ U.S. CONST. amend. V.

⁷² *Rept.*, *supra* note 5, at 15 (Testimony of Gary Mead, Deputy Director of Office of Detention and Removal Operations at ICE); Morton Memo, *supra* note 41, at 1 (“As a matter of law, ICE cannot assert its civil immigration enforcement authority to arrest and/or detain a USC.”).

⁷³ Mr. Lyttle was admitted on November 16, 2008, to a local Columbus, Georgia hospital during his incarceration at the Stewart Detention Center because of a suicide attempt from a drug overdose.

⁷⁴ *See infra* Part III.C.

have not had their claims legally recognized at first inspection are impossible to distinguish from noncitizens making false claims to U.S. citizenship. Indeed, once a U.S. citizen has been classified as an alien, it may be impossible to return to the United States to have the status corrected and hence the individual will appear in ICE ledger sheets as a deported alien, not a deported U.S. citizen. I estimate that in addition to the 1% of detainees whose claims to U.S. citizenship are affirmed by EOIR adjudicators, another .05% of those detained at the border or in an ICE facility who sign removal orders and are physically removed are U.S. citizens.⁷⁵

III. EVALUATING THE ACCEPTABLE RATE OF ICE MISCONDUCT

During 2008 congressional hearings on the detainment and deportation of U.S. citizens, Rep. Steve King (R-Iowa) said, “There is a huge human haystack of humanity that crosses our border every night that has piled up here in the United States To deal with all of that without a single mistake would be asking too much of a mortal.”⁷⁶ Is one mistake tolerable? Two? Two thousand? Since 2003, ICE has locked up over two million people.⁷⁷ If the FIRRP data hold across detention

⁷⁵ See *infra* Tables 5 and 6; see also CITY BAR JUSTICE CNTR., KNOW YOUR RIGHTS PROJECT: AN INNOVATIVE PRO BONO RESPONSE TO THE LACK OF COUNSEL FOR INDIGENT IMMIGRANT DETAINEES 9–11 (2009), http://www.nycbar.org/citybarjusticecenter/pdf/NYC_KnowYourRightsNov09.pdf (detailing evidence from 158 detainees interviewed in a survey by pro bono immigration attorneys in the Varick Detention Center, and revealing that eight percent had apparently meritorious claims to U.S. citizenship). The City Bar Justice Center study is also significant because it shows that U.S. citizenship claims make up thirty-nine percent of the total number of meritorious claims for relief. *Id.* at 11. The estimate of U.S. citizens who are actually deported is based on estimates by Kara Hartzler, who personally has observed U.S. citizens abandoning their claims and stipulating to alienage for the purpose of being released. Telephone Interview with Kara Hartzler, Att’y, Florence Immigrant and Refugee Rights Project (Apr. 1, 2008). The calculation is also based on interviews with U.S. citizens who have been and are presently in ICE custody (all seriously consider making false statements in order to be released), and a conservative assumption that the number of U.S. citizens agreeing to deportation will be fewer than those who remain and prevail but also higher than zero. For policy purposes, and for evaluating legal claims to U.S. citizenship made by those who have sworn statements attesting to alienage and who have been deported, the precise figure is less important than the fact that U.S. citizens demonstrably sign statements relinquishing claims to U.S. citizenship in accordance with standard ICE and Border Patrol operating procedures. See *infra* Part IV.B.

⁷⁶ See *Rept.*, *supra* note 5, at 3 (statement of Rep. Steve King).

⁷⁷ DHS statistics indicate a total of 2,093,329 individuals were confined under ICE authority between 2003 and 2009. See DEP’T OF HOMELAND SECURITY OFFICE OF IMMIGRATION STATISTICS, YEARBOOK OF IMMIGRATION ENFORCEMENT ACTIONS 2003, 148 (2004), <http://www.dhs.gov/xlibrary/assets/s>

centers and one percent of these occupants are U.S. citizens, then since 2003, ICE has incarcerated over 20,000 U.S. citizens, and deported thousands more. Are this rate and the absolute number of individuals affected politically and legally acceptable?

Later in the hearing, Rep. King asked this question of Kara Hartzler, a FIRR attorney: “I am curious about how you view this, [dealing] with this huge haystack of humanity The level that has been charged here for [ICE], this hundred percent, never fail, never-cross-the-line level that Mr. Brosnahan has laid out Do you think that could ever be reached practically? Or are we going to have exceptions no matter what we do?”⁷⁸ Hartzler replied, “I think that it is very, very difficult to ensure that no citizen is ever deported. But I think the point of my testimony would be that our current procedural safeguards are so lacking [that] the numbers I personally am seeing border on routine deportation and detention of US citizens.”⁷⁹ Is there an acceptable rate for the government to detain and deport U.S. citizens as an inextricable piece of immigration law enforcement? If so, what is it?

No scholarly literature presently focuses on the legal ethics of false positives in immigration cases, i.e., U.S. citizens falsely identified as noncitizens. However, the literature on wrongful convictions, that is, people convicted of crimes for which they are later legally exonerated, provides a relevant analogy for evaluating wrongful deportations,

tistics/yearbook/2003/2003ENF.pdf (231,500 locked up); MARY DOUGHERTY, DENISE WILSON & AMY WU, OFFICE OF IMMIGRATION STATISTICS, 2004 IMMIGRATION ENFORCEMENT ACTIONS ANN. REP. 1 (2005), <http://www.dhs.gov/xlibrary/assets/statistics/publications/AnnualReportEnforcement2004.pdf> (235,247 locked up); MARY DOUGHERTY, DENISE WILSON & AMY WU, OFFICE OF IMMIGRATION STATISTICS, 2005 IMMIGRATION ENFORCEMENT ACTIONS ANN. REP. 1 (2006), http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement_AR_05.pdf (238,000 locked up); DEP’T OF HOMELAND SECURITY OFFICE OF IMMIGRATION STATISTICS, 2006 IMMIGRATION ENFORCEMENT ACTIONS 1 (2008), http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_06.pdf (257,000 locked up); DEP’T OF HOMELAND SECURITY OFFICE OF IMMIGRATION STATISTICS, 2007 IMMIGRATION ENFORCEMENT ACTIONS 1 (2008), http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf (311,000 locked up); DEP’T OF HOMELAND SECURITY OFFICE OF IMMIGRATION STATISTICS, 2008 IMMIGRATION ENFORCEMENT ACTIONS 4 (2009), http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf (378,582 locked up); DEP’T OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL, IMMIGRATION AND CUSTOMS ENFORCEMENT POLICIES AND PROCEDURES RELATED TO DETAINEE TRANSFERS 1 (Nov. 2009), http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_10-13_Nov09.pdf (442,000 locked up).

⁷⁸ See *Rept.*, *supra* note 5, at 87.

⁷⁹ *Id.*

especially those based on an individual's sworn statement of alienage.⁸⁰ First, false confessions play a significant role in wrongful convictions,⁸¹ even though due process rules prevent their use in criminal cases when obtained under the conditions often used in deportation proceedings.⁸² Similarly, deportations of U.S. citizens are largely based on sworn statements stipulating to non-U.S. citizenship by indigent individuals who recently concluded a prison sentence and are incapable of obtaining assistance from attorneys or even family members,⁸³ statements that are demonstrably false. Second, the incentives for U.S. citizens to provide false confessions in deportation proceedings closely resemble those in criminal contexts: a desire to escape confinement by largely destitute young men who distrust the legal system and are recently released from jails or prisons.⁸⁴ Third, sworn statements made under conditions that would constitute egregious due process violations in criminal proceedings⁸⁵ are admitted regularly into evidence in immigration proceedings,⁸⁶ and later relied upon in subsequent criminal proceedings

⁸⁰ Thanks to Jennifer Mnookin for introducing me to this literature.

⁸¹ See, e.g., Steven Drizin & Richard Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 904 (2004) (citing study of 28 wrongful convictions which attributed 18% of the convictions to false confessions); Saul Kassim, *Confession Evidence: Commonsense Myths and Misconceptions*, 35 CRIM. JUST. & BEHAV., 1309, 1309 (2008) ("Contrary to the widespread popular belief that normal people do not confess to crimes they did not commit, the pages of American history, reaching back to the Salem witch trials of 1692, betray large numbers of men and women who were wrongfully prosecuted, convicted, imprisoned, and sometimes sentenced to death, on the basis of false confessions.")

⁸² See *Corley v. United States*, 129 S. Ct. 1558 (2009).

⁸³ See *supra* Table 6.

⁸⁴ See, e.g., NINIA SIULC ET AL., VERA INSTITUTE OF JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM: LESSONS FROM THE LEGAL ORIENTATION PROGRAM 1 (2008), <http://www.vera.org/download?file=1780/LOP%2BEvaluation...final.pdf> (noting that approximately 84% of detainees between October 1, 2006 and September 30, 2007 with completed immigration court proceedings lacked legal representation).

⁸⁵ See *infra* Part III.D.

⁸⁶ "[A] copy of all documents (including proposed exhibits or applications) filed with or presented to the Immigration Judge shall be simultaneously served by the presenting party on the opposing party or parties. . . . A certification showing service on the opposing party or parties on a date certain shall accompany any filing with the Immigration Judge unless service is made on the record during the hearing. Any documents or applications not containing such certification will not be considered by the Immigration Judge unless service is made on the record during a hearing." 8 C.F.R. § 1003.32(a). However, EOIR adjudicators regularly hold hearings in which the detained pro se respondents' files contain no certificate of service for the arrest reports (completed I-213 forms containing the information for allegations used in deportation orders), and the adjudicator does not instruct the government to provide a copy during the hearing. (In 2009 and 2010, I observed numerous hearings conducted by

if U.S. citizens are prosecuted for illegal reentry or impersonation of a U.S. citizen.⁸⁷

The rate of wrongful convictions in criminal cases is estimated to range between 1% and 2%.⁸⁸ The rate experts find tolerable in criminal proceedings is less than half of one percent,⁸⁹ which is just a benchmark that recognizes the importance of punishment for deterring unlawful behavior. In other words, if we want to discourage lawbreaking and believe punishing offenders has deterrence value, then the state may need some very low level of demonstrably wrongful punishment to accomplish this objective.⁹⁰

The rate of wrongful convictions and the rate of ICE detaining U.S. citizens prior to their possible deportation appear to be roughly identical to the rate of wrongful convictions in criminal contexts. However, a 1% to 1.5% rate of wrongful apprehensions of U.S. citizens has a legal and political significance different from the rate of wrongful convictions in criminal prosecutions. More specifically, incentives for false criminal confessions and incentives for U.S. citizens agreeing to alienage are similar, but the law and consequences are different. First, the Supreme Court has endorsed a zero tolerance for banishing U.S. citizens as aliens, as well as for imprisoning them for years as aliens.⁹¹ Second, criminal defense attorneys and civil libertarians do not dispute that crime deterrence, especially of violent crimes, is desirable and may therefore have to accept a very low rate of wrongful, if mild, punishment as the consequence of law enforcement. The purpose and effects of the

William Cassidy and J. Daniel Pelletier in which respondents did not receive copies of evidence ICE attorneys submitted to EOIR adjudicators as the grounds for deportation. I also saw this in additional respondent files obtained under the FOIA.) *See infra* Part IV.A; *see also* e-mail from Daniel Kanstroom, Director of Boston College Post-Deportation Human Rights Project, to author (Jan. 19, 2010) (on file with author) (“The sad fact is that this sort of thing happens all the time with unrepresented people and even with represented ones if their lawyer is not careful and a real fighter. . . . I’ve seen lots of problems with I-213s: language problems, coercion, etc. and they are often full of mistakes in my experience, but Judges rely on the info contained in them all the time, especially with pro se respondents. This is another example of why competent counsel is so crucial.”).

⁸⁷ *See infra* notes 315, 326, 337 and accompanying text.

⁸⁸ Robert Ramsey & James Frank, *Wrongful Conviction: Perceptions of Criminal Justice Professionals Regarding the Frequency of Wrongful Conviction and the Extent of System Errors*, 53 *CRIME & DELINQ.* 436 (2007).

⁸⁹ *Id.*

⁹⁰ *Id.* at 443 (“In sum, innocent people will be convicted even when system actors properly do their jobs. All we can expect by improving the system of justice, therefore, is a reduction in—and not an eradication of—wrongful convictions.”).

⁹¹ *See infra* Part III.B.

country's immigration policy, on the other hand, do not invite such consensus.⁹² Third, the enforcement standards to preclude wrongful adverse judgments for an analogous civil agency, the IRS, are much stricter than those in immigration enforcement, even though the stakes are much lower. IRS proceedings may involve an adverse administrative judgment that might require litigation or a financial penalty, but immigration enforcement can result in the deprivation of one's citizenship rights. The consequences of the latter range from loss of government benefits⁹³ to statelessness⁹⁴ to torture in a Honduran jail.⁹⁵ Crucially, wrongful incarceration in violation of ICE procedures has continued unabated during the Obama administration. From November 2009 to March 2010, an email address providing ICE headquarters with reports of individuals in ICE custody asserting U.S. citizenship generated 4,000 pages of messages.⁹⁶ Exchanges occurring during two weeks in March 2010 reveal that agents were not initiating e-mail contact within twenty-four hours and holding people who appeared to produce probative evidence of U.S. citizenship for weeks and possibly longer.⁹⁷ This violates the ICE memorandum informing agents, "As a

⁹² See Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 415 (2006) (evaluating the consequences of excluding ex-offenders and noncitizens from political membership: "These significant costs seem to outweigh the uncertain benefits The costs become greater upon examining who is most often excluded. Both immigration and criminal law tend to exclude certain people of color and members of lower socioeconomic classes."); see also JACQUELINE STEVENS, *STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS* (2009), Introduction and Chapter 1 (2010) (undertaking cost and benefit analysis of birthright membership rules); Sara Martin, *Postcards from the Border: A Result-Oriented Analysis of Immigration Reform Under the AEDPA and IIRIRA*, 19 B.C. THIRD WORLD L.J. 683 (1999).

⁹³ See *infra* Part VI.A.

⁹⁴ Mark Lyttle, Johann Francis, and William were rendered stateless, a condition Mr. Francis and William both endured for ten years.

⁹⁵ See *supra* Part IV.C, pp. 57–59.

⁹⁶ Telephone Interview, Richard Stevens, ICE FOIA analyst, Apr. 21, 2009, referenced in cover letter for ICE FOIA Case Number 2010 FOIA 2918 (May 10, 2010).

⁹⁷ One hundred pages of e-mail traffic to an ICE e-mail address that ICE agents and attorneys are instructed to use when they encounter individuals who claim to be U.S. citizens, in accordance with the Morton Memorandum. See *supra* note 41, at 2. (The e-mails, which were obtained through a FOIA request, are on file with author.) For example, an e-mail sent to the mailbox in March of 2010 describes an ICE detainee who was held for two weeks prior to his first court appearance, despite his assertion of his father's U.S. citizenship. The body of the e-mail states, "Attached is a reporting memo for the above referenced case. This alien is detained in Salt Lake City, although he expects to post his \$10,000 bond." E-mail from Donald C. O'Hare to "OPLA USC Claims" and "USC CLAIMS DRO, copied to Steven M. Branch (Mar. 26, 2010, 11:08 a.m.) (on file with author)). The attached memorandum, which is directed to the Director

of Field Legal Operations for the Office of the Principal Legal Advisor, provides the following synopsis: “[Redacted] came into ICE custody in Utah on March 9, 2010. He was issued a Notice to Appear (“NTA”) after admitting to immigration agents that he had illegally entered the United States and was born in Mexico. Although he told agents that his father was a United States citizen, he stated he was unclear about when his father had resided in the United States and mentioned that his father had recently passed away in Mexico. [Redacted] also stated that his mother had no legal status in the United States. On March 24, 2010, at [redacted] first detained master calendar hearing, his attorney claimed that although [redacted] was born in Mexico, he had acquired citizenship from his United States citizen father based on the presence of the father in the United States. . . . The respondent’s attorney has indicated that his parents were married at the time the respondent was born, but no such proof of such marriage [in Mexico] has been provided to date. The respondent has provided copies of documents showing that his father performed seasonal work in the United States from 1968 to 1979. The respondent has also produced a document which shows his father had reportable taxable income for roughly ten years, between the years of 1980 to 2006. [Redacted] was encountered by immigration agents in a Utah jail after being convicted of misdemeanor aggravated battery due to his involvement in a bar fight where he hit another individual with a beer bottle. . . .”

This case includes several features typical of those I encountered: (1) the individual was in legal custody and thus could not obtain documents necessary to prove his U.S. citizenship; (2) his claims to U.S. citizenship were not heeded by the DHS until he appeared in immigration court and was represented by an attorney; (3) the March 25, 2010 ICE memorandum omits reference to any legal document to support its claim that the individual admitted to immigration agents that he had illegally entered the country; and (4) there may be some uncertainty on the part of the individual as to whether he is a US citizen, or he may have informed ICE of his US citizenship and the agents ignored his claims to this effect. Either scenario in (4) entails due process problems. ICE does not have legal authority over U.S. citizens, regardless of whether they are aware of their citizenship status. (This could be because of the government’s earlier misclassification or agents’ racist assumptions about the citizenship status of those who are of Mexican descent or brown skin.) At least one deportation officer in Arizona had never heard of the Morton Memorandum over two months after it was issued. See Jacqueline Stevens, *ICE Agents Lose Track of US Citizens in their Custody, and the Rules for Releasing Them*, STATES WITHOUT NATIONS BLOG (Feb. 8, 2010), <http://stateswithoutnations.blogspot.com/2010/02/ice-agents-lose-track-of-us-citizens-in.html> (“Can you send me a copy of what you were reading [the Morton memorandum, see note 41] so I can send it to litigation?” I asked if [ICE Officer S.] had misplaced his own copy or if he just had no idea what I was talking about. He said, “They come out with these new things every day.”) The only protection against this is an opportunity for anyone in ICE custody to meet immediately with assigned counsel. If an ICE deportation officer were in fact aware of a claim to US citizenship and ignored it, then this violates the Morton Memorandum. See Morton Memo, *supra* note 41, at 1.

matter of law ICE cannot assert its civil immigration authority to arrest and/or detain a USC.”⁹⁸ The subsequent instruction to report claims of U.S. citizenship to headquarters within twenty-four hours and then await guidance within an additional twenty-four hours shows the impossibility of ICE adhering to the law: even under the best of circumstances it has authorized agents with no civil authority over U.S. citizens to detain them for up to 48 hours, a breach of law heightened by the fact that the agents are not reporting these cases in the allotted time frame⁹⁹ and evidence of the imperative for assigned counsel for all immigration arrests.¹⁰⁰

A. THE LEGALITY OF DEPRIVING U.S. CITIZENS DUE PROCESS RIGHTS IN DEPORTATION PROCEEDINGS

I. Who Is a U.S. Citizen?

Citizenship by birth results when one is born in the United States¹⁰¹ or is foreign-born and meets particular statutory criteria.¹⁰² The

⁹⁸ Morton Memo, *supra* note 41, at 1.

⁹⁹ See Telephone Interview with Stevens, *supra* note 96.

¹⁰⁰ See *Infra* Part VII.

¹⁰¹ U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

¹⁰² For current rules, see Sungjee Lee, *Part One: The Parent/Child Relationship: Derivative Citizenship Through Parents*, 16 J. CONTEMP. LEGAL ISSUES 43, 43–47 (2007) (outlining current rules governing citizenship by birth where individual is foreign-born). Lee relies for historical citations on Ann K. Wooster, Annotation, *Validity, Construction, and Application of 8 U.S.C. § 1401(c)-(g), Providing for American Citizenship in Certain Circumstances of Child Born Outside United States, or Found Within United States and of Unknown Parentage, and Predecessor Statutes*, 175 A.L.R. FED. 67 (2002) (compiling cases which have addressed 8 U.S.C. § 1401(c)-(g)). See also 8 U.S.C. § 1401 (c)-(g) (“The following shall be nationals and citizens of the United States at birth . . . (c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person; (d) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States; (e) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person; (f) a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States; (g) a person born outside the geographical limits of

fundamental rules defining U.S. citizenship do not appear in the original Constitution. Until the Fourteenth Amendment was ratified in 1868,¹⁰³ no one had a constitutional right to citizenship. Instead, Congress set the laws for those born in the U.S. and abroad. Citizenship is “acquired” when an individual is born abroad to at least one parent who is a U.S. citizen and meets other criteria.¹⁰⁴ Citizenship is “derived” when an individual is born abroad and at least one parent naturalizes before that individual turns 18 and meets other criteria.¹⁰⁵ Both of these laws have

the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in [22 U.S.C. § 288] by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in [section 288 of title 22] may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date.”).

For those born before 1978, different rules apply. Their citizenship status is determined by the Immigration and Nationality Act of 1952, 8 U.S.C. § 1401 (1952), which states that “(a) The following shall be nationals and citizens of the United States at birth: (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 1 of the International Organizations Immunities Act (59 Stat. 669; 22 U.S.C. 288) by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or with an international organization as that term is defined in section 1 of the International Organizations Immunities Act (59 Stat. 669; 22 U.S.C. 288), may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective on that date.”

¹⁰³ U.S. CONST. amend. XIV, § 1.

¹⁰⁴ 8 U.S.C. § 1401 (2006).

¹⁰⁵ 8 U.S.C. § 1433 (2006). For the nomenclature of “derived” versus “acquired” citizenship, see U.S. Citizenship and Immigration Services, *I Am a U.S. Citizen*:

changed substantially since the nineteenth century. The laws in place on the individual's date of birth determine the applicable criteria for citizenship.¹⁰⁶

ICE's procedures for arresting and locking up individuals claiming U.S. citizenship have been superseded in three memoranda since 2008, when the national media began to report on U.S. citizens in ICE custody. Each memorandum requires increased vigilance to ensure that U.S. citizens are not held in ICE custody.¹⁰⁷ The November 19, 2009 memorandum instructs agents to assess whether there is "probative evidence" of U.S. citizenship, stating, "[i]n all cases, any uncertainty about whether the evidence is probative of U.S. citizenship should weigh against detention."¹⁰⁸ The memorandum also indicates that individuals with claims to U.S. citizenship currently in ICE custody should have their cases reviewed and "if the investigation results in probative evidence that the detained individual is a [U.S. citizen], the individual should be released from detention."¹⁰⁹ But ICE agents either are not aware of these procedures or ignore them and continue to hold people who have probative evidence of U.S. citizenship.¹¹⁰ For those asserting birth in the United States, the burden of proving otherwise falls on the government in deportation proceedings, but for foreign-born respondents

How Do I . . . Get Proof of My U.S. Citizenship? (Aug. 2008), <http://www.uscis.gov/USCIS/Resources/A4en.pdf>. Commentators and judges at times use these terms interchangeably, but this Article relies on the usage indicated above.

¹⁰⁶ See *Wolf v. Brownell*, 253 F.2d 141, 141 (9th Cir. 1957) ("We hold that Section 1401(a)(7) is not retroactive and that the district court properly held appellant is not a citizen."); *Palomo v. Mitchell*, 361 F. Supp. 455, 456 (S.D. Tex. 1972) ("The conclusion is inescapable that section 301(a)(7) of the 1952 Act is not retroactive to persons born prior to its effective date."). This is also the position of the Board of Immigration Appeals. See *Matter of Sepulveda*, 14 I. & N. Dec. 616, 617 (B.I.A. 1974) ("The respondent claims that he acquired United States citizenship at birth by virtue of the fact that his mother is a native-born United States citizen. The law in effect on the date of birth governs acquisition of citizenship. At the time of the respondent's birth, acquisition of United States citizenship by children born abroad was limited to children of United States citizen fathers, Revised Statutes, § 1993.").

¹⁰⁷ See Hayes Memo I, Hayes Memo II, and Morton Memo, *supra* note 41.

¹⁰⁸ Morton Memo, *supra* note 41, at 2.

¹⁰⁹ *Id.* at 2.

¹¹⁰ See *infra* Part V. The previous November 6, 2008 procedure required ICE to "establish probable cause to believe that an individual is an alien," a much lower bar for holding people. See Hayes Memo II, *supra* note 41 (citing *Babula v. INS*, 665 F.2d 293 (3d Cir. 1981); *United States v. Cantu*, 519 F.2d 494 (7th Cir. 1975); *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971)).

asserting citizenship, the burden of proving citizenship falls on the respondent.¹¹¹

B. THE CONSTITUTIONALITY OF DEPORTING U.S. CITIZENS AS ALIENS

For over a century, the Supreme Court and federal appellate courts have shown little deference to immigration agents and adjudicators deporting U.S. citizens, and have urged application of strong norms of due process.¹¹² The decisions on the right of judicial review in this context are especially relevant because even citizens born in the United States are being deported through “administrative removal”¹¹³ and

¹¹¹ 8 C.F.R. § 1240.8(c) (2010); *see also* Immigration and Nationality Act § 240(c), 8 U.S.C. § 1229a(c) (2006) (in deportation proceedings, “the alien has the burden of establishing . . . by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission”).

¹¹² *See* *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (“Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact.”); *Chin Yow v. United States*, 208 U.S. 8, 12 (1908) (holding that before being deported an individual of Chinese ancestry must be allowed to present evidence of birth in the U.S.: “As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegation on the one side and the conclusiveness of the Commissioner’s fiat on the other, when one or the other must give way, the latter must yield” and individuals must be afforded an opportunity of judicial review); *United States v. Jung Ah Lung*, 124 U.S. 621, 632–35 (1888) (holding that failure to present a certificate of identification at a port of entry, due to the possible theft of the citizenship document by pirates in China, did not justify automatic deportation without judicial review); *Colyer v. Skeffington*, 265 F. 17, 37, 47 (1920) (“It should be noted that the fifth paragraph of the first set is a distinct mandate to hold these aliens incommunicado until otherwise ordered by the Department of Justice; that the eighth paragraph contemplates the arrest of citizens and throws upon them the burden of proof of their citizenship by documentary evidence.”). Further evidence troubled the *Colyer* court: “It should not be overlooked that many of these aliens were arrested in boarding houses or halls in which were found large quantities of literature and pamphlets, the origin and ownership of which were necessarily largely matters of guesswork. In cases of doubt, aliens, already frightened by the terroristic methods of their arrest and detention, were, in the absence of counsel, easily led into some kind of admission as to their ownership or knowledge of communistic or so-called seditious literature. The picture of a non-English-speaking Russian peasant arrested under circumstances such as described above, held for days in jail, then for weeks in the city prison at Deer Island, and then summoned for a so-called ‘trial’ before an inspector, assisted by the Department of Justice agent under stringent instructions emanating from the Department of Justice in Washington to make every possible effort to obtain evidence of the alien’s membership in one of the proscribed parties, is not a picture of a sober, dispassionate, ‘due process of law’ attempt to ascertain and report the true facts.” *Id.*

¹¹³ For example, Diane Williams, born in Louisiana, was served a Final Administrative Removal Order and told to sign it: ““They didn’t read nothing to

“administrative and expedited removal” orders. In issuing these orders, the DHS ignores statutory and constitutional law by not allowing the individual claiming U.S. citizenship to appear in an immigration court.¹¹⁴ Also noteworthy are the Supreme Court’s opinions restricting administrative findings that would “declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, [which] would be to pass out of the sphere of constitutional legislation,” as well as the full protection of the Fourteenth Amendment.¹¹⁵ These decisions are entirely ignored when district court judges allow prosecutors to introduce determinations of unlawful presence by agents of the executive branch as evidence of Illegal Reentry under 8 U.S.C. § 1326 and Personation of a U.S. Citizen under 18 U.S.C. § 911.¹¹⁶

In 1920, the Supreme Court decided to intervene in Congress’ vast plenary powers to control immigration policies since implementing those policies might lead to the deportation of U.S. citizens. This established a precedent of great relevance to current policies, which often ensnare U.S. citizens in ICE custody by assigning them the low level of constitutional protections more typically applied to noncitizens. The case of *Kwock Jan Fat* is illustrative. When *Kwock Jan Fat*, who was born and raised in Monterey, California, returned from a trip to China, an immigration agent relied on secret and what turned out to be fabricated witness testimony, which the agent may have manufactured himself, stating that the man presenting himself as *Kwock Jan Fat* was someone else. Following a lengthy review of the factual record, including the testimony of “three white” witnesses affirming *Kwock Jan Fat*’s identity and U.S. citizenship, the Court reversed district court and circuit court opinions affirming the deportation order.¹¹⁷

In a unanimous opinion commenting on the possible deportation of U.S. citizens, the Court affirmed the applicability of the Fifth and Fourteenth Amendments to *Kwock Jan Fat*’s situation.¹¹⁸ The Court’s

me. They just told me to sign,’ she said, adding that she was threatened with years of jail time to be followed by deportation. ‘I was scared.’” *Zullo*, *supra* note 36.

¹¹⁴ Expedited Removal Orders for Mark Lyttle obtained from FOIA Production No. NRC 2009025567-0006 (Aug. 2009): Administrative Removal Order, Raleigh Office, North Carolina (Oct. 29, 2008) name omitted, signature unclear; Expedited Removal Order, Hidalgo, Texas (Dec. 29, 2008) signed by Javier Perales, Jr.; Expedited Removal Order, Hatfield Atlanta Airport, Georgia (Apr. 23, 2009) issued by Charles Johnston (on file with author).

¹¹⁵ *Wong Wing v. United States*, 163 U.S. 228, 237 (1896); *see also Kanstroom, Deportation, Social Control, and Punishment*, *supra* note 20, at 1902–05.

¹¹⁶ *See* 18 U.S.C. § 911 (2006); 8 U.S.C. § 1326 (2006).

¹¹⁷ *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920).

¹¹⁸ *Id.* at 457–58.

conclusion deserves quotation at length because it relates to current immigration law enforcement practices that may be authorized by Congress, but are unlawful because of constitutional problems they pose for U.S. citizens:

The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information, not less of the Commissioner of Immigration and of the Secretary of Labor than of the courts, the judgment in this case must be reversed. *It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country.*¹¹⁹

This statement suggests that the Constitution protects natural born U.S. citizens, regardless of ancestry,¹²⁰ from deportation without due process just as zealously as it protects their rights at a criminal trial or the right to vote. Indeed, ensuring that U.S. citizens are afforded every due process protection for their legal status must be the law of the land, or these other rights are meaningless.

In 1924, Congress passed a law, still in effect, imposing on immigrants in deportation proceedings the burden of proving their lawful entry and presence in the United States.¹²¹ From the mid-1920s to the early 1930s, immigration agents and local police and sheriffs, in operations strikingly similar to those today, deported over a million U.S. residents of Mexican ancestry, about 400,000 of whom were legal residents or U.S. citizens.¹²² The families banished from their homes and land were largely from California, Colorado, Arizona, and

¹¹⁹ *Id.* at 464 (emphasis added).

¹²⁰ The opinions cited also referred to U.S. citizens of Chinese ancestry with acquired citizenship.

¹²¹ Immigration Act of 1924, ch. 190, § 23, 43 Stat. 165 (1924).

¹²² Balderrama & Rodriguez, DECADE OF BETRAYAL, *supra* note 3, at 121–22, 216–17.

Texas.¹²³ Some displaced people were from families whose ancestors had resided in the region since they were under the rule of Mexico and even Spain.¹²⁴ Not unlike today, other families that were not apprehended felt unwelcome, and this, coupled with the Depression, prompted their departure to Mexico.¹²⁵

Nonetheless, these families maintained strong social and economic ties to their homeland, that is, the United States. Their U.S.-born children would later return to their country of origin.¹²⁶ Some would settle and have families in the United States, but others established ties in Mexico, and began their families there. Among the U.S. citizens cut off from their families and languishing in detention centers, I have documented several who were born to the children of the children of the families who left the United States in the 1920s and 1930s, including George Ibarra, an honorably discharged Marine who was deported once in 1999 and once in 2004.¹²⁷ The effect is essentially ethnic cleansing, as the unlawful removal of one generation of U.S.-born Mexican-Americans imperils the U.S. citizenship of their offspring. The U.S. policy of deporting Mexican residents from the United States in the last century, including U.S. citizens of Mexican ancestry, has very clear parallels to the Nazi administrative expulsion and exclusion policies from 1933 through 1937.¹²⁸ It is not surprising that individuals whose parents were deported as children now face barriers to legal recognition of their U.S. citizenship.

Of course the legal environment in the United States during the 1930s, in part because of the tainting of racist eugenics as German and un-American, differed significantly from that of Nazi Germany.

¹²³ *Id.* at 121–22.

¹²⁴ JOSEPH NEVINS, OPERATION GATEKEEPER: THE RISE OF THE ‘ILLEGAL ALIEN’ AND THE REMAKING OF THE U.S.-MEXICAN BORDER 16–17 (2002).

¹²⁵ *Id.* at 99–100.

¹²⁶ *Id.* at 209–13.

¹²⁷ Ancestry records and narratives for David, René Saldivar, William, Alonzo, and George Ibarra; *see, e.g., In re Jorge Ibarra-Lopez*, slip op. (Immigr. Ct. Feb. 23, 2011).

¹²⁸ The laws passed during this period in the United States relied on theories of eugenics for determining admittance policies for immigration as well as citizenship criteria. DEBRA L. DELAET, U.S. IMMIGRATION POLICY IN AN AGE OF RIGHTS 29 (2000). Like U.S. immigration and citizenship laws, the 1933 Nuremberg laws were designed to use birth and marriage certificates to strip Jews residing in the German homeland of their citizenship and then banish them as aliens. These laws also gave enormous discretion to SS agents implementing these policies, designed to deport previously German-Jews as non-German aliens. Hitler and Goebbels preferred for Jews to be “dealt with in a ‘legal’ fashion, that is to say, in an orderly way that would allow for proper and thorough planning.” RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 46 (3d ed. 2003).

Emboldened by the Supreme Court's categorical statements about the unconstitutionality of deporting U.S. citizens, legal professional organizations in the 1920s and 1930s voiced their opposition,¹²⁹ including Assistant Secretary of Labor Louis Post.¹³⁰ In 1931, a commission led by George Wickersham documented widespread misconduct by local and federal agents implementing immigration laws. The 179-page report, written under the authority of the National Commission on Law Observance and Enforcement by Reuben Oppenheimer and published by the Government Printing Office, provides a thorough review of constitutional law governing the treatment of respondents to deportation orders, as well as extensive field research.

Nine of the Commission's eleven members, some of the most respected Washington insiders of the day,¹³¹ endorsed Oppenheimer's findings.¹³² The report's introduction points out that the "last 50 years has been characterized by a tendency to use administrative processes rather than judicial processes . . . to avoid delay and to secure simplification of procedure."¹³³ The result, the report continues, was that government officials, from police to immigration agents, were unconstitutionally treating U.S. citizens as noncitizens:

[T]he law makes no distinction between naturalized and unnaturalized persons in its guaranty of the great fundamental rights which are here under consideration. The Bill of Rights of the United States and of the States extend their guaranties to "persons," thus making them rights of men and not privileges of citizenship. A naturalized citizen has acquired substantive rights as a

¹²⁹ Reuben Oppenheimer, *Report on the Enforcement of the Deportation Laws of the United States*, in NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, U.S. WICKERSHAM COMMISSION REPORTS 43-45 (1931) [hereinafter Wickersham Report] (containing extensive quotations from and citations to the Supreme Court decisions discussed in this section).

¹³⁰ For an excellent account of this resistance by Assistant Secretary of Labor Louis Post, see BONNIE HONIG, *EMERGENCY POLITICS: PARADOX, LAW, DEMOCRACY* 65-86 (2009) (using the episode of Post's contingent decision to oppose Edgar Hoover as an example of the interaction of principled legal commitments with politics). For another view of Mr. Post's more compromised history, see KANSTROOM, *DEPORTATION NATION*, *supra* note 2, at 149-52.

¹³¹ George W. Wickersham, Newton D. Baker, Ada L. Comstock, William I. Grubb, William S. Kenyon, Monte M. Lemann, Frank J. Loesch, Paul J. McCormick, and Roscoe Pound endorsed the report; Henry W. Anderson concurred, and Kenneth Mackintosh was the lone dissenter. Wickersham Report, *supra* note 129, at 8-13.

¹³² Henry Anderson "concur[red] generally" but was "unable to concur in all of the conclusions and recommendations adopted by the commission." Wickersham Report, *supra* note 129, at 8.

¹³³ *Id.* at 5.

citizen by virtue of his naturalization, but the most temporary resident of the United States, owing allegiance to another government, is, while he is on our soil, given the equal protection of our laws, and it is not consistent with the spirit of our institutions or the express language of our bill of rights to deny the substance of these guaranties to resident aliens. . . .¹³⁴

Oppenheimer makes two separate points, one about the rights of naturalized citizens and another about the rights of aliens, but joins them here to apply the Fourteenth Amendment to noncitizens. He argues that unless everyone is given due process protections, U.S. citizens will be deprived of their incontrovertible right to be treated under law as U.S. citizens.¹³⁵

Oppenheimer points out that federal laws and regulations authorizing unconstitutional actions affect aliens and U.S. citizens alike:

The very investigations to see whether suspected persons are subject to deportation, by their nature, involve possible interference of the gravest kind with the rights of personal liberty. Unlawful searches and seizures may be perpetrated; rights of lawful assembly and free speech may be infringed. These investigations are not public, and they often involve American citizens. It is as important to American institutions that fundamental principles of justice and fairness be observed in the administration of the laws as it is that aliens unlawfully here should be deported.¹³⁶

The report attends to a series of Supreme Court decisions that immigration agents were regularly ignoring, the most egregious symptom of which was the unlawful deportation of U.S. citizens.¹³⁷

According to Oppenheimer, the primary evidence used against those in deportation proceedings was obtained from interrogating those in the custody of immigration agents. He believed that this evidence was not reliable and pointed out that the Supreme Court had held that a confession “obtained by compulsion must be excluded whatever may

¹³⁴ *Id.* at 7.

¹³⁵ *Id.* Louis Post asserted a similar claim during a 1920 Congressional hearing. See Honig, *supra* note 130, at 74–75.

¹³⁶ Wickersham Report, *supra* note 129, at 27 (citing WILLIAM VAN VLECK, REPORT ON ADMINISTRATIVE CONTROL OF ALIENS (1932)).

¹³⁷ Oppenheimer writes, “[T]he burden of proving alienage rests upon the Government.” Wickersham Report, *supra* note 129, at 44 (citing *Bilokumsky v. Tod*, 263 U.S. 149 (1923)).

have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise.”¹³⁸ Oppenheimer writes that in some cases, the “questioning brings out that the suspect is a United States citizen, or, if he is an alien, that he is lawfully here. But in a large proportion of the cases examined and observed the nature and persistency of the questions can only be described as inquisitorial,”¹³⁹ concluding that confessions of alienage or unlawful presence were produced by the interrogations themselves. In some cases, the “examining inspector has made up his mind that the alien should be deported and is doing everything possible to accomplish that end”¹⁴⁰ and will insert his own views of truthfulness independent of the statements.¹⁴¹ Oppenheimer quotes one inspector who writes, “[i]t is not believed that he is telling the truth when he states that he has never used any other name and that he was never ejected from the United States.”¹⁴² This statement is an epistemology consistent with detainees’ fears that responses other than those expected or even demanded are futile, leading them to relinquish claims of U.S. citizenship.

Oppenheimer’s examples include affidavits with false statements of alienage obtained through trickery, threats, and forgery.¹⁴³ Today’s episodic chastisements of EOIR adjudicators by federal judges, including Judge Posner’s rebuke,¹⁴⁴ seem mild in comparison with those of their counterparts in the first quarter of the twentieth century. The federal judges at that time believed that the documented lawbreaking of the federal government was inexcusable and more damaging to the country than the infractions of those the government was seeking to deport.¹⁴⁵ One judge wrote of the Red Raids: “Assuming petitioner is of the so-called ‘Reds’ and of the evil practice charged against him, he and

¹³⁸ *Ziang Sung Wan v. United States*, 266 U.S. 1, 14–15 (1924) (holding that confession obtained under duress during interrogation may not be used as evidence).

¹³⁹ Wickersham Report, *supra* note 124, at 69.

¹⁴⁰ *Id.* at 73.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 74–75.

¹⁴⁴ *See Benslimane v. Gonzalez*, 430 F.3d 828, 830 (7th Cir. 2005) (“[T]he adjudication of cases at the administrative level has fallen below the minimum standards of legal justice.”).

¹⁴⁵ In the 1920s, J. Edgar Hoover illegally arrested and deported thousands of U.S. citizens and legal residents organizing on behalf of labor rights, communism, or anarchism. *See* ZECHARIAH CHAFEE JR., *FREEDOM OF SPEECH* (Harcourt, Brace and Howe 1920); R.G. BROWN, ZECHARIAH CHAFEE, JR., FELIX FRANKFURTER, ERNST FREUND, SWINBURNE HALE, FRANCIS FISHER KANE, ALFRED S. NILES, ROSCOE POUND, JACKSON H. RALSTON, DAVID WALLERSTEIN, FRANK P. WALSH, & TYRRELL WILLIAMS, *NATIONAL POPULAR GOVERNMENT LEAGUE REPORT UPON THE ILLEGAL PRACTICES OF THE UNITED STATES DEPARTMENT OF JUSTICE* (1920).

his kind are less a danger to America than are those who [e]ndorse or use the methods that brought him to deportation.”¹⁴⁶ Another judge wrote of Hoover’s raids, “[A] mob is a mob, whether made up of Government officials acting under instructions from the Department of Justice, or of criminals, loafers and the vicious classes.”¹⁴⁷ In a third case, the federal court held, “The ‘mild mannered’ methods employed do not change the truth that the arrest and detention were wholly without authority of law The relator is charged with a failure to observe the immigration laws; she is sought to be condemned by another violation.”¹⁴⁸ The principle that protecting U.S. citizens from government thuggery should be prioritized over protecting against the immigration of criminal aliens is of course the *raison d’être* of the Bill of Rights and thus a longstanding central tenet of this country’s system of governance. It is therefore not just a small inconsistency when laws protecting against government abuses are not enforced, but a fundamental breach of the rule of law.

Finally, the Wickersham Report does not flinch from reporting on the dramatic personal catastrophes deportations inflict, even when done in accordance with the law; the report describes several deportations of longtime legal U.S. residents, who served prison sentences and left behind deeply rooted networks of work and family.¹⁴⁹ Oppenheimer includes comments that suggest he imagines his readers will empathize with the families of those who are deported, writing, for instance, that under current laws, “[t]here was no hope” for the family with a seven-year-old child whose father was being deported; this emotional insight is presented for an audience Oppenheimer seems to assume would share his views.¹⁵⁰ Oppenheimer’s concern is for the nine percent of cases he studied in which those being deported were related to U.S. citizens.¹⁵¹ Among those in ICE custody in southern Arizona who met FIRR attorneys, approximately one-third had U.S.-born children and if

¹⁴⁶ The Report quotes Judge Bourquin of the District Court of Montana. Wickersham Report, *supra* note 124, at 136 (quoting *Ex Parte Jackson*, 263 Fed. 110, 113 (D. Mont. 1920)).

¹⁴⁷ The Report quotes Judge Anderson of the District Court of Massachusetts. Wickersham Report, *supra* note 124, at 136 (quoting *Coyler v. Skeffington*, 265 Fed. 17, 43 (Mass. Dist. Ct. 1920)).

¹⁴⁸ Wickersham Report, *supra* note 129, at 136–37 (quoting *United States ex rel Murphy v. McCandless*, 40 F.2d 643 (E.D. Pa. 1930)).

¹⁴⁹ These include the deportation of a Mexican citizen married to a U.S. citizen with whom he has eight U.S.-born children, as well as a man of Scottish origin convicted of violating the Mann Act and subsequently deported. Oppenheimer quotes from the Scotsman’s letter to the immigration office: “As far as being deported, I do not mind, but I do care what is to become of my boy’s future.” Wickersham Report, *supra* note 124, at 131.

¹⁵⁰ *Id.* at 132.

¹⁵¹ *Id.* at 130.

deported would be separated from at least two relatives who were U.S. citizens.¹⁵²

The Wickersham Committee's findings are very important because they show a pattern of U.S. government immigration lawbreaking for well over seventy-five years. The Department of Justice, which should be prosecuting agents for large-scale and easily documented lawbreaking, ignores these violations.¹⁵³ Instead of wrenching embarrassment over an extended period in which the government has wrongfully deported citizens, the non-response appears to have calcified in some quarters into resignation or cynicism.

*C. COMPARING LAW ENFORCEMENT UNDER CIVIL STATUTES:
IMMIGRATION ENFORCEMENT AND TAX ENFORCEMENT*

Attempting to explain the widespread misconduct he observed, Oppenheimer points to a public more hostile to immigrants than to law-breaking immigration agents:

In the enforcement and observance of certain of our Federal laws public antagonism has often been a deterring factor. This is not the case with respect to the laws governing deportation of aliens [T]he defects and abuses of the present system must in part be laid at the door of public opinion.¹⁵⁴

Is Oppenheimer correct about the public's toleration of lawbreaking among immigration agents? Or, is the U.S. public simply docile and the government prone to expand enforcement capabilities in its regulatory activities across the board? One way to address these questions is to compare law enforcement tactics and budgets of Immigration and Customs Enforcement (ICE), Citizenship and Immigration Services

¹⁵² See *supra* Table 4.

¹⁵³ The threat of civil lawsuits does not deter immigration agents from submitting defective charging documents. When plaintiffs prevail, the penalties are monetary and covered by taxpayers. ICE employees identified as playing a key role in deporting U.S. citizens have been promoted. Katrina Kane, who approved Anna's deportation to France, *supra* note 15, remains the Phoenix Field Office Director; Dashanta Faucette, the ICE agent who wrote that "Mark Lyttle" was an alias for Jose Thomas and failed to obtain either Mr. Lyttle's initials on the pages she completed or the signature of a corroborating witness—both required by ICE protocols—was promoted. Moreover, the complexity of these cases, at the crossroads of immigration, criminal, and tort law, deters law firms from undertaking litigation on a contingency basis, and the individuals who suffer these harms lack funds to retain attorneys for this purpose. David and Guerrero attempted and failed to secure legal representation for the purpose of filing lawsuits.

¹⁵⁴ Wickersham Report, *supra* note 129, at 156.

(CIS), and Customs and Border Patrol (CBP)—all within the Department of Homeland Security (DHS)—with those of another administrative agency with law enforcement duties, the Internal Revenue Service (IRS), which is part of the Department of the Treasury.

Immigration law enforcement and tax law enforcement share important institutional characteristics. Both are large bureaucracies designed to administer and enforce statutes and regulations of civil law whose violation may trigger criminal investigations; both agencies enforce enormously complex laws that have different timelines for their definitions and application,¹⁵⁵ and both even share a major substantive goal—increasing tax revenues.¹⁵⁶ One populist justification for enforcing immigration laws is that unlawful immigrants inhabit a black economy and do not pay their fair share of taxes while at the same time using government services.¹⁵⁷ It is thus reasonable to conclude that if enforcing immigration law is being undertaken as a measure to enhance the U.S. coffers by enforcing tax compliance, the public would expect the IRS to be equally vigilant in enforcing the tax code. We should therefore expect to see the same toleration of false positives in identifying unlawful reporting in the “haystack” of hundreds of millions of tax records—

¹⁵⁵ Immigration law is often analogized to tax law for its complexity. Similar to tax law, immigration law changes and old statutes’ definitions are “grandfathered.” To administer or comply with the law thus requires knowledge of current laws, regulations, BIA decisions, and federal court rulings across different jurisdictions, as well as expertise on all of these from the last century.

¹⁵⁶ Following a story line from other reports, the Boston Globe reported that “taxpayers here illegally are lining up from Chelsea to the Berkshires, despite the fear of deportation that is permeating the state after a massive raid in Bedford last year and smaller raids in Boston-area cities and towns.” The story describes the perception that immigration fears are connected to concerns about free-loaders. Maria Sacchetti, *More Illegal Immigrants are Rushing to File Taxes: Many View Move as Way to Help Case for Residency*, BOSTON GLOBE, Feb. 17, 2008, available at http://www.boston.com/news/local/articles/2008/02/17/more_illegal_immigrants_are_rushing_to_file_taxes.

¹⁵⁷ A report on CNN’s “Lou Dobbs Tonight” describes undocumented immigrants pursuing tax refunds of their own income from federally withheld income associated with the social security numbers of U.S. citizens, and characterizes this as “tax fraud.” *Lou Dobbs Tonight: Illegal Alien Tax Fraud Scheme* (CNN television broadcast Dec. 15, 2008), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0812/15/ldt.01.html>. The anti-immigrant group Center for Immigration Studies states, “when all taxes paid (direct and indirect) and all costs are considered, illegal households created a net fiscal deficit at the federal level of more than \$10 billion in 2002.” CNTR. FOR IMMIGRATION STUDIES, *The High Cost of Cheap Labor: Illegal Immigration and the Federal Budget Executive Summary*, <http://www.cis.org/articles/2004/fiscalexec.html> (last visited Nov. 11, 2010).

misconduct resulting in the penalizing of innocent taxpayers—as exists for false positives that arise in the enforcement of immigration laws.¹⁵⁸

Analysis of agency budgeting, legislative changes, and legislative oversight reveals that during the same time period Congress increased its most punitive sanctions for immigration violations, it decreased and defunded enforcement of tax violations. In 1995, the IRS spent 56% of its budget on enforcement activities, compared to only 42% in 2008, a 25% decrease.¹⁵⁹ During this same period, tax non-compliance increased,¹⁶⁰ caused mainly by the increase in wealth from “nonmatchable income.” Nonmatchable income refers to transfers unreported to the government.¹⁶¹ Their accumulation in individual bank accounts can be tracked only through investigations and audits. Unreported income from real estate tax shelters comprises a major portion of unreported revenues. An ex-IRS agent estimated that in 2005, \$20 billion from real estate tax revenues went unreported.¹⁶² A former partnership specialist with the IRS relates that this type of cheating is easy.¹⁶³ During the same period that tax cheating was going up, IRS resources devoted to tax compliance were going down.

The reason for the government’s shift away from enforcing tax compliance confirms Oppenheimer’s insights into how public outcry affects agency behaviors. In 1997–1998, in the wake of passing the harsh and punitive 1996 Illegal Immigration Reform and Immigrant Responsibility Act, Congress held hearings designed to thwart alleged “IRS harassment” of taxpayers. Members of Congress claimed that while tax law compliance was a laudable goal, it could not justify even a remote and, as it turned out, unfounded possibility that its enforcement might violate due process rights: “Most of the crucial testimony in the 1997–98 hearings that preceded the new law, contending abuses by IRS agents, has proved to be unfounded, based on false or misleading

¹⁵⁸ Indeed, as the consequences of false positives in tax law enforcement are less onerous than deportation, one might expect to see an even higher toleration of false positives for those wrongfully identified as tax scofflaws compared with those wrongfully deprived of their rights as citizens.

¹⁵⁹ Table 28: *Internal Revenue Service Collections, Costs, Personnel, and U.S. Population by Fiscal Year*, INTERNAL REVENUE SERV., <http://www.irs.gov/taxstats/article/0,,id=207707,00.html> (last visited Feb. 22, 2011).

¹⁶⁰ KIM BLOOMQUIST, TRENDS AS CHANGES IN VARIANCE: THE CASE OF TAX NONCOMPLIANCE (2003), available at <http://www.irs.gov/pub/irs-soi/bloomquist.pdf>.

¹⁶¹ *Id.*

¹⁶² David Cay Johnston, *Ex-IRS Agent Says Tax Evasion by Real Estate Partners is Huge*, N.Y. TIMES, Dec. 7, 2007, available at <http://www.nytimes.com/2007/12/07/business/07taxes.html>.

¹⁶³ *Id.*

testimony or disproved in subsequent court actions.”¹⁶⁴ The *New York Times* pointed out that “not one of the first 830 complaints of taxpayer harassment filed under the new law has been upheld by the IRS or its new Congressionally designated watchdog.”¹⁶⁵ In other words, lawmakers were so sensitive to the possibility of abuses by government agents that they curtailed enforcement of the U.S. budget’s lifeline, its tax revenues, a reaction that turned out to be based on false evidence.

In 2008, knowing that U.S. citizens and corporations were fraudulently hiding hundreds of billions of dollars in legal income and therefore cheating the tax-paying public, the IRS filed criminal complaints leading to convictions in only 666 cases.¹⁶⁶ In 2007, DHS Secretary Michael Chertoff announced that enforcing immigration law would mean “unhappy consequences for the economy,”¹⁶⁷ but in 2008 the Department of Justice nonetheless obtained the criminal convictions of 70,511 individuals for immigration law violations,¹⁶⁸ a 580% increase over the 12,182 convictions in 1995.¹⁶⁹ In 2009, Congress allocated \$50.5 billion for the DHS.¹⁷⁰ Five percent went to Citizenship and Immigration Services, while ICE and CBP received a total of 33% of the DHS budget.¹⁷¹ This ratio is itself a cause of illegal immigration. The insufficient allocation for immigration services means that applications are not processed in a timely fashion,¹⁷² and individuals are being held in detention centers without bond pending approval of legal status, when instead they should be with their sponsoring relatives.

¹⁶⁴ David Cay Johnston, *Inquiries Find Little Abuse by Tax Agents*, N.Y. TIMES, Aug. 15, 2000, available at <http://www.nytimes.com/2000/08/15/business/inquiries-find-little-abuse-by-tax-agents.html>.

¹⁶⁵ *Id.*

¹⁶⁶ INTERNAL REVENUE SERV., TABLE 18: CRIMINAL INVESTIGATION PROGRAM, BY STATUS OR DISPOSITION, FISCAL YEAR 2008, CRIMINAL INVESTIGATION, COMMUNICATION, & EDUCATION, <http://www.irs.gov/pub/irs-soi/08db18ci.xls>.

¹⁶⁷ Nicole Gaouette, *Worker Rules Called Likely to Hurt the Economy*, L.A. TIMES, Aug. 11, 2007, available at http://www.house.gov/apps/list/press/ca50_bilbray/morenews/latimesenforce.shtml (last viewed Nov. 11, 2010).

¹⁶⁸ U.S. SENTENCING COMM’N, SOURCEBOOK FOR FEDERAL SENTENCING STATISTICS TABLE 46: DEMOGRAPHIC AND OFFENSE INFORMATION FOR IMMIGRATION OFFENSES FISCAL YEAR 2008, available at <http://www.ussc.gov/ANNRPT/2008/Table46.pdf>.

¹⁶⁹ IMMIGRATION & NATURALIZATION SERVS., 1996 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE: TABLE 75 CONVICTIONS FOR IMMIGRATION AND NATIONALITY VIOLATIONS FISCAL YEARS 1990–96, available at <http://www.dhs.gov/files/statistics/publications/archive.shtm>.

¹⁷⁰ DEP’T OF HOMELAND SECURITY, BUDGET-IN-BRIEF: FISCAL YEAR 2009 (2009).

¹⁷¹ ICE received 11% and CBP 22%. *Id.*

¹⁷² U.S. CITIZENSHIP & IMMIGRATION SERVS., USCIS PRODUCTION UPDATE (Oct. 5, 2009) (showing a backlog of over one million applications for legal permanent residence based on marriage).

The comparison of enforcement and budgeting in the IRS and the DHS indicates that despite the long history of well-documented abuses by immigration law agents,¹⁷³ Congress is showing an enthusiasm for these actions, in contrast with its efforts to curtail fictional abuses by IRS tax compliance officials.

D. IS DEPORTING U.S. CITIZENS AN ACCEPTABLE CONSEQUENCE OF ENFORCING IMMIGRATION LAWS?

Rep. Steve King (R-Iowa) correctly observes that as long as federal immigration agents treat the people they encounter as a “haystack of humanity,” U.S. citizens will be deported. However, Rep. King incorrectly assumes this is legal. A “haystack of humanity” does not have rights under the U.S. Constitution, but individual U.S. citizens have full due process rights.¹⁷⁴ If the federal government complied with the statutory and constitutional rights of individuals, then it would be possible to reduce these errors to the only legally acceptable rate, zero. This is the number argued for by the authors of a recent study of wrongful convictions in criminal courts, many of which were far less consequential than the deprivation of U.S. citizenship.¹⁷⁵ The lead author underscores the reasoning of federal court opinions from the 1920s: “No rate of preventable errors that destroy people’s lives and destroy the lives of those close to them is acceptable.”¹⁷⁶ One key source of these preventable errors is the absence of due process protections against confessions that would be inadmissible in any criminal court.¹⁷⁷ The Supreme Court’s 2009 ruling on the inadmissibility of confessions

¹⁷³ More evidence includes settlements from lawsuits filed against ICE. See Tyche Hendricks, *U.S. Citizens Wrongly Detained, Deported by ICE*, S.F. CHRON., July 27, 2009, at 1; Tyche Hendricks, *Suits for Wrongful Deportation by ICE Rise*, S.F. CHRON., July 28, 2009, at 1; Misconduct by Immigration Agents, Memorandum from Philip Hwang, Staff Attorney for Lawyers Committee for Civil Rights (providing list of lawsuits settled since 1996) (on file with author).

¹⁷⁴ See also Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 25 (1956) (“It has been said of the habeas corpus cases that one who searches for a needle in a haystack is likely to conclude that the needle is not worth the effort. That emphasis distorts the picture. Even with the narrowest focus it is not a needle we are looking for in these stacks of paper, but the rights of a human being.”). A bit later, Schaefer explains that one reason habeas appeals are rarely sustained is the very existence of this procedure, a safeguard not in place for those physically removed from the country without the opportunity to file a habeas motion. *Id.*

¹⁷⁵ Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005).

¹⁷⁶ Samuel Gross, quoted in Adam Liptak, *Study Suspects Thousands of False Confessions*, N.Y. TIMES, Apr. 19, 2004.

¹⁷⁷ See *Corley v. United States*, 129 S. Ct. 1558, 1564 (2009).

obtained after being held in police custody bears on this analysis.¹⁷⁸ The Supreme Court ruled eight to one that confessions obtained after someone was held for six hours and before one appeared before a judge could not be used as evidence.¹⁷⁹ Ruling against the admissibility of statements made under the duress of imprisonment and without an attorney, the Court pointed to a federal statute¹⁸⁰ and its Senate floor debate, in which Senator Joseph Tydings (D-Md.) worried that omitting this “provision would ‘permit Federal criminal suspects to be questioned indefinitely before they are presented to a committing magistrate.’”¹⁸¹ The Court also referred to centuries-old norms of due process. The presentment requirement is not an “administrative nicety” but rather a rule that “stretches back to the common law, when it was ‘one of the most important’ protections ‘against unlawful arrest.’”¹⁸² The Court also noted, “No one with any smattering of the history of 20th-century dictatorships needs a lecture on the subject, and we understand the need even within our own system to take care against going too far. ‘[C]ustodial police interrogation, by its very nature, isolates and pressures the individual.’”¹⁸³

ICE agents lock up people thousands of miles from their homes, sometimes interrogating them in unmarked, unlisted “subfield offices” inaccessible to lawyers.¹⁸⁴ Individuals in these settings may feel

¹⁷⁸ *Id.* at 1560–61.

¹⁷⁹ *Id.*

¹⁸⁰ “In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury *and if such confession was made or given by such person within six hours immediately following his arrest or other detention.*” *Id.* at 1564 n.2 (quoting 18 U.S.C. § 3501(c) (2006)) (emphasis added).

¹⁸¹ *Id.* at 1569 (citing 114 CONG. REC. 11,740 (daily ed. May 3, 1968) (statement of Sen. Joseph Tydings)).

¹⁸² *Id.* at 1570 (quoting *County of Riverside v. McLaughlin*, 500 U.S. 44, 60–61 (1991) (Scalia, J., dissenting)); *id.* at 1561 (“Today presentment is the point at which the judge is required to take several key steps to foreclose Government overreaching,” including advising the defendant of his charges, the right to a lawyer, and other protections.).

¹⁸³ *Id.* (quoting *Dickerson v. United States*, 530 U.S. 428, 435 (2000)).

¹⁸⁴ Interview with Christopher Shanahan, Field Office Director, U.S. Immigration and Customs Enforcement, at Varick Detention Center, N.Y. (Feb. 16, 2010).

pressured to sign “scratch I-213” forms¹⁸⁵ used as the basis for the formal I-213 “Record of Deportable/Inadmissible Alien.”¹⁸⁶ If respondents are not issued an Administrative Removal order or an Expedited Removal order,¹⁸⁷ they will appear before an adjudicator in an immigration hearing, and these coerced statements may be used as the sole and conclusive evidence of their alienage.¹⁸⁸ Following a hearing in which an adjudicator orders removal, respondents who are U.S. citizens report that deportation officers encouraged them to waive their right to appeal by conceding removability, statements that may be used later for criminal immigration proceedings.¹⁸⁹ In short, the regulations governing immigration proceedings, and the failure of EOIR to enforce those rules favorable to respondents,¹⁹⁰ encourage exactly the false statements that Congress and the Supreme Court have been vigilant to exclude from criminal proceedings. Immigration hearing adjudicators make no inquiries into the conditions under which statements are signed or proffered in the hearings; statements made after being held far longer than six hours are considered by the EOIR as “trustworthy and

¹⁸⁵ A U.S. Army Special Operations soldier reports that their interrogation protocols emphasize obtaining confessions when individuals are isolated and in transit. Interview with U.S. Army Special Operations soldier, Columbus, Ga. (2008). ICE states that ICE subfield offices are responsible for “84 percent of all book-ins.” SCHRIRO, *supra* note 59, at 9.

¹⁸⁶ ICE ACADEMY, ICE 287(G) PARTICIPANT WORKBOOK—I-213 PREPARATION (Mar. 2006), available at <http://www.scribd.com/doc/21968656/ICE-287-g-Participant-Workbook-I-213-Preparation>.

¹⁸⁷ See *Rept.*, *supra* note 5, at 67.

¹⁸⁸ For the due process problems with immigration hearings, see APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA’S IMMIGRATION COURTS (May 2009), available at <http://www.appleseeds.net/Portals/0/Documents/Publications/Assembly%20Line%20Injustice.pdf>. In addition to the due process violations noted by the Appleseed report, an overarching problem is the failure of the DOJ’s Office of Professional Responsibility (OPR) to ensure that the EOIR adjudicators follow EOIR procedures and to censure them for misconduct. See Jacqueline Stevens, *Atlanta Immigration Judge Sics Guards on Professor/Writer Who Revealed Improprieties*, STATES WITHOUT NATIONS BLOG (Apr. 25, 2010, 6:16 PM), <http://stateswithoutnations.blogspot.com/2010/04/atlanta-immigration-judge-sics-guards.html>. Moreover, the EOIR withholds from public inspection OPR decisions based on complaints against EOIR adjudicators while making available on its web pages information decisions indicating misconduct by practitioners. See U.S. DEP’T OF JUSTICE, LIST OF CURRENTLY DISCIPLINED PRACTITIONERS (Dec. 9, 2010), <http://www.justice.gov/eoir/profcond/chart.htm>.

¹⁸⁹ Mr. Lyttle, Mr. Francis, and William all reported that deportation officers pressured them to sign statements indicating they were not U.S. citizens and had agreed to be deported. To achieve this, the deportation officers would give them discouraging prognoses and emphasize the length they would be held before obtaining another hearing. See *supra* Table 6.

¹⁹⁰ See 8 C.F.R. § 1003.10 (2007); see also discussion *supra* note 86.

admissible as evidence to prove alienage or deportability.”¹⁹¹ When people attempt to recant these signed statements in subsequent ICE interviews, they may receive threats that they will be charged with lying to a federal agent.¹⁹² ICE agents have demonstrably lied on these forms,¹⁹³ and EOIR adjudicators routinely accept statements made under duress or coercion, even when recanted in the formal setting of a hearing where respondents may have unfounded hopes for due process

¹⁹¹ “A Form I-213 can be authenticated by any recognized procedure, such as certification by an INS district director.” *Iran v. INS*, 656 F.2d 469, 472 (9th Cir. 1981); *see also* *Espinoza v. INS*, 45 F.3d 308, 311 (9th Cir. 1995). Here, because the [OFFICIAL] certified the respondent’s Form I-213, this Court finds that it has been properly authenticated. Absent any evidence that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, it is inherently trustworthy and admissible as evidence to prove alienage or deportability. *Matter of Barcnas*, 19 I. & N. Dec. 609, 611 (B.I.A. 1988); *see also* *Espinoza v. INS*, 45 F.3d 308, 311 (9th Cir. 1995).” EXEC. OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION JUDGE BENCHBOOK (2007), *available at* http://www.justice.gov/eoir/vll/benchbook/resources/sfoutline/Form_I213_Standard_Language.html. Despite the EOIR’s rules about statements made under duress, the vast majority of statements made in I-213 interviews occur under duress, at minimum, and even may be coerced; respondents may also be instructed to sign documents that they have not read, or, agents may write that respondents “refuse to sign” documents they were never shown. Telephone Interview with Michelle Fei, Co-Director, Immigrant Defense Project (July 22, 2009) (stating that in Rikers Island Jail, an inmate told her that an ICE agent threatened his family with deportation unless he signed a statement agreeing to deportation); Interview with Johann Francis, deported U.S. citizen, in Decatur, Ga. (Jan. 15, 2010) (Francis was deported after being held at Eloy Detention Center and signing forms stipulating to his lack of a legal right to remain in the country).

¹⁹² Telephone Interview with ICE Deportation Officer (June 2009); Atlanta ICE report on Mr. Lyttle’s return, accusing him of lying to a federal agent (Apr. 24, 2009) (on file with author).

¹⁹³ In the case of Mr. Lyttle, ICE agents stated they found no evidence he was a U.S. citizen, even though his FBI report, included in Mr. Lyttle’s ICE file, states in several places that he was born in the United States and that his citizenship is “United States.” His I-213, contained in his EOIR file, states that a record check was performed and confirmed he was an alien, but the adjudicator in Atlanta, William Cassidy, who possessed the I-213 and no certificate of service on Mr. Lyttle, never instructed ICE to share this document with Mr. Lyttle, who was thus tried with secret evidence. Interview with Mark Lyttle, in Kennesaw, Ga. (June 22, 2009). In a separate incident, detained respondent Clifford Bryan was agitated when the adjudicator, J. Dan Pelletier in Lumpkin, Georgia, reading from his I-213, which was not shared with Mr. Bryan, told him that his wife was a Jamaican citizen and resident. Mr. Bryan told the EOIR adjudicator that his wife was U.S.-born and a U.S. resident in Michigan, statements Mrs. Bryan had made as well to the deportation officer. *See Master Calendar Hearing*, Stewart Detention Center (Jan. 14, 2010); Telephone Interview with Neferet Bryan (Jan. 14, 2010) (notes from hearing and interview on file with author); *see also* Kanstroom, *supra* note 20.

protections promised by the court room decor.¹⁹⁴ People who have a valid claim to citizenship or legal residence sign these statements because they do not have funds for an attorney and do not trust the unlawful system to treat them fairly.¹⁹⁵

IV. HOW ARE U.S. CITIZENS DEPORTED?

The discussion above describes some of the due process violations associated with the government detaining and deporting U.S. citizens. Three overarching and converging laws and practices trigger the events in Tables Five and Six.¹⁹⁶ The first and most significant cause of U.S. citizens being deported is the absence of accountability and transparency in immigration law enforcement,¹⁹⁷ which results in misconduct and its tolerance among ICE Field Office Directors, ICE attorneys, EOIR adjudicators, and practitioners who participate in or are numb to the daily lawbreaking. Widespread, unlawful racial and ethnic profiling at the borders, in workplaces, and in prisons, as well as the rubber-stamping of the resulting unwarranted arrests by supervisors and EOIR adjudicators, many of whom were themselves ICE prosecutors,¹⁹⁸ are tolerated and then hidden. Moreover, each time ICE acts with negligence or malfeasance, it deports the evidence, giving ICE agents a de facto immunity from prosecution for criminal activities. The time-sensitive character of these events makes filing grievances impractical and pointless.¹⁹⁹ The second reason U.S. citizens are being detained and

¹⁹⁴ Respondents are frequently confused about the status of the proceedings; the staged resemblance to a criminal court room leads respondents to believe they have more rights than they actually do.

¹⁹⁵ Failure to follow the rule of law in immigration contexts has consequences similar to what happens when the rule of law fails in other civil matters: the laws lose legitimacy and individuals pursue extra-legal avenues for entrance. See Juliet Stumpf, Associate Professor, Lewis & Clark Law School, *Obedient Immigration Law: The Compliance Conundrum*, presented at the Annual Meeting of Law, Culture and Humanities, Boston, Ma. (Apr. 4, 2009).

¹⁹⁶ See *supra* Part II.A.

¹⁹⁷ See Stevens, *supra* note 177; Jacqueline Stevens, *ICE Agents' Ruse Operations*, NATION, Dec. 17, 2009, available at <http://www.thenation.com/print/article/ice-agents-ruse-operations>; Jacqueline Stevens, *Secret Courts Exploit Immigrants*, NATION, June 29, 2009, available at <http://www.thenation.com/doc/20090629/stevens>; Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N.Y. TIMES, Jan. 10, 2010, at A1.

¹⁹⁸ See *supra* note 289; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, UPDATED DETAILED REPORTS ON INDIVIDUAL IMMIGRATION JUDGES, <http://trac.syr.edu/immigration/reports/judgereports> (Sept. 2010).

¹⁹⁹ Mr. Lyttle filed eight written grievances while he was in ICE custody in the Stewart Detention Center in late 2008. ICE never investigated any of them but on June 8, 2010 stated they were exempt from release of responsive documents under the Freedom of Information Act (FOIA) because the release would "interfere with law enforcement proceedings." However, there was no active

deported is the comingling of criminal with immigration law enforcement.²⁰⁰ And finally, the criminalization of some immigration violations has caused the wrongful arrest and conviction of U.S. citizens who assert their citizenship, as well as discouraged them from claiming citizenship for fear of arrest.

A. DISCRETION WITHOUT ACCOUNTABILITY FOR ARRESTING OFFICERS

ICE officers empowered to arrest people for being in the country illegally have enormous discretion but receive little legal training and are not subject to public oversight.²⁰¹ This is important because once an arrest has been made and an agent issues a deportation order, there is little possibility for discretion later. Even though the initial apprehension may have been in error, “most aliens have few alternatives to appearing before immigration court after entering the removal proceeding phase.”²⁰² Whereas criminal prosecutors have discretion,²⁰³ ICE prosecutors are expected to file and attempt to effect all deportation orders.²⁰⁴ Effectively acting in secret—unlike police, the vast majority of ICE agents will never testify in an immigration hearing and thus never face a respondent who might dispute their statements in front of an adjudicator—people with no law enforcement training who may have been recruited through the Internet, including Craigslist,²⁰⁵ and who may

investigation. A further explanation for the exemption was that Mr. Lyttle’s 2008 complaints are in a “queue” for a “possible investigation,” a position that the DHS FOIA appeal office has upheld. Telephone Interview with William Holzerland, FOIA Associate Director, Dep’t of Homeland Security (July 2010).

²⁰⁰ Stumpf, *supra* note 92.

²⁰¹ “[A]lthough officers exercise discretion when deciding whether or not to take action to initiate the removal process, ICE does not have guidance on officers’ exercise of discretion on who to stop, question, and arrest when initiating the removal process. Without comprehensive policies, procedures, and practices, ICE lacks assurance that management directives will be conducted as intended and that ICE officers have the appropriate tools to fully inform their exercise of discretion.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-67, IMMIGRATION ENFORCEMENT: ICE COULD IMPROVE CONTROLS TO HELP GUIDE ALIEN REMOVAL DECISION MAKING 19–20 (Oct. 15, 2007).

²⁰² *Id.* at 16.

²⁰³ See generally Rodney Endgen, *Have Sentencing Reforms Displaced Discretion over Sentencing from Judges to Prosecutors?*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 73–90 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008).

²⁰⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 196, at 66.

²⁰⁵ See, e.g., Posting of U.S. Customs & Border Protection to craigslist.org (Oct. 26, 2010) (on file with author) (“Discover a challenging and rewarding career in Customs and Border Protection, the sole organization responsible for securing the nation’s borders. As part of our carefully selected, highly trained team, you’ll leverage state-of-the-art technology, innovative strategies and world-wide partnerships to protect our communities and defend our frontier. For complete

have no respect for the rule of law,²⁰⁶ have been shunting U.S. citizens by the thousands into deportation proceedings, forcing them to choose between their liberty and their citizenship.

B. BORDER PATROL UNLAWFULLY PREVENTING ENTRY OF U.S. CITIZENS

At the border, the law-breaking behavior may include Border Patrol agents tearing up²⁰⁷ or disregarding the U.S. birth certificates of Mexican-Americans,²⁰⁸ especially Mexican-American teenagers.²⁰⁹

information including job requirements and how to apply go to: <http://www.recruitingdepart.com/3166ID.htm>.”).

²⁰⁶ For example, Border Patrol Officer Trevino at the Hidalgo crossing in Texas, the port that deported Mr. Lyttle twice and another U.S. citizen a year later, told me, “I don’t care what the law says. The law doesn’t matter to me.” Interview with Trevino, Border Patrol officer, in Hidalgo, Tx. (June 24, 2009). ICE public affairs sets the tone by lying about the agency policies and practices. Agents who encounter the cover-ups effected through this propaganda effort are led to believe, correctly, that regardless of what they do, agency headquarters prefer to cover-up illegal actions rather than investigate them and prosecute wrongdoers. See Bernstein, *supra* note 197; E-mail from Barbara Gonzalez, Public Affairs Officer, Immigration & Control Enforcement (June 24, 2009) (indicating that there was no investigation of the agents who signed false statements on Mr. Lyttle’s I-213 forms).

²⁰⁷ “Ricardo” was born in Los Angeles and grew up in Phoenix, Arizona. In 2003, he was a teenage passenger in a car driving through Nogales, Arizona. The car was pulled over by Border Patrol agents. Ricardo presented his birth certificate and Arizona driver’s license, proof of U.S. citizenship. The agent tore up Ricardo’s birth certificate, saying that he was saving Ricardo from a charge of presenting false documents. The agent warned Ricardo that if he refused to sign a statement saying he was a Mexican national, Ricardo could face time in prison. Intimidated, Ricardo signed a document his attorney believes was a stipulated order of removal. In 2006, Ricardo was arrested on the U.S. side of the border and charged with a drug crime. Because of the deportation order, he also was charged with violating 8 U.S.C. § 1326 (Illegal Reentry). At that point, he was appointed counsel for the criminal proceeding. As Ricardo no longer had his birth certificate, the attorney immediately obtained affidavits from two aunts who had witnessed Ricardo’s birth in a Los Angeles hospital and the prosecutor moved to dismiss the charge. Telephone Interview with Joel Parris, Attorney, Federal Defenders, Inc. (Dec. 2, 2009).

²⁰⁸ 22 C.F.R. § 53.2 (b)(2) states: “A U.S. citizen is not required to bear a valid U.S. passport to enter or depart the United States . . . [w]hen traveling entirely within the Western Hemisphere on a cruise ship, and . . . if the U.S. citizen is under the age of 16, he or she may present either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad issued by the Department, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services.” Prior to 2009, a birth certificate was considered sufficient proof of U.S. citizenship for children under nineteen. See DEP’T OF HOMELAND SECURITY, DOCUMENTS REQUIRED FOR TRAVELERS DEPARTING FROM OR ARRIVING IN THE UNITED STATES AT SEA AND LAND PORTS-OF-ENTRY

1. *Guillermo Olivares*

Typical of the thirty-three episodes I tracked in which U.S. citizens were refused entry at the border²¹⁰ is the experience of Guillermo Olivares, born and raised in Los Angeles County.²¹¹ In 2000, Olivares presented a copy of his birth certificate to a Border Patrol agent at the San Ysidro crossing.²¹² A copy of or original birth certificate was a legally valid form of identification for all U.S. citizens crossing at that time,²¹³ and still valid today for children under 16 or children under 19 if travelling with a school or religious group.²¹⁴ However, instead of allowing him to enter, Border Patrol agents required his mother to bring the certified original from Los Angeles before allowing Olivares to return to his home.²¹⁵

FROM WITHIN THE WESTERN HEMISPHERE 6 (2007), *available at* http://www.dhs.gov/xlibrary/assets/whti_landseafinalrule.pdf.

²⁰⁹ I recorded seven cases of U.S. citizens denied entry at the U.S.-Mexican border despite presenting copies of U.S. birth certificates. All individuals had Hispanic surnames and were under eighteen years old the first time Border Patrol agents prevented them from returning to the United States. Each was turned away on two to fifteen occasions.

²¹⁰ The sources of these accounts are lawsuits, media reports, interviews with U.S. citizens and their attorneys, and government documents in the files of deported U.S. citizens, many obtained in their entirety through requests filed under the FOIA with respondent privacy waivers.

²¹¹ Press Release, ACLU of Southern California, U.S. Citizen Who Was Illegally Detained and Twice Deported Is Latest Victim of Government's Unconstitutional Immigration Enforcement Policy (Oct. 29, 2008), *available at* <http://www.aclu-sc.org/releases/view/102910>. The description of Olivares's experiences is based on the events in this press release and an interview with the ACLU attorney familiar with the underlying events. Telephone Interview with Jennie Pasquarella, Staff Attorney, ACLU of Southern California (Dec. 8, 2009).

²¹² *Id.*

²¹³ U.S. CUSTOMS & BORDER PROTECTION, CBP INSPECTOR'S FIELD MANUAL 40 (2008) (identifying a "Birth Certificate showing a place of birth in the U.S. accompanied by good identification" as evidence of U.S. citizenship). This is consistent with 22 C.F.R. § 53.2(b) (2006) (stating that U.S. citizens are not required to carry a passport "[w]hen traveling between the United States and any country, territory, or island adjacent thereto in North, South or Central America excluding Cuba; provided, that this exception is not applicable to any such person when proceeding to or arriving from a place outside the United States for which a valid passport is required under this part if such travel is accomplished within 60 days of departure from the United States via any country or territory in North, South or Central America or any island adjacent thereto . . .").

²¹⁴ 22 C.F.R. § 53.2(b)(11) (2011).

²¹⁵ ACLU Press Release, *supra* note 206.

In 2007, while in prison, Olivares was “coerced into signing papers that were never explained to him and was deported to Mexico.”²¹⁶ When he tried to reenter, the border guards ignored his claim of U.S. citizenship and refused him entry. Olivares lived in Jalisco, Mexico until June 2008, when he learned of his father’s serious illness and tried to use the certified copy of his birth certificate to return to Los Angeles.²¹⁷ When CBP again refused him entry, he tried to cross without inspection, was apprehended and charged with attempting to cross without inspection, and deported.²¹⁸ On September 2, 2008, Olivares’ father died. Olivares tried to return to Los Angeles again, and was deported a third time.²¹⁹ Later in September, Olivares, with his mother, re-approached the Border Patrol. This time, ICE sent him to the Otay Mesa Detention Center in San Diego, where he was held until October 9, 2008, when an ACLU attorney succeeded in having Olivares released from ICE custody because ICE has no jurisdiction over U.S. citizens.²²⁰ There have been similar successes in federal court. For example, in 2010, a judge in Texas rejected government claims that Cynthia Trevino was not a U.S. citizen and ordered the State Department to issue her a U.S. passport;²²¹ a federal judge also ordered the Border Patrol to allow other individuals claiming U.S. citizenship entrance into the United States for the purpose of adjudicating their claims.²²²

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Olivares’ mother, who was frustrated with previous efforts to have Olivares released, said, ““They would never listen. It felt so unfair that they could simply disbelieve my son’s citizenship without giving us any chance to prove that what we said was true. It made me panicked and anxious . . . I just wanted my son to be able to come home.”” *Id.*

²²¹ Jazmine Ulloa, *Woman Wins Passport Fight*, BROWNSVILLE HERALD, Oct. 15, 2010, available at <http://www.brownsvilleherald.com/articles/woman-118143-fight-passport.html>.

²²² *Alvarez v. Freeman*, No. 1:07-cv-00218 (D. Tex. Aug. 17, 2009) (“The Court ORDERED the Respondents to admit the Petitioner to the United States with the same rights as a person presenting a facially valid birth card and receipt for one’s passport application and shall return to him any and all documents confiscated from him on or about June 7, 2009, when he was refused admission and returned to Mexico.”). For similar orders, see PACER docket for *Trevino v. Rice*, 1:07-cv-00218 (D. Tex.) (class action on behalf of individuals whose birth certificates were invalidated after the conviction of a midwife for fraudulently recording live births; the petitioners dispute the validity of her statements that their particular birth certificates were fraudulently recorded).

2. Raymond

The case of Raymond²²³ illustrates the weight EOIR adjudicators place on statements made by U.S. citizens who, under duress, may sign false statements of alienage at the border to avoid arrest.²²⁴ Raymond was born in Colorado, and when he was eight years old, Raymond's mother filed for divorce. Shortly thereafter, Raymond was kidnapped by his father and raised in Mexico. In 2007, Raymond, then 17, tried to return to the United States at Nogales. A Border Patrol agent tore up his birth certificate and told him that he had to sign a removal order stating he was not a U.S. citizen or he would go to jail. Raymond signed it and returned to Mexico. After discussing the situation with his father's brothers in Arizona, Raymond decided to allow himself to be arrested and held in a detention center so he could appear before an EOIR adjudicator and reclaim his citizenship. At a secret hearing held in 2008 at the Florence Service Processing Center,²²⁵ the adjudicator disregarded the three-inch file that included a certified state copy of Raymond's Colorado birth certificate, his mother's copious prenatal medical records, the hospital data from Raymond's reflex tests, and a photograph of Raymond at age eight holding a copy of the same birth certificate that he had presented to the Border Patrol agent.²²⁶ The only evidence presented by the ICE attorney to support the position that Raymond was not a U.S. citizen was the earlier statement of alienage that Raymond signed as a teenager when threatened with arrest by Border Patrol. The adjudicator affirmed ICE's deportation order, and Raymond was sent back to Mexico.

C. STATE CRIMINAL ALIEN ASSISTANCE PROGRAM

Over the last 25 years, a deportation process targeting noncitizens with criminal convictions²²⁷ has led to a new legal beast one analyst calls

²²³ The name of this individual has been changed.

²²⁴ Information for this account is from an attorney at FIRR and documents in Raymond's file that I inspected in the FIRR office in Florence, Arizona on March 25, 2009.

²²⁵ See Stevens, *supra* note 9 (describing various unlawful actions in immigration courts).

²²⁶ A typographical line in an enlarged photograph confirms that the birth certificate held by Raymond when he was eight is the same as the certified original presented to the EOIR adjudicator. *Id.*

²²⁷ See Schuck & Williams, *supra* note 7, at 463 n.326 (explaining that in 1988, "aggravated felons were 'conclusively presumed to be deportable,' making them ineligible for several forms of relief, including withholding of deportation under INA 243(h)(2) and suspension of deportation under INA 244(a)"). In 1994, the Crime Bill eliminated for the first time the right to an administrative hearing for certain classes of alleged immigrants. *Id.* at 390; see 8 U.S.C. § 1228(c) (2006).

“crimmigration.”²²⁸ Juliet Stumpf describes how the mingling of adjudicating civil and criminal statuses and penalties lacks a legitimate basis in legal and political theory, resulting in poor policy goals and outcomes.²²⁹ The policies are largely targeting long-term residents and their U.S.-based families,²³⁰ many of whom are U.S. citizens.²³¹ Hence, these policies affect well-established communities that include people with varying degrees of connections to their ancestors’ countries of origins, and not only “immigrants”²³²—a concept that implies recent new-comers who lack membership in the extant political body.²³³ The policies provide prisons and jails incentives for alerting immigration authorities to “criminal aliens,” resulting in their detention and deportation, possibly without an immigration hearing or even notice to their relatives or attorneys.²³⁴ The State Criminal Alien Assistance Program (SCAAP)²³⁵ has three main policy goals: (1) to deport

²²⁸ Stumpf, *supra* note 92, at 368, 372.

²²⁹ *Id.*

²³⁰ See Markowitz, *supra* note 20, at 290 (arguing that laws designed for “exclusion” are being used for expulsion).

²³¹ *Supra* Table 4.

²³² Stumpf’s analysis also makes this clear. One concern is that the immigration law scholarship more generally frames these policies as harmful for immigrants. See Stumpf, *supra* note 90, at 376–77. This has the unintended consequence of metonymically associating U.S. citizens and legal permanent residents with the “immigrant” population. For example, the ACLU’s Immigrant Rights Project represents U.S. citizens, such as Peter Guzman and Mark Lyttle, who have been detained or deported. These individuals are demonstrably born in the United States and are not immigrants; hence a more accurate label for this group’s rights is “resident rights” or simply “civil rights.”

²³³ See HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006) (showing the change in public policy toward legal residents, and suggesting that the bright legal line between legal residency and citizenship should be erased). Part of erasing the line may require rethinking the vocabulary for describing legal residents.

²³⁴ A common misperception is that the deportation of U.S. citizens can be traced to post-9/11 policies. The creation of the Department of Homeland Security in 2003 increased the number of U.S. citizens who would be deported by increasing the total volume of deportations, but these deportations were already part of the “crimmigration” system in place since the 1980s. For a summary of the legislative history, see generally Schuck & Williams, *supra* note 7; Jennifer Hansen, *Sanctuary’s Demise: the Unintended Effects of State and Local Enforcement of Immigration Law*, 10 SCHOLAR 289 (2008). Eliminating due process protections has resulted in the unlawful lock-up of U.S. citizens without judicial review. See, e.g., Nancy Morawetz, *Detention Decisions and Access to Habeas Corpus for Immigrants Facing Deportation*, 25 B.C. THIRD WORLD L.J. 13, 29 (2005) (describing a petitioner who “abandoned his legal battle and was deported despite his citizenship claim”).

²³⁵ See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20301, 108 Stat. 1796 (1994) (codified as amended at 8 U.S.C. §

nonviolent offenders who entered without inspection, rather than house them at the expense of state prisons and local jails;²³⁶ (2) to deport noncitizens, including legal permanent residents, who are “aggravated felons”; and (3) to partially compensate state and local law enforcement agencies incarcerating noncitizens. A 1994 Texas legislative analyst forecast the implications of the state’s SCAAP participation: “The major gains to general revenue would be in the form of additional federal aid received under the Crime Bill for compensation to the state for the incarceration of illegal aliens”²³⁷ or any inmate identified as an illegal alien, including U.S. citizens.²³⁸ Designed amidst the misperception that “deportees had more due process than did an American citizen,”²³⁹ the policies have reduced the rights of U.S. citizens in the interior to the status of aliens at the border.²⁴⁰ SCAAP requires participating prisons and jails to enter an inmate’s “alien” information,²⁴¹ which is then passed

1231(i)); Dep’t of Justice Reauthorization Act of 2005, Pub. L. 109-162, § 1196, 119 Stat. 3130 (reauthorizing SCAAP).

²³⁶ This policy is called “early parole on condition of deportation.” *See infra* Part VI.B.1 (policy and David’s deportation papers).

²³⁷ *Identify All Incarcerated Illegal Aliens and Deport Eligible Nonviolent Criminal Aliens*, in 2 TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, GAINING GROUND: PROGRESS AND REFORM IN STATE GOVERNMENT (1994), available at <http://www.window.state.tx.us/tpr/tprgg/psc02gga.txt>.

²³⁸ The Texas legislative analyst’s report on how other states had been handling their alien inmate population stated, “California’s Department of Corrections reports that its process of identification goes far beyond self-reporting. An official in its Classification and Institution Division stated that caseworkers look at court records, ‘rap sheets,’ probation officer reports and other forms of identification, including Social Security cards and birth certificates. If there is any doubt about citizenship, the inmate is referred to INS for further review. Basically, California’s policy is that, unless inmates can prove they are U.S. citizens, they are referred to INS, which will screen and identify those it deems to be deportable.” *Id.* As early as 1994, researchers had noted that states were unlawfully counting for per diem compensation individuals who were born in the United States. REBECCA CLARK ET AL., THE FISCAL IMPACTS OF UNDOCUMENTED ALIENS: SELECTED ESTIMATES FOR SEVEN STATES 39–40 nn.14 & 42 (1994) (finding that INS data on California and Texas alien inmates is overstated due to inclusion of U.S. citizens); *see also infra* note 247 (David’s listing in Georgia database of alien inmates).

²³⁹ Schuck & Williams, *supra* note 7, at 436 (quoting 136 CONG. REC. S17, 106, S17, 109 (1990) (statement of Sen. Simpson)).

²⁴⁰ *Id.* at 412 n.191 (noting a 1989 GAO study indicating that cases in which deportees sought relief took “five times longer than cases in which no relief was sought,” and that “only about twenty-five percent . . . were ultimately successful”). Schuck and Williams’ minimization of this number is jarring in light of the consequences.

²⁴¹ BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, STATE CRIMINAL ALIEN ASSISTANCE PROGRAM, <http://www.ojp.usdoj.gov/BJA/grant/scaap.html> (last visited Feb. 22, 2011).

on to ICE agents who issue administrative removal orders or Notices to Appear in immigration court.

According to the Government Accountability Office (GAO), the rate of SCAAP compliance appears to be 100%,²⁴² indicating a nationwide prison staff eager to support federal immigration policies but lacking the education and training, as well as motivation, to distinguish citizens from aliens. Documented patterns of ignorance and malfeasance include bizarrely inaccurate state prison ethnic and racial classification systems,²⁴³ tactical disregard of self-identifications by prison intake staff

²⁴² OFFICE OF THE INSPECTOR GEN., COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES (2007), available at <http://www.justice.gov/oig/reports/OJP/a0707/final.pdf>. The GAO reviewed 76 randomly selected files of individuals the investigators considered criminal aliens from 164 agencies. *Id.* at 21. All 76 had been reported to ICE. *Id.* This is a marked increase from the 1990s. Government research then indicated that the “INS failed to screen more than a third of the foreign-born prisoners.” Schuck & Williams, *supra* note 7, at 407 (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/T-GGD-97-154, CRIMINAL ALIENS: INS EFFORTS TO IDENTIFY & REMOVE IMPRISONED ALIENS NEEDS TO BE IMPROVED (1997), available at <http://www.gao.gov/archive/1997/gg97154t.pdf>).

²⁴³ The persistence of such anachronistic, foolish typologies is both a cause and a symptom of why U.S. citizens are being deported. For instance, the Department of Corrections in North Carolina uses an “Oriental” designation, and staff applied this to someone who has no relatives from Asia: the Neuse Correctional Facility Offender Information Report for Mark Lyttle indicates on the line for “ethnicity” that he is “Oriental.” FOIA response to August 27, 2008 enquiry, NRC 2009025567, p. 263. The Active Foreign Inmates database for the Georgia Department of Corrections list for August 2009 includes the names of 32 individuals who supposedly self-identified as citizens of the *country* “Africa,” including those who, on belief of their attorneys, had never been to Africa and were U.S. citizens. GA. DEP’T OF CORR. OFFICE OF PLANNING & ANALYSIS, *Active Inmates Claiming Foreign Birth or Citizenship* (2009) (on file with author). One attorney said of a client on this list, “This guy’s a good ol’ boy. I’d be more than amazed to find out he’s from Africa.” Telephone Interview with Georgia criminal defense attorney (Sept. 22, 2009). The database also lists two individuals as citizens of China who appeared to have no reason for the designation other than the middle or last name “Lee.” (The photographs online show one man who is phenotypically African-American and the other who is phenotypically White). When I inquired about these apparent anomalies, the DOC official supervising the list’s production and dissemination said that they might have been born on U.S. military bases in China. After it was pointed out that the U.S. has never had military bases in China, the official provided anecdotes about children of so-called mixed-race couples he knew. After it was pointed out that anyone born in the U.S. would be a U.S. citizen he said that maybe the inmates were born on a U.S. military base in China. Telephone Interview with Georgia DOC Data Warehouse Manager (Sept. 21, 2009).

assigning alienage as a trigger for ICE review,²⁴⁴ and the absence of any due process for inmates to challenge wrongful designations.

I. "David"

In a case typical of deportation orders initiated from prisons, "David,"²⁴⁵ a U.S. citizen at birth (through acquired citizenship),²⁴⁶ was interviewed by an immigration agent in a Georgia prison in 1998 as part of a group that appears to have been flagged as noncitizens during intake interviews, pursuant to SCAAP.²⁴⁷ The details of his experience are a series of shocking civil rights violations. It is important to underscore that the severity of the misconduct does not indicate that it is aberrant, only underreported. David's narrative is typical of what I encountered in my findings of the SCAAP implementation, from Los Angeles to Raleigh.²⁴⁸

²⁴⁴ Once someone in the interior asserts birth in the United States, the government bears the burden of proof to show otherwise. *See* 8 C.F.R. § 1240.8(c). But a Los Angeles Sheriff's Department employee said in an affidavit it was legal for him to substitute his own judgments for accurate assertions of U.S. citizenship because "persons who are arrested [especially illegal aliens] often times falsely represent their place of birth." Federal Respondents Response to Request for Status Conference, Declaration by Al Wood, *Guzman v. Chertoff*, No. CV 07-3746-GHK (C.D. Cal. June 15, 2007). A Neuse Correctional Institution supervisor said that the prison's job is to alert ICE to possible alienage but not to make a final determination. Upon learning that ICE issued an administrative removal order for someone Neuse had incorrectly characterized as born in Mexico, the officer supervisor said, "I don't understand how ICE did this. They're the ones who are supposed to check this." Telephone Interview with supervisor, Neuse Correctional Institution (Aug. 19, 2009).

²⁴⁵ This is not his real name.

²⁴⁶ Copy of David's U.S. passport and documents from his EOIR file (on file with author).

²⁴⁷ In November 1998, David was given a ten-year sentence for a victimless crime so rarely charged that naming it would jeopardize his privacy.

²⁴⁸ Many of those whose records I inspected and whose experiences I recorded among the residents of a camp for the "deportados" in June 2009 in Reynosa, Mexico had been deported by EOIR adjudicator William Cassidy, the same individual who deported Mark Lyttle. The accounts and documents of deported residents in the Reynosa camps and shelters revealed one or more serious due process violations in their deportations, including groundless arrests by North Carolina and Georgia police based on ethnic profiling, confinement by local law enforcement for more than forty-eight hours before transfer to ICE custody, being bullied into signing removal orders by ICE agents in prisons for charges that do not legally trigger deportation, and hearings that differed significantly from the protocols described in the Immigration Judge Benchbook. *See* Jacqueline Stevens, *It's a Small World*, STATES WITHOUT NATIONS BLOG (June 24, 2009), <http://stateswithoutnations.blogspot.com/2009/06/its-small-world.ht>

David describes the first steps of his 1999 wrongful classification as an illegal alien in the Georgia prison system as follows:

Pete P.²⁴⁹ visited me in Hancock [State Prison]. He's from immigration. The first time he visited me in Jackson²⁵⁰ he asked me if I was illegal and I told him, "I am an American citizen." He said, "I am not going to take pictures or fingerprints, but if you are lying then you will have serious problems." He told me he knew everyone else was illegal, but he believed me. He led me along.²⁵¹

David was born in Mexico, but his father was a U.S. citizen by birth²⁵² and met the other criteria for conferring U.S. citizenship to David and his siblings.²⁵³

I asked David how he came to be interviewed by Agent P. in the first place. David said that after spending a few weeks in Georgia jails,

They sent me to Jackson Diagnostic. Everybody goes there. I met Agent P. there. They called a group of Hispanics and talked to us. They took everybody's pictures except for me. That's the way they do it, if your name is Hispanic. It doesn't matter if you're Puerto Rican, just if your name is Hispanic. He wasn't sure if I was lying but it's against the law to take my fingerprints

ml. The secrecy with which ICE and the EOIR operate is responsible for the lack of public information about these processes. The public's ignorance ossifies into the belief that these events do not and could not transpire. With this in mind, I am documenting in detail the processes that led to David's false imprisonment for several years beyond when he should have been released after serving time for his criminal conviction.

²⁴⁹ Last name omitted.

²⁵⁰ Georgia Diagnostic and Classification Prison in Jackson, Ga.

²⁵¹ The direct quotations are responses to my questions. The transcript reflects only David's replies. The sources for this narrative are David's prison records, deportation documents and immigration court records and decisions, and telephone interviews with David, his pro bono attorney Neil Rambana in Tallahassee, Florida, David's sister in Long Beach, California, and wardens and other prison officials in Georgia between June 12, 2008 and December 18, 2008 (on file with author).

²⁵² His father moved as a child with his family to Mexico in 1925, during the period of forced expulsions. *See* Balderrama & Rodriguez, *supra* note 2.

²⁵³ On December 16, 1989, the consular office in Juarez, Mexico issued David, at the age of 16, a consular card indicating his U.S. citizenship. He used this to enter the country, but he did not have this with him in the prison. Copy of consular card (on file with author); Telephone Interview with David (Dec. 18, 2008).

if I'm an American citizen. I went to Coffee [minimum security] because he didn't find nothing on me.

I asked about the nature of agent P's questions:

He was asking for something to prove my citizenship. I told him, "I'm in prison. Whatever I told you is all I can give you. I gave you my social security number; my ex-wife is a permanent resident because of me [through David's U.S. citizenship]. All you have to do is go to the immigration building." I don't think anyone did nothing to find out. All they had to do is call to the [U.S.] embassy in Mexico. I really don't think he did a thing to find this out.

David told Agent P. that in addition to the evidence of his citizenship leading to his wife's green card and on file with the Atlanta immigration office, the U.S. consulate in Juarez would have on file the paperwork on which it relied to issue him a consular card as a U.S. citizen when he was fifteen.

A few months following this encounter, guards abducted David during the night and without explanation took him from the low security Coffee Prison to one that was close security.²⁵⁴ David was informed later that he was being deported and issued a Notice to Appear (NTA) in immigration court.²⁵⁵ The NTA stated he was being deported because he had not been lawfully admitted into the United States. In order to thwart this, David relied on his mother and sister to send his INS documents, so that he could bring to INS' attention the information from its own files and prove his U.S. citizenship. In 2002, he sent these documents to the Atlanta INS office. A year passed and he heard nothing. Still anxious to be in a facility with nonviolent offenders and to clarify his citizenship, David resent the documents in 2003. No one replied.

²⁵⁴ David served most of his time at Telfair State Prison, a closed facility for adult male felons. See *Telfair State Prison*, GA. DEP'T OF CORRECTIONS, http://www.dcor.state.ga.us/GDC/FacilityMap/html/telfair_state_prison.html (last visited Feb. 22, 2011).

²⁵⁵ "Suddenly they picked me up in the middle of the night and said that I would be transferred. They didn't tell me where. Later they told me it was because of an immigration hold. The prison officers came. That's the way they do it when someone is going to be transferred. I didn't know what to think. I was trying to find the reason. I thought I was going to another minimum security prison but they sent me close security. I was afraid because it was dangerous, more dangerous than Coffee [prison]. In the prison in Coffee there are only people from three years and down. The majority are not aggravated assault, but there for something simple. In close security you've got murderers, rapists, people with life sentences, a lot of people with nothing to lose." Telephone Interview with David (Dec. 18, 2008).

According to the warden of the minimum security facility that transferred David, “[a]n immigration detainer would put someone into heightened security.”²⁵⁶ Among the numerous due process violations associated with SCAAP, there is no venue for appealing a reclassification based on putative alien status.²⁵⁷ Absent a legal venue or even procedure to correct the misclassification,²⁵⁸ David remained in a maximum security prison. Had David been correctly classified as a U.S. citizen he would have been eligible for parole because of his exemplary record, the numerous classes he had taken, and the certificates he had earned.²⁵⁹ However, under the terms of SCAAP, Georgia was receiving a

²⁵⁶ Telephone Interview with Warden, Coffee Prison (June 2008).

²⁵⁷ *Id.*

²⁵⁸ The Coffee Prison warden told me that the classification could not be rectified unless “immigration contacts us and says they’re a citizen.” *Id.* David’s INS warrant “commands” INS officers to “take the above-named alien into custody for proceedings in accordance with the applicable provisions of the immigration laws and regulations.” David’s warrant (Jan. 1999) (on file with author). There is no legal process for having ICE change this designation prior to being put into detention and waiting for an administrative hearing. *See* INA § 287, 8 U.S.C. § 1357 (2006). And yet in a separate case now pending, even after acknowledging these policies in effect for the entire Bureau of Prisons, a federal district court in Maryland denied David Johnson’s habeas challenge to his misclassification (on two prior occasions immigration courts had terminated deportation proceedings in response to his evidence of U.S. citizenship). *See* Johnson v. Whitehead, No. 8:08-cv-01872-PJM, at 5 & n.10 (D. Md. May 14, 2009) (faulting the petitioner for not appealing to “either the Regional Office or the Office of General Counsel [for the BOP]” and citing court precedent that “we will not read futility or other exceptions into statutory exhaustion requirements”). For David and Mr. Johnson’s situations, however, no statutory appeal process even exists. *Id.* at 3 (“BOP policy dictates that inmates who are not U.S. citizens shall have a ‘Deportable Alien’ Public Safety Factor (“PSF”) applied. Petitioner’s PSF . . . could only be removed when officials at ICE or the Executive Office for Immigration Review have determined that deportation proceedings are unwarranted.”).

²⁵⁹ David received a letter dated May 1, 2005 and headed “Parole Reconsideration.” The letter states: “A Fulton County Superior Court judge recently signed an order ruling that the Parole Board’s 90% policy, adopted in 1997, was ‘implemented improperly and as a result is ineffective and has no force or effect’ Receipt of this letter documents the Board’s intention to reconsider your case without regard to its former 90% policy. The guidelines recommendation in your case will be your guidelines grid score.” Letter from Milton Nix, Chairman, Georgia State Board of Pardons and Paroles, to David (May, 2005) (date omitted to preserve confidentiality) (on file with author). The certificates David earned include his Diploma for General Educational Development (GED), 1999; American Bible Academy, Certificate of Completion for several books of the Bible, 2002; Certificate of Achievement, Substance Abuse 101, 2001; Exodus Bible Correspondence School Certificate, 2001; Certificate for Industrial Machine Operator, 900 hours, 2002; Las

per diem reimbursement from the federal government and in no hurry to release him, per the Georgia agreement with the Department of Justice on early release conditional on deportation.²⁶⁰

An official with the Georgia Parole Board confirmed that the Board does not issue these orders before an inmate would be released without the INS detainer:

If the parole board hearing in Georgia makes a decision to grant parole, they don't make it earlier than what it would if they do not have an ICE detainer. . . . [We do this only] if they're parole eligible. Just because they have an ICE detainer does not mean we will consider them. We're not granting them parole.²⁶¹

Although the congressional intent was to save taxpayer money by sending nonviolent offenders to their country of origin through early parole, rather than housing them in minimum-security facilities, it appears that so-called aliens were being held as long as or longer than they might have been otherwise.²⁶²

Eight years into David's ten-year sentence, after the Supreme Court in Georgia had ruled that all inmates serving time for nonviolent crimes had to be considered for parole after three years, he received a notice of this Supreme Court decision and an "Order of Conditional Transfer to

Escuelas Fuente de Luz, correspondence course completion, 2002; and Certificate of Achievement, Family Violence, 2005.

²⁶⁰ See *Fact Sheet: ICE Rapid REPAT Program*, IMMIGRATION & CUSTOMS ENFORCEMENT, available at <http://www.ice.gov/news/library/factsheets/rapidrepat.htm> ("On October 3, 2008, ICE and the State of Georgia signed an agreement to implement the Rapid REPAT program, similar to the program Georgia has had in place since 1995.").

²⁶¹ Telephone Interview with Official, Georgia Parole Board (July 7, 2008).

²⁶² Per the terms of SCAAP, Georgia receives no reimbursements from the federal government for the prisoners who are U.S. citizens, only those classified as aliens. See Clark, *supra* note 238. A staff attorney with the Southern California ACLU independently volunteered her impression that inmates classified as aliens were serving longer prison terms than inmates denoted U.S. citizens, although she was not familiar with the SCAAP. Telephone Interview with Staff Attorney, ACLU (Dec. 2009). Governor Pete Wilson (R-Cal.) was one of the major politicians pressing to initiate these reimbursements. Schuck & Williams, *supra* note 7. Senator Diane Feinstein (D-Cal.) has pressed President Obama to revise the federal budget for SCAAP upwards. *Senate Judiciary Approves SCAAP Reauthorization Bill 12*, *Bulletin 7*, CAL. CAPITOL HILL BULL. (Mar. 18, 2005), http://www.calinst.org/bulletins/b1207.htm#_1_1. President Bush's budgets, as did Obama's in 2009, sought SCAAP's elimination. *Id.* Senator Feinstein and others overturned the recommendation and funded SCAAP. *Id.*

I.N.S., With Detainer.” The order, consistent with the 1994 Crime Bill and the 1996 IIRIRA, states: “[t]his grant of executive clemency shall permit the subject of this Order to depart the custody of the Georgia Department of Corrections only for the purpose of entering into and actually remaining in the confinement custody of the United States Immigration and Naturalization Service pending deportation.”²⁶³ The document effects commuting a sentence on condition of deportation: “all sentences now being served by the subject of this Order are hereby stayed and suspended pending the actual deportation of the subject of this Order.”²⁶⁴ The Order does not contemplate the possibility that the recipient of this Order is a U.S. citizen.²⁶⁵

After serving eight years in prison, David was transferred to ICE custody in 2006 and taken in a van to the Etowah Detention Center in Gadsden, Alabama:

I thought it was going to be two or three weeks. When I was first in immigration I spent 3 months there. I went to see this guy [an ICE officer], and he said, “Do you want to be deported or see the judge?” I told him I was American and wanted to see the judge. He told me, “You’re not a U.S. citizen.” Then he opened it, what I sent in 2002, and said, “Wow, you really are an American citizen! What are you doing here?” He really got surprised. “The reason is you never looked at the papers,” I said. “You never paid attention to what I sent you.” He said, “You’re going to have to see the judge. You can tell the judge.”²⁶⁶

The adjudicator presiding over David’s case, William Cassidy, was in Atlanta, Georgia, and David was supposed to appear for the hearing via televideo.

Mr. Cassidy cancelled the hearing, and a guard told David it was rescheduled for two weeks later:

²⁶³ PFO 04-77 Rev. 8/95 (Ga. State Bd. of Pardons & Paroles Dec. 2005) (on file with author).

²⁶⁴ *Id.*

²⁶⁵ *Id.* The complexity and even contradictions within the rules controlling the conditions of incarceration for U.S. citizens wrongfully classified as aliens as a result of racial profiling and other misconduct are inconsistent with due process. The legal violations David and his family experienced as a result of his initial misclassification included: (1) undeserved time in maximum security; (2) an apparent increase or no change in time served despite an order predicated on “early release”; (3) the anxiety of facing deportation for ten years; and (4) years of frustration over the lack of recourse to rectify a clearly erroneous classification, even after having twice submitted the relevant documents.

²⁶⁶ See Telephone Interview with David, *supra* note 251.

I didn't have a problem to wait. I knew I was going to be released. But they never went to pick me up. They told me the guys who were going to pick me up didn't know where I was. They thought I was in another place. They told me I was going to wait for another court date in two months. I was not too desperate. I waited too long for that moment. Two more months, it ain't too much. After two months they didn't pick up again. I went to talk to them again, and they told me the same thing. That's when I started getting desperate. They told me they were giving me another date. One more month. By this time, I talked to Mr. Rambana [David's pro bono attorney]. He told me, "Just send me the papers and I'm going to take you out of there."²⁶⁷

ICE told David it had scheduled a third hearing for him, a month away. ICE, for a third time, failed to pick him up, but the hearing was held telephonically in David's absence and Mr. Rambana, David's pro bono attorney in Tallahassee, prevailed.

On August 31, 2006, five months after David was released into ICE custody, Mr. Cassidy, the adjudicator who presided over hearings for detained populations in Georgia and Alabama,²⁶⁸ terminated David's deportation order.²⁶⁹ Mr. Rambana assumed the matter was closed and that David would be released.

That same day, back at the Etowah Detention Center in Alabama, David remained in ICE custody. David explained:

Judge Cassidy terminated the proceedings. As far as I know, they got 72 hours to let me out. I was looking at the computer and that's what they say. I went to talk to an immigration officer, and she told me the judge terminated my case because they didn't take me to court, not because he was accepting my American

²⁶⁷ Telephone Interview with David (Dec. 18, 2008). Rambana & Ricci is a law firm on the pro bono list that the EOIR is required to make available to respondents in detention centers. *See* Memorandum from David Neal, Chief Immigration Judge, to All Immigration Judges, Guidelines for Facilitating Pro Bono Legal Services 4 (Mar. 10, 2008).

²⁶⁸ Inspection of dockets at the Atlanta federal building; Interviews with recently deported individuals, in Reynosa, Mexico (June 2009); Interview with Tracey Blagec, Court Watcher, in Decatur, Ga. (Oct. 8, 2009); personal observation of respondents in shackles and wearing "Etowah County" jumpsuits for hearings in Mr. Cassidy's court (Oct. 25, 2010).

²⁶⁹ Cassidy, Written Decision (June 2008) (referencing original August 2006 decision terminating the deportation order).

citizenship.²⁷⁰ The next step was I had to start all over again. I felt like I was kidnapped. I told them, release me or deport me or do something. They said, “We cannot deport you because it has to be the judge.” So I said, “Then release me.”

I was sad, depressed, desperate. I found people who were there for five years. One guy was from Africa. They were [legal] residents, and not guilty of what they were accused of. They were fighting their cases. I thought I was going to spend a long time there.

David’s sister,²⁷¹ also a U.S. citizen, confirmed David’s despondent condition, and how he came close to signing a statement falsely swearing that he was not a U.S. citizen:

They sent him to detention for immigrants. They said either he signs or stays there. He wants to sign just to be free. We said, “No, you don’t sign. You’ve already been in there nine years. Just one more year. It’s not worth it for you to sign.” Unfortunately we never had any money for an attorney.²⁷²

David did what he could to obtain his release:

I wrote a letter to the judge and asked for a decision on paper and told him I was going to look for some help. He sent the papers to Mr. Rambana, and Mr. Rambana released me, the same week. I sent the papers on Monday and Friday I was released. But they didn’t release me. I was downstairs with my street clothes on, but they told me I had a hold from the Department of Corrections, Georgia, so they sent me to a county jail. I thought they just wanted to take my information, but no, they just put me in jail, the same county jail for Friday, Saturday, and Sunday. And then they take me to Atlanta.

²⁷⁰ The statement by the ICE deportation officer was simply false, most likely an indication of poor training and lack of legal knowledge. In the fall of 2010, people held by ICE in the Etowah County Jail continued to miss hearings because they were not transported to the Atlanta federal building. Attorney Statement to Judge Cassidy (Oct. 25, 2010) (notes from hearing on file with author).

²⁷¹ She resides in Los Angeles with her husband and children and spoke to me during a break from her job as a dispatcher for a city agency in southern California.

²⁷² Telephone Interview with David’s older sister (2008).

David inferred from the conversations he overheard that he was being held with no obvious legal authority:

The jail in Georgia didn't want to pick me up because I didn't have a charge. I was in a jail in downtown until 6 pm. They left me there in the waiting room, in intake. At 6 pm ICE picked me up again and put me in another jail, Fulton. They were so strange. Everything was so strange. When we got to Fulton County they didn't want to let me in. They told me the same thing. "You're going to get us in trouble. What is the charge?" [The ICE agent said,] "I don't know. He's a got a hold." "How come he got a hold from Georgia Department of Corrections, but he was already released?" When they put a hold it's only because you have a new charge. [The ICE agent] told them he was going to pick me up the next morning. They booked me like I broke parole. That's what they put in the computer, and I saw it. I spent three weeks in Fulton County.²⁷³

I asked David how he felt when this was happening. He replied, "I was feeling kidnapped." The problem was that Georgia's DOC had released him into ICE custody on condition of deportation as an alien; following the termination of this process, that order specifically precluded paroling him, even though he was a U.S. citizen. The order is written to comply with a regulation intended to use this for "early" parole on condition of deportation. However, as the Georgia Parole Board had indicated, David was not being paroled early,²⁷⁴ and the guards at the jails that would not incarcerate him understood this. The underlying problem was that by collapsing the enforcement of criminal and immigration law, and failing to execute either properly or provide due process protections, the government had led David into a maze laid out according to the logic of Kafka's Castle²⁷⁵ and the politics of Hitler's Nuremberg laws.²⁷⁶ If David had succumbed to ICE pressure, as other U.S. citizens have done, he would have been shipped to Reynosa, Mexico in early 2006, and the United States would have furthered the implicit policy of SCAAP's racial cleansing.²⁷⁷ David was falsely

²⁷³ David said the ICE agent in the van discussed how David ended up in this situation: "On the road to Fulton, ICE tells me that Pete P. says that you told him that you were illegal. 'If I told him that, why didn't he take my picture or fingerprints?'"

²⁷⁴ See *supra* text accompanying notes 259–60.

²⁷⁵ FRANZ KAFKA, *THE CASTLE* (Oxford University Press 1998) (1926).

²⁷⁶ HILBERG, *see supra* note 128.

²⁷⁷ Rep. Steve King's reference to the Mexicans entering the United States as a "haystack of humanity" conveys the dehumanizing view of people of Mexican

imprisoned for two years simply for insisting that his own government recognize him as a citizen, regardless of his last name, place of birth, and accent.²⁷⁸

Further complicating the plight of U.S. citizens in deportation proceedings is that, unlike criminal law in which a trial judge or jury verdict of not guilty is unreviewable, when the prosecution loses in immigration courts, it may appeal within thirty days.²⁷⁹ The prosecution appealed in five of the FIRR cases in which judges months later affirmed the termination orders.²⁸⁰ ICE filed such an appeal in David's case. On September 29, 2006, twenty-nine days after Cassidy had terminated David's deportation order, ICE prosecutor Renae Hansell in Atlanta, Georgia filed an unsigned and undated appeal²⁸¹ and, most importantly, did not send a copy of the appeal to David's attorney.²⁸²

ancestry consistent with a commitment to sweeping this haystack, so to speak, out of the country.

²⁷⁸ An additional complication is David's parole board records following his return to prison. They make no sense. DOC employees confirmed this when I made inquiries in telephone interviews. Also, his sister told me that each time she made what she believed were arrangements that met the criteria for his release, the probation officers gave her objections that they themselves admitted were idiosyncratic. They told her, "It [the rules for his release] depends on what officer you get.' And that's when I said, 'No, this does not depend on what officer I get, but on the law. No matter who I talk to, I should get the same answer.'" Interview with David's sister, *supra* note 272.

²⁷⁹ 8 C.F.R. § 1003.38 (2010).

²⁸⁰ See Komis Interview, *supra* note 51. Based on interviews with FIRR and other immigration attorneys, this number underestimates the rate of ICE prosecutor appeals because it does not account for the respondents who rescind their claims to U.S. citizenship instead of remaining locked up as David was. The EOIR recordings I used to verify the outcomes would indicate that these "aliens" had been ordered deported, not that they were cases that had been terminated. If the ICE prosecutor appealed a decision terminating a deportation order and the individual decided not to challenge the appeal, that case would not appear among the 82 cases of individuals whose deportations had been terminated due to U.S. citizenship. Therefore, there would be no record that ICE had filed an appeal of an order terminating U.S. deportation on grounds of U.S. citizenship. For evidence of ICE trial attorneys extorting false confessions among respondents locked up in southern Arizona, see, for example, Jacqueline Stevens, *Kidnapped Canadian*, IMMIGRATION DAILY (Oct. 14, 2010), available at <http://www.ilw.com/articles/2010,1014-stevens.shtm>. See also *United States v. Wilson*, 420 U.S. 332, 352 (1975) ("[P]olicies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal.").

²⁸¹ See *infra* note 285.

²⁸² Telephone Interview with Neil Rambana, Pro Bono Attorney, Rambana & Ricci (June 12, 2008). David's EOIR file confirms the absence of a certificate of service that would have been present in David's file if DHS had sent either of them a copy of the appeal.

The Georgia DOC, however, had David back in its custody. Between September 2006 and May 12, 2008, David was shuffled around several Georgia prisons without notice given to his attorney.²⁸³ David did not know if he was being falsely imprisoned because of the Georgia DOC²⁸⁴ or because of ICE. All he knew was that in 2005 he received a notice from the Georgia DOC that he was eligible for parole; in 2006, an adjudicator ruled David was indeed a U.S. citizen, and that he should be back with his family in Texas.

The undated, unsigned appeal that, according to the Board of Immigration Appeals (BIA), Ms. Hansell filed on September 29, 2006,²⁸⁵ makes several false assertions, including David's alleged statement that he had illegally entered the United States.²⁸⁶ The BIA remanded the case because EOIR adjudicator Mr. Cassidy did not record the hearing, and because he did not issue a written decision stating the reasons for terminating the deportation order.²⁸⁷ The BIA decision incorrectly indicated that David was pro se.²⁸⁸ Eventually, almost two years after he thought his client had been released from custody, Mr. Rambana learned that David was still in prison and that ICE had scheduled a new hearing for him to be deported. In 2008, EOIR adjudicator Mr. Cassidy, a former ICE attorney, altered the timeline of events so that it appeared his first decision was given in 2008 and not 2006.²⁸⁹ This alteration made legally invisible the interim of the appeal and the ICE attorney's unlawful failure to send Mr. Rambana a copy of the appeal. ICE's zealous efforts to deport David concluded after the ICE attorney withdrew her appeal

²⁸³ Records on file with author. *See also* Interview with David, *supra* note 251.

²⁸⁴ The Georgia DOC employees familiar with David's record seemed confused about the reason for his reclassification in the prison. David said one explanation was that he had been classified as a sex offender and needed to meet certain residency criteria before he could be released. However, not only did the Executive Director of the state's Sex Offender Registry inform me that the GA DOC had not sent David's record to her office, but the Georgia State Supreme Court had overturned these requirements in 2007. Telephone Interview, Director of Georgia State Sex Offender Registry (2008) (notes on file with author).

²⁸⁵ This is the date indicated by the Board of Immigration Appeals' one-member decision in March 2008, but there is no underlying evidence for this. *See supra* note 251.

²⁸⁶ *Id.*

²⁸⁷ *See* Cassidy, Written Decision (June 2008) (on file with author).

²⁸⁸ *See supra* note 251.

²⁸⁹ In June, 2008, another ruling by Mr. Cassidy mentioned his initial order, but post-dated this from August 31, 2006 to May 13, 2008, legally obliterating the extended period of David's unauthorized incarceration in the custody of ICE, an agency that includes Mr. Cassidy's former colleagues from his time as an immigration prosecutor. *See Judge William A. Cassidy*, TRAC IMMIGRATION REPORTS, <http://trac.syr.edu/immigration/reports/judgereports/00004ATL/index.html> (last visited Feb. 22, 2011).

following a professor's inquiries to ICE and EOIR and blog posts describing these events.²⁹⁰ Despite his U.S. citizenship at birth and a prison record warranting parole in 2005, if not earlier, David was forced to serve every minute of his ten-year prison sentence, and was not released until November 2008.²⁹¹

2. Mark Daniel Lyttle

Mark Lyttle was born in 1977 in Rowan County, North Carolina, and is therefore a U.S. citizen by birth.²⁹² There is no evidence that his biological parents have ties to Mexico and his adoptive parents demonstrably have none. Mr. Lyttle speaks no Spanish. Yet on December 19, 2008, Mr. Lyttle was flown in handcuffs and shackles on a Justice Prisoner Air Transport plane, dropped off in Hidalgo, Texas with only the green prison outfit he had on when ICE picked him up six weeks earlier in North Carolina, and told to leave his country and walk across a bridge to Reynosa, Mexico.²⁹³ The only identification he had was a deportation order for "Jose Thomas."²⁹⁴ This event was the culmination of numerous acts of misconduct and due process violations on the part of law enforcement officials and an EOIR adjudicator. In addition to these defects of administrative law enforcement, a subsequent threat of imprisonment for violating immigration laws meant that Mr.

²⁹⁰ The motion provides no reason for ICE withdrawing its appeal. (Motion on file with author; full citation would disclose confidential information.) ICE attorney Renae Hansell, in Atlanta, did not reply to telephone messages I left in June, 2008 requesting further information on her decision to withdraw the government's appeal of Cassidy's order terminating David's deportation.

²⁹¹ At the time ICE withdrew its appeal, three months remained on David's reinstated ten-year prison sentence. A Georgia probation officer said that they would not bother with a new review. Telephone Interview with Georgia DOC Parole Officer (Sept. 2008).

²⁹² This account is based on interviews on the phone and in person with Mark Lyttle, Neil Rambana, the pro bono attorney representing Mr. Lyttle after ICE arrested Mr. Lyttle in the Atlanta airport, and Mr. Lyttle's DHS and EOIR files. Government violations include false sworn statements by ICE agents, misconduct in failing to follow the procedures for verifying claims to U.S. citizenship as specified by memoranda issued by James Hayes, Jr., see Hayes Memo I and Hayes Memo II, *supra* note 41, and the EOIR adjudicator's failure to follow the rules for conducting hearings detailed in the Immigration Judge Benchbook, see EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION JUDGE BENCHBOOK (2007), available at <http://www.justice.gov/eoir/vll/benchbook>, as well as violation of the procedures in 8 C.F.R. § 235.3(b)(5) (2010).

²⁹³ For further details, see Jacqueline Stevens, STATES WITHOUT NATIONS BLOG, <http://www.stateswithoutnations.blogspot.com> (follow "Mark Lyttle" hyperlink).

²⁹⁴ This was the name an ICE agent at the Neuse Correctional Institution in Goldsboro, North Carolina wrote on Mr. Lyttle's scratch I-213, and it appears on many but not all of the documents in Mr. Lyttle's "alien file."

Lyttle was denied any opportunity to rectify his deportation through the agencies that deported him. When he attempted to return, Border Patrol agents told him another effort would land him in prison. As a result of the threat of prison time, Mr. Lyttle said he spent four and a half months in shelters, immigration camps, and a jail in Mexico, Honduras, Nicaragua, El Salvador, and Guatemala.²⁹⁵

Shortly after arriving in Reynosa, Mr. Lyttle crossed the bridge spanning the Rio Grande and tried to return home. On the first occasion, December 22, 2008, he explained what had happened to the Border Patrol agents,²⁹⁶ but they told him that he was in their records as a deported alien and needed to turn around and go back to Mexico. On the second occasion, December 29, 2008, the guards issued an Expedited Removal Order stating, “[Y]ou falsely represented yourself to be a United States citizen for the following purpose or benefit: to attempt to enter the United States without valid entry documents.”²⁹⁷ The Expedited Removal Order also includes, as part of the form, a warning stating that false representation under 8 U.S.C. § 1326 is a crime for which one may be imprisoned up to twenty years and fined up to \$250,000.²⁹⁸ Thereafter, Mr. Lyttle believed that if he attempted to tell government officials he was a U.S. citizen, he would be sent to prison. Missionaries at Christian shelters advised Mr. Lyttle to seek assistance at the U.S. embassy in Mexico City, but Mr. Lyttle did not believe they understood his situation.

Subsequent encounters confirmed his fears. Following inquiries from the Honduran immigration authorities, the U.S. Embassy in Tegucigalpa, Honduras refused to make inquiries of Mr. Lyttle’s family, and so the Honduran immigration authorities sent Mr. Lyttle to an immigration camp and from there to a jail near Nicaragua.²⁹⁹ Several months later, after Mr. Lyttle obtained a U.S. passport based on the efforts of a consular official who called his family and said his

²⁹⁵ See sources cited *supra* note 292.

²⁹⁶ Telephone interviews with Mark Lyttle (Apr.–June 2009) (notes on file with author); see also Lyttle’s Customs and Border Protection records (on file with author).

²⁹⁷ *Id.*

²⁹⁸ *Id.* Mr. Lyttle was held in a cell and then picked up by a van driven by an employee of the Mexican government and dropped off in Reynosa. Forms were filled out characterizing the encounter, but without his signature. *Id.* The forms state that he refused to sign the forms. Mr. Lyttle states that he never refused to sign any forms and that he was not asked to sign them. *Id.*

²⁹⁹ See sources cited *supra* note 292; Interview with Oscar and his supervisor, Honduran Immigration Officials, in San Pedro Sula, Honduras (June 30, 2008); Telephone Interview with immigration official, in Tegucigalpa, Honduras (June 30, 2008); Honduran Immigration Record for “Jose Thomas” (Mar. 3, 2008).

citizenship claims were “easy” to confirm,³⁰⁰ Mr. Lyttle was detained in the Atlanta airport en route to his brother, a soldier based in Kentucky. On April 23, 2008, ICE issued a third Expedited Removal order, even though a U.S. passport is conclusive proof of U.S. citizenship unless it is obviously invalid.³⁰¹ Neither the ICE agents nor the ICE Desk Attorney in the Atlanta Field Office returned phone calls made by a pro bono attorney recently procured by Mr. Lyttle’s brother.³⁰² Were it not for inquiries by a researcher and phone calls from an ICE agent in Washington, D.C. on Mr. Lyttle’s behalf, the April 23, 2009 Final Departure Order indicates that he would have been flown back to Mexico.³⁰³ On October 13, 2010, the American Civil Liberties Union and the law firm Troutman Sanders filed lawsuits on Mr. Lyttle’s behalf against the state and federal agencies and individuals responsible for these events.³⁰⁴

³⁰⁰ Interview with Maria Alvarado, Vice-Consul, U.S. Embassy, in Guatemala City, Guatemala (July 1, 2009).

³⁰¹ Matter of Villanueva, 19 I. & N. Dec. 101, 102 (B.I.A. 1984).

³⁰² Telephone Interview with Neil Rambana, Mr. Lyttle’s Attorney, Rambana & Ricci (June 23, 2009).

³⁰³ See supra notes 114, 292; Telephone Interview with Barbara Gonzalez, Public Affairs Officer, ICE (Apr. 26, 2009); Jacqueline Stevens, *U.S. Citizen Deported to Mexico, Shipped to Guatemala, Now Held in Jail*, STATES WITHOUT NATIONS BLOG (Apr. 23, 2009, 12:33 PM); Jacqueline Stevens, *U.S. Kidnaps Mark Lyttle, Leaves Him Stateless in Mexico, Honduras, Nicaragua, Guatemala*, STATES WITHOUT NATIONS BLOG (Apr. 24, 2009).

³⁰⁴ According to the Director of the National Security/Immigrants’ Rights Project at the ACLU of Georgia, Azadeh Shahshahani, “Mr. Lyttle’s disabilities were obvious and well documented but the government offered him no legal assistance and worse still, failed to even perform the normal verification procedures on his legal status No reasonable basis existed to suspect that Mr. Lyttle was not a United States citizen.” Press Release, American Civil Liberties Union, *ACLU Files Lawsuits After Government Wrongfully Deports U.S. Citizen With Mental Disabilities* (Oct. 13, 2010), available at <http://www.aclu.org/immigrants-rights/aclu-files-lawsuits-after-government-wrongfully-deports-us-citizen-mental-disabili>. Another case on behalf of a U.S. citizen with cognitive disabilities who was born in Los Angeles and deported to Mexico in 2007 settled on May 4, 2010 after the U.S. government agreed to pay \$350,000 to Mr. Guzman and his mother, Maria Carbajal. *Guzman v. Chertoff*, No. CV08-01327 GHK (C.D. Cal. May 4, 2010) (order granting settlement). On January 7, 2011, attorney Elliott Ozment filed a lawsuit against law enforcement agents and agencies in Davidson County and Nashville, Tennessee, alleging false imprisonment and other civil rights violations committed against his client Daniel Renteria-Villegas, who was held for almost two weeks as an illegal alien, despite the fact that he was born in Portland, Oregon. *Renteria v. Hall* (Tenn. Ch. filed Jan. 7, 2011).

D. U.S. CITIZENS IMPRISONED FOR IMMIGRATION CRIMES

Prison is not only a site where U.S. citizens are identified for deportation as aliens, but also a place where U.S. citizens may return after being wrongfully convicted of violating federal immigration laws,³⁰⁵ crimes for which U.S. citizenship is a conclusive defense.³⁰⁶ Moreover, the threat of such a conviction is sufficient to incentivize false confessions of alienage at the border for returning U.S. citizens who may not have been deported,³⁰⁷ and also leads deported citizens not to press legally valid claims to return to their homes.³⁰⁸ Deported U.S. citizens who attempt to return to their rightful homes have been charged, convicted, and served years in prison for Illegal Reentry (8 U.S.C. § 1326)³⁰⁹ and Personation of a U.S. Citizen (18 U.S.C. § 911),³¹⁰ both crimes predicated on alienage.³¹¹ The fortunate ones among this group have been able to subsequently prove their citizenship and obtain their release.³¹² For others, their administrative records are incorrectly equated with the underlying truth of their legal status, from which judges, including appellate court judges, incorrectly infer alienage.³¹³ The

³⁰⁵ See 8 U.S.C. § 1326 (2006) (determining penalties for an alien who reenters the United States); 18 U.S.C. § 911 (2006); 8 U.S.C. § 1182 (2006). Decisions reached in the absence of due process protections designed to protect U.S. citizens from government misconduct provide the basis for these subsequent criminal convictions, despite precedents which prohibit conclusions reached in administrative proceedings to be used as irrebuttable evidence in criminal proceedings. See also *United States v. Mendoza-Lopez*, 481 U.S. 828, 839 (1987) (“[A] collateral challenge to the use of a deportation proceeding as an element of a criminal offense must be permitted where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review.”).

³⁰⁶ See *infra* text accompanying notes 327–28.

³⁰⁷ See, e.g., *supra* text accompanying note 224; see also Susan Carroll, *Houston Native Wrongly Deported*, HOUS. CHRON., Sept. 13, 2010, available at <http://www.chron.com/disp/story.mpl/special/immigration/7199653.html>; Susan Carroll, *Deported Man May Be Houston-born Citizen: Border Patrol Doubted His Papers Because He Speaks Very Little English*, HOUS. CHRON., June 23, 2010, available at <http://www.chron.com/disp/story.mpl/metropolitan/7077166.html> (“He said he was detained from 4 p.m. to midnight and pressured to sign paperwork that resulted in his being sent to Matamoros. ‘The official that was holding me told me I had to sign them . . . or I would have to stay there,’ Delgado said. ‘I thought if I signed them, they’d let me go free, and I could return to Houston’ . . .”).

³⁰⁸ All the individuals whose deportations are reflected in Table 5 at some point signed documents indicating that they were not U.S. citizens, for the reasons indicated therein.

³⁰⁹ See *supra* Table 5.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ See cases cited *infra* note 337.

appearance of U.S. citizens charged with immigration violations in federal courts in border states may be best explained by detailed review of two case studies. In one, a U.S. citizen served seven years in prison for Illegal Reentry. In another, Border Patrol agents deterred a wrongfully deported U.S. citizen from returning to the U.S. by threatening him with prison time if he persisted in his accurate claim to U.S. citizenship.³¹⁴

Once U.S. citizens have been deported, it is extremely difficult to receive a fair hearing about their claims. Border Patrol agents rely on the classifications from the deportation orders and treat U.S. citizens seeking admission to their country as criminal aliens. The following case studies illustrate the serious harms caused by laws designed and implemented without due process considerations.

1. Mario Guerrero

Mario Guerrero was born in Mexico in 1964.³¹⁵ He acquired U.S. citizenship at birth.³¹⁶ When Mr. Guerrero was a teenager, he moved with his family to San Diego. He initially believed that he and his siblings were legal permanent residents, not U.S. citizens.³¹⁷ In 1993, he was arrested for robbery and in 1995, under the terms of the 1994 Crime Bill, he was issued a deportation notice and placed into removal proceedings. Mr. Guerrero lacked funds to hire an attorney. During this process Mr. Guerrero met with several INS agents and appeared before an EOIR adjudicator. At no point did any employee of the U.S. government inquire about his biography to ascertain whether he might

³¹⁴ As noted above, *see supra* note 292, the regulation for implementing expedited removal orders to those claiming U.S. citizenship, 8 C.F.R. § 235.3(b)(5), requires law enforcement officers to refer these so-called aliens to immigration court, and yet this requirement has been demonstrably violated. Any law authorizing the deprivation of the rights of U.S. citizenship from those who are indeed U.S. citizens is not regulating immigration, but rather unconstitutionally depriving U.S. citizens of their fundamental rights.

³¹⁵ The account of Mr. Guerrero's experiences is based on court records available on PACER and telephone interviews with Mr. Guerrero and his sister in May 2009.

³¹⁶ Mario's father, a U.S. citizen, was married to Mario's mother at the time Mario was born and met the other criteria for conferring U.S. citizenship on his children. In February 2007, based on evidence of these facts, the USCIS issued Mario a Certificate of U.S. Citizenship and the U.S. government moved to dismiss a second charge of Illegal Reentry.

³¹⁷ In his twenties, Mr. Guerrero and his siblings informally discussed the possibility that they were U.S. citizens, but Mr. Guerrero gave up on this possibility after he was first deported: "If an immigration judge tells you you're not a U.S. citizen, then I believe that." Telephone Interview with Mario Guerrero (May 11, 2009).

meet the criteria for U.S. citizenship.³¹⁸ Mr. Guerrero understood he had the right to appeal the deportation order, but facing another year “in jail,”³¹⁹ with no possibility of bail, he decided against this route and signed the papers that would trigger his banishment to Mexico.³²⁰

Mr. Guerrero’s deportation order triggered not only his physical removal from the United States, but eventually set into motion a prison sentence. On April 18, 1998, Mr. Guerrero was charged with illegal reentry (8 U.S.C. § 1326) and false personation of a U.S. citizen (18 U.S.C. § 911).³²¹ When Mr. Guerrero told the border agent in San Ysidro on April 18, 1998 that he was a U.S. citizen, Mr. Guerrero at that point did not believe this to be true. He agreed to plead guilty, but after speaking with other inmates in San Diego, he realized he was in fact a U.S. citizen and changed his plea to “not guilty.” Knowing that his U.S. citizenship was conclusive evidence of innocence, he turned down a guilty plea deal offer that would have resulted in a sentence of two years and six months. However, District Court Judge Irma Gonzalez granted the prosecution motion “precluding defendant from challenging the lawfulness of prior deportations.”³²²

On July 20, 1998, the day before the trial, the prosecution sent a memorandum to the judge summarizing an interview with Mr. Guerrero’s father.³²³ The memorandum incorrectly concluded that Mr.

³¹⁸ Mr. Guerrero said, “I didn’t know I was a U.S. citizen. They didn’t explain nothing [sic] to me. It was real quick. I just signed some papers.” *Id.*

³¹⁹ This is the phrase Mr. Guerrero used. The federal government refers to its custody of individuals in deportation proceedings as “detention,” but the so-called detainees often come from other institutions where they have been physically confined by other branches of law enforcement and experience the forms of custody as similar. Moreover, ICE subcontracts to over 300 state, local, and private prisons and jails. See IGSA FACILITIES USED BY ICE IN FY2010, *available at* <http://www.ice.gov/doclib/foia/isa/igsafacilitylistasof03012010.pdf>.

³²⁰ Mr. Guerrero explained, “I already did some time, and when I was getting out they told me, ‘You fight deportation or you sign the paper. If you don’t sign, you might spend a year here.’ All I wanted to do is get out because I already spent a year. I signed the paper and I got out. They told me I was giving up my rights but nothing was for sure. I could spend another year in jail or get out.” Telephone Interview with Mario Guerrero (May 11, 2009).

³²¹ Mr. Guerrero missed his family and tried on three occasions to blend in with the crowds at San Ysidro and reenter. Each time he was accosted and his efforts recorded and rebuffed. On the third occasion he was arrested and taken into custody. Telephone Interview with Mario Guerrero (May 11, 2009); *see also* *United States v. Guerrero-Cruz*, No. 98CR1406-IEG, slip op. (S.D. Cal. July 13, 2008).

³²² *Guerrero-Cruz*, No. 98CR1406-IEG, at 1.

³²³ Memorandum from Daniel Butcher, Assistant U.S. Att’y, to Judge Irma Gonzalez (July 20, 1998).

Guerrero did not meet the criteria for acquired citizenship.³²⁴ However, on the day of the trial, the prosecution moved to dismiss the charge of false personation of a citizen.³²⁵ The judge did not revise her ruling, and Mr. Guerrero was not allowed to present his claims to U.S. citizenship,³²⁶ although this would be a conclusive defense against an 8 U.S.C. § 1326 charge. The jury found him guilty, and Judge Gonzalez sentenced Mr. Guerrero to seven years and five months in federal prison for illegal reentry.³²⁷

At some point during his prison sentence, which he was serving in Texas, Mr. Guerrero was again served a deportation order. Through the Institutional Hearing Program, an administrative hearing was conducted at a room in the Texas prison where, Mr. Guerrero estimated, about twenty-four other individuals also had their cases decided:

No, [the adjudicator] never addressed me individually. There was no lawyer, no nothing. He was just reading the thing that we were getting deported. He talked some stuff. I don't remember what he said. He just talked for 10 to 20 minutes. They just figured I was deported before, so they just say we're going to deport him again. I didn't do no talking, no nothing. I just had to be there

³²⁴ *Id.*

³²⁵ *Guerrero-Cruz*, No. 98CR1406-IEG, at 22.

³²⁶ A member of the jury stated that at no point was the jury informed that Mr. Guerrero might be a U.S. citizen. On discovering that Mr. Guerrero was indeed a U.S. citizen who, based on the immigration crime conviction, had served seven years in prison, the juror, a photojournalist concerned about civil liberties, was upset: "Had I been a juror on a case where there was even some possibility that this person was [a] U.S. citizen I would not have gone along with the others. As a U.S. citizen you value that, and to find out that some other citizen is being deported and is not being provided due process is deeply disturbing." Telephone Interview with Guerrero juror (June 2009).

³²⁷ Mr. Guerrero's public defender disputed the district court judge's interpretation of sentencing guidelines and filed an appeal with the Ninth Circuit, stating that the initial robbery conviction did not warrant the length of the prison sentence for his § 1326 conviction. *United States v. Guerrero*, No. 98-50685, 1999 U.S. App. LEXIS 32233 (9th Cir. Sept. 15, 1999). Mr. Guerrero said that upon learning he lost the appeal, which he mistakenly believed was based on his U.S. citizenship, "I cried." Mr. Guerrero served most of his sentence in Texas prisons, over 1,000 miles from his family in southern California. At Big Spring Correctional Center in Texas, Mr. Guerrero was bitten by a rattlesnake during a recreation period. He stated that "They didn't do anything right away. A couple hours later, I'm in pain, my arm is about to explode, and they sent me to a hospital. I stayed there for about a week. They didn't do nothing to my finger, just gave me morphine for the pain. My finger was turning black and starting to smell bad. They cut it off, the index finger for my right hand, and I am right handed. It was costing me my finger there in jail."

in a little room, and then they took me back to my cell and that was it.

After serving his prison sentence, Mr. Guerrero was driven in a minibus to a pedestrian crossing in Texas to Juarez, Mexico and told to walk across the bridge. He stayed in Juarez for about a year and a half, doing construction work, and then tried to return. On January 30, 2006, Mr. Guerrero was apprehended as he tried to return from Tijuana, and was again charged with Illegal Reentry:

This time I had a real good lawyer. This lady, she investigated real good and she proved [U.S. citizenship] by my grandmother being married in Tucson, and [my father] always coming across. She fought the case and won. I spent another year in jail while she was fighting the case. My dad came up with evidence that he's been living in the U.S. before we were born by all kinds of research. This lawyer did a real good job.³²⁸

While Mr. Guerrero was awaiting trial, his Certificate of U.S. Citizenship arrived and the prosecution moved to dismiss the charges on February 7, 2007, after Mr. Guerrero had spent more than a quarter of his life in prison for crimes he never committed.

Had Mr. Guerrero been more assertive about his belief that he was a U.S. citizen when he was in prison in 1995, he may have been able to avert this chain of events. However, his confusion does not mean that he was at fault for the deportation, much less that it was valid.³²⁹ The BIA has even gone so far as to rule that if a foreign-born individual were not aware of a claim to citizenship, a residency requirement in effect at that time should be waived and the respondent given a “reasonable opportunity to come to the United States as a citizen after learning of his claim to citizenship.”³³⁰

³²⁸ Elizabeth Barros, Federal Defenders, Inc., San Diego, was Mr. Guerrero's attorney. *United States v. Guerrero-Cruz*, No. 98-50685, 1999 U.S. App. LEXIS 32233 (9th Cir. Sept. 15, 1999).

³²⁹ “While performing their duties, U.S. Immigration and Customs Enforcement (ICE) officers, agents, and attorneys, may encounter aliens who are not certain of their status or claim to be United States citizens (USC) As a matter of law, ICE cannot assert its civil immigration enforcement authority to arrest and/or detain a USC. Consequently, investigations into an individual's claim to U.S. citizenship should be prioritized” Morton Memo, *supra* note 41, at 1.

³³⁰ Wooster, *supra* note 102, at 23 (summarizing *Matter of Yanez-Carrillo*, 10 I. & N. Dec. 366 (B.I.A. 1963)). There are rulings against respondents in similar

Mr. Guerrero's ignorance of his own status and rights as a U.S. citizen resulted in part from the deportation proceedings themselves. This compounds the injustices visited on him by his government at birth. Neither the U.S. Constitution nor Congress authorizes depriving U.S. citizens of their citizenship because of an incorrect classification by an immigration agent. Moreover, in similar cases of citizenship at birth acquired or derived by those whose parents appear to be of European descent,³³¹ these confusions seem to appear less frequently.³³² It is the presumption of U.S. citizenship on the part of those born abroad to U.S.-born parents who seem White, and the presumption of foreign citizenship for similarly situated children of U.S. parents who are racialized as non-White that resulted in Mr. Guerrero's ignorance, not of his roots—he knew the identities, biographies, and citizenship status of his parents—but of their significance to his own citizenship. This is not a result of vague, internalized stereotypes but of legal errors on the part of immigration officials who should have realized when Mr. Guerrero's father brought his children to the United States that individuals with histories such as Mr. Guerrero's are U.S. citizens and are eligible for U.S. passports, not green cards.³³³

situations as well. *See, e.g., Ramos-Hernandez v. INS*, 566 F.2d 638 (9th Cir. 1977).

³³¹ The history of origins and the inherent hybridity of each individual as well as race, nation, ethnicity and so forth mean that this is an illogical typology. However, phenomenologically there are certain racialized differences triggered by and prompting political membership policies. For more on the origin and practice of race, see JACQUELINE STEVENS, *REPRODUCING THE STATE* 172–208 (1999).

³³² For instance, President Barack Obama was born in the United States, yet his father's Kenyan origins put into question his citizenship. *See Dobbs Repeatedly Makes Obama Birth Certificate Claims His CNN Colleagues Call 'Total Bull,' MEDIA MATTERS* (July 17, 2009, 7:26 PM), <http://mediamatters.org/research/200907170039>. Lou Dobbs did not subject Senator John McCain, born in Panama, to questions about whether he was a natural born U.S. citizen, even though McCain is “foreign-born” and therefore without the legal presumption of U.S. citizenship. *Id.*

³³³ The U.S. citizens deported who did not know they were U.S. citizens, see *supra* Table 6, and many of the U.S. citizens who have been imprisoned pending determination of their legal status by an EOIR adjudicator were screened as children by U.S. immigration agents, who mistakenly issued green cards for them and instructed their parents that they were legal permanent residents. In an appeal of a decision terminating a deportation order on the grounds of U.S. citizenship, the government referenced its previous error (granting the respondent's mother legal residency and not informing her of her U.S. citizenship) to imply the adjudicator who had reviewed various legal documents and interviewed family members under oath was mistaken: “The fact that the USCIS issued the respondent's mother a Certificate of Naturalization and not a Certificate of Citizenship is further evidence that the respondent's mother did not acquire United States citizenship at birth.” Brief for Appellant at

V. U.S. CITIZENS PERMANENTLY DENIED U.S. CITIZENSHIP

That thousands of U.S. citizens have been detained, deported, or convicted of immigration crimes predicated on alienage before the government recognizes their citizenship status is a gross miscarriage of justice. These cases might be considered “false negatives,” i.e., legally authenticated U.S. citizens falsely identified as noncitizens. But even worse are the unknown number of cases in which narratives very close to the ones above take a different turn and the individuals are wrongfully denied recognition of their U.S. citizenship for years,³³⁴ or perhaps forever. These cases largely involve individuals born abroad and raised since infancy or childhood in households in the United States by at least one parent who is a U.S. citizen.³³⁵

Recent Ninth Circuit appellate court decisions in the last decade appear to have foreclosed the opportunity to present evidence of U.S. citizenship in some cases by individuals who very well may be U.S.

18, *In re Jorge Ibarra-Lopez* (B.I.A. May 5, 2011). The respondent’s reply brief states: “The DHS points to absolutely no case law, statute, or regulation in support of its suggestion that admission on an immigrant visa or a subsequent naturalization casts doubt on whether an individual previously acquired citizenship; indeed, hundreds if not thousands of U.S. citizens file for a certificate of citizenship despite previously having been admitted on an immigrant visa.” Reply Brief for Respondent at 8, *In re Jorge Ibarra-Lopez* (B.I.A. May 18, 2011).

³³⁴ For instance, an EOIR adjudicator at Eloy unlawfully deported Mr. Johann Francis in 1999. Until 2009, he was unable to obtain the Jamaican birth certificate he needed to obtain a U.S. passport. From 1999 to 2009, he was a U.S. citizen but would appear in a study such as this as a noncitizen; he remains classified as a noncitizen in ICE and EOIR databases. See Interview with Johann Francis, *supra* note 191.

³³⁵ The U.S. Census states that as of 2008, 16.33 million U.S. citizens were born abroad and naturalized. *Table 44 Foreign-Born Population by Citizenship Status and Place of Birth: 2008*, U.S. CENSUS, www.census.gov/compendia/statab/2010/tables/10s0044.xls. A 2000 Census survey based on a sample indicates that an additional 1.92 million individuals acquired U.S. citizenship at birth because they were born to U.S. citizens abroad. U.S. CENSUS, PLACE OF BIRTH BY CITIZENSHIP STATUS (2000) (on file with author). In light of the demonstrated underestimates of Latino populations by census-takers, and the fact that many people do not understand their citizenship status, this number is useful only as a benchmark for the minimum number of people who have acquired U.S. citizenship from being born abroad to a U.S. citizen. Another census report indicates there are 208,000 foreign-born children of native-born parents, of whom 177,000 are married, and a total of six million foreign-born children living in the United States. *Living Arrangements of Children Under 18 Years/1 and Marital Status of Parents, by Age, Sex, Race, and Hispanic Origin/2 and Selected Characteristics of the Child for All Children: 2009*, U.S. CENSUS, <http://www.census.gov/population/www/socdemo/hh-fam/cps2009.html>.

citizens.³³⁶ The petitioners or criminal defendants, the former often pro se, are challenging deportation orders or felony immigration charges, respectively, on the grounds of U.S. citizenship. The government and district court judges in some instances have taken the position that respondents' failure either to assert this position in administrative proceedings or to prevail in administrative proceedings precluded filing a habeas motion or presenting a U.S. citizenship defense in a criminal trial.³³⁷ The fact patterns in these cases are virtually identical to those of

³³⁶ The decisions by the appellate and district court in adjudicating Herbert Flores-Torres's claim to U.S. citizenship are a welcome sign that the federal courts in California are realizing the EOIR decisions may be legally flawed. See *infra* note 352.

³³⁷ See *Taniguchi v. Schultz*, 303 F.3d 950, 956 (9th Cir. 2002) (holding that "Taniguchi failed to exhaust her administrative remedies by not appealing the decision of the IJ to the BIA 'A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien' 8 U.S.C. § 1252(d)(1) (2006); see also *Castro-Cortez v. INS*, 239 F.3d 1037, 1044 (9th Cir. 2001). Second, even if the IJ's decision could be considered the final order of removal for purposes of § 1252(b), a petition for review would have been untimely as of the date the habeas corpus petition was filed, October 20, 1999. The IJ's order was filed April 13, 1999. A petition for review, to be timely, must be filed not later than 30 days after the date of the final order of removal. 8 U.S.C. § 1252(b)(1) (2006). Thus the petition would have been untimely and there would be no basis for transferring the case to the court of appeals, because the court of appeals would not have been able to exercise jurisdiction on the date that the petition for habeas corpus was filed with the district court"); *United States v. Gomez-Moreno*, 221 Fed. App'x 524, 527 (9th Cir. 2007) (upholding conviction under 8 U.S.C. § 1326(a) over the defendant's assertion that the adjudicator misrepresented the record and despite the court finding that "[t]he prosecutor engaged in some misconduct"); *United States v. Silva-Gonzalez*, 171 Fed. App'x 702, 703 (9th Cir. 2006) ("Thus, a trial judge may exclude or limit evidence to prevent excessive consumption of time, undue prejudice, confusion of the issues, or misleading the jury."); *Menendez v. Terhune*, 422 F.3d 1012, 1033 (9th Cir. 2005) (upholding trial court's exclusion of derivative citizenship claim based on prior 1326 conviction); *Garza-Gorena v. Ashcroft*, 114 Fed. App'x 925, 926 (9th Cir. 2004) ("Garza-Gorena's sole contention is that he is a U.S. citizen and therefore cannot be removed for his criminal offenses. Garza-Gorena's alienage has been established twice, in his 1974 deportation hearing and in his 1987 conviction for illegal reentry pursuant to 8 U.S.C. § 1326. General principles of res judicata and collateral estoppel prevent him from re-litigating matters that were finally resolved in earlier proceedings."); *United States v. Quintana-Quintana*, 60 Fed. App'x 104, 105-06 (9th Cir. 2003) (explaining that "Quintana's third claim is that the district court erred in instructing the jury that it could not consider evidence of Quintana's father's citizenship as evidence of Quintana's own citizenship. Quintana did not object to this instruction in the district court. Even if the instruction were plainly erroneous, any error would not warrant reversal of Quintana's conviction because the evidence of Quintana's father's citizenship was insufficient to create reasonable doubt as to Quintana's own citizenship, particularly in light of the admissions made by Quintana to the INS agents (who

individuals who prevailed in their claims to U.S. citizenship after being deported (and who are counted in Table Five).

Mr. Lyttle and the thirty-one other deported U.S. citizens counted in Table Six signed removal orders stipulating alienage, did not appeal decisions of EOIR adjudicators, or misstated their nationality on legal documents—all events that occurred, they said, because of ignorance, confusion, or duress.³³⁸ Such claims appear in other federal cases as well.³³⁹ I have no evidence that the appellants in these cases are bona fide U.S. citizens, but the exclusions and assertions accepted by the appellate courts in these cases would have precluded affirmation of U.S. citizenship for many of those whose cases are tabulated in Part II.³⁴⁰ It is inviting to infer that the few cases profiled in the media of U.S. citizens wrongfully deported means that these events are rare and therefore notable. Another possibility, one I have seen first-hand for David, Mr. Lyttle, and Mr. Ibarra, is that media attention itself triggers the rightful recognition of U.S. citizenship or release from detention pending a final determination.³⁴¹ It should be noted as well that even after deported U.S. citizens return and ICE is aware of its unlawful actions, the agency continues to expose U.S. citizens to future harms by failing to file motions with the immigration courts for the purpose of vacating and rescinding the deportation orders. For instance, Johann Francis, despite presenting his U.S. passport, was detained in Miami when he returned from a trip to Jamaica in November 2010; William, born in the United States but deported to the Dominican Republic for ten years in 1999,

testified at trial) that he was a Mexican citizen who was in the United States illegally. Moreover, the district court did not preclude defense counsel from suggesting reasonable doubt as to Quintana's alienage by cross-examining INS agents regarding their failure to investigate whether Quintana might have derivative citizenship or by emphasizing this lack of investigation in closing arguments").

³³⁸ See Interview with deported witnesses, *supra* notes 14, 15, 16, and 36.

³³⁹ See *supra* note 337.

³⁴⁰ Herbert Flores-Torres prevailed in his claim of U.S. citizenship, but only after his claim had been denied by an EOIR adjudicator and the BIA, and after he spent four and a half years in a detention center. *Flores-Torres v. Holder*, 680 F. Supp. 2d 1099 (N.D. Cal. 2009); Respondent's Opening Brief on Appeal, *Flores-Torres*, *supra* note 34, at 5. Mr. Flores prevailed for two reasons: (1) he remained in the detention center for four years and did not succumb to the temptation of signing a false statement conceding he was not a U.S. citizen; and (2) he had a dedicated group of U.C. Davis Law School students working on his behalf under the supervision of Professor Holly Cooper. Flores's defeats at the hands of the DOJ employees and the years it took for the appeal confirm the perspicuity of U.S. citizens who abandon pursuing their U.S. citizenship claims because they fear spending years in a detention center. Were it not for his successful appeal, Mr. Flores would have been recorded in ICE statistics as a criminal alien deported to El Salvador.

³⁴¹ See *supra* notes 297 and 313.

lives in terror that a chance encounter with the local police will trigger a fingerprint match and another round of detention and possible removal, a possibility ICE provides no recourse for preventing.³⁴²

VI. ICE, EOIR, AND FEDERAL JUDGES ON FAMILY LAW

In addition to the judicial misunderstandings that block invocation of U.S. citizenship as a defense against immigration crimes, some decisions by EOIR adjudicators, the BIA, and federal appellate judges adjudicating *de novo* claims to U.S. citizenship misconstrue the family and citizenship rules in former versions of 8 U.S.C. §§ 1101, 1401, 1409(a), and 1432(a).³⁴³ These misconstructions unlawfully classify as aliens individuals who are about twenty-five to fifty-eight years old and meet the criteria for U.S. citizenship codified at the time of their birth. Statutory revisions have superseded these older definitions, but misunderstandings of these legitimacy laws could result in the erroneous deportation of thousands of incarcerated men and women of foreign birth.

The relevant portions of the U.S. Code defining “Nationality at Birth” state:

(c) As used in subchapter III of this chapter—

(1) The term ‘child’ means an unmarried person under twenty-one years of age and includes a child

³⁴² E-mail and phone calls with Andrew Lorenzen-Strait & Ernestine Fobbs, ICE officials (Jan., Feb., and Dec. 2010) (failing to respond to repeated queries on ICE procedures for correcting inaccurate designations of US citizens as deported criminal aliens in DHS databases); Telephone Interviews with and e-mail from Mr. Francis (Nov. and Dec. 2010); Interview with William (Dec. 17, 2010). William’s deportation followed the INS in 1999 locating a visa issued to William as a toddler traveling to the United States on a Dominican Republican passport. William says his mother had abandoned him in the DR as an infant, and while her Dominican citizenship could be used to convey this to William, this alone did not prove that William was not a U.S. citizen as well. During his televideo hearing, William, pro se and 19 years old, informed the adjudicator that he always believed he was born in the United States, a fact he was able to corroborate ten years later when relatives obtained documents of his birth, including his birth certificate and the original photograph and bed card for “Baby D-” associated with his place and date of birth in a Boston suburb. Copies of William’s U.S. passport, immigration hearing recording, and underlying documents are on file with author.

³⁴³ The revised citizenship statute now requires that “a blood relationship between the person and the father is established by clear and convincing evidence.” Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 13(b), 100 Stat. 3655 (1986) (amending Immigration and Nationality Act § 309(a), 8 U.S.C. § 1409(a)).

legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere, and, except as otherwise provided in sections 1431-1434 of this title, a child adopted in the United States, if such legitimation or adoption takes place before the child reaches the age of sixteen years, and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.³⁴⁴

....

Subchapter III—Nationality and Naturalization

§ 1401. Nationals and citizens of United States at birth.

(a) The following shall be nationals and citizens of the United States at birth:

....

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

....

§ 1409. Children born out of wedlock.

(a) The provisions of paragraphs (3)–(5) and (7) of section 1401(a) of this title, and of paragraph (2) of section 1408, of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this chapter, if the paternity of such

³⁴⁴ 8 U.S.C. § 1101(c)(1) (2006).

child is established while such child is under the age of twenty-one years by legitimation.

The statutes, by explicitly referring to legitimacy based on domicile or residence, indicate that interpretations of family, and therefore citizenship, status will require deference to family law in different states and countries.

Immigration adjudicators and federal courts must rely on state agencies and legislatures for guidance because 8 U.S.C. § 1101, the “definitions” section of the statute, does not define “legitimacy” or “father” for purposes of citizenship, though an earlier section does define “child” and “parent” for purposes of immigration.³⁴⁵ Competing policy objectives of the agencies responsible for their implementation further complicate these statutes. Many states, including California, Montana, Hawaii, and Washington, all in the Ninth Circuit, rely on the Uniform Parentage Act,³⁴⁶ designed to remove the stigma of illegitimacy by providing an expansive understanding of paternity for the purpose of enhancing family unity.³⁴⁷ However, a federal regulation instructs ICE and the DOJ to presume the alienage of U.S. citizens³⁴⁸ and thus to break up bona fide families who may lack the resources to hire attorneys with expertise in citizenship and family law necessary to prevent their adult incarcerated children from being banished.³⁴⁹

³⁴⁵ See 8 U.S.C. § 1101(b)(1)–(2) (1952).

³⁴⁶ NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, UNIFORM PARENTAGE ACT (2002), available at <http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.htm>; see CAL. FAM. CODE §§ 7600–7606; MONT. CODE §§ 40-6-101–40-6-135; HAW. REV. STAT. §§ 584-1–584-26; WASH. REV. CODE §§ 26.26.011–26.26.914.

³⁴⁷ NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, *Prefatory Note*, *supra* note 346 (“The most important uniform act addressing the status of the nonmarital child was the Uniform Parentage Act approved in 1973 [hereinafter referred to as UPA (1973)]. As of December, 2000, UPA (1973) was in effect in 19 states stretching from Delaware to California; in addition, many other states have enacted significant portions of it. Among the many notable features of this landmark Act was the declaration that all children should be treated equally without regard to marital status of the parents. In addition, the Act established a set of rules for presumptions of parentage, shunned the term ‘illegitimate,’ and chose instead to employ the term ‘child with no presumed father.’”).

³⁴⁸ 8 C.F.R. § 235.3(b)(5)(iv); see *supra* note 25.

³⁴⁹ Family law also may be extremely complex and varies by state. An individual appealing a conviction under 8 U.S.C. § 1326 on the basis of acquired or derived U.S. citizenship would require counsel with an expertise in criminal law, immigration and citizenship law, and family law for the states and domiciles of the defendant and her father. These cases routinely pose due process challenges for indigent defendants or respondents.

Family and citizenship laws appear to be based on so-called natural or pre-legal relationships but in fact state legislatures and Congress are making these status determinations of parent, father, child, and citizen, and then invoking certain mythical ideas about nature for their legitimacy. This means that children born abroad may have bona fide parent-child relations according to state legitimacy or paternity laws (i.e., using statutory definitions of “parent” and “child”) and these may not be recognized as such by immigration adjudicators or federal judges unfamiliar with family laws, potentially denying these children their rightful legal status as U.S. citizens.³⁵⁰ If a child were born abroad to an alien parent between 1952 and 1986 and has a legitimate parent who was a U.S. citizen before the child turned sixteen, then, assuming other criteria are met, the child was a U.S. citizen at birth. However, also for reasons of preserving family unity, legitimacy may curtail a claim to U.S. citizenship: if, for example, before February 27, 2001³⁵¹ the mother of a child who was a legal permanent resident naturalized before the child was eighteen, but the legitimate father did not, the child did not derive U.S. citizenship: “If U.S. citizenship were conferred to a child where one parent naturalized, but the other parent remained an alien, the alien’s parental rights could be effectively extinguished”³⁵² A law designed to protect both parents’ rights to custody meant a child had to have both parents naturalize and not just one for purposes of automatically deriving citizenship.

Here and elsewhere, state statutes, as well as the United States Supreme Court, define “natural” parent using the law and not biology: “Under California law, a child born to a married woman living with her husband is presumed to be a child of the marriage. The presumption of legitimacy may be rebutted only by the husband or wife, and then only in limited circumstances.”³⁵³ Indeed, this is true by definition: judicial

³⁵⁰ These incorrect decisions affect all family members—who are also U.S. citizens—and not just the children making claims to U.S. citizenship.

³⁵¹ From that point forward, a child who is a legal resident under 18 will have derived U.S. citizenship if only one parent naturalizes. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, I AM A U.S. CITIZEN: HOW DO I . . . GET PROOF OF MY U.S. CITIZENSHIP? (Aug. 2008), <http://www.uscis.gov/USCIS/Resources/A4en.pdf>.

³⁵² *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1066 (9th Cir. 2003) (citing *Fierro v. Reno*, 217 F.3d 1, 6 (1st Cir. 2000)); *see also Flores-Torres v. Holder*, 680 F. Supp. 2d 1099, 1102–03, 1105 (N.D. Cal. 2009). The opinion in *Flores-Torres* is important for confirming that the EOIR adjudicator and the BIA tried to deport a U.S. citizen because they misunderstood the basis for deciding paternity (de facto relations with the child, not biology alone) and the basis for determining legitimacy (state law in the U.S., and not just the law of the foreign country where the child was born).

³⁵³ *Michael H. v. Gerald D.*, 491 U.S. 110, 123–24 (1989) (explaining that the state’s interest in protecting marriage supersedes the rights of biological fathers to custody of children born to another man’s wife) (citing Cal. Evid. Code Ann.

opinions constitute legal outcomes, be they those that characterize businesses, intellectual copyrights, or families, although these similarities on occasion seem to elude immigration adjudicators and some judges. As a result, in the context of disputes over U.S. citizenship individuals claiming acquired citizenship press for an inclusive understanding of legitimacy, while individuals born before 2001 and seeking derived U.S. citizenship prefer a narrow definition of legitimacy. The narrow definition would find citizenship if only a de facto custodial parent naturalizes (usually the mother), without holding to the earlier versions' requirement that both parents naturalize.³⁵⁴ Both the inclusive and narrow positions are consistent with the language and intent of the 1952 statute. Under § 1409(a) from at least 1952 to 1986, the government was supposed to pursue policies favoring family unity, even when it conflicted with genetic paternity.³⁵⁵ Yet an ahistorical and inaccurate view of the family, largely without legal authority on the part of DHS and EOIR adjudicators, BIA officials, and federal judges has resulted in decisions wrongfully stripping U.S. citizens of their U.S. citizenship.³⁵⁶

§ 621 (West Supp. 1989)). The Court quoted *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977): “Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.” The *Michael H.* Court continued: “Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria [unwed biological father and daughter] has been treated as a protected family unit under the historic practices of our society, or whether, on any other basis, it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family (Gerald, Carole [the married couple] and the child they acknowledge to be theirs [Carole’s daughter from her liaison with Michael]) against the sort of claim Michael asserts.” For a discussion of the law’s definition of “*jus sanguinis*” and “natural parent” based on kinship rules and not biology, see STEVENS, *supra* note 331 and Stevens, *supra* note 91, at 152–83.

³⁵⁴ 8 U.S.C. § 1432 (1952 & 1986).

³⁵⁵ *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005).

³⁵⁶ The discussion here focuses on individuals born between 1952 and 1986, before Congress changed the statute and specified a “blood relation” as a requirement for U.S. citizenship acquired through a father who is a U.S. citizen. See 8 U.S.C. § 1401 (2006). Citizenship is adjudicated based on laws in place at the time of birth. See sources cited *supra* note 102. In a case before the Fourth Circuit in 2011, the government is attempting to deport someone whom adjudicators on two previous occasions deemed a U.S. citizen, asserting that a third adjudicator correctly understood that Congress could require noncustodial parents who had no relationship with each other to be married for purposes of effecting a “legal separation” necessary for the naturalized parent to claim sole custody for the purpose of deriving U.S. citizenship. Brief for Appellee at 12, *Johnson v. Whitehead*, No. 10-1488 (4th Cir. Aug. 25, 2010) (“The immigration judge determined that ‘legal separation’ under INA section 321(a) required ‘a

A. NINTH CIRCUIT CITIZENSHIP DECISIONS BASED ON FAMILY LAW

Two recent cases in the Ninth Circuit reveal the BIA's and appellate courts' troubling responses to acquired citizenship claims.³⁵⁷ In *Martinez-Madera v. Holder*, two of three Ninth Circuit judges affirmed a deportation order for Juan Martinez-Madera.³⁵⁸ Mr. Martinez was born in Mexico in 1953 to a mother who was a citizen of Mexico. He never knew his biological father. In 1960, Mr. Martinez' mother married Jesus Gonzalez, a U.S. citizen.³⁵⁹ The opinion states: "The record does not contradict the Petitioner's assertion that since he was six months old, Gonzalez [a U.S. citizen] has held Petitioner out and treated him as his son."³⁶⁰ After Mr. Martinez served a prison sentence for attempted murder, the government attempted to deport him as an aggravated felon.³⁶¹ Mr. Martinez asserted he had acquired U.S. citizenship at birth because Mr. Gonzalez had "legitimated him as his son 'in accordance with California's legitimation statute.'"³⁶² The immigration adjudicator Dennis James and the BIA rejected his claim to U.S. citizenship. The Court of Appeals for the Ninth Circuit, in a two to one opinion affirmed the EOIR's findings.

The key fact the BIA and appellate court highlighted was that Mr. Gonzalez was not married to Mr. Martinez's mother at the time of Juan's birth, thereby distinguishing his case from two others in which the Ninth Circuit recognized the U.S. citizenship at birth for foreign-born children of married couples in which one spouse was a U.S. citizen and not the child's biological parent.³⁶³ Furthermore, the absence of any biological tie between Mr. Gonzalez and Mr. Martinez precluded any claim of

judicially recognized marital separation and, by implication, a marriage.") (internal citations omitted). For a discussion of this case, see Jacqueline Stevens, UNROW Law Clinic Fights for David Johnson's U.S. Citizenship, STATES WITHOUT NATIONS BLOG (Jan. 31, 2011), <http://stateswithoutnations.blogspot.com/2011/01/unrow-law-clinic-fights-for-david.html>. The Fourth Circuit Court of Appeals, in a 2-1 decision, determined that "8 U.S.C. §§ 1252(b)(9) and 1503(a) prohibit Johnson from obtaining review of his citizenship claims through a habeas corpus petition" and that the Constitution did not provide equal protection to illegitimate children of fathers who had become naturalized U.S. citizens. *Johnson v. Whitehead*, No. 10-1488, 2011 U.S. App. LEXIS 10424, at *8, *10 (4th Cir. May 24, 2011).

³⁵⁷ The judges refer to these as "derivative," although the USCIS reserves this term for children who are legal permanent residents under age eighteen when their parents naturalize. See *supra* note 100.

³⁵⁸ 559 F.3d 937, 939 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1052 (2010).

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1091 (9th Cir. 2005); *Scales v. INS*, 232 F.3d 1159, 1161 (9th Cir. 2000).

legitimation, the judges held, for two reasons. First, the majority quoted 8 U.S.C. § 1409(a) (1986), establishing that U.S. citizenship for children born out of wedlock requires “a blood relationship between the person and the father”³⁶⁴ Second, the majority stated that California’s Civil Code applied “only to fathers legitimating their illegitimate *biological* children [and] . . . does not apply to stepfathers informally adopting stepchildren.”³⁶⁵

In *United States v. Marguet-Pillado*, the Ninth Circuit panel rejected the claim of acquired U.S. citizenship by Carlos Jesus Marguet-Pillado, who had appealed his conviction under 8 U.S.C. § 1326(a).³⁶⁶ Carlos Marguet was born in 1968 in Tijuana. His mother was a Mexican citizen and his father is unknown. Michael Marguet, a U.S. citizen, was named as Carlos’ father on a Mexican birth certificate filed in 1973 and “has held out Carlos Marguet as his own son.”³⁶⁷ Michael was the only father Carlos knew. After serving time in prison for burglary and attempted murder, Carlos Marguet was released in 2002. In 2006, he was “taken into custody for an unrelated incident”³⁶⁸ and an EOIR adjudicator ordered his deportation as a criminal alien. In reviewing Mr. Marguet’s claim to U.S. citizenship *de novo*, the Ninth Circuit panel held:

It is a commonplace that the traditional ways of transmitting and acquiring citizenship at birth are *jus soli* and *jus sanguinis*. In this country, the former is provided for by the Constitution, and the latter is provided for by the enactments of Congress. It would be a bit surprising to discover that over the decades Congress had selected a method that relied on neither concept, but, rather, was content to have United States citizenship acquired at birth by a person born out of wedlock, who was not born on United States soil and who, at the time, did not have a natural parent who was a United States citizen. As it is, there is no cause for surprise.³⁶⁹

The panel paraphrases Mr. Marguet’s claim to citizenship as requiring that “children born out of wedlock can be dubbed United States citizens .

³⁶⁴ *Martinez-Madera*, 559 F.3d at 941.

³⁶⁵ *Id.* at 942.

³⁶⁶ 560 F.3d 1078, 1084 (9th Cir. 2009).

³⁶⁷ *Id.* at 1080.

³⁶⁸ *Id.* There is no time limit for the period between a conviction of an “aggravated felony” and the government’s initiation of deportation proceedings. The decision makes no mention of any subsequent charge and it appears that Carlos Marguet was placed into ICE custody in 2006 because of a prison sentence he completed in 2002.

³⁶⁹ *Id.* at 1082.

...³⁷⁰ a position that is mocked and rejected.³⁷¹ Referring to an earlier decision rebuffing citizenship acquired from a non-biological father for a child born out of wedlock, the majority writes, “It is difficult to see how a man could ‘have’ a child ‘out of wedlock’ if he was not that child’s biological father.”³⁷²

The analyses in these cases are flawed on three grounds. First, the history of *jus sanguinis* differs quite substantially from the one the judges presume. Second, statutes on legitimacy, and other laws regulating the family, were designed to provide legal certainty in the midst of biological uncertainty and flux, e.g., uncertain paternity and adoption.³⁷³ The overriding purpose of these statutes, marriage law more generally, and the relevant California legitimacy and federal citizenship statutes in effect when Carlos Marguet was born and grew up³⁷⁴ is precisely to establish husbands, including stepfathers, as legal fathers and to “dub” their children as legitimate and citizens, regardless of the ability to establish a genetic relation. Third, a cursory consideration of the U.S. Constitution’s equal protection and due process clauses anticipates a more detailed statutory exegesis: the blurring and mutually constitutive lines of biology and law inherent in kinship rules require deference to a range of families and not an inflexible, one-size-fits-all definition, as the opinions in *Martinez-Madera* and *Marguet-Pillado* set out to establish in contradiction with California family law precedents. If this view of family law prevails, children in the same families will have nationalities different from a parent’s spouse and the child’s siblings, a situation that discriminates based on birth order, legitimacy, and a family’s legal acumen and resources,³⁷⁵ and serves no compelling state

³⁷⁰ *Id.*

³⁷¹ *See id.* at 1083.

³⁷² *Id.* (citing *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008)). The opinion also states, “[T]he Government naturally requires proof of paternity before determining someone to be the legal father.” *Id.* at 1084 n.11 (quoting *Ablang v. Reno*, 52 F.3d 801, 805 (9th Cir. 1995)).

³⁷³ *See* STEVENS, *supra* note 331, at chs. 1, 6.

³⁷⁴ 8 U.S.C. §1409(a) (repealed 1986).

³⁷⁵ The Court has allowed immigration laws to discriminate on the basis of legitimacy but only in circumstances in which respondents sought to establish de facto families through the law, not when attempting to provide de jure recognition to de facto families. In other cases, the Court has held distinctions based on legitimacy to a standard of intermediate scrutiny. *See, e.g., Clark v. Jeter*, 486 U.S. 456 (1988) (holding that a six-year statute of limitations for identifying father of illegitimate child for child support does not meet intermediate standard of scrutiny); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (finding that illegitimate children have equal right to death benefits). Requiring that families complete formal adoption procedures to achieve citizenship for one child and not another establishes two practical hurdles to family unity. First, requiring families to publicly announce that one child is “adopted” performs a distinction parents may want to avoid. Second,

interest. Rather than abide by the legitimacy precedents confined to disputes over inheritance or family custody arrangements, federal courts confronting legitimacy claims in the context of deportation proceedings might consider articulating new understandings of legitimacy that conform with California Civil Code § 230 (repealed 1975) or the Uniform Parentage Act sections of California's Family Code in effect since then. These statutes may be read to include so-called stepfathers as legal parents, so as to prevent the federal government from deporting adult children who have or had an exclusive relation with their mothers' husbands as minors and therefore should be recognized as U.S. citizens by virtue of California law and federal law. This reading, however, has found little traction because of the poorly chosen precedents and demonstrably mistaken dicta in *Martinez* (including reference to the wrong version of 8 U.S.C. § 1409) and *Scales*.

The pro bono and nonprofit attorneys who represented Juan Martinez and Carlos Marguet laid out the basic analyses and legal authorities that support this claim: first, 8 U.S.C. § 1409(a) (1952) conferred U.S. citizenship "if the paternity of such a child is established while such a child is under the age of twenty-one years by legitimation"; and second, under California law, they had been legitimated by their U.S. citizen fathers. Ergo, they are U.S. citizens. In its response, the government ignored the federal statutes' deference to definition of legitimacy in a father's domicile and instead relied on a strained reading of *Black's Law Dictionary's* definition of "father" and a partial reading of California legitimacy laws.

"Black's Law Dictionary," according to the Office of Immigration Litigation attorneys, "defines paternity as '[t]he state or condition of being a father, esp. a biological one; fatherhood.'"³⁷⁶ The attorneys conclude that this indicates the "ordinary and natural meaning of 'paternity' relates to biological fathers."³⁷⁷ The fact that paternity may be "esp. a biological" state suggests that also among its ordinary meanings is a nonbiological state; hence the source cited is not dispositive as to the statutory meaning of paternity established through legitimation. It is of course possible that a state statute would confine legitimacy to situations in which the only possible legitimate father is a genetic one, a claim the

immigrating adults may not properly attend to their children's citizenship status and therefore create status problems for their children for which their children are not responsible. As one attorney explained to me, "Parents are very careful about their own legal status but are sloppy when it comes to their children"—for example, with timely filing applications for naturalization and maintaining their children's legal documents. Telephone Interview with Los Angeles immigration attorney (Apr. 2008).

³⁷⁶ Brief for Respondent at 12, *Martinez-Madera v. Holder*, 559 F.3d 937 (9th Cir. 2009) (No. 06-73157).

³⁷⁷ *Id.*

government also makes, but here again the precedents are not dispositive.

The appellant's reply brief quotes the relevant California legitimation statute³⁷⁸ and states:

Respondent argues that . . . Cal. Civ. Code § 230, "is only applicable to biological fathers legitimating their illegitimate children." (Resp't Br. 10.) The plain language of section 230 contains no such requirement and the Respondent has failed to cite a single case that has so held.

Instead, Respondent relies on dicta in a case that is 115 years old and concerned a set of facts entirely inapposite to this case. In *Blythe v. Ayres*, 31 P. 915 (Cal. 1892), the California Supreme Court considered the petition of the [presumptive] biological daughter of the deceased seeking a determination of her right to inherit her biological father's estate. Her [presumptive] biological parents were never married. The court held that the petitioner was legitimated by her [presumptively] biological father when he publicly acknowledged her as his own child.

In the course of its analysis, the court commented that section 230 is a legitimation statute, not an adoption statute.

[T]he verb "adopts," as used in section 230, is used in the sense of "legitimizes," and that the acts of the father of an illegitimate child, if filling the measure required by that statute, would result, strictly speaking, in the legitimation of such child, rather than in its adoption. Adoption, properly considered, refers to persons who are strangers in blood; legitimation, to persons where the blood relation exists.

Respondent's attempt to transform this dicta into a rule that a stepfather [sic] cannot legitimate a child finds no

³⁷⁸ "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of birth." Reply Brief for Appellant at 3, *Martinez-Madera v. Holder*, 559 F.3d 937 (9th Cir. 2009) (No. 06-73157) (quoting CAL. CIV. CODE § 230).

support in *Blythe* nor in any case decided in the 115 years since.³⁷⁹

The brief goes on to cite several cases in which the California Supreme Court “emphasized that the presumption of fatherhood for a parent who has raised a child as his own can prevail over the competing claim of the child’s biological father.”³⁸⁰

Moreover, the inheritance cases invoking section 230 cited by the government also support the appellant. These cases rely, for purposes of establishing legitimacy, on whether a father holds out a child as his own and not proof of genetic paternity, a status that could not be ascertained during most of the period for the decisions cited. Legitimation laws are part and parcel of a kinship system of marriage and inheritance laws designed to place men in a legal relationship with children despite the uncertainty of biological paternity. They are premised on the idea that it is in society’s interest to recognize a father-child relationship if a man holds forth a child as his own, absent competing claims. According to a 1945 decision on inheritance flowing to an arguably illegitimate son:

The view of the common law has given way in large measure to the concept that the onus for the act of the parents cannot be visited justly upon the child and that placing responsibility for the support of the child upon the father equally with the mother, permitting it to become legitimated and to have a right to his name and to inheritance from him, will tend as well or better to deter the potential father than did the common-law doctrine of irresponsibility, and at the same time conform more closely to our present ideas of justice. Indeed, aside from considerations of justice, it may be suggested that the complete freedom from legal responsibility for illegitimate children, which the common law afforded the father, may have been a doctrine which to the male in licentious moments was

³⁷⁹ *Id.* at 3–4. I would use the term “father” and not “stepfather” in circumstances when no other man presents himself as a father and the mother was not married to anyone else at the time of the child’s birth. See *In re Nicholas H.*, 46 P.3d 932 (Cal. 2002). The appellants’ brief also points out that the other two cases cited by the government lack relevance because neither “considered whether a stepparent could legitimate its step child.” Reply Brief for Appellant, *Martinez-Madera*, at 4.

³⁸⁰ Reply Brief for Appellant at 5, *Martinez-Madera v. Holder*, 559 F.3d 937 (9th Cir. 2009) (No. 06-73157) (quoting CAL. CIV. CODE § 230).

more encouraging than deterrent, and were better abandoned.³⁸¹

The court clearly assumes biological paternity, and the decision is cited to claim section 230 excludes nongenetic children, but the case provides no evidence that Lund is indeed the genetic father. Nor does the statute state a genetic relation as requirement for paternity. Simply because people, including judges, may have expected a genetic relation to underlie a claim of paternity does not mean that the statute requires this expectation, as the cases discussed below illustrate.

The California legislature wanted to ensure that men took responsibility for children they held out as their own. It did not, nor could not at the time the statute was written, require genetic paternity as a precondition for paternity. The California courts have viewed section 230 and legitimacy more generally to convey and withhold assignments of paternity and legitimacy in a wide variety of contexts that do not always follow from genetic paternity.³⁸² This is true as well under the successor code adopting the UPA: “[Plaintiff’s] private interest in establishing a parent and child relationship based on alleged biological father status is overridden by the state interests in familial stability and the best interest of the child.”³⁸³

In *In re Nicholas H.*, the court held that despite a man’s admission that he is a nonbiological father, the law nonetheless construes him as the presumed father based on his financial support and holding out a child as his son.³⁸⁴ On point for the U.S. citizenship cases in which biological fathers do not assert paternity is the court’s claim that the admission of nonbiological paternity is relevant only when another man

³⁸¹ *In re Lund’s Estate*, 159 P.2d 643, 648 (Cal. 1945).

³⁸² See *In re Estate of Bassi*, 44 Cal. Rptr. 541, 551 (Cal. Ct. App. 1965) (“Although criticized, it is the law of this state that where a husband and wife are separated he cannot by setting up a second family and receiving natural children therein, legitimate the latter without the wife’s consent.”). The decision recognizes that a stepfather may be the legitimate father, even if this determination derives from Italian law, and not California’s § 230.

³⁸³ *Miller v. Miller*, 74 Cal. Rptr. 2d 797, 801 (Cal. Ct. App. 1998) (“[T]he conclusive presumption of paternity applies to Michael as a matter of law. Consequently, whether or not Gary is in fact Samantha’s biological father is immaterial Michael has established an emotional and financial father-daughter relationship with Samantha. Thus, Gary’s private interest in establishing a parent and child relationship based on alleged biological father status is overridden by the state interests in familial stability and the best interest of the child.”). The court held that Gary’s DNA tests proving genetic paternity did not overcome Michael’s status as the presumptive father. *Id.*

³⁸⁴ See *In re Nicholas H.*, 46 P.3d 932 (Cal. 2002) (“Our conclusion—that a man does not lose his status as a presumed father by admitting he is not the biological father—is also supported by subdivision (b) of section 7612.”).

asserts paternity.³⁸⁵ In *In re Karen C.*, the court ruled that marriage was not necessary for assigning parental status to a nonbiological and nonadoptive mother who had raised a child as her own, and deemed paternity a “decretal fiction.”³⁸⁶ In *In re Salvador M.*, the court ruled that an older sister who raised her biological brother as her son was the presumptive mother, and that the Kern County Social Services must recognize her as such.³⁸⁷

These decisions occurred after the 1975 repeal of section 230, but they are on point for two reasons. First, as one commentator notes, the decisions “liberally construed [the UPA’s] provisions to ‘legitimize’ children.”³⁸⁸ Second, they suggest that California family law favors marital, financial, and de facto parental relations over genetic ones, when in conflict; and when there is no evidence of a biological parental relationship, the courts will nonetheless defer to the de facto parent-child relationship absent any other parent’s competing custody claims. Such fact patterns are the same as those in the cases discussed in this article. Moreover, the timeframe for the UPA in California, passed in 1975,³⁸⁹ overlaps with that of the 1952–1986 version of 8 U.S.C. § 1409(a) and would cover minors in custody of U.S. citizen parents who were married to their biological parent—and thus in a legal child-parent relation under California’s family code.

In light of the numerous subsequent decisions from California family law that affirm the value of a de facto or de jure family that may

³⁸⁵ *Id.*

³⁸⁶ 124 Cal. Rptr. 2d 677 (Cal. Ct. App. 2002) (“The judicial determination of paternity is thus a mixture of a search for genetic truth and the implementation of the strong public policies favoring marriage and family stability, and disfavoring labels of illegitimacy. A judgment establishing paternity can, therefore, be a decretal fiction.”).

³⁸⁷ *In re Salvador M.*, 4 Cal. Rptr. 3d 705, 709 (Cal. Ct. App. 2003) (“Rather, we conclude this is clearly not an appropriate case to find respondent rebutted the presumption because there was no competing maternal interest and to sever this deeply rooted mother/child bond would contravene the state’s interest in maintaining the family relationship.”).

³⁸⁸ Jenny Wald, *Legitimate Parents: Construing California’s Uniform Parentage Act to Protect Children Born into Nontraditional Families*, 6 J. CTR. FOR FAMS. & CTS. 139, 142 (2005). Section 230 (enacted 1872, repealed 1975) states: “The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this Chapter do not apply to such an adoption.”

³⁸⁹ Uniform Parentage Act, ch. 1244, § 11, 1975 Cal. Stats. (repealed 1994) (current version at CAL. FAM. CODE §§ 7600–7730 (Deering, LEXIS through 2011 Sess.)).

be at odds with the family tree from DNA tests, also cited by the attorneys for Martinez-Madera, it would be very strange to imagine that the concept of legitimacy, which is a legal term of art and not a biological relation, would be used to limit and not expand the class of children for whom fathers would be incentivized to protect and shelter. For instance, California Family Code section 7570, the successor statute to section 230,³⁹⁰ states:

The Legislature hereby finds and declares as follows:

(a) There is a compelling state interest in establishing paternity for all children. Establishing paternity is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including, but not limited to, social security, health insurance, survivors' benefits, military benefits, and inheritance rights.

Despite this clearly stated policy preference, the Ninth Circuit has produced decisions incentivizing fathers or stepfathers without the financial acumen to pursue formal adoptions to look on their foreign-born sons as aliens in their own households. Such a situation encourages precisely the lack of responsibility and caretaking that, according to the California Supreme Court, section 230 and the subsequent paternity statutes were designed to avert.

Also corrosive of paternity and its social benefits are the implications of endorsing the disestablishment of families in which the fathers and children mutually believed a genetic relation existed but were later proven to be in error. (An overzealous ICE investigator might produce DNA showing a foreign-born adult child is not biologically associated with his or her U.S. citizen parent, or produce a decades-old immigration document from one's parents indicating that perhaps

³⁹⁰ CAL. FAM. CODE § 7570 (Deering, LEXIS through 2011 Sess.). The connection between § 230, related sections of the 1872 civil code, and the UPA is underlined by *In re Adoption of Marie R.*, 145 Cal. Rptr. 122, 125 (Cal. Ct. App. 1978) (“[W]hile the Uniform Parentage Act abolishes the concept of legitimacy, the Legislature has retained . . . two carry-overs from that concept. The effect of the new law is to draw a distinction between a natural father proven to be such by the evidence and ‘presumed’ fathers whose paternity can be determined by the use of presumptions”), and also in *Michael H. v. Gerald D.*, 491 U.S. 110, 117 (1989) (“When California adopted the Uniform Parentage Act, it amended § 621 by replacing the word ‘legitimate’ with the phrase ‘a child of the marriage’ and by adding nonsterility to nonimpotence and cohabitation as a predicate for the presumption.”) (internal citations omitted). This is evidence that since at least 1975 California has defined legitimacy as presumed paternity on the basis of the criteria in the UPA and not on the basis of genetic criteria, as suggested by the DHS, DOJ, and BIA.

another man is one's biological father, as happened to Joseph Anderson, discussed below.)³⁹¹ In other words, the government's implementation of the legal fictions of U.S. citizenship and immigration laws comes at the expense of enforcing the legal fictions of state and federal family policies.

The decisions in the Ninth Circuit are important because of the large population of California, the Ninth Circuit states' proximity to Mexico and Canada, and because the UPA legitimacy laws are applicable to many of the children in these border states, including adult children, in contrast with those that overtly reference biological paternity as a requirement for legal paternity.³⁹² California's public policy pursues the

³⁹¹ In *Clevenger v. Clevenger*, 11 Cal. Rptr. 707 (Cal. Ct. App. 1961), the court used the principle of estoppel to obligate a mother's husband, who held himself out as the father, to make child support payments for a son his wife conceived with another man. This principle might also be used to preclude the government from requiring biological evidence of a parental relationship for purposes of establishing legitimacy, even under the 1986 version of 8 U.S.C. § 1409(a). Moreover, insofar as the federal government for over thirty years never attempted to inform Joseph Anderson that he was a legal permanent resident and not a U.S. citizen, and that his father, Harold, was not his biological father, the government benefitted from the father-son relationship this established. It appears capricious and excessively harmful not only to Joseph, but also to his siblings and his mother, to emphasize facts that would destroy this relationship at this late date. Moreover, the action appears to conflict with California Family Code § 7630(c), limiting the parties who may challenge a father-child relationship. CAL. FAM. CODE § 7630 (Deering, LEXIS through 2011 Sess.) ("Except as to cases coming within Chapter 1 (commencing with Section 7540) of Part 2, an action to determine the existence of the father and child relationship may be brought by the child or personal representative of the child, the Department of Child Support Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor."). The DHS falls into none of these categories and thus appears to lack standing for rebutting a respondent's invocation of a parent-child relation in the state of California.

³⁹² See, e.g., Act of Mar. 17, 1921, ch. 114, 1921 Ariz. Sess. ("Every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock, except the right to dwelling or a residence with the family of its father, if such father be married. It shall inherit from its natural parents and from their kindred heir, lineal and collateral, in the same manner as children born in lawful wedlock. This section shall apply to cases where the natural father of any such child is married to one other than the mother of said child, as well as where he is single."). But see *In re Lund's Estate*, 159 P.2d 643, 648 (Cal. 1945) (discussing reasons not to insist on biological paternity). Section 230 omits the word "natural" and refers only to a "father." Moreover, according to the U.S. Supreme Court, even "natural children" is a legal term of art: "The Roman law distinguished between the offspring of that concubinage

opportunity for children who are fatherless except for their relationship with the husbands of their mothers to have a father-child relationship and be considered as legitimate under either section 230 or the parent-child sections of the UPA, discussed in more detail below.³⁹³ The BIA and court decisions used to deport California residents who grew up as children and siblings of U.S. citizens relied not only on ahistorical and incorrect intuitions about paternity but also, in *Martinez-Madera* and *Scales*, statutory language and analyses from the incorrect version of 8 U.S.C. § 1409(a), citing to the 1986 and legally binding 1952 version. The brief requesting an en banc hearing on behalf of Mr. Martinez pointed out the correct legal analysis of the dissenting judge and the outright error of the two judges in the majority, a point made by Judge Kim Wardlaw during a 2011 oral argument in response to the government's attorney's claim that legitimacy required a "blood relationship."³⁹⁴ Judge Wardlaw replies that this was an opinion signed by just two Supreme Court justices in *Miller v. Albright*.³⁹⁵

Our court relied on [*Miller dicta*] in *Marguet-Pillado* . . . but it also in turn relied on an earlier decision of our court that somehow contains an error. I hate to blame law clerks for this sort of thing but [*Martinez-Madera*] cites to the new version of the statute for the proposition that the old version contains the blood relationship . . . and it's just a mistake in the opinion that got picked up later because as you [addressing the government attorney] and I both know, the new version expressly added it, whereas it was not in the old version.³⁹⁶

It is tempting to ascribe the judiciary's erroneous designation of the relevant statute to the complexity of citizenship law, but there is something else behind these mistakes, as well as the unfounded assertions about *jus sanguinis* that appear in the Marguet-Pillado opinion. A few Ninth Circuit judges share with the rest of the public some rather primitive intuitions about families and family law, a

which it tolerated as an inferior species of marriage, and 'the spurious brood of adultery, prostitution, and incest.' The former were termed naturales; and the latter, *spurii, adulterini, incestuosi, nefarii, or sacrilegi*, according as they were respectively the fruit of prostitution, of incest between persons in the direct line of consanguinity, or related in remoter degree, and of the violation of vows of chastity." Stevenson's Heirs v. Sullivant, 18 U.S. 207, 262 (1820) (citations omitted).

³⁹³ See *supra* text accompanying note 387.

³⁹⁴ Oral Argument, *Anderson v. Holder*, No. 09-70249 (9th Cir. argued Feb. 9, 2011), available at http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000006940.

³⁹⁵ *Miller v. Albright*, 523 U.S. 420 (1998).

³⁹⁶ See *Anderson*, No. 09-70249 (oral dissent of Judge Wardlaw).

situation not at all surprising due to the enormous gulf between a family romance well-entrenched in metanarratives of even advanced- and post-industrial societies and the lived experiences of most families.

B. IDEOLOGY OF JUS SANGUINIS PERFORMED THROUGH KINSHIP RULES

One reason that the opinions are somewhat confused is that many of us seem to believe that citizenship laws have traditionally relied on “blood”³⁹⁷ (genetic paternity), an assumption that is categorically incorrect.³⁹⁸ Certainty of these relationships did not exist until the late twentieth century.³⁹⁹ “Given the impossibility” of assigning genetic paternity without DNA tests, Gregory Kaebnick observes, “British and American law has long held that a biological relationship must always be assumed to exist,” even when it cannot be known.⁴⁰⁰ The authors explain that this is “known as the ‘marital presumption’ or ‘presumption of legitimacy’,”⁴⁰¹ and it applies to the mother’s husband “unless he was absent, impotent, or sterile.”⁴⁰² Moreover, the law may grant exclusive paternity rights to the statutory father, even if he is demonstrably not the genetic one. In *Michael H. v. Gerald D.*, the genetic father was denied custody rights because these were the irrebuttable and solitary rights of the mother’s husband.⁴⁰³ The Court ruled in a manner consistent with Kraebnick’s observation that this “presumption can fly in the face of the facts, even of the very widely known facts”⁴⁰⁴

By allowing a child born out of wedlock is the child of a married parent’s spouse, as long as the marriage occurred before the child was eighteen years old, the U.S. government made exactly the policy commitment the majority in *Marguet-Pillar* claimed was “ludicrous.” In *Scales* and *Solis-Espinoza*, the Ninth Circuit recognized legal and not biological paternity as sufficient for automatically acquiring U.S. citizenship.⁴⁰⁵ The opinions held that being born in wedlock satisfied the

³⁹⁷ The anachronistic, metonymic reference to “blood” and not the more accurate word “genetics” represents the judges’ investment in fictional narratives of intergenerational ties. The connotation of “blood” saturating intergenerational relations heightens the putative and not historical importance of paternal genetics for establishing paternity.

³⁹⁸ See STEVENS, REPRODUCING THE STATE, *supra* note 331, at 3–101.

³⁹⁹ Gregory Kaebnick, *The Natural Father: Genetic Paternity Testing, Marriage, and Fatherhood*, 13 CAMBRIDGE Q. OF HEALTHCARE ETHICS 49 (2004).

⁴⁰⁰ *Id.* at 49.

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ 491 U.S. 110, 111 (1989).

⁴⁰⁴ See Kaebnick, *supra* note 399, at 54.

⁴⁰⁵ See *Scales v. INS*, 232 F.3d 1159, 1163–64 (2000) (finding that Washington state law on legitimacy confers paternity “because he is born in wedlock” despite affidavit stating Scales is not the genetic father); *Solis-Espinoza v.*

relevant statutory requirements for acquired citizenship during the period the respondents were born, even though the U.S. citizen parents from whom citizenship was acquired certainly were not genetically related to their children.⁴⁰⁶ The decision relied not only on 8 U.S.C. § 1401, but also on California law on legitimacy:

According to the Cal. Civil Code in effect when Mr. Solis was born: “The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth.”⁴⁰⁷

The statute contemplates a child’s retroactive legitimation to the “time of its birth” absent legitimacy at the chronological time of birth and absent a genetic relation between the father and the child. Similarly, California’s Vital Statistics agency performs this for nongenetic legitimate or adoptive parents, whose names retroactively appear on the birth certificates as the child’s parents at the time of birth.⁴⁰⁸ These legal fictions appear throughout the law, and especially family law,⁴⁰⁹ the practice of which requires these for marriage to even exist.⁴¹⁰ Mr.

Gonzales, 401 F.3d 1090, 1093–94 (9th Cir. 2005) (finding that “California Civil Code §230 provided specifically that a child, such as Solis-Espinoza, who was acknowledged by the father and accepted into the family by the father’s wife, was legitimate” even if there was no blood relationship).

⁴⁰⁶ *Scales*, 232 F.3d at 1160 (“We must decide whether 8 U.S.C. § 1401 requires a blood relationship between a person born outside the United States and his U.S. citizen parent, a question of first impression. We hold that it does not . . .”).

⁴⁰⁷ *Solis-Espinoza*, 401 F.3d at 1094 (quoting CAL. CIV. CODE § 230 (1872) (repealed 1976)).

⁴⁰⁸ The state in which the legal parents of an adopted child reside will issue a new birth certificate indicating their names as “mother” and “father” at the time of birth. *See* CAL. HEALTH & SAFETY CODE §§ 102625–102769 (Deering, LEXIS through 2011 Sess.) (concerning certificates of birth following adoption, legitimation, court determination of paternity, and acknowledgment).

⁴⁰⁹ *Black’s Law Dictionary* states that a child is legitimate when “conceived or born in lawful wedlock, or legitimated either by the parents’ later marriage or by declaration or judgment of legitimation,” a tautology that performs the legal character of the concept, i.e., a child is legitimate when declared or judged legitimate.

⁴¹⁰ In 2007, forty percent of mothers who gave birth were unmarried. *Changing Patterns of Nonmarital Childbearing in the United States*, CTRS. FOR DISEASE CONTROL, <http://www.cdc.gov/nchs/data/databriefs/db18.htm> (last visited Dec. 26, 2010). In 2008, 7.1 million people were married, and 3.5 million people divorced. CTRS. FOR DISEASE CONTROL, NATIONAL VITAL STATISTICS REPORT,

Marguet's appeal requesting an *en banc* hearing makes this point as well, pointing out that the law is the law even if it does not conform with a judge's expectations: "Because Congress has defined the terms 'child' and 'legitimation,' this Court cannot employ an alternative definition. This is true even if the panel finds the results 'surprising'."⁴¹¹ Moreover, other California judges have found the rigorous attachment to *jus sanguinis* "absurd"⁴¹² and thus presumably would find the *Marguet* opinion surprising.

The main distinction between conveying legitimacy by a nongenetic parent's marriage to the alien parent via a marriage certificate issued prior to the U.S. citizen's birth and after a child's birth bears primarily on the question of others who might come forward to dispute a claim to paternity. One California case quotes two dictionaries defining a stepfather as a "man who succeeds one's father as the husband of one's mother." Black's Law Dictionary defines 'stepparent' as "[the] mother or father of a child born during a previous marriage of the other parent and hence, not the natural parent of such child."⁴¹³

The suggestion here, the use of the paternal presumption absent a genetic relation when no one else asserts paternity, and the notion that father-child relationships may be primarily about intergenerational support and not individual genetics is based on legal precedents relevant for evaluating cases in which the judiciary is being asked to weigh California's efforts to preserve family unity against the federal government's efforts to disrupt this. The mothers of Mr. Martinez, Mr. Marguet, and, Mr. Anderson did not marry their biological fathers. Thus, according to their *de facto* experiences and the definitions quoted above,

http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_19.pdf (last visited Dec. 26, 2010). In 2009, 30% of children were being raised without two married parents, meaning that for any particular child, the chances of being in a household without two married parents at some point before the age of 18 was about 50%. *America's Families and Living Arrangements: 2009*, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/socdemo/hh-fam/cps2009.html> (last visited Dec. 26, 2010). See Jacqueline Stevens, *Methods of Adoption: Eliminating Genetic Privilege*, in *ADOPTION MATTERS* 68, 77-78 n.9 (Sally Haslanger & Charlotte Witt eds., 2005).

⁴¹¹ Petition for Rehearing *En Banc* at 6, *United States v. Marguet-Pillado*, No. 08-50130 (9th Cir. May 11, 2009).

⁴¹² *In re Angela A.*, 28 Cal. Rptr. 3d 923, 930 (Cal. Ct. App. May 26, 2005) ("Application of the privilege here would lead to the absurd result of protecting a family unit that no longer exists, and giving Angela a father she has never really known and who has never shown any willingness to support her financially or otherwise.")

⁴¹³ *Marckwardt v. Soto*, 198 Ca. Rptr. 41, 46 (Cal. Ct. App. 1984) (quoting, respectively, *RANDOM HOUSE COLLEGE DICTIONARY* 1287 (1982) and *BLACK'S LAW DICTIONARY* 1268 (5th ed. 1979)) (emphasis supplied in opinion).

the men who held them out as their respective sons were not stepfathers. In other words, they were and are their only fathers.

The notion that a so-called stepfather becomes a father by receiving his new wife's children into his family was codified as well in section 209 of the California Civil Code (enacted 1872, repealed 1979):

A husband is not bound to maintain his wife's children by a former husband; but if he receives them into his family and supports them, it is presumed that he does so as a parent, and, where such is the case, they are not liable to him for their support, nor he to them for their services.

Section 209 refers to the husband who receives "his wife's children by a former husband" into his home as a "parent," but in cases in which the children's mother did not have a "former husband," the current husband could be construed as the father and not just a parent, as no other father exists. The historical and current statutes thus express a range of parenting possibilities that California courts have recognized absent evidence of a genetic child-father relationship. The statutes afford the courts a great deal of discretion for recognizing husbands as de facto and hence de jure fathers—a possibility to which the BIA and the Ninth Circuit opinions in *Martinez-Madera* and *Marguet-Pillado* were perhaps insufficiently attentive.

This is not surprising. Family law's implementation is typically defined by contests among competing custodial parents disputing their responsibilities and obligations, or among relatives in probate courts. Typically the state is a third party adjudicating these disputes or intervening when a minor child is in danger. By entering the family scene as an interested party, and in particular a party interested in thwarting the unity of undisputed de facto families residing in California, the federal government is implementing priorities and agendas at odds with the state legitimation and parent/child laws to which 8 U.S.C. §§ 1101, 1401 and 1409 require deference.⁴¹⁴

Because a child becomes a U.S. citizen when her non-U.S. citizen parent marries a U.S. citizen, even if the child is biologically unrelated to the U.S.-citizen parent, as in *Scales* and *Solis-Espinoza*, the pressing legal question is not whether the statute in effect between 1952 and

⁴¹⁴ There are grounds for challenging the constitutionality of the 8 USC § 1409(a) (1986) "blood" requirement but these will not be explored in this article.

1986⁴¹⁵ allowed parents to ensure that genetically unrelated children shared their own U.S. citizenship. Instead, the relevant legal question is whether, for those born outside the United States between 1952 and 1986, the law accommodates claims to acquired citizenship through legitimation or other declarations of paternity by a father who was not married to the mother until after the child was born. The opinions in *Martinez-Madera* and *Marguet-Pillar*, and a subsequent version of § 1409,⁴¹⁶ maintain an understanding of the family directly at odds with the statute in place until 1986 and also the opinions in *Scales*, *Solis-Espinoza*, and *Flores-Torres*.

In *Scales* and *Solis-Espinoza*, the petitioners were deemed U.S. citizens at birth because one genetic parent was married to a U.S. citizen when the petitioners were born. But the *Solis-Espinoza* decision does not limit legitimacy to these criteria and indeed invites a broad legal definition of legitimacy under 8 U.S.C. §§ 1401 and 1409: “Public policy supports recognition and maintenance of a family unit. The immigration and Nationality Act (‘INA’) was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members.”⁴¹⁷ For Mr. Flores, ICE and the BIA construed legitimacy broadly for the purpose of claiming that his mother’s naturalization before he was eighteen could not trigger U.S. citizenship for her son because Mr. Flores had been legitimated by his father, a citizen only of El Salvador.⁴¹⁸ However, District Court Judge Alsup held on remand that, despite episodic encounters with his father and his father’s legal acknowledgement of paternity under Salvadoran law, Mr. Flores was a U.S. citizen. The heart of the decision is a detailed analysis of El Salvador’s rules on legitimacy and the

⁴¹⁵ See *Martinez-Madera v. Holder*, 559 F.3d 937, 941 n.1 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1052 (2010) (“The text of 8 U.S.C. §§ 1401 and 1409 was not amended in any relevant way between 1952 and 1986.”).

⁴¹⁶ 8 U.S.C. § 1409(a) (2006) (requiring “clear and convincing evidence” of a blood relationship between a child and father, among other requirements, to establish citizenship for the child).

⁴¹⁷ *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005). The opinion continues: “See, e.g., *Kaliski v. Dist. Dir. of INS*, 620 F.2d 214, 217 (9th Cir. 1980) (discussing the ‘humane purpose’ of the INA and noting that a ‘strict interpretation’ of the Act, including an ‘arbitrary distinction’ between legitimate and illegitimate children, would ‘detract from . . . the purpose of the Act which is to prevent continued separation of families’); H.R. Rep. No. 85-1199, pt. 2 (1957), *reprinted in* 1957 U.S.C.C.A.N. 2016, 2020 (observing that the ‘legislative history of the Immigration and Nationality Act clearly indicates that Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united.’)” *Id.*

⁴¹⁸ *Flores-Torres v. Mukasey*, 548 F.3d 708, 709–10 (9th Cir. 2008).

petitioner's family history, from birth through high school,⁴¹⁹ exactly the careful examination of family ties necessary if citizenship laws are not to run roughshod over intimate family ties. Unlike the Ninth Circuit decisions discussed above, Judge Alsup's opinion recognizes the inherent complexity of family ties and the need for laws regulating these ties in context.⁴²⁰

De facto families are not always de jure families for purposes of marriage and citizenship laws. However, even within the relatively narrow scope of single- or two-parent households, family law has never been implemented without careful analysis of specific de facto conditions and relationships. Forays into adjudicating citizenship claims based on family law need to reflect these nuanced and case-specific evaluations, as well as the variation among state family laws.⁴²¹ Family law in statutes and as interpreted under the Constitution has been crafted to distinguish some intergenerational households as having the legal status of parents and children. Citizenship laws historically have attempted to ensure that children have the same citizenship as their parents.⁴²² Efforts to define "family" by heavily weighting biological ties are inconsistent with kinship practices worldwide, including within the United States. Political societies' definitions of paternity have not and could not follow from genetic ties because these so-called blood relations are historically unstable, largely unknown and in many places

⁴¹⁹ *Flores-Torres v. Holder*, 680 F. Supp. 2d 1099 (N.D. Cal. Dec. 23, 2009). The judge observed the history of the petitioner's mother's financial support for her son while she was in California and he was in the care of her mother in El Salvador, her concerns about his gang associations that prompted her to send him out of state to his father's home for part of eighth grade, where, the judge wrote, his "father treated him like a stranger," and the father's overall comportment as a "deadbeat dad in almost every way that mattered." The judge recognized that applying a statute so as to protect the potential rights of a non-custodial parent when Mr. Flores was seventeen—practically speaking it seems unlikely he would be pressing for the right to bring him to El Salvador at that point—would have been nonsensical. *Id.* at 1106.

⁴²⁰ See discussion *supra* note 410.

⁴²¹ For instance, the Seventh Circuit held that citizenship could be conferred under §1401(g) by a U.S. father in a common law marriage, as the defendant asserted had occurred for his U.S. citizen father and his noncitizen mother who gave birth to him in Mexico. *United States v. Gomez-Orozco*, 188 F.3d 422, 426 (7th Cir. 1999) ("[I]f Gomez-Orozco was born in wedlock, which includes common law marriages, then he would be a citizen of the United States, and it would not be possible for him to be guilty of the crime with which he was charged."). PACER indicates that the case terminated on May 8, 2000, suggesting that the prosecution dropped the charge of Illegal Reentry (searched Jan. 29, 2010).

⁴²² See *supra* notes 405, 417 and accompanying text; STEVENS, *supra* note 331, at 102–71 (reviewing legal theories and histories of citizenship laws based on kinship rules from antiquity to present).

unknowable and ungovernable, and thus have never been the basis of the legal practice of *jus sanguinis*, but only its myth.⁴²³ This was the basis of the Court's decisions in a series of cases granting Congress authority to allow sex discrimination in its immigration laws: for the purpose of citizenship laws, families are not defined primarily by genetic relationships.⁴²⁴

1. Joseph Anderson

Mr. Anderson's case illustrates the importance of relying on state family law for determining a respondent's citizenship status, and not on the intuitions about family law held by EOIR adjudicators. Joseph Anderson was born in the Philippines in 1974. His mother was a citizen of the Philippines and, although they were not married when Joseph was born, the father indicated on his birth certificate, the man who married Joseph's mother on returning from duty in Vietnam when Joseph was seven months old, and the man who supported Joseph and held him out

⁴²³ Not only is paternity largely uncertain, the family itself may take several forms, making the singular definition unknowable absent a political decision. Perhaps the best discussion of this is found in EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* 126 (Joseph Ward Swain trans., 1965) (arguing that laws predate families, so that formal rules allow recognition of what counts as a family), and CLAUDE LEVI-STRAUSS, *ELEMENTARY STRUCTURES OF KINSHIP* (Rodney Needham ed., James Harle Bell & John Richard von Sturmer trans., 1969) (showing the political and psychological, not biological, bases for kinship and membership rules).

⁴²⁴ See, e.g., *Miller v. Albright*, 523 U.S. 420, 438 (1998) (holding that 8 U.S.C. § 1409 also serves two other important purposes that are unrelated to the determination of paternity: the interest in encouraging the development of a healthy relationship between the citizen parent and the child while the child is a minor; and the related interest in fostering ties between the foreign-born child and the United States," indicating that paternal blood ties are not dispositive in establishing a relationship sufficient to merit definition of a "child" for purposes of citizenship, and citing *Lehr v. Robertson*, 463 U.S. 248 (1983), for the holding that states may regulate paternity based on legal criteria and not genetics); *Fiallo v. Bell*, 430 U.S. 787 (1977) (holding that exclusion of illegitimate natural child of father and not mother from definition of "child" in the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 (b)(1)(D) and (b)(2), is constitutional). In short, state governments and the Court have announced that genetic paternity is not a sufficient basis for establishing legal paternity, and that legal relationships are sufficient to define a child's legitimacy, absent genetic ties. See also Opening Brief of Respondent at 16, *Flores-Torres v. Mukasey*, 548 F.3d 708 (9th Cir. 2008) (No. 08-16484) ("California distinguishes between biological and presumed fathers, giving the latter greater legal rights than biological fathers."); *In re Zacharia D.*, 862 P.2d 751, 760 n.15 (Cal. 1993) ("A biological or natural father is one whose biological paternity has been established but who has not achieved presumed father status as defined in Civil Code § 7004 [now Family Code § 7611].").

as his son until he passed away in a 2001 car accident, was Harold Anderson, Jr., a U.S. citizen.⁴²⁵

When Joseph was three, Officer Anderson moved his family to a base in Alaska. Shortly after that, the family settled at the Alameda Naval Base, where Joseph lived with his married parents and his younger brother until he was nine, at which point the family moved to Phoenix, Arizona.⁴²⁶ Joseph graduated from high school and remained in the area until 2002, when he was found guilty of a drug crime, which ICE charged as an “aggravated felony.” On December 23, 2007, at the conclusion of his prison sentence, Mr. Anderson believed he was being released in time for Christmas dinner at his grandmother’s home. Instead, federal agents brought him to the wing of the Pinal County Jail rented out to ICE,⁴²⁷ an act his mother refers to as a “kidnapping.”⁴²⁸

DHS attorneys argued that Joseph Anderson was not Harold’s legitimate son and was therefore ineligible for citizenship under the old INA sections 301 and 309(a) because no blood relation existed and Harold was not married to Joseph’s mother at the time of Joseph’s birth, an analysis the BIA twice upheld.⁴²⁹ The BIA stated that the respondent did not provide documentation from the Philippines, Arizona, or California “indicating that even one of those jurisdictions would consider him to be the legitimate offspring of Harold Anderson, Jr.”⁴³⁰ Further, the BIA distinguished Mr. Anderson’s case from *Scales* and *Solis-Espinoza*: “[T]he Ninth Circuit concluded that the requirement of a blood relationship could only be overlooked in instances where the child was not ‘born out of wedlock.’”⁴³¹ The BIA also stated: “...even were we to assume that the respondent could apply either Filipino, Arizona, or California law to establish his legitimacy, we would still conclude that

⁴²⁵ *In re Anderson*, 2009 WL 263034 (B.I.A. Jan. 21, 2009). Anderson’s case was recently argued before the Ninth Circuit Court of Appeals. *Anderson v. Holder*, No. 09-70249 (9th Cir. argued Feb. 8, 2011).

⁴²⁶ Interview with Joseph Anderson in Florence, Ariz., at Pinal County Jail (Apr. 9, 2008).

⁴²⁷ Mr. Anderson mentioned paying special attention to the Travel Channel. He thought that the shows on restaurants might assist in any job search he might need to conduct if he is indeed deported. Interview with Joseph Anderson in Florence, Ariz., at Pinal County Jail (Mar. 25, 2009).

⁴²⁸ Telephone Interview with Lanie Anderson, Joseph’s mother (Mar. 10, 2010).

⁴²⁹ See *In re Anderson*, 2009 WL 263034 (B.I.A. Jan. 21, 2009); *In re Anderson*, slip op. (B.I.A. Aug. 5, 2008) (on file with author).

⁴³⁰ *In re Anderson*, 2009 WL 263034 (B.I.A. Jan. 21, 2009).

⁴³¹ *Id.* (citing *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1093–94 (9th Cir. 2005)). The BIA also rejected his attorney’s argument that Mr. Anderson’s conviction did not constitute an “aggravated felony” under the 1996 Act. *Id.*

he has not met his burden of proving that he possesses a blood relationship with Harold Anderson, Jr.”⁴³²

This BIA decision makes a number of mistakes, all similar to those that ICE, the EOIR adjudicator, and the DHS attorney made in deciding Mr. Flores’s status. Instead of following congressional citizenship policy designed to maintain family unity,⁴³³ these agencies pressed for family separations.⁴³⁴ The EOIR decisions in 2008 and 2009 reiterated the positions taken by ICE, and provided no evidence that anyone from the EOIR had actually read the analysis put forward by Mr. Anderson’s Motion to Reconsider and appeals.⁴³⁵ Mr. Anderson’s second Motion to Reconsider cites INA § 309(a) and INA § 101(b)(1)(C):⁴³⁶

In its decision, this Board stated, “Insofar as the respondent was born in the Philippines, we must look to that jurisdiction’s laws to determine whether he has been legitimated.” BIA Dec. at 2. The decision offered no explanation as to why the place of birth controls for purposes of legitimation. [Note:] Several paragraphs before the discussion of legitimation, the decision states that the “applicable law for transmitting citizenship” is the “law in effect on the child’s birth date.” BIA Dec. at 2. While this Board’s decision may be implying that the relevant law is also the law in effect at the *place* and *time* of the child’s birth, case law only supports the interpretation that the *date* of the child’s birth is controlling for purposes of determining the law under which citizenship, not legitimacy, will be determined. Furthermore, the idea that the applicable law of legitimacy is the law in effect at the place and time of birth is at odds with the plain language of the statute”⁴³⁷

⁴³² *Id.* at note 2.

⁴³³ *See supra* notes 355, 417 and accompanying text.

⁴³⁴ *See supra* notes 356 and accompanying text.

⁴³⁵ The initial motion included copious analysis of U.S. family law and legitimacy laws for California and Arizona, per §§ 301 and 309. The initial BIA decision ignored this and without explanation relied exclusively on legitimacy law in the Philippines. *See* Appellant’s Mot. to Reconsider, *In re* Anderson (B.I.A. Aug. 5, 2008) (on file with author).

⁴³⁶ “[A] child legitimated under the law of the child’s residence or domicile, or under the law of the father’s residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen” Appellant’s Mot. to Reconsider at 2–3, *In re* Anderson (B.I.A. Oct. 20, 2008) (on file with author).

⁴³⁷ *Id.* at 3–4 (citations omitted).

An earlier Motion to Reconsider had likewise pointed out: “the BIA’s decision to apply the law of the Philippines to the exclusion of other residences or domiciles of Respondent or Harold Anderson prior to Respondent’s 21st birthday was not explained or otherwise supported by logic or authority.”⁴³⁸ Nonetheless, the appeal again quotes from and carefully analyzes legitimacy statutes in the Philippines, and argues that Joseph is Harold’s legitimate son under those laws as well.⁴³⁹ The BIA decisions therefore confuse the BIA’s own failure to consider Mr. Anderson’s arguments with the allegation that they were not submitted. (The second decision ignores entirely the respondent’s analysis of legitimacy law in the Philippines.)⁴⁴⁰

During the February 9, 2011 oral argument before the Ninth Circuit, a judge asked the government attorney if Mr. Anderson met the legitimacy requirements under the law of the Philippines, California, or Arizona. The government attorney stated he did not, and said that the BIA also believed this to be the case, implying that the BIA had considered Mr. Anderson’s legitimacy claims based on California and Arizona law and found them wanting. The BIA decisions, however, only address the legitimacy claim based on its analysis of legitimacy law in the Philippines, despite the fact that Mr. Anderson’s BIA appeal lays out the argument for his legitimacy under California law:

In *Michael H. v. Gerald D.*, 491 U.S. 110, 119 (1989), Justice Scalia noted that a similar presumption of paternity under California law that disregards a blood relationship should be accorded deference as a substantive rule of law. Justice Scalia noted, “Of course, the conclusive presumption not only expresses the State’s substantive policy but also furthers it, excluding inquiries into the child’s paternity that would be destructive of family integrity and privacy.”⁴⁴¹

Later, the appeal discusses in detail Mr. Anderson’s claim under California’s section 230, quoting the statute and then explaining:

Here, the evidence establishes that Harold Anderson publicly acknowledged Respondent as his child by

⁴³⁸ See Appellant’s Mot. to Reconsider at 3–4, *In re Anderson* (B.I.A. Aug. 5, 2008) (on file with author).

⁴³⁹ “Article 220 Title VII, Chapter 1 of the Civil Code of the Philippines reads: ‘In case of doubt, all presumptions favor the solidarity of the family. Thus every intendment of law or facts leans toward the validity of marriage, the indissolubility of marriage bonds, the *legitimacy of children*’” *Id.* (emphasis added in Motion).

⁴⁴⁰ See *In re Anderson*, 2009 WL 263034 (B.I.A. Jan. 21, 2009).

⁴⁴¹ See Brief for Respondent at 9, *In re Anderson* (B.I.A. Oct. 20, 2008).

signing Respondent's birth certificate and completing a sworn Affidavit to Be Accomplished in Case of an Illegitimate Child, listing himself as the "father of the child" described in the birth certificate. Furthermore, the fact that Harold Anderson married Respondent's mother, filed petitions for Respondent and Respondent's mother, returned to the United States together, and lived in various places as a family demonstrates that Harold Anderson treated Respondent as if he were Harold Anderson's legitimate son.⁴⁴²

The BIA does not explain how it comes to assert the requirement of a "blood relation" in the face of a state legitimation law the respondent is invoking to show that legitimation may occur without this. Thus the BIA did not provide any reasons for disputing Mr. Anderson's claim to legitimacy under California law, but simply ignored it.

Also troubling is the BIA's incorrect citation of *Solis-Espinoza* to claim that a "blood relationship could only be overlooked in instances where the child was not 'born out of wedlock.'"⁴⁴³ The passage the BIA cites states: "While we observed in *Scales* that the 'blood relationship' requirement in 8 U.S.C. § 1409 applied to an illegitimate child, we held that the requirement applied *only* to an illegitimate child and that it did not apply to someone who was not born 'out of wedlock.'"⁴⁴⁴ *Solis-Espinoza* says a genetic relationship is required "*only*" for illegitimate children, but Joseph is not illegitimate because under § 1409 legitimacy is retroactive. Hence, under California law and thus § 1409 (1974), Joseph is Harold's legitimate son.⁴⁴⁵ Far from supporting the position of ICE, this passage referencing § 1409 supports the position of Mr. Anderson.

The BIA states that "Harold Anderson Jr. signed the respondent's birth certificate and completed a separate affidavit attesting to his paternity."⁴⁴⁶ This and the ongoing financial and other support Harold provided his son are enough to establish Harold Jr. as Joseph's presumed father under the Uniform Parentage Act, codified as California's paternity laws since 1975.⁴⁴⁷ Moreover, no one else would qualify as

⁴⁴² *Id.* at 12.

⁴⁴³ See *In re Anderson*, 2009 WL 263034 (B.I.A. Jan. 21, 2009).

⁴⁴⁴ *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1093 (9th Cir. 2005) (citing *Scales v. INS*, 232 F.3d 1159, 1164 (9th Cir. 2000)).

⁴⁴⁵ 8 U.S.C. § 1409(a) (2006); see also Brief for Petitioner at 2, *Flores-Torres v. Mukasey*, 548 F.3d 708 (9th Cir. 2008) (No. 08-16484).

⁴⁴⁶ *In re Anderson*, 2009 WL 263034 (B.I.A. Jan. 21, 2009) (punctuation omitted).

⁴⁴⁷ CAL. FAM. CODE § 7611 (Deering, LEXIS through 2011 Sess.) defines the presumption of paternity as follows:

Joseph's presumed natural father. No one else married Joseph's mother, was named on Joseph's birth certificate as his father, or received him into his home and openly held him out as his son. Joseph appears to qualify as Harold Jr.'s legitimate child and thus meets the criteria for U.S. citizenship.⁴⁴⁸

VII. RECOMMENDATIONS

U.S. citizens are being wrongfully deported because of problems systemic to current immigration laws and their enforcement by DHS and DOJ agencies. As noted above, existing law prohibits ICE from detaining U.S. citizens. ICE officials and spokespersons have interpreted this to mean that it "may not knowingly" detain U.S. citizens.⁴⁴⁹ This interpretation appears designed to avoid liability for civil damages and

A man is presumed to be the natural father of a child if [. . .]:

(a) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.

(b) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce.

(2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(c) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) With his consent, he is named as the child's father on the child's birth certificate, or

(2) He is obligated to support the child under a written voluntary promise or by court order.

(d) He receives the child into his home and openly holds out the child as his natural child."

⁴⁴⁸ On August 23, 2010, over two years after I first met Mr. Anderson, who was held since December, 2007, I posted bond and he was released from ICE custody. His appeal of the BIA decision awaits a hearing before the Ninth Circuit.

⁴⁴⁹ See Telephone Interview with Andrew Strait-Lorenzen, Community Outreach Coordinator, ICE (Feb. 12, 2010).

worse. ICE is proposing that its agents' ignorance of facts and law is a defense against civil rights and false imprisonment claims. However, this position is politically and legally dubious for several reasons, an obvious one being the agency's refusal to regulate detention operations.⁴⁵⁰ If the DHS will not regulate its detention operations, it may not claim it is enforcing the due process rights of U.S. citizens.

Below are some minimum measures necessary to protect U.S. citizens from being held in ICE custody and deported:

1. Laws and regulations should be enacted to provide detained respondents the same due process protections as defendants in criminal proceedings, as this standard appropriately ensures against the wrongful deportation of U.S. citizens. These protections include government-funded counsel if the respondent is not able to afford a lawyer; the inadmissibility into evidence for deportation cases of confessions to unlawful presence in the United States signed under duress, including extended confinement of more than six hours; and a review of EOIR files for the purpose of overturning deportation orders in which the EOIR file contains an I-213 without a certificate of service indicating it was shared with the respondent.⁴⁵¹
2. ICE should allow full public access to sites of respondents' incarceration. Anyone in ICE custody should be able to meet with anyone from the public subject only to the two parties' mutual agreement. Visiting policies should reflect the fact that no one in ICE custody is there for reasons of punishment. Allowing access is therefore consistent with the statutory goal of ensuring respondents' removal in the event this is ordered. It also serves an important role in providing accountability for deportation officers, who at present may violate the law without this being reported. The government does not assert that its "service processing" (from the ICE predecessor agency "Immigration and Naturalization Service") and "detention" centers (privately owned) are for purposes of punishment; thus there is no good immigration-related policy reason for requiring respondents' isolation from the larger public, a

⁴⁵⁰ See Letter from Jane Holl Lute, Deputy Sec'y, ICE, to Michael Wishnie, Clinical Professor of Law, Yale Law School, and Parmita Shah, Associate Director, National Lawyers Guild (July 24, 2009), *available at* <http://www.nationalimmigrationproject.org/legalresources/Immigration%20Enforcement%20and%20Raids/Detention%20Standards%20Litigation/DHS%20denial%20-%202007-09.pdf>.

⁴⁵¹ In light of EOIR failing to issue sanctions against DHS attorneys upon receipt of I-213s without certificates of service for respondents, affirmative administrative actions are necessary to ensure respondents have access to evidence that will be used against them in immigration hearings.

practice that denies U.S. citizens the right to call attention to their plights and hold ICE accountable.⁴⁵²

3. The DOJ should ensure immigration court access is consistent with 8 C.F.R. § 1003.27. If the DOJ lacks funds sufficient to provide public hearings for those in ICE custody, then the EOIR should order the release of respondents so that their hearing venues are accessible to the public, in conformity with the regulation.
4. The DOJ Office of Professional Responsibility and the Office of the Inspector General should investigate the EOIR's attorneys in the agency's Office of General Counsel and Office of the Chief Immigration Judge for evidence of malfeasance in failing to forward evidence of adjudicator and staff misconduct to the OPR and OIG, as required by 8 C.F.R. § 292.3(i)⁴⁵³ and 28 C.F.R. § 0.29c(a),⁴⁵⁴ and interference with the investigation of complaints against practitioners by state bar associations. Complaints to the EOIR and OPR that had yielded negative findings should be reopened.

Two measures that might appear to prevent ICE from deporting U.S. citizens without the costs and effort of the changes suggested above include screening for U.S. citizens and affording their cases special scrutiny, or issuing national identity cards that would conclusively prove one's U.S. citizenship. However, these are demonstrably insufficient. On November 9, 2009 John Morton, ICE Assistant Secretary, issued the

⁴⁵² On several occasions in 2009, ICE public affairs officers Kelly Nantel, Brian Hale, and Phoenix Field Director Katrina Kane violated the visiting and media procedures in the ICE Detentions Standards, depriving Joseph Anderson of his right to freedom of association. See Jacqueline Stevens, *ICE Puts Son of Navy Officer Incommunicado, Attorney Outraged*, STATES WITHOUT NATIONS BLOG (Mar. 9, 2009, 8:10 AM), <http://stateswithoutnations.blogspot.com/2010/03/ice-puts-son-of-us-navy-officer.html>; *Latino USA: ICE Accountability at Issue*, NAT'L PUB. RADIO (Mar. 11, 2009), <http://www.latinousa.org/884>.

⁴⁵³ 8 C.F.R. § 292.3(i) (2010) ("Complaints regarding the conduct or behavior of DHS attorneys shall be directed to the Office of the Inspector General, DHS. If disciplinary action is warranted, it will be administered pursuant to the Department's attorney discipline procedures."). According to documents responsive to a request filed under the FOIA, between September 2009 and August 2010 EOIR failed to forward any misconduct complaints to OPR, including ones that detailed evidence supporting allegations of civil and criminal law-breaking by EOIR adjudicators and other staff. Stevens, *supra* note 184.

⁴⁵⁴ 28 C.F.R. § 0.29c(a) (2010) ("Evidence and non-frivolous allegations of criminal wrongdoing or serious administrative misconduct by Department employees shall be reported to the OIG, or to a supervisor or a Department component's internal affairs office for referral to the OIG, except as provided in paragraph (b) . . .").

agency's deportation officers and attorneys an order to release individuals producing probative evidence of U.S. citizenship.⁴⁵⁵ The lack of due process protections discussed above has allowed ICE agents to ignore the order.⁴⁵⁶ Likewise, an identity card will not work for people who do not know they are U.S. citizens because of earlier mistakes by Citizenship and Immigration Services or Customs and Border Protection. Also, ICE has detained and attempted to deport U.S. citizens who have valid U.S. passports,⁴⁵⁷ which under present law is proof of U.S. citizenship.⁴⁵⁸ In short, the only way to guarantee that the U.S. government is not depriving U.S. citizens of their rights in deportation proceedings, an objective mandated by constitutional and statutory law, is to afford everyone in ICE custody full due process rights.

5. Congress should make the Child Citizenship Act of 2000, Public Law 106-395, retroactive and thus applicable to all individuals, regardless of their date of birth. These statutory rules provide clear criteria for derived and acquired citizenship that the older statutes lack, and thus would allow for more efficient determinations of U.S. citizenship status.⁴⁵⁹

Admittedly, some of these measures may burden U.S. taxpayers. However, unless these protections are afforded to everyone in DHS custody, the unlawful and unjust practice of deporting U.S. citizens will continue. The costs of these measures are the costs of the due process protections U.S. citizens need in order for them not to be wrongfully deported. If Congress cannot afford to deport undocumented residents and also protect the rights of U.S. citizens, then it may repeal those laws whose enforcement is deemed too costly.

⁴⁵⁵ See Morton Memo *supra* note 41.

⁴⁵⁶ See, e.g., *supra* text accompanying note 97.

⁴⁵⁷ See, e.g., discussion of Mr. Lyttle, *supra* note 301 and accompanying text; Complaint, Keil v. Treveline, No. 09-3417 (W.D. Mo. filed Nov. 6, 2009) (“At the time of his arrest Defendants referred to Plaintiff, a United States Citizen, as an ‘illegal alien’ Defendants took Respondent’s facially valid US Passport Defendant was later charged in the Western District of Missouri, for falsely claiming to be a United States Citizen.”).

⁴⁵⁸ 22 U.S.C. § 2705 (2006); see *In re Villanueva*, 19 I. & N. Dec. 101 (B.I.A. 1984) (“Unless void on its face, valid United States passport issued to individual as citizen of United States is not subject to collateral attack in administrative immigration proceedings and passport constitutes conclusive proof of such person’s citizenship; district director erred in failing to consider passport as conclusive proof of United States citizenship for purpose of admitting spouse of petition as spouse of American citizen.”).

⁴⁵⁹ See Press Release, U.S. Citizenship and Immigration Services, The Child Citizenship Act of 2000 (Oct. 24, 2004), http://www.uscis.gov/files/pressrelease/CCA_102504.pdf (providing an official summary of Public Law 106-395 provisions for acquired citizenship).

APPENDIX

The FIRR files are sorted by detention center, year, and, in the case of the Eloy files, whether the respondent had “won,” which included those who agreed to voluntary departure and therefore would not have claims to U.S. citizenship affirmed. For the total number of files from 2006 to 2008, I relied on FIRR’s reporting data to the Vera Institute for Justice, which subcontracts to FIRR from a grant from the Department of Justice. I inspected each file that was sorted in the Eloy “win” drawers from 2006 to 2008. Although I physically handled over 2,000 files, I read and took notes only on those in which it appeared that the respondent had a deportation order terminated because of U.S. citizenship.

A. ELOY DETENTION CENTER FILES

Each respondent file contains notes recorded by FIRR attorneys during and immediately following their consultations with people in ICE custody preparing for their pro se appearances before an EOIR adjudicator. Most of the files stated the date of the meeting, the reason for the detention, the legal claim, if any, for the respondent remaining in the United States, and the EOIR adjudicator hearing date and decision. The files also might include legal documents, correspondence with respondents and their family members, and dated notes based on follow-up meetings recorded on the file sleeve. The files typically included one entry reflecting one meeting, though many of the files of those making successful claims of U.S. citizenship included multiple entries.

For those who had deportation orders terminated because of U.S. citizenship, and for some of those who seemed to have strong claims but were deported, I recorded on a laptop spreadsheet data under headings that included the reason for detention, details of the U.S. citizenship claim, intake date at the detention center, the place detained, the date the EOIR adjudicator first terminated deportation proceedings on grounds of U.S. citizenship, and the date the individual was ultimately released, in some cases several months after the EOIR’s initial order. For some of the cases, the file information was incomplete. For instance, information on when the respondent was first detained might not have been recorded.⁴⁶⁰ When this information was not included I relied on either copies of ICE documents in the file indicating when the respondent was first detained or notes on when the respondent first met with the FIRR

⁴⁶⁰ FIRR attorneys typically made weekly presentations at Eloy and then made themselves available for brief consultations in advance of their hearings. Respondents with hearings at the Florence Processing Center, who may be held in other facilities and transferred in the early morning to FPC, would receive their presentations immediately before their initial hearings. Interview with Kara Hartzler, FIRR staff attorney, in Florence (Mar. 25, 2009).

attorney to establish the beginning range of detention.⁴⁶¹ I also used the EOIR 800 number case retrieval system to confirm the dates for proceedings terminated by EOIR adjudicators.⁴⁶²

B. FLORENCE SERVICE PROCESSING CENTER AND LOCAL JAIL FILES

The files for individuals confined at the Florence Service Processing Center and individuals held at local jails under contract with ICE were not sorted by “wins.” Because of time constraints, I inspected each file from 2008 to determine whether the respondent had a successful claim of U.S. citizenship, but could not inspect the files for previous years. In reviewing all of the Florence files for 2008,⁴⁶³ I noticed a pattern of close ties to U.S. citizens among those appearing to have no legal claim to residence. Lacking time to record the data from all of the files along this dimension, I episodically tracked these by counting all cases within randomly selected letters of the alphabet, for instance, tallying data available for all files labeled with a last name beginning with the letter “E.” These results appear in Table 4.

C. COMPARISON OF FIRRP FILE RESPONDENT CHARACTERISTICS WITH TOTAL DETAINED POPULATION

There is no way to definitively match the characteristics of the respondents in the files I reviewed with those of the entire population of respondents in detention, or even the characteristics of the respondents held in southern Arizona. Four factors indicate the FIRRP sample understates the number of U.S. citizens locked up by ICE; one factor might contribute to the sample overstating the percentage of U.S. citizens among the total detainee population.

First, the opportunity to attend a legal orientation program (LOP) meeting is available only to individuals who will be appearing at an EOIR hearing.⁴⁶⁴ However, a large number of those assembled in detention centers in southern Arizona and elsewhere are being taken out of the country on the basis of “stipulated removal orders” and thus do not receive an administrative hearing, a disproportionate number of

⁴⁶¹ This resulted in an understatement of the length of detention. FIRRP attorneys often met people who had been detained days or even weeks earlier, but would never create a file for someone who had not yet been detained.

⁴⁶² See *Immigration Case Status Information*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, <http://www.justice.gov/eoir/npr.htm> (last updated Sept. 2010).

⁴⁶³ FIRRP has filed all non-Eloy files as “Florence,” and I follow its division here as well.

⁴⁶⁴ *Legal Orientation and Pro Bono Program*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, <http://www.justice.gov/eoir/probono/probono.htm> (last updated Dec. 2010).

whom are held in Eloy.⁴⁶⁵ This is the group most likely to contain U.S. citizens.⁴⁶⁶

According to Rachel Rosenbloom, a professor at Northeastern Law School, an immigration judge who insists on “thoroughly questioning” people who sign these orders “regularly encounters U.S. citizens.” Rosenbloom adds, “There are many judges who don’t question people, and it’s very likely there’s going to be U.S. citizens among those people as well, and they’re not being [identified].”⁴⁶⁷

Such individuals often would not have an opportunity to attend an LOP or meet a FIRR attorney and therefore would not appear in their files.⁴⁶⁸

Second, the New York Bar Association surveyed people held in the Varick Detention Center in 2009 and found 8% had valid claims to U.S. citizenship.⁴⁶⁹ This is a population that would include people with notices to appear before an EOIR adjudicator as well as those with administrative removal orders who were being held en route to transfers abroad.

Third, as the records in Tables Five and Six indicate, people who have valid claims to U.S. citizenship may sign documents indicating otherwise. Although they were held as aliens in the Eloy or Florence Detention Centers, and may have met with FIRR attorneys, their agreement to removal orders would cause them to be classified as aliens, and they would not have their deportation orders terminated by an EOIR adjudicator.

⁴⁶⁵ From 2003–2008, ICE removed 100,000 individuals on the basis of stipulated removal orders, the plurality of which were issued in Eloy. Jayashri Srikantiah & Karen Tumlin, Press Release, National Immigration Law Center, Background: Stipulated Removal (Nov. 12, 2008), <http://www.nilc.org/immla/wpolicy/removpsds/stipulated-removal-bkgrndr-2008-11.pdf>.

⁴⁶⁶ Most of the cases in Tables 5 and 6 refer to individuals who had received administrative removal orders, the basis of an EOIR adjudicator issuing a stipulated removal order.

⁴⁶⁷ See *supra* note 12.

⁴⁶⁸ If individuals ICE arrests as aliens make a claim of U.S. citizenship, ICE is supposed to give them a Notice to Appear for an immigration hearing. However, these individuals would not be on a list of those invited to LOP presentations, and ICE does not always follow this regulation.

⁴⁶⁹ NEW YORK CITY BAR. NYC KNOW YOUR RIGHTS PROJECT 8, 12 (November, 2009), http://www.nycbar.org/citybarjusticecenter/pdf/NYC_KnowYourRights_Nov09.pdf (“Potential Eligibility for Relief, Derivative Citizenship, 8%”; “The sample analyzed for this report consists of 158 detainees interviewed at the weekly clinics between December 11, 2008 and July 9, 2009.”).

Fourth, people who have strong claims to U.S. citizenship are probably more likely to have private counsel than the rest of people ICE detains. These people would be more likely to meet directly with their own attorneys and would therefore not appear in the FIRRP files as detained U.S. citizens.

One factor causing the FIRRP data to overstate the ratio of U.S. citizens in ICE custody is that the denominator may include individuals more likely to have claims of relief than the denominator of the entire detained population. People who believe they have no grounds of relief may not meet with the LOP attorneys and would not be included in their files.