

2-15-2020

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Lydia V. Zepeda

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Recommended Citation

Zepeda, Lydia V. (2020) "The Costs of U.S. Immigration Policies," *California Western Law Review*. Vol. 56 : No. 1 , Article 16.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol56/iss1/16>

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THE COSTS OF U.S. IMMIGRATION POLICIES

LYDIA ZEPEDA *

INTRODUCTION

Four United States immigration policies—Muslim bans, family separations, mass detentions, and mass deportations—will go down in history as shameful, destructive to our national reputation, and lethal to immigrants. These policies have broken up families; sent people to countries they may have no family or roots in, where they may not even speak the language; and resulted in extortion, torture, and even death.

While the above ethical costs of U.S. immigration policies are apparent to some, the financial costs go largely unrecognized. For the fiscal year 2019 (“FY”), the budget requested by the Department of Homeland Security (“DHS”) to apprehend, detain, and remove unauthorized immigrants was over \$30 billion.¹ The budgets for apprehension and enforcement have focused on illegal border crossings, which are at a 48-year low.² Meanwhile, the numbers of legal immigrants and those entering legally and later invalidating their right to stay in the U.S. have grown. In FY 2018, the number of people who were suspected of being illegally in the U.S. due to overstaying their visas was 569,604.³ This is over 200,000 more than the number of border crossings along the southwest border in 2017.⁴ Customs and

* Professor Emerita, University of Wisconsin-Madison. lzepeda@wisc.edu.

1. See U.S. DEP’T OF HOMELAND SEC., FY 2019 BUDGET IN BRIEF (2018), <https://www.dhs.gov/sites/default/files/publications/DHS%20BIB%202019.pdf>.

2. U.S. DEP’T OF HOMELAND SEC., 2017 YEARBOOK OF IMMIGRATION STATISTICS 91, 95 (July 2019), https://www.dhs.gov/sites/default/files/publications/yearbook_immigration_statistics_2017_0.pdf [hereinafter U.S. DEP’T OF HOMELAND SEC., 2017 YEARBOOK].

3. U.S. DEP’T OF HOMELAND SEC., FISCAL YEAR 2018 ENTRY/EXIT OVERSTAY REPORT 10, https://www.dhs.gov/sites/default/files/publications/19_0417_fy18-entry-and-exit-overstay-report.pdf (last visited Dec. 20, 2019).

4. See U.S. DEP’T OF HOMELAND SEC., 2017 YEARBOOK, *supra* note 2, at 95.

Border Protection (“CBP”) picked up 310,531 people⁵ and estimated the number of undetected unlawful entries at the southwestern border at 57,000 for FY 2017.⁶ Yet the problem of illegal overstays has been ignored and the U.S. policy focus is on “border security.”

In practice, U.S. immigration policies target unauthorized immigrants who are Mexican and Central American rather than the larger group of unauthorized immigrants who are from elsewhere. This article examines these immigration trends, the priorities of enforcement, and the economic costs of U.S. immigration policies.

I. WE ARE AT A 48-YEAR LOW IN ILLEGAL BORDER CROSSINGS

A widely-shared misconception is that the U.S. borders are being overrun by undocumented immigrants. In reality, illegal border crossings are the lowest they have been since 1969.⁷ The number of border apprehensions by CBP—the government catching an unauthorized immigrant entering the U.S. illegally—was only 310,531 in FY 2017.⁸ Although over 98% of these apprehensions occurred along the U.S.-Mexico border,⁹ only 42% of those apprehended were Mexican.¹⁰ Further, these unauthorized immigrants are not “sneaking” into the U.S. Forty-four percent of those the CBP apprehended along the U.S.-Mexico border in FY 2017 were apprehended in the Rio Grande Valley (“RGV”) sector:¹¹ a populated, highly-patrolled 320-

5. *Id.*

6. U.S. DEP’T OF HOMELAND SEC., DEPARTMENT OF HOMELAND SECURITY BORDER SECURITY METRICS REPORT 14 (2019), https://www.dhs.gov/sites/default/files/publications/ndaa_border_metrics_report_fy_2018_0_0.pdf [hereinafter U.S. DEP’T OF HOMELAND SEC., BORDER SECURITY METRICS REPORT].

7. U.S. DEP’T OF HOMELAND SEC., 2017 YEARBOOK, *supra* note 2, at 91.

8. *Id.* at 95.

9. *Id.*

10. *See* U.S. CUSTOMS & BORDER PROT., U.S. BORDER PATROL NATIONWIDE APPREHENSIONS BY CITIZENSHIP AND SECTOR IN FY2017 2–3, <https://www.cbp.gov/sites/default/files/assets/documents/2018-May/usbpa-apprehensions-citizenship-sector-fy2017.pdf> (last visited Dec. 20, 2019).

11. *Id.* at 2; U.S. DEP’T OF HOMELAND SEC., DEPARTMENT OF HOMELAND SECURITY BORDER SECURITY METRICS REPORT, *supra* note 6, at 21.

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mile section along the U.S.'s nearly 2,000-mile border.¹² Many of those apprehended in the RGV in FY 2017 (53.5%) were members of family groups or unaccompanied minors.¹³ Over 50% of those apprehended were from Northern Triangle countries (Honduras, Guatemala, and El Salvador), and 18% of all those apprehended in the RGV had claims of “credible fear.”¹⁴

Why then do many Americans believe that the U.S.'s southern border is being overrun by undocumented immigrants? Dramatic fluctuations in the flow of unauthorized immigrants have contributed to this inaccurate perception of illegal border crossings. The number of apprehensions was 45,336 in 1959, they climbed to over one million in 1976, and reached nearly 1.8 million in 1986.¹⁵ The numbers stabilized at about one million per year for the next five years, then climbed again to about 1.8 million in 2000.¹⁶ Since 2000, apprehensions by CBP have fallen markedly to a little over 300,000 annually.¹⁷ Thus, as the numbers show, the flood of illegal entries into the U.S. happened twenty years ago: not today.

Apprehensions are strongly correlated with “returns” plus “removals” (Figure 1). “Returns” are confirmed departures of deportable or unauthorized immigrants that were made without a court

12. See Christopher Klein, *Everything You Need to Know About the Mexico-United States Border*, HISTORY, <https://www.history.com/news/everything-you-need-to-know-about-the-mexico-united-states-border> (last updated Dec. 26, 2018); see also *Rio Grande Valley Sector Texas*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/rio-grande-valley-sector-texas> (last updated May 17, 2016).

13. See U.S. DEP'T OF HOMELAND SEC., BORDER SECURITY METRICS REPORT, *supra* note 6, at 24–25.

14. *Id.* at 21; *U.S. Border Patrol Claims of Credible Fear Apprehensions by Sector*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear/apprehensions-sector> (last updated Oct. 23, 2019).

15. U.S. DEP'T OF HOMELAND SEC., 2017 YEARBOOK, *supra* note 2, at 91.

16. *Id.*

17. *Id.* at 91, 95.

order.¹⁸ “Removals” include what are commonly called deportations,¹⁹ expedited removals,²⁰ and inadmissible entries (persons who seek admission to the US by fraud or misrepresentation of fact).²¹

Throughout most of the twentieth century, removals were few relative to returns, and stable (under 40,000 per year).²² In contrast, returns fluctuated wildly between 1927 and 2000, from 6,531 to almost 1.7 million (Figure 2).²³ Removals began to increase after 1996, the year Congress changed the laws to allow expedited removals.²⁴ The Anti-Terrorism and Effective Death Penalty Act (“AEDPA”) and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) expanded the application and use of expedited removals. One can conclude that the increased priorities and budgets of Immigration and Customs Enforcement (“ICE”) to deport “criminal” aliens contributed to the rise of removals, which peaked in 2013.²⁵ As

18. U.S. DEP’T OF HOMELAND SEC., ANNUAL FLOW REPORT, DHS IMMIGRATION ENFORCEMENT: 2016 2, <https://www.dhs.gov/sites/default/files/publications/DHS%20Immigration%20Enforcement%202016.pdf> (on file with author). It includes voluntary departures (no bar to re-entry at a port of entry but failure to leave in time allotted results in a ten year bar to entry), voluntary returns, and withdrawals under docket control. *Id.*

19. *Id.* Deportations are ordered by an immigration judge. *Id.* The U.S. Department of Justice, Executive Office for Immigration Review (“EOIR”) operates immigration courts. *See Executive Office for Immigration Review*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/eoir> (last visited Dec. 20, 2019).

20. *Fact Sheet: Expedited Removal*, NAT’L IMMIGRATION FORUM (June 4, 2019), <https://immigrationforum.org/article/fact-sheet-expedited-removal/> [hereinafter NAT’L IMMIGRATION FORUM, *Fact Sheet*]. Deportations authorized by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act allow DHS to deport without an immigration judge’s order. *Id.*

21. Bryan Baker, ANNUAL REPORT DECEMBER 2017, IMMIGRATION ENFORCEMENT ACTIONS: 2016, U.S. DEP’T OF HOMELAND SEC. 5–6, https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf.

22. *Table 33. Aliens Apprehended: Fiscal Years 1925 To 2014*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/immigration-statistics/yearbook/2014/table33> (last visited Dec. 20, 2019).

23. *Table 39. Aliens Removed or Returned: Fiscal Years 1892 to 2017*, U.S. DEP’T OF HOMELAND SEC. <https://www.dhs.gov/immigration-statistics/yearbook/2017/table39> (last visited Dec. 20, 2019) [hereinafter U.S. DEP’T OF HOMELAND SEC., *Table 39*].

24. *See id.*; *see also* NAT’L IMMIGRATION FORUM, *Fact Sheet*, *supra* note 20.

25. U.S. DEP’T OF HOMELAND SEC., *Table 39*, *supra* note 23.

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one can see from Figure 2, removals have remained above returns since 2011.²⁶ Indeed, removals were more than double returns in FY 2015: 326,962 versus 129,429.²⁷ The rise in removals means that more people have been deported from the U.S. between 1997 and 2015 than were deported in all years prior to 1997.²⁸ Deportations peaked under Obama in 2013 at 433,000; in FY 2017 only 230,000 were deported.²⁹

While returns declined in the early 2000s, the biggest drop occurred after the 2008 financial crisis.³⁰ This decline in returns is due in part to the large decrease in unauthorized immigrants crossing the border to begin with.³¹ This is clear from the fact that apprehensions have fallen despite huge increases in budget and staffing for Customs and Border Protection (“CBP”). Furthermore, more aggressive enforcement by ICE, like by increasing the use of expedited removal, may have reduced the number of immigrants who voluntarily return home and resulted in more expensive removals. In addition, an increasing number of those crossing the border are asylum seekers who fear for their lives in their own countries, and therefore are unlikely to return voluntarily.

Given the fall in illegal border crossings and increasing number of asylum seekers, in-land arrests by ICE are making up a larger proportion of removals.³² The subjects of inland arrests tend to be unauthorized immigrants who have been living in the U.S. for some time.³³ A substantial number of these arrests are made by state and

26. *Id.*

27. *Id.*

28. Tanya Golash-Boza, *The Parallels Between Mass Incarceration and Mass Deportation: An Intersectional Analysis of State Repression*, 22 J. WORLD-SYSTEMS RES. 484, 484–85 (2016) [hereinafter Golash-Boza, *Mass Incarceration and Mass Deportation*].

29. Jeffrey S. Passel & D’Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, PEW RESEARCH CTR. (Nov. 27, 2018), <https://www.pewresearch.org/hispanic/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade/> [hereinafter Passel & Cohn, *Unauthorized Immigrant Total Dips*].

30. See Table 39, *supra* note 23. There was an approximately 30% drop in returns from 2008 to 2009, and about 20-30% declines each year after, except in 2014. See *id.*

31. Passel & Cohn, *Unauthorized Immigrant Total Dips*, *supra* note 29.

32. See U.S. DEP’T OF HOMELAND SEC., 2017 YEARBOOK, *supra* note 2, at 95.

33. Kevin Sieff, *The U.S. Sends Thousands of Deportees Each Month to Mexico’s Most Dangerous Border Areas*, WASH. POST (Jan. 8, 2019),

local law enforcement who cooperate with ICE as part of Section 287(g) of the Immigration and Nationality Act (“INA”).³⁴ In 2008, one-third of those deported from the U.S. interior were arrested through cooperative agreements with state and local law enforcement.³⁵

DHS used to publish estimates of the number of unauthorized immigrants living in the U.S.³⁶ Their last estimate that was made public was for January 2012; it was 11.4 million.³⁷ The unauthorized population appears to have peaked in 2007 at 11.8 million.³⁸ DHS estimated that 86% of this population had been in the U.S. for more than seven years, only 59% was of Mexican origin, and that 79% of this population was concentrated in ten states, with 25% residing in California.³⁹ DHS researchers explained the declining population:

It is unlikely that the unauthorized immigrant population has increased since 2007 given relatively high U.S. unemployment, improved economic conditions in Mexico, *record low numbers of apprehensions of unauthorized immigrants at U.S. borders*, and greater levels of border enforcement.⁴⁰

It is clear from this passage that DHS recognizes that there is no flood of immigrants across the border. In fact, it is just the opposite: we are at a 48-year low.⁴¹ Since the 2012 DHS report, apprehensions have fallen even further, suggesting that even fewer

https://www.washingtonpost.com/world/the_americas/the-us-sends-thousands-of-deportees-each-month-to-mexicos-most-dangerous-border-areas/2019/01/07/bbe4036e-ff45-11e8-a17e-162b712e8fc2_story.html.

34. Tanya Golash-Boza & Pierrette Hondagneu-Sotelo, *Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program*, 11 *LATINO STUD.* 271, 278 (2013) [hereinafter Golash-Boza, et al., *Latino Immigrant Men*].

35. *Id.* at 279–80.

36. See Bryan Baker & Nancy Rytina, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012*, U.S. DEP’T OF HOMELAND SEC. 3 (Mar. 2013), https://www.dhs.gov/sites/default/files/publications/Unauthorized%20Immigrant%20Population%20Estimates%20in%20the%20US%20January%202012_0.pdf.

37. *Id.*

38. *Id.*

39. *Id.* at 3–5.

40. *Id.* at 3 (emphasis added).

41. U.S. DEP’T OF HOMELAND SEC., 2017 YEARBOOK, *supra* note 2, at 91, 95.

unauthorized immigrants are crossing the border.⁴² Interestingly, DHS stopped publishing data on the number of unauthorized immigrants in the U.S. in 2012, precisely when illegal border crossings decreased.⁴³

II. U.S. IMMIGRATION POLICIES TARGET MEXICANS AND CENTRAL AMERICANS

While DHS has stopped publishing its estimates, estimates by the Pew Research Center corroborate past DHS studies, indicating that the unauthorized immigrant population has continued to decline.⁴⁴ Pew researchers estimate that the number of unauthorized immigrants from Mexico declined by two million from 2007 to 2017.⁴⁵ They estimate there were 10.7 million unauthorized immigrants in the United States in 2016, a decrease of 13% since 2007.⁴⁶ Over one million of these unauthorized immigrants have temporary protection under Deferred Action for Childhood Arrivals (“DACA”) or Temporary Protected Status (“TPS”) that could be rescinded.⁴⁷ Pew researchers confirmed DHS’s past findings that the undocumented immigrant population is concentrated in a handful of states.⁴⁸ They also found that the proportion of the undocumented population that is Mexican has fallen to 50%, that 66% of the adult population had lived in the U.S. for more than ten years, and that Mexicans are three times as likely as other unauthorized immigrants to have lived in the U.S. for more than five years.⁴⁹

42. *Id.*

43. *See* Baker & Rytina, *supra* note 36.

44. *See* Jynnah Radford, *Key Findings About U.S. Immigrants*, *Fact Tank*, PEW RESEARCH CTR. (June 17, 2019), <http://www.pewresearch.org/fact-tank/2017/05/03/key-findings-about-u-s-immigrants/>.

45. *Id.*

46. Passel & Cohn, *Unauthorized Immigrant Total Dips*, *supra* note 29.

47. *Id.*

48. Jens Manuel Krogstad, Jeffrey S. Passel & D’Vera Cohn, *5 Facts About Illegal Immigration in the U.S.*, PEW RESEARCH CTR. (June 12, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s/>.

49. *Id.*

In light of (1) the dramatic decline in unauthorized immigrants crossing the U.S.'s southern border, and (2) the fact that more Mexicans are leaving the U.S. than entering it (Figure 3), anti-Mexican immigration rhetoric ("build a wall, have Mexico pay for it") lacks any factual basis and is transparently racist. Still, U.S. immigration policy has the effect of targeting Hispanics and ignoring other unauthorized immigrants. For example, in 2013, the policy of expedited removal almost exclusively affected Mexicans, Guatemalans, Hondurans and Salvadorans: in FY 2013, these groups represented 98% of those placed in expedited removal.⁵⁰ In FY 2017, over 90% of all removals were from Mexico and the Northern Triangle.⁵¹

As mentioned above, along with a decline in illegal border crossings, the number of those crossing in a legal way, by seeking asylum, has increased.⁵² Between 2000 to 2009, there were about 5,000 asylum claims per year.⁵³ There were a little over 50,000 asylum claims in FY 2014⁵⁴ and just over 48,000 in FY 2015.⁵⁵ In FY 2018, there were 264,945 claims and 38,687 were granted asylum.⁵⁶ While claims take some time to adjudicate, the asylums granted in FY 2018 represent 14.6% of the number of applications. Older sources indicate that about 49% of those who applied for asylum received it.⁵⁷

50. Elizabeth Cassidy & Tiffany Lynch, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM 13 (2016), <https://www.uscirf.gov/sites/default/files/Barriers%20to%20Protection.pdf>.

51. Katherine Witsman, U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT IMMIGRATION ENFORCEMENT ACTIONS: 2017 9 (2019), https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf.

52. Cassidy & Lynch, *supra* note 50, at 14.

53. *Id.*

54. *Id.*

55. *Id.* at 34, n.42.

56. Nadwa Mossaad, *Annual Flow Report October 2019, Refugees and Asylees: 2018*, U.S. DEP'T OF HOMELAND SEC. 1, 6-7 (2019), https://www.dhs.gov/sites/default/files/images/OIS/2018/refugees_asylees_2018.pdf.

57. Sharita Gruberg, *How For-profit Companies Are Driving Immigration Detention Policies*, TUCSONSENTINEL (Dec. 22, 2015), http://www.tucsonsentinel.com/opinion/report_/122215_detention_policy/how-for-profit-companies-are-driving-immigration-detention-policies/

Thirty-nine percent of the asylum applications in FY 2018 were from the Northern Triangle: Honduras, Guatemala, and El Salvador.⁵⁸ The rise in Central Americans coming to the U.S. is because they are fleeing violence and gang activity.⁵⁹ Almost 40% of asylum seekers are fleeing to escape direct threats against them and/or their family, forced gang recruitment, and/or extortion.⁶⁰ The violence in these countries stems from the huge numbers of firearms that were imported to the region during civil wars between 1960 and 1991, many of which were provided by the U.S. and its allies.⁶¹ This and corruption, economic instability, and U.S. policies and practices have allowed gangs to thrive.⁶² The U.S. provides more small arms and ammunition to Central America than any other country and many are sold by corrupt Northern Triangle officials to gangs.⁶³ This endemic violence in the Northern Triangle is why, in 2014 and 2016, the number of people from the Northern Triangle (henceforth referred to as Central Americans) surpassed the number of Mexicans who entered the U.S. without authorization (Figure 4).⁶⁴ They are fleeing despite the huge cost to

58. Mossaad, *supra* note 56, at 6.

59. Sarah Bermeo, *Violence Drives Immigration from Central America*, BROOKINGS INST. (June 26, 2018), <https://www.brookings.edu/blog/future-development/2018/06/26/violence-drives-immigration-from-central-america/>.

60. Carmen Rodriguez, *Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis*, MÉDECINS SANS FRONTIÈRES (2017), https://www.msf.org/sites/msf.org/files/msf_forced-to-flee-central-americas-northern-triangle_e.pdf.

61. See UNITED NATIONS OFFICE ON DRUGS & CRIME, TRANSNATIONAL ORGANIZED CRIME IN CENTRAL AMERICA AND THE CARIBBEAN: A THREAT ASSESSMENT 59 (2012), https://www.unodc.org/documents/data-and-analysis/Studies/TOC_Central_America_and_the_Caribbean_english.pdf.

62. Amelia Cheatham, Danielle Renwick & Rocio Cara Labrador, *Central America's Turbulent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS (June 26, 2018), <https://www.cfr.org/background/central-americas-violent-northern-triangle>.

63. Alex Yablon, *U.S. Gun Makers Send Weapons South as Migrants Flee North*, TRACE (Mar. 8, 2019), <https://www.thetrace.org/2019/03/american-gun-exports-violence-latin-america-colt/>.

64. The situation was made worse during the 1990s when the U.S. deported gang members from Los Angeles who were able to exploit the fragile Northern Triangle states and their prevalence of weapons. These gang members set up quasi-state organizations for extortion and drug trafficking. They use violence to force recruitment into their gangs and extort payments from the populace. In 2015, it was estimated that the people of the Northern Triangle paid \$651 million in extortion

reach the U.S., up to \$12,000 per person,⁶⁵ which is several times the per capita annual income in each of the Northern Triangle countries.⁶⁶

While illegal border crossings get all the attention, the number of unauthorized immigrants who entered the U.S. legally and overstay their visas has been largely ignored. It is estimated there were 700,000 overstays in FY 2017 compared with 310,000 border apprehensions.⁶⁷ In other words, there were more than twice as many unauthorized immigrants who overstayed their visas than who crossed the border illegally. Still, neither the money, the rhetoric, nor the immigration policies have targeted this much larger population of unauthorized immigrants. While 95% of those apprehended crossing the border are from Mexico or Central America, ninety percent of overstays are from elsewhere.⁶⁸ Thus, ignoring overstays and focusing on “border security” allows immigration policy to target Mexicans and Central Americans for apprehension and removal, while ignoring a proportionally much larger problem consisting of a class of unauthorized immigrants from other parts of the world.

This lopsidedness is reflected in immigration detention as well: data for FY 2015 indicated that 89% of those detained were Mexicans and Central Americans.⁶⁹ This focus of immigration policy enforcement on Mexicans and Central Americans, to the exclusion of other unauthorized immigrants, has occurred against a backdrop of a rise in the U.S. Hispanic population. For instance, the 2017 U.S. Census estimates indicated that the Hispanic population had reached

money to gangs. Julian Borger, *Fleeing a Hell the US Helped Create: Why Central Americans Journey North*, GUARDIAN (Dec. 19, 2018), https://www.theguardian.com/us-news/2018/dec/19/central-america-migrants-us-foreign-policy?CMP=Share_iOSApp_Other.

65. *Id.*

66. *GDP Per Capita*, WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> (last visited Nov. 11, 2019).

67. Passel & Cohn, *Unauthorized Immigrant Total Dips*, *supra* note 29 (“Apprehensions at the border do not exactly match attempts at unlawful entry, but enforcement officials and researchers view them as an indicator of entries.”).

68. *Id.*

69. Emily Ryo & Ian Peacock, *The Landscape of Immigration Detention in the United States*, AM. IMMIGRATION COUNCIL (Dec. 5, 2018), <https://www.americanimmigrationcouncil.org/research/landscape-immigration-detention-united-states>.

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just under 18% of the U.S. population.⁷⁰ Hispanics are the largest minority group in the U.S.⁷¹ There are 43% more Hispanics than non-Hispanic African Americans, and 329% more Hispanics than Asian Americans.⁷² Given that nearly one in five Americans is Hispanic, Hispanics are vastly underrepresented in politics,⁷³ business,⁷⁴ the media,⁷⁵ education,⁷⁶ and many other venues of power.

The hyperbole regarding border crossings also diverts attention from the dramatic rise in legal immigration. The number of legal temporary workers and their family members in the U.S. in FY 2017 was 3,969,276, while the number of people captured by CBP trying to illegally enter the U.S. in FY 2017 was 310,531.⁷⁷ In other words, more than ten times that of unauthorized immigrants.⁷⁸ Furthermore, this is a long-term trend. The number of foreign-born people in the U.S., i.e. immigrants, has grown steadily to over forty-four million in 2017; since the population of unauthorized immigrants has declined since 2007,⁷⁹ this growth is entirely due to legal immigration. The number of unauthorized immigrants fell to 3% of population⁸⁰ and 23% of all

70. ACS *Demographic and Housing Estimates 2013-2017 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=C F> (last visited Nov. 10, 2019).

71. *Id.*

72. *Id.*

73. See Ronny Rojas, et al., *The Latino Struggle to Reach Public Office*, UNIVISION (Oct. 13, 2016, 11:43 a.m.), <https://www.univision.com/univision-news/the-latino-struggle-to-reach-public-office>.

74. See *Missing Pieces Report: The 2016 Board Diversity Census of Women and Minorities on Fortune 500 Boards*, DELOITTE. (Feb. 6, 2017), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-corporate-governance/us-board-diversity-census-missing-pieces.pdf>.

75. See Darnell Hunt, et al., *Hollywood Diversity Report 2018: Five Years of Progress and Missed Opportunities*, UCLA COLL. OF SOC. SCI., <https://socialsciences.ucla.edu/wp-content/uploads/2018/02/UCLA-Hollywood-Diversity-Report-2018-2-27-18.pdf>.

76. Amanda Fernandez, *Closing the Latino Leadership Gap*, FUTUREED (Feb. 5, 2018), <https://www.future-ed.org/closing-the-latino-leadership-gap/>.

77. U.S. DEP'T OF HOMELAND SEC., 2017 YEARBOOK, *supra* note 2, at 66, 95.

78. *See id.*

79. Radford, *supra* note 44.

80. *Id.*

immigrants.⁸¹ The number of legal permanent residents during this period has remained at about 1.1 million per year.⁸² Naturalizations peaked at over one million in 2008 and fell to around 700,000 in 2017, while temporary workers and their families have climbed from 1.9 million to over three million between 2008 and 2017.⁸³

U.S. refugee policies have also targeted specific populations. For instance, in FY 2018, 45,000 was the annual cap on refugee admissions, and less than half this number were admitted: 22,405.⁸⁴ Despite a global refugee crisis that has forcibly displaced 70.8 million people,⁸⁵ only 22,405 refugees were allowed into the U.S. in FY 2018.⁸⁶ The number of Muslim and Latin American refugees the U.S. let in was down 90% and 40%, respectively, and only sixty-two Syrians refugees were allowed in.⁸⁷ The U.S.'s already miserly refugee cap has been further reduced by a third for FY 2019: the cap is now 30,000 and is set to be reduced to 18,000 in FY 2020.⁸⁸

III. THE COST OF IMMIGRATION POLICIES

The costs of implementing U.S. immigration policy have risen dramatically with the advent of the specific goals of excluding Mexicans, Central Americans, and Muslims. The DHS's FY 2019 budget request was \$74.4 billion, a 7.3% increase over FY 2018.⁸⁹ DHS has three units focused on unauthorized immigrants:⁹⁰ (1)

81. See U.S. DEP'T OF HOMELAND SEC., 2017 YEARBOOK, *supra* note 2, at 5.

82. *Id.*

83. *Id.* at 52, 63.

84. Mossaad, *supra* note 56, at 2.

85. *Figures at a Glance*, UNITED NATIONS REFUGEE AGENCY, <https://www.unhcr.org/en-us/figures-at-a-glance.html> (last visited Dec. 21, 2019).

86. Mossaad, *supra* note 56, at 2.

87. Deborah Amos, *2018 Was a Year of Drastic Cuts to U.S. Refugee Admissions*, NPR (Dec. 27, 2018), <https://www.npr.org/2018/12/27/680308538/2018-was-a-year-of-drastic-cuts-to-u-s-refugee-admissions>.

88. *Id.*; Priscilla Alvarez, *US Sets a Refugee Cap of 18,000 for Next Year—A New Historic Low*, CNN (Sept. 26, 2019), <https://www.cnn.com/2019/09/26/politics/refugee-cap-historic-low/index.html>.

89. U.S. DEP'T OF HOMELAND SEC., FY 2019 BUDGET IN BRIEF, *supra* note 1, at 1.

90. See generally *id.*

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Citizenship and Immigration Services (“CIS”) administers immigrant and non-immigrant benefits;⁹¹ (2) Customs and Border Protection (“CBP”) is responsible for apprehending unauthorized aliens who enter between Ports of Entry and up to 100 miles from the border;⁹² and (3) Immigration and Customs Enforcement (“ICE”) arrests in-land undocumented immigrants and any immigrant who has violated the terms of their visa or permanent residency.⁹³

Between FY 2002 and 2013, the budgets of CBP and ICE, which deal with apprehension and detention, tripled.⁹⁴ Meanwhile, the budget for the office that runs the immigration courts, the Executive Office of Immigration Review (“EOIR”) in the Department of Justice (“DOJ”), increased by only 70%.⁹⁵ This disproportionate allocation of funds to apprehension and detention over adjudication meant that by the end of August 2014, the immigration courts had 456,644 pending individual removal cases that had been waiting an average of 635 days.⁹⁶

Providing another example of where the government’s priorities lie, DHS spends more on CBP than on the Federal Emergency Management Agency (“FEMA”), despite an increase in both the number of natural disasters and the costs of responding to them.⁹⁷ Natural disasters cost the U.S. \$307 billion in 2017.⁹⁸ The priority of spending on the border “emergency” over actual emergencies affecting Americans was illustrated when DHS transferred \$10 million from FEMA’s budget to ICE for detention and removal in 2018.⁹⁹

91. *Id.* at 70–72.

92. *Id.* at 25–26; *see also* ACLU, CUSTOMS AND BORDER PROTECTION’S (CBP’S) 100-MILE RULE 1, https://www.aclu.org/sites/default/files/assets/13_08_01_aclu_100_mile_cbp_zone_final.pdf (last visited Dec. 21, 2019).

93. *See id.* at 32–35.

94. *See* Cassidy & Lynch, *supra* note 50, at 15.

95. *Id.*

96. *See id.*

97. U.S. DEP’T OF HOMELAND SEC., FY 2019 BUDGET IN BRIEF, *supra* note 1, at 26, 61; *Billion-Dollar Weather and Climate Disasters: Overview*, NAT’L CTRS. FOR ENVTL. INFO., <https://www.ncdc.noaa.gov/billions/>.

98. Kimberly Amadeo, *Natural Disasters’ Economic Impact: Natural Disasters Are a Bigger Threat than Terrorism*, BALANCE, <https://www.thebalance.com/cost-of-natural-disasters-3306214> (last updated June 25, 2019).

99. Ron Nixon, *\$10 Million from FEMA Diverted to Pay for Immigration Detention Centers, Document Shows*, N.Y. TIMES (Sept. 12, 2018),

The FY 2019 budgets for CBP, ICE and CIS are about \$16.7 billion, \$8.8 billion, and \$4.7 billion, respectively.¹⁰⁰ They total approximately \$30.2 billion: this money is used to apprehend and detain immigrants, and enforce and administer immigration laws. By comparison, DOJ EOIR's requested a budget of \$563 million to adjudicate immigration cases.¹⁰¹ This amounts to 1.7% of the combined budgets of CBP, ICE, and CIS.

Features of the FY 2019 DHS budget include: \$1.6 billion for sixty-five miles of border wall in the Rio Grande Valley corridor; 750 additional Border Patrol Agents; 2,000 additional ICE law enforcement officers; 1,312 ICE support personnel; \$2.8 billion for 52,000 detention beds (49,500 adults and 2,500 family beds); and over a half a billion dollars to transport and remove detainees.¹⁰² The cost of the sixty-five miles of border wall works out to \$4,662 per foot of wall.¹⁰³ The cost of detention averages over \$145 per night, per bed.¹⁰⁴

A. *The Cost of Border Apprehension*

The sharp drop in the number of unauthorized immigrants attempting to cross the U.S.-Mexico border has been accompanied by an astronomical rise in the average cost of apprehensions. While CBP does more than just apprehend individuals crossing the border, the trends in its staffing and budget illustrate how costs have risen. In FY 2017, CBP's apprehensions per Full-Time Equivalent employee ("FTE") were 5.3, at a cost of \$12,254 per apprehension.¹⁰⁵ Using CBP

<https://www.nytimes.com/2018/09/12/us/politics/fema-ice-immigration-detention.html>.

100. U.S. DEP'T OF HOMELAND SEC., FY 2019 BUDGET IN BRIEF, *supra* note 1, at 11.

101. U.S. DEP'T OF JUSTICE, FY 2019 BUDGET REQUEST AT A GLANCE 3, <https://www.justice.gov/jmd/page/file/1033086/download> (last visited Dec. 21, 2019) [hereinafter U.S. DEP'T OF JUSTICE, 2019 BUDGET].

102. U.S. DEP'T OF HOMELAND SEC., FY 2019 BUDGET IN BRIEF, *supra* note 1, at 3-4.

103. *See id.* at 3.

104. *See id.* at 4.

105. *Id.* at 88; U.S. DEP'T OF HOMELAND SEC., 2017 YEARBOOK, *supra* note 2, at 95; *United States Border Patrol: Budget History: 1990-2017*, NAT'L IMMIGRATION FORUM, <https://immigrationforum.org/wp-content/uploads/2019/02/BP-Budget->

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budgets over time illustrates the rise in the costs of apprehension.¹⁰⁶ In FY 1990, the average cost per apprehension was \$225.¹⁰⁷ Costs rose to \$581 in 2000, and leapt to \$12,254 by FY 2017.¹⁰⁸ This implies that the increase in average apprehension costs between FY 1990 and FY 2017 is 5,446% (Figure 5).¹⁰⁹ Comparing this average cost of \$13,803 per apprehension to the per capita annual income of Mexico (\$9,698), El Salvador (\$4,058), Guatemala (\$4,549), Honduras (\$2,482),¹¹⁰ we are spending between about 1.3 to nearly 4.9 times the average annual income of an unauthorized immigrant simply to apprehend them.

The average cost per apprehension has risen for two reasons. First, there simply are not that many immigrants attempting to cross the border. Second, Congress continues to allocate more money to Border Patrol.¹¹¹ Rather than focus on a real problem, like those outstaying their visas or the immigration court backlogs, Congress throws money at a problem that occurred twenty years ago.

Looking at the border crossings numbers, it becomes clear that, not only are fewer people crossing, but apprehensions are getting easier. The apprehensions are concentrated in a small portion of the border and increasingly, those apprehended are women and children; specifically, about half of all border apprehensions occur along the 320 mile Rio Grande Valley (“RGV”) sector of the U.S.-Mexican Border.¹¹² Over 70% of the women and nearly three-quarters of the juveniles crossing the U.S.-Mexican border cross at RGV.¹¹³ In 2014, females made up one-third of all RGV apprehensions by Border Patrol as contrasted with

History-1990-2017.pdf (last visited Dec. 21, 2019) [hereinafter NAT’L IMMIGRATION FORUM, *Border Patrol Budget*].

106. See NAT’L IMMIGRATION FORUM, *Border Patrol Budget*, *supra* note 105.

107. See *id.*; see also U.S. DEP’T OF HOMELAND SEC., 2017 YEARBOOK, *supra* note 2, at 91.

108. *Id.*

109. *Id.*

110. WORLD BANK, *supra* note 66.

111. See NAT’L IMMIGRATION FORUM, *Border Patrol Budget*, *supra* note 105.

112. Guillermo Cantor, *Hieleras (Iceboxes) in the Rio Grande Valley Sector: Lengthy Detention, Deplorable Conditions, and Abuse in CBP Holding Cells*, AM. IMMIGRATION COUNCIL 5, https://www.americanimmigrationcouncil.org/sites/default/files/research/hieleras_iceboxes_in_the_rio_grande_valley_sector.pdf (last visited Nov. 11, 2019).

113. *Id.*

a 16% average for the entire Mexican border.¹¹⁴ During this time, 31% of the apprehensions at RGV were juveniles versus 12% across the entire Mexican border.¹¹⁵ In 2017, 38.5% of all CBP's apprehensions were families and unaccompanied minors.¹¹⁶ CBP's increasing budget does not seem justified in light of the fact that there are fewer border crossings, and where they do still happen, they are concentrated along a short portion of the border where large percentages of those crossing are women and children.

The rising costs of apprehensions can be contrasted against the relatively inexpensive cost of immigration proceedings: the average cost of EOIR per completed case was only \$2,696 in FY 2017 and this fell to \$2,234 in FY 2018.¹¹⁷ This begs the question, why should it cost five to six times the amount to apprehend someone as to try them?

B. *The Cost of Detention Policies*

In 1958, the Supreme Court ruled that detention should be the exception, not the rule, regarding unauthorized immigrants.¹¹⁸ The mass emigration of 125,000 Cubans to the U.S. in 1980, known as the Mariel boatlift, changed the practice of detention policy in the U.S.¹¹⁹ To avoid another Mariel boatlift, the federal government planned to use detention as a deterrent, especially against Haitians, all of whom were detained by 1981.¹²⁰ Again, the implementation of U.S. immigration policy is highly racialized; the *Marielitas*, as well as the Haitians, were

114. *Id.*

115. *Id.*

116. *Southwest Border Migration FY2017*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017> (last visited Dec. 21, 2019).

117. See U.S. DEP'T OF JUSTICE, 2019 BUDGET, *supra* note 101, at 3; see also U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, STATISTICS YEARBOOK FISCAL YEAR 2018 7, <https://www.justice.gov/eoir/file/1198896/download> (last visited Dec. 21, 2019).

118. Ana Raquel Minian, *America Didn't Always Lock up Immigrants*, N.Y. TIMES (Dec. 1, 2018), <https://www.nytimes.com/2018/12/01/opinion/sunday/border-detention-tear-gas-migrants.html?action=click&module=Opinion&pgtype=Homepage> (quoting *Leng v. Barber*, 357 U.S. 185, 190 (1958)).

119. *Id.*

120. *Id.*

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largely non-white.¹²¹ Detention policy continues to be highly racialized and gendered today, targeting Mexicans and Central American men.

Public monies being spent on detention are just as misguided and wasteful as the money being spent on apprehensions. By way of an example, in 2009, nine years into a dramatic decline in border crossings and despite DHS data that showed that the unauthorized immigrant population was falling, Senator Robert Byrd (D-WV), inserted a detention mandate into ICE's budget requiring ICE to maintain 33,400 detention beds and increased ICE's budget to cover the costs of the quota.¹²² Given the dramatic drop in unauthorized border crossings and the increasing number of asylum seekers, the only way to fill the quota was to go after people already in the U.S. and asylum seekers.¹²³ In other words, the quota effectively forced immigration enforcement to focus on these people.

In 2013, the bed quota was increased to 34,000.¹²⁴ In FY 2017, it was reduced to 30,913.¹²⁵ The FY 2019 budget called for 52,000 beds.¹²⁶ DHS estimated it costs about \$126/day/bed for an adult and \$161/day/bed for a family detention.¹²⁷ Thus, a bed quota of 31,000 costs U.S. taxpayers \$2.2 billion per year.¹²⁸ It should be noted that there is no evidence that the people being detained would not appear at their court hearings—the compliance rate in immigration court is above 90%.¹²⁹

121. *See id.*

122. Lydia Zepeda, *The High Cost of U.S. Immigration Policy: Putting US Agriculture at Risk*, 2 APPROACHES POULTRY, DAIRY & VETERINARY SCI. 185, 185 (2018), <https://crimsonpublishers.com/apdv/pdf/APDV.000549.pdf>.

123. *Id.*

124. Bethany Carson & Eleana Diaz, *Payoff: How Congress Ensures Private Prison Profit with an Immigrant Detention Quota*, GRASSROOTS LEADERSHIP (Apr. 2015), <https://grassrootsleadership.org/reports/payoff-how-congress-ensures-private-prison-profit-immigrant-detention-quota#1>.

125. Jennifer Chan, *Immigration Detention Bed Quota Timeline*, NAT'L IMMIGRANT JUSTICE CTR. (Jan. 13, 2017), <https://www.immigrantjustice.org/staff/blog/immigration-detention-bed-quota-timeline>.

126. U.S. DEP'T OF HOMELAND SEC., FY 2019 BUDGET IN BRIEF, *supra* note 1, at 4.

127. U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF FY 2017 38 (2018), <https://www.dhs.gov/sites/default/files/publications/FY2017BIB.pdf>.

128. *Id.* at 5.

129. Cassidy & Lynch, *supra* note 50, at 48.

The effect of the bed quota along with the 1996 AEDPA and IIRIRA laws is that we have six times the number of people in detention as before these took effect.¹³⁰ In FY 1994, the average daily number of people detained was 6,785.¹³¹ This number climbed to about 20,000 by FY 2000 and remained around there until FY 2007, when it jumped to around 30,000.¹³² In FY 2017, it was 38,106:¹³³ 23% above the quota mandated by Congress.¹³⁴

As the number of detentions have increased, so have their costs. Using the FY 2019 ICE budget, detention costs an average of \$52,990 per person per year.¹³⁵ Detaining a single individual for one year costs 57% more than what half of Americans earn each year.¹³⁶ The Census Bureau's latest estimate for the median U.S. income was \$33,706 per person.¹³⁷

Detention costs are steep for the detainees' families as well. Sources from five to nine years ago indicated that half the men in detention had children, one quarter of deportees were parents of U.S. citizens, and 5,000 children a year were put into foster care due to deportations.¹³⁸ Detained fathers cannot provide financial support for their families, leaving their families in poverty and increasing demand for state and federal services. In addition to economic strife that reduces assets and resources, these families face deleterious psychological and

130. *See id.*; *see also* Ryo & Peacock, *supra* note 69.

131. Ryo & Peacock, *supra* note 69.

132. *Id.*

133. *Id.*

134. *See* U.S. DEP'T OF HOMELAND SEC., BUDGET IN BRIEF FY 2017, *supra* note 127, at 38; *see also* U.S. DEP'T OF HOMELAND SEC., FY 2019 BUDGET IN BRIEF, *supra* note 1, at 33.

135. *See* U.S. DEP'T OF HOMELAND SEC., FY 2019 BUDGET IN BRIEF, *supra* note 1, at 36.

136. *PINC-01. Selected Characteristics of People 15 Years and Over, by Total Money Income, Work Experience, Race, Hispanic Origin, and Sex*, U.S. CENSUS BUREAU (2018), <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-01.html>.

137. *See id.*

138. Golash-Boza, *Mass Incarceration and Mass Deportation*, *supra* note 28, at 497–98.

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social impacts, like depression, stress, social isolation, and lack of trust in the police and other government services.¹³⁹

U.S. immigration policies also have indirect costs on the U.S. economy in terms of lost workers and tax revenues.¹⁴⁰ For example, researchers estimate immigrants provide over half of all labor on dairy farms and that eliminating their labor would reduce both milk output and the number of dairy farms, that U.S. economic output would fall by \$32.1 billion, and that over 200,000 jobs would be lost.¹⁴¹ Meanwhile, deportations have created incentives for businesses to leave the U.S. to exploit a cheap workforce of deportees.¹⁴² For example, the Mexican state of Baja California has about 35 call centers serving the U.S. that employ nearly 10,000 people, who typically earn a little less than \$150 a week to start.¹⁴³ Forty-five percent of these workers are deportees.¹⁴⁴ In addition, it is estimated that undocumented immigrants pay around \$12 billion in taxes and this would increase by about \$2 billion were they to have legal status.¹⁴⁵

IV. WHAT ARE WE GETTING FOR OUR MONEY? THE USE OF FOR-PROFIT AND COUNTY AND STATE FACILITIES FOR DETENTION

Given that in 2017 71% of those in ICE custody were held in privately-operated facilities and 29% were held in jails by local

139. Jodi Berger Cardoso, et al., *Deporting Fathers: Involuntary Transnational Families and Intent to Remigrate Among Salvadoran Deportees*, 50 INT'L MIGRATION REV. 197, 204–05 (Spring 2016).

140. See David P. Anderson, Flynn Adcock & Parr Rosson, Texas A&M University, Address at the USDA Outlook Conference: The Economic Impacts of Immigrant Labor on U.S. Dairy Farms (Feb. 23, 2017).

141. *Id.*

142. *Id.*

143. See Elliot Spagatamar Millan, *Deported Mexicans Find New Life at Call Centers in Tijuana*, SEATTLE TIMES (Aug. 23, 2014), <http://www.seattletimes.com/nation-world/deported-mexicans-find-new-life-at-call-centers-in-tijuana/>.

144. *Id.*

145. *Adding up the Billions in Tax Dollars Paid by Undocumented Immigrants*, AM. IMMIGRATION COUNCIL (Apr. 4, 2016), <https://www.americanimmigrationcouncil.org/research/adding-billions-tax-dollars-paid-undocumented-immigrants>.

governments,¹⁴⁶ the bed quota is effectively a transfer of money from the U.S. government to private, for-profit prisons, local jails, and state prisons with spaces to rent. In 2015, ICE used 638 different facilities to detain immigrants, with at least one in each state.¹⁴⁷ In 2016, 65% of those detained by ICE were held in private, for-profit prisons; 25% were held in local jails and state prisons, often with the rest of the general prison population; and only 10% were held in federally-run prisons.¹⁴⁸

The federal government views the use of for-profit prisons for federal prisoners as problematic, but has not registered these concerns for detained immigrants. In August 2016, the Justice Department announced the end to the use of private contract prisons for federal prisoners.¹⁴⁹ That same month, DHS announced a no-bid, four-year, \$1 billion contract with private contractor Corrections Corporation of America (“CCA”) for immigration detention.¹⁵⁰ Under this contract, CCA receives \$20 million each month whether or not any of the 2,400 beds are occupied.¹⁵¹ ICE avoided an open bid process by arranging

146. Tara Tidwell Cullen, *ICE Released Its Most Comprehensive Immigration Detention Data Yet. It’s Alarming.*, NAT’L IMMIGRANT JUSTICE CTR. (Mar. 13, 2018), <https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet>.

147. Ryo & Peacock, *supra* note 69.

148. U.S. DEP’T OF HOMELAND SEC., HOMELAND SECURITY ADVISORY COUNCIL REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES 6 (Dec. 1, 2016), <https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf> [hereinafter U.S. DEP’T OF HOMELAND SEC., PRIVATIZED IMMIGRATION DETENTION FACILITIES].

149. Aviva Shen, *The Problem with the DOJ’s Decision to Stop Using Private Prisons*, THINKPROGRESS (Aug. 18, 2016), <https://thinkprogress.org/the-federal-government-is-not-actually-ending-private-prisons-40e8c8dbf976/#.cmjxrwpn2>. In 2014, 8% of the federal prison population was housed in for-profit prisons. *Id.*

150. *Id.*

151. Eric Levitz, *The Obama Administration’s \$1 Billion Giveaway to the Private Prison Industry*, INTELLIGENCER (Aug. 15, 2016), <http://nymag.com/daily/intelligencer/2016/08/obamas-usd1-billion-giveaway-to-the-private-prison-industry.htm>; *see also* Chico Harlan, *Inside the Administration’s \$1 Billion Deal to Detain Central American Asylum Seekers*, WASH. POST (Aug. 14, 2016), https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2_story.html?utm_term=.d555c41c857b.

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two separate contracts: one between ICE and the city of Eloy, Arizona where CCA operates a detention facility, and another between the city of Eloy and CCA.¹⁵² ICE pays Eloy, Eloy passes the money onto CCA, and Eloy retains less than 2% in administrative fees.¹⁵³ In June 2017, a CCA facility in Dilley, Texas with an ICE contract to house asylum-seeking women and children had only 600 occupants.¹⁵⁴ Since ICE pays CCA the same whether any beds are occupied or not, this means that ICE paid CCA \$1,111 per person per night to hold them.¹⁵⁵ Already the most profitable of CCA's seventy-four facilities, providing 14% of its revenue in 2015,¹⁵⁶ this contract has ensured even greater profits for CCA (renamed CoreCivic).¹⁵⁷

A DHS subcommittee examining the use of contracts with private corporations and state and local facilities justified their use as more flexible than federal facilities in accommodating fluctuating numbers of unauthorized immigrants.¹⁵⁸ They also claimed private detention is more cost-effective than federally-run facilities.¹⁵⁹ However, their calculations of \$144.23 per person per day for private versus \$184.35 per person per day for federal facilities¹⁶⁰ presumably were based on contracts that pay only for those beds used, not for flat-fee contracts, like the one made with CCA for a facility in Dilley, Texas, or with Emerald Correction Management LLC in Alvarado, Texas.¹⁶¹ Emerald did not negotiate quite as good of a rate as CCA: it receives \$89.25 per day per bed for a minimum of 525 beds, regardless of whether those

152. Harlan, *supra* note 151.

153. *Id.*

154. E-mail newsletter from CARA Pro Bono Project to author (June 26, 2017) (on file with author).

155. *Id.*; *see also* Harlan, *supra* note 151.

156. *See* Harlan, *supra* note 151.

157. Bethany Davis, *Corrections Corporation of America Rebrands as CoreCivic*, CCA (Oct. 28, 2016), <http://www.correctionscorp.com/insidecca/corrections-corporation-of-america-rebrands-as-corecivic>.

158. *See* U.S. DEP'T OF HOMELAND SEC., *PRIVATIZED IMMIGRATION DETENTION FACILITIES*, *supra* note 148, at 7.

159. *Id.* at 9.

160. *See id.*

161. *See* Harlan, *supra* note 151; *see also* U.S. DEP'T OF HOMELAND SEC., *PRIVATIZED IMMIGRATION DETENTION FACILITIES*, *supra* note 148, at 1.

beds are filled.¹⁶² The calculation of “cost-effectiveness” also fails to take account of the fact that immigrants detained in for-profit detention centers are detained significantly longer than those who stay at federal state or county facilities.¹⁶³ On average, detainees in for-profit detention centers are detained 82% longer than those of similar characteristics who are detained in other facilities.¹⁶⁴

Despite the alleged rationale of cost savings, a DHS subcommittee admitted constitutional scruples in utilizing for-profit detention centers: “Because legitimate restriction on physical liberty is inherently and exclusively a governmental authority, much could be said for a fully government-owned and government-operated detention model.”¹⁶⁵ The committee also admitted that the lack of oversight and mixing detainees with the general population of county jails was even worse than for-profit detention in terms of how detainees are treated:

County jails are, in general, the most problematic facilities for immigration detention. Because most of them are mixed-use facilities primarily handling county detainees in the criminal-justice process, such facilities often will not accept the full range of detailed detention standards that ICE has developed . . . [O]fficials operating such county facilities . . . do not wish to have sharp differences in treatment for different categories of detainees (ICE vs. local) held at the same facility.¹⁶⁶

The problematic use of non-federal facilities is corroborated by findings at Gadsen County jail in Gadsen, Alabama.¹⁶⁷ There, officers sold contraband to detainees in the form of alcohol, drugs, and cell phones.¹⁶⁸ Despite these problems with the use of for-profit and state

162. See U.S. DEP’T OF HOMELAND SEC., PRIVATIZED IMMIGRATION DETENTION FACILITIES, *supra* note 148, Appendix C at 96.

163. See Ryo & Peacock, *supra* note 69.

164. *Id.*

165. U.S. DEP’T OF HOMELAND SEC., PRIVATIZED IMMIGRATION DETENTION FACILITIES, *supra* note 148, at 5.

166. *Id.* at 7–8.

167. *Id.*

168. See Khushbu Shah, *Etowah: The Ice Detention Center with a Goal to ‘Make Your Life Miserable,’* GUARDIAN (Dec. 2, 2018), https://www.theguardian.com/us-news/2018/dec/02/etowah-the-ice-detention-center-with-the-goal-to-make-your-life-miserable?CMP=Share_iOSApp_Other.

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and county facilities, ICE reduced the number of detainees in federal facilities from 1,600 to only 3 detainees between June and October of 2018.¹⁶⁹ Detention (and oversight) in federal facilities is all but extinct.

Private detention facilities are highly profitable. In 2017, CoreCivic and Geo Group reported a combined revenue of \$4 billion.¹⁷⁰ They are guaranteed “clients” and, in some contracts, they are paid whether they provide services or not.¹⁷¹ As though guaranteed profits are not enough, private prisons exploit the labor of detainees, many of whom are unable to work legally in the United States.¹⁷² The practice of using the labor of detainees can be traced back to DOJ rulings on internment camps from 1943.¹⁷³ However, most of the Japanese-Americans who were interned were U.S. citizens and therefore could legally work in the U.S.¹⁷⁴ Hiring an undocumented immigrant is a violation of federal law.¹⁷⁵ However, the practice of paying detained immigrants for their work was codified in the 1950 Immigration Service expenses law.¹⁷⁶ While the law requires that the wage rate be adjusted periodically, it is common practice that immigrants today are still paid one dollar a day for their work while in detention.¹⁷⁷

169. Conrad Wilson, *ICE Appears to End Use of Federal Prisons for Immigrant Detainees*, NPR (Oct. 20, 2018 6:01 am ET), <https://www.npr.org/2018/10/20/658988420/ice-appears-to-end-use-of-federal-prisons-for-immigrant-detainees>.

170. Amanda Holpuch, *Private Prison Companies Served with Lawsuits over Using Detainee Labor*, GUARDIAN (Nov. 5, 2018), https://www.theguardian.com/us-news/2018/nov/25/private-prison-companies-served-with-lawsuits-over-usng-detainee-labor?CMP=Share_iOSApp_Other.

171. Harlan, *supra* note 151.

172. *See* Holpuch, *supra* note 170.

173. *See generally* Jacqueline Stevens, *One Dollar Per Day: The Slaving Wages of Immigration Jail, from 1943 to the Present*, 29 GEO. IMMIGRATION L. J. 391, 391 (Spring 2015). Internment camps run by the Department of Justice paid workers who were interned 80 cents a day. *Id.* at 391.

174. *Japanese Internment Camps*, HISTORY (Sept. 23, 2019), <https://www.history.com/topics/world-war-ii/japanese-american-relocation>.

175. Ilona Bray, *Legal Rights of Undocumented Immigrants*, LAWYERS.COM, <https://www.lawyers.com/legal-info/immigration/general-immigration/legal-rights-of-illegal-immigrants.html>.

176. Act of July 28, 1950, Pub. L. No. 81-626, 64 Stat. 380–81 (codified as Immigration Service Expenses 8 U.S.C. § 1555 (2019)).

177. *See generally* Stevens, *supra* note 173. Class action suits have been filed for wage theft or forced labor against CoreCivic facilities in New Mexico and

Even more problematic is the detention of children in for-profit and “non-profit” prisons. For instance, Southwest Key Programs (“SKP”) earned \$626 million in government contracts in 2018.¹⁷⁸ The non-profit houses more immigrant children than any other organization.¹⁷⁹ At any given time, the organization houses up to 5,000 children in twenty-four shelters.¹⁸⁰ In 2017, SKP’s founder, Juan Sanchez, paid himself \$1.5 million, his wife \$500,000, and his friend and CFO, Melody Chung, \$1 million.¹⁸¹ They also use the non-profit to make lucrative deals with themselves.¹⁸² Sanchez and Chung rent shelter space to SKP at above market rates.¹⁸³ In addition, SKP paid \$117,000 per month to rent a facility that advertised rent at \$30,000 a month, and lent \$6 million to a pair of developers to buy and renovate a Walmart as a shelter, then SKP paid the developers \$5 million a year to rent the space.¹⁸⁴ Beyond their highly questionable financial dealings, SKP has been fined for child abuse, failed to meet a deadline to provide proof of employee background checks, and has agreed to close two shelters in Arizona because of “numerous red flags and licensure problems.”¹⁸⁵

V. WHAT ARE WE GETTING FOR OUR MONEY? BORDER HOLDING FACILITIES

Border Patrol’s holding facilities are designed to detain people for twenty-four hours or less,¹⁸⁶ yet the average holding time is about two

Georgia, a wage theft suit was filed against Geo Group in Colorado, and Washington State has filed a suit against Geo Group for paying detainees \$1/day. Holpuch, *supra* note 170.

178. Kim Barker, Nicholas Kulish & Rebecca R. Ruiz, *He’s Built an Empire, with Detained Migrant Children as Bricks*, N.Y. TIMES (Dec. 2, 2018), <https://www.nytimes.com/2018/12/02/us/southwest-key-migrant-children.html?action=click&module=Top%20Stories&pgtype=Homepage>. One of the shelters is a former Walmart that can hold up to 1,410 children. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *See id.*

184. *Id.*

185. *Id.*

186. U.S. GOV’T ACCOUNTABILITY OFFICE, IMMIGRATION DETENTION: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN DHS MANAGEMENT OF SHORT-

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days in the “*hieleras*.”¹⁸⁷ “*Hieleras*” are 15’ x 10’ concrete rooms that are kept so cold that their given name translates to “icebox.”¹⁸⁸ In 2013, three-quarters of those detained in the RGV sector reported extremely cold temperatures, and while 96% said they received a foil blanket, 100% said it was not sufficient to stave off the cold.¹⁸⁹ Detainees often arrive wet and most of their personal items, such as coats and hats, are taken from them.¹⁹⁰ At any given time, there may be as many as 40 people in a *hielera* where they must share an open toilet.¹⁹¹ There is not enough room to lie down, and in terms of where the detainees sleep, it is on concrete floors.¹⁹² Detainees in the RGV reported that lights are kept on twenty-four hours a day and the detainees are woken periodically during the night for head counts.¹⁹³ Ninety-nine percent of detainees in the RGV said the food was insufficient.¹⁹⁴ Detainees reported that when they ask for food, blankets, or medical care they were ignored, denied or punished.¹⁹⁵ Women complain they are separated from male children older than eleven or twelve; that their babies are left unclothed; that there is a lack of sanitation, soap, food, and privacy; that any medicines they had are thrown away; and that children become sick due to the cold.¹⁹⁶ Most complaints made by individuals are not made while they are in Border Patrol custody, but rather after they have been transferred to ICE custody in a detention facility.¹⁹⁷ After the *hielera*, most detainees are transferred to the

TERM HOLDING FACILITIES 2 (May 2016),
<https://www.gao.gov/assets/680/677484.pdf>.

187. See Cantor, *supra* note 112, at 4.

188. See *id.* <http://themostimportantnews.com/wp-content/uploads/2014/07/Illegal-Immigration-Holding-Center-450x337.jpg>.

189. *Id.* at 10.

190. Interviews with detainees at South Texas Family Residential Center in Dilley, Texas (Jan. 10–15, 2016, Jan. 6–13, 2017).

191. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 186, at 2.

192. See *infra* Figure 6.

193. Cantor, *supra* note 112, at 12.

194. *Id.* at 13.

195. *Id.* at 13, 15.

196. See *generally id.*

197. See *generally* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 186.

“*perreras*,” the dog kennels.¹⁹⁸ These are cages over a concrete floor. The temperatures are not as cold as the *hieleras* and detainees are given pads to sleep on.¹⁹⁹

CBP’s official position in 2008 was that a detainee should not be held for more than 12 hours in the *hieleras*.²⁰⁰ In October 2015, CBP changed the time limit policy to 72 hours.²⁰¹ What did not change—CBP facilities. At the Rio Grande Valley CBP facility during the August through December 2013, 1,173 individuals were detained for an average of 41.1 hours.²⁰²

After being held by CBP, immigrants may then be released, released on bond, moved to detention facilities, or removed.²⁰³ Asylum seekers are interviewed by ICE to determine if they have a “credible” fear as a basis for their asylum claim; a negative determination means being returned to their home country, a positive determination means they may be allowed to stay to pursue an asylum request. However, ICE has not applied its criteria for parole of asylum seekers in Expedited Removal with positive credible fear determinations in a consistent manner.²⁰⁴ For example, New Orleans released only 0.5% of asylum seekers, while Harlingen released 98%.²⁰⁵

198. https://hips.hearstapps.com/hmg-prod.s3.amazonaws.com/images/gettyimages-458329266-1529609058.jpg?crop=1xw:1xh:center,top&resize=480:*

199. Interviews with detainees, *supra* note 190.

200. U.S. CUSTOMS & BORDER PROTECTION, U.S. BORDER PATROL POLICY: DETENTION STANDARDS 3 (Jan. 31, 2008), <https://www.documentcloud.org/documents/818095-bp-policy-on-hold-rooms-and-short-term-custody.html>.

201. U.S. CUSTOMS & BORDER PROTECTION, U.S. CUSTOMS AND BORDER PROTECTION NATIONAL STANDARDS ON TRANSPORTATION, ESCORT, DETENTION, AND SEARCH 14 (Oct. 2015), <https://www.cbp.gov/sites/default/files/assets/documents/2017-Sep/CBP%20TEDS%20Policy%20Oct2015.pdf>.

202. Cantor, *supra* note 112, at 6. An average of 212 (18%) individuals were held longer than 72 hours. In 2014, the RGV was where most of the women (70.1%) and juveniles (74.1%) crossed. *Id.*

203. Rafael Carranza, *What Happens to People Caught Crossing the Border?*, AZCENTRAL (Sept. 20, 2017), <https://www.azcentral.com/story/news/politics/border-issues/2017/09/20/what-happens-people-caught-crossing-border/647052001/>; *How Immigration Bail Bonds Work*, ABOUTBAIL (last visited Dec. 22, 2019), <https://www.aboutbail.com/pages/how-immigration-bail-bonds-work>.

204. Cassidy & Lynch, *supra* note 50, at 46.

205. *Id.*

VI. ACCESS TO LEGAL SERVICES AND ALTERNATIVES TO DETENTION
REDUCE COSTS

Currently, unauthorized immigrants are not entitled to legal representation and because most detention facilities are located in remote, rural areas, this makes it difficult to access legal services.²⁰⁶ However, access to legal services actually reduces detention costs.²⁰⁷ The immigration proceedings of ICE detainees who participated in Legal Orientation Programs (LOPs carried out by NGOs) were accelerated by an average of 12 days when compared to those who did not participate in LOPs.²⁰⁸ Using FY 2017 DHS budget estimates of roughly \$126 per day for detention,²⁰⁹ LOPs would save ICE \$1,512 in detention costs per adult, and \$3,864 for a family of two appearing in court together.²¹⁰ Compare this to the average cost of adjudicating immigration cases by EOIR. In FY 2018, EOIR had a budget of \$505 million²¹¹ and completed 195,696 cases.²¹² Using this data, the cost per completed case was \$2,580 in FY 2018. This implies that LOPs save ICE roughly 59% to 150% of what it costs to adjudicate immigration cases. Given there were 795,566 pending EOIR cases in FY 2018,²¹³ increased access to LOPs could free up money desperately needed to reduce EOIRs caseload.

Alternatives to Detention (“ATD”) also reduce costs of immigration policies by providing much cheaper alternatives to detention, with nearly 100% compliance rates.²¹⁴ ICE’s primary ATD

206. *Id.* at 52.

207. *Id.* at 51–52.

208. *Id.* at 52.

209. U.S. DEP’T OF HOMELAND SEC., BUDGET-IN-BRIEF FY 2017, *supra* note 127, at 38.

210. *See id.*; *see also* Cassidy & Lynch, *supra* note 50, at 46.

211. U.S. DEP’T OF JUSTICE, FY 2020 BUDGET REQUEST AT A GLANCE 3, <https://www.justice.gov/jmd/page/file/1142306/download> (last visited Dec. 22, 2019).

212. U.S. DEP’T OF JUSTICE, ADJUDICATION STATISTICS, NEW CASES AND TOTAL COMPLETIONS (Oct. 7, 2019), <https://www.justice.gov/eoir/page/file/1060841/download>.

213. U.S. DEP’T OF JUSTICE, ADJUDICATION STATISTICS, PENDING CASES (Oct. 7, 2019), <https://www.justice.gov/eoir/page/file/1060836/download>.

214. Cassidy & Lynch, *supra* note 50, at 48.

program involves either electronic monitoring only, or electronic monitoring plus community-based supervision provided by contractors.²¹⁵ For FY 2016 through February 29, 2016, ATD programs resulted in an appearance rate of 99.45 at a cost of only \$4.45 per person per day.²¹⁶ This compares to FY 2017 estimates of detention of \$126 per day per adult and \$161 per day per person for family detention.²¹⁷ Detention costs twenty-eight to thirty-six times the cost of ATD to achieve about one-half of one-percent improvement in appearance rates. Whatever the ethics or constitutionality of detention, it is not a rational or cost-effective use of public monies.

VII. POLICIES ARE NOT TARGETING CRIMINALS NOR ARE UNAUTHORIZED IMMIGRANTS TAKING JOBS

In theory, ICE's number one priority is to deport criminals.²¹⁸ However, using ICE's own statistics, the only crime committed by 85% of the immigrants removed or detained was attempting to enter the United States unlawfully.²¹⁹ Of the 450,954 removals and detentions in FY 2016, less than 2% of the unauthorized immigrants can be classified as dangerous.²²⁰ By comparison, as of 2010, 8% of adults in the U.S. had a felony conviction.²²¹ In other words, on average, undocumented immigrants are far less dangerous than U.S. citizens.

In fact, it appears that most unauthorized immigrants are simply parents trying to support their kids.²²² 7.6 million of the 10.5 million unauthorized immigrants in the U.S. in 2017 were in the workforce.²²³

215. *Id.*

216. *Id.*

217. U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF FY 2017, *supra* note 127, at 38.

218. *See id.* at 34–37.

219. U.S. DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT, DHS IMMIGRATION ENFORCEMENT: 2016, *supra* note 18, at 6.

220. *See id.* at 6. 0.18% was suspected of being a national security threat and 1.8% had committed an aggravated felony. *Id.*

221. Sarah K.S. Shannon, et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1814 (October 2017).

222. *See* Krogstad, et al., *supra* note 48.

223. *Id.*

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Meanwhile, five million U.S. children have at least one undocumented parent,²²⁴ and another 700,000 children are themselves undocumented, living with undocumented parents.²²⁵

Illegal immigration is often blamed for taking jobs. However, the percentage of the workforce made up of undocumented immigrants has declined from a peak of 5.4% in 2007 to 4.6% in 2017.²²⁶ Moreover, undocumented immigrants work mostly in low-paying jobs that, while they have difficulty attracting American workers, are crucial to many sectors of the economy. These jobs are largely in agriculture, restaurants, hospitality, and construction.²²⁷ For example, in 2016, it was estimated that up to 75% of farmworkers²²⁸ and 15% of construction workers were undocumented.²²⁹ Talk to any farmer and they will tell you: they cannot find American workers to fill these jobs.²³⁰

Contrast the hue and cry over undocumented workers who work primarily in low-paying jobs that Americans will not take with the approximately four million temporary workers and their families in the U.S. in FY 2017.²³¹ The number of *legal* workers and their families in the U.S. in FY 2017 was more than ten times the number of people apprehended at the U.S. southern border for entering illegally that

224. Passel & Cohn, *U.S. Unauthorized Immigrant Total Dips*, *supra* note 29.

225. *Id.*

226. *Id.*; Krogstad, et al., *supra* note 48.

227. TANYA MARIA GOLASH-BOZA, DEPORTED: IMMIGRANT POLICING, DISPOSABLE LABOR, AND GLOBAL CAPITALISM 15 (2015).

228. *Timeline of Agricultural Labor: Farm Workers and Immigration*, NAT'L FARM WORKER MINISTRY & YOUTH & YOUNG ADULT NETWORK, <http://nfwm.org/farm-workers/farm-worker-issues/timeline-of-agricultural-labor/> (last visited Nov. 12, 2019).

229. Jeffrey S. Passel & D'Vera Cohn, *Size of U.S. Unauthorized Immigrant Workforce Stable After the Great Recession*, PEW RESEARCH CTR. (Nov. 3, 2016), <https://www.pewresearch.org/hispanic/2016/11/03/size-of-u-s-unauthorized-immigrant-workforce-stable-after-the-great-recession/>.

230. Yet few farmers apply for temporary H-1A work visas. These visas would increase farm expenses because they would require farmers to pay their workers more than they currently pay on average. Lydia Zepeda, *The High Cost of US Immigration Policy: Putting US Agriculture at Risk*. 2 APPROACHES POULTRY, DAIRY, & VETERINARY SCI. 185 (2018), <http://crimsonpublishers.com/apdv/pdf/APDV.000549.pdf>.

231. U.S. DEP'T OF HOMELAND SEC., 2017 YEARBOOK, *supra* note 2, at 65.

year.²³² So, if anyone is taking good paying jobs away from Americans, it is workers here legally on temporary visas. These are jobs Americans actually want: high paying, technical ones. H1-B visa holders earned an average of \$80,600 per year between 2010 and 2016,²³³ compared to the median salary during that period of \$26,363 to \$30,553.²³⁴ Meanwhile, H2-A holders must be paid between \$11.71 and \$15.83 per hour depending on the state,²³⁵ and the average agricultural worker earns \$11.30 per hour.²³⁶

In theory, there has been a cap of 85,000 H-1B visas for skilled temporary workers issued per year since 2005, which includes 20,000 visas for workers with graduate degrees from U.S. academic institutions. Over 1.8 million H-1B visas were issued between 2001 and 2015: half were issued to Indian nationals, while the majority of the remainder were issued to East Asians.²³⁷ Because these “temporary” visas allow workers to stay up to six years, there are about a half a million H-1B holders in the U.S.²³⁸ By comparison, the median length of time a U.S. worker stays at a job is 4.2 years.²³⁹ It is hard to understand how these workers are deemed “temporary” when they remain in jobs 30% longer than the median U.S. worker.

232. *See id.*

233. Neil G. Ruiz & Jens Manuel Krogstad, *East Coast and Texas Metros Had the Most H-1B Visas for Skilled Workers from 2010 to 2016*, PEW RESEARCH CTR. (Mar. 29, 2018), <https://www.pewresearch.org/fact-tank/2018/03/29/h-1b-visa-approvals-by-us-metro-area/>.

234. *Measures of Central Tendency for Wage Data*, SOC. SEC. ADMIN., <https://www.ssa.gov/OACT/COLA/central.html> (last visited Dec. 23, 2019).

235. *Adverse Effect Wage Rates*, U.S. DEP'T OF LABOR, <https://www.foreignlaborcert.doleta.gov/adverse.cfm> (last visited Dec. 23, 2019).

236. *Average Farm Worker Hourly Pay*, PAYSACLE, https://www.payscale.com/research/US/Job=Farm_Worker/Hourly_Rate (last visited Dec. 23, 2019).

237. *Id.*

238. Daniel Costa & Jennifer Rosenbaum, *Temporary Foreign Workers by the Numbers: New Estimates by Visa Classification*, ECON. POLICY INST. (Mar. 7, 2017), <https://www.epi.org/publication/temporary-foreign-workers-by-the-numbers-new-estimates-by-visa-classification/>.

239. *Economic News Release: Employee Tenure Summary in 2018*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (Sept. 20, 2018), <https://www.bls.gov/news.release/tenure.nr0.htm>.

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Companies claim they cannot find American workers to hire for these skilled, high-paying jobs, yet one-quarter of the jobs H-1B visa holders have require only a two-year associate's degree.²⁴⁰ Furthermore, while companies claim it is difficult to find skilled workers, they have been reluctant to raise wages; real wages have remained stagnant for over forty years.²⁴¹ As early as 2014, concerns were being raised that U.S. tech companies were using the H-1B visa program to replace American workers with cheaper foreign workers.²⁴² In other words, it is companies asking for temporary work visas for skilled workers who are taking jobs away from Americans: not unauthorized (or authorized) immigrants. As an example, in 2019, Uber received approval for nearly 300 new H-1B visas and laid off nearly 400 (presumably non-H-1B) workers.²⁴³

Why would companies preferentially hire workers on H-1B visas and other temporary visas over U.S. citizens or permanent residents? H-1B visa holders can only switch jobs if they find another sponsor, and their employers can fire them at will.²⁴⁴ In other words, it is difficult for H-1B workers to leave their jobs and their employers can dismiss them for any reason, and unless they find a new sponsor, they lose their visa status.²⁴⁵ The implication is that H-1B visa holders are unlikely to complain or try to organize because they could risk losing their jobs, and hence their visas. These policies ensure a compliant “temporary” workforce. It is as much a strategy for keeping workers

240. Neil G. Ruiz, *Key Facts About the U.S. H-1B Visa Program*, Fact Tank, PEW RESEARCH CTR. (Apr. 27, 2017), <https://www.pewresearch.org/fact-tank/2017/04/27/key-facts-about-the-u-s-h-1b-visa-program/>.

241. Drew DeSilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RESEARCH CTR. (Aug. 7, 2018), <https://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/>.

242. *See Tech Demands More H-1B Visas as Critics Cry Foul*, NBC (Apr. 10, 2014), <https://www.nbcnews.com/business/business-news/tech-demands-more-h-1b-visas-critics-cry-foul-n77161>.

243. Ethan Baron, *H-1B: Uber Snatches up More Foreign-Worker Visas as it Lays Off Hundreds of Employees*, MERCURY NEWS (Oct. 17, 2019), <https://www.mercurynews.com/2019/10/17/h-1b-uber-snatches-up-more-foreign-worker-visas-as-it-lays-off-hundreds-of-employees/>.

244. *See Does the US Policy of “At Will” Employment Apply to H1B Visa Workers?*, H1B.IO, <https://www.h1b.io/blog/us-policy-will-employment-apply-h1b-visa-workers/> (last visited Dec. 23, 2019).

245. *Id.*

compliant as the threat of deportation is for undocumented workers in low-wage jobs.

Furthermore, the path to citizenship for these “temporary” workers is so arduous and lengthy it is nearly impossible.²⁴⁶ For instance, for Indians with an H1-B visa, the wait time is estimated at 151 years.²⁴⁷ Between 67% to 72% of all H1-B visas have gone to Indians in the last five fiscal years.²⁴⁸ So while the four million workers and their families are counted in the Census for purposes of determining Congressional representatives, they cannot vote and for most, there is no path to citizenship.²⁴⁹ Thus, they have no say in the policies that affect them. This is simply another manifestation of voter suppression.

In sum, U.S. policy regarding temporary visa holders benefits companies; suppresses the ability of workers to complain, organize, and earn a decent wage; and it derogates democratic principles by creating a class of residents who are unable to vote.

CONCLUSION

Many myths have shaped the U.S.’s current immigration policies and their implementation. The most significant of these myths is that the U.S. is being overrun by immigrants crossing its southern border illegally. However, the number of illegal border crossings has been plummeting since the year 2000.²⁵⁰ In FY 2017, CBP reported that it apprehended 310,531 people,²⁵¹ reflecting the lowest number of illegal border crossings since before 1970.²⁵² It is worth repeating: we are at

246. See Deborah Dsouza, *H-1B Visa to Green Card Backlog: Why Tech Companies Demand Change*, Investopedia (May 17, 2019), <https://www.investopedia.com/h-1b-visa-to-green-card-why-tech-companies-demand-change-4580110>.

247. *Id.*

248. Dipanjan Roy Chaudhury, *72% of H-1B Visas for Indians*, ECON. TIMES (Jul. 23, 2019), <https://economictimes.indiatimes.com/nri/visa-and-immigration/72-of-h-1b-visas-for-indians/articleshow/70338671.cms?from=mdr>.

249. See U.S. DEP’T OF HOMELAND SEC., 2017 YEARBOOK, *supra* note 2, at 65; *see also id.*

250. U.S. DEP’T OF HOMELAND SEC., 2017 YEARBOOK, *supra* note 2, at 103.

251. *DHS Announces Progress in Enforcing Immigration Laws*, U.S. DEP’T OF HOMELAND SEC. (Dec. 5, 2017), <https://www.dhs.gov/news/2017/12/05/dhs-announces-progress-enforcing-immigration-laws-protecting-americans>.

252. U.S. DEP’T OF HOMELAND SEC., 2017 YEARBOOK, *supra* note 2, at 103.

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a 48-year low in illegal border crossings. The insistence of the U.S. government in focusing on a problem that does not exist calls to mind Arendt's assertion that "[f]actuality itself depends . . . upon the existence of the nontotalitarian world."²⁵³

Another myth is that U.S. immigration policies are anti-immigrant. With four million temporary visa holders mostly from South and East Asia,²⁵⁴ over 700,000 illegal overstays annually (mostly not from Mexico and Central America),²⁵⁵ and only 310,531 annual illegal border crossings,²⁵⁶ the enforcement of U.S. immigration policy is not anti-immigrant: it is anti-Mexican, anti-Central American, and opportunistically anti-Muslim.²⁵⁷ It is also highly gendered. Since 1998, the number of women deported has remained stable, but the number of men has skyrocketed.²⁵⁸ Nearly the entire increase in deportations since 2003 is attributable to Mexican and Central American men. One can interpret DHS's enforcement of U.S. immigration policy through the lens that "[t]he task of the totalitarian police is not to discover new crimes, but . . . to arrest a certain category of the population."²⁵⁹ With respect to immigration enforcement, that "category of population" is Hispanic and male.

While executive orders have certainly affected the implementation of immigration policies, one of the largest myths about immigration policy is that Congress does not have anything to do with it. Conversely, Congress could do a lot: they could repeal and reverse prior legislation that has caused mass detention and deportations targeting Mexicans and Central Americans. The increase in deportations started because of two laws passed by Congress in 1996: AEDPA and

253. HANNAH ARENDT, *TOTALITARIANISM: PART THREE OF THE ORIGINS OF TOTALITARIANISM* 86 (1968).

254. Ruiz, *supra* note 239.

255. Passel & Cohn, *U.S. Unauthorized Immigrant Total Dips*, *supra* note 29.

256. U.S. DEP'T OF HOMELAND SEC., *2017 YEARBOOK*, *supra* note 2, at 95.

257. Such as, with implementation of refugee resettlement and attempts at travel bans. *The Muslim and Refugee Ban*, ARAB AM. INST., https://www.aaiusa.org/the_muslim_and_refugee_ban (last visited Dec. 23, 2019).

258. *See generally* Golash-Boza, *Mass Incarceration and Mass Deportation*, *supra* note 28, at 490.

259. ARENDT, *supra* note 253, at 124.

IIRIRA.²⁶⁰ These two laws expanded the grounds for deportation, narrowed the grounds for appeal, and increased funding for law enforcement. Repealing these laws would reduce mass detention and deportation.

Subsequent congressional actions increased funding and imposed mandates on detentions and deportations. This resulted in more people being deported from the U.S. since 1997 than all the years prior to 1997 (five million).²⁶¹ IIRIRA allowed for expedited removal without a hearing for those entering a U.S. Port of Entry who lack proper documentation and do not express fear of return.²⁶² In 1998, the year it was implemented, expedited removals rose to 43% of all removals. IIRIRA demonstrates Congress's willingness to abdicate its responsibilities: it gave the executive branch discretion to apply expedited removal to those apprehended in the interior within two years of entry.

In 2005, Congress further increased the use of immigration policy to target Mexicans and Central America men by passing legislation that expanded expedited removals from Ports of Entry to within 100 miles of the border. When this change was implemented, only 10% of expedited removals were inland and 90% were at Ports of Entry. By FY 2014, inland expedited removals rose to 80% and 20% for Ports of Entry. In FY 2013, 98% of those in expedited removals were Mexicans or Central Americans.²⁶³ The effect of this policy is to target Hispanics.

Increasing funding to CBP and ICE has enabled the implementation of these racist policies. DHS's FY 2019 budget to apprehend, detain, and remove unauthorized immigrants is over \$30 billion.²⁶⁴ This has resulted in an over 5,000% increase in the average estimated

260. Golash-Boza, *Mass Incarceration and Mass Deportation*, *supra* note 28, at 486.

261. *Id.* at 484.

262. Cassidy & Lynch, *supra* note 50, at 11.

263. U.S. IMMIGRATION & CUSTOMS ENF'T, REPORT OF THE DHS ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS 2–3 (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

264. *See* U.S. DEP'T OF HOMELAND SEC., FY 2019 BUDGET IN BRIEF, *supra* note 1.

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apprehension cost from FY 1990 to FY 2017.²⁶⁵ Furthermore, ICE estimates the cost of detention is \$52,990 per person per year.²⁶⁶ The effect of these costly policies is to deport mostly Mexicans and Central Americans, who incidentally, are far less likely to commit crimes than U.S. citizens. At the same time, DHS has ignored the much larger problem of overstays by people who mostly are not Mexican or Central American. The size of the DHS budget and its workforce has enabled normalization of policies that target detention and deportation of Mexican and Central Americans, reminding us that people are “capable of even greater crimes than so-called professional criminals, provided only that these crimes [a]re well organized and assume[] the appearance of routine jobs.”²⁶⁷

The economic beneficiaries of racist and misguided U.S. immigration policies are not just those employed to enforce the policies. Private companies, non-profits, and state and local governments have made money by providing detention facilities. Profits due to U.S. immigration policies have flowed more broadly to sectors of the economy that depend on undocumented labor and on legal “temporary” workers. The enforcement of immigration policies that target Mexicans and Central Americans has created greater vulnerability among a workforce that is already exploited. At the other end of the job spectrum, H-1B visas have the same impact of creating a workforce that is vulnerable and compliant. These workers can be dismissed at will and are at risk of losing their visas should they complain. Thus, immigration policies and enforcement have enabled the exploitation of immigrant workers within low-paying, as well as high-paying, jobs. Clearly, creating vulnerability and fostering compliance within sectors of the labor force adversely affects all workers and benefits companies. This could explain why we have the immigration policies and enforcement that we have: they are profitable for corporations.

What is striking about U.S. immigration policies is how wasteful and costly they are. The cost of apprehension has risen astronomically because both the numbers of people crossing illegally has radically

265. See NAT’L IMMIGRATION FORUM, *Border Patrol Budget*, *supra* note 105; see also U.S. DEP’T OF HOMELAND SEC., 2017 YEARBOOK, *supra* note 2, at 91.

266. U.S. DEP’T OF HOMELAND SEC., FY 2019 BUDGET IN BRIEF, *supra* note 1, at 36.

267. ARENDT, *supra* note 253, at 35.

declined and the budgets of CBP have risen. The money thrown at private companies and state and county jails for detention is not justified given the high court appearance rates of unauthorized immigrants and the low-cost alternatives to detention. Anti-immigrant rhetoric provides cover to make taxpayers bear the high costs of anti-Mexican, anti-Central American enforcement of immigration policies.

Even larger are the costs that families of unauthorized immigrants bear: legal expenses, lost income from detained or deported family members, and broken families. The legacy of our current policies is the generation of U.S. children whose fathers, mothers, brothers, sisters, and friends have been detained and deported. History will hear their voices.

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