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OVERCRIMINALIZING IMMIGRATION

JENNIFER M. CHACÓN*

Although there is a burgeoning literature on the criminalization of migration,¹ immigration issues are not usually included in academic conversations surrounding overcriminalization.² Criminal law scholars may not have been particularly attuned to developments in the world of immigration law because they have understood it to be primarily the domain of civil or administrative law.³ For most of U.S. history, this has

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¹ See, e.g., Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009) [hereinafter *Managing Migration*]; Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007) [hereinafter *Unsecured Borders*]; Ingrid Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639 (2004); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2009); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11*, 25 B.C. THIRD WORLD L.J. 81 (2005); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003); Juliet P. Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

² Two recent symposia on the topic of overcriminalization, for example, have not included any discussions dedicated to the topic of immigration enforcement. See Ellen S. Podgor, *Foreword*, 7 J.L. ECON. & POL'Y 565 (2011) (describing the contributions to the 2010 George Mason symposium on overcriminalization); Ellen S. Podgor, *Foreword: Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005) (outlining the contributions to the 2005 American University Washington College of Law symposium on overcriminalization).

³ Supreme Court jurisprudence reinforces this divide, making it clear that deportation is not a criminal punishment and that the procedural protections that apply in the criminal realm do not apply to the administrative proceedings associated with the removal of noncitizens. See, e.g., *Negusie v. Holder*, 555 U.S. 511, 526 (2009) ("This Court has long understood that an 'order of deportation is not a punishment for crime.'" (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893))); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) ("The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws."); *Fong Yue Ting*, 149 U.S. at 730. *But cf.* *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010) (recognizing that, because of changes in the immigration laws, "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who

been the case. Or perhaps the failure to consider immigration law in overcriminalization discussions has occurred because widespread enforcement of criminal immigration laws is a relatively new phenomenon.⁴ Whatever the reasons, in an era when about half of all federal criminal prosecutions are of immigration crimes,⁵ and when many states and localities are enacting ordinances aimed at criminalizing offenses related to migration,⁶ now is a good time to start including immigration policy in the broader conversation on overcriminalization. Increasingly, our immigration policy provides a paradigmatic example of overcriminalization, whereby governments—both state and local—are creating “too many crimes and criminaliz[ing] things that properly should not be crimes.”⁷ Like the war on drugs before it, the growing war on unauthorized migration is suddenly and dramatically being waged through the criminal justice system. The distorting effects of this use of state and federal criminal justice systems are only beginning to show.⁸ Therefore, it seems particularly critical for scholars concerned with overcriminalization to take stock of recent developments in immigration enforcement.

This Article argues that contemporary immigration policy is a site of overcriminalization. To explain how this came to be the case, the Article first evaluates the major developments in immigration law and immigration enforcement that have increased the criminalization of immigration. In the latter half of the twentieth century, three important assumptions undergirded immigration enforcement. The first assumption was that the federal government had the exclusive power to regulate immigration.⁹ The

plead guilty to specified crimes”). The Court’s decision in *Padilla v. Kentucky* erodes some of the significance of the civil–criminal divide, at least for purposes of Sixth Amendment jurisprudence. For a discussion on the significance of *Padilla*, see, for example, Anita Ortiz Maddali, *Padilla v. Kentucky: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1 (2011). For a discussion of the difficulties experienced by state courts—many of which have been heretofore unfamiliar with the distinct legal sphere of immigration law—in implementing *Padilla*, see César Cuauhtémoc García Hernández, *When State Courts Meet Padilla: A Concerted Effort Is Needed to Bring State Courts Up to Speed on Crime-Based Immigration Law Provisions*, 12 LOY. J. PUB. INT. L. 299 (2011).

⁴ See discussion *infra* Part II.

⁵ BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2009, at 1 (2011) [hereinafter FEDERAL JUSTICE STATISTICS, 2009], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf>.

⁶ See discussion *infra* Part III.

⁷ Darryl K. Brown, *Criminal Law’s Unfortunate Triumph Over Administrative Law*, 7 J.L. ECON. & POL’Y 657, 657 (2011).

⁸ See discussion *infra* Part IV.

⁹ See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 62–63 (1941); *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889); see also STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY, at x (5th ed. 2009).

second was that, although it was essentially the sole responsibility of the federal government to make and enforce immigration laws, the federal government was actually unable to achieve widespread enforcement of the federal immigration laws on the books.¹⁰ And the third assumption was that state and local governments not only had no role in the regulation of immigration, but also had very little to do with the enforcement of federal immigration law.¹¹ Of course, these three general statements stand in for a more nuanced set of facts on the ground, but at a basic level, they generate a fairly accurate picture of the state of immigration enforcement as recently as fifteen years ago.¹²

Over the past fifteen years, however, all three of these assumptions have given way to new realities. This Article describes the transformation of these three fundamental assumptions of immigration law and discusses the new realities that have replaced them. It also explains how the resulting changes in the underlying structure of immigration law and its enforcement have increased significantly the use of the criminal law as a means to effect immigration control. Part I discusses the apparent decline of federal

¹⁰ See, e.g., Deborah Sontag, *Chaos at the Gates: Porous Deportation System Gives Criminals Little to Fear*, N.Y. TIMES, Sept. 13, 1994, at A1. With the passage of the Immigration Reform and Control Act of 1986, Congress intended to normalize the status of a significant percentage of the unauthorized population (then estimated at four to six million), and to enforce the law so as to prevent the future development of a sizeable unauthorized population in the future. LEGOMSKY & RODRÍGUEZ, *supra* note 9, at 1158. But by 1995, the government's estimated unauthorized population was again at around five million. U.S. IMMIGRATION & NATURALIZATION SERV., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000, at 10 (2003), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/III_Report_1211.pdf. Researchers estimate that the number of unauthorized migrants had grown to around ten million by 2004. JEFFREY S. PASSEL, RANDY CAPPAS & MICHAEL FIX, UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES 1 (2004) (estimating the undocumented population at 9.3 million), available at http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf.

¹¹ See Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 34 (2007) (“[S]tate, county, and local ordinances aimed at regulating general immigration functions are unconstitutional as a function of exclusive federal preemptory powers.”); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1089 (2004) (“[O]n the whole, enforcement of the immigration statutes has traditionally been the province of federal immigration officials.”). *But see* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 792 (2008) (arguing that “immigration is more like areas of constitutional law that involve a mix of federal and state authority”); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1627 (1997) (observing and celebrating the fact that “states are emerging as major players in immigration law- and policy-making”).

¹² See, e.g., Sontag, *supra* note 10; *INS ‘Enforcement Deficit’ Tied to Law*, WASH. POST, Feb. 2, 1995, at A3; *see also* LEGOMSKY & RODRÍGUEZ, *supra* note 9, at 1148–52 (describing increased resources devoted to border enforcement as a development of the mid-1990s and increased interior enforcement as an even more recent development).

exclusivity in immigration regulation and the rise of state and local legislation—particularly state criminal laws—aimed at controlling migration. Part II discusses the significant expansion of federal immigration enforcement efforts and, in particular, the recent dramatic rise in the use of federal criminal sanctions as a means of enforcing immigration laws. Part III discusses the rise of state and local participation in the enforcement of federal immigration laws and the consequent increase in the policing of low-level state criminal offenses in certain communities.

While no one would dispute that the criminalization of migration has increased over the past decade,¹³ this leaves open the question of whether this is an appropriate policy response or whether the resulting policies can be described as overcriminalization. Therefore, the final section of the paper explains why these policies constitute overcriminalization and suggests alternative approaches to immigration enforcement specifically and to immigration policy more generally.

¹³ At least two other shifts in immigration policies can be said to have increased the criminalization of migration. The first is that, through legislation enacted in 1988, 1994, and especially in 1996, Congress has significantly expanded the immigration consequences of criminal offenses. In other words, for noncitizens, the list of crimes that can result in expulsion (or inadmissibility) has significantly expanded. This has tightened the link between criminal law and immigration enforcement. See Jennifer M. Chacón, *Whose Community Shield? Examining the Removal of the “Criminal Street Gang Member,”* 2007 U. CHI. LEGAL F. 317, 321–23 (2007) (describing the relevant legislative enactments of 1988, 1994, and 1996). Most notably, the Antiterrorism and Effective Death Penalty Act (“AEDPA”) greatly expanded the definition of what constitutes an “aggravated felony” for purposes of immigration law. Pub. L. No. 104-132, § 440, 110 Stat. 1214 (1996) (codified as amended at 8 U.S.C. § 1101(a)(43) (2006)). Second, the nominally civil immigration system has increasingly assumed the punitive features of the criminal law system, but without the procedural protections that generally apply in criminal proceedings. See Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 47–50 (2010) (discussing the “excesses” of immigration detention); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007) (“Those features of the criminal justice model that can roughly be classified as enforcement have indeed been imported [to the civil immigration system]. Those that relate to adjudication—in particular, the bundle of procedural rights recognized in criminal cases—have been consciously rejected [I]mmigration law has been absorbing the theories, methods, perceptions, and priorities of the criminal enforcement model while rejecting the criminal adjudication model in favor of a civil regulatory regime.”).

I discuss the administrative immigration detention issue as part of a broader discussion on the expansion of federal immigration enforcement. See discussion *infra* Part II. Because the first trend does not fit neatly within the rubric of “overcriminalization,” I do not dedicate extensive space to that discussion. Nevertheless, it is important to recognize that the problems of overcriminalization discussed herein are understated insofar as they only partially account for the increasingly punitive administrative processes aimed at noncitizens.

I. THE DECLINE OF FEDERAL EXCLUSIVITY IN THE REGULATION OF
IMMIGRATION

Over the past two decades, states and localities have become increasingly active in regulating immigration, defying the notion that immigration regulation is a power exclusively reserved to the federal government. This Part begins by explaining how, over the past 150 years, federal courts generally struck down sub-federal efforts to regulate immigration and articulated a very narrow set of parameters within which states would be allowed to regulate immigration. Next, this Part discusses how states and localities recently have enacted a number of provisions—primarily criminal provisions—to indirectly regulate migration. States and localities often have been forthcoming about the fact that these provisions are designed to affect immigration, for example by achieving “attrition [of unauthorized migrants] through enforcement” of these laws.¹⁴ Rather than striking all of these laws down as impermissible, however, courts have given states a surprising amount of latitude to regulate noncitizens through their substantive criminal laws and criminal law enforcement.¹⁵ Finally, this Part critiques states’ increasing reliance on the criminal law as a tool to address the issue of migration, notwithstanding the fact that immigration generally poses little or no threat to public safety or security.¹⁶ Ironically, sub-federal criminal law is increasingly used to manage a problem that has never been, at root, a criminal law problem.¹⁷

¹⁴ Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070), ch. 113, § 1, 2010 Ariz. Sess. Laws 450, 450 [hereinafter S.B. 1070].

¹⁵ See discussion *infra* at Part I.B.

¹⁶ RUBÉN G. RUMBAUT & WALTER A. EWING, IMMIGRATION POLICY CTR., AM. IMMIGRATION LAW FOUND., THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN 6–8 (2007), available at <http://www.cata-farmworkers.org/english%20pages/Myth.pdf> (noting much lower incarceration rates among immigrants than among similarly situated native-born citizens); Corina Graif & Robert J. Sampson, *Spatial Heterogeneity in the Effects of Immigration and Diversity on Neighborhood Homicide Rates*, 13 HOMICIDE STUD. 242, 243 (2009) (noting that “research has largely found an insignificant or negative link between immigrant status and crime” and, in an original study, finding no correlation or an inverse correlation between immigrant concentrations and homicide rates); Kristen F. Butcher & Ann Morrison Piehl, *Why Are Immigrants’ Incarceration Rates So Low? Evidence on Selective Immigration, Deterrence, and Deportation* 26–27 (Fed. Reserve Bank of Chi., Working Paper No. 2005-19, 2005), available at http://www.chicagofed.org/digital_assets/publications/working_papers/2005/wp2005_19.pdf (finding that immigrants are a self-selecting group that tends to have a lower crime rate than the native-born population).

¹⁷ See discussion *infra* at Part I.C.

A. THE RISE OF FEDERAL EXCLUSIVITY IN THE REGULATION OF IMMIGRATION

The notion that the federal government has exclusive power to regulate immigration is fairly well-established as a matter of constitutional law. It is certainly true that in the early days of the nation, including much of the nineteenth century, sub-federal entities actively regulated immigration.¹⁸ Many states had laws barring entry to paupers, individuals with certain diseases, and racially undesirable groups.¹⁹ These barriers to entry applied not just to immigrants from other countries, but also to migrants from other states.²⁰ States also sought to control the composition of their populations in other ways, including through the imposition of head taxes on immigrants.²¹

It was in the context of the latter sort of initiative that the Supreme Court first began to chip away at sub-federal immigration regulation. In *Henderson v. Mayor of New York*, the Supreme Court declared that only Congress could regulate migration through the imposition of head taxes.²² In the decades that followed, the federal government increasingly centralized immigration control. In 1875, Congress enacted the first restrictive federal immigration law—the Page Act—which prohibited the entry of immigrants deemed undesirable, including certain contract laborers and women who entered with the intent of engaging in prostitution.²³ The law was clearly designed and enforced so as to restrict entry of Chinese immigrants in the face of growing anti-Chinese sentiment in the western United States.²⁴ Indeed, Congress followed up the Page Act with the enactment of the Chinese Exclusion Act of 1882.²⁵ In the case upholding the constitutionality of the Act, the Supreme Court made sweeping

¹⁸ See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1833–34 (1993).

¹⁹ *Id.* at 1883 (“[S]tate immigration law in the century preceding 1875 included five major categories: regulation of the migration of convicts; regulation of persons likely to become or actually becoming a public charge; prevention of the spread of contagious diseases, including maritime quarantine and suspension of communication by land; and regionally varying policies relating to slavery, including prohibition of the slave trade, bans on the migration of free blacks, and the seamen’s acts.”).

²⁰ See *id.* at 1834; see also Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1355 (2009).

²¹ Neuman, *supra* note 18, at 1850, 1855, 1858; see also *Edye v. Robertson*, 112 U.S. 580, 586 (1884); *Henderson v. Mayor of New York*, 92 U.S. 259, 261 (1875).

²² 92 U.S. at 274.

²³ Page Act of 1875, ch. 141, 18 Stat. 477, 477 (repealed 1974).

²⁴ See Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 647, 691, 702, 710 (2005).

²⁵ Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

statements about the broad power of Congress to regulate immigration, writing:

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties.²⁶

Over time, the statement of absolute power over immigration law was construed to limit to the federal government the power to regulate entry and exit.²⁷ The Court made it clear that while a state could act within its traditional spheres of state power, such as licensing of businesses, it could do so only to the extent that any indirect regulation of immigration did not conflict with the federal immigration scheme. In *DeCanas v. Bica*, the Court therefore upheld a California statute prohibiting the employment of unauthorized immigrants because at that time, there was no comprehensive scheme for regulating the employment of such workers.²⁸ But generally, the Court rather jealously protected the prerogative of the federal government in immigration enforcement.²⁹

Even when policies aimed at noncitizens did not expressly contravene federal immigration law, the Court was willing to strike down state efforts to regulate noncitizens to the extent they were deemed insufficiently complementary of congressional objectives. This was obviously the case in *Hines v. Davidowitz*, where a Pennsylvania law that did not conflict with federal law was deemed preempted simply because the federal government occupied the field,³⁰ for example. But the Court also applied a similar analysis to a Texas law that would have required undocumented immigrant

²⁶ *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889); *see also Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (“The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single state can, at her pleasure, embroil us in disastrous quarrels with other nations.”).

²⁷ The following three paragraphs draw from and elaborate upon a brief discussion in Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J., at Part I (forthcoming 2013).

²⁸ 424 U.S. 351 (1976).

²⁹ *See, e.g., Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941) (“[W]here the federal government . . . has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.”).

³⁰ *Hines*, 312 U.S. at 66–67.

students to pay for their education in public elementary and high schools in *Plyler v. Doe*.³¹ The Court struck the law down as a violation of those students' right to equal protection under the Fourteenth Amendment.³² Since the Texas law did not create new categories of authorized and unauthorized migrants, and since it regulated an area—education—long understood to be the prerogative of the states,³³ it would be possible to imagine that the Court might uphold the regulation as a lawful regulation of noncitizens, operating permissibly and complementarily in the interstices of federal immigration law. But that is not what happened. Instead, in *Plyler v. Doe*, the Court wrote:

As we recognized in *DeCanas v. Bica*, the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal. In *DeCanas*, the State's program reflected Congress' intention to bar from employment all aliens except those possessing a grant of permission to work in this country. In contrast, there is no indication that the disability imposed by [the Texas statute] corresponds to any identifiable congressional policy. The State does not claim that the conservation of state educational resources was ever a congressional concern in restricting immigration. More importantly, the classification reflected in [the Texas statute] does not operate harmoniously within the federal program.³⁴

The reasoning of *Plyler* clarifies that even when states pass laws in a domain of traditional state power like education, the constitutionality of those laws is not assured simply because the law does not conflict with federal law. Instead, *Plyler* suggests that to withstand constitutional scrutiny, a state law that creates unique obligations or disabilities for noncitizens—including undocumented noncitizens—must further a legitimate state goal, correspond to a specific, identifiable congressional policy, and operate harmoniously with federal immigration regulation.

In short, from the 1880s through the 1980s, the Supreme Court made it clear that Congress controlled federal immigration policy. States could only act indirectly to manage migration, and only when such actions fell within the traditional scope of their power and where such actions were “harmonious” with federal policy. Over the past few years, however, scholars and policymakers have raised new challenges to the notion of federal exclusivity in the realm of immigration policy. This, in turn, has given rise to a preemption jurisprudence that is more accepting of sub-federal immigration regulations, including regulations that are not

³¹ *Plyler v. Doe*, 457 U.S. 202, 225 (1982); see also *id.* at 237 n.1 (Powell, J., concurring).

³² *Id.*, at 230 (majority opinion).

³³ TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981), *invalidated by Plyler*, 457 U.S. at 230–31.

³⁴ *Plyler*, 457 U.S. at 225–26 (citations omitted).

completely harmonious with federal regulations.

B. THE CHALLENGE TO FEDERAL EXCLUSIVITY IN IMMIGRATION REGULATION

A wave of state and local immigration ordinances is sweeping across the nation. In recent years, thousands of local governments around the country have debated or enacted ordinances designed to restrict the ability of unauthorized migrants to live and work in their communities.³⁵ One high-profile example comes from the town of Hazleton, Pennsylvania, where local officials enacted an ordinance that prohibited landlords from renting to noncitizens present without legal authorization and also allowed for the revocation of the business licenses of any business owner who employed an unauthorized worker.³⁶ Other localities have enacted narrower provisions—such as regulations designed to deter day laborers from soliciting work in public spaces.³⁷

States have also joined the fray. In 1994, California voters passed Proposition 187,³⁸ a measure aimed at curbing undocumented migration to the state through the elimination of state benefits (including, fatally for the law, public K–12 education).³⁹ That law was quickly enjoined by a federal district court⁴⁰ and languished when the state’s governor declined to pursue the state’s legal defense of the law in court.⁴¹ Fifteen years later, however, the country once again witnessed the rise of state ordinances that, while

³⁵ MONICA W. VARSANYI, *TAKING LOCAL CONTROL* 3 (2010) (“In 2006, 500 bills were considered, 84 of which became law. In 2007, 1,562 immigration- and immigrant-related pieces of legislation were introduced, and 240 became law. And most recently, in 2009, approximately 1,500 laws and resolutions were considered in all 50 state legislatures, and 353 were ultimately enacted.”); Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 *GEO. IMMIGR. L.J.* 47, 49 (2010); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 *MICH. L. REV.* 567, 570 (2008).

³⁶ Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 *IOWA L. REV.* 1449, 1455 (2006); see also *Lozano v. City of Hazleton*, 620 F.3d 170, 176 (3d Cir. 2010), *vacated sub nom. City of Hazleton, Pa. v. Lozano*, 131 S. Ct. 2958 (2011).

³⁷ See, e.g., *REDONDO BEACH, CAL., MUNICIPAL CODE* § 3-7.1601 (2010); see also *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 475 F. Supp. 2d 952, 955 (C.D. Cal. 2006), *aff’d*, 657 F.3d 936 (9th Cir. 2011) (en banc).

³⁸ 1994 Cal. Stat. A-317 (approved by electors Nov. 8, 1994).

³⁹ *Id.* at A-317, § 1.

⁴⁰ *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1250 (C.D. Cal. 1997).

⁴¹ Patrick J. McDonnell, *Davis Won’t Appeal Prop. 187 Ruling, Ending Court Battles*, *L.A. TIMES*, July 29, 1999, at A1, available at <http://articles.latimes.com/1999/jul/29/news/mn-60700> (“Attorneys for Gov. Gray Davis and civil rights organizations have reached an agreement to end the litigation surrounding Proposition 187, effectively killing the landmark 1994 ballot referendum that targeted illegal immigrants and became a pivotal juncture in California’s political life.”).

purportedly crafted to avoid the constitutional problems encountered by Proposition 187's education provisions, actually sweep far beyond the scope of Proposition 187 in other respects.

Over the last five years, lawmakers have proposed more than 7,000 state immigration proposals.⁴² While ordinances such as the Legal Arizona Workers Act (LAWA) are narrowly aimed at denying business licenses to employers who hire unauthorized workers,⁴³ many states have recently enacted much broader ordinances designed to regulate the employment of, housing for, policing of, and benefits available to undocumented immigrants.

The Arizona legislature ignited a national firestorm when it enacted a bill—signed into law by Governor Jan Brewer on April 23, 2010—that greatly expanded the role Arizona's state and local officials play in the enforcement of immigration law.⁴⁴ The Support Our Law Enforcement and Safe Neighborhoods Act,⁴⁵ often referred to as S.B. 1070, effectively sought to impose criminal liability based on undocumented presence in the United States. Although proponents of the law argued that it mirrors federal immigration law,⁴⁶ this was clearly not the case. Among other things, the law made state criminal offenses out of violations that were formally crimes only at the federal level⁴⁷ and criminalized conduct that is neither a civil nor a criminal violation under federal law.⁴⁸

⁴² NAT'L CONFERENCE OF STATE LEGISLATORS, 2011 IMMIGRATION-RELATED LAWS AND RESOLUTIONS IN THE STATES (JAN. 1–DEC. 7, 2011) 2 (no publication date), available at <http://www.ncsl.org/documents/immig/2011ImmFinalReportDec.pdf>.

⁴³ ARIZ. REV. STAT. ANN. §§ 23-211 to -214 (Supp. 2011); see also Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1973 (2011) (upholding the constitutionality of LAWA).

⁴⁴ Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1, available at <http://www.nytimes.com/2010/04/24/us/politics/24immig.html>.

⁴⁵ Ch. 113, 2010 Ariz. Sess. Laws 450.

⁴⁶ See Gabriel J. Chin & Marc Miller, *The Unconstitutionality of State Regulation of Immigration through Criminal Law*, 61 DUKE L.J. 251, 252 (2011) (discussing the “mirror image” theory of sub-federal immigration enforcement and arguing that even the criminal provisions that “mirror” federal immigration law are unconstitutional).

⁴⁷ Compare, e.g., ARIZ. REV. STAT. ANN. § 13-1509 (Supp. 2011) (criminalizing “willful failure to complete or carry an alien registration document”), with 8 U.S.C. §§ 1304(e), 1306(a) (2006) (criminalizing similar violations as federal misdemeanors). The Supreme Court has found previous state efforts to enact alien registration schemes that run parallel to the federal scheme unconstitutional. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

⁴⁸ Chin et al., *supra* note 35, at 50. Compare, e.g., ARIZ. REV. STAT. ANN. § 13-2928(C) (making it a crime for an “unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state”), with 8 U.S.C. § 1324(a) (2006) (prohibiting employers from knowingly hiring unauthorized workers but containing no provision criminalizing a worker's act of soliciting or performing work). I have written a more detailed analysis of S.B. 1070 and the Supreme Court

S.B. 1070 also “imposes new duties and creates new powers designed to increase [state and local law enforcement’s] investigation of immigration status, arrests of removable individuals, reporting of undocumented immigrants to federal authorities, and assistance in removal by delivering removable noncitizens to federal authorities.”⁴⁹ Major provisions of the law were enjoined by U.S. District Court Judge Bolton, and the injunction was upheld by the Ninth Circuit Court of Appeals and largely upheld by the Supreme Court, with a significant exception.⁵⁰ While the case was pending review in the Supreme Court, other states, including Utah,⁵¹ Alabama,⁵² and South Carolina,⁵³ enacted provisions that looked very similar to Arizona’s S.B. 1070.

Alabama enacted immigration regulations that not only mirrored some of Arizona’s controversial provisions, but also extended far beyond anything that Arizona tried to do. Indeed, Alabama’s H.B. 56 is the most draconian state regulation to be enacted in the period before the Supreme Court’s consideration of the Arizona law. It not only would have restricted

jurisprudence up to and including the challenge to this law in *Chacón*, *supra* note 27. I draw upon that work in my discussions of S.B. 1070, *United States v. Arizona*, and *Chamber of Commerce v. Whiting* in this Subpart.

⁴⁹ Chin et al., *supra* note 35, at 62.

⁵⁰ *United States v. Arizona*, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010), *aff’d*, 641 F.3d 339 (9th Cir. 2011), *aff’d in part, rev’d in part*, *Arizona v. United States*, 132 S. Ct. 2492 (2012). The Supreme Court reversed the injunction of S.B. 1070’s Section 2, which requires law enforcement officials to investigate immigration status upon arrest and, when practicable during a lawful stop, upon reasonable suspicion of an immigration violation. *Arizona*, 132 S. Ct. at 2510–11.

⁵¹ Marjorie Cortez, *Utah Gov. Gary Herbert Signs Immigration Bills into Law*, DESERET NEWS (Mar. 15, 2011, 4:19 PM), <http://www.deseretnews.com/article/705368733/Utah-Gov-Gary-Herbert-signs-immigration-bills-into-law.html> (discussing Utah’s enactment of a moderate form of Arizona’s S.B. 1070, along with an attempted state-level guest worker program).

⁵² Beason-Hammon Alabama Taxpayer and Citizen Protection Act (H.B. 56), 2011 Ala. Laws [hereinafter H.B. 56]. Several of the major provisions of this bill have been enjoined. *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012) (enjoining provisions including those relating to alien registration; criminalization of working without authorization; employer sanctions; invalidation of the enforcement of contracts with unauthorized migrants; and prohibition on applications for identity cards and licenses). For a critique of the Alabama law that situates the law in a larger historical and cultural context, see Kevin R. Johnson, *Immigration and Civil Rights: Is the “New” Birmingham the Same as the “Old” Birmingham?*, WM. & MARY BILL RTS. J. (forthcoming 2013).

⁵³ S.C. CODE ANN. § 6-1-170 (2008), *amended by* Act of June 27, 2011, No. 69, 2011 S.C. Acts; *see also* Reid J. Epstein, *Haley OKs S.C. Immigration Cops*, POLITICO (June 27, 2011), <http://www.politico.com/news/stories/0611/57874.html> (describing South Carolina’s immigration laws as similar to Arizona’s, but including additional provisions for a state immigration enforcement unit). Much of that bill was enjoined in December 2011. Robbie Brown, *Parts of Immigration Law Blocked in South Carolina*, N.Y. TIMES, Dec. 23, 2011, at A18.

renting to and employing unauthorized workers, but also would have nullified any contracts when one party was an undocumented immigrant, required the police to check the papers of anyone lawfully detained upon reasonable suspicion that the individual was present without authorization, mandated that public school officials determine and report on students' immigration status, and criminalized the act of knowingly "concealing, harboring or shielding" an unauthorized migrant.⁵⁴ This final provision was so broad that it prompted a group of religious leaders to file a constitutional challenge arguing that the Alabama law infringed on their religious mission.⁵⁵ Sub-federal regulation of immigration is not a new phenomenon, but in their anti-immigrant aim, their scale, and their scope, these state-level ordinances are unprecedented in modern U.S. history.⁵⁶

The growing efforts on the part of states and localities to participate in immigration regulation are pushing courts to reexamine assumptions about federal exclusivity in this sphere. In the decades since the Court decided *Plyler v. Doe*, the scholarly consensus concerning federal preemption in immigration regulation has eroded somewhat.⁵⁷ A diverse group of legal

⁵⁴ H.B. 56 §§ 10–13, 16–18, 27, 28 & 30; 2011 ALA. CODE §§ 31-13-10 to -13, 31-13-16 to -18, 31-13-26 to -27, 31-13-28 to -29 & 31-13-30; *see also* A. ELENA LACAYO, NAT'L COUNCIL OF LA RAZA, THE WRONG APPROACH: STATE ANTI-IMMIGRATION LEGISLATION IN 2011, at 15 (2012), *available at* http://www.nclr.org/images/uploads/publications/The_Wrong_Approach_Anti-ImmigrationLeg.pdf ("While Georgia and South Carolina passed bills more draconian than SB 1070, both are surpassed in harshness by Alabama HB 56, signed by Republican Governor Robert Bentley on June 9."). Although the provision requiring investigation of immigration status (H.B. 56 § 12, ALA. CODE § 31-13-12) has been allowed into effect pursuant to the Supreme Court's ruling in *United States v. Arizona*, most of the other provisions of the law have been enjoined at this time. *See supra* note 52.

⁵⁵ *Justice Dept. Challenges Alabama Immigration Law*, N.Y. TIMES, Aug. 2, 2011, at A16 ("On Monday, Roman Catholic, United Methodist and Episcopal bishops filed a lawsuit, saying the law 'makes it a crime to follow God's command to be Good Samaritans.'"). The federal government and a coalition of civil and immigrants' rights organizations also challenged the law. *Id.*

⁵⁶ Nativist sentiments and anti-immigrant policies in times of economic hardship are certainly not new. In the era of the Great Depression, for example, tens of thousands of Mexicans and Mexican-Americans were sent to Mexico, even though many of those "repatriated" were in fact U.S. citizens who had never been in Mexico. *See generally* FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (1995) (analyzing the history of the "repatriation" campaign); F. ARTURO ROSALES, CHICANO! THE HISTORY OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT 26–86 (2d rev. ed. 1997) (same). The Chinese Exclusion Act also grew out of economic anxiety. *See* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRATION AND THE SHAPING OF MODERN IMMIGRATION LAW 7 (1995). But regulations and discourse around sub-federal immigration regulation have changed substantially in recent years, facilitating this wave of sub-federal immigration regulation. *See discussion infra* at Part III.

⁵⁷ Of course, a significant number of scholars continue to argue quite persuasively against a larger role for states and localities in immigration regulation, both on constitutional

scholars has taken the view that the Constitution does not require federal exclusivity and that there is legal space for sub-federal entities to participate in immigration regulation.⁵⁸

The Supreme Court gave tentative voice to similar views in its recent decision in *U.S. Chamber of Commerce v. Whiting*.⁵⁹ That case involved a challenge to the Legal Arizona Workers Act, which provides that the licenses of state employers that knowingly or intentionally hire unauthorized workers may be (and, in some cases, must be) revoked; the statute also requires that all Arizona employers use the federal electronic employment authorization database known as E-Verify.⁶⁰ The Court found that the regulation was not preempted by federal laws restricting the employment of unauthorized workers because it was a licensing scheme, which fell “squarely within the savings clause” of the federal law that expressly preempted “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens.”⁶¹ Perhaps most tellingly for the course of future litigation, the Court rejected the argument that the law was impliedly preempted because it upset the careful balance between employment restrictions and antidiscrimination protections struck by the Immigration

and on policy grounds. *See, e.g.*, Olivas, *supra* note 11, at 34 (arguing that “state, county, and local ordinances aimed at regulating general immigration functions are unconstitutional as a function of exclusive federal preemptory powers”); Huyen Pham, *The Inherent Flaws of the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 967 (2004) (arguing that “the immigration power is an exclusively federal power that must be exercised uniformly”); Michael J. Wishnie, *Laboratories of Bigotry: Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 497 (2001) (reasoning that the “immigration power is an exclusively federal one that Congress may not devolve by statute to the states”).

⁵⁸ *See, e.g.*, Huntington, *supra* note 11, at 792 (arguing that “the constitutional mandate for federal exclusivity over pure immigration law is far more contestable than the traditional debate would suggest”). While Huntington stresses the constitutionality of sub-federal immigration regulation, Cristina Rodriguez also argues that there is a functional need for such regulation. *See* Cristina M. Rodriguez, *supra* note 35, at 571–72 (2008) (“[T]he federal exclusivity principle obscures our structural need for federal, state, and local participation in immigration regulation. Today’s realities suggest different structural imperatives—namely the need for subfederal regulation.” (footnote omitted)); *see also* Spiro, *supra* note 11, at 1636 (“Affording the states discretion to act on their preferences diminishes the pressure on the structure as a whole; otherwise, because you don’t let off the steam, sooner or later the roof comes off.”).

⁵⁹ 131 S. Ct. 1968 (2011). As previously noted, my discussion of the *Chamber of Commerce v. Whiting* case draws in part from my discussion of the case in Chacón, *supra* note 27.

⁶⁰ ARIZ. REV. STAT. ANN. §§ 23-211 to -214 (Supp. 2011).

⁶¹ *Whiting*, 131 S. Ct. at 1973 (quoting 8 U.S.C. § 1324a(h)(2) (2006)).

Reform and Control Act of 1986⁶²—an argument that had actually carried the day in the Third Circuit in litigation involving the Hazleton, Pennsylvania, employment ordinance.⁶³ Chief Justice Roberts chided that “[i]mplied preemption analysis does not justify a free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives.”⁶⁴

Although much of the reasoning of *Whiting* explores the effects of the savings clause of the 1986 Immigration Reform and Control Act on state licensing provisions,⁶⁵ the opinion’s language concerning implied preemption suggests that unless Congress has expressly barred states from enacting particular immigration-control provisions, the Court will be somewhat reluctant to invalidate those efforts on preemption grounds.⁶⁶ This seems very different from the preemption language used by the Court in *Hines v. Davidowitz* in striking down a state alien registration scheme that ran parallel to the federal scheme.⁶⁷ The Court’s reasoning in *Whiting*, which prompted its later remand of the Third Circuit’s decision in *Hazleton v. Lozano*,⁶⁸ has left the door open for state and local regulation of the employment of unauthorized workers so long as such laws rely on federal classification concerning who is authorized to work.⁶⁹ More significantly, the Court’s suggestion that it will employ a narrow form of implied preemption analysis emboldened state legislatures around the country that seek to regulate migration with tools far beyond business licensing limitations.

More recently, the Court seemed to back away from its seemingly deep skepticism of field and obstacle preemption analysis in the context of immigration. In *Arizona v. United States*, a majority of Justices employed a traditional field preemption analysis—with citation to *Hines v. Davidowitz*—to strike down the alien registration offense in Section 3 of S.B. 1070.⁷⁰ The Court struck down the law’s criminal prohibition on

⁶² Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.); see *Whiting*, 131 S. Ct. at 1981–85.

⁶³ *Lozano v. City of Hazleton*, 620 F.3d 170, 175 (3d Cir. 2010), *vacated sub nom. City of Hazleton, Pa. v. Lozano*, 131 S. Ct. 2958 (2011).

⁶⁴ *Whiting*, 131 S. Ct. at 1985 (internal quotation marks omitted).

⁶⁵ See *id.* at 1977–81.

⁶⁶ See *id.* at 1981–85.

⁶⁷ *Hines v. Davidowitz*, 312 U.S. at 66–67.

⁶⁸ *Lozano*, 131 S. Ct. at 2958 (remanding the case for further consideration in light of *Whiting*).

⁶⁹ For a critique of the Court’s new approach to the preemption question, see Lauren Gilbert, *Immigrant Laws, Obstacle Preemption and the Lost Legacy of McCulloch*, 33 BERKELEY J. EMP. & LAB. L. 153 (2012).

⁷⁰ *Arizona v. United States*, 132 S. Ct. 2492, 2501–03 (2012). I have written a more detailed analysis of the case and its reasoning in Chacón, *supra* note 27.

working without authorization on the grounds that it was obstacle preempted by the Immigration Reform and Control Act of 1986 (IRCA).⁷¹ And it also used obstacle preemption analysis to strike down Section 6, which would have allowed local officials to arrest individuals on the ground that they had committed removable offenses.⁷² But it did uphold Section 2, requiring investigation of immigration status for some individuals lawfully stopped and all individuals arrested, rejecting the federal government's argument that this provision, too, was preempted under a theory of obstacle preemption.⁷³ A more traditional and robust application of obstacle preemption principles in the immigration context would have required a different result.⁷⁴

C. SUB-FEDERAL CRIMINALIZATION OF MIGRATION

As previously noted, after the Court issued its decision in *Whiting*, several states enacted broad criminal provisions in an effort to do indirectly what they cannot do directly: regulate immigration law. Efforts to criminalize undocumented labor and the failure to carry alien registration papers are now barred in the wake of *United States v. Arizona*,⁷⁵ efforts to criminalize alien smuggling are also under scrutiny in the courts.⁷⁶ But efforts to empower local enforcement of federal immigration laws have gained traction.⁷⁷ A number of other states have also criminalized “trafficking” in recent years.⁷⁸ Although legislation to prevent human

⁷¹ *Id.* at 2503–05.

⁷² *Id.* at 2505–07.

⁷³ *Id.* at 2507–11.

⁷⁴ For a more detailed critique of the Court's reasoning and holding in this portion of the opinion, see Chacón, *supra* note 27, at Part III.

⁷⁵ *Arizona*, 132 S. Ct. at 2501–07.

⁷⁶ H.B. 56 § 13; Ala. Code § 31-13-13. The District Court enjoined Alabama's anti-smuggling provision in an order dated September 28, 2011, *United States v. Alabama*, 813 F. Supp. 2d 1282, 1351 (N.D. Ala. 2011), and the Eleventh Circuit affirmed in part, 691 F.3d 1269 (2012). The Arizona district court originally declined to enjoin Arizona's anti-smuggling provision, *United States v. Arizona*, 703 F. Supp. 2d 980, 999–1000 (D. Ariz. 2010), but recently revisited that decision and enjoined the provision, citing the reasoning of the Eleventh Circuit. *Valle Del Sol v. Whiting*, No. CV 10-1061-PHX-SRB (D. Ariz., Sept. 5, 2012) (enjoining the anti-smuggling provisions of S.B. 1070). Arizona has used its anti-smuggling law for years to prosecute migrants for smuggling themselves. See Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749 (2011) (discussing prosecutions of unauthorized migrants under Arizona's 2005 criminal prohibition on alien smuggling).

⁷⁷ *Arizona v. United States*, 132 S. Ct. at 2510–11 (reversing the injunction of Arizona S.B. 1070's section 2(B)).

⁷⁸ See Jennifer M. Chacón, *Tensions and Trade-offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1647 n.164 (2010).

trafficking is laudable, some of these laws have been codified in ways that allow state officials to enforce immigration laws indirectly.⁷⁹ Indeed, some legislators have been quite candid in stating that this was one of the driving forces behind the adoption of these laws, yet these provisions have not been challenged on preemption grounds.⁸⁰

Clearly, states have not limited their efforts to regulate immigration to areas in the interstices of federal regulation of the employment of noncitizens. Instead, they have deployed a host of criminal laws and ordinances to achieve indirectly that which they cannot achieve directly: the regulation of immigration law in their states. Juliet Stumpf has explained that this is not surprising given that the police power is a place where a state's authority is at its height.⁸¹ State efforts that criminalize activities in order to affect migration indirectly have, in many cases, avoided court scrutiny, and the Supreme Court's *Arizona* decision evinces tolerance for sub-federal participation in enforcement efforts. States interested in controlling migration policy are increasingly using the criminal law as a tool to address the issue of migration, despite the fact that these laws are unlikely to have any positive public safety or security effects.

Public safety concerns are not motivating these bills, despite sometimes-heated rhetoric to the contrary.⁸² Not only is the evidence fairly consistent that immigrants commit crimes at relatively low rates compared to the native born and that the presence of immigrants is negatively correlated with crime rates,⁸³ but in jurisdictions where restrictive ordinances were enacted, crime rates were actually falling even as the unauthorized migrant population was growing.⁸⁴ Most troublingly, in at least one jurisdiction, zealous enforcement of immigration laws has come at

⁷⁹ *See id.*

⁸⁰ *Id.* at 1649 & n.166 (discussing the restrictionist motivations behind antitrafficking legislation and enforcement in Georgia, Missouri, and Arizona).

⁸¹ Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1593 (2008).

⁸² One famous example of efforts to play on fears of migrant criminality is Arizona Governor Jan Brewer's now-infamous allegation that S.B. 1070 was necessary to combat dangerous beheadings in the Arizona desert. Robert Farley, *Beheadings, Kidnappings and Other Immigration Distortions*, TAMPA BAY TIMES POLITIFACT.COM (Sept. 10, 2010, 3:01 PM), <http://www.politifact.com/truth-o-meter/article/2010/sep/10/fact-checking-beheadings-and-other-immigration/>. Arizona's brief to the Supreme Court in favor of S.B. 1070 opens on the first page with an assertion that a public safety "emergency" motivated the passage of the bill. Brief for Petitioners at 1, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 416748, at *1.

⁸³ *See supra* note 16.

⁸⁴ *See* Farley, *supra* note 82 ("FBI crime statistics show that violent crime fell 11 percent from 2004 to 2008 in Arizona.").

the expense of investigations of serious and violent crimes.⁸⁵ And many law enforcement officials have expressed concern that their new responsibilities to police migration will destroy the trust necessary to achieve effective community policing in their jurisdictions.⁸⁶

The apparent basis for using criminal law as a response to migration issues is the myth of migrant criminality, sometimes tinged with (or even steeped in) racism or nativism. Criminal law is merely a vehicle by which legislators attempt to address the litany of problems that unauthorized migrants are purported to have caused—from alleged beheadings to school overcrowding to changing local culture—not only because that is the tool that seems more likely to avoid legal scrutiny, but also because it is the tool that most closely resonates with the public discourse around migration, which is dominated by the trope of criminality.⁸⁷ Unfortunately, this creates a self-perpetuating phenomenon where migrants are increasingly subject to criminal law sanctions, thereby ironically validating previously unjustified assumptions concerning migrant criminality.⁸⁸

The Court's decision in *Arizona v. United States* has helped to clarify the extent to which the Court is willing to allow states to police migration within their own borders. But even before the decision was handed down in June 2012, many states were already taking the position that they have a fair amount of latitude to regulate immigration indirectly. This trend, particularly in conjunction with the Court's decision to affirm the constitutionality of investigations into immigration status by state and local law enforcement, provides legislators with ample tools to achieve immigration enforcement by attrition.

These laws have other costs as well. Recently, the Department of Justice has compiled reports concerning state and local policing practices

⁸⁵ See Marc Lacey, *Sex Crimes Were Ignored, Say Reports on Sheriff*, N.Y. TIMES, Dec. 10, 2011, at A14 [hereinafter *Sex Crimes Were Ignored*] (“Sheriff Arpaio . . . is perhaps best known for his . . . aggressive raids aimed at illegal immigrants. But . . . [h]is deputies failed to investigate or conducted only the sketchiest of inquiries into hundreds of sex crimes between 2005 and 2007 Many of those cases involved molested children.”).

⁸⁶ See, e.g., J.J. Hensley, *Immigration-enforcement efforts damaging to community, police group says*, ARIZ. REPUBLIC (March 19, 2011 12:00 AM), available at <http://www.azcentral.com/arizonarepublic/local/articles/2011/03/19/20110319immigration-police-enforcement-weak.html> (describing a report of the Police Executive Review Forum finding that local immigration enforcement damaged police–community trust).

⁸⁷ See Chacón, *Unsecured Borders*, *supra* note 1, at 1835–50; Ian F. Haney Lopez, *Post-Racial Racism*, 98 CALIF. L. REV. 1023, 1033 (2010).

⁸⁸ As previously noted, *see supra* note 16, earlier studies have discredited the link between migrants and crime. Some have done so by looking at incarceration rates. As incarceration rates of migrants soar as a result of the increased prosecution of migration crimes, it will become important for scholars to disaggregate the kinds of crimes for which migrants are incarcerated.

that have resulted in widespread racial profiling of Latinos.⁸⁹ The discriminatory policing practices identified in these reports are often related to sub-federal efforts to police immigration.⁹⁰ As states and localities continue to attempt to regulate immigration and to assist in federal immigration enforcement,⁹¹ it seems all but certain that these problems will continue to grow.

II. INCREASED FEDERAL ENFORCEMENT

The second maxim of immigration enforcement that has given way to a new reality is that the federal government does not do much to enforce the nation's immigration laws. The notion that the federal government is "not doing anything" or "not doing enough" to enforce federal immigration law has actually become something of a mantra among restrictionists, particularly those who have pushed for sub-federal immigration regulation and enforcement.⁹² As a historical matter, it is clear that the federal

⁸⁹ See, e.g., Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, to Bill Montgomery, Cnty. Att'y, Maricopa Cnty. 2 (Dec. 15, 2011) [hereinafter Letter from Thomas E. Perez], available at http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf ("Based upon our extensive investigation, we find reasonable cause to believe that MCSO engages in a pattern or practice of unconstitutional policing."); Mark Zaretsky, *Justice Department Finds East Haven Police Department Deliberately Targeted Latinos*, NEW HAVEN REG. (Dec. 19, 2011), <http://nhregister.com/articles/2011/12/19/news/metro/doc4eef61a24fca4049275981.txt> ("The East Haven Police Department 'engages in a pattern or practice of systematically discriminating against Latinos in violation of the 14th Amendment to the Constitution,' U.S. Department of Justice officials said Monday.").

⁹⁰ Marc Lacey, *U.S. Says Arizona Sheriff Shows Pervasive Bias Against Latinos*, N.Y. TIMES, Dec. 16, 2011, at A1 [hereinafter *Sheriff Bias*] ("The report also suggested that Sheriff Arpaio's well-publicized raids aimed at arresting illegal immigrants were sometimes prompted by complaints that described no criminal activity but referred to people with 'dark skin' or to Spanish speakers congregating in an area. 'The use of these types of bias-infected indicators as a basis for conducting enforcement activity contributes to the high number of stops and detentions lacking in legal justification,' the report said.").

⁹¹ See discussion *infra* Part III.

⁹² See, e.g., Dan Rivoli, *Alabama Immigration Law Challenged Again: U.S. Government Seeks Injunction*, INT'L BUS. TIMES (Oct. 9, 2011), <http://www.ibtimes.com/articles/227787/20111009/alabama-immigration-law-appeal.htm> ("Alabama, along with other states including Georgia and Arizona, has implemented a law this year to make life for illegal immigrants difficult. Supporters of these laws say they are addressing an illegal immigrant problem in their state created by the federal government's inaction."); Press Release, Statement by Governor Jan Brewer, Apr. 23, 2010, available at http://azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf ("[D]ecades of federal inaction and misguided policy have created a dangerous and unacceptable situation.").

Pratheepan Gulasekaram and S. Karthick Ramakrishnan have noted that states and localities claiming to act because the federal government has failed to do so is the "conventional" explanation for sub-federal immigration regulation. Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Polarized Change: An Evidence-Based Theory*

immigration agencies have not succeeded in implementing widespread measures to effectuate immigration enforcement.⁹³ But over the past decade, the federal immigration enforcement apparatus has ballooned in size, and the effects of this expansion are widespread. This Part first evaluates the rapid growth in various forms of federal enforcement efforts, then focuses particular attention on the rise of federal prosecutions of immigration crimes.

A. THE MANY FACES OF FEDERAL IMMIGRATION ENFORCEMENT

In fiscal year 2008, the U.S. government spent billions of dollars on immigration enforcement activities.⁹⁴ Immigration and Customs Enforcement (ICE), the agency responsible for immigration enforcement activities in the interior of the country, had a budget of just over \$5 billion.⁹⁵ Customs and Border Protection (CBP), which includes the Border

of Subnational Immigration Regulation 7–10 (Jan. 28, 2012) (unpublished manuscript) (on file with the author). It is a narrative that they ultimately discount with empirical data. *Id.* at 21–24.

⁹³ For this one need only look at the rise in the number of unauthorized migrants in the country since 1986. In 1986, Congress enacted the Immigration Reform and Control Act, which authorized the legalization of millions of unauthorized migrants present in the country at that time. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C. (2006)). Just under 3 million people received lawful status as a result of the IRCA. LEGOMSKY & RODRÍGUEZ, *supra* note 9, at 1179. To gain the support of more restrictionist members of Congress, IRCA also included an employer sanctions provision and enforcement mechanisms. 8 U.S.C. § 1324a (2006). The notion was that by drying up future employment opportunities for unauthorized workers, the law would stop the flow of future unauthorized workers after the legalization. This did not come to pass, perhaps because the law was not vigorously enforced in the twenty years that followed. See generally Michael A. Wishnie, *Prohibiting the Employment of Unauthorized Workers: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 209–210 [hereinafter *The Experiment Fails*] (discussing the lax and opportunistic enforcement of IRCA’s employer sanctions provisions).

Currently, there are about 11.2 million noncitizens present in the country without legal authorization. JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 1 (2011), available at <http://www.pewhispanic.org/files/reports/133.pdf>. This number has declined slightly in recent years, largely as a result of the faltering U.S. economy. COMM. ON LAW AND JUSTICE, NAT’L RESEARCH COUNCIL, BUDGETING FOR IMMIGRATION ENFORCEMENT: A PATH TO BETTER PERFORMANCE 32–34 (Steve Redburn et al. eds., 2011) [hereinafter BUDGETING FOR IMMIGRATION ENFORCEMENT] (finding that immigration enforcement efforts had very little measurable impact on migration flows and that the downturn in the U.S. economy appears to account for most of the decrease in flow in recent years).

⁹⁴ I discussed the expansion of federal enforcement expenditures previously, in Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1571–72 (2010). I borrow directly from that discussion in this paragraph.

⁹⁵ U.S. DEP’T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2008, at 19 (2008),

Patrol, as well as other enforcement agencies focusing on the flow of goods and people across the U.S. borders, had a budget of just over \$10 billion,⁹⁶ bringing the combined total operating budgets for the two to over \$15 billion in fiscal year 2008. By way of comparison, in 1998, the budget for the Immigration and Naturalization Service (INS) was just over \$3.6 billion.⁹⁷ This figure includes immigration services that are now provided by Citizenship and Immigration Services (CIS) and are not included in the \$15 billion figure above. Additionally, although these budget figures reflect DHS spending on investigations, prosecutions, detention, and removal, they do not reflect all of the federal costs of immigration enforcement, given the costs of prosecuting and punishing immigration crimes in criminal courts. Even so, the \$15 billion budget for ICE and CBP represents a five-fold budget increase in the past decade, and the budget is more than fifteen times what it was in 1988.⁹⁸

Another significant transformation in immigration enforcement is in the rise of immigration detention.⁹⁹ Largely as a result of mandatory detention provisions enacted by Congress in 1996,¹⁰⁰ the vast majority of those arrested for immigration offenses are detained as they await trial or removal proceedings. Strikingly, although 81% of those charged with drug-trafficking offenses are detained after arrest and 87% of those charged with violent crimes are detained after arrest, a full 95% of those who have committed immigration crimes (which are largely nonviolent and most often misdemeanors) are detained upon arrest.¹⁰¹ Given the significant rise in the number of immigration arrests over the past decade, this practice of

available at http://www.dhs.gov/xlibrary/assets/budget_bib-fy2008.pdf.

⁹⁶ *Id.*

⁹⁷ *An Overview of Federal Drug Control Programs on the Southwest Border: Immigration and Naturalization Service*, OFF. NAT'L DRUG CONTROL POL'Y, http://www.ncjrs.gov/ondcpcpubs/publications/enforce/border/ins_3.html (last visited Dec. 9, 2012).

⁹⁸ JUSTICE MGMT. DIV., U.S. DEP'T OF JUSTICE, BUDGET TREND DATA: FROM 1975 THROUGH THE PRESIDENT'S 2003 REQUEST TO THE CONGRESS 104-08 (2002) [hereinafter BUDGET TREND DATA], available at http://www.justice.gov/archive/jmd/1975_2002/2002/pdf/BudgetTrand.pdf (showing budget trends for INS from 1975 to 2003 and recording an INS budget of \$1.01 billion in 1988).

⁹⁹ The next two paragraphs draw from my discussion of these issues in *A Diversion of Attention?*, *supra* note 94, at 1577-78.

¹⁰⁰ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 303(a), 110 Stat. 3009-546, 3009-585 (codified as amended at 8 U.S.C. § 1226(c)); see also *Demore v. Kim*, 538 U.S. 510, 513 (2003) (upholding the mandatory detention provisions); Margaret Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, in IMMIGRATION STORIES 343, 348-54 (David A. Martin & Peter H. Schuck eds., 2005) (describing the enactment of these provisions and critiquing their overbreadth).

¹⁰¹ FEDERAL JUSTICE STATISTICS, 2009, *supra* note 5, at 1.

detaining most arrestees has generated an explosion in immigration detention that has been costly for taxpayers and lucrative for private contractors.¹⁰²

Regarding the immigration detention landscape, Anil Kalhan recently observed, “[i]n 1994, officials held approximately 6,000 noncitizens in detention on any given day. That daily average had surpassed 20,000 individuals by 2001 and 33,000 by 2008. Over the same period, the overall number of individuals detained each year has swelled from approximately 81,000 to approximately 380,000.”¹⁰³ Although civil immigration detention technically is not a part of the criminal justice system, as a practical matter, many noncitizens in immigration detention in fact are housed in county jails, and even those detained in separate facilities are subject to the same kinds of punitive detention as criminal defendants. Indeed, a 2009 report by Dora Schriro, then a senior Department of Homeland Security (DHS) official, found that immigration detainees are held under circumstances that are unjustifiably punitive given the noncriminal purposes of immigration detention.¹⁰⁴ Thus, it is important to take the civil detention of nearly 400,000 noncitizens into account when contemplating the extent to which immigration has been criminalized in recent years.

Another measure of the growth in federal enforcement efforts can be found in the physical space along the U.S.–Mexico border, which has become increasingly militarized during this period. CBP now operates six Predator drones along the border.¹⁰⁵ For a time, and in a move that further obfuscates the total dollars being spent on immigration enforcement, 1,200

¹⁰² See Christopher Nugent, *Towards Balancing a New Immigration and Nationality Act: Enhanced Immigration Enforcement and Fair, Humane and Cost-Effective Treatment of Aliens*, 5 U. MD. L.J. RACE RELIGION GENDER & CLASS 243, 254–55 & n.46 (2005) (discussing state, local, and private fiscal benefits of immigration detention); Nina Bernstein, *City of Immigrants Fills Jail Cells with Its Own*, N.Y. TIMES, Dec. 27, 2008, at A1 (reporting on illusory nature of fiscal benefits for localities but ample benefits for private contractors); Nina Bernstein, *Getting Tough on Immigrants to Turn a Profit*, N.Y. TIMES, Sept. 29, 2011, at A1 (discussing financial benefits accruing to private immigration detention contractors globally). Since federal arrests constitute only 1% of total arrests made, see MARK MOLTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2009 (2011), available at www.bjs.gov/content/pub/pdf/fjs09.pdf, it comes as no surprise that private companies in the detention industry have actively promoted state-level immigration legislation. See Laura Sullivan & Beau Hodai, *How Corporate Interests Got SB 1070 Passed* (NPR broadcast Nov. 9, 2010), transcript available at <http://www.npr.org/2010/11/09/131191523/how-corporate-interests-got-sb-1070-passed>.

¹⁰³ Kalhan, *supra* note 13, at 44–45.

¹⁰⁴ DORA SCHRIRO, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 10, 15 (2009).

¹⁰⁵ *U.S. Adds Surveillance Drone on Mexico Border*, REUTERS (Dec. 27, 2011), <http://www.reuters.com/article/2011/12/27/us-usa-mexico-drone-idUSTRE7BQ17220111227>.

National Guard members were also stationed along the border.¹⁰⁶ President Obama recently reduced that number by 300, but this costly intervention continues.¹⁰⁷ The only major piece of immigration legislation that Congress was able to agree on in the past decade was a bill to build 700 miles of fencing along the southern border with Mexico, notwithstanding the evidence that the costs of the project—in terms of dollars, the environment, private property rights, and human lives—would outweigh any measureable benefits in the reduction of unauthorized migration.¹⁰⁸

Increased federal enforcement efforts have resulted in a huge increase in the number of noncitizens removed from the country each year. As a result of these efforts, the number of individuals removed from the United States annually has increased significantly—from about 18,000 in 1980 to about 30,000 in 1990 to about 188,000 in 2000, and reaching a record high of about 392,000 in 2011 (the most recent year for which official statistics are available).¹⁰⁹ Of course, if individuals were simply removed, it might be easy to exempt these individuals from a discussion of overcriminalization. But noncitizens caught up in expanded removal efforts are not simply pushed through an administrative system and removed. A significant and growing number of them are subjected to federal criminal prosecution.¹¹⁰ The following Subpart discusses and critiques the

¹⁰⁶ *National Guard Forces to Be Cut at Southern Border*, N.Y. TIMES, Dec. 21, 2011, at A29.

¹⁰⁷ *See id.*

¹⁰⁸ *See, e.g.*, CHAD C. HADDAL ET AL., CONG. RESEARCH SERV., RL33659, BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER 26–27 (2009), available at <http://www.fas.org/sgp/crs/homsec/RL33659.pdf> (estimating the cost of the border fence at more than \$16.4 million to \$70 million per mile over the projected twenty-five-year life of the fence and questioning whether the barrier would even be effective at reducing unauthorized migration).

¹⁰⁹ DEP'T OF HOMELAND SEC., 2011 YEARBOOK OF IMMIGRATION STATISTICS 102 (2012), available at <http://www.dhs.gov/immigration-statistics>. Notably, the number of people “returned” (which would include not only noncitizens who were removed, but also those noncitizens—often stopped near the border or its functional equivalent—who leave the United States without formal process or otherwise departed “voluntarily” in the absence of a removal order) has actually fallen in recent years. From a record high of 1.676 million in 2000, that number was 323,542 in 2011, *id.*, suggesting a preference on the part of the past two administrations to remove noncitizens through the issuance of a formal removal order that will serve as a permanent disability in a noncitizen’s future efforts to reenter.

¹¹⁰ Many individuals removed by the federal government also entered the process through the states’ criminal justice systems, and their immigration status played a significant role in the processing and disposition of their criminal cases. *See generally* Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variations in Local Enforcement*, 88 N.Y.U. L. REV. (forthcoming 2013) (discussing the variable ways in which immigration status affects the criminal process experienced by noncitizens in three different jurisdictions). The interplay between sub-federal criminal justice systems and the immigration system is considered further *infra* Part III.

tremendous increase in federal immigration prosecutions.

B. PROSECUTING FEDERAL IMMIGRATION CRIMES

The growth of federal immigration enforcement efforts is manifested clearly in the rise in prosecutions of immigration crimes.¹¹¹ In 1993, the number of suspects in matters received by U.S. Attorneys' Offices for immigration offenses was 5,934,¹¹² of whom 5,400 were prosecuted or disposed of by a magistrate.¹¹³ This was only 5.4% of the total number of cases investigated in that year.¹¹⁴ In these records, immigration offenses are listed as a subcategory of "[o]ther" "[p]ublic-order" offenses.

The effects of the draconian 1996 changes in the immigration laws¹¹⁵ were felt in the years that followed. By 2000, the number of individuals investigated for immigration offenses was 16,495.¹¹⁶ This was only 13.4% of the total number of cases investigated in that year.¹¹⁷ Interestingly, this was so even though the INS made 33% of the arrests made by federal officers in that year,¹¹⁸ suggesting that in many cases individuals who were arrested by the INS were either not investigated or, presumably in a few cases, were prosecuted for other, more serious offenses. In these records, immigration offenses continue to be listed as a subcategory of "[o]ther" "[p]ublic-order" offenses.¹¹⁹

But the true explosion in criminal immigration enforcement came in the years following the September 11th attacks. Once the INS had been reorganized into three separate agencies under the auspices of the DHS and the money for immigration enforcement began pouring in, arrests and prosecutions for immigration crimes skyrocketed. This trend has continued year after year, no matter who is in the White House and who controls

¹¹¹ I discussed this trend in some detail in Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 139 (2009), http://www.columbia-lawreview.org/assets/sidebar/volume/109/135_Chacón.pdf. I borrow from that discussion in this Subpart.

¹¹² BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1993, at 15 (1996), available at bjs.ojp.usdoj.gov/content/pub/pdf/cfjs93.pdf.

¹¹³ *Id.* at 15–16.

¹¹⁴ *Id.*

¹¹⁵ See *supra* notes 13 & 100 and accompanying text.

¹¹⁶ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2000, at 1 (2002), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=605>.

¹¹⁷ *Id.* at 1 (indicating that U.S. Attorneys initiated investigations in 123,559 cases in 2000, and that 16,495 of those involved immigration offenses).

¹¹⁸ *Id.* at 1.

¹¹⁹ *Id.* at 27.

Congress.

With regard to arrests, the Bureau of Justice Statistics recently recorded that “[b]etween 2005 and 2009, immigration arrests increased at an annual average rate of 23%,” and that “[i]mmigration offenses (46%) were the most common of all arrest offenses in 2009, followed by drug (17%) and supervision (13%) violations.”¹²⁰ The government is now arresting more than twice as many people annually as it did in 1995, and the bulk of that increase is the result of increased immigration arrests originating with DHS officials.¹²¹

At present, the number of immigration convictions occurring each month outstrips the annual total of immigration prosecutions in 1993.¹²² This is not a deviation, but has been the norm for several years.¹²³ Between mid-2008 and September 2011, conviction rates were almost always in excess of 6,000 per month, and approached numbers as high as almost 10,000 per month.¹²⁴

Immigration prosecutions take many forms. Until recently, by far the most numerous were for simple misdemeanor illegal entry.¹²⁵ Obtaining a conviction for this crime simply requires the prosecutor to establish that an individual entered the country without inspection or evaded inspection.¹²⁶ A typical case might involve a person who crossed the border away from a formal port of entry. No particular mens rea is required for a conviction of entry without inspection,¹²⁷ although the law also contains a provision for the prosecution of those who “willfully” conceal a material fact or make false statements to gain entry.¹²⁸

¹²⁰ FEDERAL JUSTICE STATISTICS, 2009, *supra* note 5, at 1.

¹²¹ *See id.* at 1, fig.1.

¹²² *Compare Immigration Convictions for September 2011*, TRAC IMMIGRATION (Dec. 14, 2011), <http://trac.syr.edu/tracreports/bulletins/immigration/monthlysep11/gui/> [hereinafter *Immigration Convictions for September 2011*] (placing the number of immigration prosecutions in September 2011 at 6,055, and noting that this number is actually a decrease from the previous month), with *supra* text accompanying note 113.

¹²³ *See Immigration Convictions for September 2011*, *supra* note 122, at fig.1. As this Article goes to press, more recent data suggests that immigration prosecutions peaked early in 2011 and have declined since that time, although the numbers are still at historic highs. *Decline in Federal Criminal Immigration Prosecutions*, TRAC IMMIGRATION (June 12, 2012), <http://trac.syr.edu/immigration/reports/283/>.

¹²⁴ *Immigration Convictions for September 2011*, *supra* note 122, at fig.1.

¹²⁵ 8 U.S.C. § 1325 (2006); *see Illegal Reentry Becomes Top Criminal Charge*, TRAC IMMIGRATION (June 10, 2011), <http://trac.syr.edu/immigration/reports/251/> (noting that 2011 was “the first year that recorded prosecutions for illegal reentry surpassed those of illegal entry, which have been declining from their high during FY 2009”).

¹²⁶ *See* § 1325(a).

¹²⁷ *Id.*

¹²⁸ *Id.*

In 2009, two-thirds of the individuals prosecuted for immigration crimes were “disposed by U.S. magistrates as petty misdemeanants in . . . five Southwest border districts.”¹²⁹ The rote prosecution of illegal entrants created a huge distortion in some dockets.¹³⁰ The prosecution of illegal entry along the southern border consumed resources that courts might otherwise have used to combat violent crime.¹³¹ Magistrate judges have typically handled these cases in proceedings in which mass plea agreements are obtained.¹³² These proceedings fall well short of the kind of procedural protections generally given to a defendant taking a criminal plea.¹³³ Indeed, the Ninth Circuit has concluded that these en masse plea agreements violate Federal Rule of Criminal Procedure 11.¹³⁴ Unfortunately, individual defendants in that case—and many others—are without a remedy because they are unable to show prejudice.

Until recently, the second most common group of prosecutions was for felony reentry, but in 2011, felony reentry prosecutions actually exceeded prosecutions for misdemeanor entry.¹³⁵ “From 2001 to 2008, 111,920 [noncitizens] were prosecuted for the crime [of illegal re-entry] Obama’s administration is averaging about 34,355 annually and is on pace to surpass 103,000 in his first three years.”¹³⁶ The surge in felony reentry prosecutions is no surprise. Since millions of noncitizens have been formally removed in recent years, if even a small percentage of those individuals with strong ties to the United States attempt to return during the period in which their return is barred,¹³⁷ this will cause a surge in felony

¹²⁹ FEDERAL JUSTICE STATISTICS, 2009, *supra* note 5, at 5.

¹³⁰ Ted Robbins, *Claims of Border Program Success Are Unproven* (NPR broadcast Sept. 13, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=129827870>.

¹³¹ *Id.*

¹³² See Chacón, *Managing Migration*, *supra* note 1, at 142–43; see also JOANNA LYDGATE, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, BERKELEY LAW SCHOOL, ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 1–2 (2010), available at www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf.

¹³³ Chacón, *Managing Migration*, *supra* note 1, at 145–47.

¹³⁴ *United States v. Roblero-Solis*, 588 F.3d 692, 693 (9th Cir. 2009) (“The problem generated by the massive caseload on the court understandably led the court to adopt a shortcut. Abstractly considered, the shortcut is not only understandable but reasonable. The shortcut, however, does not comply with Rule 11. We cannot permit this rule to be disregarded in the name of efficiency nor be violated because it is too demanding for the district court to observe.”).

¹³⁵ Julian Aguilar, *Illegal Re-entry Cases Surge Under Obama*, TEX. TRIB. (June 15, 2011), <http://www.texastribune.org/texas-mexico-border-news/texas-mexico-border/illegal-reentry-cases-surge-under-obama/>.

¹³⁶ *Id.*; see also *Immigration Convictions for September 2011*, *supra* note 122.

¹³⁷ An individual who is removed from the U.S. is generally barred from reentering for five years, 8 U.S.C. § 1182(a)(9)(A)(i) (2006), although that bar stretches to ten years for

reentry. And at least some portion of the tens of thousands of border crossers who were prosecuted for illegal entry are attempting to reenter—except that now, their entry is a felony by virtue of their prior conviction. One thing that the number of felony reentry prosecutions makes clear is that many noncitizens are not deterred from returning by their past detentions or by the threat of future detention or criminal incarceration.¹³⁸

As with the misdemeanor entry cases, felony reentry cases are often resolved through plea agreements. Unless the initial removal was invalid, there are few grounds upon which a defendant can successfully contest this charge, which carries a potential sentence of up to twenty years.¹³⁹ Very few defendants receive twenty-year sentences, but what is striking about these prosecutions is how varied the sentences are. For defendants in “Fast-Track” jurisdictions, pleas of two to three years are not uncommon, while those who by happenstance are detained and tried in other areas (where perhaps the pressure of immigration cases on the docket is less of a problem), the sentences tend to be substantially longer, regardless of the underlying offenses—if any—that led to the initial removal.¹⁴⁰ The irrationality of federal sentencing for reentry crimes suggests a much deeper lack of consensus over the seriousness of the offense and the degree to which such sentences serve as a general deterrent to illegal entry and reentry. As with drug crimes, heavy sentences do not seem to be tethered to any kind of factual analysis aimed at determining the optimal use of criminal sanctions to achieve enforcement goals.

The remainder of prosecutions for immigration offenses constitutes an extremely small portion of the overall prosecutions. Charges for alien smuggling, human trafficking, and immigration-related fraud are few and far between.¹⁴¹ Criminal prosecutions of employers who have violated

anyone who has been present without authorization for a year or more, § 1182(a)(9)(B)(i)(II).

¹³⁸ See also BUDGETING FOR IMMIGRATION ENFORCEMENT, *supra* note 93, at 34, 118 (concluding that increased reliance on criminal prosecutions had little deterrent effect on unauthorized migrants).

¹³⁹ 8 U.S.C. § 1326(b) (2006).

¹⁴⁰ Alison Siegler, *Disparities and Discretion in Fast-Track Sentencing*, 21 FED. SENT'G REP. 299, 299 (2009).

¹⁴¹ Data from January 2012 is illustrative. The top-ranked immigration charge in federal district court in that month was illegal reentry, 8 U.S.C. § 1326 (2006), numbering 1,477, while the next highest number of prosecutions for alien smuggling and harboring, § 1324, numbered only 166, and all additional charges were in the double or single digits. See *Immigration Prosecutions for January 2012*, TRAC IMMIGRATION (Apr. 19, 2012), <http://trac.syr.edu/tracreports/bulletins/immigration/monthlyjan12/fil/>. That same month, in the magistrate courts, the most frequently cited lead charge was misdemeanor illegal entry, § 1325, which was the lead charge for 56.8% of the 6,069 defendants in immigration cases filed before magistrates that month, with felony reentry, § 1326, comprising 37.9%—almost

IRCA's criminal provisions are rare.¹⁴² The bulk of prosecutorial resources are aimed not at those who prey on or profit from the migrants, but on the migrants themselves.

In short, the past fifteen years have witnessed a massive expansion of federal resources dedicated to immigration enforcement, an unprecedented militarization of the southern border, an exponential increase in the number of noncitizens held in detention, and a more than twelve-fold increase in the number of criminal immigration prosecutions. Yet, as previously noted, the mantra that the federal government is not enforcing immigration law is still frequently invoked in the national dialogue concerning immigration. Given the tremendous cost of this endeavor—and given that many of these expenses have come at a time when so many other federal programs are being asked to cut back or slow growth—it is not clear exactly what would appease those who call for ever more vigorous enforcement of immigration laws.

Reviewing the figures concerning federal enforcement efforts and federal prosecutions of immigration crimes reveals a very different problem from the one that has been the rallying cry of restrictionists. The federal government is enforcing immigration law. It is enforcing immigration law as never before and is relying on the criminal justice system in an unprecedented way to do so. The question is: do these enforcement efforts make sense? Or do they constitute an overcriminalization of migration, the costs of which are difficult to justify when weighed against any cost savings (if indeed there are cost savings) achieved by reducing the number of unauthorized workers present within our borders? The data suggests that this use of the criminal justice system is having, at best, a marginal effect on migration flows, and may be having no impact at all.¹⁴³

Unfortunately, this is not the question that the immigration debate is focused upon, but it is an important question. For even as the federal

all of the remaining immigration cases. *Id.*

¹⁴² ANDORRA BRUNO, CONG. RESEARCH SERV., R40002, IMMIGRATION-RELATED WORKSITE ENFORCEMENT: PERFORMANCE MEASURES 8 (2012), available at <http://www.fas.org/sgp/crs/homsec/R40002.pdf> (noting that there were only 196 criminal arrests of managerial employees in connection with workplace hiring violations, and noting that “ICE . . . criminal arrests in worksite enforcement operations represent a very small percentage of the potential population of violators”); see also Wishnie, *The Experiment Fails*, *supra* note 93 at 209–11. For arguments that employer sanctions are harmful to workers and should be abolished, see Bill Ong Hing, *Asian Americans and Immigration Reform*, 17 ASIAN AM. L.J. 83, 104 (2010) (“The rationale for employer sanctions always has been that the law would dry up jobs for the undocumented and discourage them from coming. However, a close look at ICE raids reveals that employer sanctions have had disastrous effects on all workers.”); Wishnie, *The Experiment Fails*, *supra* note 93, at 214–17.

¹⁴³ BUDGETING FOR IMMIGRATION ENFORCEMENT, *supra* note 93, at 34.

government ramps up its enforcement effort, it is being joined by a number of force multipliers in the form of state and local law enforcement agencies that are now expending some of their own resources to enforce federal immigration laws.

III. DECLINING FEDERAL EXCLUSIVITY IN THE ENFORCEMENT OF IMMIGRATION LAWS

Throughout the twentieth century, the federal government assumed an almost exclusive role not merely in the legal *regulation* of migration, as previously noted, but also in the *enforcement* of immigration law.¹⁴⁴ This is not to suggest that states and localities have played no role in immigration enforcement. On the contrary, during the twentieth century, state and local governments participated in a number of high-profile attempts to rid their borders of individuals who were (or were perceived to be) undocumented. For example, local officials actively participated in the “repatriation” of Mexicans—and many Mexican-Americans—during the 1930s.¹⁴⁵ And in

¹⁴⁴ Chin & Miller, *supra* note 46, at 273–74 (reviewing existing precedent as standing for the proposition that “[t]he federal government has exclusive authority not only to establish the standards for the admission and exclusion of immigrants, but also to apply *and enforce them*” (emphasis added)); Wishnie, *supra* note 11, at 1089 (“[A]lthough individual police officials have occasionally directed their departments to enforce immigration laws, on the whole, enforcement of the immigration statutes has traditionally been the province of federal immigration officials.” (footnote omitted)). Indeed, reviewing history and precedent, Wishnie and others have concluded that sub-federal enforcement of civil immigration law by local officials is unconstitutional. *See id.* at 1089 (“Nor may this constitutional power to regulate immigration be devolved by statute or executive decree to state or local authorities, because the federal immigration power is ‘incapable of transfer’ and ‘cannot be granted away.’” (citations omitted)); *id.* at 1090 n.35 (citing scholarly work); *see also* Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 995–96 (2004) (arguing that local enforcement of immigration law is inherently unconstitutional).

¹⁴⁵ *See* FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S*, at 119–59 (rev. ed. 2006). During the 1930s, hundreds of thousands of Mexicans (and U.S. citizens of Mexican descent) were “repatriated” to Mexico. Balderrama and Rodriguez estimate the number to be about 1 million, with 400,000 leaving from California alone. *Id.* at 151, 305. The term “repatriation” is misleading for two reasons. First, it suggests a voluntary movement, when in fact, much of the relocation was generated by legal coercion by federal, state, and local actors, in connection with threats of violence and virulent discrimination by private actors. *Id.* at 119–59, 305. Second, it suggests that those being “repatriated” were returning to their native land—a situation that was not the case for the many U.S. citizens of Mexican ancestry who were sent to Mexico during this time. Kevin R. Johnson, *The Forgotten “Repatriation” of Persons of Mexican Ancestry and Lessons for the “War on Terror,”* 26 PACE L. REV. 1, 4–5 (2005) (estimating that 60% of the “repatriated” Mexicans were U.S. citizens); *see also* BALDERRAMA & RODRIGUEZ, *supra*, at 307–08 (giving examples of citizen children caught up in the “repatriation” movement). State and local governments were active participants in the campaign, using coercion and physical force to achieve the removal of Mexicans and

the course of the federally orchestrated immigration policing action known as “Operation Wetback,” local governments acted in cooperation with the federal government in detaining undocumented noncitizens—as well as U.S. citizens of Mexican descent and Mexican migrants lawfully present—and removing them to Mexico.¹⁴⁶

In spite of the frequent interventions on the part of state and local actors in immigration enforcement, formal legal authority for such interventions did not exist. One might argue that the power to enforce federal immigration law is an inherent power of state and local law enforcement, but throughout the past century, neither the existing case law nor existing scholarly theories supported this conclusion. Indeed, in response to confusion on the point, the Department of Justice issued a 1996 memorandum outlining the limits of state and local authority to enforce immigration laws as these limits were understood at the time.¹⁴⁷ The memorandum concluded that “[s]tate and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability, as opposed to a criminal violation of the immigration laws or other laws.”¹⁴⁸ On the other hand, the memorandum also concluded that “state and local police may constitutionally detain or arrest aliens for violating the criminal provisions of the Immigration and Naturalization Act.”¹⁴⁹ In short, the federal position was that a state or local police officer had the authority to conduct arrests for immigration crimes such as felony reentry or alien smuggling, but not for the civil offense of being present in the country without current legal authorization. And even when the state had the power to arrest an immigration violator, there was no basis to prosecute that person for immigration violations at the state level.¹⁵⁰ This task—as well as the task of removing that person from the country—remained the sole province of the federal government.

Mexican-Americans. *Id.* at 305; Johnson, *supra*, at 4–5. This was true notwithstanding the constitutional obstacles to this sub-federal immigration enforcement. Johnson, *supra*, at 9–10. (“Through efforts to enforce the immigration laws, state and local governments also infringed on the federal immigration power.”).

¹⁴⁶ JUAN RAMON GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954, at 183–202 (1980) (discussing the cooperation of many California and some Arizona officials, and opposition from Texas officials).

¹⁴⁷ Assistance by State and Local Police in Apprehending Illegal Aliens, 20 Op. O.L.C. 26, 32 (1996) [hereinafter Apprehending Illegal Aliens], available at <http://www.justice.gov/olc/immstopo1a.htm>; see also NAT’L IMMIGRATION FORUM, BACKGROUNDER: IMMIGRATION LAW ENFORCEMENT BY STATE AND LOCAL POLICE 1 (2004), available at <http://www.immigrationforum.org/images/uploads/Backgrounder-StateLocalEnforcement.pdf> (discussing the Office of Legal Counsel memo).

¹⁴⁸ Apprehending Illegal Aliens, *supra* note 147.

¹⁴⁹ *Id.* at 27.

¹⁵⁰ Chin & Miller, *supra* note 46, at 312–14.

In two major pieces of legislation enacted in 1996, Congress expanded the power of state and local law enforcement to enforce federal immigration law in three specific ways.¹⁵¹ First, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) formally authorized sub-federal law enforcement officers to arrest and detain unlawfully present noncitizens who had “previously been convicted of a felony in the United States.”¹⁵² Second, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) empowered the Attorney General¹⁵³ to authorize local officials to enforce civil immigration laws when “an actual or imminent mass influx of aliens . . . presents urgent circumstances requiring an immediate Federal response.”¹⁵⁴ Finally, IIRIRA added § 287(g) to the Immigration and Nationality Act to allow the Attorney General to delegate immigration enforcement authority to state and local police pursuant to a formal agreement between the state or local agency and the Department of Justice, provided the state or local officers have undergone adequate training to enforce the immigration laws.¹⁵⁵ Such agreements, now increasingly common, are often referred to as “287(g) agreements.”¹⁵⁶ None of these provisions would have been necessary if state and local governments actually had “inherent authority” to enforce immigration laws, which suggests that Congress did not believe that they did.

In 2002, the Office of Legal Counsel (OLC) under Attorney General John Ashcroft revised the 1996 memorandum regarding the role of state and local police in immigration enforcement, concluding that state and local law enforcement had “inherent authority” to arrest and detain immigration violators, including civil immigration violators.¹⁵⁷ Although the OLC memo was not immediately released, this new policy—which contravened

¹⁵¹ NAT’L IMMIGRATION FORUM, *supra* note 147, at 3, 5. I have previously traced the sub-federalization of immigration enforcement developments in Chacón, *supra* note 27, at Part I.A and Chacón, *supra* note 94, at 1579–98, and I draw from those discussions throughout the remainder of this Subpart.

¹⁵² Pub. L. No. 104-132, § 439(a), 110 Stat. 1214, 1276 (1996) (codified at 8 U.S.C. § 1252(c) (2006)).

¹⁵³ This responsibility now falls to the Secretary of the Department of Homeland Security. *See* 8 U.S.C. § 1103(a)(1), (10) (2006 & Supp. IV 2010).

¹⁵⁴ Pub. L. No. 104-208, § 303(a), 110 Stat. 3009-546, 3009-646 (codified as amended at 8 U.S.C. § 1103(a)).

¹⁵⁵ *See* 8 U.S.C. § 1357(g) (2006).

¹⁵⁶ *See, e.g.*, Press Release, U.S. Dep’t of Homeland Sec., Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements (July 10, 2009) [hereinafter Dept. of Homeland Sec. Press Release], available at http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm.

¹⁵⁷ Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to the Att’y Gen. (Apr. 3, 2002), available at <http://www.aclu.org/files/FilesPDFs/ACF27DA.pdf>.

conventional scholarly opinion and prior legal opinions—created a new source of confusion concerning the scope of state and local power to enforce immigration law.

Given leeway, some law enforcement agencies began asserting “inherent authority” to conduct arrests to effectuate both federal civil and criminal immigration laws.¹⁵⁸ Although this position is difficult to reconcile with the narrow and specific congressional grants of power to states and localities in the 1996 legislation, the notion has gained a surprising degree of currency in recent years.¹⁵⁹ As a consequence, state and local law enforcement are engaged in policing immigration at unprecedented levels, sometimes without the express authority of the federal government.¹⁶⁰ Compounding this trend is the necessary involvement of state and local officials in enforcing the sub-federal immigration laws enacted in their jurisdictions.¹⁶¹ Arizona’s S.B. 1070 and similar state laws have attempted to expand the states’ ability to participate in and, indeed, to shape and define the parameters of local immigration enforcement through the use of their own criminal and licensing laws.¹⁶²

At the same time that the federal government has sought to rein in

¹⁵⁸ See, e.g., Penny Starr, *Sheriff Arpaio’s Office is Only Law Enforcement Agency in U.S. Denied Authority to Enforce Immigration Laws, Says DHS*, CNS NEWS (Oct. 22, 2009), <http://cnsnews.com/news/article/sheriff-arpaios-office-only-law-enforcement-agency-us-denied-authority-enforce> (reporting Sheriff Joe Arpaio’s statement that he would continue to enforce immigration law even if not authorized to do so by a 287(g) agreement, and citing to Kris Kobach’s argument, relying on the 2002 OLC memo, see *supra* note 157, that Arpaio was entitled to do so). The legality and legitimacy of these enforcement efforts have been challenged by the Justice Department. See Letter from Thomas E. Perez, *supra* note 89, at 3 (“Our investigation uncovered a number of instances in which immigration-related crime suppression activities were initiated in the community after [the Maricopa County Sheriff’s Office] received complaints that described no criminal activity, but rather referred, for instance, to individuals with ‘dark skin’ congregating in one area, or individuals speaking Spanish at a local business. The use of these types of bias-infected indicators as a basis for conducting enforcement activity contributes to the high number of stops and detentions lacking in legal justification.”). The Department has found similar problems with the East Haven, Connecticut, Police Department—another department that engages in immigration policing in the absence of a 287(g) agreement. See Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep’t of Justice, to Joseph Maturo, Jr., Mayor of East Haven at 9 (Dec. 19, 2011), available at www.justice.gov/crt/about/spl/documents/easthaven_findletter_12-19-11.pdf (“EHPD does not have . . . a ‘287(g) agreement[.]’ Nonetheless, EHPD has allowed its officers to engage in haphazard and uncoordinated immigration enforcement efforts to target Latino drivers for traffic stops.”). It is impossible to know just how many jurisdictions are engaged in such practices, but clearly such practices are ongoing in some jurisdictions.

¹⁵⁹ Chin & Miller, *supra* note 46, at 255–56.

¹⁶⁰ See Starr, *supra* note 158.

¹⁶¹ See *supra* Part I.

¹⁶² *Supra* Part I.C.

states and localities in their immigration enforcement efforts,¹⁶³ the federal government has also come to rely on state and local law enforcement agents in conducting its own, newly expanded enforcement efforts.¹⁶⁴ As previously noted, 1996 legislation empowered the federal government to enter into contractual arrangements with sub-federal entities to enforce immigration laws.¹⁶⁵ Although the federal government did not begin entering into such agreements in the 1990s, it did so throughout the last decade, and currently has contractual agreements with fifty-seven law enforcement agencies in twenty-one states.¹⁶⁶ Depending on the scope of the agreements, state and local officials in these jurisdictions can do anything from screen the immigration status of jail inmates¹⁶⁷ to conduct arrests for federal immigration violations.¹⁶⁸ Critics contending that the federal government failed to sufficiently train and oversee state and local agents in implementing these agreements were vindicated when a Government Accountability Office (GAO) report essentially concluded just that.¹⁶⁹ As a result, agents were engaging in racial profiling and other impermissible tactics in policing immigration. Since the GAO report was issued, the Obama administration has increased oversight and training and reduced the number of 287(g) agreements, although critics contend that the underlying problems of profiling and other constitutional abuses continue.¹⁷⁰

¹⁶³ See discussion of the federal lawsuits in Arizona and Alabama at notes 50–54, *supra*.

¹⁶⁴ For a discussion of the tension in these policies, see Julianne Hing, *Justice Dept. Finally Cuffs Sheriff Joe, But Not the Policy That Made Him*, COLORLINES (Jan. 5, 2012, 9:54 AM), http://colorlines.com/archives/2012/01/sheriff_joe_will_cooperate_with_doj_cleanup_issues_demands_of_his_own.html.

¹⁶⁵ 8 U.S.C. § 1357(g) (2006); see *supra* text accompanying notes 155–57.

¹⁶⁶ *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/287g.htm#signed-moa> (last visited Nov. 28, 2012).

¹⁶⁷ See, e.g., Memorandum of Agreement between U.S. Immigration & Customs Enforcement and the Arizona Dep't of Corr. (Oct. 15, 2009), available at http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gazdeptofcorrections101509.pdf.

¹⁶⁸ See, e.g., Memorandum of Agreement between U.S. Immigration & Customs Enforcement and Springdale Police Dep't (Oct. 15, 2009), available at http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gspringdalepd101509.pdf.

¹⁶⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 4–7, 10–19 (2009), available at <http://www.gao.gov/new.items/d09109.pdf>.

¹⁷⁰ For a brief discussion by the Department of Homeland Security concerning its own efforts to reform the program, see Dept. of Homeland Sec. Press Release, *supra* note 156. For an example of continued criticism from immigrants' rights organizations in response to these reforms, see, for example, *ICE Reforms Fail to Solve Fundamental 287(g) Problems*,

Moreover, the federal government has not simply invited state and local participation in immigration enforcement. With the rollout of the Secure Communities program, the federal government has *mandated* the participation of state and local officials in federal immigration enforcement. Pursuant to the Secure Communities program, Immigration and Customs Enforcement (ICE) screens the biometric information gathered by state and local law-enforcement to identify noncitizens in state prisons and local jails who are potentially subject to removal. As of August 22, 2012, the biometric-information-sharing capability of the Secure Communities program is active in “3,074 jurisdictions in 50 states, 4 territories and Washington D.C.”¹⁷¹ In these jurisdictions, any individual who is arrested has his identifying information run through the Department of Homeland Security’s database so that the federal government can determine whether the individual is in violation of immigration laws. If an individual is deemed to be an immigration law violator, ICE may authorize the local agency to detain that individual for up to forty-eight hours, at which time ICE must either claim custody of the individual or the individual is released.¹⁷²

The Secure Communities program has generated a number of concerns. First, inaccuracies in the DHS database have resulted in a number of false arrests, including the arrest and detention of U.S. citizens and noncitizens lawfully present.¹⁷³ Early studies of the Secure Communities program also suggest that discriminatory policing of Latinos has tended to increase in certain jurisdictions when they begin their

NAT’L IMMIGR. L. CTR. (Apr. 2010), <http://www.nilc.org/287g-OIG-report-2010-04-29.html>.

¹⁷¹ U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ACTIVATED JURISDICTION 1 (August 22, 2012), available at www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf.

¹⁷² See *Secure Communities: Frequently Asked Questions, How Does Secure Communities Work?*, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/faq.htm (last visited June 4, 2012) (“When state and local law enforcement officers arrest and book someone into custody for a violation of a criminal offense, they generally fingerprint the person DHS receives these fingerprints from the FBI, so that ICE can determine if that person is also subject to removal (deportation) In cases where the person appears from these checks to be removable, ICE may issue a detainer on the person, requesting that the state or local jail facility hold the individual no more than an extra 48 hours (excluding weekends and holidays) to allow for an interview of the person.”). Interestingly, there is no statutory authority for these detainers outside of the context of drug crimes. 8 U.S.C. § 1357(d) (2006) (authorizing detainers “for a violation of controlled substances laws” only).

¹⁷³ AARTI KOHLI ET AL., CHIEF JUSTICE EARL WARREN INST. OF LAW & SOC. POL’Y, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 2 (2011), available at http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf (“Approximately 3,600 United States citizens have been arrested by ICE through the Secure Communities program.”).

participation in the program.¹⁷⁴ In combination with the toxic rhetoric of the contemporary immigration debate, it is unsurprising that some law enforcement officers feel that it is their duty to more vigorously police populations that they identify as potentially “illegal.” As a consequence, poor Latinos and individuals living in immigrant communities are increasingly likely to be stopped, arrested, and detained for low-level state and local criminal offenses as they are caught up in an informal dragnet aimed at immigration violators.¹⁷⁵ On the other hand, the federal government maintains that the program has the ability to reduce profiling precisely because it eliminates state and local law enforcement discretion in immigration enforcement, and relies solely on federal screening for immigration enforcement decisions.¹⁷⁶ This is plausible in theory, although it is apparently not yet a reality in practice.

In short, state and local governments are now actively participating in the enforcement of federal immigration law. In some cases, they are doing so because they erroneously believe that they have the inherent authority to do so. Increasingly, they are doing so at the behest of the federal government, sometimes even when they are not interested in dedicating their law enforcement resources to these efforts.¹⁷⁷ The involvement of

¹⁷⁴ *Id.* at 3 (arguing that early data provides support for allegations that Secure Communities has increased racial profiling, but noting that additional study is needed).

¹⁷⁵ *Id.* at 6 (concluding that in some jurisdictions, Latinos are disproportionately “target[ed] . . . for minor violations and pre-textual arrests with the actual goal of initiating immigration checks through the Secure Communities system”); *see also* Letter from Thomas E. Perez, *supra* note 89, at 3 (describing racial profiling in immigration policing by the Maricopa County Sheriff’s Office); Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep’t of Justice, to Joseph Maturro, Jr., Mayor of East Haven at 9 (Dec. 19, 2011), *available at* www.justice.gov/crt/about/spl/documents/easthaven_findletter_12-19-11.pdf (describing racial profiling in immigration policing by the EHPD). A variety of immigrants’ rights organizations and academics have compiled reports that include descriptions of policing strategies that target Latinos and Latino neighborhoods. *See, e.g.*, WEISSMAN ET AL., THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS 8 (2009), *available at* <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf>; SARAH WHITE & SALMUN KAZEROUNIAN, TENN. IMMIGRANT AND REFUGEE RIGHTS COAL., THE FORGOTTEN CONSTITUTION: RACIAL PROFILING AND IMMIGRATION ENFORCEMENT IN BEDFORD COUNTY, TENNESSEE 6 (2011), *available at* <http://www.tnimmigrant.org/storage/The%20Forgotten%20Constitution.pdf>.

¹⁷⁶ *Secure Communities: Civil Rights and Civil Liberties*, IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Nov. 28, 2012) (“Secure Communities reduces opportunities for racial or ethnic profiling because all people booked into jails are fingerprinted.”) (emphasis in original).

¹⁷⁷ DHS has clearly stated that it is a “fact” that jurisdictions cannot opt out of the program. *See Secure Communities: Get the Facts*, U.S. DEP’T OF HOMELAND SEC., IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/get-the-facts.htm (last visited June 4, 2012). The agency has maintained this position even when confronted with representatives from jurisdictions that have been skeptical of or hostile to the program. *See,*

literally hundreds of thousands of additional law enforcement agents in the policing of immigration substantially widens the net that the government is using to catch immigration violators. In the short term, at least, this has compounded the policing problems that aggressive immigration enforcement has generated in the past.

IV. CONCLUSIONS: OVERCRIMINALIZATION?

It should be clear from the foregoing discussion that there has been an increased criminalization of immigration in recent years. Federal prosecutions of immigration are at all-time record highs, and immigration offenses are now the single most commonly prosecuted federal criminal offenses. State and local governments now are assisting actively in federal immigration enforcement efforts. Moreover, states and localities are attempting to regulate immigration through their own laws, which routinely include criminal ordinances.

Aggregate per capita expenditure on law enforcement by local, state, and federal governments remained flat—and even fell slightly when adjusted for inflation—in the period from 2002 through 2007.¹⁷⁸ At the federal level, per capita expenditures for judicial and legal services declined 7% in this period, as did per capita expenditure on corrections, while per capita expenditure on protection fell 2%.¹⁷⁹ Yet during this period, expenditures on immigration enforcement expanded significantly, meaning that such expenditures have put even further fiscal pressure on other enforcement efforts and on other government programs. It is difficult to

e.g., Brian Bennett, *Deportations Won't Require States' OK*, L.A. TIMES, Aug. 6, 2011, at AA2 (reporting that DHS informed governors that they could not opt out of the program, notwithstanding the fact that “Governors in California, Illinois, Massachusetts and several other states have complained that the effort also has ensnared thousands of minor offenders, including some who were arrested but not yet tried or convicted, and has deterred some crime victims from coming forward to aid police” and “[s]everal governors had announced their intention to withdraw from the program [or] refused to sign agreements”). Notwithstanding the absence of opt-out provisions, some jurisdictions have continued to seek ways to limit their participation in the program. *See, e.g.*, Liz Farmer, *D.C. Council Bucking ICE's Secure Communities*, WASH. EXAMINER (Nov. 15, 2011), <http://washingtonexaminer.com/local/2011/11/dc-council-bucking-ices-secure-communities/120394> (discussing Washington D.C.'s efforts to enact similar limitations); *Santa Clara County Ends Collaboration with ICE*, NEW AM. MEDIA (Oct. 18, 2011), <http://newamericamedia.org/2011/10/santa-clara-county-ends-collaboration-with-ice.php> (discussing Santa Clara County's efforts to limit cooperation by limiting the detainer individuals flagged by the database check).

¹⁷⁸ TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JUSTICE EXPENDITURES AND EMPLOYMENT, FY 1982–2007—STATISTICAL TABLES 2 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jee8207st.pdf>.

¹⁷⁹ *Id.*

determine exactly what is happening on the state level, but similar trends are probably emerging in states with an active immigration-enforcement agenda. Several scholars have recently noted that states have moved to focus scarce criminal justice resources on traditional criminal justice areas.¹⁸⁰ Yet this is happening at a time when states and localities are aiming new criminal sanctions and new enforcement efforts at unauthorized migration. So surely, in at least some places, a shift in law enforcement resources is occurring.¹⁸¹

The question is whether this constitutes overcriminalization. Overcriminalization occurs when a legislature defines too many different activities as “crime,” when the system excessively punishes offenses, or both. Scholars have condemned the U.S. criminal justice system for both punishing too much conduct and punishing conduct too harshly, and the word “overcriminalization” is frequently applied to U.S. criminal law and law enforcement.¹⁸² In a system characterized by overcriminalization, law enforcement operates with an undesirable degree of unchecked discretion, procedural protections are undercut, and scarce resources are misallocated in crime control efforts.¹⁸³

All of the major problems associated with overcriminalization appear

¹⁸⁰ Roger A. Fairfax, Jr., *From “Overcriminalization” to “Smart on Crime”: American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL’Y 597, 610–11 (2011); Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 583 (2012).

¹⁸¹ See Lacey, *Sex Crimes Were Ignored*, *supra* note 85 (discussing the Maricopa County Sheriff’s Department’s failure to prosecute sex crimes); *Robbins*, *supra* note 130 (discussing the general decline in felony prosecutions along the southern border with the rise of misdemeanor illegal entry prosecutions).

¹⁸² See, e.g., DOUGLAS N. HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 3 (2008) (“The two most distinctive characteristics of both federal and state systems of criminal justice in the United States during the past several years are the dramatic expansion in the substantive criminal law and the extraordinary rise in the use of punishment.”); Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 158 (1967); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512–18 (2001). For some efforts to define “overcriminalization” more precisely, see, for example, Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 749 (2005) (“[T]he common features of overcriminalization include the following: (1) excessive unchecked discretion in enforcement authorities, (2) inevitable disparity among similarly situated persons, (3) potential for abuse by enforcement authorities, (4) potential to undermine other significant values and evade significant procedural protections, and (5) misdirection of scarce resources (opportunity costs).”); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 717 (2005) (“[T]he overcriminalization phenomenon consists of: (1) untenable offenses; (2) superfluous statutes; (3) doctrines that overextend culpability; (4) crimes without jurisdictional authority; (5) grossly disproportionate punishments; and (6) excessive or pretextual enforcement of petty violations.”).

¹⁸³ See Beale, *supra* note 182, at 749; Luna, *supra* note 182, at 717.

in contemporary immigration enforcement. By imposing criminal law solutions on what is (and has always been) primarily an issue of labor migration flow,¹⁸⁴ legislatures have not only failed to address the central dynamics that drive migration,¹⁸⁵ but have also created a series of undesirable and expensive byproducts. The failure of the policies of criminalization is evident in the numbers. Although harsh criminal enforcement of immigration laws may be having a marginal effect on migration flows,¹⁸⁶ any such effect has come at huge cost and could likely have been attained through more effective migration policy outside of the criminal sphere.

First, there is the monetary cost. The resources meted out to achieve the criminal punishment of migrants are disproportionate to the problem and corrosive to the overall balance of resources in the criminal justice system. As previously noted, the cost of immigration enforcement is crowding out other investments in criminal justice, particularly during a time of scarce resources. Whether through deliberate policy choices or through the necessity of allocating scarce resources, the current immigration enforcement agenda skews spending toward the prosecution of migration offenders and away from the prosecution of violent and dangerous

¹⁸⁴ BILL ONG HING, *ETHICAL BORDERS: NAFTA, GLOBALIZATION AND MEXICAN MIGRATION* 9–28 (2010) (discussing the labor market effects of NAFTA, including the production of increased unauthorized labor flow from Mexico); KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* 119 (2007) (“It is unquestionably the case that economic forces bring the majority of migrants to the United States. Many come to this country for economic opportunities far superior to those available to them in their homeland.”); DOUGLAS S. MASSEY, *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* 21–23 (2002) (theorizing market expansion as the driving force behind international migration).

¹⁸⁵ For useful discussions of mechanisms for regularizing and regulating migration flow that focus on the underlying economic realities of international migration, see, for example, HING, *supra* note 184, at 133–60 (proposing more complete North American economic integration); MASSEY, *supra* note 184, at 142–64.

¹⁸⁶ See *BUDGETING FOR IMMIGRATION ENFORCEMENT*, *supra* note 93, at 34 (finding no measurable impacts of enforcement on migration flow); PASSEL & COHN, *supra* note 93 (citing enforcement as one factor in the slight reductions in migration flow, but also noting the importance of the economic slowdown in the U.S.). No effort is made in these studies to disaggregate the use of criminal prosecutions from other enforcement mechanisms, including increased workplace document screening and increased document inspection at the border. Hence, it is presently impossible to determine whether criminal enforcement has had any significant effect on migration flow. But would-be migrants who are undeterred by the very real and well-known threats of robbery, serious violence, rape, sexual assault, and death in the desert in the course of northward migration seem likely to give very little weight to the possibility of criminal sanctions when deciding whether to undertake the journey. Clearly, for some, the forces that compel migration are powerful enough to overcome even the most severe criminal sanctions they might face.

crimes.¹⁸⁷

Moreover, converting immigration enforcement into a criminal problem has resulted in several harms that are classically understood as symptoms of overcriminalization. One harm is racial profiling. Because immigration status is impossible to determine at a glance, officials who are enforcing immigration laws without knowledge of a particular individual's status are necessarily relying on profiling—and particularly the racial profiling of those of “Mexican appearance” that courts have judicially sanctioned in immigration enforcement¹⁸⁸—to make stops and arrests for immigration violations. As state-level criminal sanctions aimed directly at migrants continue to proliferate, the number of actors making these race-reliant stops will increase, and racial profiling will increase as well. The Supreme Court's refusal to uphold the preliminary injunction of Section 2 of Arizona's S.B. 1070, which authorizes state and local officials' investigations into immigration status, ensures that in Arizona and other states, sub-federal actors will be actively engaged in immigration policing. Available data already establishes that many investigators are disproportionately stopping and arresting Latinos for various other low-level criminal offenses in an effort to catch noncitizens in the immigration enforcement dragnet. Indeed, one of the lead charges against Latinos in counties with 287(g) programs is “driving without a license”—a charge that cannot even be established until a stop is made. The fact that such charges against Latinos have risen drastically and in ways that are completely out of proportion to the presence of Latinos in the general population suggests that immigration enforcement is a driving force in the rise of misdemeanor charges against Latinos.¹⁸⁹ In this way, the criminalization of migration also has fueled the overcriminalization of misdemeanors committed by a particular racial group. Unless and until more restrictive guidelines on the use of race are promulgated and the proliferation of migration-related

¹⁸⁷ See Lacey, *Sex Crimes Were Ignored*, *supra* note 90; Robbins, *supra* note 130.

¹⁸⁸ *United States v. Martinez-Fuerte* 428 U.S. 543, 564 n.17 (1976) (“[T]o the extent that the Border Patrol relies on apparent Mexican ancestry at this checkpoint, that reliance clearly is relevant to the law enforcement need to be served.” (citation omitted)); *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975) (accepting “Mexican appearance” as a relevant factor in immigration policing); see also CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES 2 (2003) (allowing reliance on race as “a factor” in immigration and national security enforcement while ruling it out in other kinds of criminal investigations). See generally Jennifer M. Chacón, *supra* note 94 (discussing these and other cases that have eviscerated Fourth Amendment protections in the immigration context).

¹⁸⁹ See, e.g., TREVOR GARDNER II & AARTI KOHLI, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM 5–7 (2009), available at http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf; WEISSMAN ET AL., *supra* note 175, at 27–29.

offenses decreases, it is all but certain that the recent and rapid rise in Latino incarceration will continue.

In addition to the procedural harms generated by profiling, a distinct set of procedural harms has accrued as a result of the “streamlined” procedural mechanisms used to obtain convictions for illegal entry and felony reentry. In criminal courts along the southern border, illegal entry pleas are counseled only nominally, with six to ten defendants pleading at a time with the assistance of one public defender.¹⁹⁰ The Federal Rules of Criminal Procedure concerning plea agreements are routinely and systematically violated in these procedures.¹⁹¹ Disparate sentences for identically situated defendants are meted out for illegal reentry, depending on where a defendant happens to be apprehended.¹⁹² And as different states enact differing criminal provisions as a form of indirect regulation of migration, the disparate interstate treatment of individuals whose only genuine offense is presence without authorization will increase.

“[T]he criminal sanction should be reserved for specific behaviors and mental states that are so wrongful and harmful to their direct victims or the general public as to justify the official condemnation and denial of freedom that flow from a guilty verdict.”¹⁹³ At the moment, nearly half of federal prosecutions target noncitizens whose only crime is their decision to act on their desire to work and live in a place that affords greater opportunity for themselves and for their children. Our society certainly faces costs and challenges associated with unauthorized migration and should work to forge policies that effectively address the issue. But reliance on the criminal law is not the solution and generates many new problems, including racial profiling, unequal treatment of similarly situated defendants, overreliance on (expensive) incarceration, and the underemphasis of other, more

¹⁹⁰ Chacón, *Managing Migration*, *supra* note 1, at 142.

¹⁹¹ *United States v. Roblero-Solis*, 588 F.3d 692, 694–700 (9th Cir. 2009); Chacón, *Managing Migration*, *supra* note 1, at 142.

¹⁹² Siegler, *supra* note 140, at 299 (“[I]f a defendant is caught in Oregon after returning to the United States after deportation, he is eligible for a thirty-month sentence because of that district’s fast-track program; if that same defendant is caught in Illinois, he may face a Guidelines range of seventy-seven to ninety-six months because such a program does not exist in any Illinois district.”); *see also* Thomas E. Gorman, Comment, *Fast-Track Sentencing Disparity: Rereading Congressional Intent to Resolve the Circuit Split*, 77 U. CHI. L. REV. 479, 479 (2010) (“[F]ast-track sentencing is approved in just a fraction of judicial districts. Therefore, not all defendants are eligible for a reduced fast-track sentence, and eligibility is dependent on where the defendants are found and prosecuted.”). For a critique of the program, *see* Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 138 (2005) (“[T]hese programs introduce large and blatant inequalities, undercut national policy, cloak the need to reallocate enforcement priorities, and truncate procedural protections.”).

¹⁹³ Luna, *supra* note 182, at 714.

important law enforcement goals.