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#### About the Warren Institute

The Chief Justice Earl Warren Institute on Law and Social Policy is a multidisciplinary, collaborative venture to produce research, research-based policy prescriptions and curricular innovation on the most challenging civil rights, education, criminal justice, family and economic security, immigration and healthcare issues facing California and the Nation.

## SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS

By Aarti Kohli, Peter L. Markowitz and Lisa Chavez\*

### Introduction

The United States will deport a record number of individuals this year, due in large part to rapidly expanding federal immigration programs that rely on local law enforcement. The numbers are sobering: annual deportations have increased over 400% since 1996 and more than a million people have been removed from this country since the beginning of the Obama administration.<sup>1</sup> Almost 300,000 individuals are currently in deportation proceedings but have not yet been removed.<sup>2</sup> The newest and most controversial immigration enforcement program partnering with local law enforcement is Secure Communities.

Secure Communities was introduced by the Bush administration in March 2008 and piloted in 14 jurisdictions beginning in October 2008.<sup>3</sup> Under President Obama, the program has expanded dramatically. As of the drafting of this report, Secure Communities is active in 1,595 jurisdictions in 44 states and territories, a 65% increase since the beginning of this year.<sup>4</sup> The Immigration and Customs Enforcement (ICE) agency of the Department of Homeland Security (DHS) has stated that it plans to have the program active in all jurisdictions in the United States by 2013.<sup>5</sup>

Like earlier programs such as the 287(g) program and the Criminal Alien Program (CAP), Secure Communities mobilizes local law enforcement agencies' resources to enforce federal civil immigration laws.<sup>6</sup> Whereas earlier programs such as 287(g) trained law enforcement agents to assist with immigration enforcement, Secure Communities relies heavily on almost instantaneous electronic data sharing.<sup>7</sup> This data sharing has transformed the landscape of immigration enforcement by allowing ICE to effectively run federal immigration checks on every individual booked into a local county jail, usually while still in pre-trial custody.

It has long been the case that local law enforcement agencies electronically share fingerprint data from the people they arrest with the Federal Bureau of Investigation (FBI). If that data comes from a Secure Communities jurisdiction, however, the FBI now forwards the fingerprints to the DHS.<sup>8</sup> DHS checks the fingerprints against the Automated Biometric Identification System, also known as IDENT, a fingerprint repository containing information on over 91 million individuals, including travelers, applicants for immigration benefits, and immigrants who have previously violated immigration laws.<sup>9</sup> When a match is detected,

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ICE reportedly examines its records to determine whether the person is deportable. If ICE believes an individual may be deportable, or if ICE wishes to further investigate an individual's immigration status, then ICE issues a detainer. The detainer is a request to the local police to notify immigration authorities when the individual is going to be released from criminal custody and to hold the individual for up to two days for transfer to ICE.<sup>10</sup>

Despite the scrutiny that the program has generated in the public sphere,<sup>11</sup> the federal government has conducted limited systematic analysis of its own data on individuals who are arrested under Secure Communities.<sup>12</sup> To address this gap in knowledge, the Chief Justice Earl Warren Institute on Law and Social Policy at UC Berkeley School of Law has undertaken a comprehensive study of data provided by the federal government to the National Day Labor Organizing Network (NDLON), the Center for Constitutional Rights, and the Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law pursuant to a partial settlement in *NDLON v. ICE*.<sup>13</sup>

This initial report is the first in a series based on that data. In this report, we attempt to better understand the profile of individuals who have been apprehended through Secure Communities and the process they have encountered as they are funneled through the system.<sup>14</sup> Overall, the findings point to a system in which individuals are pushed through rapidly, without appropriate checks or opportunities to challenge their detention and/or deportation. This conclusion is particularly concerning given that the findings also reveal that people are being apprehended who should never have been placed in immigration custody, and that certain groups are over-represented in our sample population.

Key findings include:

- Approximately 3,600 United States citizens have been arrested by ICE through the Secure Communities program;
- More than one-third (39%) of individuals arrested through Secure Communities report that they have a U.S. citizen spouse or child, meaning that approximately 88,000 families with U.S. citizen members have been impacted by Secure Communities;
- Latinos comprise 93% of individuals arrested through Secure Communities though they only comprise 77% of the undocumented population in the United States;
- Only 52% of individuals arrested through Secure Communities are slated to have a hearing before an immigration judge;
- Only 24% of individuals arrested through Secure Communities and who had immigration hearings had an attorney compared to 40% of all immigration court respondents who have counsel;
- Only 2% of non-citizens arrested through Secure Communities are granted relief from deportation by an immigration judge as compared to 14% of all immigration court respondents who are granted relief;
- A large majority (83%) of people arrested through Secure Communities is placed in ICE detention as compared with an overall DHS immigration detention rate of 62%, and ICE does not appear to be exercising discretion based on its own prioritization system when deciding whether or not to detain an individual.

## The Troubled History of Secure Communities

The Secure Communities program was designed by DHS, together with the FBI, and touted as a tool to improve public safety by deporting dangerous “criminal aliens.”<sup>15</sup> ICE first introduced Secure Communities on a county-by-county basis, beginning with Harris County, Texas,<sup>16</sup> and suggested that participation would be voluntary for localities, as CAP and 287(g) had always been.<sup>17</sup> However, after several counties expressed a desire not to participate in Secure Communities, the federal government reversed its position. DHS announced that since memorandums of agreement (MOAs) were signed at the state-level,<sup>18</sup> once a state had signed an MOA, then DHS maintained that localities in that state would not be able to “opt-out” of Secure Communities.<sup>19</sup>

The role of states in Secure Communities was tested recently, when Illinois, Massachusetts, and New York sought to withdraw from the program or declined to sign MOAs authorizing initiation of the program in 2011.<sup>20</sup> In response, DHS declared that participation is compulsory for all jurisdictions nationwide; states and localities do not have the option to opt-out.<sup>21</sup> Some counties have now begun using other mechanisms to limit ICE’s jail based enforcement programs, such as refusing to hold certain individuals on ICE detainers for transfer into immigration detention.<sup>22</sup>

Following the opt-out requests by states and mounting criticism from advocates and government officials, the federal government established a Task Force on Secure Communities as a subcommittee of the Homeland Security Advisory Council (HSAC). The task force included state and local government officials, as well as representatives of law enforcement, the private sector and academia, and was charged with identifying ways to reduce the impact of Secure Communities on local community policing. The task force released a draft report in September 2011, which recommended more transparency, accountability and a stronger focus on individuals who pose a threat to public safety.<sup>23</sup> Some task force members resigned because they did not feel the recommendations went far enough, instead, they urged that the program should be ended.

The HSAC report acknowledged that while ICE has hailed Secure Communities as the new face of immigration enforcement, policy-makers, law enforcement

officials and advocates have critiqued it on a number of fronts.<sup>24</sup> First, the program is criticized for its spillover effects on local and community policing. ICE has maintained that Secure Communities does not impact local policing because it is merely a data-sharing program related to routine fingerprint checks.<sup>25</sup> However, there is a strong perception in immigrant communities that local police are acting as ICE agents.<sup>26</sup> Advocates maintain that this perception results in victims and witnesses not coming forward to police in fear of deportation.<sup>27</sup> In addition, community and advocacy groups have asserted that Secure Communities is creating an incentive for some local law enforcement agencies to engage in racial profiling through the targeting of Latinos for minor violations or pretextual arrests.<sup>28</sup> Demographic data in our research provides some support for these assertions but further research needs to be conducted on this issue.

A second major critique is that the program has not stayed true to its stated goal of removing only those serious offenders who pose a threat to public safety. Instead it has led to the mass deportation of low-level offenders, such as people who violate traffic laws and people without criminal histories at all.<sup>29</sup> Secure Communities was introduced administratively, rather than through Congressional mandate, although Congress did comply with the administration’s request for funding by appropriating \$200 million in each of FY 2009 and 2010 to fund Secure Communities.<sup>30</sup> The Secure Communities program funding was part of a larger appropriation for identifying and removing non-citizens convicted of crimes.<sup>31</sup> Yet, according to ICE’s own figures, well over half of those deported through Secure Communities had either no criminal convictions or had been convicted only of very minor offenses, including traffic offenses.<sup>32</sup> This picture has remained relatively constant in the year since this initial data became available. An examination of the offenses leading to a deportation through Secure Communities will be contained in our next report.

A final set of concerns which has received somewhat less attention relate to a lack of due process for the individuals identified for removal by Secure Communities. These concerns reflect the challenges for all immigrants facing deportation since the passage of the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA) and Anti-Terrorism and Effective Death Penalty Act (AEDPA)

One of the most disturbing findings in our research is that 1.6% of cases we analyzed were U.S. citizens... We find that approximately 3,600 U.S. citizens have been apprehended by ICE.

in 1996. Together these pieces of legislation created a much harsher framework by broadly expanding the types of crime that can lead to deportation and by establishing a mandatory detention system for certain criminal offenses.<sup>33</sup> IIRIRA also instituted certain administrative removal mechanisms that allow immigration officials to summarily remove noncitizens without a hearing before an immigration judge.<sup>34</sup> Further, IIRIRA constrained the ability of immigration judges to grant relief even in compelling deportation cases.<sup>35</sup> Advocates and immigration lawyers have argued that individuals who enter deportation proceedings through Secure Communities and similar programs experience even more limited due process rights and protections than the already very limited protections in place since IIRIRA.<sup>36</sup> These claims are substantiated by the data in this report.

## Data and Analysis

The findings in this report are based on a random national sample of 375 individuals who were identified as “IDENT-Matches” by the Secure Communities Program and were apprehended<sup>37</sup> by ICE after October 1, 2008, the program’s formal start date. As noted above, this sample was obtained pursuant to a partial settlement of a Freedom of Information Act lawsuit against the federal government by NDLOJ, the Center for Constitutional Rights, and the Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law. The ICE data consists of demographic information, detentions and enforcement actions. We also received data on immigration court proceedings from the Executive Office of Immigration Review (EOIR) regarding bond and court proceedings.<sup>38</sup> Pursuant to the stipulation, ICE provided the narrative portion of the I-213, a form filled out by the ICE official who administratively arrests and questions the individual in immigration

custody. Although the level of detail varies, this form describes the current charge and the criminal and immigration history of the person. The I-213s are not the main focus of this research, they will instead be the subject of our next report examining the criminal and immigration history of those individuals processed through Secure Communities.

## Who is Affected by Secure Communities?

While some general characteristics of deportees in the United States are known, such as their countries of origin, much remains unknown regarding this population. As Secure Communities expands, it is important to understand information such as age, gender, and family characteristics to provide a fuller picture of who is being placed in deportation proceedings. Family characteristics in particular are important to gauge whether children and/or spouses<sup>39</sup> are being impacted by deportations.

### U.S. Citizens Apprehended

On its Secure Communities website, ICE acknowledges that there might be IDENT matches, or hits, for U.S. citizens for a number of reasons, including that naturalization data has not been updated in its databases.<sup>40</sup> ICE has never published any data indicating the number or percentage of citizens who have been apprehended through Secure Communities. If Secure Communities were working properly, U.S. citizen hits should never result in the apprehension of such individuals for deportation because U.S. citizens cannot be deported. One of the most disturbing findings in our research is that 1.6% of cases we analyzed were U.S. citizens and all were apprehended by ICE.<sup>41</sup> If we extrapolate that number to the 226,694 cumulative administrative arrests and/or bookings into ICE custody from Secure Communities’ inception, then **we find that approximately 3,600 US citizens have been apprehended by ICE from the inception of the program through April 2011.**<sup>42</sup>

What do these apprehensions indicate? Our dataset contains limited information, but we know that the U.S. citizens were not officially booked into an ICE detention facility, but were arrested, held in custody for some period and presumably subject to questioning regarding their immigration status. No data is available on their length of time in ICE custody. One of the U.S. citizens in our dataset appears to have been arrested on a criminal not on an immigration charge, which indicates that all U.S. citizen

apprehensions are not necessarily unlawful. However, the best available data on the remaining five U.S. citizens apprehended in our dataset suggests that they were wrongfully apprehended for civil deportation.

Recent litigation on wrongful deportations and detentions indicates that the consequences for U.S. citizens apprehended by ICE may be severe.<sup>43</sup> If Secure Communities is to continue, at the very least ICE must improve its record-keeping to indicate the circumstances under which U.S. citizens are apprehended by ICE and to indicate if and for how long, the person is held for questioning by an ICE official.

### U.S. Citizen Family Members

Notably 39% of the people identified for deportation by ICE in our study reported having a U.S. citizen family member. Thirty-seven percent reported a U.S. citizen child and 5% reported a U.S. citizen spouse. This may reflect an undercount as immigrants may fear disclosing personal information to immigration authorities, particularly if they live in mixed-status families and fear negative consequences for family members.

As the number of individuals who are placed in deportation proceedings grows, so does the impact on their families and communities. Demographers have noted that over 4 million children have undocumented parents in the United States.<sup>44</sup> A recent research report in the Harvard Educational Review highlights the negative impacts of the fear of deportation on both U.S. citizen children and undocumented children of unauthorized parents. Researchers note, “[t]he implications of growing up in an unauthorized family span a variety of developmental contexts . . . including psychological well-being, mental health, physical health, education, and employment.”<sup>45</sup> These findings are particularly worrisome as the number of deportations increase. No data exists as to what percentage of children and spouses leave the United States along with their deported family members but anecdotal evidence points to increasing family separations.<sup>46</sup>

Extrapolating out to the total cumulative administrative arrests and/or bookings into ICE custody since the inception of Secure Communities **we find that approximately 88,000 families with US citizen members were affected by Secure Communities from its inception through April 2011.**<sup>47</sup>

### Demographic Data

There is no definitive dataset on the characteristics of individuals who are placed in deportation proceedings in the United States. To see whether any patterns emerge in this report, we compared the age, gender and country of origin of people in our sample population with existing datasets on noncitizens and on unauthorized immigrants.<sup>48</sup>

#### Age & Gender<sup>49</sup>

Previous research indicates that 43% of the population of undocumented residents in the U.S. are women and 57% are men.<sup>50</sup> By contrast, 93% of individuals in our Secure Communities sample were categorized as males. The median age of individuals in our data is 29-years-old with 11% age 21 or younger. Since our data does not contain information on length of residence in the United States, it is difficult to ascertain whether these individuals are recent migrants or were brought to the U.S. as children. The federal government’s data indicates that 61% of the current unauthorized population entered before the year 2000.<sup>51</sup> If that percentage is applied to our population then a significant portion can be assumed to have entered the U.S. as children. These figures indicate that individuals processed through Secure Communities are, on average, younger than the general noncitizen population, which has a median age of 40.<sup>52</sup>

Since Secure Communities is intended to target criminal aliens, these data might be interpreted to reinforce the notion that men are more likely to commit crime than women. While that is true generally, FBI data indicates that females represented 25% of arrests nationwide in 2009.<sup>53</sup> In contrast, the share of females in our sample population is 7%. Without more information, it is difficult to reach conclusions as to the significance of the over-representation of males who are being processed through Secure Communities.

#### Ethnicity

There are different points of comparison for nationality data. Data on all foreign-born persons<sup>54</sup> in the United States indicate that 53% are from Latin America, 28% from Asia and 13% from Europe.<sup>55</sup> The unauthorized population has a different composition, with 77% from Latin America, 13% from Asia and 6% from Europe and Canada.<sup>56</sup> **By either measure, however, Latinos<sup>57</sup> are disproportionately impacted by Secure Communities. The data indicate that 93% of the people identified for deportation**

Over 8 in 10 (83%) of the individuals in our sample were booked into an ICE detention facility as compared to a 6 in 10 (62%) detention rate for all DHS immigration apprehensions.

**through Secure Communities are from Latin American countries, while 2% are from Asia and 1% are from Europe and Canada.**<sup>58</sup> The overwhelmingly large percentage of Latinos among those identified for deportation by Secure Communities raises serious questions.

ICE has consistently maintained that Secure Communities does not impact local policing because it is merely a fingerprint check and that it actually protects against racial profiling because the fingerprint checks are run on all persons arrested or booked into local facilities. However, as the Homeland Security Advisory Council found, there is a strong perception in immigrant communities that the local police are acting as ICE agents.<sup>59</sup> Community and advocacy groups have also asserted that Secure Communities is, in some jurisdictions, masking local law enforcement agencies' practice of racial profiling.<sup>60</sup> These jurisdictions are criticized for targeting Latinos for minor violations and pre-textual arrests with the actual goal of initiating immigration checks through the Secure Communities system.<sup>61</sup>

As outlined above, the data in our sample indicate that noncitizens who are arrested and brought to a local jail, and thus subject to Secure Communities, fit a particular profile, namely a young Latino male. Some might assert that since Secure Communities targets criminal aliens, this profile makes sense because they presume that this population (young immigrant Latino males) is more likely to engage in criminal behavior than the average U.S. citizen. This assertion is, however, not supported by the data. When ICE begins deportation proceedings against an individual, it issues a removal charge indicating the reason for deportation. As explained further below, only approximately one quarter (27%) of the individuals in our sample were

charged with removal based on a criminal conviction while others were charged with removal for a civil immigration violation or were issued no charge at all.<sup>62</sup> Moreover, previous research studies have demonstrated that noncitizens are less likely, not more, to engage in criminal behavior. Research has shown that immigrants have lower rates of representation in state and local jails and prisons thereby questioning the perception of immigrant criminality.<sup>63</sup> Our next report will examine more closely the criminal history of the individuals in our Secure Communities sample but these initial data raise further questions as to why young Latino men are disproportionately represented in Secure Communities enforcement actions.

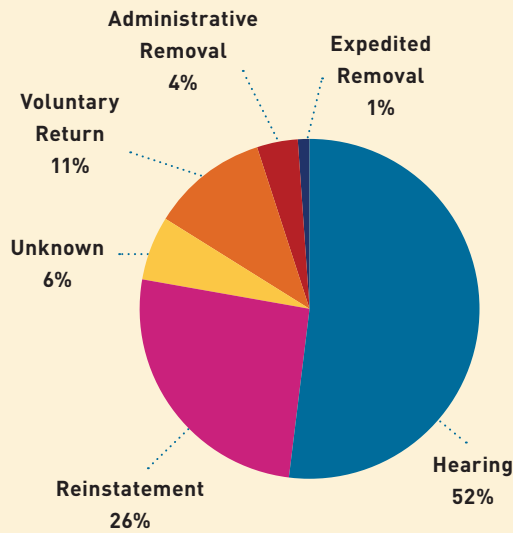
## Due Process in Secure Communities Proceedings

The Secure Communities Program technically should not affect the due process rights and protections for individuals in immigration proceedings, given that it is supposed to be a simple data sharing mechanism. Nevertheless, the rollout of the program has resulted in dramatic increases in the number of people entering deportation proceedings,<sup>64</sup> and little is known about what happens to these individuals once they are in ICE custody. In the following section, we examine four key issues: the availability of hearings before an immigration judge, detention pending removal, legal representation during the process, and immigration arrest outcomes.<sup>65</sup>

### Hearings Before an Immigration Judge

Given that the "severe penalty"<sup>66</sup> of deportation is at issue for everyone who is apprehended and detained because of Secure Communities we might assume that individuals processed through Secure Communities have access to an immigration judge. Unfortunately, not every type of removal process entitles the person to appear before an immigration judge. These categories include administrative and expedited removals. Through administrative removals, ICE officers can deport individuals with an aggravated felony conviction who are not lawful permanent residents or conditional permanent residents when removal proceedings begin. Expedited removals involve the removal of certain individuals who have not been formally admitted to the United States or who arrive in the United States.<sup>67</sup> In addition, ICE can simply have orders of removal reinstated without a further hearing for individuals who have

FIGURE 1 | Type of Proceeding Initiated



previously been ordered removed—even if such previous orders were entered *in absentia*.<sup>68</sup> In some limited circumstances such as a claim of fear of persecution upon return, these categories of persons may be eligible for a hearing in front of an immigration judge.

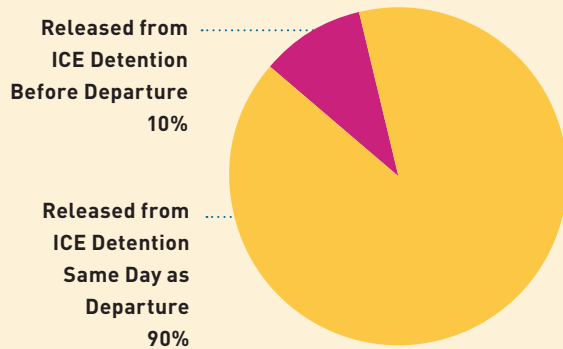
The data reveals that slightly more than half (52%) of people identified through the Secure Communities program had the opportunity to appear before an immigration judge following their Secure Communities apprehension (see Figure 1).<sup>69</sup> One percent of our population was returned through expedited removal, and only 4% through administrative removal. Eleven percent accepted voluntary return, a discretionary grant by ICE officials that allows an individual to leave without a formal order of removal. The last 26% had their removal order reinstated and thus were only entitled to a hearing if they claimed a fear of persecution or torture if returned to their country of origin. For a significant number of people in the sample (6%), the data does not indicate the type of removal process initiated. Notably our sample does not indicate whether anyone was subject to stipulated removal—an increasingly common process where individuals agree to be deported and waive their right to a hearing.<sup>70</sup> Recent research suggests stipulated removals may be counted in ICE data as hearings in immigration court because a judge signs the removal order.<sup>71</sup> Thus, we may be overestimating the share of our population who receive a hearing before an immigration judge.

## Detention Pending Removal

Whether or not they are deported, immigrants identified through the Secure Communities program face potential due process infringements arising from their detention while they await the disposition of their cases. Whether a person is in or out of custody during their removal proceedings has a tremendous impact on their ability to obtain counsel and on their ultimate chances of prevailing and being allowed to remain in the United States.<sup>72</sup> Over 8 in 10 (83%) of the individuals in our sample were booked into an ICE detention facility as compared to a 6 in 10 (62%) detention rate for all DHS immigration apprehensions.<sup>73</sup> Detention for immigrants facing possible deportation is, by DHS' own assessment, the equivalent of criminal incarceration. Notably unlike criminal defendants, however, immigration detainees are not afforded the basic procedural protections that come with criminal proceedings. Immigration detainees are not provided with attorneys; large categories are not afforded the right to bond due to harsh mandatory detention laws; and are not guaranteed a trial in the venue where they were arrested, but rather are routinely transferred thousands of miles away to remote detention facilities in far off jurisdictions. In a 2009 audit of the immigration detention system, Dr. Schriro, former DHS Special Advisor on ICE Detention and Removal, recommended that detention should be used only when necessary and that ICE consider implementing a risk-based approach to curb punitive detention since immigration is supposed to be a civil system. Although the current administration has made a public commitment to reform the immigration detention system, progress has been slow and widely criticized.<sup>74</sup>

**Length of Detention** We found that individuals in our sample population spent an average of 28 days in detention and 28% spent more than one month in detention. One person spent over 500 days in detention. Examining those in our sample with ICE detention book-out dates and departure dates,<sup>75</sup> we found that only 10% were released prior to their departure. A substantial share of those who left the country, 90%, were in detention until the date of their departure (see Figure 2).<sup>76</sup> These data indicate that the vast majority of those who are detained and subsequently removed do not have the opportunity to return to their homes to gather their belongings, get their affairs in order or say good-bye to family members once they enter detention.

**FIGURE 2 | ICE Detention Release Date Compared with Departure Date**



**Bond** Individuals in the standard criminal process are entitled to a bail hearing which normally focuses on an individualized determination of whether their detention is necessary to secure their presence at trial (flight risk) or to prevent them from doing some harm (danger to the community).<sup>77</sup> In the immigration system, bonds provide the same function as bail but not all immigrants receive a bond hearing to determine if they can be released from an immigration jail. Congress has deprived some immigrants of the right to such an individualized determination and the Supreme Court has upheld Congress’s determination.<sup>78</sup>

Generally, when ICE apprehends an individual for potential deportation, an ICE deportation officer makes an initial determination about the individual’s detention. The officer may make one of four decisions: release on own recognition, release subject to supervision, release on bond, or detain. If the officer determines that the person can be released on bond, ICE can either exercise its discretion and set the bond amount or decide not to set a bond. If an individual is unhappy with ICE’s custody determination, she can, in some instances, ask an immigration judge to hold a custody redetermination hearing. However, as noted above, in certain cases immigration judges are deprived of jurisdiction to set bond. For example, immigration judges are completely deprived of jurisdiction to review ICE’s custody determination for many people with even minor criminal convictions and people deemed “arriving aliens.”<sup>79</sup> This means that immigration judges—presumably neutral fact-finders—cannot balance factors in favor of releasing a person from custody, including serious medical conditions, a child’s dependence on the person, or community ties.

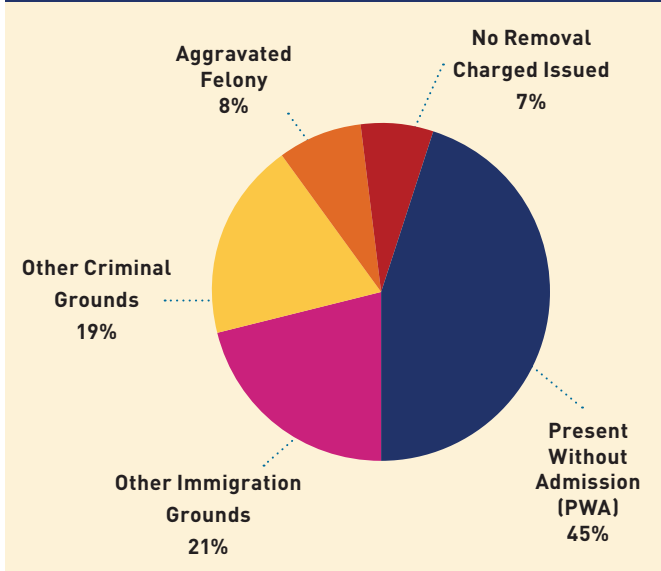
The critical questions are who gets bond hearings, who gets bond, and who gets out? Partially as a result of the policy and judicial determinations described above, and partially as a result of the discretion (or lack of discretion) exercised by ICE, our dataset revealed that only 2% of individuals booked into detention under Secure Communities were given bond by ICE, and only 6% got bond redetermination hearings before immigration judges. Our data does not reflect whether individuals were able to post bond in order to be released from custody. The average initial bond amount set by ICE was \$7,000 in our sample population and the average amount after a redetermination hearing was \$5,000, which is slightly below the national average of \$5,941.<sup>80</sup> From these data, we conclude that ICE is providing a small share of people in its custody with the opportunity to be released on bond.

**Discretion in Detention** As mentioned above, a significant percentage of our population (83%) was booked into an ICE detention facility. In order to determine whether ICE was exercising discretion in detention determinations we analyzed detention rates by both removal charges and by ICE’s own Secure Communities prioritization categories.

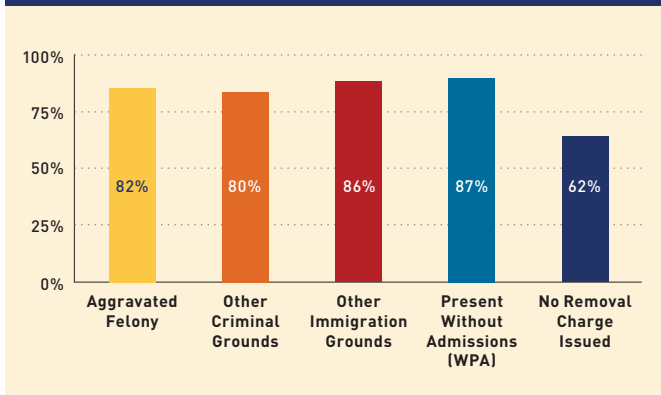
In the first analysis we looked at detention rates by ICE removal charges, which indicate the reason ICE is seeking to deport an individual. The Immigration and Nationality Act (INA) contains many grounds for removal. We have placed the charges in our data in the following categories according to INA charges: Aggravated Felony,<sup>81</sup> Other Criminal Grounds, Other Immigration Grounds (indicating various civil immigration violations, including for example overstaying one’s visa), and Present Without Admission (indicating someone who entered the country without authorization). Approximately 93% of cases we analyzed were issued at least one removal charge and the distribution of type of removal charges are shown in Figure 3.<sup>82</sup> Nearly half (45%) of the cases we analyzed were solely charged with being Present without Admission (PWA)—a charge that does not indicate any criminal history. Only 8% of individuals were charged with being removable following an aggravated felony conviction and 7% were not issued a removal charge at all.<sup>83</sup> We found high rates of detention for all categories of removal charges. Individuals whose removal charges were solely immigration-related or PWA have similar detention rates to people who are likely subject to mandatory detention based on their Aggravated



**FIGURE 3 | Removal Charge Issued**



**FIGURE 4 | ICE Facility Detention Rates by Removal Charge Issued**



Felony charges or Other Criminal Ground (see Figure 4). Even for people with no removal charge, 62% were booked into an ICE detention facility.<sup>84</sup>

In our second analysis, we examined detention by the Secure Communities offense level assigned by ICE. When Secure Communities began in 2008, it contained a controversial three-tier system to determine threat levels of various “criminal aliens” based on whether an individual had been convicted of *or* charged with particular crimes.<sup>85</sup> Level 1 crimes were ostensibly the most violent, dangerous crimes, although they did include some nonviolent misdemeanor offenses. A memo issued in March 2010 by ICE Assistant Secretary John Morton changed this definition of Level 1 offenses to refer to individuals convicted of “aggravated felonies” under § 101(a) (43) of the INA, or

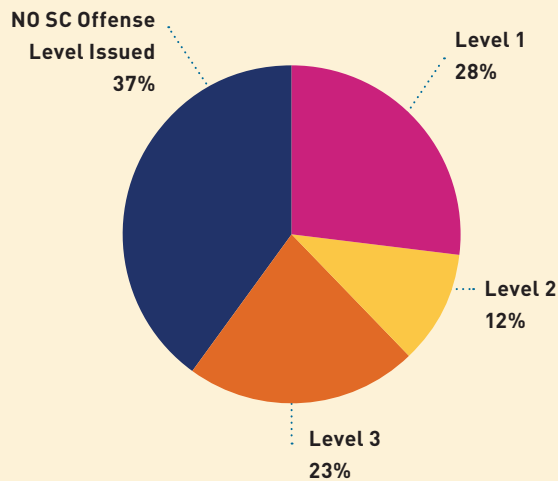
two or more other felonies;<sup>86</sup> Level 2 includes individuals convicted of one felony or three or more misdemeanors; and Level 3 consists of individuals convicted solely of misdemeanors, including minor traffic offense.<sup>87</sup>

ICE records the offense levels of individuals placed in deportation proceedings due to Secure Communities. These data are reported in the interoperability reports ICE updates on a regular basis and appear to be one method the agency uses to measure its success in deportations of criminal aliens.<sup>88</sup> Although the accuracy of the offense levels is questionable and will be examined further in our next report, for the purposes of this analysis, we analyze detention rates based upon ICE’s own classification system.

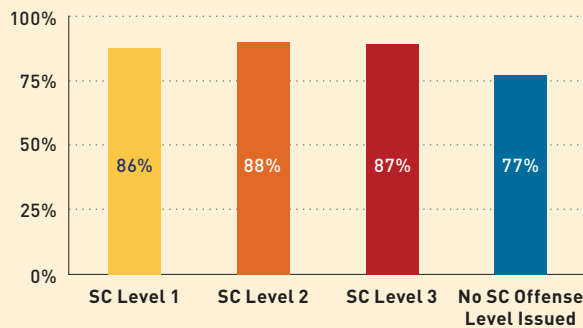
We found that 63% of individuals in our sample population were issued at least one Secure Communities offense level and the distribution of Secure Communities Levels are shown in Figure 5. Over one-third of our population (37%) was not issued a Secure Communities offense level, suggesting that those individuals were the non-criminals who are being ensnared through Secure Communities. Approximately a quarter (28%) of those in our sample were issued the highest level (Level 1). Figure 6 also shows detention rates by Secure Communities offense level; again, there is little difference among those who vary by Secure Communities offense level. Even for those individuals not assigned an offense level, the large majority were detained. Accordingly, the data suggests that the government’s determinations about whether or not to detain individuals are arbitrary and do not follow the risk-based recommendations of Dr. Schriro.<sup>89</sup> Moreover, it suggests ICE is not appropriately using its discretion when non-citizens are placed in detention.

Even for those individuals not assigned an offense level, the large majority were detained. Accordingly, the data suggests that the government’s determinations about whether or not to detain individuals are arbitrary.

**FIGURE 5 | Secure Communities Offense Level Issued**



**FIGURE 6 | ICE Facility Detention Rates by Secure Communities Offense Level Issued**



**Transfers** We analyzed the number of times individuals were transferred during their detention period. The number of times a person is transferred and the distance of their transfer is crucial for individuals having access to legal representation and to maintaining contact with families. In a review of all transfers between 1999 and 2008 and interviews with immigrants and their families, Human Rights Watch found that transfers were increasing and that “the impact on detainees and their families is profound.” Out of state transfers are particularly onerous personally and legally; moving a person to a different state can lead to changes in the way the law is applied to their case, and “can ultimately lead to wrongful deportations.”<sup>90</sup>

Analysis of our data found that nearly half (47%) of individuals placed in deportation proceedings were transferred to a different ICE facility at least once; 22% were

transferred two or more times (see Table 1). One person was transferred 10 times in less than five months. Of those transferred, 28% were sent out-of-state. We also found that the number of days individuals spent in detention correlated with the number of times they were transferred (see Figure 7). These data indicate that individuals who wait an average of three months for an immigration court hearing<sup>91</sup> are more likely to be moved away from their place of initial encounter. Therefore, they are more likely to be away from family and friends who could potentially help them get representation.

### Access to Legal Advice and Representation

The practice of immigration law has become a highly specialized area because of the complexity of the laws and regulations. Despite the high stakes, the government does not provide counsel to individuals appearing before an immigration judge because deportation is not considered to be a criminal proceeding. Thus, only those individuals who can pay for an attorney or who find a pro bono attorney have legal assistance during their proceedings. Even then, however, non-citizens in deportation proceedings face many barriers to accessing counsel, including locating counsel while in detention, collecting the needed paperwork for their case, and staying in contact with their attorney while they are in custody and being moved by ICE.<sup>92</sup> Scholars and advocates have raised concerns that as the numbers of immigrants in deportation proceedings increase because of programs like 287(g), the Criminal Alien Program (CAP), and Secure Communities, fewer people will have access to a lawyer.<sup>93</sup> These concerns are borne out by our analysis.

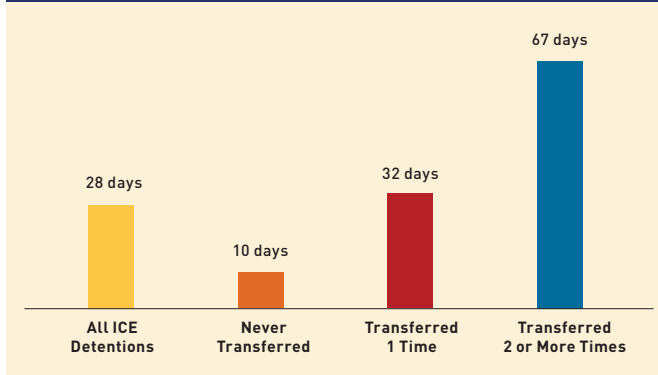
Nearly half (46%) the people in our sample had an immigration court proceeding. The Executive Office of Immigration Review (EOIR) indicates in its annual report that approximately 41% of individuals in immigration court from 2008 through 2010 had an attorney.<sup>94</sup> The data reveals that individuals who are processed through Secure Communities, however, have far lower rates of representation (see Figure 8).<sup>95</sup> Among those individuals in our sample with an EOIR proceeding in front of an immigration judge just 24% of those individuals were represented by a lawyer unlike 41% of those in immigration proceedings nationwide.

The number of individuals who were granted relief or who appealed their decision to the Board of Immigration Appeals is small (8 and 5, respectively). As a result, we are

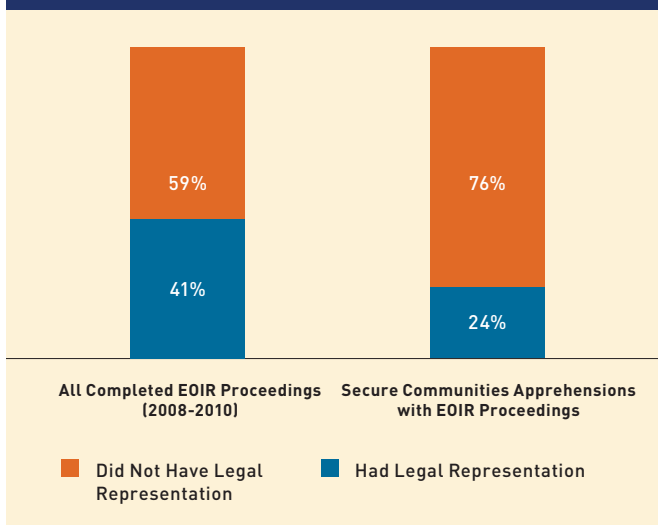
**TABLE 1 | Patterns of Detention Among Individuals Booked into an ICE Facility**

Number of Days in Detention		Number of Times Transferred to a Different Detention Facility	
In-Out Same Day	27%	Never	53%
1-30 Days	45%	Once	25%
31+ Days	28%	Two or More	22%
<b>TOTAL</b>	<b>100%</b>	<b>TOTAL</b>	<b>100%</b>

**FIGURE 7 | Average Number of Days in ICE Detention by Number of Times Transferred to a Different Facility**



**FIGURE 8 | Legal Representation Status in Immigration Court**



## The Value of Legal Representation – Insight from ICE narratives

Very few of the ICE I-213 narratives mention legal representation, but those that do paint a picture of individuals who are much more empowered in their decision-making when they have an attorney.

SC-LA-1867 was a Mexican man arrested for driving under the influence in San Bernardino County in August 2009. He had no criminal history and no immigration history in the United States, and when he was handed to ICE in September 2009, they offered him a voluntary return. The respondent was one of the few to have a lawyer, and after obtaining legal advice over the phone, made a conscious decision to stay in custody and await a hearing before an immigration judge.

SC-4888 was a woman from an unnamed country who was arrested for handling of a controlled substance in August 2008 and was identified as a deportable non-citizen by a 287(g) officer (local police officer trained by ICE). The charges against the respondent were dropped and she had no prior criminal or immigration history, but she was nevertheless immediately turned over to ICE instead of being released. The respondent was able to contact her lawyer, and on her lawyer's advice refused to sign any paperwork.

unable to draw statistically significant conclusions about the legal representation status of these two small groups as subsamples. However, it is noteworthy that of the small share of people who were granted relief from deportation, nearly two-thirds (63%) had an attorney of record and 5 out of 5 of those who filed an appeal had legal representation.<sup>96</sup> This suggests that having access to counsel makes a difference.

## Immigration Arrest Outcomes

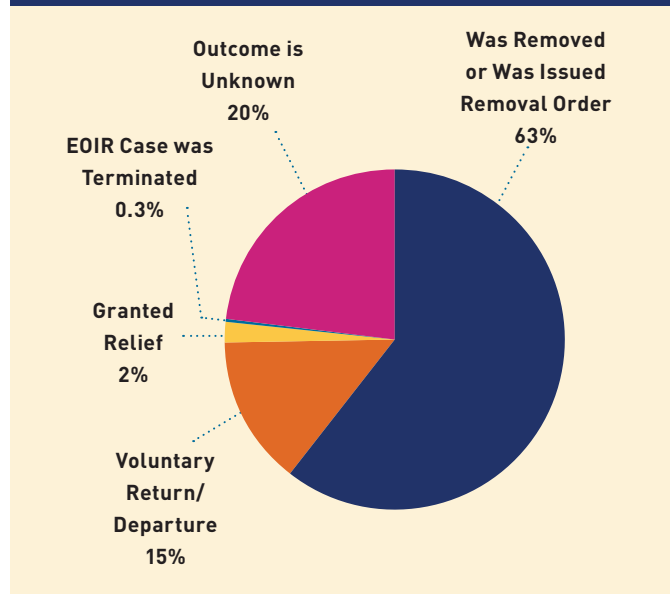
Even those noncitizens entitled to have a hearing may not always appear before a judge because of the enormous backlog in the system. Currently, approximately 285,000 cases are waiting to be heard in the immigration courts.<sup>97</sup> Recent research suggests that as a result of lengthy wait times, more immigrant detainees give up valid claims for relief or agree to waive their rights and sign stipulated orders of removal, presumably to get out of custody sooner.<sup>98</sup> Although the dataset for this report did not record when there was a stipulated order of removal, we do know that

A meager 2% of individuals in our dataset were granted relief from deportation, while the majority were removed or ordered removed. Yet, nationwide 14% of proceedings in immigration courts resulted in grants of relief.

individuals detained through Secure Communities wait an average of 88 days, nearly three months, for an immigration judge decision.<sup>99</sup> Although immigration judges hear cases of those detained faster than those out of custody three months can be a long time, particularly for those who have never been in jail before. For those who are not detained in our sample population, the average wait time for a decision from an immigration judge is 208 days.

Finally, even if an individual does appear before a judge, their chances of relief may be slim. IIRIRA eliminated the 212(c) waiver, which allowed immigration judges to grant relief from deportation for lawful permanent residents convicted of aggravated felonies.<sup>100</sup> Immigration judges can no longer take mitigating factors, including rehabilitation, length of residence and the impact of deportation on lawfully residing family members, into consideration in removal proceedings for aggravated felonies; these individuals are subject to mandatory deportation.<sup>101</sup> IIRIRA also limited avenues for relief for long-term undocumented residents with family ties in the U.S. Prior to IIRIRA, judges could suspend the deportation of undocumented immigrants who had lived in the U.S. for 7 consecutive years

**FIGURE 9 | Outcomes Among All Individuals Arrested Under Secure Communities**



and could show extreme hardship to a US citizen or LPR family member. IIRIRA narrowed the criteria to require 10 years of residence and a showing of ‘exceptional and extremely unusual hardship’ in order for an immigrant to receive what is now called ‘cancellation of removal’.<sup>102</sup>

A meager 2% of individuals in our dataset were granted relief from deportation, while the majority were removed or ordered removed (see Figure 9). Yet, nationwide 14% of proceedings in immigration courts resulted in grants of relief.<sup>103</sup> EOIR reports that 75% of those with immigration proceedings in 2010 resulted in a removal. Based on EOIR’s data, it is likely that a significant percentage of our currently unknown cases will also result in removal. These might include cases that have not yet been adjudicated and other cases where the results were not recorded.

## CONCLUSION

Programs like Secure Communities are understudied, largely because of their rapid implementation and expansion and because the data has been kept, in large part, confidential. Given that its expansion does not appear to be slowing down, it is all the more imperative that research on the impact of Secure Communities continues.

Our analysis provides a fuller picture of the population being processed through Secure Communities and raises serious concerns about the level of screening and potential targeting of certain social groups. In particular, we find that US citizens are significantly impacted by the Secure Communities program, both through their own apprehension, and through the impact on UC citizen family members. We are also concerned that Latinos appear to be disproportionately impacted by Secure Communities. Further, we have noted that those who are identified through Secure Communities enter a complex legal process, often while in detention, and rarely with legal advice about their rights and options. The adjudication process for those processed through Secure Communities points to minimal procedural and due process protections. Thus, individuals who are not meant to be in the system, may have little opportunity to get out.

These disturbing findings indicate that our system of justice is not working well for those who are being detained and deported under Secure Communities. If Secure Communities is to continue, we recommend the following to address the concerns raised by this analysis:

- Implement improved safeguards to protect US citizens from wrongful arrests and to provide further transparency about the impact of Secure Communities on US citizen populations;
- Conduct a thorough investigation into the potential racial profiling of Latinos as a result of Secure Communities and implement safeguards to protect against such abuses;
- Overhaul the mechanism and guidelines by which detention decisions are made by ICE to ensure that only individuals who pose a significant flight risk or genuine danger to the community are detained;
- Provide access to government-appointed counsel, particularly for detained populations. In the alternative, improve access to pro-bono representation.
- Improve transparency by providing regular public reporting on the topics covered in this report
- Halt the expansion of Secure Communities until the recommendations above can be implemented and further research can be done to determine whether due process can be adequately protected for individuals affected by Secure Communities.

## APPENDIX A

The findings in this report are based on a data obtained pursuant to a partial settlement of a Freedom of Information Act lawsuit brought by the National Day Labor Organizing Network, the Center for Constitutional Rights, and the Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law (collectively “the plaintiffs”) against several federal agencies involved in administering Secure Communities, most significantly the U.S Immigration Customs and Enforcement agency.

Per the settlement, data fields were extracted from various federal government databases in two steps. First, an initial random sample of 1,650 individuals was drawn from all IDENT matches (Secure Communities fingerprint queries that resulted in “hits” in the Department of Homeland Security’s databases) between October 1, 2008 and January 31, 2010. An IDENT match indicates previous contact with DHS officials and does not necessarily indicate that the person is subject to deportation. IDENT matches may occur from any contact ranging from obtaining a tourist visa, to becoming a naturalized U.S. citizen, to being previously ordered deported. Random identification numbers were assigned to the initial sample with identifying information redacted.

Next, information was extracted from two data sources for each identification number where available: ICE databases (ENFORCE, EID, IIDS, and GEMS) and the Executive Office of Immigration Review (EOIR) Case Access System (CASES). The ICE data consists of demographic data fields such as age, gender, country of citizenship, relatives and their countries of citizenship, and marital status, and data fields describing enforcement actions including status at entry, detainer date, apprehension date, Secure Communities offense level, Notice to Appear date, book-in and book-out of ICE detention facilities dates, facility name(s), type of proceeding initiated, removal charge(s), and date of departure from the U.S. The EOIR data fields pertained to immigration court proceedings include: information on custody redetermination, representation status, date of court proceedings, immigration judge decision, and date of appeal to Board of Immigration Appeals.

Pursuant to the stipulation, ICE also provided the narrative portion of the I-213, a form generally filled out by the ICE official who administratively arrests a person to be deported. Although the majority of key data fields were populated, we did not have complete data on every individual in the sample.

A total of 502 individuals (out of the 1650) had data available in ICE databases (with the majority having an I-213 narrative) and 359 had EOIR data. Presumably the IDENT matches for whom no ICE or EOIR records exist were not subject to deportation; they could, for example, be U.S. citizens, or lawful immigrants who have committed no crimes. Among the 502 individuals for whom data was available, 127 were excluded from the analysis for three reasons: 1) they had enforcement actions that pre-dated Secure Communities, and/or 2) they were issued detainers but were not apprehended by ICE, and/or 3) we were unable to draw reasonable conclusions about them given the format of data received. The ICE data fields were provided at the individual level rather than the encounter level and all data fields were provided in separate files that were to be merged using individual identification codes. Given this structure, we were unable to determine which data fields corresponded to which ICE apprehension event for individuals with multiple ICE apprehensions. As a result, the analyses in this report are based on 375 individual cases that had an ICE apprehension date that occurred after October 1, 2008 when Secure Communities formally began. The majority (over 72%) had apprehension dates in 2009 while 22% had these enforcement dates in 2010. A small share took place in 2008 and 2011. The last apprehension date was in April 2011. Of the 375 apprehended individuals in our sample, 46% had EOIR data with a post-Oct 1, 2008 proceeding and 91% had an I-213 narrative. We conducted one-sample t-tests on all sample-based percentages discussed in this report and all are statistically significant at the 95% confidence level unless specifically noted. We confirmed that there were no differences in detention rates by removal categories (Figure 4) and Secure Communities offense levels (Figure 6) by performing Chi-Square tests of significance.

## Endnotes

1. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2010 YEARBOOK OF IMMIGRATION STATISTICS (2011), 15, 94 *available at* [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois\\_yb\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf). The administration has indicated that it will deport over 400,000 people this year.
2. Transactional Records Access Clearinghouse, Immigration, *Rising Immigration Backlog At All-time High Yet Criminal, National Security, and Terrorism Cases Fall*, (Sept. 14, 2011), *available at* <http://trac.syr.edu/immigration/reports/261/>.
3. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., ACTIVATED JURISDICTIONS (2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf> (statistics as of September 27, 2011).
4. *Id.* In January 2011, after over two years of implementation, only 969 jurisdictions were active. *See also* <http://www.newyorkimmigrationlawyersblog.com/2011/01/secure-communities-activation.html>.
5. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., SECURE COMMUNITIES FREQUENTLY ASKED QUESTIONS, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (last visited Oct. 12, 2011).
6. The 287(g) program and CAP are two other ICE administered programs that have the same goal of screening inmates in local jails and state prisons for the purpose of identifying deportable non-citizens. The 287(g) program, introduced in 1996, allows local police to be trained to act as immigration enforcement officers in their jurisdictions. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., FACT SHEET: DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Oct. 6, 2011). CAP, which has existed in various forms since the mid-1980's, involves police interviews of new inmates. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., CRIMINAL ALIEN PROGRAM, <http://www.ice.gov/criminal-alien-program/> (last visited Oct. 6), [http://www.immigrationpolicy.org/sites/default/files/docs/Criminal\\_Alien\\_Program\\_021710.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/Criminal_Alien_Program_021710.pdf). Secure Communities is the third technology-based arm of this strategy.
7. Although the centerpiece of Secure Communities is a data-sharing program, local officials and governments have been concerned that police are now being perceived as a "gateway" to immigration enforcement. HOMELAND SEC. ADVISORY COUNCIL, U.S. DEP'T OF HOMELAND SEC., TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS 16 (2011), *available at* <http://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities-findings-and-recommendations-report.pdf> (hereinafter "HSAC Task Force Report").
8. DHS is the umbrella agency which houses Immigration and Customs Enforcement (ICE) and other immigration enforcement agencies.
9. U.S. DEP'T OF HOMELAND SECURITY, DHS EXHIBIT 300 PUBLIC RELEASE BY10/NPPD—US-VISIT—AUTOMATED BIOMETRIC IDENTIFICATION SYSTEM (IDENT) (2010), <http://www.exercise.dhs.gov/xlibrary/assets/mgmt/e300-nppd-usvisit-ident2010.pdf>.
10. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 5. *See in particular* "The Secure Communities Process".
11. *See, e.g.*, Julia Preston, *States Resisting Program Central to Obama's Immigration Strategy*, N.Y. TIMES, May 6, 2011, at A18, *available at* <http://www.nytimes.com/2011/05/06/us/06immigration.html>; Miriam Jordan, *States Rebel Over Deportations*, WALL ST. J., May 14, 2011, at A3, *available at* <http://online.wsj.com/article/SB10001424052748704681904576321404203166580.html>; Editorial, *Resistance Grows: Massachusetts, New York and Illinois Reject the Obama Enforcement-Only Way*, N.Y. TIMES, June 8, 2011, at A22, *available at* <http://www.nytimes.com/2011/06/08/opinion/08wed1.html>.
12. Transactional Records Access Clearinghouse, Immigration, *Current ICE Removals of Noncitizens Exceed Numbers Under Bush Administration* (Aug. 2, 2010), <http://trac.syr.edu/immigration/reports/234/>.
13. *NDLON v. ICE*, 10-cv-3488 Dkt. #84 (S.D.N.Y. July 12, 2011) (stipulation and order), *available at* <http://ccrjustice.org/files/4-8-11%20Sampling%20Stipulation.pdf>. For more information about the case, visit <http://www.ccrjustice.org/secure-communities>.

14. An “apprehension” in this context is an administrative arrest of an individual believed to be present in the United States in violation of immigration laws. See 8 U.S.C. § 287(a)(2), 8 C.F.R. § 287.8(c). We use apprehension and arrest interchangeably in this report.
15. *Supra* note 5.
16. Under President George W. Bush, the program was piloted in 14 counties in 2008: Harris County, Texas (October 27), Suffolk County, Massachusetts (November 5), Wake County, North Carolina and Dallas County, Texas (November 12), Buncombe, Gaston and Henderson Counties, North Carolina (November 17), Maverick and Val Verde Counties, Texas (December 9), Bucks and Montgomery Counties, Pennsylvania and Kinney and Real Counties, Texas (December 16), and Pinal County, Arizona (December 23). See ACTIVATED JURISDICTIONS, *supra* note 3.
17. See Dep’t of Homeland Sec. Appropriations for 2010: Hr’g on Priorities Enforcing Immigration Law Before the H. Appropriations Comm. Subcommittee on Homeland Sec., 11th Cong. 917-1280, at 1238 (2009), see also Uncover the Truth, Newly Released Secure Communities Documents Signal Opening for Local Opt-Out, <http://uncoverthetruth.org/featured/newly-released-secure-communities-documents-signal-opening-for-local-opt-out/>
18. See Shankar Vedantam, WASH. POST, *No Opt-Out for Immigration Enforcement*, Oct. 1, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/30/AR2010093007268.html>.
19. For a more detailed exploration of the opt-out controversy see *Restoring Community, A National Community Advisory Report on ICE’s Failed ‘Secure Communities’ Program*, 25-28, August 2011, available at <http://altopolimigra.com/s-comm-shadow-report>.
20. New York State, Illinois and Massachusetts have all sought to leave the program. See e.g., *Resistance Grows*, *supra* note 9.
21. Kirk Semple & Julia Preston, *Deal to Share Fingerprints Is Dropped, Not Program*, N.Y. TIMES, Aug. 6, 2011, at A11, available at <http://www.nytimes.com/2011/08/06/us/06immig.html>; Elise Foley, *Secure Communities Agreements Canceled, Participation Still Required*, HUFFINGTON POST, Aug. 5, 2011, [http://www.huffingtonpost.com/2011/08/05/secure-communities-update-department-of-homeland-security\\_n\\_919651.html](http://www.huffingtonpost.com/2011/08/05/secure-communities-update-department-of-homeland-security_n_919651.html).
22. Jen Sabella, *Cook County Votes To Free Immigrant Inmates Wanted By Feds*, HUFFINGTON POST CHICAGO, Sept. 9, 2011, [http://www.huffingtonpost.com/2011/09/10/cook-county-votes-to-free\\_n\\_954158.html](http://www.huffingtonpost.com/2011/09/10/cook-county-votes-to-free_n_954158.html)
23. HSAC Task Force Report, *supra* note 7, at 25-27.
24. *Id.* at 25-27.
25. *Id.* at 11.
26. *Id.* at 12.
27. AMERICA’S VOICE EDUC. FUND, PUBLIC SAFETY ON ICE: HOW DO YOU POLICE A COMMUNITY THAT WON’T TALK TO YOU? (2011), available at [http://amvoice.3cdn.net/73093e2eeae748d60d\\_bdm6iy3u2.pdf](http://amvoice.3cdn.net/73093e2eeae748d60d_bdm6iy3u2.pdf).
28. CENTER FOR CONSTITUTIONAL RIGHTS, NATIONAL DAY LABORER ORGANIZING NETWORK AND CARDOZO SCHOOL OF LAW IMMIGRATION JUSTICE CLINIC *Briefing Guide to Secure Communities*, 3 (Aug. 2, 2010), available at <http://uncoverthetruth.org/wp-content/uploads/Secure-Communities-Fact-Sheet-Briefing-guide-8-2-2010-Production.pdf>; RIGHTS WORKING GROUP, *Faces of Racial Profiling: A Report From Communities Across America* 7 (2010), available at <http://www.rightsworkinggroup.org/sites/default/files/rwg-report-web.pdf>.
29. *Restoring Community supra* note 19 and see AARTI KOHLI & DEEPA VARMA, CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY & DIVERSITY *Borders, Jails And Jobsites: An Overview Of Federal Immigration Enforcement In The U.S.* (Feb. 2011) at 23.
30. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *SECURE COMMUNITIES: QUARTERLY REPORT, FISCAL YEAR 2010, Report to Congress* (Aug. 11, 2011), [http://www.ice.gov/doclib/foia/secure\\_communities/r\\_congressional\\_fy10rdquarterreport.pdf](http://www.ice.gov/doclib/foia/secure_communities/r_congressional_fy10rdquarterreport.pdf).
31. *Id.*
32. *Secure Communities: IDENT/IAFIS Interoperability Monthly Statistics through April 30, 2011*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, retrieved from [http://www.ice.gov/doclib/foia/sc-stats/nationwide\\_interoperability\\_stats-fy2011-feb28.pdf](http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-feb28.pdf); See also CENTER FOR CONSTITUTIONAL RIGHTS, *supra* note 28.
33. Immigration and Nationality Act of 1952, 8 U.S.C. (hereinafter 8 U.S.C.) § 236(c) (2011).



34. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 321, 110 Stat. 3009, 3009-627.
35. *Id.*
36. See e.g., AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA, THE POLICIES AND POLITICS OF LOCAL ENFORCEMENT OF IMMIGRATION LAWS: 287(G) PROGRAM IN NORTH CAROLINA, 16, Feb. 2009, available at [http://acluofnc.org/files/287gpolicyreview\\_0.pdf](http://acluofnc.org/files/287gpolicyreview_0.pdf) (noting that 287(g) leads to increased due process violations because of inadequate training and unfamiliarity of local officials with the complexities of immigration law and procedure); Teresa A. Miller, Lessons Learned, Lessons Lost: Immigration Enforcement's Failed Experiment, 38 FORDHAM URB. L.J. 217, 238-241 Nov. 2010 (arguing that immigration detainers, which are the lynchpin of programs like CAP and Secure Communities, lead to increased due process violations).
37. *Supra* note 14.
38. For a complete list of data fields see Appendix A.
39. We do not have data on non-traditional family structures such as domestic partnerships.
40. Secure Communities *supra* note 32 at 50.
41. None were issued ICE detainers.
42. The cumulative number of administrated arrests and/or bookings was retrieved here: Secure Communities: IDENT/IAFIS Interoperability Monthly Statistics *supra* note 32 at 2. We extrapolated the number of U.S. citizens apprehended by ICE by multiplying 226,694 by 0.016 (the estimated proportion of U.S. citizens in the sample). The proportion of 0.016 is statistically significant at the 95% confidence level according to a one-sample t-test against zero. We also used the upper and the lower boundary of the 95% confidence interval of the estimated proportion of U.S. citizens among our sample to estimate the maximum and the minimum numbers of U.S. citizens being apprehended by ICE, which are 6,574 (226,694 x .003) and 680 (226,694 x .029). The federal government no longer reports the number of administrative arrests and/or ICE bookings in their interoperability reports; as such, it is impossible to calculate the number of U.S. citizens apprehended after April 2011 using the same methodology.
43. In many of the litigated cases the U.S. citizens concerned had mental disabilities and were left in highly vulnerable situations after deportation. See Ian James, *Wrongly Deported, American Citizen Sues INS for \$8 million*, ASSOC. PRESS, Sept. 3, 2000; *Guzman v. Chertoff*, No. 08-01327 (C.D. Cal. filed Feb. 27, 2008) (detention and deportation of USC with mental disabilities, settled in December 2009); Elise Foley, *Lawsuit Claims ICE Deported Mentally Ill U.S. Citizen*, WASH. INDEPENDENT, Oct. 14, 2010, discussing *Lyttle v U.S.A.*, [.http://www.aclu.org/immigrants-rights/lyttle-v-united-states-america-et-al](http://www.aclu.org/immigrants-rights/lyttle-v-united-states-america-et-al) filed by the ACLU on behalf of Hispanic USC with mental disabilities who was detained and deported).
44. JEFFREY S. PASSEL & PAUL TAYLOR, UNAUTHORIZED IMMIGRANTS AND THEIR U.S.-BORN CHILDREN, PEW HISPANIC CTR., 1 (2010), available at <http://pewhispanic.org/files/reports/125.pdf>.
45. CAROLA SUÁREZ-OROZCO, ET AL., Growing Up in the Shadows: The Developmental Implications of Unauthorized Status, 81 HARV. EDUC. REV. 438, 462 (2011).
46. *Id.* and Damien Cave, *Crossing Over, and Over*, N.Y. TIMES, Oct. 3, 2011, at A1, available at [www.nytimes.com/2011/10/03/world/americas/mexican-immigrants-repeatedly-brave-risks-to-resume-lives-in-united-states.html](http://www.nytimes.com/2011/10/03/world/americas/mexican-immigrants-repeatedly-brave-risks-to-resume-lives-in-united-states.html).
47. We generated this estimate by following the same methodology used to extrapolate to apprehended U.S. citizen, see *supra* at note 42, except we multiplied 226,694 by 0.39. Based on the upper and the lower boundary of the 95% confidence interval, we estimate the maximum and minimum number of families with U.S. citizens affected by Secure Communities to be 99,498 and 77,021, respectively.
48. Data on the undocumented population in the U.S. is an apt point of comparison because at least 80% of our sample consists of individuals whose status upon entry was Present without Admission (PWA) indicating they are likely to be undocumented.
49. ICE maintains data for males and females. Therefore, the number of transgendered persons impacted by Secure Communities is unknown at this time.
50. MICHAEL HOEFER, NANCY RYTINA, & BRYAN C. BAKER, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE U.S.: JANUARY 2010, 5 (February 2011). Although women comprise just 7% of arrests under Secure Communities, as noted above they are impacted by the deportation of their partners, siblings and fathers. Although our population consists of immigrants in all statuses (unauthorized, visitors, lawful permanent residents) the majority are unauthorized.

51. *Id.* at 3.
52. WILLIAM A. KANDEL, CONG. RESEARCH SERV., THE U.S. FOREIGN-BORN POPULATION: TRENDS AND SELECTED CHARACTERISTICS 15 (2011), available at [http://assets.opencrs.com/rpts/R41592\\_20110118.pdf](http://assets.opencrs.com/rpts/R41592_20110118.pdf).
53. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2009, (2010).
54. Foreign-born persons include lawful permanent residents, naturalized citizens and undocumented residents.
55. ELIZABETH M. GRIECO & EDWARD N. TREVELYAN, U.S. CENSUS BUREAU, PLACE OF BIRTH OF THE FOREIGN-BORN POPULATION: 2009 2 (2010), available at <http://www.census.gov/prod/2010pubs/acsbr09-15.pdf>.
56. JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 5 (2006), available at <http://pewhispanic.org/files/reports/61.pdf>.
57. For the purposes of this analysis we categorize all individuals who claim a Latin American country as their country of citizenship as Latino or Hispanic, which are interchangeable terms. We use Latino in this report.
58. The remaining 3% of the population is from Africa and other countries. PASSEL *supra* note 56.
59. HSAC Task Force Report, *supra* note 7, at 12.
60. Briefing Guide, *supra* note 28.
61. *Restoring Community supra* note 19, at 10.
62. See Figure 3. We see a similar demographic pattern in the portion of our sample that did not have criminal removal charges: 95% are Latino, 92% are men, and the median age is 29.
63. PUBLIC POLICY INSTITUTE OF CALIFORNIA, IMMIGRANTS AND CRIME, (2008), available at [http://www.ppic.org/content/pubs/jtf/JTF\\_ImmigrantsCrimeJTF.pdf](http://www.ppic.org/content/pubs/jtf/JTF_ImmigrantsCrimeJTF.pdf). See also Brad Myrstorl, *Noncitizens Among Anchorage Arrestees*, 20 ALASKA JUST. F. 1, 7 (2003), available at <http://justice.uaa.alaska.edu/forum/20/1spring2003/201.spring2003.pdf>. Immigrants do have higher rates of representation in federal prisons but that is mainly attributed to immigration-related offenses such as misdemeanor unlawful entry (8 USC 1325) or felon re-entry (8 USC 1326).
64. JANET NAPOLITANO, U.S. SECRETARY OF HOMELAND SECURITY, REMARKS AT AMERICAN UNIVERSITY ON SMART EFFECTIVE BORDER SECURITY AND IMMIGRATION ENFORCEMENT (Oct. 5, 2011), (transcript available at <http://www.dhs.gov/ynews/speeches/20111005-napolitano-remarks-border-strategy-and-immigration-enforcement.shtm>).
65. The remaining analyses in this report are based on the 369 non-U.S. citizens who were arrested by ICE.
66. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010) (“We have long recognized that deportation is a particularly severe penalty.”) (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).
67. 8 U.S.C. § 1225(b)(1)(A)(i), (iii) (ordering removal, without further hearing or review, of arriving aliens who are inadmissible because they lack proper documentation or have committed fraud or willful misrepresentation to procure an immigration benefit and persons who have entered the United States without inspection within the prior two years).
68. 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).
69. Two individuals had a “voluntary departure” proceeding initiated and we coded these as having a “Hearing” because voluntary departure can only be granted by an immigration judge.
70. For a critical analysis of the stipulated removal process see JENNIFER LEE KOH, JAYASHRI SRIKANTIAH, KAREN C. TUMLIN, DEPORTATION WITHOUT DUE PROCESS 5 (Sept. 2011), available at: <http://www.nilc.org/immlawpolicy/arrestdet/Deportation-Without-Due-Process-2011-09.pdf>.
71. “[O]ther records suggest that immigration judges are given “case completion” credit for stipulated removals as if they had completed a regular court hearing, thereby providing an incentive for them to sign stipulated removals as quickly as possible in order to claim higher individual case closures and manage their extraordinarily high caseloads.” fn20 [Email from S. McDaniel to S. Griswold and S. Rosen, re: Stips (Apr. 25, 2008) (EOIR-2008-5140(5)-000039-42) (noting that a San Francisco court was able to meet “case completion goals” due to the large number of stipulated removals in the jurisdiction).] *Id.* at 5.
72. KATZMANN IMMIGRANT REPRESENTATION STUDY GROUP AND THE VERA INSTITUTE OF JUSTICE, *The New York Immigrant Representation Study Preliminary Findings* (May 3, 2011), available at <http://graphics8.nytimes.com/packages/pdf/nyregion/050411immigrant.pdf>.

73. We use DHS's 2009 statistics here for comparison since the large majority of our sample are 2009 apprehensions. In 2009 DHS had approximately 613,000 immigration apprehension and detained approximately 383,000 of them, for a 62% detention rate. U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2009, ANNUAL REPORT (Aug. 2010), *available at* [http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement\\_ar\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf). This likely understates the disparity between the detention rate for Secure Communities versus other ICE arrestees since that large majority of DHS apprehensions in 2009 were Customs and Border Patrol (CBP) not ICE apprehensions and CBP is likely to have a higher detention rate. *See* DR. DORA SCHIRO, DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2, 4 (Oct.6, 2009), *available at* <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> (last visited Oct. 12, 2011); Anil Kalhan, Rethinking Immigration Detention, 110 Colum. L. Rev. Sidebar 42 (July 21, 2010); and Ellis Johnston, *Once a Criminal, Always a Criminal? Unconstitutional Presumptions for Mandatory Detention of Criminal Aliens*, 89 Geo. L.J. 2593, 2596 (August 2001).

74. *See e.g.*, HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW, 2011, *available at* <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf> (last visited Oct. 12, 2011).

75. We assume that a departure date indicates that the person physically left the U.S.

76. Individuals with detention book-out dates and departure dates comprised 65% of our sample.

77. Bail Reform Act of 1984, 18 U.S.C. § 3142.

78. 8 U.S.C. § 236(c); *Demore v. Hyung Joon Kim*, 538 U.S. 510 (2003).

79. *See* 8 U.S.C. § 1226(c) (mandating detention of certain criminal aliens); 8 U.S.C. § 1226(e) (denying judicial review of discretionary decisions regarding application of apprehension and detention of aliens); 8 U.S.C. § 1225(b)(1)(A)(i), (B)(iii) (IV) (ordering removed arriving aliens who are inadmissible because *inter alia* they lack a valid entry document and providing mandatory detention for such individuals who indicate a credible fear of persecution or an intention to seek asylum); 8 C.F.R. § 1003.19(h)(2)(i) (denying immigration judges with ability to re-determine conditions of custody for *inter alia* arriving aliens in removal proceedings).

80. AMNESTY INTERNATIONAL, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA, (March 2009) 18, *available at*: <http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf>.

81. Aggravated felonies are defined in section 101(a)(43) of the Immigration and Nationality Act. The term is often called a misnomer. For a criminal offense to be deemed an aggravated felony, it need not be a felony nor involve aggravating circumstances. For example, shoplifting with a one-year suspended sentence can be considered an aggravated felony under immigration law.

82. Twenty-two percent of those with at least one removal code had more than one code (and most had just two codes). For these cases, we categorized them in the following priority order: Aggravated Felony, Other Criminal Grounds, Other Immigration Grounds, Present Without Admission. For example, if someone had two removal codes and one was for Other Criminal Grounds and the other was for Other Immigration Grounds, they were categorized as the former for purposes of this analysis.

83. Almost half of the 7% without removal charges were slated to have an immigration hearing.

84. While the data provides no explanation for the detention of individuals without removal charges, it does raise serious questions about whether individuals not subject to removal were wrongfully detained.

85. This classification raised serious due process issues since not everyone charged with an offense is ultimately prosecuted or found guilty.

86. MEMORANDUM FROM JOHN MORTON, DIRECTOR, DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), *available at* <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

87. *Id.*

88. *See* note 32, *supra*.

89. *See* note 73, *supra*.

90. HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES, 2 (2009), *available at* <http://www.hrw.org/sites/default/files/reports/us1209web.pdf>.

91. See discussion *infra* Immigrant Arrest Outcomes.
92. See e.g., AMNESTY INTL., *JAILED WITHOUT JUSTICE*, *supra* note 80; and Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541 (2009).
93. See Mark Hamblett, *Forum Stress Plight of New York's Unrepresented Immigrants*, NEW YORK L. J., (May 6, 2011), available at <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202493130604&slreturn=1>.
94. U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE OF IMMIGRATION REVIEW, FY 2010 STATISTICAL YEAR BOOK, G1 (Jan. 2011), available at <http://www.justice.gov/eoir/statspub/fy10syb.pdf>.
95. These were identified as those having a date of E-28, Notice of Entry of Appearance as Attorney or Representative.
96. Also, 70% of those who had a new bond hearing had lawyers.
97. *Rising Immigration Backlog supra* note 2.
98. JENNIFER LEE KOH, ET AL., *supra* note 70.
99. For this analysis we compared the Notice to Appear date with the immigration judge's decision date.
100. 8 U.S.C. § 1182(c) (1988). (repealed by IIRIRA). However, in *Immigration and Naturalization Service v. St. Cyr*, the Court ruled that certain categories of non-citizens with convictions pre-dating IIRIRA may be eligible for 212(c) relief. 533 U.S. 289, 326 (2001).
101. See 8 U.S.C. § 1229b(a) (2006). Cancellation of Removal is not available to noncitizens convicted of aggravated felonies. Even for LPRs who are eligible for Cancellation do not always prevail. In FY 2010, approximately 3700 cases of Cancellation of Removal were granted. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2010 STATISTICAL YEAR BOOK, at R3 (table 15), available at <http://www.justice.gov/eoir/statspub/fy10syb.pdf>.
102. 8 U.S.C. § 240A.
103. U.S. DEP'T OF JUSTICE *supra* note 94, at D2.

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