

ICE Effects: Federal Worksite Non-Enforcement of U.S. Immigration Laws, 2007–2008

By LORRAINE SCHMALL*

Introduction

MEDIA REPORTS during the second term of U.S. President George W. Bush gave the distinct impression that government agencies were cracking down on illegal immigration by raiding businesses suspected of employing illegal workers. At the same time, the U.S. Congress, along with many smaller political subdivisions, passed new or amended existing immigration laws,¹ and federal and local police agencies entered into agreements to share enforcement powers in detaining or arresting suspected illegal immigrants.² Despite the publicity of these workplace raids and the subsequent congressional

* Northern Illinois University College of Law. The author wants to thank Dr. Marsha Katz, Governors State University, and Dr. Helen LaVan, DePaul University, for encouraging her to present earlier data at the 2008 International Conference of the Association of Employment Practices and Policies at DePaul University; Professor Maria Ontiveros and the U.S.F. Law Review for their invitation to speak and write for their 2009 Law Review Symposium and for their editing of this Article; Dr. David Maina, Columbia College, and Professors Frank Lima and Daniel Schneider, at Northern Illinois University, for their help with the data analysis; and Michael Coughlin, Sarah Moczydlowski, and Lori Scardina for their research assistance.

1. See, e.g., Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135; cf. TRAC IMMIGRATION, IMMIGRATION ENFORCEMENT: THE RHETORIC, THE REALITY (2007), <http://trac.syr.edu/immigration/reports/178> (last visited Nov. 15, 2009) (“Zbigniew Brzezinski, a national security adviser to President Jimmy Carter . . . said that the Bush Administration’s elevation of the words ‘war on terror’ [became] a ‘national mantra’ [and] . . . ‘stimulated the emergence of a culture of fear’ that ‘obscures reason, intensifies emotions and makes it easier for demagogic politicians to mobilize the public on behalf of the policies they want to pursue.’”).

2. 8 U.S.C. § 1357(g) (2006) (“[T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States.”).

reaction, federal worksite enforcement of U.S. immigration laws has largely been superficial.

The U.S. Immigration and Customs Enforcement (“ICE”)³ agency advanced two purposes for its use of these raids as a worksite enforcement mechanism: (1) “to mitigate the risk of terrorist attacks posed by unauthorized workers employed in secure areas of our nation’s critical infrastructure,”⁴ such as airports, seaports, nuclear plants, chemical plants, and defense facilities; and (2) to “prohibit employers from taking advantage of illegal workers”⁵ who either cannot or will not attempt to secure their legal workplace rights. Yet, the data examined for this Article indicates that less than a quarter of the raided employers were involved in the nation’s “critical infrastructure”;⁶ and employees, not employers, were the overwhelming majority of those arrested in raids.⁷ In addition, the raids were criticized for exhibiting institutional racial bias, reflected in the fact that a disproportionate number of those employers that *were* arrested had minority surnames.⁸

Part I identifies the scope of the problem inherent in both the sheer number of undocumented workers in the United States and the institutional barriers that exist in combating this issue. Part II reviews recent attempts to address worksite enforcement, and Part III analyzes the ICE raids by charting the actual results of the raids. Finally, Part IV identifies the disparities between the stated objectives and practices of the ICE raids and the actual results.

I. Defining the Scope of the Problem

The United States has a substantial undocumented population living in the country and, because many undocumented people seek employment within the United States, there is a correspondingly large number of unauthorized workers.⁹ Yet, the United States has neither

3. The U.S. Immigration and Customs Enforcement agency was created in 2003. U.S. Immigr. & Customs Enforcement, About U.S. Immigr. and Customs Enforcement, <http://www.ice.gov/about/index.htm> (last visted Nov. 2, 2009).

4. U.S. Immigr. & Customs Enforcement, Worksite Enforcement, <http://www.ice.gov/pi/worksite/index.htm> (last visited Nov. 2, 2009).

5. *Id.*

6. *See infra* Figure 4: Percentage and Numbers of Raids at Government Contractors/Critical Infrastructure Worksites 2007–2008.

7. *See infra* Figure 1: Total Number and Identity of Arrestees 2007–2008.

8. *See infra* Figure 2: Percentage of Employers, Owners, or Managers Arrested Who Had Minority Surname.

9. JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CENTER, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES i (2009), *available at* <http://pewhispanic.org/>

aggressively enforced immigration laws nor provided the financial resources required by government agencies to adequately address the issue. This results in underfunded and understaffed government agencies targeting the easily identified undocumented worker. In 2007 to 2008, this translated into raids on businesses known for their reliance on immigrant workers, such as the construction and restaurant industries.

A. The Unauthorized Workforce

The United Nations reports that the United States hosts more migrants than any other country¹⁰ and, by extrapolation, the largest contingent of undocumented workers. Most U.S. immigrants come from Mexico.¹¹ More than eleven percent of the Mexican population now lives in the United States.¹² The Mexican economy in the United States is, by some estimates, as large as the Mexican economy in Mexico.¹³ The amount of cash Mexicans in the United States send home each year has grown from \$3.5 billion in 1996 to \$23 billion in 2006.¹⁴ Despite the prevalence of Mexican immigrants, the immigrant population in the United States is diverse. Many new immigrants come from Central and South America, Asia, the former Soviet Union, India, the Philippines, and sub-Saharan Africa.¹⁵

files/reports/107.pdf (estimating the unauthorized immigrants living in the United States in 2007 at 11.9 million, and “8.3 million undocumented immigrants in the U.S. labor force in March 2008”). The Department of Homeland Security reports its own estimates of unauthorized immigrant population, and these estimates track closely to those reported through the Pew Hispanic Center. See MICHAEL HOEFER, NANCY RYTINA & BRYAN C. BAKER, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2008, at 1 (2009), available at www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf (“[T]he number of unauthorized immigrants living in the United States declined from 11.8 million in January 2007 to 11.6 million in January 2008.”).

10. U.N. Dep’t Econ. & Soc. Affairs, Population Division, *International Migration Report 2006: A Global Assessment*, xiv, U.N. Doc. ESA/P/WP.209 (2009), available at http://www.un.org/esa/population/publications/2006_MigrationRep/exec_sum.pdf (indicating the United States hosted the largest number of migrants—thirty-eight million—in 2005, followed by the Russian Federation with twelve million and Germany with ten million).

11. PEW HISPANIC CENTER, MEXICAN IMMIGRANTS IN THE UNITED STATES, 2008, at 1 (2009), available at <http://www.pewhispanic.org/files/factsheets/47.pdf> (“Mexicans comprise about six-in-ten (59%) of the estimated 11.9 million unauthorized immigrants in the U.S.”).

12. JORGE G. CASTANEDA, *EX MEX: FROM MIGRANTS TO IMMIGRANTS* 15 (2007).

13. *Id.*

14. *Id.* at 18–19.

15. Steven A. Camarota, *Immigrants in the United States, 2007: A Profile of America’s Foreign-Born Population*, BACKGROUNDER (Center for Immigr. Stud., Wash., D.C.) Nov. 2007, at 4, available at <http://www.cis.org/articles/2007/back1007.pdf>.

Illegal immigrants often take some of the country's most dangerous and least attractive jobs, such as those in the meatpacking, food services, and agricultural industries.¹⁶ In 2008, seventeen percent of all construction workers in the country were unauthorized immigrants.¹⁷ Agriculture also accounts for large numbers of undocumented workers.¹⁸ Farmers stress that access to migrant labor is critical for agriculture. There are about one million full-time farm workers in the United States.¹⁹ In federal fiscal years 2005–2007 (inclusive), seventy-five percent of all hired farm workers were foreign born and fifty-two percent of that group were not authorized to work in the United States.²⁰

Because of their dependency on the business owner for employment and the potential exposure to government authorities, unauthorized workers are less likely to confront employers about harmful working conditions. This leads to the under-enforcement of substantive labor rights in immigrant-dominated industries, which could incentivize business owners to prefer undocumented workers.²¹ Researchers have noted “‘unscrupulous firms’ opportunistic invocation of work authorization to fire workers involved in organizing [union] campaigns” and retaliatory threats to report workers who assert employment rights to immigration authorities.²² In addition,

16. Pia M. Orrenius & Madeline Zavodny, *Do Immigrants Work in Riskier Jobs?* (Fed. Reserve Bank of Dallas, Working Paper No. 0901, 2009), available at <http://dallasfed.org/research/papers/2009/wp0901.pdf>.

17. PASSEL & COHN, *supra* note 9.

18. *Id.* at iv (indicating unauthorized immigrants made up twenty-five percent of all workers employed in farming occupations).

19. U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Employment and Wages: Construction Laborers (May 2008), <http://www.bls.gov/oes/current/oes472061.htm>.

20. Letter from Daniel Carroll, Economist, Off. of Pol'y Dev. and Res., U.S. Dep't of Labor, to author (Oct. 23, 2009) (on file with author).

21. See Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law*, in *THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET* (Annette Bernhardt, Heather Boushey, Laura Dresser & Chris Tilley eds., 2008); see also *United States v. Brignoni-Ponce*, 422 U.S. 873, 879 (1975) (“The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation.”); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004) (“Granting employers the right to inquire into workers’ immigration status in cases like this would allow them to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices or files a Title VII action.”); Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 676–79 (2003) (arguing that undocumented workers are reluctant to report labor law violations).

22. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (no backpay); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (no reinstatement remedy); *NIBCO*, 364 F.3d

many employers perceive that recently arrived workers are less likely to resist employer demands, display “attitude,” and complain about illegal or unfair treatment.²³

B. Government Resources Are Limited

As part of a post-9/11 overhaul of the federal agencies tasked with keeping American people safe, enforcement of immigration laws was moved to the Immigration and Customs Enforcement agency within the Department of Homeland Security (“DHS”).²⁴ And, though ICE has more than 16,500 employees and an annual budget of nearly \$5 billion, it is also responsible for enforcing more than 400 federal statutes, which requires investigating a wide range of violations including drug smuggling, human trafficking, illegal arms exports, financial crimes, commercial fraud, human smuggling, document fraud, money laundering, child pornography/exploitation, and immigration fraud.²⁵

At the same time the United States undertook its overhaul of the immigration system in 2003, the Government Accountability Office (“GAO”) conducted an international study that found unemployment was growing in most of the countries it surveyed and the growth was accompanied by increased immigration, which led to attempts at legal

at 1064 (granting a protective order barring discovery into each plaintiff’s immigration status on the basis that allowing NIBCO to use the discovery process to obtain such information would chill the plaintiffs’ willingness and ability to bring civil rights claims).

23. CHIRAG MEHTA, NIK THEODORE & MARIELENA HINCAPIÉ, CENTER FOR ECONOMIC DEVELOPMENT, SOCIAL SECURITY ADMINISTRATION’S NO-MATCH LETTER PROGRAM: IMPLICATIONS FOR IMMIGRATION ENFORCEMENT AND WORKERS’ RIGHTS (2003), *available at* <http://www.urbanecconomy.org/node/49>. ICE’s Worksite Enforcement Unit also helps employers improve worksite enforcement of employment regulations. U.S. Immigr. & Customs Enforcement, Worksite Enforcement, *supra* note 4. The ice.gov 2009 website promises to create a “culture of compliance” by shaming guilty employers. “Responsible employers who seek to conduct their business lawfully are put at an unfair disadvantage as they try to compete with unscrupulous businesses. Such businesses gain a competitive edge by paying illegal alien workers low wages.” U.S. Immigr. & Customs Enforcement, Worksite Enforcement Fact Sheet, <http://www.ice.gov/pi/news/factsheets/worksite.htm> (last visited Nov. 2, 2009).

24. President Bush created the White House Office of Homeland Security on October 8, 2001. *See* U.S. DEP’T OF HOMELAND SECURITY, BRIEF DOCUMENTARY HISTORY OF THE DEPARTMENT OF HOMELAND SECURITY, 2001–2008 (2009), *available at* http://www.dhs.gov/xabout/history/brief_documentary_history_of_dhs_2001_2008.pdf. Congress passed legislation creating the Department of Homeland Security on November 19, 2002, which became operational on January 24, 2003; most component agencies merged on March 1, 2003. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

25. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2007 ANNUAL REPORT: PROTECTING NATIONAL SECURITY AND UPHOLDING PUBLIC SAFETY 1 (2007) [hereinafter ICE 2007 ANNUAL REPORT], *available at* www.ice.gov/doclib/about/ice07ar_final.pdf.

controls.²⁶ GAO found that the laws of most other countries were ineffective for the same reason that they were ineffective in the United States—an overtaxed and underfunded agency cannot effectively prevent violations.²⁷ Law-shirking is more likely when there is little threat of enforcement.

II. ICE Worksite Enforcement

United States immigration laws have historically made working without authorization illegal, but prohibitions against hiring an undocumented worker were codified only in the last twenty years.²⁸ In 1986, Congress amended the immigration laws to require an employer to take certain affirmative acts to verify work authorization and to make it a crime to hire, recruit, or refer for employment an illegal immigrant knowing he/she is unauthorized.²⁹ The law defines several distinct employer offenses related to illegal immigrants, including encouraging or inducing unauthorized immigrants to enter the United States.³⁰ However, proving a “knowing” violation of the law is difficult.³¹

Making a case against an employer requires time and significant investments of investigative resources. The Model Penal Code, an exemplar of U.S. federal and state criminal law that provides a template for most prosecutions, concludes that a “person acts knowingly . . . when he [*sic*] is aware that it is practically certain that his [*sic*] conduct

26. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-86-17BR, *ILLEGAL ALIENS: INFORMATION ON SELECTED COUNTRIES' EMPLOYMENT PROHIBITION LAWS* (1985), available at <http://www.gao.gov/products/GGD-86-17BR>.

27. *Id.*

28. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892–93 (1984) (“For whatever reason, Congress has not adopted provisions in the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization.”).

29. 8 U.S.C. § 1324a (2006).

30. *Id.*

31. It is difficult to find a report of an employer's conviction for immigration violations, especially since the cases are often litigated for years. *But see* News Release, U.S. Attorney's Office, Northern Virginia Business Owner and Wife Sentenced in Immigration Fraud Scheme (Apr. 16, 2009), available at www.usdoj.gov/usao/dc/Press_Releases/2009Archives/April/09-097.pdf (Golam Razaul Karim and his wife, Naureen Moin, were convicted of immigration fraud for operating a scheme which “called for myriad small-business owners to support the fraudulent labor-based immigration applications of aliens who were never intended to, and never did, work for the employers, or for non-existent aliens whose approved documentation would be used by real persons seeking immigration status. Among those employers were Karim and Moin, both also originally from Bangladesh, who owned and operated Peoples Pest Control between 2001 and 2002.”).

will cause such a result.”³² Chain-of-command matters and informal operating procedures complicate cases, and few courts have found or agreed that “constructive knowledge” is sufficiently culpable.³³ Through 2008, there were few reported cases where an employer or its agent knowingly violated the law.³⁴ Two of the most public raid cases that pre-dated this study, involving thousands of undocumented workers at Wal-Mart Stores, Inc. and Tyson Foods, Inc., resulted in acquittals or dismissal of nearly every criminal charge.³⁵

In 2007, ICE announced it would target *employers* who hire illegal immigrants with the goal of “reducing the pull of the ‘jobs magnet’ that draws illegal workers across the border in search of employment.”³⁶ ICE issued the following statement:

Employers who exploit illegal alien labor to reap greater profits for themselves can expect to pay a high price for their greed. Whether the violator is a multinational corporation or a small business, ICE

32. MODEL PENAL CODE § 2.02(2)(b) (1962).

33. *Collins Foods Int'l, Inc. v. U.S. INS*, 948 F.2d 549, 554 (9th Cir. 1991) (noting employment offer before verification of legal status does not constitute constructive knowledge); *Mester Mfg. Co. v. INS*, 879 F.2d 561, 566–67 (9th Cir. 1989) (noting knowledge element satisfied where employer was on notice of possible illegal status of employee but failed to investigate); *Trollinger v. Tyson Foods, Inc.*, 543 F. Supp. 2d 842, 853 (E.D. Tenn. 2008) (noting non-English application does not raise reasonable suspicion to constitute knowledge of illegal status).

34. *United States v. Shiu Sun Shum*, 496 F.3d 390 (5th Cir. 2007); see News Release, U.S. Immigr. & Customs Enforcement, QSI Supervisor, Employee Sentenced for Knowingly Hiring Illegal Aliens (Nov. 19, 2007), <http://www.ice.gov/pi/news/newsreleases/articles/071119springfield.htm>. A staffing agency employee who worked inside a Cargill meat packing plant and whose title was not given, pleaded guilty to one count of harboring illegal aliens. *Id.* “[She] was aware that illegal aliens she helped hire at [Quality Service Integrity, Inc.] had been instructed to obtain new identities after QSI headquarters noted that the employees’ Social Security numbers did not correspond with their names. She also completed employment documents that she knew contained false information, including statements that illegal alien QSI employees were lawful residents or U.S. citizens.” *Id.* No where is there any indication of her motive for doing so.

35. Docket, *United States v. Tyson Foods, Inc.*, No. 4:01-cr-061 (E.D. Tenn. 2003) (jury acquitted defendants); Stephanie E. Tanger, *Enforcing Corporate Responsibility for Violations of Workplace Immigration Laws: The Case of Meatpacking*, 9 HARV. LATINO L. REV. 59, 60 (2006) (“Three of the indicted managers were caught on tape and fired by Tyson. One of them committed suicide four months after the indictment; the other two pled guilty and received a one-year probation and fines of \$2,100 and \$3,100, respectively. The other three indicted managers and the company itself were ultimately acquitted by a jury on March 26, 2003.”); News Release, U.S. Immigr. & Customs Enforcement, Wal-Mart Stores, Inc. to Pay a Record \$11 Million to ICE to Settle Nationwide Worksite Enforcement Investigation (Mar. 18, 2005), <http://www.ice.gov/about/investigations/worksite/test.htm> (last visited Nov. 15, 2009) (identifying \$11 million civil settlement with Wal-Mart Stores, Inc. as a result of an ICE “investigation into the alleged hiring of illegal aliens by independent contractors that provided cleaning services to Wal-Mart stores . . .”).

36. ICE 2007 ANNUAL REPORT, *supra* note 25, at iii.

is aggressively targeting employers who use illegal alien workers to gain an unfair business advantage and take jobs away from legal workers.³⁷

ICE also proposed a rule to simplify its burden of proof in criminal cases.³⁸ Since 1994, the Social Security Administration has sent employers “no-match” letters indicating all social security number and name irregularities among their employees.³⁹ The purpose of these letters is to ensure that social security payments deducted from the employee’s paycheck were matched with the proper social security account. ICE’s proposed rule would have required those employers who received a no-match letter to take certain steps or be attributed with “constructive knowledge” of the worker’s undocumented status.⁴⁰ However, there could be numerous reasons for irregularities, such as clerical or mechanical mistakes, unregistered surname changes, or agency error. The rule was enjoined upon the motion of a consortium of unions and business groups, and a federal court found the rule would subject employers to greater compliance costs and employees to an increased risk of wrongful termination.⁴¹

In the interim, DHS is relying on a voluntary compliance program called “E-Verify,” which allows employers to verify work authorization online.⁴² But even this more modest plan suffers shortcomings. In 2005, the GAO issued a report identifying the “weaknesses” that hinder the employment verification process.⁴³ It found that adherence to a mandatory E-Verify program would require significant financial and staffing demands and would apply to more than seven million employers in the United States.⁴⁴ GAO predicted that verifying em-

37. News Release, U.S. Immigr. & Customs Enforcement, *New York Restaurant Owner Among 11 Charged with Harboring in ICE Probe* (Apr. 16, 2008), <http://www.ice.gov/pi/news/newsreleases/articles/080416buffalo.htm> (quoting Julie L. Myers, Assistant Secretary for U.S. Immigration and Customs Enforcement).

38. *Safe-Harbor Procedures for Employers Who Receive a No-Match Letter*, 72 Fed. Reg. 45611 (Aug. 15, 2007).

39. *Amer. Fed. of Labor v. Chertoff*, 552 F. Supp. 2d 999, 1003 (N.D. Cal. 2007).

40. *Safe-Harbor Procedures for Employers Who Receive a No-Match Letter*, 72 Fed. Reg. 45611 (Aug. 15, 2007).

41. *Amer. Fed. of Labor*, 552 F. Supp. 2d at 1006 (“If enacted, DHS and SSA will immediately mail no-match packets to 140,000 employers, identifying no-matches for approximately 8 million employees.”).

42. U.S. Immigr. & Customs Enforcement, *E-Verify®*, <http://www.uscis.gov/portal/site/uscis> (last visited Nov. 2, 2009) (follow “E-Verify Homepage” hyperlink).

43. U.S. GOV’T ACCOUNTABILITY OFFICE, *GAO-08-729T, EMPLOYMENT VERIFICATION: CHALLENGES EXIST IN IMPLEMENTING A MANDATORY ELECTRONIC EMPLOYMENT VERIFICATION SYSTEM* (2008), available at <http://www.gao.gov/docdb/lite/summary.php?rptno=GAO-08-729T&accno=A81969>.

44. *Id.* at 3.

ployees hired in fiscal years 2009 through 2012 would cost \$765 million, while verifying the status of current employees would cost an additional \$100 million.⁴⁵ Additionally, the E-Verify program cannot detect document fraud (use of counterfeit documents) and identity fraud (fraudulent use of valid documents or information belonging to others).⁴⁶ This makes it difficult for employers who want to comply with the employment verification process to hire only authorized workers and easier for unscrupulous employers to knowingly hire unauthorized workers. Furthermore, the large number and variety of documents acceptable for proving work eligibility have also hindered verification efforts.⁴⁷ The Obama Administration promises to find a workable federal identification system,⁴⁸ yet no significant changes have been formally adopted since GAO's report.

III. Impact of the ICE Raids

Under the Bush Administration, ICE stepped up its worksite enforcement, resulting in a significant increase in arrests from 2006 to 2008.⁴⁹ In 2002, ICE made 25 criminal and 485 administrative arrests.⁵⁰ In 2006, they soared to 716 and 3667; in 2007, they increased slightly to 863 and 4077; and in 2008, they topped out at 1103 and 5184.⁵¹ An overwhelming number of convictions are of undocumented workers, rather than of their employers.⁵²

From the start of 2007 through the end of 2008, armed officers of ICE raided eighty-six workplaces.⁵³ Most employees were "administratively" arrested and deported or jailed.⁵⁴ Though immigration laws do not make it a felony to work illegally, ICE had paired with federal and

45. *Id.* at 4.

46. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-813, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS (2005), *available at* <http://www.gao.gov/highlights/d05813high.pdf>.

47. *Id.*

48. DORIS MEISSNER & DONALD KERWIN, MIGRATION POLICY INSTITUTE, DHS AND IMMIGRATION: TAKING STOCK AND CORRECTING COURSE 29 (2009), *available at* http://www.migrationpolicy.org/pubs/DHS_Feb09.pdf.

49. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2008 ANNUAL REPORT 17 (2008) [hereinafter ICE 2008 ANNUAL REPORT].

50. *Id.*

51. *Id.*

52. *Id.* ("Of the criminal arrests [1103 in 2008], 135 were owners, managers, supervisors or human resources employees who face charges.")

53. *See infra* Part IV.

54. *See* ICE 2008 ANNUAL REPORT, *supra note* 49, at 17; NAT'L COMM'N ON ICE MISCONDUCT & VIOLATIONS OF 4TH AMENDMENT RIGHTS, RAIDS ON WORKERS: DESTROYING OUR RIGHTS 36 (2008) [hereinafter RAIDS ON WORKERS].

local prosecutors to successfully charge and convict employees who used fake identification for other federal crimes, such as fraud or identity theft.⁵⁵

Anecdotal and empirically, the raids had dramatic effects, not only for those arrested or deported, but also for the communities in which they worked. Workplace raids by armed officers are intimidating and disruptive. The largest ICE raids have involved over a thousand workers, and even the smaller ones net hundreds at a single worksite. A study of the three largest raids showed that “raids have a wide range of adverse consequences for the entire family. Parents are separated from children for long periods of time, and children—especially younger children—cannot understand why this separation occurred. . . . Whole communities experience fear, and this fear leads to trauma for children.”⁵⁶ Citizens have been falsely arrested, and residents have been summarily tried, convicted, and jailed or deported without access to lawyers or clear waiver of whatever rights they may have had.⁵⁷ In one set of audacious raids at several plants operated by Swift & Company, detainees were segregated by race and national origin and interrogated without legal representation.⁵⁸

Racism and xenophobia emanated from and were instigated by the raids.⁵⁹ Commentators have argued that raids heightened tensions between immigrants and African Americans.⁶⁰ In almost half of all raids where employers were arrested, the employer, owner, or its agents had minority surnames, creating an impression of racial or ethnic targeting.⁶¹ In one of the most aggressive enforcement actions, the

55. See ICE 2008 ANNUAL REPORT, *supra* note 49, at 6–7.

56. RANDY CAPPS, ROSA MARIA CASTANEDA, AJAY CHAUDRY & ROBERT SANTOS, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA’S CHILDREN 68 (2007) [hereinafter PAYING THE PRICE], available at http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf.

57. RAIDS ON WORKERS, *supra* note 54, at 52–54.

58. *Id.* at 15; see also Earnest McBride, *Worker Rights Group Condemns Treatment of Howard Plant Workers*, JACKSON ADVOC., Sept. 4, 2008, at 9A (“We are deeply concerned that workers are reporting similar practices that we have seen during the Swift raids in 2006, where workers are segregated by race or ethnicity and interrogated and denied access to counsel,” said Nsombi Lambright, ACLU executive director.”).

59. See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/GGD-90-62, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF IMMIGRATION (1990), available at <http://archive.gao.gov/d24t8/140974.pdf>.

60. McBride, *supra* note 58.

61. See *infra* Figure 2: Percentage of Employers, Owners, or Managers Arrested Who Had Minority Surname.

R

R

R

owners of a targeted kosher meatpacking plant were Orthodox Jews,⁶² and the nationwide media attention led to anti-Semitic behavior in the plant's home community.⁶³ In addition, a disparate pattern of enforcement exists, since individuals with minority surnames accounted for seventy-nine percent of the total number of those employers convicted.⁶⁴

Arrests and detentions of unauthorized workers produce the irony of punishing those who actually live the American ideal: commitment to stable employment⁶⁵ and family. Forty-seven percent of unauthorized immigrants living in the United States live in a household with a spouse and children; whereas only twenty-one percent of U.S.-born residents and thirty-five percent of legal immigrants do so.⁶⁶ Nearly three-fourths of the children of undocumented entrants are citizens of the United States;⁶⁷ however, they were often housed with their families in prison-like environments while the family awaited detention hearings.⁶⁸

IV. Research Reveals a Disparity

A. A Note on Methodology

Statistical information about worksite enforcement of immigration laws was difficult to collect for several reasons. First, the federal

62. See Linda Waddington, *Judge Considers Prejudice in Rubashkin Grand Jury Indictment*, IOWA INDEP., Feb. 24, 2009, <http://iowaindependent.com/11974/judge-considers-prejudice-in-rubashkin-grand-jury-indictment>.

63. See *id.* ("Defense attorneys painted an unappealing picture of anti-Semitism" that tainted the prosecution of Sholom M. Rubashkin, "the highest ranking day-to-day corporate officer at the Postville meatpacking plant, [who] faces a total of 97 charges ranging from bank fraud to immigration-related offenses that, when combined, carry a possible maximum sentence of more than 2,000 years in prison.").

64. See *infra* Figure 2: Percentage of Employers, Owners, or Managers Arrested Who Had Minority Surname.

65. See PAYING THE PRICE, *supra* note 56, at 92 ("Plant turnover was only about a quarter before the raids, meaning that the average worker was there for about four years. Some of the arrested workers had been working at the plant ten years or more. According to respondents, many Latinos owned their own homes and automobiles before the raid. Among the arrested immigrants, those from Mexico had been in the community the longest—or had relatives or acquaintances in town the longest—and they tended to be well integrated.").

66. PASSEL & COHN, *supra* note 9, at ii.

67. *Id.*

68. Susan Carroll & Stewart Powell, *ICE Will Revamp Detainee System Policy of Using Converted Prisons to Hold Families of Illegal Immigrants Is On Its Way Out*, HOUS. CHRON., Aug. 7, 2009, at A1; Press Release, ACLU, Landmark Settlement Announced in Federal Lawsuit Challenging Conditions at Immigration Detention Center in Texas (Aug. 27, 2007), <http://www.aclu.org/immigrants/detention/31469prs20070827.html>.

R

R

government does not publish a list of raid sites nor does it differentiate between employee and employer arrests. The Federal Justice Department's statistics do not distinguish between workplace and other criminal immigration violations of the U.S. Code.⁶⁹ Most information is available only by a careful reading of the ICE website and popular media. Second, not every raid nor employer is identified. The ICE website does not have a running list of "enforcement actions";⁷⁰ therefore, most of the cases were discovered under the headings of "public information," "news releases," or "speeches and testimony." The 2007 and 2008 ICE Annual Reports were also examined, but the 2007 report identified only one employer by name, and the 2008 report identified no employers by name.⁷¹

In light of those difficulties, this research is based on an analysis of eighty-six cases identified on the ICE website or LexisNexis® and covers the period from January 2007 through the end of 2008.⁷² It

69. See Federal Justice Statistics Resource Center, <http://fjsrc.urban.org/index.cfm> (last visited Nov. 2, 2009). Employers are most commonly charged under 8 U.S.C. § 1324 (2006), which prohibits bringing in and harboring aliens with knowledge of or reckless disregard of their illegal status. This section is used in cases against such diverse defendants as human traffickers, see *United States v. Mi Kyung Byun*, 539 F.3d 982, 983 (9th Cir. 2008) (invitation to under-age girls to work in club and be paid for intimate services); migrant smugglers, see *United States v. Lemus-Gonzalez*, 563 F.3d 88, 88 (5th Cir. 2009) (trucker who transported people from the Mexican-United States border was convicted of second-degree murder for driving drunk, eluding a police officer, and killing five of the nine immigrants he was transporting); churches and communities who offer sanctuary to immigrants, see *Am. Baptist Churches v. Meese*, 666 F. Supp. 1358, 1358 (N.D. Cal. 1987); and a union organizer, see *United States v. Pereyra-Gabino*, 563 F.3d 322, 323–24 (8th Cir. 2009) (conviction reversed on appeal) (provided his contact number in case a plant worker was arrested and discouraged employees from disclosing their immigration status to him).

70. U.S. Immigr. & Customs Enforcement, *Worksite Enforcement*, *supra* note 4. Presumably, this data can be procured through requests filed under the Federal Freedom of Information Act. The Immigration Justice Clinic at the Benjamin Cardozo School of Law filed two FOIA lawsuits to obtain arrest data and internal memos regarding home raids conducted by Immigration Customs and Enforcement. BESS CHIU, LYNLY EGYES, PETER L. MARKOWITZ & JAYA VASANDANI, CARDOZO IMMIGRATION JUSTICE CLINIC, CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS 9 (2009), available at http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-Report-Updated.pdf. The data showed that prior to 2006, ICE teams were expected to arrest 125 "fugitives" per year and that seventy-five percent of those arrested needed to be "criminal aliens." *Id.* at 23. In 2006, ICE changed its policy, requiring the ICE teams to arrest 1000 fugitives and eliminating the quota regarding how many arrests needed to be of "criminal aliens." *Id.* at 23.

71. ICE 2007 ANNUAL REPORT, *supra* note 25, at 7–8 (2007) (describing the raids conducted at Swift & Co. meat processing facilities); ICE 2008 ANNUAL REPORT, *supra* note 49.

72. This data came from multiple sources pieced together to make qualitative judgments. The results of the analysis were double-checked against various sources to determine the number of raids; the arrest patterns between employers and employees; the identity of the arrestees; and the number of employers who actually faced sanctions. Al-

R

R
R

groups targets by type of work, and it compares the arrest data by status (employee/employer) and by whether the arrestee had an ethnic surname.

This research does not discount the significance of enforcement actions over the past two years. Comparing 2002⁷³ and 2008, employees were nearly eleven times more likely to be arrested for working without documentation.⁷⁴ Yet the latest numbers still affect less than two percent of all undocumented workers and fewer than one percent of all employers. In 2008, the ICE raids resulted in 6287 arrests⁷⁵ of undocumented workers; compare this number with the approximately 12 million illegal immigrants⁷⁶ and the estimated 7.6 million U.S. employers that existed at the time of the raids.⁷⁷ Enforcement resulted in less than one-twentieth of one percent of all potential violators.

B. Employees, Not Employers, Are Targeted in Raids

Contrary to its public pronouncements, ICE did not aggressively target employers who provide the incentive for immigration. Of the 6527 arrests examined for this Article, most were of employees and only 151 were of officers or company managers. At thirty-three of the eighty-six raid sites, no employers were arrested. Among the handful of those arrested at the other raid sites, many were affiliated with subcontractors working as employment agencies on-site at larger, multinational corporations; rarely were the host companies or officers charged.

though only those cases that were reported during 2007–2008 were included, some of these cases began earlier. In addition, all arrests through June 2009 are included in the data even though some of these occurred after the raids. Raw data is on file with author.

73. Following 9/11, the Homeland Security Act of 2002 was passed, creating the Department of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. Immigration and Customs Enforcement was then created and placed within the Department of Homeland Security. U.S. Immigr. and Customs Enforcement, About U.S. Immigration and Customs Enforcement, *supra* note 3.

74. See ICE 2008 ANNUAL REPORT, *supra* note 49, at 17.

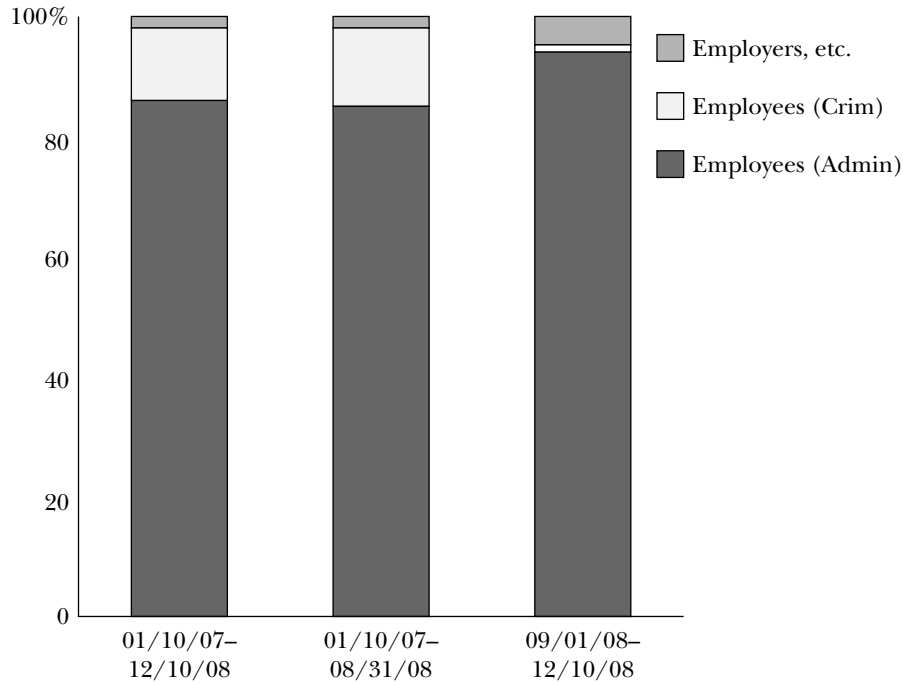
75. *Id.*

76. PEW HISPANIC CENTER, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. (2006).

77. U.S. Census Bureau, USA QuickFacts from the U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Nov. 2, 2009) (“Private nonfarm establishments with paid employees, 2006 [equaled] 7,601,160”).

R
R

Figure 1: Total Number and Identity of Arrestees 2007–2008.



Thus far, few of the raids have resulted in a finding of complicity or knowledge by management.⁷⁸ Some of the facts surrounding several of the raids point to widespread knowledge of a “problem with employees’ documentation,” but the government has not pursued owners or managers.⁷⁹

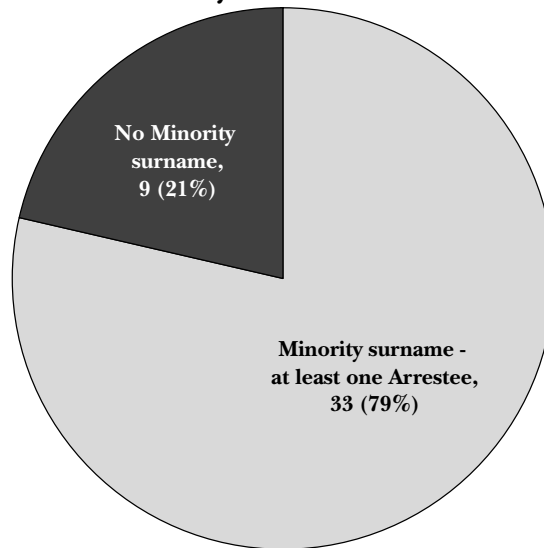
The analysis of the eighty-six cases also indicates possible discriminatory enforcement. Not only were employees more likely than em-

78. See News Release, U.S. Immigr. & Customs Enforcement, Guilty Plea in Government’s Probe of Immigration Violations at IFCO Systems (July 16, 2007) <http://www.ice.gov/pi/news/newsreleases/articles/070716albany.htm>; *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 599 (7th Cir. 1982).

79. See News Release, Sentenced for Knowingly Hiring Illegal Aliens, *supra* note 34; see also News Release, U.S. Immigr. & Customs Enforcement, Indictments and Search Warrants Target Criminal Violations by Staffing Firm for Portland Fruit and Vegetable Processing Plant (June 12, 2007), <http://www.ice.gov/pi/news/newsreleases/articles/070612portland.htm> (“According to the affidavit, beginning in approximately January 2007, ICE conducted an undercover operation at American Staffing Resources, Inc. and Del Monte. During the course of that operation, the undercover informant openly discussed with managers at both Del Monte and American Staffing Resources, Inc. that he was not legally in the United States and did not have the proper identification to work. An employee of American Staffing Resources, Inc. provided him with a counterfeit Social Security card, and later provided him with counterfeit Social Security cards and counterfeit Resident Alien cards for others.”).

ployers to be arrested, but most of those employers who *were* arrested had minority surnames.⁸⁰ ICE denies arbitrary enforcement and has stated specifically: “We don’t racially profile.”⁸¹

Figure 2: Percentage of Employers, Owners, or Managers Arrested Who Had Minority Surname.



C. Thwarting Terrorism Replaced by Immigrant Stereotyping

Some critics call the program “enforcement by propaganda.”⁸² There was broad news coverage of every large raid, which served to “produce[] a narrative that condition[ed] the public to associate immigration with illegality, crisis, controversy and government failure.”⁸³

80. See *infra* Figure 2: Percentage of Employers, Owners, or Managers Arrested Who Had Minority Surname.

81. Milford Prewitt, *Industry Blasts Intensified Immigration Raids: Dragnets Round Up Nearly 200 Workers, Threaten Employers with Criminal Charges*, NATION’S RESTAURANT NEWS, June 9, 2008.

82. May Swanton, *The Year in Review: #18. ICE-Men*, INSIDE COUNSEL, Dec. 1, 2007, available at <http://www.insidecounsel.com/Issues/2007/December%202007/Pages/The-Year-in-Review-18-ICEMen.aspx#>.

83. BANU AKDENIZLI, E.J. DIONNE JR. & ROBERTO SURO, THE BROOKINGS INSTITUTION, A REPORT ON THE MEDIA AND THE IMMIGRATION DEBATE: DEMOCRACY IN THE AGE OF NEW MEDIA VI, at 24 (2008), available at http://www.brookings.edu/reports/2008/0925_immigration_dionne.aspx (follow “Download PDF” hyperlink) (“That coverage is very clearly dominated by various forms of illegality: unauthorized entry to the U.S. and efforts by the government to control it; criminal behavior by immigrants; and malfeasance or incompetence by immigration officials. For example, an analysis of 1,848 Associated Press stories on immigration topics from 1980 to 2007 showed that 79 percent fit into the framework of

Despite the press, two-thirds of immigrants in the United States are here legally.⁸⁴ Of the remaining one-third, few are “criminals.” Less than five percent of the approximate ten million undocumented immigrants present in the United States in 2005⁸⁵ had committed a crime for which they were incarcerated.⁸⁶ GAO examined the status of convicted criminal immigrants and found that twenty-one percent of illegal alien arrests were immigration related; yet sixty-eight percent of criminal immigrants are incarcerated in federal prisons because of immigration-related convictions.⁸⁷ Nearly a quarter of illegal alien arrests and convictions were based on drug offenses, and less than two percent of convictions were based on sex crimes or homicides.⁸⁸ Thus, ICE’s goals of thwarting terrorism and apprehending criminal aliens do not appear to be realized through workplace raids.

ICE’s website maintains that areas involving critical infrastructure and national security are the priority;⁸⁹ however, in practice the raids target a number of facilities that employ “modestly paid workers in all types of manufacturing, agricultural, and food production businesses.”⁹⁰ Furthermore, less than a quarter of the ICE raids conducted in 2007 and 2008 were of government contractors or critical infrastructure worksites.⁹¹

illegality. Of 2,614 stories on immigration in The New York Times over the same period, 86 percent dealt with illegality in various forms, and that included 83% of the coverage in Washington and 88% of the stories from elsewhere in the country. Of 381 stories about immigration on the ‘CBS Evening News’ from 1990 to 2007, 87 percent fit the framework of illegality. And results from other news organizations show the same pattern.”)

84. See MICHAEL HOEFER ET AL., *supra* note 9, at 3 (indicating estimated foreign-born population on January 1, 2008 was 31.3 million, while estimated resident unauthorized immigrant population on the same day was 11.6 million).

R

85. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-646R, INFORMATION ON CERTAIN ILLEGAL ALIENS ARRESTED IN THE UNITED STATES i (2005), *available at* <http://www.gao.gov/new.items/d05646r.pdf>.

86. *Id.* at 12.

87. *Id.* at 18–19.

88. *Id.* at 18.

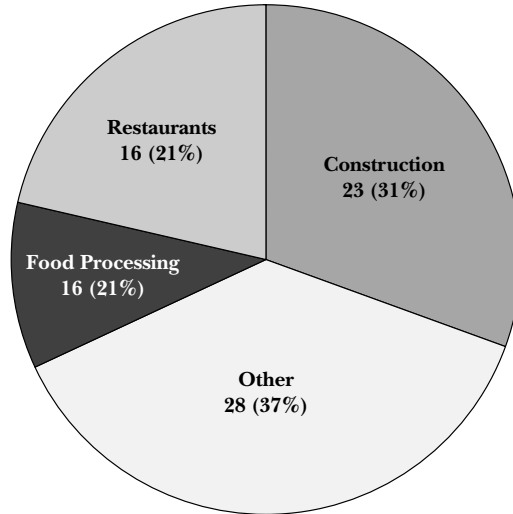
89. U.S. Immigr. and Customs Enforcement, Worksite Enforcement, *supra* note 4.

R

90. JENNIFER G. PARSER, *Remedies Available for Employers That May Have Hired Illegal Aliens*, HR.BLR.COM, June 16, 2008, <http://hr.blr.com/whitepapers.aspx?id=78505>.

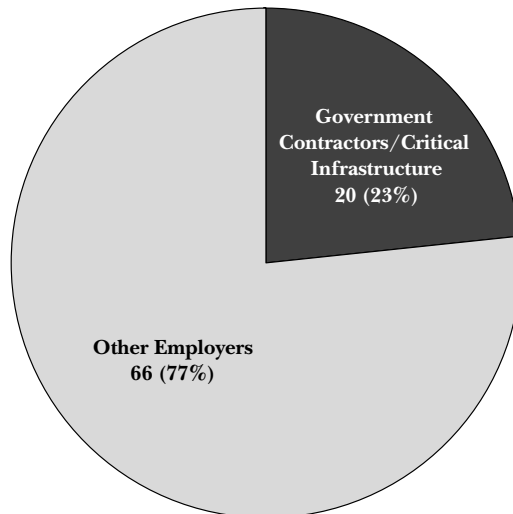
91. See *infra* Figure 4: Percentage and Numbers of Raids at Government Contractors/Critical Infrastructure Worksites 2007–2008.

Figure 3: Raids By Type of Employer



Only twenty of the raids took place at a government contractor or a firm performing “critical infrastructure” work, while nineteen of the raids were at restaurants. Although the second largest cohort of undocumented workers toils at farms or food processing plants, only ten such entities were raided. The likeliest raids were at construction sites (twenty-three), and restaurants were the second likeliest to be raided.

Figure 4: Percentage and Numbers of Raids at Government Contractors/Critical Infrastructure Worksites 2007–2008.



Conclusion

Since 2009, ICE has articulated a slightly different agenda:

ICE will focus its resources in the worksite enforcement program on the criminal prosecution of employers who knowingly hire illegal workers in order to target the root cause of illegal immigration. ICE will continue to arrest and process for removal any illegal workers who are found in the course of these worksite enforcement actions in a manner consistent with immigration law and DHS priorities. Furthermore, ICE will use all available civil and administrative tools, including civil fines and debarment, to penalize and deter illegal employment.⁹²

This shift in policy has been marked by a very significant effect: there have been no worksite raids reported on the ICE website since February 2009.⁹³ However, the Obama Administration makes raid research no easier, continuing to make information available only in news stories on the website. Moreover, the departmental budget for the fiscal year of 2010 no longer lists “Worksite Enforcement” as a line item, as did the last Bush Administration.⁹⁴ Thus, comparison between administrations is difficult.⁹⁵ The government promises to avoid human rights violations to increase fairness and help employers comply with the law. Further, the current administration wants to make it possible to electronically determine the immigration status of every worker and detect fraudulent use of identification.⁹⁶

92. U.S. Immigr. & Customs Enforcement, Worksite Enforcement Overview, <http://www.ice.gov/pi/news/factsheets/worksite.htm> (last visited Nov. 15, 2009).

93. U.S. Immigr. & Customs Enforcement, <http://www.ice.gov> (last visited Nov. 15, 2009).

94. *Compare* U.S. IMMIGR. & CUSTOMS ENFORCEMENT, FACT SHEET: FISCAL YEAR 2010 PRESIDENT’S BUDGET REQUEST (2009), *available at* <http://www.ice.gov/pi/news/factsheets/index.htm>, *with* U.S. IMMIGR. & CUSTOMS ENFORCEMENT, FACT SHEET: FISCAL YEAR 2009, at 5 (2008), *available at* <http://www.ice.gov/pi/news/factsheets/index.htm>.

95. Congressional testimony about the DHS and ICE budgets suggests a departure from the dramatic raids of the previous administration:

I also intend to bring new ideas and creativity to our worksite enforcement program, including working with our federal, state and local partners to ensure that exploitative employers that violate labor and other laws are fully prosecuted. My goal is to implement a strategy that will not only punish employers who knowingly violate the law, but effectively deter employers from hiring unauthorized labor, addressing the demand that drives illegal immigration. This will reduce the effect of one magnet that encourages many people to enter the United States unlawfully.

The Fiscal Year 2010 Budget for Immigration and Customs Enforcement, Customs and Border Protection, and the U.S. Coast Guard: Hearing Before the Subcomm. on Border, Maritime and Global Counterterrorism and the H. Comm. On Homeland Sec., 111th Cong. 3–4 (2009) (statement of John T. Morton, Assistant Secretary, U.S. Immigration and Customs Enforcement).

96. U.S. Immigr. and Customs Enforcement, Worksite Enforcement, *supra* note 4.

ICE had few resources to devote to these cases, and most raids were at restaurants or construction sites, rather than at businesses that affect homeland security. Overwhelmingly, the arrestees were illegal aliens. Those company officers or managers who were charged were primarily those with a minority surname. There is no known nexus between the scope of unauthorized working or hiring and workplace raids.

It is far from clear that the ten-fold increase in worksite raids since the DHS was created⁹⁷ has either mitigated illegal immigration or bolstered employer compliance. Charting the location of workplace raids shows no significant difference over time. Raids have stopped for the most part. Criminal prosecution against more employers who were raided may continue. But there is little to no evidence that two years of internal immigration enforcement accomplished the identified goals of the Department of Homeland Security.

97. News Release, U.S. Immigr. & Customs Enforcement, Milwaukee-Area Restaurant Owner Arrested for Hiring, Harboring Illegal Aliens, May 22, 2008, <http://www.ice.gov/pi/news/newsreleases/articles/080522milwaukee.htm> ("In fiscal year 2007, ICE secured more than \$30 million in criminal fines, restitutions, and civil judgments in worksite enforcement cases. ICE arrested 863 people in criminal cases and made more than 4,000 administrative arrests, which is a tenfold increase over 2002 figures.").

