HUMAN RIGHTS WATCH

WITHIN REACH

A Roadmap for US Immigration Reform that Respects the Rights of All People

(front cover) Mario Chavez shares a moment with his wife, Lizeth Chavez, through the border fence at Playas de Tijuana during a weekend family visit. Mario, a US citizen, cannot leave the US because of parole restrictions, and Lizeth, a Mexican citizen, does not have a visa to go to the United States. The couple, who have two children, had been meeting every Saturday since December 2007. Family visits and picnics held on the beach at the border wall were once common for people with family on both sides of the border, but have since been severely restricted by the US Border Patrol.

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The urge to migrate—for family or "a better life"—has shaped the history of the United States since its inception. Today, 13 percent of the US population is foreign-born.[1] Among these 40 million immigrants, 11 million are unauthorized, living and working in the United States without legal status.[2] Their lack of status makes them highly vulnerable to violations of basic rights protected under US and international law. Fear of deportation often drives many to live as quietly as possible, doing nothing to draw attention to themselves, even if it means not reporting crimes or workplace abuses.

Yet these immigrants do not live in isolation. Many are husbands and wives of US citizens and lawful permanent residents, as well as fathers and mothers, sisters and brothers, and sons and daughters. Unauthorized immigrants perform jobs often shunned by citizens yet crucial to the US economy.[3]

The current US immigration system, however, focuses more on harsh enforcement of outdated, ineffective laws than on application of policies that take into account the family and labor considerations that draw immigrants to the United States. Since 1990, the US government has deported over 4 million immigrants,[4] under laws that largely disregard family bonds and the immigrants' deeply held ties to American communities. In 2011, the immigration detention system—which has increasingly become like the criminal justice system—held over 400,000 people, most of whom were not facing criminal charges; it has held about 3 million people over the past decade.[5]

The injustices and inefficiencies of the immigration system can have devastating consequences not only for the millions of unauthorized immigrants in the United States, but also for the millions of citizens and legal residents who share their lives and depend on them. It hurts their employers, their schools, and their communities. A system that is arbitrary, unfair, and bewildering can destroy individual lives, damage the country's economy, and erode society's faith in the rule of law.

The majority of Americans support comprehensive reform that squarely addresses the vulnerabilities of the 11 million unauthorized immigrants.[6] The Obama administration and Congress should seize this opportunity to create a fairer, more effective, and more compassionate immigration system. The long history of immigration in the United States, from its brightest to its darkest moments, provides a wealth of lessons from which the government can draw to create a system that regulates migration effectively while it protects fundamental rights.

Such a system should be guided by the following four principles:

1. The US immigration system should respect and protect families.
2. The US immigration system should be committed to protecting immigrants from workplace violations and crime.
3. Immigration reform should include an effective legalization process that respects families, protects victims from abuses and crimes, and acknowledges the contributions of long-term residents.
4. The US immigration system should focus enforcement efforts on genuine threats and ensure due process rights are protected for all people.

Mario Aguilar shows photos of his four sons as he waits for work outside the Casa del Migrante shelter for migrants in Tijuana, Mexico. Aguilar, a Mexican citizen, had been living in the United States for 28 years before he was deported.

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I. The US Immigration System Should Respect and Protect Families.

Current US immigration law threatens American families' right to live together.

According to the Pew Hispanic Center, nearly 17 million people in the United States live in families in which at least one member is an unauthorized immigrant.[7] Despite these family relationships, most unauthorized immigrants have no realistic way to gain legal status under existing law.

Some of these immigrants have valid applications for legal status filed by their US citizen or permanent resident family members, but low numerical limits for family visas and processing inefficiencies have led to a massive

Benny Lopez (right) and his four children, in their Texas apartment, near the Mexican border. Their mother, formerly a permanent resident of the United States, was deported after a conviction for drug possession. Flores uprooted his family from his native Kansas to be closer to his wife. The Flores family is one among thousands torn apart by US immigration rules that do not adequately address family unity.

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backlog. An adult son or daughter from Mexico, for example, may wait almost 20 years after a petition is filed by a US citizen parent. This backlog creates tremendous pressure throughout the immigration system, leading to increased illegal immigration and visa overstays.

Others are ineligible to apply for legal status, despite their family relationships, because of the length of time they have been in the US without status or because of the way in which they entered the country. Even spouses of US citizens, if they entered unlawfully, cannot gain legal status without leaving the country—and that can trigger a 10-year bar to returning. A common misconception is that having a US citizen child can enable an unauthorized immigrant to immediately gain legal status. A US citizen can apply for a parent to gain permanent resident status only once he or she turns 21, and even then a parent who has been in the US without status for over a year will have to leave the country and wait 10 years to

apply for legal status. A recent change in administrative policy will allow some relatives (excluding parents of US citizens) to apply for a waiver of the 10-year bar, which requires proof of extreme hardship to a US citizen relative, before leaving the country.[8] But this change only gives people the option of applying for the waiver in advance and is limited to a small number of unauthorized immigrant family members. It does not eliminate the general bar most relatives face to gaining legal status.

Other immigrants are completely barred from getting a visa through their US citizen partners. The Defense of Marriage Act, known as DOMA, excludes lesbian and gay couples from the definition of "spouse," thereby preventing thousands of US citizens from receiving legal recognition of their same-sex partners for purposes of immigration.[9]

Thus, under current immigration law, most unauthorized immigrants with US citizen family are under a constant threat of deportation.[10] In most cases, immigration judges are not even empowered to take family unity into account. In just the past two years, the US government has carried out over 200,000 deportations of people who said they had US citizen children.[11] These parents have almost no way to return legally. Immigrants can be barred from the US for 10 years, or for life, if they leave after having been in the country for at least a year without authorization.

Immigration law is particularly harsh on people who face deportation after criminal convictions, even for lawful permanent residents convicted of minor or old offenses. Amendments that went into effect in 1996 stripped immigration judges of much of the discretion they once had to balance family unity against the seriousness of the crime. As a result, many lawful permanent residents, after serving whatever sentence is imposed by the criminal justice system, feel they are further punished with exile.[12] If they return without permission to the US, they are often charged with the federal crime of illegal reentry, punishable by up to 20 years in prison. Those who, often in desperation, return repeatedly end up serving, as one criminal defense attorney put it, "a life sentence on the installment plan."[13]

Arrested and Deported After an Unpaid Ticket

"Alicia S." came to the United States in 2000 without authorization. She found work at a hotel, married another unauthorized immigrant, and started a family. Her daughters, both US citizens, are now 11 and 9 years old. At age 5, her younger daughter's kidneys began to fail. In 2009, Alicia's husband was deported (she has not heard from him since). A year later, police stopped Alicia for pulling out of a parking lot without her lights on. Surrounded by several squad cars, she was arrested for not having paid a ticket for driving without insurance, while her daughters cried in the back seat.

That was the last time Alicia saw her daughters. After she spent two weeks in jail, a local judge ordered her released, saying it was wrong for her to be jailed for traffic violations. But immigration authorities then immediately arrested her, and she was deported to Mexico.

Alicia's daughters are now in foster care. Soon after being deported, Alicia received word that her daughter had successfully received a kidney transplant. "I felt so much joy,
I was so happy," Alicia said, from the sitting room of a shelter in Mexico for dozens of women recently deported from the United States. "But I felt sad that I could not be in the hospital taking care of her."

Alicia has tried to cross back into the US three times, but she was caught in the first two attempts, and in the last she got lost and turned back. She has been abandoned by smugglers without water and food, and she has spent three months in immigration detention and two weeks in federal jail. She also now has a criminal record for the federal misdemeanor of illegal entry. She said, "I begged the judge to forgive me, that I was desperate because of my daughters." She has been told the conviction would make it almost impossible for her to get a visa now. But Alicia cannot imagine living without her daughters: "I have not lost the desire to try again."[1]

[1] Human Rights Watch interview with Alicia S. (pseudonym), Tijuana, Mexico, October 17, 2012.

We Live Day to Day Praying that the Immigration Laws Will Change

"Chet," 67, and his Taiwanese partner "Wei," 59, have been committed partners for two decades, during most of which time Wei has lived in the US without legal status. As Chet told us, "We have lived together and been devoted to each other for the last 20 years and have tried every way possible to get him permanent residence.... Every possibility has been a dead end because of immigration laws against gay partners.... [Wei's] mother passed away two years ago but he could not chance returning for the funeral for fear he would not get back in." Now Chet fears that if he dies, Wei will be deported if he comes forward as an heir. "We live day to day praying that the immigration laws will change and we can live together in peace without the constant fear that something will happen that will cause his deportation."[2]

[2] Email communication from "Chet" to Immigration Equality (names changed at his request), September 1, 2003, in Human Rights Watch/Immigration Equality, *Family, Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples under US Law*, May 2, 2006, http://www.hrw.org/reports/2006/05/01/family-unvalued-0.

Recommendations: Improvements to the US immigration system should be grounded in the fundamental responsibility of government to protect families.

- Restore the power of judges to consider family unity in any removal decision and expand the eligibility criteria for cancellation of removal and other legal defenses that take into consideration the impact on US citizen and permanent resident family members.
- Reevaluate the country quotas and number of family-based preference visas available, set decades ago, to reflect the current situation.
- Ensure bi-national same-sex couples receive the same recognition and treatment afforded to bi-national opposite-sex couples.
- Create avenues for immigrants who are currently inadmissible, including those who have criminal convictions, to apply for permission to gain legal status if they have lawfully present family in the US and can currently demonstrate good moral character.

II. The US Immigration System Should Be Committed to Protecting Immigrants from Workplace Violations and Crime.

A. Equal protection for all workers

Immigrant workers, both authorized and unauthorized, are a mainstay of the US economy. Eight million unauthorized immigrants work in the US economy.[14] Many immigrants are entrepreneurs, starting businesses as humble as grocery stands and as transformative as Google. And certain industries depend on immigrant workers. For example, the vast majority of farmworkers (72 percent) are foreign-born; conservative estimates suggest that 50 percent of all farmworkers are unauthorized.[15]

All workers, regardless of immigration status, should have the right to safe and healthy work conditions, to equal treatment, and to organize and bargain collectively. Immigrant workers, however, face particular challenges in asserting these rights, even when they are legally allowed to work in the United States. Industries that rely heavily on an immigrant workforce, such as agriculture and home health care, are excluded from basic labor laws, such as overtime, that apply to nearly every other sector. Immigrant workers injured on the job or subject to sexual abuse are often afraid to report the harm they have suffered.[16] Employers who fail to pay wages often tell their workers, "I don't have to pay you, you're illegal."[17] The US Supreme Court's 2002 decision in *Hoffman Plastic v. NLRB* emboldens such employers, potentially limiting the remedies available to unauthorized workers when employers use such tactics. Temporary workers, despite having legal permission to work,

Hard Work Rewarded with Threats of Deportation

Human Rights Watch met "Monica V." in upstate New York, where she had come looking for work as a farmworker. She said she had come to the US alone 12 years ago because the father of her children left her, and she could no longer take care of her six children in Guatemala. Her family was eating only one meal a day, a tortilla with salt.

When Monica first arrived in the United States, she began working in sanitation at a turkey processing plant in Georgia. She worked two shifts a day, and even took on another two-hour stint injecting turkeys for extra income, sleeping only three hours a night. But she was injured when the hose she used to clean the machines hit her eye. The company asked her for "good papers," even though she had already been working at the company for three years, and then fired her for being unauthorized. "[W]hen I had the accident," she says, "they started to disregard me. I was no longer good for them."

This experience was repeated. Monica reported that several years later an employer at another poultry processing plant also used her lack of legal immigration status to push her out when she was injured on the job. Her hand was injured so badly in the workplace injury, she said, that two of her fingers still have no feeling. Managers called her into the office and asked, "Do you want us to call the police or do you want to leave on your own?" She replied, "Why would you want to call the police?" and they responded, "Because the papers are not good. You have to leave or I'll call the police."

Then, Monica said, her supervisor asked her where she lived, making "very clear what he was looking for"—if Monica had sex with him, she could have her job back. Monica says, "I cried so bitterly, why God, why so many things? And they didn't give me back my job." She had worked at the plant for seven years.

After 12 years in this country, having endured numerous injuries, harassment, and employer abuse, Monica said, "I feel so sad…. Does the president not know how much we do? How much we sacrifice? And now we are criminals?"[3]

[3] Human Rights Watch interview with Monica V. (pseudonym), New York, August 2011, in Human Rights Watch, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment*, May 16, 2012, http://www.hrw.org/reports/2012/05/15/cultivating-fear.

A 15-year-old girl hoes cotton in Texas. Unauthorized migrant farmworker women and girls are exceptionally vulnerable to sexual abuse. Geographic isolation, language barriers, fear of deportation, and the desperate need for work make it very difficult for them to report abuse, much less get help.

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"Now there's no safety for Hispanics."

Soon after Alabama passed a harsh anti-immigrant law in 2011, "Sara M." found out that a friend, a Honduran immigrant, had been beaten and robbed in Birmingham. Two neighbors had witnessed the assault, brought her friend inside, and tended to his wounds. But they did not call the police or take him to the hospital because he feared questions about his unauthorized status. Sara said she called the police and asked if they would ask about his status if he came in to report the crime. When they replied, "Yes," she hung up. "Before, you could call the police and feel safe," Sara said. "Now there's no safety for Hispanics."[4]

[4] Human Rights Watch interview with Sara M. (pseudonym), (location withheld), October 29, 2011, in Human Rights Watch, *No Way to Live: Alabama's Immigrant Law,* December 14, 2011, http://www.hrw.org/reports/2011/12/14/no-way-live.

are dependent on their employers for continued legal status. Thus, unscrupulous employers can use the threat of deportation to coerce immigrant workers, both authorized and unauthorized, to not report abuses. And unlike victims of serious crimes, victims of workplace abuse who file claims have no access to temporary visas that would allow them to remain in the United States while their claims are pending.

Recommendations: A new immigration system should ensure that all workers, regardless of immigration status, can assert their basic rights and seek remedies when those rights are violated.

- Create temporary visas for unauthorized workers who are victims of workplace abuses so that they can pursue their claims and, in criminal cases, so that they can testify and help ensure that perpetrators face justice.
- Ensure equality of remedies for all workers who suffer workplace violations or seek to enforce workers' rights, regardless of immigration status.
- Minimize the particularly exploitative conditions of temporary migrant work:
    - Make temporary worker visas portable between employers, including employers in different industries.
    - Provide temporary migrant workers a grace period to search for new employment after leaving their initial job.
    - Ensure temporary migrant workers can maintain legal status while credible legal claims are pending.

B. Equal protection for all victims of crimes.

When unauthorized immigrants fear reporting crimes, the entire community is put at risk. Instead of encouraging trust in law enforcement, the US government and several states support laws and policies that, in effect, intimidate unauthorized immigrants and deter them from calling the police.

Local law enforcement agencies have increasingly become intertwined with federal immigration enforcement. Over the last several years, the US government has pushed states to adopt programs such as the Criminal Alien Program, the 287(g) Program, and Secure Communities. Through these programs, unauthorized immigrants who come into contact with law enforcement—often through incidents as minor as traffic stops—have been checked against an immigration database and then held for immigration authorities. Although the Obama administration claims Secure Communities targets only serious criminals for deportation, over half of immigrants removed through the program had no criminal convictions or convictions only for minor offenses, including traffic violations and street vending.[18] In some communities, unauthorized immigrants have good reason to believe any contact with the police, even a call reporting domestic violence, can lead to deportation. As a result, law enforcement officials around the country have expressed concern that the program is adversely affecting their ability to police their communities.

At the same time, state governments in Arizona, Alabama, South Carolina, Georgia, and Utah have all passed laws that require or authorize law enforcement agencies to check the immigration status of individuals during a lawful stop or arrest.

A police car on patrol in Troy, Alabama, where a state law in 2011 had placed severe restrictions on the access of unauthorized immigrants to public services, schools, and business contracts. A US Supreme Court ruling in 2012 set aside most of those limits, but allowed police to question people about their immigration status during routine stops.

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A temporary visa called the U visa is available to unauthorized immigrants who are victims of certain serious crimes, who have suffered serious physical or mental abuse, and who cooperate with the investigation,[19] but only 10,000 visas are available each year, and for each of the past three years that limit has been reached before the end of the year. Local law enforcement agencies also often unfairly refuse to certify applications for victims who have cooperated with investigations.[20] Most witnesses to crimes—as opposed to victims—are not eligible for U visas, which limits law enforcement's ability to investigate crimes fully.

Recommendations: A new immigration system should ensure that civil immigration enforcement does not take priority over protecting communities from violent crime.

- End Secure Communities, the 287(g) Program, and similar programs that turn local law enforcement officers into immigration agents.
- Eliminate the arbitrary cap on U visas.
- Allow for additional ways to prove cooperation with law enforcement in applications for U visas.
- Create temporary visas for witnesses of serious crimes (the crimes enumerated in the eligibility criteria for U visas) in order to further investigations.

III. Immigration Reform Should Include an Effective Legalization Process that Respects Families, Protects Victims from Abuses and Crimes, and Acknowledges the Contributions of Long-Term Residents.

The large and highly vulnerable unauthorized immigrant population in the US faces many unnecessary hardships under the current immigration system. To be effective, any revision of the system will need to be coupled with a program of legalization for unauthorized immigrants currently in the United States. Such a legalization process should be clear and straightforward, and its eligibility criteria should be non-discriminatory and anchored by the values of fairness that the US has long espoused.

Recommendations: The United States should put in place a revamped legalization process that is forward-looking and includes opportunities for those who are currently unfairly disqualified from applying for legal status. The process should:

- Include immigrants of limited means.
- Include procedural safeguards such as confidentiality and an ability to appeal decisions to a higher authority.
- Ensure that vulnerable immigrants (for example, youth, the elderly, and persons with mental disabilities) have access to assistance in navigating the process.
- Recognize the special ties to the United States established by immigrants who have lived in the US from a young age.
- Ensure that unauthorized immigrants who under existing law may be barred from the United States, such as for immigration offenses or criminal convictions, are given the opportunity to overcome these bars and apply for legalization if they are able to offer evidence of current good moral character, long residence in the United States, family ties, military service, and similar factors in their favor.
- Create mechanisms that allow future legalization of unauthorized immigrants if certain requirements are met, so that unfair treatment of immigrants is not replicated in future generations.

An unauthorized immigrant who has lived in the US for 12 years sits with her US citizen grandson in her Mexican restaurant in Alabama.

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IV. The US Immigration System Should Focus Enforcement Efforts on Genuine Threats and Protect the Due Process Rights of All People.

The US immigration enforcement system has grown exponentially since the last major legalization program under President Ronald Reagan. Deportations have increased dramatically, from 30,039 in 1990 to over 400,000 in 2012, totaling over 4 million since 1990. As recently reported by the Migration Policy Institute, expenditures on immigration enforcement exceed spending by all other criminal federal law enforcement agencies *combined*.[21] Yet rather than ensure public safety and enhance the rule of law, the indiscriminate enforcement of harsh laws has broken apart families and forced others to live in fear, while diverting public resources that could have been usefully spent in other ways.

Studies indicate that recent immigrants commit crimes at lower rates than US-born people.[22] As local law enforcement gets increasingly involved in immigration enforcement through programs like Secure Communities, the interactions that lead to deportation are not arrests for serious, violent offenses, but often traffic stops and other matters that do not always lead to criminal charges. At the same time, an enormous number of crimes, including nonviolent offenses like shoplifting, now constitute "aggravated felonies" under immigration law (even if they do not match the definition of "aggravated felony" in criminal law) and are grounds for mandatory and permanent deportation, even of longtime lawful permanent residents. The federal crimes of illegal entry (a misdemeanor) and illegal reentry (a felony) also now make up over 50 percent of all federal prosecutions,[23] driven largely by Operation Streamline and similar programs that seek to criminally prosecute everyone caught entering the US unlawfully. Customs and Border Protection refers more cases for criminal prosecution than the FBI,[24] and some judges and prosecutors have raised questions about whether resources are being diverted from more serious criminal matters.

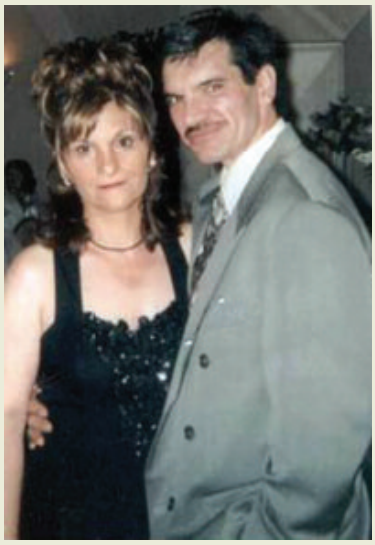
The sharply expanded caseload has severely impacted the rights of non-citizens to due process and to a fair hearing in both civil immigration courts and in the federal criminal justice system. The backlog in immigration courts has not diminished. A case for a non-detained person takes an average of 17.5 months to be adjudicated in immigration court, with some cases lasting over five years.[25] Within this tremendously complex system, where losing a case can sometimes mean a permanent bar to returning to the United States, non-citizens are only represented by a lawyer if they are able to pay for counsel or can find pro bono assistance. The impact of having counsel is stark: asylum seekers, for example, are three to six times as likely to receive asylum if they are represented by counsel. Without appointed counsel, particularly vulnerable populations, like persons with mental disabilities and children, cannot fairly defend themselves or receive a fair hearing. Once a removal order is final, non-citizens have very limited opportunities to appeal the decision to a federal court. Thus, even when errors are made by immigration judges, it can be extremely difficult to remedy the errors, especially when the non-citizen has already been deported.

Even this flawed system of removal proceedings, with its delayed hearings and limited access to counsel, is unavailable to hundreds of thousands of people each year. The majority of deportations are not carried out through orders by an immigration judge but by mechanisms like "stipulated removals," in which non-citizens accept removal before seeing an immigration judge, or "expedited removals," in which non-citizens can only offer limited defenses to deportation and are heard not by a judge, but by an immigration officer. Many have reported being misled about and pressured to accept stipulated removal—even when they may have had valid claims to stay in the country legally—by officials who promised to release them or said, "You can come right back tomorrow."[26]

The pressure of increased immigration enforcement has also had a significant impact on the federal criminal justice system. Under Operation Streamline and similar programs along the border, federal courtrooms have become unrecognizable, packed with defendants who plead guilty in groups, with lawyers who are able to meet with their clients for only 10 to 30 minutes at a time. Federal judges, prosecutors, and defenders have criticized Operation Streamline for wasting resources that would have been better spent on prosecuting more serious crimes.[27]

And although the Obama administration claims that it is targeting serious and dangerous criminals for deportation, its claims do not hold up when the statistics are scrutinized. Although a greater proportion of non-citizens deported now have criminal convictions than ever

No Second Chances



Antonio Cerami came to the United States from Italy with his family when he was 12 years old, as a lawful permanent resident. In 1984, he met Cristina, who is a US citizen, and they were married in 1992. Antonio became stepfather to her four children, and the couple had a son of their own.

Cristina told Human Rights Watch, "We were fine, we were just a normal—not a rich—family, but very comfortable, right? I went to work, he went to work, we hardly ever saw each other because we worked for 10 hours. But we had a plain old normal life."

Then, in 2003, Antonio decided to take his young son and wife on a three-week trip to Italy for a niece's wedding. Upon their return to Chicago's O'Hare airport, Antonio was taken into custody in connection with a conviction he had received 19 years earlier for participating in the attempted robbery of a pizza parlor. Antonio had been sentenced to six years in prison and released after three years for good behavior. Although he had since complied with all conditions of his parole and lived without further troubles with the law for over 15 years, Antonio was ordered deported back to Italy. Cristina explained what happened when she was called to testify at the immigration court:

When I begged the judge not to take Tony away, the judge said, 'You have a job, you can work.' Well what happened to America and family unity? What happened to that? Does that not mean anything? No child left behind?... My husband paid taxes. He was here for 30 years [before his deportation].... My daughter, you should have seen the way she was crying.... He was her dad. He raised her since she was five years old.

Cristina's youngest son had to undergo counseling after his father was deported. With the loss of Antonio's income and expensive legal fees, Cristina lost their house in the suburbs.

Her oldest daughter moved in with her boyfriend's family and, Cristina explained, "Right now we don't really have a home.... John lives with a friend, Jessica lives with another friend, Danny's with his uncle and Angela lives with another friend. They have really split us up."[5]

[5] Human Rights Watch interview with Cerami family, Chicago, Illinois, February 5, 2006, in Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, July 17, 2007, http://www.hrw.org/reports/2007/07/16/forced-apart-0.

before, of the 188,382 non-citizens deported for criminal convictions in 2011, 42 percent had as their most serious offense a conviction for immigration or criminal traffic offenses.[28] Four years earlier, when there were almost 50 percent fewer deportations of people with criminal records, traffic offenses did not even make the top 10 offenses.[29]

Hector Barajas, left, and Fabian Rebolledo show photographs of themselves from when they were in the US Army. Both were deported to Mexico after felony convictions, despite their military service and having US-born children. The two formed a support group to help deported US veterans around the world and to lobby for changes in US immigration law.

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The blurring of the line between civil immigration enforcement and criminal law enforcement is perhaps most apparent and problematic in the vast system of immigration detention. To deprive a person of his or her liberty is a grave matter, particularly when it occurs outside the criminal justice system, with its established due process protections. Many nonviolent offenses, including minor possession of controlled substances and shoplifting, trigger a "mandatory detention" provision in immigration law, meaning immigrants (including lawful permanent residents) have no opportunity to post bond. By contrast, in the US criminal justice system, no one is held in comparable circumstances (in pre-trial detention, for example) without a hearing to determine if they are a flight risk or dangerous.

Immigration detention is supposed to be civil and administrative in nature, rather than punitive, and it should be used as sparingly as possible. As the American Bar Association has recommended, civil detention should be closer in nature to housing in a secure nursing facility or residential treatment facility than to incarceration in a prison.[30] About half of all detainees have never been convicted of a crime, and even those convicted of a crime have already served any sentences meted out by the criminal justice system.

In the last decade, however, an expensive and extensive system of detention centers and local jails have held 3 million non-citizens, without due consideration of whether they are actually dangerous or at risk of absconding from legal proceedings. Numerous detainees, including torture victims and children, have endured punitive conditions in which medical care is grossly inadequate and sexual abuse goes unreported or unaddressed.[31]

Prolonged detention also severely impacts non-citizens' ability to fight deportation, as continued detention often separates them from their families, limits access to counsel (particularly when they are transferred far from home), and leads to financial hardship. Rather than ensuring that immigrants attend removal hearings, such detention unfairly impedes their ability to receive a fair hearing.

Recommendations:

- Reject the draconian and arbitrary provisions of the 1996 amendments to the immigration system and limit the definition of "aggravated felony" to serious violent crimes classified as felonies under state law.
- Restore discretion to immigration judges to weigh evidence of rehabilitation, family ties, and other equities against a criminal conviction in deciding whether to deport lawful permanent residents.
- Ensure that lawfully present non-citizens, and those non-citizens whose legal status is in dispute, who are facing removal have access to judicial review and appeal to a higher authority, as required by international human rights law. In addition, ensure that detained individuals, including those detained pending deportation, have access to judicial review of the decision to detain them.

A Mother Convicted and Imprisoned as She Tries to Return to Her American Family

Last year, "Brenda R.'s" two adult sons were killed in Mexico. She said her sons were not involved in any criminal activity, but one son had befriended a woman said to be the girlfriend of a local drug trafficker, in a small town in the state of Chihuahua, the site of considerable drug-related violence. After receiving threats, Brenda's son and his brother decided to leave town. But before they could leave, they were gunned down in the parking lot of a bar.

Brenda traveled to Chihuahua to bury her sons, but also started asking questions about the police investigation and the woman with whom her son had been involved. Fighting back tears, Brenda remembered that local residents and the police in Chihuahua had warned her to stop asking questions.

Feeling unsafe in Mexico, Brenda tried to return her family in Texas. Although she had no legal status, she was a long-time resident of Dallas and was married with two US-born children. But that made no difference when she was caught in an area covered by the federal program known as Operation Streamline. Under its zero-tolerance policy, Brenda was criminally prosecuted and convicted of the federal misdemeanor of illegal entry.

In desperation at being separated from her American family, Brenda tried two more times and each time, she was referred for criminal prosecution.

Brenda had never been in trouble with the law before. She now has a federal criminal record with two illegal entry convictions and one for presenting false documents, and very limited options for reuniting with her US family. She ended up spending 60 days in a county jail, and she still remains in immigration detention, fighting for a chance to show that her life is at risk back in Mexico.[6]

[6] Human Rights Watch interview with Brenda R. (pseudonym), Pecos, Texas, September 24, 2012.

- Reform the expedited removal process to allow for a fairer and more complete review of a non-citizen's arguments against deportation.
- Ensure immigration judges provide custody hearings for "arriving aliens" on an individual basis and review all deportation orders in order to reduce the risk of wrongful deportation.
- Make legal counsel available to indigent vulnerable immigrants, such as mentally ill persons and children, facing deportation or seeking asylum.
- Eliminate arbitrary deadlines currently in law, such as the one-year limit to apply for asylum.
- Halt Operation Streamline's expansion and evaluate the need for continuing operation of such programs.
- Reform immigration detention and:
    - Limit mandatory detention to violent offenders.
    - Do not subject lawful permanent residents and asylum seekers to mandatory detention (unless they are shown to be a safety or flight risk).
    - Expand the limited alternatives-to-detention programs currently in use.
    - Prohibit all long-distance transfers of detainees that could interfere with assistance of counsel or unduly separate detainees from their familes.
    - Guarantee proper treatment of detainees, including access to adequate medical care.

Notes

[1] Pew Hispanic Center, "Unauthorized Immigrant Population: National and State Trends, 2010," February 1, 2011, http://www.pewhispanic.org/files/reports/133.pdf (accessed January 8, 2013).

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[3] Pew Hispanic Center, "Unauthorized Immigrant Population: National and State Trends, 2010."

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[20] See Human Rights Watch, *Cultivating Fear*, Section V: A Dysfunctional Immigration System, Limitations of U Visas, p. 49.

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