

# “SANCTUARY” LAWS: THE NEW IMMIGRATION FEDERALISM

*Barbara E. Armacost\**

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## ABSTRACT

*The policy of “immigration federalism” has justified granting state and local police officers greatly increased responsibilities for enforcing immigration laws. It is designed to amplify federal enforcement by drawing on the vast number of local police and their knowledge of local conditions. Now, however, over 300 local jurisdictions have adopted so-called “sanctuary policies” designed to resist attempts to co-opt their participation in immigration enforcement. In response, national legislators and the Trump Administration have proposed legislation to squelch local resistance by cutting federal funds to those localities. Such responses are, however, deeply misguided and fundamentally inconsistent with the very theory of federalism. The widespread resistance to immigration enforcement partnerships is a state- and local-inspired reaction to the serious, if unintended consequences of localized immigration policing. A true immigration federalist should view such local resistance not as mere opposition to be quashed, but as a “new immigration federalism”—a source of insight into the on-the-ground problems with current immigration policies.*

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\* Professor of Law, University of Virginia School of Law. I wish to thank my colleagues John Duffy, Rachel Harmon, and David Martin for helpful comments on earlier drafts. I also thank the participants in a Criminal Justice Roundtable at the University of Virginia School of Law. Special thanks to the immensely talented reference librarians at the Law School who offered detailed and invaluable research assistance, including Leslie Ashbrook, Ben Doherty, Kristin Glover, Cathy Palombi, and John Roper. Finally, I am indebted to the Law School Foundation for summer research grants that supported my work.

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## INTRODUCTION

When Kathryn Steinle was murdered in San Francisco by an illegal immigrant subject to a federal immigration detainer, her death was blamed on the city’s so-called “sanctuary” policies.<sup>1</sup> The sanctuary accusation refers to San Francisco’s ordinance limiting the city’s cooperation with federal detainers, which are the primary way immigration officials obtain control of illegal aliens in state or local custody. San Francisco is among over 300 state and local jurisdictions that have adopted “sanctuary” laws.<sup>2</sup> Federal officials

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1. The woman, Kathryn Michelle Steinle, was visiting a tourist attraction in the Embarcadero district when she was gunned down at 6:30 in the evening. She was taken by ambulance to San Francisco Hospital and died two hours later. See Christina Littlefield, *Sanctuary Cities: How Kathryn Steinle’s Death Intensified the Immigration Debate*, L.A. TIMES (July 24, 2015, 5:10 AM), <http://www.latimes.com/local/california/la-me-immigration-sanctuary-kathryn-steinle-20150723-htlmlstory.html> [<https://perma.cc/CT4K-SACD>]. Ironically, the city’s sanctuary law was not the cause of the release for the immigrant who murdered Ms. Steinle. See *infra* note 203.

2. Bryan Griffith & Jessica Vaughan, *Sanctuary Cities Continue to Obstruct Enforcement, Threaten Public Safety*, CTR. FOR IMMIGRATION STUD. (Aug. 31, 2016), <http://cis.org/Sanctuary-Cities-Map> [<https://perma.cc/RS3K-D3A2>]. Some sources

claim that such laws have only one purpose: to shelter illegal aliens from federal immigration enforcement. As one legislator framed it, San Francisco is a “utopian” city that is “more interested in providing a sanctuary for those criminals than they are in providing a sanctuary for their own law-abiding citizens.”<sup>3</sup> More recent threats to cut federal funding to states and localities with sanctuary policies mirror this view.

In fact, the term “sanctuary” is not an accurate description of this modern state resistance movement, which is quite different from its historical namesake. The concept of a “sanctuary city” has American historical roots in 1980s efforts by churches to hide and shelter immigrants from Central America who had fled their countries’ violent civil wars and entered the United States illegally across the Mexican border. The sanctuary movement was initiated by private citizens whose explicit goal was to thwart federal immigration enforcement and prevent the immigrants’ deportation.

By contrast, modern sanctuary law is a principled legislative response by states and localities. It is designed not to obstruct immigration enforcement writ large but to address certain pathologies of a system in which local policing and immigration enforcement has become destructively intertwined. Just as some states have enacted their own immigration enforcement regimes or formed partnerships with federal enforcers, sanctuary jurisdictions have chosen to distance themselves from federal immigration enforcement in furtherance of important state interests involving their immigrant communities. As such, sanctuary laws are the last in a long line of federalist paradigms that have defined the relationship between states, localities, and federal immigration officials.

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suggest much higher estimates of state and local resistance. *See, e.g.*, Christopher N. Lasch, *Why Trump’s Anti-Immigration Bluster Won’t Stop ‘Sanctuary Cities,’* THE CRIME REPORT (Oct. 25, 2016), <http://thecrimereport.org/2016/10/25/why-trumps-anti-immigration-bluster-wont-stop-sanctuary-cities> [https://perma.cc/K8ZC-MNC6] (estimating that “some 350 jurisdictions had enacted policies limiting detainer compliance” by 2015); Josh Sanburn, *How Mayors Across the U.S. Are Defying Donald Trump on Immigration,* TIME (Nov. 21, 2016), <http://time.com/4578847/sanctuary-city-mayors-donald-trump-immigration> [https://perma.cc/U3X3-57RP] (reporting that “Lena Graber, an attorney with the Immigrant Legal Resource Center, says more than 500 counties and about 40 cities routinely reject detainer requests”).

3. Mary Ann Toman-Miller, *House Passes Bill to Curb Funding for ‘Sanctuary Cities,’* L.A. TIMES (July 23, 2015, 2:42 PM), <http://www.latimes.com/nation/la-na-sanctuary-cities-hearing-20150723-story.html> [https://perma.cc/ZZB3-YPHB].

State and local police have played a variety of roles in immigration regulation. Historically, the relationship between law enforcement and immigration enforcement was often informal and undefined. But in the 1990s, Congress created a number of opportunities for explicit partnerships, including the 287(g) program, which empowered specially trained state officials to enforce immigration law, and Secure Communities, which channeled fingerprint data from state and local arrestees to immigration authorities.<sup>4</sup> Around the same time that the federal government was inviting state–federal collaborations, states began enacting legislation that empowered state and local police to engage in various forms of immigration enforcement.

Scholars have devised the term “immigration federalism” or “immigration policing” to describe these various forms of frontline immigration enforcement by state and local officials. The confluence of policing and immigration enforcement is also part of a broader phenomenon that academics have called “cimmigration,” meaning the increasing convergence between immigration law and criminal law, two previously independent legal regimes.<sup>5</sup>

Many scholars and practitioners extol the virtues of immigration policing. The most obvious is that involving state and local officials acts as a “force multiplier” for immigration enforcement.<sup>6</sup> While federal agencies employ approximately 18,000 immigration and customs enforcement *officers*,<sup>7</sup> there are nearly 18,000 law enforcement *agencies* in the country employing over 750,000 police personnel with general arrest powers.<sup>8</sup>

Moreover, these myriad state and local police officers have informational advantages over federal officials in ferreting out undocumented noncitizens. As they patrol the streets, enforce traffic

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4. See 8 U.S.C. § 1357(g) (2000).

5. See, e.g., César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1458, 1465 (2013); Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1708-10 (2011).

6. See Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 181 (2005).

7. BRIAN A. REAVES, BUREAU OF JUST. STATS., U.S. DEP’T OF JUST., FEDERAL LAW ENFORCEMENT OFFICERS, 2008 1 (2012), <http://www.bjs.gov/content/pub/pdf/fleo08.pdf> [<https://perma.cc/8HCR-G684>].

8. BRIAN A. REAVES, BUREAU OF JUST. STATS., U.S. DEP’T OF JUST., CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008 1-2 (2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cslea08.pdf> [<https://perma.cc/2AXC-QRDH>].

laws, answer emergency calls, and investigate crimes, they gain important information about the identity and location of individuals who might be in the country illegally.<sup>9</sup> Stops and arrests for state and local crimes, which are typically accompanied by searches and questioning, are particularly effective sources of information of all sorts, including about immigration status.<sup>10</sup> Indeed, under some circumstances state and local police tuned in to immigration violations might be the first line of defense for identifying illegal immigrants who pose a serious risk to public safety.<sup>11</sup>

Immigration policing also has powerful detractors, including many state and city officials, police leaders, and civil rights proponents. Critics argue that enlisting police in immigration enforcement undermines public safety by diverting attention toward finding illegal aliens (without regard to dangerousness) rather than fighting crime.<sup>12</sup> They also charge that immigration policing leads to racial profiling and undermines the trust and cooperation of lawful immigrant communities.<sup>13</sup> To the claim that immigration policing might ferret out terrorists, critics point out that illegal presence is not, by itself, a good proxy for criminality, let alone terrorism.<sup>14</sup> Others object that immigration policing creates incentives for police to target minor traffic offenders and misdemeanants in order to funnel them into the federal immigration system.<sup>15</sup>

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9. See, e.g., Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1337-40 (2012).

10. See Barbara E. Armacost, *Arizona v Gant: Does it Matter?*, 2010 SUP. CT. REV. 275, 293; Cox & Posner, *supra* note 9, at 1338-39; Rachel Harmon, *Why Arrest?*, 115 MICH. L. REV. (forthcoming 2017); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 827 (2015); *infra* notes 118-24 and accompanying text.

11. Four of the nineteen 9/11 terrorists were stopped by police officers within weeks before the attacks and were released without knowledge of then-current civil immigration violations. See Kobach, *supra* note 6, at 183-84.

12. See, e.g., Rick Su, *Police Discretion and Local Immigration Policymaking*, 79 UMKC L. REV. 901 (2011).

13. See Carrie L. Arnold, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 119-21 (2007); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1104 (2004).

14. See Jacob I. Stowell et al., *Addition by Subtraction?: A Longitudinal Analysis of the Impact of Deportation Efforts on Violent Crime*, 47 LAW & SOC'Y REV. 909, 912-14 (2013).

15. See David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 202 (2012). Crimmigration scholars argue that involving police officers adds to the pathologies of an increasingly criminalized immigration system. See, e.g., *id.* at 202-03.

It is precisely these pathologies that have led an increasing number of state and local jurisdictions to adopt so-called sanctuary policies: laws or ordinances that limit or reshape the way local law enforcement officials interact with federal immigration officers. Contrary to those who claim these laws represent simple intransigence by states and localities, I argue that they embody an alternative, and defensible, model of immigration federalism, and one that comports with serious concerns about the legality of immigration detainees.

While scholars to date have used the term “immigration federalism” to encompass only state and local immigration *enforcement*, I use the term more capaciously, to include state and local immigration *resistance*. Immigration policing regimes and sanctuary/resistance regimes represent differing views by states and localities about what arrangements best effectuate a productive relationship between authorities and their immigrant communities. They are *both* exemplars of federalism, broadly understood to encompass the myriad ways in which states and localities seek to share power with the federal government. For purposes of this Article, I call current sanctuary policies “the new immigration federalism,” to differentiate it both from the 1980s sanctuary movement and from the enforcement regimes to which the term immigration federalism has generally been applied.

One aim of this Article is to demonstrate in real-world detail how the modern sanctuary/resistance movement is a practical critique of enforcement-oriented immigration federalism. Those who defend immigration policing argue that it will or will not have certain effects on the shape of policing and the shape of immigration enforcement, but they make these arguments at a macro level. Their claims cannot be evaluated unless we begin with a close-to-the-ground understanding of ordinary police practices and then analyze how immigration enforcement impacts them. These issues remain under-theorized by the current literature. This Article seeks to fill that gap by viewing sanctuary policies as pragmatic responses to the negative consequences of immigration policing. It takes seriously that state and local officials are in a good position to offer insight into the real-world problems with current immigration policies. I argue that the new immigration federalism offers wisdom for harnessing the benefits of immigration policing while addressing its pathologies.

This Article also contributes to crimmigration scholarship by focusing on two neglected areas. First, most of the crimmigration

literature has focused on substantive law, describing the ways in which immigration law has become “criminalized.”<sup>16</sup> With the notable exception of a recent article by Ingrid Eagly, scholars have paid little attention to the ways immigration law intersects with criminal procedure.<sup>17</sup> Second, crimmigration scholarship has been largely unidirectional: Scholars have addressed the criminalization of immigration law in great detail, but have paid much less attention to the effects of immigration on criminal justice.<sup>18</sup> An article by David Sklansky has begun to engage this topic, describing how police officers have come to view immigration law and criminal law as tools to be used interchangeably against suspected criminal aliens. Sklansky calls this interchangeable use of legal regimes “ad hoc instrumentalism.”<sup>19</sup>

This Article adds to Eagly’s focus on crimmigration enforcement and Sklansky’s focus on instrumentalist policing in two ways. First, it links the instrumentalist features of immigration policing to an instrumentalism that is broadly pervasive in the policing context.<sup>20</sup> Second, it applies lessons from the policing

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16. See, e.g., Sklansky, *supra* note 15, at 162-63. For example, in recent years Congress has made more immigration offenses crimes and defined more criminal offenses as triggers for mandatory deportation. See *id.* at 164-81; Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1588-89 (2008). Immigration officials increasingly use detention as punishment for immigration offenses and deportation as a tool of crime control. See Sklansky, *supra* note 15, at 202. Indeed, ICE now manages “the largest detention system in the country.” See *id.* at 183 (quoting DORA SCHIRRO, DEP’T HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 6 (2009), <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> [<https://perma.cc/W8Q2-23CQ>]). Immigration enforcement employs the largest body of armed federal law enforcement officials in the nation, and prosecutions for immigration offenses constitute the largest category of federal criminal prosecutions. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 388 (2006); Sklansky, *supra* note 15, at 158.

17. See Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1126 (2013).

18. Early scholarship on the 287(g) program made general claims about effects of immigration enforcement on policing, see, e.g., Greg K. Venbrux, *Devolution or Evolution?: The Increasing Role of the State in Immigration Law Enforcement*, 11 UCLA J. INT’L L. & FOREIGN AFF. 307 (2006), but recent scholarship has not returned to these themes.

19. Sklansky, *supra* note 15, at 201-02.

20. Police officers routinely use stops and arrests for minor offenses, such as traffic violations, to investigate crimes for which they lack probable cause. See *infra* notes 117-23 and accompanying text. For articles providing a more general elaboration on this point, see *supra* note 10.

literature to provide an on-the-ground account of how criminal law and criminal procedure have become part of the broader instrumentalist universe of immigration enforcement tools.<sup>21</sup>

The rest of this Article is organized as follows: Part I briefly reviews the increasingly prominent role of state and local police in immigration enforcement, what has been called “immigration federalism.” It then describes the recent backlash by states and localities enacting policies that resist federal–state immigration partnerships. Multiple states have adopted statutes or ordinances that decline to honor U.S. Immigration and Customs Enforcement (ICE) detainers or seriously limit the conditions under which they will honor them. Others have challenged the constitutionality of immigration detainers or declined to participate in Secure Communities or its successor, the Priority Enforcement Program (PEP). I call these policies the “new immigration federalism.”

Part II disputes the claim that enlisting state and local police in direct immigration enforcement can “multiply” the nation’s ability to enforce immigration law without changing the shape of policing. This claim rests on the flawed assumption that policing decisions and immigration enforcement decisions will remain independent. In fact, police officers’ anticipation of downstream immigration enforcement affects their upstream law enforcement priorities. In particular, police officers have strong incentives to engage in so-called “pretextual policing,” using non-immigration stops and arrests (especially for traffic offenses and minor crimes) to funnel suspected illegal immigrants into the federal immigration system.

These distortions of state and local law enforcement impose serious costs on communities. Pretextual policing compromises political accountability, making it more difficult to identify precisely which agency or level of government is responsible for the shape and priorities of immigration enforcement.<sup>22</sup> Aggressive policing of minor offenders diverts resources away from crime control and undermines the trust and cooperation of immigrant communities, leading to an overall reduction in public safety.<sup>23</sup> Immigration policing is also strongly correlated with racial profiling.<sup>24</sup>

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21. The analysis here is a theoretical complement to Eagly’s recent empirical project in which she studies the relationship between the criminal justice system and the immigration system in three urban localities. *See* Eagly, *supra* note 17.

22. *See infra* Section II.B.

23. *See infra* Section II.B.

24. *See infra* Section II.C.

Part III describes in more detail the range of new immigration federalism policies that states and localities have adopted.<sup>25</sup> It takes issue with critics who claim that these so-called sanctuary laws arise from a militant desire to obstruct all enforcement against illegal immigrants. To the contrary, they are designed to counteract the unintended, negative consequences of immigration policing and to address valid concerns regarding the legality of federal immigration detainers. Part III gives an on-the-ground account of how the new immigration federalism addresses the specific pathologies resulting from pretextual policing described in Part II.<sup>26</sup> That federal immigration authorities have begun to adjust their enforcement and detainer policies to address some of the objections raised by the new immigration federalism demonstrates that these policies contain important and constructive insights. By contrast, slapping the misnomer “sanctuary city” on new federalism jurisdictions and threatening to sanction them by cutting federal funds is deeply misguided and fundamentally inconsistent with the very theory of federalism.

#### I. IMMIGRATION POLICING: FROM ENFORCEMENT TO RESISTANCE

In recent years there has been an explosion of scholarship about so-called “immigration policing.” All this attention might suggest that state and local immigration involvement is new or novel. In fact, it is not at all new. Both by federal design and by default, states and cities have always taken an active role in immigration matters. Despite the conventional wisdom that the “[p]ower to regulate immigration is unquestionably . . . a federal power,”<sup>27</sup> the *responsibility* for the safety, security, and regulation of immigrant communities is widely shared by all levels of government.

Historically, much of the federal, state, and local collaboration occurred informally and behind the scenes. This is no longer true for a number of reasons. In the 1990s, Congress passed several

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25. See *infra* Section III.B.

26. See *infra* Section III.B.

27. *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (emphasis added) (upholding a California statute that made it unlawful for an employer to knowingly employ an illegal alien). While federal exclusivity does not prohibit “every state enactment [that] in any way deals with aliens,” only the federal government can “*regulat[e]* . . . *immigration*, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.” *Id.* at 355 (emphasis added).

immigration bills that gave state and local officials targeted and publicly visible immigration enforcement power. Federal immigration officials also enacted programs like Secure Communities that created more overlap between ordinary crime fighting and immigration regulation. In addition, state legislatures began to enact immigration laws that sought to mirror or supplement the reach of federal immigration law.

It may be that these programs represent a relative increase in the level of state and local immigration involvement. What is undoubtedly new is the extent to which immigration enforcement and ordinary policing have become intertwined. As a result, each has dramatically changed the shape and priorities of the other.

The first wave of immigration federalism scholarship focused on the criminalization of federal immigration regulation, so-called “cimmigration.”<sup>28</sup> To a lesser extent, it addressed distortions in the other direction, namely how immigration enforcement by police has changed the shape and priorities of policing, so-called “immigration policing.” What has received relatively less attention is that these changes have produced a backlash by states and localities responding in a new iteration of immigration federalism. In this Part, I provide a short history of immigration federalism and the shape of the backlash it has produced.

#### A. Immigration Policing in Federal Law

State and local enforcement is part of federal immigration law’s design. This is particularly true over the past two decades. In each of two major reforms of this period, Congress created new roles and expanded existing roles for states and localities to enforce immigration law.<sup>29</sup>

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28. See, e.g., Stumpf, *Cimmigration*, *supra* note 16.

29. See APPLESEED, FORCING OUR BLUES INTO GRAY AREAS: LOCAL POLICE AND FEDERAL IMMIGRATION ENFORCEMENT 17-18 (2008), <http://cdm266901.cdmhost.com/cdm/ref/collection/p266901coll4/id/1603> [<https://perma.cc/R4S7-WFQ5>] [hereinafter FORCING OUR BLUES]. The dramatically increased participation of state and local law enforcement is an innovation of the 1990s. Prior to the 1996 immigration reforms, there were only a few instances in which the heads of individual police departments directed their officers to enforce immigration laws. See Wishnie, *supra* note 13, at 1089 n.28 (citing WILLIAM F. McDONALD, THE CHANGING BOUNDARIES OF LAW ENFORCEMENT: STATE AND LOCAL LAW ENFORCEMENT, ILLEGAL IMMIGRATION AND TRANSNATIONAL CRIME CONTROL, FINAL REPORT 6.1-.114 (1999) (unpublished manuscript) (on file with NAT’L INST. OF

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which together contained four provisions increasing state and local participation.<sup>30</sup> The most important immigration policing provision was § 133 of IIRIRA, often referred to as 287(g) of the Immigration and Naturalization Act (INA).<sup>31</sup> This section authorizes the U.S. Attorney General to enter into agreements with state and local governments that permit police to carry out federal immigration functions such as investigating, apprehending, and detaining aliens.<sup>32</sup> The original 287(g) program included two different models of federal–state partnerships.<sup>33</sup> The “jail model” empowered officers working in state and local detention facilities to identify and process removable aliens who had been charged with or convicted of a crime.<sup>34</sup> The “task force model” authorized state and local police to identify and process aliens subject to removal while engaged in their normal policing duties in the community.<sup>35</sup>

From its inception, the 287(g) program—especially the task force model—was heavily criticized. Immigrant advocacy groups complained that the program promoted racial profiling, caused a breakdown of trust between police and immigrant communities, and encouraged police to use minor offenses as a pretext for immigration

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JUST., U.S. DEP’T OF JUST., <https://www.ncjrs.gov/pdffiles1/nij/grants/188877.pdf> [<https://perma.cc/CGV4-6JG6>]).

30. FORCING OUR BLUES, *supra* note 29, at 17–18.

31. *See id.* The other three provisions that increased state and local participation were: Section 439 of AEDPA, which amended the INA to authorize state police to arrest and detain any alien who has reentered the United States after having been convicted of a crime and subsequently deported from the country; section 372 of IIRIRA, which amended the INA to permit the U.S. Attorney General (AG) to deputize state and local police to enforce federal immigration law if the AG identifies “urgent circumstances” involving an “actual or imminent mass influx” of aliens; and section 642 of IIRIRA, which provides that no state or local entity or official may be prohibited from sending, requesting, or receiving information from federal immigration officials concerning the legal status of an individual. These three provisions are codified as 8 U.S.C. §§ 1252c, 1103(a)(10), and 1373 (1996), respectively.

32. *See* 8 U.S.C. § 1357(g) (2006).

33. *See Developments in the Law—Policing*, 128 HARV. L. REV. 1706, 1776 n.41 (2015) (citing RANDY CAPPAS ET AL., MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(g) STATE AND LOCAL IMMIGRATION ENFORCEMENT 1 (2011), <http://www.migrationpolicy.org/pubs/287g-divergence.pdf> [<https://perma.cc/6MH7-DUHS>]).

34. *See id.*

35. *See id.*

enforcement.<sup>36</sup> These and other criticisms eventually triggered a series of investigations by the Department of Homeland Security (DHS), Office of the Inspector General. After a number of very critical investigative reports by that office,<sup>37</sup> ICE abandoned the task force model entirely in 2012.<sup>38</sup> As of this writing, ICE has thirty-two jail model 287(g) agreements with law enforcement agencies in sixteen states.<sup>39</sup>

In 2008, DHS launched an additional federal–state cooperative program, “Secure Communities,” designed to detect noncitizens who come into the custody of law enforcement.<sup>40</sup> For reasons I will

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36. See, e.g., FORCING OUR BLUES, *supra* note 29, at 9-11.

37. See, e.g., OFF. OF THE INSPECTOR GEN., DEP’T OF HOMELAND SEC., THE PERFORMANCE OF 287(g) AGREEMENTS 1 (2010), [http://www.oig.dhs.gov/assets/Mgmt/OIG\\_10-63\\_Mar10.pdf](http://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf) [<https://perma.cc/CD8R-D68U>] [hereinafter 2010 OIG REPORT] (reporting that the program suffered from lack of adequate screening and training of state and local officials, shoddy supervision by federal immigration officials, inadequate program oversight and evaluation, unsatisfactory complaint procedures, and insufficient data collection and reporting mechanisms). A later report stated that ICE had “made significant progress” toward addressing problems. See OFF. OF THE INSPECTOR GEN., DEP’T OF HOMELAND SEC., THE PERFORMANCE OF 287(g) AGREEMENTS, FY 2013 UPDATE 2 (2013), [http://www.oig.dhs.gov/assets/Mgmt/2013/OIG\\_13-116\\_Sep13.pdf](http://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-116_Sep13.pdf) [<https://perma.cc/VLB4-MC5H>] [hereinafter 2013 OIG REPORT].

38. See 2013 OIG REPORT, *supra* note 37, at 2. The high point for the 287(g) program was in 2009, when the Department of Homeland Security had sixty-six memoranda of agreement (MOAs) with state and local law enforcement agencies in twenty-three states with 833 active 287(g) officers. See 2010 OIG REPORT, *supra* note 37, at 2. According to ICE, since January 2006, the 287(g) program has been credited with identifying more than 402,079 potentially removable aliens, and the agency has trained and certified more than 1,675 state and local officials to enforce immigration law. See U.S. IMMIGRATION & CUSTOMS ENF’T, DEP’T OF HOMELAND SEC., *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, <http://www.ice.gov/factsheets/287g> (last visited Dec. 12, 2016) [<https://perma.cc/7VBB-RZKJ>] [hereinafter *Fact Sheet*].

39. See *Fact Sheet*, *supra* note 38. These agreements follow a uniform template setting out the scope and limitations of the delegated authority. Before state and local officials can be cross-designated to serve as 287(g) immigration officials, they must be screened by the law enforcement agency and independently by ICE and undergo a four-week training program provided by ICE. A template of the current 287(g) Memorandum of Agreement being used by ICE can be found at U.S. IMMIGRATION & CUSTOMS ENF’T, DEP’T HOMELAND SEC., MEMORANDUM OF AGREEMENT TEMPLATE (2013), [http://www.ice.gov/doclib/detention-reform/pdf/287g\\_moa.pdf](http://www.ice.gov/doclib/detention-reform/pdf/287g_moa.pdf) [<https://perma.cc/T8EA-33N4>].

40. The description of the Secure Communities program is derived from U.S. IMMIGRATION & CUSTOMS ENF’T, DEP’T OF HOMELAND SEC., SECURE COMMUNITIES, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) [<https://perma.cc/NT2G-A8YU>] (last visited Dec. 12, 2016).

discuss in detail below, Secure Communities was met with suspicion and resistance by state and local authorities. In response to widespread criticism, DHS discontinued Secure Communities in 2014, and replaced it with a program called “Priority Enforcement Program” or “PEP.”<sup>41</sup> As it turns out, however, the two programs are more alike than different. I discuss them together noting the differences.

Secure Communities and its successor program PEP rely on fingerprint-based biometric data that is automatically submitted to the FBI when individuals are arrested or booked into custody by state or local officials. The FBI checks the fingerprints against its Integrated Automatic Fingerprint Identification System (IAFIS) to see if an arrestee has a criminal record. Under Secure Communities/PEP, these prints are also shared with ICE, which checks the local arrestee information against ICE’s Automated Biometric Identification System (IDENT) for evidence of immigration violations. The IDENT system automatically notifies ICE personnel (and the originating jail or police station if desired) whenever the prints of state or local arrestees match those of a person previously encountered and fingerprinted by immigration officials. If these checks reveal that an individual is unlawfully present or removable due to a criminal conviction, ICE officials have discretion to issue a detainer or initiate deportation proceedings based on previously identified enforcement priorities.<sup>42</sup>

When it was replaced by PEP at the end of 2014, Secure Communities was operational in all 3,181 jurisdictions within the fifty states, the District of Columbia, and five U.S. Territories.<sup>43</sup>

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41. Jerry Markon, *DHS Deportation Program Meets with Resistance*, WASH. POST (Aug. 3, 2015), [http://www.washingtonpost.com/politics/dhs-finds-resistance-to-new-program-to-deport-illegal-immigrants/2015/08/03/4af5985c-36d0-11e5-9739-170df8af8eb9\\_story.html](http://www.washingtonpost.com/politics/dhs-finds-resistance-to-new-program-to-deport-illegal-immigrants/2015/08/03/4af5985c-36d0-11e5-9739-170df8af8eb9_story.html) [https://perma.cc/Q82L-7A9H0].

42. See Memorandum from John Morton, Director, U.S. Immigration & Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel (Dec. 21, 2012), <http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf> [https://perma.cc/XV4U-8YDX] [hereinafter Morton Civil Enforcement Memorandum]; Memorandum from John Morton, Director, U.S. Immigration & Customs Enforcement, to All ICE Employees (Mar. 2, 2011), <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> [https://perma.cc/BUP3-Z3250].

43. See U.S. IMMIGRATION & CUSTOMS ENF’T, DEP’T OF HOMELAND SEC., SECURE COMMUNITIES: MONTHLY STATISTICS THROUGH AUGUST 31, 2014, 2-6 (2014), [http://www.ice.gov/doclib/foia/sc-stats/nationwide\\_interop\\_stats-fy2014-to-date.pdf](http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2014-to-date.pdf) [https://perma.cc/RD9U-T5LL] (last visited Dec. 12, 2016). Full implementation was completed in January 2013. See *id.* at 4.

Federal officials were very vocal in assuring participants that Secure Communities targeted only the most dangerous illegal immigrants, designated as “Level 1” or “high threat” criminal immigrants.<sup>44</sup> As the program expanded, however, there were widespread claims that it had caused the deportation of large numbers of immigrants without criminal records or who had committed only lower-level offenses such as traffic violations or petty crimes.<sup>45</sup> For example, through August 31, 2012, more than 166,000 immigrants convicted of crimes were removed from the United States after identification through Secure Communities.<sup>46</sup> Of this group, only a little over 61,000 immigrants had been convicted of Level 1 offenses.<sup>47</sup> The continued allegations that Secure Communities was targeting low-level offenders created public hostility and resulted in widespread refusals to cooperate by governors, mayors, and state and local police. These circumstances are what led to the renaming and redesign known as “Priority Enforcement Program” or “PEP.” Prior to its reincarnation as PEP, some 350 jurisdictions had dropped their participation in Secure Communities.<sup>48</sup>

One other attempt by federal officials to enhance state and local immigration enforcement deserves mention. In 2002, relying on an unreleased memorandum written by the Office of Legal Counsel (OLC) of the U.S. Department of Justice,<sup>49</sup> then-Attorney General

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44. U.S. IMMIGRATION & CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., SECURE COMMUNITIES: SETTING THE RECORD STRAIGHT 5 (2010), <http://www.aila.org/File/DownloadEmbeddedFile/51329> [https://perma.cc/9LL5-JC7Y].

45. See *infra* notes 160-65 and accompanying text.

46. See U.S. IMMIGRATION & CUSTOMS ENF'T, DEP'T OF HOMELAND SECURITY, SECURE COMMUNITIES: MONTHLY STATISTICS THROUGH AUGUST 31, 2012, 2 (2012), [http://www.ice.gov/doclib/foia/sc-stats/nationwide\\_interop\\_stats-fy2012-to-date.pdf](http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2012-to-date.pdf) [https://perma.cc/668J-KT8W].

47. See *id.*

48. See Markon, *supra* note 41. According to the Washington Post, “While DHS says more than 30 of the nation’s largest law enforcement agencies have indicated a willingness to work with the agency on PEP, few have publicly said they will participate.” *Id.* In its 2015 year-end report, DHS claims that it made presentations to over 2,000 jurisdictions during 2015 and that “16 of the top 25 jurisdictions with the largest number of previously declined detainees are now participating in PEP.” U.S. IMMIGRATION & CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., DHS RELEASES END OF FISCAL YEAR 2015 STATISTICS (2015), <http://www.ice.gov/news/releases/dhs-releases-end-fiscal-year-2015-statistics> [https://perma.cc/9SR2-LDC4].

49. Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, to John Ashcroft, U.S. Att’y Gen. (Apr. 3, 2002), <https://www.aclu.org/files/FilesPDFs/ACF27DA.pdf> [https://perma.cc/A75U-YPVV]. The 2002 OLC

Ashcroft announced that state and local officials have “inherent authority” to enforce both *civil* and *criminal* provisions of federal immigration law.<sup>50</sup> The 2002 opinion reversed an unbroken line of OLC precedent, the most recent in 1996, taking the view that non-federal officers are generally authorized to enforce federal *criminal* statutes, including criminal provisions of the immigration law, but they lack authority to enforce federal *civil* immigration law.<sup>51</sup> The assertion that state and local officials have inherent civil enforcement authority has been strongly contested in the academy,<sup>52</sup> in police departments,<sup>53</sup> and in the courts.<sup>54</sup> As I argue in the next section, the

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memorandum was released pursuant to a lawsuit under the Freedom of Information Act. See *Nat'l Council of La Raza v. U.S. Dep't of Justice*, 411 F.3d 350, 352 (2d Cir. 2005).

50. John Ashcroft, U.S. Att'y Gen., Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), <http://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm> [<https://perma.cc/M96U-V6TW>].

51. See Memorandum from Teresa Wynn Roseborough, Deputy Assistant Att'y Gen., U.S. Dep't of Justice Off. of Legal Counsel, on Assistance by State and Local Police in Apprehending Illegal Aliens (Feb. 5, 1996), <http://www.justice.gov/sites/default/files/olc/opinions/1996/02/31/op-olc-v020-p0026.pdf> [<https://perma.cc/XK49-3FUB>]; Memorandum from Douglas W. Kmiec, Assistant Att'y Gen., U.S. Dep't of Justice Off. of Legal Counsel, to Joseph R. Davis, Assistant Dir. Legal Counsel, FBI, on Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File (Apr. 11, 1989), [http://www.aclu.org/pdfs/immigrants/1989\\_olc\\_opinion.pdf](http://www.aclu.org/pdfs/immigrants/1989_olc_opinion.pdf) [<https://perma.cc/KHS2-KH4C>].

52. Compare Kobach, *supra* note 6, at 199-201, 232 with Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 52-53 (2007).

53. Many police officers oppose any role in immigration enforcement. While a few police agencies have made independent decisions to get involved in immigration enforcement, few have embraced the theory of inherent authority. See generally FORCING OUR BLUES, *supra* note 29, at 35.

54. Compare *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301-02 (10th Cir. 1984) (finding that state highway patrol officer's consultation with a local INS official did not defeat officer's probable cause for arresting driver of vehicle transporting passengers who did not have identification papers or green cards), and *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295-96 (10th Cir. 1999) (denying motion to suppress where police officer arrested defendant without verifying he was an illegal alien previously deported for a felony conviction—prerequisites for arrest under 8 U.S.C. § 1252(c)—on grounds that federal law “does not limit or displace the preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law”), and *United States v. Santana-Garcia*, 264 F.3d 1188, 1194 (10th Cir. 2001) (finding that local and state law enforcement officials have implicit authority to make arrests for federal immigration law violations, regardless of whether a state law affirmatively authorized them to do so), with *Gonzales v. City of Peoria*, 722 F.2d 468, 475-76 (9th Cir. 1983), *overruled on other grounds* by *Hodgers-Durgin v. De La Vina*, 199

reasoning of the Supreme Court's opinion in *Arizona v. United States* likely put this argument to rest.<sup>55</sup>

## B. State Immigration Policing Legislation

At around the same time the federal government was expanding immigration policing programs, states began passing their own immigration enforcement legislation. The earliest was California's Proposition 187 § 4, which required police to verify the immigration status of any person who was arrested and suspected of being an illegal alien.<sup>56</sup> Shortly after passage, a California district court struck down § 4 as preempted by federal law.<sup>57</sup> After a lull of nearly a decade, the 2001 attack on the World Trade Center by illegal immigrant terrorists renewed interest in state immigration enforcement. Striving to avoid the pitfalls of Proposition 187, lawmakers in Colorado, Georgia, Oklahoma, and Missouri passed statutes requiring police to verify the immigration status of arrestees or report to U.S. immigration officials if they had reason to suspect a detainee was an illegal alien.<sup>58</sup>

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F.3d 1037, 1043 (9th Cir. 1999) (requiring a finding that state law affirmatively granted local police authority to enforce criminal provisions of the Immigration and Naturalization Act and emphasizing the authorization's limitation to criminal violations).

55. *Arizona v. United States*, 132 S. Ct. 2492, 2508-09 (2012). See also *infra* notes 66-71 and accompanying text.

56. See *ILLEGAL ALIENS, INELIGIBILITY FOR PUBLIC SERVICES, VERIFICATION AND REPORTING, CALIFORNIA PROPOSITION 187 § 4* (1994), [http://repository.uchastings.edu/ca\\_ballot\\_props/1104/](http://repository.uchastings.edu/ca_ballot_props/1104/) [<https://perma.cc/G2Y5-BAQD>]. It also required police to inform the arrestee, the Attorney General of California, and the United States Immigration and Naturalization Service of the arrestee's apparent illegal status. *Id.*

57. *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 786-87 (C.D. Cal. 1995). The court reasoned that § 4 comprised a "comprehensive [state] scheme to detect and report the presence and effect the removal of illegal aliens" and invited state agents to make "independent determinations" of immigration status. *Id.* at 769-70. The decision was originally appealed to the Ninth Circuit Court of Appeals, but the appeal was dismissed when California Governor Gray Davis refused to defend the law. See Patrick J. McDonnell, *Davis Won't Appeal Prop. 187 Ruling, Ending Court Battles*, L.A. TIMES (July 29, 1999), <http://articles.latimes.com/1999/jul/29/news/mn-60700> [<https://perma.cc/UF92-2VX9>].

58. COLO. REV. STAT. § 29-29-103 (2)(a)(I) (2010) ("A peace officer who has probable cause that an arrestee for a criminal offense is not legally present in the United States shall report such arrestee to the United States immigration and customs enforcement office if the arrestee is not held at a detention facility. If the arrestee is held at a detention facility and the county sheriff reasonably believes that the arrestee is not legally present in the United States, the sheriff shall report such

The first state statute requiring immigration verification not only of arrestees but also of those being stopped or detained was Arizona S.B. 1070. While other states, including Arizona, had entered into 287(g) agreements,<sup>59</sup> S.B. 1070 was the first *nonfederal* statute that called for direct, on-the-street immigration enforcement by state officials without federal supervision.<sup>60</sup> Other state laws had prompted legal challenges,<sup>61</sup> but the breadth of S.B. 1070 and its explicit immigration policing focus led the U.S. Department of

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arrestee to the federal immigration and customs enforcement office.”); GA. CODE ANN. § 42-4-14(b), (c) (2011) (“(b) When any person is confined, for any period, in the jail of a county or municipality or a jail operated by a regional jail authority in compliance with Article 36 of the Vienna Convention on Consular Relations, a reasonable effort shall be made to determine the nationality of the person so confined. (c) When any foreign national is confined, for any period, in a county or municipal jail, a reasonable effort shall be made to verify that such foreign national has been lawfully admitted to the United States and if lawfully admitted, that such lawful status has not expired. If verification of lawful status cannot be made from documents in the possession of the foreign national, verification shall be made within 48 hours through a query to the Law Enforcement Support Center (LESC) of the United States Department of Homeland Security or other office or agency designated by the federal government. If the foreign national is determined to be an illegal alien, the keeper of the jail or other officer shall notify the United States Department of Homeland Security, or other office or agency designated for notification by the federal government.”); MO. ANN. STAT. § 577.680(1) (West 2011) (“If verification of the nationality or lawful immigration status of any person who is charged and confined to jail for any period of time cannot be made from documents in the possession of the prisoner or after a reasonable effort on the part of the arresting agency to determine the nationality or immigration status of the person so confined, verification shall be made by the arresting agency within forty-eight hours through a query to the Law Enforcement Support Center (LESC) of the United States Department of Homeland Security or other office or agency designated for that purpose by the United States Department of Homeland Security. If it is determined that the prisoner is in the United States unlawfully, the arresting agency shall notify the United States Department of Homeland Security.”); OKLA. STAT. ANN. tit. 22, § 171.2(A)-(B) (West 2011) (“When a person charged with a felony or driving under the influence . . . is confined, for any period, in the jail for the county, any municipality or a jail operated by a regional jail authority, a reasonable effort shall be made to determine the citizenship status of the person so confined.”).

59. See *supra* notes 31-39 and accompanying text.

60. See S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

61. See, e.g., *Thomas v. Henry*, 260 P.3d 1251, 1256, 1262 (Okla. 2011) (holding unconstitutional subsection 5(c) of OKLA. STAT. ANN. tit. 22, § 171.2, which deals with a presumption that a foreign national is a flight risk, but leaving intact subsections (A) and (B), which relate to verifying citizenship status of people in jail). For a description of some earlier lawsuits, see Julia Preston, *In Reversal, Courts Uphold Local Immigration Laws*, N.Y. TIMES (Feb. 10, 2008), <http://www.nytimes.com/2008/02/10/us/10immig.html> [<https://perma.cc/Y6CQ-NBGX>].

Justice to file a lawsuit, which ultimately made its way to the Supreme Court in *Arizona v. United States*.<sup>62</sup>

The DOJ lawsuit challenged on preemption grounds four provisions of S.B. 1070, of which two—§ 2(B) and § 6—were immigration policing laws. The Supreme Court struck down § 6 and upheld § 2(B).<sup>63</sup> Section 6 would have permitted state officers to make warrantless arrests based on probable cause to believe a suspect had committed “any public offense that makes [him] removable.”<sup>64</sup> The Court concluded that immigration law does not permit arrests for noncriminal offenses, even by federal immigration officials,<sup>65</sup> and § 6 would “create[] an obstacle to the full purposes and objectives of Congress” by authorizing additional arrest power.<sup>66</sup> The Supreme Court did not specifically address the claim made in a 2002 Office of Legal Counsel memorandum that state and local police have “inherent authority” to enforce civil immigration law,<sup>67</sup>

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62. *Arizona v. United States*, 132 S. Ct. 2492 (2012).

63. *Id.* at 2510. The United States had sought to enjoin six sections of S.B. 1070: Section 2(B) (requiring police to verify the immigration status of persons stopped or arrested if reasonable suspicion persons are illegal aliens), § 3 (making it a state crime to fail to carry “alien registration papers”), two portions of § 5 (making it a crime for an illegal alien to apply for, solicit, or perform work in the state and making it a state crime to transport or harbor illegal aliens or encourage them to relocate to Arizona), § 6 (permitting warrantless arrests for certain civil immigration violations), and § 10 (permitting impoundment of vehicles used to transport or harbor illegal aliens). The district court enjoined § 2(B), § 3, the first part of § 5, and denied injunction relief with regard to the second portion of § 5 and § 10. *See United States v. Arizona*, 703 F. Supp. 2d 980, 987, 1008 (D. Ariz. 2010). The State of Arizona appealed the denial of injunctive relief, and the motion was affirmed by a divided Court of Appeals for the Ninth Circuit. *See United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011). Judge Paez wrote the majority opinion, joined by Judge Noonan, who also wrote a separate concurrence. *Id.* at 366 (Noonan, J., concurring). Judge Carol Bea dissented from the majority’s holding with respect to § 2(B) and § 6. *Id.* at 369 (Bea, J., dissenting).

64. *Arizona*, 132 S. Ct. at 2505 (quoting ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (2010)).

65. It is not generally a crime for a removable alien to remain in the United State. Under such circumstances, officials are to issue an administrative document called a “Notice to Appear.” *Id.*

66. *Id.* at 2507.

67. *See supra* notes 49-56 and accompanying text. While the Supreme Court did not address this issue, the Ninth Circuit opinion in *United States v. Arizona* strongly disagreed with the argument that state and local officials have inherent authority to make arrests for violations of federal *civil* immigration law. 641 F.3d at 363-66.

but the Court's conclusion that arrests for *civil* violations lack "the usual predicate for an arrest" appears to foreclose this argument.<sup>68</sup>

The Court upheld § 2(B),<sup>69</sup> which requires state officers to make a "reasonable attempt . . . to determine the immigration status" of any person stopped, detained, or arrested on some other legitimate basis if there is "reasonable suspicion . . . that the person is an alien and is unlawfully present in the United States."<sup>70</sup> The Court reasoned that, unlike § 6, § 2(B) requires state officers to investigate immigration status only *after* the individual has been detained for some other offense.<sup>71</sup>

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68. *Arizona*, 132 S. Ct. at 2505. Awarding state officials "inherent authority" to make arrests for civil violations would be to reinstate the § 6 power disallowed by the Supreme Court in *Arizona*. See Santos v. Frederick Cty. Bd. of Comm'rs, 725 F.3d 451, 464 (4th Cir. 2013) (holding that, absent express authorization by federal statute or federal officials, state and local officials lack power to detain or arrest an individual based solely on known or suspected civil immigration violations). At one point, some members of Congress sought to empower state and local police to enforce civil immigration law and to withhold federal funds from any state that failed to enact parallel authorizing legislation. These efforts were widely unpopular with most police agencies and they failed to pass in Congress. See David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 26-27 (2006) (discussing the proposed House bill called the Clear Law Enforcement for Criminal Alien Removal ("CLEAR") Act and its Senate counterpart, the Homeland Security Enhancement Act ("HSEA")). Neither bill was brought to a vote. Bills with the same names were introduced in the 109th Congress (S. 1362 and H.R. 3137), but neither made it out of its committee.

69. *Arizona v. United States*, 132 S. Ct. at 2509.

70. ARIZ. REV. STAT. ANN. § 11-1051(B) (2010). The section also provides that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released." *Id.* The ordinary process for performing status checks is for state officials to contact ICE, which maintains a database of immigration records. Section 2(B) is supported by two additional provisions. See ARIZ. REV. STAT. ANN. § 11-1051(A), (H). Section 2(A) requires state and local officials engaged in these investigative activities to fully enforce federal immigration law. Support Our Law Enforcement and Safe Neighborhoods Act, 2010 Ariz. Legis. Serv. Ch. 113 (S.B. 1070) § 2(A), as amended by 2010 Ariz. Legis. Serv. Ch. 211 (H.B. 2162) § 3 (codified at ARIZ. REV. STAT. ANN. § 11-1051 (2010)) ("No official or agency of this state or a county, city, town or other political subdivision of this state may limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law."). Section 2(H) creates a private cause of action allowing any legal resident of Arizona to seek money damages against any government official or agency that adopts a policy "limit[ing] or restrict[ing] the enforcement of federal immigration laws . . . to less than the full extent permitted by federal law." See ARIZ. REV. STAT. ANN. § 11-1051 (H).

71. *Arizona v. United States*, 132 S. Ct. at 2509. The Court reasoned that § 2(B) does not "put state officers in the position of holding aliens in custody for

Five other states in addition to Arizona—Utah, Indiana, Georgia, Alabama, and South Carolina—have enacted provisions that authorize or require state and local police to verify the immigration status of individuals detained pursuant to ordinary law enforcement actions.<sup>72</sup> The Alabama<sup>73</sup> and South Carolina<sup>74</sup> statutes

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possible unlawful presence without federal discretion and supervision.” *Id.* It is also broadly consistent with federal immigration provisions that invite state officials to “communicate” with the federal government about suspected immigration violations and obligate the office of Immigration and Customs Enforcement to respond to any request by state officials for verification of immigration status. *See* 8 U.S.C. § 1357 (g)(10)(A) (2012). The Court explicitly preserved the possibility of future preemption challenges should § 2(B) be applied to permit state officials to enforce immigration law without federal oversight. *Arizona v. United States*, 132 S. Ct. at 2510.

72. In 2012, five additional states—Kansas, Mississippi, Missouri, Rhode Island, and West Virginia—introduced omnibus immigration bills containing provisions requiring police officers to verify immigration status during lawful stops. None of these bills were enacted. *See* Ann Morse et al., *State Omnibus Immigration Legislation and Legal Changes*, NAT’L CONFERENCE OF STATE LEGISLATURES (Aug. 27, 2012), <http://www.ncsl.org/research/immigration/omnibus-immigration-legislation.aspx> [<https://perma.cc/TRL2-ZAA9>].

73. ALA. CODE § 31-13-12 (2011). Section 12(a) states: “Upon any lawful stop, detention, or arrest made by a state, county, or municipal law enforcement officer of this state in the enforcement of any state law or ordinance of any political subdivision thereof, where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the citizenship and immigration status of the person, except if the determination may hinder or obstruct an investigation. Such determination shall be made by contacting the federal government pursuant to 8 U.S.C. § 1373(c) and relying upon any verification provided by the federal government.” *Id.* § 12(a).

Section 12(b) states: “Any alien who is arrested and booked into custody shall have his or her immigration status determined . . . by contacting the federal government pursuant to 8 U.S.C. § 1373(c) within 24 hours of the time of the alien’s arrest.” *Id.* § 12(b). The Alabama statute requires police to verify with the federal government the legal status of any person who is arrested for failure to have a motor vehicle license while driving. *Id.* § 18. In addition, any such arrestee who is determined to be an illegal alien is to be detained as a flight risk until prosecution or transfer to U.S. immigration. *Id.* The statute also requires verification of legal status for any person charged with a crime for which bail or confinement is required. *Id.* § 19.

74. S.C. CODE ANN. § 17-13-170 (2012). Subsection (A) provides: “If a law enforcement officer of this state or political subdivision of this State lawfully stops, detains, investigates, or arrests a person for a criminal offense, and during the commission of the stop, detention, investigation, or arrest the officer has reasonable suspicion to believe that the person is unlawfully present in the United States, the officer shall make a reasonable effort, when practicable, to determine whether the person is lawfully present in the United States, unless the determination would hinder or obstruct an investigation.” *Id.* at (A). Subsection (B) provides that an

mirror the Arizona statute in *requiring* (the Georgia statute merely “authorizes”<sup>75</sup>) police to determine the immigration status of persons who have been stopped, detained, investigated,<sup>76</sup> or arrested when police have “reasonable suspicion” that the detainees may be illegal aliens. Utah’s provision is similar, requiring police to verify the status of any individual they stop, detain, or arrest if the detainee is unable to provide verification of legal status.<sup>77</sup> Like Arizona S.B. 1070, Utah, Alabama, and Indiana<sup>78</sup> also include provisions that create sanctions against state and local officials who fail to fully enforce state and federal law.<sup>79</sup> Finally, Utah authorizes state and

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individual is “presumed to be lawfully present in the United States” if the person presents identification documents, including a driver’s or picture identification issued by South Carolina or another state, a passport or military identification, or a tribal picture identification. *Id.* at (B). In addition, the statute provides for the arrest of any person who is operating a motor vehicle on a public highway without a driver’s license. *Id.*

75. The Georgia statute provides in pertinent part: “[D]uring any investigation of a criminal suspect by a peace officer, when such officer has probable cause to believe that a suspect has committed a criminal violation, the officer shall be authorized to seek to verify such suspect’s immigration status when the suspect is unable to provide [documentation of legal status].” GA. CODE ANN. § 17-5-100(b) (West 2012). Section 14 of the Georgia statute also requires officials to make a “reasonable effort”—by reviewing documents or contacting the federal Law Enforcement Support Center—to determine the legal status of any “foreign national” who is confined in a state or local facility. *Id.* § 42-4-14(c) (West 2011).

76. The South Carolina and Georgia statutes are arguably the broadest in scope, authorizing police to verify the legal status of any individual they are “investigating.” *See* S.C. CODE ANN. § 17-13-170(A) (2012); GA. CODE ANN. § 17-5-100(b) (West 2012).

77. UTAH CODE ANN. § 76-9-1003(1) (LexisNexis 2011). The statute also requires verification when the officer has a reasonable suspicion that the driver or passengers are violating laws on transporting or smuggling illegal aliens, and when a person is booked into a jail or other correctional facility. *Id.* § 76-9-1003(2)-(3).

78. Indiana requires legal status verification only for “[a] committed criminal offender.” IND. CODE ANN. § 11-10-1-2(a)(4) (LexisNexis 2011). Under Indiana law, “‘committed’ means placed under the custody or made a ward of the department of correction,” including in “a community transition program.” *Id.* § 11-8-1-5. “Criminal offender” means “a person of any age who is convicted of a crime.” *Id.* § 11-8-1-9(1).

79. UTAH CODE ANN. § 76-9-1006(1) (LexisNexis 2011) (prohibiting state or local government agencies or officials from limiting or restricting the authority of local government agencies to help enforce federal immigration law); Act 2011-535 §§ 5, 6, 2011 Ala. Legis. Serv. (West) (providing penalties for state agencies adopting policies limiting the enforcement of federal immigration laws or the new state immigration laws); IND. CODE ANN. §§ 5-2-18.2-4 & 5-2-18.2-5 (LexisNexis 2011) (prohibiting governmental bodies from “restrict[ing] the enforcement of

local police to make warrantless arrests if they have “reasonable cause to believe” the individual is “subject to a civil removal order issued by an immigration judge.”<sup>80</sup>

### C. The Backlash: State Immigration Resistance

Beginning in the 1990s, police leaders, civil liberties groups, and scholars began to identify some serious negative consequences of immigration federalism. Task force model 287(g) agreements, which authorized police officers to carry out federal immigration enforcement, met with extensive criticism, including allegations of racial profiling, compromise of public safety from diversion of local policing resources, and loss of trust in immigrant communities.<sup>81</sup> As a result of these and other negative consequences, some jurisdictions withdrew from participating in the 287(g) task force model program and eventually the program was terminated.<sup>82</sup> Critics raised similar allegations against states that adopted immigration policing pursuant to state statute, especially emphasizing the racial targeting of suspected illegal aliens and the fraught relations between police and immigrant communities.<sup>83</sup>

The most vehement criticism was reserved for Secure Communities. The program was sold to states and localities as a mechanism for ridding communities of dangerous criminal aliens by identifying for deportation illegal immigrants who had committed serious crimes or who otherwise posed a risk to public safety.<sup>84</sup> During the pendency of the program, ICE claimed to have explicitly prioritized enforcement against criminal aliens, resulting in an 89% increase in the number of deportees with criminal convictions and a

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federal immigration laws” and allowing citizens to bring suit to compel the governmental body to comply).

80. UTAH CODE ANN. § 77-7-2(5) (LexisNexis 2011) (permitting warrantless arrests if officer has “reasonable cause to believe” the individual is “subject to a civil removal order issued by an immigration judge”).

81. See FORCING OUR BLUES, *supra* note 29, at 9-11.

82. See *supra* notes 32-38 and accompanying text.

83. See *supra* notes 32-40 and accompanying text.

84. See SECURE COMMUNITIES, *supra* note 40. Under the program, jail officials submit fingerprint records of arrestees to the FBI to be checked against DHS databases for evidence of immigration violations. If a match is found, that information is sent to the local ICE office, which has discretion to file “detainers” for those whom ICE wants the local organization to hold or transfer to its custody.

29% decrease in the deportation of noncriminals.<sup>85</sup> Critics were alarmed to learn that many of the “criminal convictions” that had led to deportation during this period were either traffic offenses or convictions for immigration offenses (typically illegal entry, a petty misdemeanor under federal law).<sup>86</sup> According to an analysis by the Transactional Records Access Clearinghouse of ICE’s records obtained through FOIA requests, the most serious charge in fully one half of the total deportations was an immigration or traffic offense.<sup>87</sup> A *New York Times* investigation of internal government records revealed that two-thirds of the nearly two million individuals deported since 2009 had committed only minor infractions, including traffic offenses, or had no criminal record at all.<sup>88</sup> The use of federal immigration detainers also increased dramatically under Secure Communities. ICE employs detainers to obtain information or to request that immigration violators be held for an additional forty-eight hours beyond the time they would have been released.<sup>89</sup> The use of detainers dramatically increased under Secure Communities, rising from 15,000 detainers in fiscal year 2007, when Secure Communities was launched, to a current high of over 250,000 per

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85. Nick DeFiesta & Christopher Peak, *Officials Protest Secure Communities Program*, YALE DAILY NEWS (Feb. 21, 2012), <http://yaledailynews.com/blog/2012/02/21/officials-protest-secure-communities-program/> [<https://perma.cc/T5BW-7LNB>].

86. *Secure Communities and ICE Deportation: A Failed Program?*, TRAC IMMIGRATION (Apr. 17, 2014), <http://trac.syr.edu/immigration/reports/349/> [<https://perma.cc/AV25-R7HX>].

87. *Id.*

88. Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (Apr. 6, 2014), [http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?\\_r=](http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?_r=) [<https://perma.cc/L3EP-TBFG>]. The *Times* reported that the number of deported immigrants whose most serious offense was listed as a traffic violation “quadrupled from 43,000 during the last five years of President George W. Bush’s administration to 193,000 during the five years” of the Obama administration. *Id.*

89. An “immigration detainer” is a document by which ICE notifies other law enforcement agencies of its interest in individual aliens whom these agencies are detaining. 8 C.F.R. § 287.7(a) (2011). ICE uses a standard detainer form (Form I-247) to record actions it has taken that could lead to the alien’s removal, for example, determining “there is reason to believe” the alien is removable or initiating removal proceedings. The form also allows ICE to request other agencies to take actions that could facilitate removal, such as continuing to hold an individual or notifying ICE before releasing an individual. See *Immigration Detainer—Notice of Action*, DEP’T OF HOMELAND SECURITY, <https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf> [<http://perma.cc/G49M-D3ZN>] (last visited Dec. 12, 2016).

year.<sup>90</sup> Secure Communities also “resulted in the issuance of more [immigration] detainers for persons at earlier stages [of] criminal proceedings” and more detainers for minor criminal offenders than ever before.<sup>91</sup>

In light of these revelations, support for Secure Communities plummeted. Over a short period of time, multiple police agencies announced that they would no longer participate in the program or in its successor program, PEP.<sup>92</sup> While police agencies could not avoid submitting fingerprint records to the FBI (and ultimately to DHS) without compromising their own law enforcement goals,<sup>93</sup> more and more announced that they would not cooperate with ICE “detainers.”

A December 2016 report by the Center for Immigration Studies lists approximately 300 jurisdictions, including four states and the District of Columbia, that have adopted policies restricting the extent to which they honor ICE-issued detainers.<sup>94</sup> Some involve broad limitations prohibiting local law enforcement from honoring *any* ICE detainers. Others are more narrow, restricting compliance to detainers for individuals who have actually been convicted of serious crimes or to circumstances in which DHS has agreed to reimburse the locality for the cost of the additional detention. A number of localities have refused to honor detainers unless they are accompanied by a judicial warrant supported by probable cause. A 2015 Department of Homeland Security report estimated that

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90. Christopher Lasch, *The Faulty Legal Arguments Behind Immigration Detainers*, AM. IMMIGRATION COUNCIL (Dec. 18, 2013), <https://americanimmigrationcouncil.org/research/faulty-legal-arguments-behind-immigration-detainers> [<https://perma.cc/75KY-3RN3>].

91. See KATE M. MANUEL, CONG. RESEARCH SERV., IMMIGRATION DETAINERS: LEGAL ISSUES 1 (2014), <https://fas.org/sgp/crs/homesecc/R42690.pdf> [<https://perma.cc/85S7-8YR3>].

92. See Julián Aguilar, *Activists Sue 10 Federal Agencies Over Secrecy in Deporting Alleged Criminals*, TEXAS TRIBUNE (Jan. 20, 2016, 5:06 PM), <https://www.texastribune.org/2016/01/20/immigration-enforcement-agencies-sued-allegedly-wi/> [<https://perma.cc/38G3-825Y>].

93. Police agencies submit fingerprints to determine if a detainee has a previous criminal record and whether there are outstanding warrants for the detained individual. Once the fingerprints are submitted to the FBI, they are automatically submitted to DHS for comparison with its database. See MANUEL, *supra* note 91, at 1-2.

94. See Griffith & Vaughan, *supra* note 2; see also LAW ENFORCEMENT SYSTEMS & ANALYSIS: DECLINED DETAINER OUTCOME REPORT, DEP’T OF HOMELAND SECURITY 27-28 (2014), [cis.org/sites/cis.org/files/Declined%20detainers%20report\\_0.pdf](https://cis.org/sites/cis.org/files/Declined%20detainers%20report_0.pdf) [<https://perma.cc/V4X8-FCSX>] [hereinafter DECLINED DETAINER REPORT]. A partially redacted copy of the report was obtained by the Center for Immigration Studies.

between January 1, 2014, (when ICE began tracking declinations of immigration detainers) and June 2015 (before the July 2015 implementation of PEP), state and local law enforcement agencies declined a total of 16,495 immigration detainers.<sup>95</sup>

Federal court decisions provide strong legal support for these resistance policies. For example, courts have upheld federal detainers against Tenth Amendment challenges only by construing them as *requests* for detention or transfer of suspected illegal aliens, rather than *commands*.<sup>96</sup> In addition, courts have held that states and localities violate the Fourth Amendment if, without probable cause, they detain a suspected illegal immigrant pursuant to a federal detainer beyond the time the subject would otherwise have been released from state or local custody.<sup>97</sup>

More recently, state and local resistance has created its own backlash, this time by federal legislators. The murder of Kathryn Steinle in San Francisco focused renewed attention on similar incidents in other cities where sanctuary policies were alleged to

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95. U.S. IMMIGRATION AND CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT, FISCAL YEAR 2015, at 5 (Dec. 22, 2015), <https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf> [<https://perma.cc/SH6T-9FRM>].

96. See, e.g., *Galarza v. Szalczyk*, 745 F.3d 634, 640-41 (3d Cir. 2014) (agreeing with the First, Second, Fourth, Fifth, and Sixth Circuits, the Third Circuit concluded that detainers are not mandatory and to conclude otherwise would violate the Tenth Amendment's anti-commandeering rule); *Villars v. Kubiatowski*, 45 F. Supp. 3d 791, 802 (N.D. Ill. 2014); *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at \*5 (D. Or. Apr. 11, 2014); see also *Jimenez Moreno v. Napolitano*, No. 11 C 5452, 2016 WL 5720465, at \*4 (N.D. Ill. Sept. 30, 2016) (holding that ICE's detention program, which seeks to detain subjects without a warrant, in the absence of a determination by ICE that the subjects are likely to escape before a warrant can be obtained, exceeds its statutory authority).

97. See, e.g., *Villars*, 45 F. Supp. 3d at 807-08; *Galarza*, 2012 WL 1080020 (E.D. Pa. Mar. 30, 2012), *rev'd on other grounds*, 745 F.3d at 642; *Miranda-Olivares*, 2014 WL 1414305, at \*10-11; *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 29, 33-34 (D.R.I. 2014), *aff'd*, 793 F.3d 208 (1st Cir. 2015). Some jurisdictions appear to have adopted policies that forbid state or local officials from providing information about illegal immigrants to ICE. A memorandum from the Office of the Inspector General at the U.S. Department of Justice concluded that these policies violate federal immigration law, specifically 8 U.S.C. § 1373. The analysis in the memorandum is limited and does not engage other relevant legal issues. Memorandum from Michael E. Horowitz, Inspector Gen., to Karol V. Mason, Assistant Att'y Gen. for the Office of Justice Programs, Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients (May 31, 2016), <https://oig.justice.gov/reports/2016/1607.pdf> [<https://perma.cc/PFR5-7G6V>] [Hereinafter Memorandum to Karol V. Mason] (Posted to [oig.justice.gov](https://oig.justice.gov) on July 28, 2016).

have resulted in the release of immigrants who went on to commit violent crimes.<sup>98</sup> In response, the House of Representatives passed the “Enforce the Law for Sanctuary Cities Act,” which would have cut federal funding for local governments that harbor illegal immigrants, bar police from asking about immigration status, or fail to honor detainers.<sup>99</sup> Although the national legislation was not ultimately passed, there have also been state legislative efforts to curtail local sanctuary policies.<sup>100</sup>

## II. IMMIGRATION FEDERALISM: WHAT WENT WRONG?

Scholars have coined the term “immigration federalism” to describe affirmative immigration enforcement by state and local officials.<sup>101</sup> It is more in line with the broader meaning of the term “federalism,” however, to encompass in the term *all* the ways in which states and localities have sought to share power over immigration with federal authorities.<sup>102</sup> I use the term in this broader sense in order to highlight that state and local *enforcement* policies and state and local *sanctuary* policies are both species of immigration federalism. They represent differing views by states and localities as to what policies best promote a productive and healthy relationship with their immigrant communities. More specifically, current sanctuary policies have arisen in large part as a movement against the perceived negative consequences of immigration policing.<sup>103</sup> To understand this argument, one must appreciate the features of immigration policing that have fueled the current rise in resistance policies.

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98. See Littlefield, *supra* note 1.

99. See Enforce the Law for Sanctuary Cities Act, H.R. 3009, 114th Cong. (2015). H.R. 3009 was received in the Senate and referred to the Judiciary Committee, but there has been no further action on the bill in the Senate since. *Id.*

100. See, e.g., Sarah Posner, *A South Carolina Bill Would Hold Faith Groups Liable for Refugees They Settle—Including Their Crimes*, WASH. POST (Mar. 25, 2016), <http://www.washingtonpost.com/news/acts-of-faith/wp/2016/03/25/a-new-south-carolina-bill-might-hold-churches-liable-for-refugees-they-settle-including-their-crimes/> [http://perma.cc/CT4K-SACD] (detailing a state bill, ultimately defeated, which was designed to curtail religiously based sanctuary efforts).

101. See, e.g., Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2076 (2013).

102. *Id.* at 2075-76.

103. While sanctuary policies have a long history that predates their current popularity, the current resistance movement is significantly different from the older sanctuary movement. See *infra* notes 207-10; see also Michael J. Davidson, *Sanctuary: A Modern Legal Anachronism*, 42 CAP. U. L. REV. 583, 609 (2014).

Supporters of immigration policing argue that involving state and local police vastly “multiplies” the nation’s ability to enforce immigration law:<sup>104</sup> As law enforcement officers vastly outnumber federal immigration agents, it makes sense for police to investigate suspected immigration violators during routine patrols.<sup>105</sup> For supporters, this is a win-win situation: State officials can pursue federal immigration priorities by simply adding immigration enforcement to policing activities they are already doing.

Critics respond that immigration enforcement cannot simply be “added on” without causing fundamental changes in the shape of policing. Rather, involving state and local police distorts law enforcement decisions and diverts resources away from ordinary crime fighting. Supporters dispute this claim on the grounds that immigration enforcement is triggered only *after* police have detained or incarcerated a suspected alien in connection with some other crime. This Part argues that the critics of immigration policing are right: Police awareness that law enforcement actions can lead to immigration enforcement has a distorting effect on upstream policing decisions.<sup>106</sup>

#### A. Distorted Policing

Proponents resist accusations that immigration policing distorts ordinary law enforcement by pointing out that state immigration laws permit immigration investigation only *after* a suspect has been stopped, detained, or arrested pursuant to “any other [state or local] law.”<sup>107</sup> The same is true for § 287(g) jail programs and Secure

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104. See *Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws: Hearing Before the Subcomm. on Immigration, Citizenship, Refugee, Border Security, and Int’l Law, the Subcomm. on the Constitution, Civil Rights, and Civil Liberties and the H. Judiciary Comm.*, 111th Cong. 5-6 (2009) (testimony of Kris W. Kobach, Professor, University of Missouri (Kansas City) School of Law), <https://judiciary.house.gov/wp-content/uploads/2009/04/Kobach090402.pdf> [<https://perma.cc/2D4N-QWfy>] (referring to the value of § 287(g) as a force multiplier).

105. The perceived need for a “force multiplier” is particularly salient in states on the nation’s southern border, where it has proved difficult to stem the tide of illegal immigration.

106. See generally Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

107. See, e.g., ARIZ. REV. STAT. ANN. § 11-1051(B) (2012); COMMON MYTHS AND FACTS REGARDING SENATE BILL 1070, OFFICE OF ARIZONA GOVERNOR JANICE K. BREWER 1 (2010), <http://www2.fiu.edu/~revellk/pad3802/Myths.pdf> [<https://perma.cc/BT7Y-GXD8>] (last visited Dec. 12, 2016) (“S.B. 1070 is a ‘secondary

Communities/PEP: They are triggered only *after* police have detained an individual for some other, nonimmigration offense.

While proponents' claim is superficially true, it is also deeply misleading. The basic argument is that immigration policing targets only "criminals" who have been identified prior to and independently from any investigation of their immigration status. This assertion is meant to reassure critics by suggesting two implications. First, that immigration policing focuses only on *criminals* is meant to imply that it is good way to target (for investigation and deportation) a subgroup of immigrants who endanger public safety. Second, and relatedly, the claim is meant to suggest that police officers will identify these criminals *independently*—in the course of ordinary policing activities—and only then investigate and refer them to federal officials for immigration enforcement. Neither of these implications follows from the claim.

That immigration policing only targets "criminals" is belied by considering the two most common types of police stops that could lead to immigration enforcement under current programs: traffic stops and investigative "*Terry* stops." Neither of these stops is a good mechanism for identifying "dangerous" people who should be priorities for immigration investigation and enforcement. Take traffic stops. While traffic violations are technically "crimes"—and in many states they are arrestable offenses—we do not ordinarily think of traffic violators as "dangerous criminals" unless they have recklessly or repeatedly caused serious harm on the road. State traffic laws criminalize a wide range of conduct, including reckless driving or driving under the influence of alcohol or drugs, but also failing to signal or driving with a headlight out. Some traffic laws do prohibit dangerous, criminal conduct, but others are merely regulatory. Police officers have a huge amount of discretion about whether and when to enforce most traffic laws, and it is hard to argue that violating these

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enforcement' law. S.B. 1070 requires that there must first be a 'lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency . . . in the enforcement of any other law or ordinance. . . .' A.R.S. § 11-1051(B)."); Kris W. Kobach, *Defending Arizona: Its Statute Will Withstand the Inevitable—and Already Begun—Challenges in Court*, NAT'L REV. (June 7, 2010), <http://www.nationalreview.com/article/243409/defending-arizona-kris-w-kobach> [<http://perma.cc/EK3B-L223>] ("[C]ritics have claimed that the law requires police officers to stop people in order to question them about their immigration status. . . . But Section 2 of S.B. 1070 stipulates that in order for its provisions to apply, a law-enforcement officer must first make a 'lawful stop, detention, or arrest . . . in the enforcement of any other law or ordinance of a county, city or town or this state.'").

laws, while technically criminal conduct, makes one a dangerous “criminal.”

The same is true of street stops. Police officers are authorized to conduct brief, temporary investigative “*Terry* stops” of individuals whose conduct is merely suspicious.<sup>108</sup> *Terry* stops, which are designed to give police a set of graduated responses to suspected or unfolding criminal activity, require a very small probability—reasonable suspicion—that an individual *might be* involved in criminal activity.<sup>109</sup> Reasonable suspicion may be based on a quite small quantum of highly ambiguous facts,<sup>110</sup> and a *Terry* stop may or may not lead to an arrest or even continued investigation if police are unable to confirm the suspicions that led to the stop. If police officers are permitted (or required) to verify the immigration status of any individual who is stopped or detained in these kinds of circumstances, it is hard to argue that they are targeting the subset of “dangerous criminals” who are the most deserving of immigration investigation or enforcement.

Of course, 287(g) jail model agreements and Secure Communities/PEP do not rely on mere traffic stops or *Terry* stops. As they are triggered only when an individual has actually been arrested, booked, and placed in custody, one might have thought that these programs are better suited to identify dangerous, illegal immigrants worthy of deportation. It turns out, however, that one of the most persistent criticisms of Secure Communities is precisely that it has resulted in excessive deportations of minor offenders.<sup>111</sup> The reason is that many minor traffic offenses and street crimes are arrestable offenses, which can be used to funnel minor violators into Secure Communities/PEP or the 287(g) program.

One response to these arguments is that targeting minor offenders for immigration enforcement is unobjectionable because *all* illegal immigrants are criminals, having arrived or remained in violation of immigration law. In fact, most illegal aliens are only guilty of civil offenses (and subject to civil sanctions) rather than criminal ones, and are not “criminals” under the law. Moreover, putting labels aside, it is important to acknowledge that virtually no one thinks we can (or should) deport all eleven million illegal aliens

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108. *Terry v. Ohio*, 392 U.S. 1, 27-28 (1968).

109. *See id.* (concluding that a reasonable person observing the defendants in this case could conclude that the men were armed and intended to commit a robbery based on the officer’s reasonable observation).

110. *See, e.g., Alabama v. White*, 496 U.S. 325, 330 (1990).

111. *See supra* notes 84-97 and accompanying text.

who currently reside in the United States. If so, it makes sense to focus our investigative resources on the ones who *actually* threaten public safety. That immigration policing targets minor offenders makes it a very poor mechanism for identifying dangerous aliens deserving of deportation.

The second implication alleged to follow from the claim that immigration policing is directed only at independently identified criminal aliens is that policing decisions will be not be influenced by the promise of downstream immigration investigation. Supporters argue that police officers will decide whether to stop, detain, or arrest particular suspects in the ordinary course of their law enforcement duties without any consideration of whether the targets might be illegal aliens. Similarly, ICE claims that under Secure Communities, now PEP, “[F]ederal officers make immigration enforcement decisions . . . only after a *completely independent decision* by state and local law enforcement to arrest an individual for a criminal violation of state law separate and apart from any violations of immigration law.”<sup>112</sup> To the contrary, the potential for back-end immigration enforcement strongly influences front-end investigative choices made by police officers engaged in ordinary policing.

Consider the following scenario: Suppose a police officer clocks a driver going 45 mph in a 40 mph zone. Speed laws, like many traffic laws and other low-level criminal offenses, are routinely underenforced. This means that the decision whether to stop a mildly speeding automobile will necessarily depend upon other factors, which may or may not be related to road safety, for example, whether the police officer has reached her “quota” of traffic tickets or whether the automobile is a make and model often used by drug dealers. Suppose now that when the officer clocks the vehicle’s speed at 45 mph, she also notices that there are five men in the car, all Hispanic. Now the officer has an additional reason why she might wish to stop the speeding driver: She suspects that the car packed with Hispanic men is headed for a site where illegal immigrants hire themselves out as construction day laborers. (Of course, this scenario also poses a high risk of racial profiling, which I address in detail below.)

This does not add up to reasonable suspicion of any immigration crime, but it doesn’t matter because the officer already has probable cause to stop the driver for speeding. Once the

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112. *Secure Communities: Get the Facts*, ICE, [http://www.ice.gov/secure\\_communities/get-the-facts.htm](http://www.ice.gov/secure_communities/get-the-facts.htm) [<https://perma.cc/NV83-QVTB>] (emphasis added).

automobile is stopped the officer can ask the occupants for identification and, finding none, she might have reasonable suspicion to believe they are in the country illegally. (Recall that reasonable suspicion requires only facts sufficient to suggest that a suspect *might* be involved in illegal activity.)<sup>113</sup> This then obligates the officer (under Arizona and some other state laws) to investigate the immigration status of the suspicious individuals.<sup>114</sup> Alternatively, the officer could simply arrest the driver for speeding and book him into custody knowing with certainty that the detainee's immigration status would automatically be ascertained through the Secure Communities/PEP program.<sup>115</sup> A similar result would obtain under the jail model 287(g) agreements in place in many jurisdictions: Incarceration triggers the authority of specially trained state and local officials to enforce federal immigration law in local jails.

The relevant point is that the decision to stop, detain, or arrest in enforcement of "any other law" is not hermetically sealed from the decision to investigate a suspect for immigration violations. Faced with this combination of facts—a speeding car filled with Hispanic-looking men in an area where large numbers of illegal Hispanic aliens reside—officials in states with immigration policing laws could plausibly believe they are *required* to stop such a vehicle.<sup>116</sup>

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113. See *Terry v. Ohio*, 392 U.S. 1, 27-28 (1968).

114. Three caveats are in order here. First, the officers may have difficulty demonstrating reasonable suspicion of *criminal* activity, as illegal presence may or may not be a criminal offense under the circumstances. Second, officers who extended the length of the stop to investigate immigration status without reasonable suspicion or probable cause of criminal activity could be found to have violated the Fourth Amendment. See *Terry*, 392 U.S. at 29. Third, if the investigation revealed merely a civil immigration violation, police would have no power to arrest the suspect on that ground. See *supra* notes 42-56, 65-72 and accompanying text.

115. At the scene of an arrest, police also have authority to search the arrestee's automobile if the arrestee is within "grabbing distance" of the automobile or if police have reason to believe that there is evidence of the crime of arrest in the automobile. See *Arizona v. Gant*, 556 U.S. at 332, 351 (2009). Under these facts, police might be able to argue (although this is a stretch) that the lack of identification gives them reason to believe there may be further evidence of illegality in the automobile, such as documents or letters evidencing a foreign address.

116. In a 2010 article, Kris Kobach, who drafted Arizona S.B. 1070, suggested that this precise set of facts might, itself, be enough to prompt a stop. Kobach, *supra* note 6 ("The most common situation in which S.B. 1070 will come into play is during a traffic stop. Suppose a police officer pulls over a minivan for speeding. He discovers that 16 people are crammed into the van and the seats have been removed. Neither the driver nor any of the passengers have any identification documents. The driver is acting evasively, and the vehicle is traveling on a known

Even in states without such laws, the existence of Secure Communities/PEP or a jail model 287(g) agreement provides incentives for police to take immigration suspects into custody in order to ensure investigation of possible immigration violations.

The use of pretextual traffic stops is not merely speculative. It is well documented that police officers use stops and arrests for minor traffic offenses in precisely this way: as pretexts for investigating other, more serious criminal conduct. For example, police officers often wait for drivers to commit traffic offenses in order to look for drugs or investigate crimes for which they lack probable cause or reasonable suspicion to stop.<sup>117</sup>

The key insight behind pretextual traffic stops is that arrests—even arrests for minor traffic offenses—come with powerful investigative tools: Police who arrest for a simple traffic violation get an automatic search incident to arrest of the arrestee’s person and can seize evidence of crime in plain view in the automobile.<sup>118</sup> They can search the passenger compartment if the arrestee is within “grabbing distance” of the automobile or if police have reason to believe that there is evidence of the crime of arrest in the automobile.<sup>119</sup> Alternatively, they can do a *Terry* frisk of the automobile if there is reasonable suspicion that the suspect is seeking to access a weapon.<sup>120</sup> If any of these strategies turn up evidence of crime, police

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human-smuggling corridor. Courts have held that those four factors can give an officer reasonable suspicion to believe that the occupants are aliens unlawfully present in the United States.”).

117. See David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 311-18 (1999) (discussing techniques and case law enabling police to use traffic stops to investigate the car and driver). The facts at issue in the Fourth Amendment case, *Arizona v. Gant*, illustrate this strategy. Police were conducting a drug investigation focused on a particular residence. They observed Mr. Gant leaving the residence but they lacked probable cause or reasonable suspicion to detain him in connection with suspected drug dealing. Instead, they investigated Gant’s traffic record and found an outstanding warrant against him for driving without a license. When Gant returned in his automobile, police had probable cause—based on the outstanding traffic warrant—to stop him and search his car for drugs. See *Arizona v. Gant*, 556 U.S. 332 (2009). The Supreme Court held that the police can no longer do an *automatic* search incident to arrest of the car once the suspect has been removed from it. *Id.* at 350-51.

118. See *Arizona v. Hicks*, 480 U.S. 321, 326 (1987); *United States v. Robinson*, 414 U.S. 218, 225 (1973).

119. See *Gant*, 556 U.S. at 350-51. Prior to the Court’s holding in *Gant*, police officers got an automatic search incident to arrest of the arrestee’s vehicle even if the arrestee was sitting in handcuffs in the officer’s patrol car. See *New York v. Belton*, 453 U.S. 454, 460 (1981). See generally Armacost, *supra* note 10.

120. See *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983).

could then have probable cause to search the entire automobile.<sup>121</sup> Alternatively, the officers could seek consent to search the vehicle,<sup>122</sup> which is virtually always granted by suspects. And if all else fails, police officers can arrest the driver, impound the automobile, and inventory the contents, which may uncover evidence of crime.<sup>123</sup> In sum, police have strong incentives to leverage minor violations into broader investigative power.

Involving state and local police in immigration enforcement creates similar incentives for them to use traffic and street stops as tools to investigate suspected illegal immigrants. Defenders argue that immigration policing does not *permit* police officers to stop or arrest for the *purpose* of checking immigration status. While this is technically true, once police have reasonable suspicion or probable cause to stop or arrest for a minor traffic or other offense, their actual motivation for the stop or arrest is irrelevant to the lawfulness of the stop.<sup>124</sup> Even if motivation did matter, it would be difficult to determine (let alone prove) whether the officer stopped the speeding car and *secondarily* verified the occupants' immigration status or she *waited* for a foreign-looking driver to commit a traffic offense *in order* to check his immigration status. And no one but the officer herself knows which came first. This chicken-and-egg question is especially acute in jurisdictions where immigration verification is mandatory for all individuals who are lawfully stopped.<sup>125</sup> In short, police officers can (and likely will) use minor offenses as pretexts to pursue suspected illegal immigrants. (Moreover, in places like Arizona—where the stated purpose of state immigration law is attrition by enforcement—police have strong political reasons for doing so.)

More broadly, the nationwide inauguration of Secure Communities/PEP and the continued use of 287(g) jail model

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121. See *California v. Acevedo*, 500 U.S. 565, 580 (1991).

122. See *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

123. See, e.g., *Colorado v. Bertine*, 479 U.S. 367, 375 (1987); *South Dakota v. Opperman*, 428 U.S. 364, 372 (1976).

124. See *Whren v. United States*, 517 U.S. 806, 812-13 (1996).

125. For example, "Since 2008, the Phoenix Police Department (PPD) has directed its force to ask all lawfully-detained suspects about their immigration status." Eagly, *supra* note 17, at 1182. According to the PPD, this policy saves the city money by transferring potential defendants to federal custody rather than booking them for a crime through the local system. *Id.* at 1183. See also *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 830 (D. Ariz. 2013) (Maricopa County Sheriff's Deputy Rangel testified in civil rights trial that "it is possible to develop probable cause to stop just about any vehicle after following it for two minutes.").

agreements also create strong incentives for pretextual stops and arrests. The knowledge that booking and jailing comes with automatic immigration verification encourages police to use traffic offenses to bring suspected illegal immigrants into the Secure Communities/PEP network. Incarceration also triggers 287(g) authority for specially trained prison officials to investigate suspected immigration violations, serve warrants of arrest, prepare charging documents, issue immigration detainers, detain arrested aliens subject to removal, and transport them to ICE-approved facilities. Especially in the current anti-immigrant climate, state and local police have strong incentives to use ordinary law enforcement actions to expose suspected illegal immigrants to federal immigration investigation.

U.S. Immigration and Customs Enforcement (ICE), the federal agency that administers federal–state partnerships such as Secure Communities/PEP and the 287(g) program, has acknowledged the significant risk that such collaborations might distort law enforcement decisions. In response, ICE has repeatedly affirmed its *intention* that state and local policing decisions should be made independently from immigration enforcement goals<sup>126</sup> but has made little or no concrete efforts to enforce this intention. In language used to promote its collaborative programs, ICE explicitly encourages state and local officials to see themselves as part of the ICE “team” in addressing security challenges in their community.

Public comments by police leaders confirm that they view programs like Secure Communities/PEP in precisely this way: as tools to amplify the breadth and power of ordinary policing.<sup>127</sup> As a

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126. ICE asserts that Secure Communities functions only after state and local officials have made “a completely independent decision . . . to arrest and book an individual for a criminal violation of state or local law separate and apart from any violations of immigration law.” JOHN MORTON, DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, PROTECTING THE HOMELAND: ICE RESPONSE TO THE TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS 11 (2012), <https://www.dhs.gov/sites/default/files/publications/ICE%20Response%20to%20Task%20Force%20on%20Secure%20Communities.pdf> [perma.cc/53U5-FAV8].

127. See, e.g., Ivan Moreno, *Immigrant Groups Criticize Fingerprint Initiative*, ASSOCIATED PRESS (July 26, 2010, 5:04 PM), [http://www.nbcnews.com/id/38417091/ns/us\\_news-immigration\\_a\\_nation\\_divided/t/immigrant-groups-criticize-fingerprint-initiative/#.U8\\_AGbHLJMY](http://www.nbcnews.com/id/38417091/ns/us_news-immigration_a_nation_divided/t/immigrant-groups-criticize-fingerprint-initiative/#.U8_AGbHLJMY) [https://perma.cc/35Q7-ETG3] (quoting Butler (Ohio) County Sheriff Rick Jones who praised the program as “heaven-sent” because “I don’t want [illegal alien criminals] in my community. I’ve got enough homegrown criminals here.”); *Sheriff’s Office Partners with ICE to Launch Secure Communities Program*, FAIRFAX CTY., VA. (Mar. 9, 2009), <http://www.fairfaxcounty.gov/sheriff/news/ice.htm> [https://perma.cc/NH6A-C3DX] (quoting

result, these programs have dramatically merged the lines between policing and immigration enforcement by inducing police to view them “simply as different kinds of tools, and to use whichever tool works best against a particular offender or suspect.”<sup>128</sup> Indeed, it is common for “individuals [to be] shunted back and forth between the criminal justice system and the immigration enforcement system, or targeted by both simultaneously.”<sup>129</sup> State and local officials have strong economic incentives to affirm the merged system: By turning illegal aliens directly over to immigration officials, they avoid the costs of criminal prosecution.<sup>130</sup> Whether by design or default, state and local police have come to view immigration enforcement as simply another tool in the law enforcement arsenal.

An empirical study of state and local immigration policing by Ingrid Eagly supports the claim that the promise of back-end immigration enforcement affects front-end law enforcement choices. In a study of three large urban jurisdictions—Los Angeles County, California; Harris County, Texas; and Maricopa County, Arizona—Eagly concluded that “criminal law’s integration with immigration enforcement has a far more powerful impact on local criminal

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then-Sheriff Stan Barry of Fairfax County who called Secure Communities a “win-win situation both for the community and law enforcement” because “[w]e will be able to identify illegal immigrants who commit crimes in Fairfax County and get them in the process for deportation, and it does not require additional funds or manpower from us.”).

128. Sklansky, *supra* note 15, at 202.

129. *Id.* A dramatic, earlier example of a program explicitly designed to substitute immigration enforcement for criminal prosecution was “Operation Community Shield.” Under this program state and local police would identify individuals suspected of being members of a criminal gang and turn their names over to ICE with the understanding that federal immigration officials would initiate deportation proceedings against them. The program was described by ICE as an effort “to use all our tools to disrupt and dismantle” criminal gangs. Kirk Semple, *Gang Activity Now a Focus for Immigration Agents*, N.Y. TIMES (Dec. 9, 2010), [http://www.nytimes.com/2010/12/10/nyregion/10gangs.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/12/10/nyregion/10gangs.html?pagewanted=all&_r=0) [<https://perma.cc/AYB3-YWUZ>] (quoting James T. Hayes, Jr., Special Agent in Charge, Investigations Division, Immigration and Customs).

130. For example, since 2008, the Phoenix Police Department (“PPD”) has instructed its officers to question each lawfully detained individual about his or her immigration status. According to the PPD, one benefit of this practice is that immigration violators can be transported directly to federal authorities without booking them into their own local jails. After adopting this policy, the PPD reports that the number of jail bookings with immigration detainees has declined by 13%, saving the city expenses normally associated with booking and jailing. Eagly, *supra* note 17, at 1182-83.

process than previously understood.”<sup>131</sup> Her study demonstrates that law enforcement officials are “keenly aware of both the immigration status of defendants and the practical effects of the federal government’s reliance on convictions in making immigration-enforcement decisions.”<sup>132</sup> For example, defense attorneys in Maricopa County describe how police officers use traffic stops for minor violations to justify a stop and request for identification. Then, if a driver’s identification, either a driver’s license or a Mexican consular identification card, looks “suspicious,” the detainee is taken into local criminal custody on suspicion of document fraud, which exposes her to immigration verification.<sup>133</sup>

Maricopa Sheriff Joseph Arpaio’s 287(g) operation was the consummate example of the instrumental use of traffic stops for immigration enforcement. Under Arpaio, the Maricopa County Sheriff’s Office (MCSO) conducted “saturation patrols” in which officers would conduct traffic enforcement operations for the explicit purpose of detecting unauthorized aliens during the course of the stops.<sup>134</sup> In one type of saturation patrol, officers were instructed to “station themselves at locations where Latino day laborers assembled,” identify vehicles that would pick up day laborers, and follow the vehicles until the drivers committed minor traffic offenses.<sup>135</sup> During saturation patrols, the MCSO kept statistics on how many unauthorized aliens had been arrested during the patrol, and after such patrols, MCSO issued press releases emphasizing that their purpose was immigration enforcement.<sup>136</sup> Internal emails

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131. *Id.* at 1134.

132. *Id.* Eagly based her conclusions on interviews with the whole range of state and local criminal justice officials (including “prosecutors, public defenders, private attorneys, judges, pretrial services officers, probation officers, and jail personnel”) as well as on local laws and procedures, court documents, criminal and immigration-enforcement statistics, and prosecution policies and training manuals. *Id.* at 1133-34.

133. *Id.* at 1183. Similarly, in the trial of the federal civil rights suit against the Maricopa County Sheriff’s Department, Sheriff Arpaio testified, “[O]urs is an operation, whether it’s the state law or the federal, to go after illegals, not the crime first, that they happen to be illegals. . . . [Y]ou go after them and you lock them up.” *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 830-31 (D. Ariz. 2013).

134. *Id.* at 831. The court found that during day labor operations and other small-scale saturation operations, there was a high correlation between total stops and stops that resulted in immigration arrests. *Id.* at 834.

135. *Id.* at 831.

136. *Id.* at 840.

confirm that saturation patrols often followed citizen complaints about day laborers, illegal immigrants, or “Mexicans.”<sup>137</sup>

## B. What Is Wrong with Pretextual Immigration Stops?

One response to all of this is to say “So what?” So what if state and local police are using traffic offenses and *Terry* stops strategically to investigate and ultimately prosecute illegal aliens? This strategy is no different from stopping and arresting traffic violators as a pretext to search for evidence of drugs, a practice the Supreme Court has deemed lawful under the Fourth Amendment.<sup>138</sup> Using pretextual stops in the immigration context is no different.

The argument that practices like these are tolerable (if not preferred) is similar to the defense of so-called “pretextual prosecutions.” It is common for federal prosecutors who suspect a criminal defendant of one crime to charge and convict him of an unrelated, less serious but more easily proven crime.<sup>139</sup> Pretextual prosecutions are a common feature of our criminal justice system and are generally (although not universally) accepted as legally and ethically permissible.<sup>140</sup> Prosecutors argue that they are targeting defendants who are, in fact, guilty of actual crimes for which any citizen could be prosecuted and punished.<sup>141</sup> Why should the Al Capones of the world be immune from punishment for their small crimes simply because they have also committed larger crimes?<sup>142</sup> Defendants who challenge their prosecutions on these grounds

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137. *Id.* at 859.

138. The controlling case is *Whren v. United States*, 517 U.S. 806 (1996), in which the Court deemed pretextual stops lawful under the Fourth Amendment if there is objective evidence of criminal activity, regardless of the actual motivation of police officers who carry them out. Even an invidious racial motivation does not render a search or seizure unlawful under the Fourth Amendment, *id.* at 813, and it may or may not implicate the Fourteenth Amendment. See *infra* notes 177-85 and accompanying text.

139. See generally Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005).

140. See *id.* at 585.

141. See *id.* at 584.

142. As long as the subject is actually guilty of the underlying crime for which action has been taken and there is no allegation that she was singled out for invidious reasons, she cannot be heard to complain that she was treated unfairly. See *id.* at 584.

generally lose, unless they can prove racial (or other invidious) discrimination.<sup>143</sup>

Returning to the immigration context, identifying possible immigration violators by arresting them for traffic offenses is no more problematic than prosecuting Al Capone for tax evasion. Why should the speeder be immune from prosecution just because police also suspect her of being in the country illegally? Or, to flip the argument around, if not all illegal immigrants can be (or should be) investigated and prosecuted, doesn't it make sense to target for police action those who have violated other laws? Federal immigration officials take the view that criminal misconduct serves as a good sorting mechanism in an immigration enforcement regime in which federal law is—either by design or default—underenforced. This intuition lies behind the enforcement priority that federal immigration authorities have placed on illegal immigrants who have engaged in (serious) criminal activity.<sup>144</sup>

Criminal justice scholar David Sklansky responds that pretextual prosecutions and pretextual immigration policing are problematic, not because they are unfair but because they compromise political accountability.<sup>145</sup> Sklansky places these phenomena into a broader category he calls “ad hoc instrumentalism,” meaning law enforcement strategies that view the whole range of substantive law, procedure, and remedies as interchangeable tools to be employed strategically as the circumstances demand.<sup>146</sup> Instrumentalist strategies start by

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143. The leading case addressing the so-called “pretext” argument is *Wayte v. United States*, 470 U.S. 598 (1985). In *Wayte*, the defendant was one of some 674,000 who illegally failed to register for the draft. Unlike the other draft-dodgers, however, he repeatedly wrote letters to the Justice Department announcing that he had not, and would not, register and daring them to prosecute him. *See id.* at 601 n.2, 604. When he was prosecuted, the defendant objected that he was singled out for writing the letters. The Supreme Court rejected his argument. *Id.* at 607-10. *See generally* 4 WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE § 13.4(c) (3d ed. 2007).

144. *See* Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 5 (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<https://perma.cc/UX7F-V4FV>].

145. *See* Sklansky, *supra* note 15, at 161.

146. *Id.* at 161. Sklansky links ad hoc instrumentalism with a broader phenomenon of legal instrumentalism involving the “decline of natural law,

identifying the subject (or suspect) to be targeted and then searching among various sources of law for legal options to investigate or prosecute her.<sup>147</sup> In the immigration context, ad hoc instrumentalism means the pragmatic use of two formally separate sources of law and procedure—immigration law and criminal law—to target the same perceived threat: the criminal alien.<sup>148</sup> On this view, immigration policing, like pretextual stops more generally, compromises our ability to hold law enforcers accountable for their conduct and policies.<sup>149</sup>

Political controls are effective only if the allocation of responsibility for decisions is clear and programmatic motivations for decisions are sufficiently transparent.<sup>150</sup> The merging of policing and immigration enforcement—so-called crimmigration—has made it increasingly difficult to identify who is ultimately responsible for the decisions and enforcement priorities resulting from immigration policing.<sup>151</sup> Under the collaborative federal–state programs at issue here, state and local officials are engaged in enforcing ordinary crimes at the same time they are investigating immigration violations. When they conduct a traffic stop or a *Terry* stop of a foreign-looking person, it may not be clear what actually motivated

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customary law, and legal formalism” and the “tendency to see law as instrumental and artificial.” *See id.* at 198.

147. *Id.* at 201.

148. *Id.* at 201-02. According to Sklansky, the general strategy of identifying a category of criminal actors—for example, gang-members or drug dealers—and then “pulling every lever” to get them off the streets is well known in the policing community. *Id.* at 203. He argues that so-called “pulling levers focused deterrence” originated from the problem-oriented policing movement and was piloted as part of the Boston Gun Project in the 1990s to address gang violence. *Id.* The approach was subsequently embraced by the U.S. Department of Justice as an effective method of crime prevention. *Id.* at 181. As a result, it has been employed in many American cities through federally sponsored violence prevention programs. In sum, the practice of identifying the troublemakers, gang-members, or suspected criminals and then finding some way to investigate and prosecute them is common in state and local law enforcement circles.

149. *Id.* at 214.

150. *See generally* Richman & Stuntz, *supra* note 139. For example, Richman and Stuntz argue that when a murder suspect is prosecuted for tax evasion even though the real law enforcement concern is the more serious crime, it deprives the public of information the prosecution would otherwise provide about the social meaning of its enforcement actions. *Id.* at 585-87.

151. The rise of immigrant groups and public interest organizations committed to immigration reform has enhanced political accountability in this area, but crimmigration has made it difficult to assign ultimate responsibility for the shape of immigration enforcement. Sklansky, *supra* note 15, at 213-15.

their actions: law enforcement or immigration enforcement. This muddies the social meaning of their policing actions, making it difficult for the public to monitor whether or not they are pursuing desired public safety (or immigration) priorities.<sup>152</sup> Conversely, when federal officials deport large numbers of individuals who have been “fed” into the immigration enforcement system by state and local police, it is difficult to determine whether the universe of deportees was motivated by immigration goals or was largely path dependent, i.e., predetermined by criminal justice priorities.

Political accountability is also compromised in another way by the merged systems of criminal justice and immigration law: When immigrants (both legal<sup>153</sup> and illegal) are caught up in this overlapping legal regime, “it is difficult if not impossible to determine who is responsible for [their] treatment.”<sup>154</sup> In the criminal justice system there are reasonably clear lines of responsibility: police, prosecutors, judges, juries, prison officials, and parole officers have distinct functions at precise points in the criminal process. For the most part at least, decisions made and actions taken within their spheres of responsibility can be traced back to them. The lines of responsibility for immigration decisions are reportedly less transparent,<sup>155</sup> but until the advent of immigration policing, at least we knew which agency was responsible for immigration enforcement decisions. In the merged system, it may be difficult to determine at which point (and by whom) particular decisions were made, for example, whether to detain or investigate a suspected illegal alien, whether to transport or incarcerate her, whether to file a detainer, and whether to act on that detainer. Relatedly, it may be difficult to trace responsibility for establishing and executing enforcement priorities.<sup>156</sup>

A good example of the latter problem is determining responsibility for enforcement patterns that have resulted from the operation of Secure Communities/PEP. According to ICE, Secure Communities was launched primarily to enhance the ability of federal officials to find and deport noncitizens who have committed

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152. See generally Richman & Stuntz, *supra* note 139.

153. There have been multiple stories of legal immigrants or even American-born citizens being mistakenly caught up in the immigration net, sometimes with dramatic consequences before errors were caught and corrected. See, e.g., Sklansky, *supra* note 15, at 215-17.

154. See *id.* at 214.

155. *Id.* at 213-14.

156. *Id.* at 212-13.

serious crimes.<sup>157</sup> Under the program, fingerprint records submitted to the FBI by state and local law enforcement agencies are passed on to ICE to be checked against DHS databases for evidence of immigration violations. If a match is found, that information is sent to the local ICE office, which has discretion to file “detainers” for those whom ICE wants the local organizations to hold and then turn over to it (or under PEP, whom ICE wants transferred to its custody). (In jurisdictions that have jail model 287(g) agreements, designated state and local officials are authorized to investigate possible immigration violations and issue detainers under the supervision and direction of ICE officials.<sup>158</sup>) Based on this framework, it is allegedly federal officials who establish and execute federal immigration priorities. State and local officials make upstream criminal justice decisions—who to detain or arrest under state or federal criminal law—but they have no independent role in determining the specific individuals who will be subject to immigration enforcement.<sup>159</sup>

In fact, the actual lines of responsibility for the shape of immigration enforcement under Secure Communities are much less clear. According to ICE, between 2008—when Secure Communities

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157. See Press Release, Dep’t of Homeland Security, Secretary Napolitano and ICE Assistant Secretary Morton Announce that the Secure Communities Initiative Identified More Than 111,000 Criminal Aliens in Its First Year (Nov. 12, 2009), <http://www.dhs.gov/news/2009/11/12/secure-communities-initiative-identified-more-111000-criminal-aliens-its-first-year> [<https://perma.cc/GY3U-D7AN>].

158. The model Memorandum of Agreement for current 287(g) jail model agreements states that “[t]he purpose of this collaboration” between state, local, and federal officials “is to enhance the safety and security of communities by focusing resources on identifying and processing for removal criminal aliens who pose a threat to public safety or a danger to the community.” MEMORANDUM OF AGREEMENT, DEP’T OF HOMELAND SECURITY 1 (2016) [https://www.ice.gov/doclib/detention-reform/pdf/287g\\_moa.pdf](https://www.ice.gov/doclib/detention-reform/pdf/287g_moa.pdf) [<https://perma.cc/5VPM-VER5>].

159. In its early implementation, Secure Communities was explicitly described by federal officials as a “partnership” between ICE and federal, state, tribal, and local law enforcement. This language implied that law enforcement officials and immigration officials had joint responsibility for immigration enforcement actions. More recently, ICE has characterized Secure Communities as merely an “information-sharing partnership.” The current Department of Homeland Security web site emphasizes that:

Under Secure Communities state and local law enforcement officers are not deputized, do not enforce immigration law, . . . only federal officers make immigration enforcement decisions, and they do so only after a completely independent decision by state and local law enforcement to arrest an individual for a criminal violation of state law separate and apart from any violations of immigration law.

ICE, *Secure Communities*, *supra* note 112.

was launched by the George W. Bush administration—and April of 2014 over 283,000 illegal aliens have been deported.<sup>160</sup> ICE claims that Secure Communities operated pursuant to clear and commonsense priorities for removing those aliens with criminal convictions.<sup>161</sup> According to ICE, this led to an 87% increase in the number of deportees with criminal convictions and a 29% decrease in the deportation of noncriminals.<sup>162</sup> Critics respond that these claims are highly misleading: According to an analysis by the Transactional Records Access Clearinghouse (TRAC), ICE’s statistics mask the fact that many of the “criminal convictions” that led to deportation during this period were either traffic offenses or convictions for immigration offenses (typically illegal entry, a petty misdemeanor under federal law).<sup>163</sup> Indeed, the number of deported immigrants whose most serious offense was listed as a traffic violation “quadrupled from 43,000 during the last five years of President George W. Bush’s administration to 193,000 during the five years [of the Obama administration].”<sup>164</sup> This occurred in spite of the fact that beginning in 2010, just as Secure Communities was ramping up,<sup>165</sup> former ICE director John Morton issued a series of directives instructing agency staff to focus their limited resources on deporting serious criminals, with the highest priority on noncitizens who posed a serious risk to public safety or endangered national security.<sup>166</sup>

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160. See Christi Parsons & Brian Bennett, *Homeland Security May Reduce Deportations of Nonviolent Immigrants*, L.A. TIMES (May 24, 2014, 6:12 PM), <http://www.latimes.com/nation/la-na-secure-communities-20140525-story.html> [https://perma.cc/SA6C-LHXA].

161. ICE, *Secure Communities*, *supra* note 112.

162. See TRAC IMMIGRATION, *supra* note 86, tbl. 2. (reporting data for the period between October 2008—when Secure Communities was launched—and October 2011).

163. Based on ICE records obtained through a series of FOIA requests, TRAC reports that “the most serious charge for fully half of the total [deportations] was an immigration or traffic violation.” *Id.* ¶ 5; see also Thompson & Cohen, *supra* note 88 (based on internal government records, NYT reported that between 2009 and the date of reporting two-thirds of the nearly 2 million deportees had committed only minor infractions, such as traffic offenses, or had no criminal record at all).

164. *Id.*

165. Prior to 2010, very few jurisdictions were covered by Secure Communities. That year signaled a rapid expansion of the program, which was extended to virtually all jurisdictions by the end of fiscal year 2013. TRAC IMMIGRATION, *supra* note 86.

166. See Memorandum from John Morton, *supra* note 144.

So what (and who) is responsible for this apparent turn from the “clear and commonsense” priority set by high-level ICE officials to target dangerous criminal aliens? It is not entirely clear. On the one hand, the crucial assumption, oft repeated by ICE, that state and local police will go about their business without regard to the promise of immigration verification is false for the reasons outlined above. This means that the detainee population that is ultimately subject to Secure Communities verification is itself determined by law enforcement actions that are tainted by pretextual stops and arrests designed to funnel criminal justice suspects (mostly minor offenders) into the immigration system. If so, the final mix of detainees subject to immigration detainers is partially path-dependent, and state and local officials are, at least in part, responsible for setting immigration enforcement priorities.

On the other hand, ICE officials have the final say over whether to take immigration enforcement actions against any particular detainee. It is ICE officials from Enforcement and Removal Operations (ERO) who “transport[] removable aliens from point to point, manage[] aliens in custody,” and remove from the United States individuals “who have been ordered to be deported.”<sup>167</sup> So if significant numbers of aliens who have committed only minor crimes are being deported, the failure to meet publicly stated immigration priorities traces right back to ICE and its failure to monitor its own agents. Such monitoring is made more difficult by the reality that immigration enforcement is broadly dispersed, with on-the-ground authority falling to local ERO field office personnel. Many local ERO agents have resisted the imposition of “formalized prosecutorial discretion” by high-level ICE officials seeking to channel federal immigration priorities.<sup>168</sup> Moreover, even if local ERO officials are willing and ready to follow centralized instructions, it takes time to get detailed guidance and training in place. Thus another explanation for the gap between stated federal immigration priorities and actual deportation numbers involves a principle-agent problem within ICE itself.

But there is a third possible reason why so many low-level offenders have been the subject of enforcement action. Although the

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167. ICE, *Enforcement and Removal Operations*, <http://www.ice.gov/about/offices/enforcement-removal-operations/> [<https://perma.cc/F6RQ-Y7CQ>] (last visited Dec. 12, 2016).

168. I am indebted to my colleague Professor David Martin for this point. Professor Martin served as Principal Deputy General Counsel of the Department of Homeland Security from January 2009 to December 2010.

immigration advocacy community routinely tries to portray federal priorities as allowing removal only of serious offenders, that is not how the ICE priority directives actually read. Some individuals who have committed low-level criminal violations are within the priorities, not primarily because of their criminal offenses but because they fit other criteria ICE has laid out for enforcement action. While ICE has set its highest priority on aliens who have committed serious crimes, its second and third priorities are recent border crossers and re-entrants (after removal) or fugitives who did not honor a removal order.<sup>169</sup> ICE's press releases, which have tended to emphasize the focus on deportation of dangerous criminals, have fed into the misunderstanding that only serious criminal offenders will be targeted for deportation. In its claim that Secure Communities targets petty criminals and traffic offenders, TRAC has been careless (or misleading) in not recognizing that some illegal immigrants who have committed only minor crimes have been deported on other grounds that *do* satisfy publicly stated priorities. These mistakes have been picked up and repeated by immigration advocacy groups.<sup>170</sup> In sum, it may be that Secure Communities is, in fact, targeting exactly the population of illegal immigrants identified by high-level ICE officials.

The confusion about *who* is responsible for the shape of enforcement under Secure Communities/PEP and *whether* the program is meeting its publicly stated goals is an example of how ad hoc instrumentalism can undermine political accountability.<sup>171</sup> The confusion results from the merged systems of criminal and immigration enforcement and the strategy of using the two instrumentally, as interchangeable tools of enforcement against an identified class of individuals in which both systems have an interest. Supporters of immigration policing in its various forms—state immigration legislation, 287(g) agreements, Secure Communities—have touted its benefits, particularly the fact that these programs serve as “force multipliers” to federal immigration enforcement. These benefits must be balanced, however, against the costs, one of which is a significant loss of political accountability that occurs

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169. The memorandum from John Morton sets three priorities. *See generally* Memorandum from John Morton, *supra* note 144, at 4-5.

170. *See* David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 411, 448 (2015).

171. *See* Sklansky, *supra* note 15, at 161.

when the two systems of criminal justice and immigration law are merged.

### C. The Problem of Racial Profiling

More troubling than pretextual stops and arrests, however, is that immigration policing leads almost unavoidably to racial profiling. By the term racial profiling I mean any investigative or prosecutorial action taken by police against an individual based on the assumption that individuals of his or her particular race or ethnicity are more likely to engage in criminal conduct than persons of other races or ethnicities.<sup>172</sup> Recall my example of the five Hispanic men stopped for going 45 mph in a 40 mph zone. It seems clear that if they had been five white males in a vehicle going 45 mph, they would not have been stopped merely for speeding. Moreover, the only reason to suspect them of being illegal aliens is the color of their skin. Race by itself, however, is not a good proxy for illegal presence, especially where it is most often used as an indication of illegal presence, namely in parts of the country with large immigrant populations. While it might be true that in some areas of the country, for example near our southern border, a Hispanic person is more likely than a white person to be an illegal alien, it does not follow that most Hispanic individuals in those areas are illegal aliens.<sup>173</sup> But programs like Secure Communities/PEP and 287(g), as well as state immigration policing laws, create strong incentives for police to stop or arrest foreign-looking individuals for minor offenses in order to funnel them into the immigration verification system.

In response to concerns about racial profiling, supporters of immigration policing emphasize that state immigration laws

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172. I have borrowed this definition from Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1415 (2002) (“As we use the term, ‘racial profiling’ occurs whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person’s racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating.”).

173. According to a recent report, less than half of Hispanics in the United States—35.5%—were born in another country. See JENS MANUEL KROGSTAD, MARK HUGO LOPEZ & MOLLY ROHAL, PEW RESEARCH CTR., HISPANIC NATIVITY SHIFT: U.S. BIRTHS DRIVE POPULATION GROWTH AS IMMIGRATION STALLS 3 (2014), [http://www.pewhispanic.org/files/2014/04/2014-04\\_hispanic-nativity-shift.pdf](http://www.pewhispanic.org/files/2014/04/2014-04_hispanic-nativity-shift.pdf) [<https://perma.cc/AB35-M2UQ>].

expressly prohibit racial profiling by forbidding the use of “race, color or national origin . . . except to the extent permitted by the United States . . . Constitution.”<sup>174</sup> Agreements under 287(g) have similar prohibitions on racial profiling.<sup>175</sup> It turns out, however, that quite a bit of racial profiling is legal under the U.S. Constitution. In particular, police officers who target foreign-looking individuals for traffic stops or *Terry* stops as a pretext for immigration enforcement will be engaged in racial profiling that is either perfectly legal (albeit controversial) or very, very difficult to litigate.

Consider again my speeding car hypothetical. Suppose the police officer admits that he would not have pulled the automobile over except that he suspected the occupants were illegal aliens because they “looked foreign.” Given that most of the 350,000 illegal aliens in the state of Arizona are Hispanic,<sup>176</sup> we should expect that police officers who view themselves as partners in the pursuit of illegal immigrants *will* target individuals from this ethnic group. For all practical purposes, such targeting is constitutionally permissible as long as it is “hidden” behind an otherwise legitimate stop.

First, there would be no claim under the Fourth Amendment. In *Whren v. United States*, the Supreme Court held that a police officer’s actual motive—racial or otherwise—is irrelevant to the lawfulness of a search or seizure as long as it is supported by

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174. 2010 Ariz. Legis. Serv. Ch. 113 (S.B. 1070) § 2 (West), *amended by* 2010 Ariz. Legis. Serv. Ch. 211 (H.B. 2162) § 3 (West) (codified at ARIZ. REV. STAT. ANN. § 11-1051(B) (2010)); 2010 Ariz. Legis. Serv. Ch. 113 (S.B. 1070) § 3 (West), *amended by* H.B. 2162 § 4 (codified at ARIZ. REV. STAT. ANN. § 13-1509(C) (2010)); ALA. CODE § 31-13-12(c) (LexisNexis 2011) (“A law enforcement officer shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States. A law enforcement officer may not consider race, color, or national origin in implementing the requirements of this section except to the extent permitted by the United States Constitution or the Constitution of Alabama of 1901.”).

175. See, e.g., MEMORANDUM OF AGREEMENT, *supra* note 158, at 1, 8. (“Participating [name of state LEA] personnel are bound by all Federal civil rights laws, regulations, guidance relating to non-discrimination, including U.S. Department of Justice ‘Guidance Regarding The Use Of Race By Federal Law Enforcement Agencies’ dated June 2003 and Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000 et seq., which prohibits discrimination based upon race, color, or national origin (including limited English proficiency) in any program or activity receiving Federal financial assistance.”).

176. BRYAN BAKER & NANCY RYTINA, DEP’T OF HOMELAND SECURITY, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012, Table 4 at 5 (2013), [http://www.dhs.gov/sites/default/files/publications/ois\\_ill\\_pe\\_2012\\_2.pdf](http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf) [<https://perma.cc/26A5-TEBE>].

objective evidence (e.g., probable cause) of illegal activity.<sup>177</sup> Second, while the defendants in *Whren* could theoretically have raised claims of racial animus under the Equal Protection Clause,<sup>178</sup> such claims are difficult to bring and even more difficult to win.<sup>179</sup> To pursue a discriminatory enforcement claim—which would be brought pursuant to 42 U.S.C. § 1983—plaintiffs must prove both discriminatory *effect* and discriminatory *intent*.<sup>180</sup> Plaintiffs generally try to meet this burden by offering evidence that police officers disproportionately stopped or arrested individuals from the plaintiff's racial or ethnic group. This requires that the plaintiff offer data about not only his or her own stop or arrest but also the stops or arrests of other, similarly situated individuals. In addition to the heavy evidentiary burden such a showing entails—and the fact that the necessary evidence is in the hands of the police department—the Supreme Court in *United States v. Armstrong*<sup>181</sup> made it almost impossible for plaintiffs to obtain discovery of the factual information necessary to prove intent in discriminatory enforcement cases. Moreover, even if successful, § 1983 suits in this context are unlikely to result in large damages recoveries, although the availability of attorneys' fees may mitigate this limitation to some degree<sup>182</sup>

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177. 517 U.S. 806, 812 (1996). In *Whren*, police allegedly stopped a driver for failing to signal a right turn. *Id.* at 808. The suspects claimed that the actual motivations for the stop were that they were African American and police officers suspected them of drug dealing (a crime for which police did not have probable cause to stop). *Id.* at 809-10. The Supreme Court rejected these arguments, holding that motive was irrelevant to the lawfulness of the stop. *Id.* at 812.

178. *See id.* at 813 (pointing defendants to the Equal Protection Clause as source of relief for allegations of racial animus in policing).

179. While multiple scholars have made this point, one of the clearest accounts is found in Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2004 (1998).

180. *See* *Washington v. Davis*, 426 U.S. 229, 235, 239-40, 248 (1976) (holding that discriminatory intent has to be proven in an equal protection challenge to a facially neutral employment policy).

181. *See* *United States v. Armstrong*, 517 U.S. 456, 458 (1996) (holding that defendants must show that the government failed to prosecute similarly situated suspects of other races in order to file selective-prosecution claims). The Court denied the plaintiffs' discovery request in *Armstrong*, despite persuasive evidence of racial bias in enforcement of crack cocaine laws and despite defendants' showing that *all* crack cocaine defendants arrested in the same jurisdiction were black. *Id.* at 470. *See also* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1283 (1995).

182. By diverting claims of racial animus from the Fourth Amendment to the Equal Protection Clause, the Supreme Court has also eliminated the best remedy

Third, in the immigration context some intentional, race-conscious actions by law enforcement officials are lawful under the Fourth Amendment and the Equal Protection Clause. In *United States v. Brignoni-Ponce*, the Supreme Court held that officers may explicitly cite the race of the suspect in making out reasonable suspicion for immigration-oriented stops near the U.S. border if race is “relevant” to the question of whether the individual was in the country illegally.<sup>183</sup> In *Brignoni-Ponce*, roving border patrol agents stopped a vehicle near the Mexican border and questioned its occupants about their immigration status based *only* on suspicion that the occupants appeared to be of Mexican ancestry. The Court upheld the stop, reasoning that an officer “is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling” including his experience in “recogniz[ing] the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut.”<sup>184</sup> Importantly, if race is “relevant” to the Fourth Amendment question, then there is also no review under the Equal Protection Clause. By embracing the government’s argument that “trained officers can recognize the characteristic appearance of persons who live in Mexico” and can use alleged Mexican appearance to make immigration stops, the Court has

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available for combating racially motivated searches and seizures, the exclusion of the evidence in any criminal case against the claimant. See Karlan, *supra* note 179, at 2004.

183. 422 U.S. 873, 881, 885, 887 (1975) (citing *Terry v. Ohio*, 392 U.S. 1 (1968); *Adams v. Williams*, 407 U.S. 143 (1972)). If race is relevant to the Fourth Amendment question, then there is no review under the Equal Protection Clause. See also Bernard E. Harcourt, *United States v. Brignoni-Ponce and United States v. Martinez-Fuerte: The Road to Racial Profiling*, in *CRIMINAL PROCEDURE STORIES* 318 (Carol S. Steiker ed., 2006). In addition to race, other factors cited by the court as relevant to the showing of reasonable suspicion include: the characteristics of the area in which they encounter the vehicle (its location, proximity to the border, usual patterns of traffic); officers’ previous experience with illegal border crossings; the suspects’ behavior (erratic driving, obvious attempts to evade the officers); and aspects of vehicle itself (fold down seats, compartments that could hide aliens, heavy load, extraordinary number of passengers). *Brignoni-Ponce*, 422 U.S. at 884-85.

184. *Brignoni-Ponce*, 422 U.S. at 885. Federal law authorizes federal agents, without a warrant:

‘within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance or vehicle . . .’ Under [then-]current regulations, this authority could be exercised anywhere within 100 miles of the border.

*Id.* at 877 (quoting 8 CFR § 287.1(a) (1975)).

explicitly embraced the use of racial profiling in immigration policing.<sup>185</sup> The Court so held despite that even in areas with large concentrations of individuals with the physical characteristics of Mexican ancestry, a relatively small proportion of them are illegal aliens.<sup>186</sup> In other words, “Mexican appearance” is not, in fact, a good proxy for illegal presence.<sup>187</sup>

In light of the facts that police officers are more likely to suspect “foreign-looking” people of illegal presence, that some uses of race in immigration stops are legal, and that unlawful uses of race are hard to litigate, it is not surprising that allegations of racial profiling have plagued immigration policing programs. There were widespread claims of racial profiling in jurisdictions with 287(g) task force programs, where state and local officials were authorized to

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185. Harcourt, *supra* note 183, at 328. As Kevin Johnson has argued, the very idea of a “Mexican appearance” is itself problematic. There is no one “phenotype” of people who are from Mexico; their coloring ranges from dark to fair. In any event, people are notoriously poor at identifying ethnic differences correctly. See Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1025-26 (2010). The Court’s estimate that “85% of the aliens illegally in the country are from Mexico” was (and is) wildly inaccurate, the number being closer to 50%. *Id.* (quoting *Brignoni-Ponce*, 422 U.S. at 879).

186. The Supreme Court itself recognized this difficulty in *Brignoni-Ponce*. 422 U.S. at 886. The Supreme Court continued in the same direction, however, in *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976) (holding that referrals to secondary inspection at fixed checkpoints “made largely on the basis of apparent Mexican ancestry” do not violate the U.S. Constitution).

187. The Ninth Circuit recognized this in *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 889 (2000) (rejecting use of race because “[t]he likelihood that in an area in which the majority—or even a substantial part—of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus”). In *Montero-Camargo*, the court concluded that under the circumstances, race was not probative of illegality and “must be disregarded as a matter of law.” *Id.* The court also emphasized that racial profiling is socially harmful: “Stops based on race or ethnic appearance send the underlying message . . . that those who are not white are judged by the color of their skin alone” and that they “enjoy a lesser degree of constitutional protection—that they are in effect assumed to be potential criminals first and individuals second.” *Id.* at 1135. *But see* *United States v. Manzo-Juardo*, 457 F.3d 928, 935 n.6 (9th Cir. 2006) (holding that “Hispanic appearance” could be used as one factor supporting an immigration stop near the Canadian border in Havre, Montana, which is “sparsely populated with Hispanics”). The court’s reasoning in *Manzo-Juardo* is deeply flawed: That Havre, Montana, has few Hispanics is no reason to think that the few who are there—especially near a border with a non-Hispanic country—are illegal aliens.

carry out specified immigration enforcement duties in the field.<sup>188</sup> In its 2010 report on the 287(g) program, the Office of the Inspector General (OIG) identified as a major concern that communities subject to 287(g) enforcement had reported racial discrimination and intimidation by law enforcement agency participants.<sup>189</sup> The OIG reported that civil rights lawsuits had been filed against three jurisdictions; one was ongoing and two had been settled when police departments agreed to collect extensive data on police conduct during traffic stops and adopt strong policies against racial profiling.<sup>190</sup> Multiple immigrant advocacy groups have also written reports identifying patterns of racial profiling in 287(g) jurisdictions.<sup>191</sup> While many of these discrimination allegations involved 287(g) task force model programs, the still ongoing jail model 287(g) program has not escaped criticism: For example, a study of stops and arrests in connection with a 287(g) jail model program in Davidson County, Tennessee, led to the conclusion that police officers were targeting foreign-looking drivers for traffic stops in order to funnel them into the criminal justice system.<sup>192</sup>

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188. The 287(g) task force model program was terminated by ICE in December 2010. *See supra* notes 160-76 and accompanying text.

189. *See* 2010 OIG REPORT, *supra* note 37, at 23.

190. *See id.* The OIG Report did not give the names of the 287(g) jurisdictions subject to civil rights lawsuits. The DHS was a defendant in an additional lawsuit in connection with another law enforcement agency. *Id.* In its report, the OIG also faulted ICE for failing to screen its potential 287(g) partners for past civil rights violations and for failing to maintain policing data on current agency enforcement action that would screen for racial profiling and pretextual arrests. *See id.* at 26-27.

191. *See, e.g.,* Azadeh Shahshahani, *The Persistence of Racial Profiling in Gwinnett: Time for Accountability, Transparency, and an End to 287(g)*, ACLU OF GA. 1, 6, 8, 26 (Mar. 2010), [https://www.acluga.org/sites/default/files/gwinnett\\_racial\\_profiling\\_report\\_1.pdf](https://www.acluga.org/sites/default/files/gwinnett_racial_profiling_report_1.pdf) [<https://perma.cc/2TLY-9CHF>]; *see also, e.g.,* Deborah M. Weissman, Rebecca C. Headen & Katherine Lewis Parker, *The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina*, ACLU OF N.C. LEGAL FOUND. 1, 8, 10, 54 (Feb. 2009), <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf> [<https://perma.cc/WDS4-KHNQ>]; *The 287(g) Program: A Flawed and Obsolete Method of Immigration Enforcement*, AM. IMMIGRATION COUNCIL (Nov. 29, 2012), <http://www.immigrationpolicy.org/just-facts/287g-program-flawed-and-obsolete-method-immigration-enforcement> [<https://perma.cc/7MV9-E6QA>]; *Under Siege: Life for Low-Income Latinos in the South*, SOUTHERN POVERTY LAW CTR. 1, 16, 20 (Apr. 2009), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/UnderSiege.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/UnderSiege.pdf) [<https://perma.cc/G8GA-X42Z>].

192. *See* Lindsay Kee, *Consequences & Costs: Lessons Learned from Davidson County, Tennessee's Jail Model 287(g) Program*, ACLU OF TENN. 1, 3-4, 11-12 (Dec. 2012), <http://www.aclu-tn.org/wp-content/uploads/2015/01/287gF.pdf> [<https://perma.cc/6X23-HMLZ>].

Perhaps the most notorious allegations of racial profiling in connection with immigration policing arose in connection with a 287(g) agreement with the Maricopa County (Arizona) Sheriff's Office (MCSO). Allegations of racial discrimination resulted in the filing of a civil rights suit against the County and Sheriff Arpaio<sup>193</sup> and an adverse judgment in federal court.<sup>194</sup> The court found that the MCSO was routinely conducting "saturation patrols," in which they allegedly applied a "zero tolerance policy" for traffic violations<sup>195</sup> but in practice targeted Hispanic individuals who had violated minor traffic laws. The court concluded that Arpaio and his deputies had relied on racial profiling and illegal detentions to target Latinos, using their foreign appearance as the main basis for suspecting them of being in the country illegally.<sup>196</sup> Many of the targeted individuals were American citizens or legal residents.<sup>197</sup> Arpaio's flouting of

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193. See Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, Civil Rights Div., to Mr. Bill Montgomery, County Att'y, Maricopa Cty. (Dec. 15, 2011), [https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso\\_findletter\\_12-15-11.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf) [<https://perma.cc/B5W8-VQSJ>]. The investigation focused on the Maricopa County Sheriff's Office compliance with the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, and Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7. See *id.*

194. See *Melendres v. Arpaio*, 784 F.3d 1254, 1255, 1266-67 (9th Cir. 2015); see also *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 827, 895, 907, 910 (D. Ariz. 2013). See also Andrew Cohen, *Federal Judge Chronicles Lawlessness of Joe Arpaio-Led Sheriff's Office*, THE ATLANTIC (May 25, 2013), <http://www.theatlantic.com/national/archive/2013/05/federal-judge-chronicles-lawlessness-of-joe-arpaio-led-sheriffs-office/276150/> [<https://perma.cc/T67U-TWHL>]; Fernanda Santos, *Judge Finds Violations of Rights by Sheriff*, N.Y. TIMES (May 24, 2013), <http://www.nytimes.com/2013/05/25/us/federal-judge-finds-violations-of-rights-by-sheriff-joe-arpaio.html> [<https://perma.cc/52VJ-D386>].

195. See *Melendres*, 989 F. Supp. 2d at 861. As MCSO officers later testified at trial in the civil rights case against the department, a zero tolerance policy would be "impossible" to administer because "if you follow any vehicle on the roads . . . for even a short amount of time, you will be able to pull that person over for some kind of violation." *Id.* at 860-61. The court concluded that, in fact, MCSO officers had followed no such policy but instead had targeted for stops and arrests individuals with Hispanic appearance and Hispanic sounding names. See *id.* at 863-69, 905.

196. See *id.* at 905. MCSO officers and deputies testified at trial that their ICE 287(g) training allowed for the consideration of race as a factor in making immigration law enforcement decisions. *Id.* at 825. For example, officers testified that race could be used as "one factor among many in stopping a vehicle." *Id.* at 846. The officers testified that the use of race as one factor was not "racial profiling," which was forbidden (although no definition of racial profiling was provided). *Id.* at 841.

197. On appeal the 9th Circuit found some provisions of the permanent injunction issued against MCSO to be overbroad and vacated and remanded those

federal law and immigration policies resulted in a revocation of the 287(g) agreement with the MCSO<sup>198</sup> and ultimately with all law enforcement agencies in the state.

Accusations of racial discrimination have also been raised in connection with the long-established Criminal Alien Program, a federal–state partnership in which “local jail officials hold people in jail until ICE can screen arrestees and issue a detainer” in appropriate cases.<sup>199</sup> Similarly, a study analyzing arrests under Secure Communities, now PEP, also found evidence of racial profiling in connection with pretextual stops and arrests in anticipation of immigration verification.<sup>200</sup>

The bottom line is that state immigration policing statutes and state–federal immigration partnerships that funnel criminal aliens into the immigration system both permit and encourage racial profiling. And, more importantly, such profiling is either completely legal or very difficult to challenge in court.

### III. THE NEW IMMIGRATION FEDERALISM

The negative consequences of immigration federalism have led to a backlash of resistance by state and local officials: Many states and localities withdrew from participation in Secure Communities

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provisions to the district court. *See Melendres*, 784 F.3d at 1264–65. The court did not overturn the holding of constitutional violations by the MCSO. *Id.* at 1267. Further, in May of 2016, the District Court for the District of Arizona found Sheriff Arpaio and others in civil contempt for failure to comply with the previous preliminary injunction in the case. *Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2016 WL 2783715 (D. Ariz., May 31, 2016). In August, the court referred the Sheriff for a determination of whether he should be held in criminal contempt. *See Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2016 WL 4414755, at \*17 (D. Ariz., Aug. 19, 2016).

198. The 287(g) agreement with Maricopa County Sheriff’s Office was revoked on October 16, 2009. *See Melendres*, 989 F. Supp. 2d at 843. Sheriff Arpaio claimed that MCSO officers retained authority to enforce federal immigration law despite the revocation and he continued to conduct saturation patrols. That claim was apparently based on erroneous legal research that had been conducted by a police sergeant in the MCSO. *Id.*

199. *See TREVOR GARDNER II & AARTI KOHLI, THE CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM 1, 8 (2009); see also ANDREA GUTTIN, IMMIGRATION POL’Y CTR., THE CRIMINAL ALIEN PROGRAM: IMMIGRATION ENFORCEMENT IN TRAVIS COUNTY, TEXAS 3-4, 16 (2010).*

200. *See AARTI KOHLI, PETER L. MARKOWITZ & LISA CHAVEZ, THE CHIEF JUSTICE EARL WARREN INST. ON L. & SOC. POL’Y, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS (2011).*

and many have declined to participate in ICE's new PEP program.<sup>201</sup> Close to 300 states and localities have adopted laws or policies that prohibit officials from honoring federal immigration detainees or that limit the circumstances under which officials will honor them.<sup>202</sup> Still other states and localities have brought successful statutory or constitutional challenges to federal detainees in court.

These resistance efforts have often been called "sanctuary policies," suggesting that their primary goal is to shelter illegal immigrants from federal immigration enforcement. For example, when Kathryn Steinle was murdered by an illegal immigrant in the so-called "sanctuary city" of San Francisco, many people blamed the tragedy on the city's failure to cooperate with federal immigration officials.<sup>203</sup> In fact, the term "sanctuary" as applied to these modern resistance efforts is a misnomer. The concept of a "sanctuary city" has American historical roots in 1980s efforts by churches to shelter immigrants from El Salvador, Guatemala, and Nicaragua who fled their countries' civil wars and illegally entered the United States across the Mexican border.<sup>204</sup> These early policies differed from

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201. See, e.g., Aguilar, *supra* note 92.

202. Griffith & Vaughan, *supra* note 2. Some estimates are as high as 500 jurisdictions. See Sanburn, *supra* note 2.

203. See Lee Romney, Cindy Chang & Joel Rubin, *Fatal Shooting of S.F. Woman Reveals Disconnect Between ICE, Local Police; 5-time Deportee Charged*, L.A. TIMES (July 6, 2015, 10:39 PM), <http://www.latimes.com/local/crime/la-me-sf-shooting-20150707-story.html> [<https://perma.cc/6NQK-RLL8>]. Prior to his release in San Francisco, Lopez-Sanchez was serving time in federal prison for felony criminal reentry (i.e., for the crime of entering after having been deported), the third time he had served time for this crime. See *id.* ICE officials filed a detainer with the Federal Bureau of Prisons, but instead of holding him, federal officials shipped him off to San Francisco to answer for a 20-year-old felony charge for selling marijuana. (Lopez-Sanchez had six prior (non-violent) drug convictions, all in the 1990s.) When the district attorney determined that the marijuana case was too old to pursue, charges were dropped and Lopez-Sanchez was released. See *id.* ICE spokesperson Virginia Kice said in a statement that local officials ignored a detainer filed by ICE requesting that immigration officials be notified prior to releasing Lopez-Sanchez. *Id.* With the benefit of hindsight, Lopez-Sanchez's release was a tragic mistake, but it cannot be attributed to a policy designed to shelter dangerous criminals. While Lopez-Sanchez probably should not have been released under then-current federal immigration priorities, his criminal history did not suggest he would turn violent.

204. See Davidson, *supra* note 103, at 602. The sanctuary movement of this period was led by churches and religious groups. See *id.* at 603. At its peak, the movement involved "over 300 churches serving as sanctuaries, with as many as 2,000 additional churches providing logistical support." See *id.* Some religious groups opposed the sanctuary movement, including conservative leaders in the Catholic Church and the national Association of Evangelicals. See *id.* at 604. The

modern resistance policies in two important ways. First, the 1980s sanctuary movement involved *civil disobedience* against existing law by *private* citizens.<sup>205</sup> Second, the *only* and explicit goal of the movement was to thwart the enforcement of federal immigration law in order to keep citizens from being sent back to dangerous countries.

By contrast, current so-called sanctuary policies involve state and local officials acting pursuant to duly enacted laws and ordinances. Moreover, these policies are not designed primarily to obstruct all federal immigration enforcement. Rather, they are designed to get states and localities out of the business of frontline immigration enforcement. They are targeted to address the distortions that result from immigration federalism, namely the deportation of minor offenders, the increased incidence of racial profiling, and the resulting compromise of public safety.<sup>206</sup>

Viewed this way, state and local resistance policies represent a “new immigration federalism:” a principled rejection of one option for state immigration policy and the embrace of another. States and localities that have declined to cooperate in immigration policing are doing so for reasons that touch on immigrant issues in which they have a legitimate interest. Many state and local police departments complain that associating ordinary policing so closely with immigration enforcement—especially when it involves racial profiling and targets minor offenders—undermines trust between the police and immigrant communities.<sup>207</sup> According to police experts, this makes victims, witnesses, and other residents unwilling to report

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idea of providing sanctuary to aliens and even criminals has much older religious and cultural roots, going all the way back to ancient times. *See id.* at 609.

205. *See id.* at 605-07. The federal government actively opposed the sanctuary movement, conducting surveillance operations and arresting, jailing, and convicting some for violations of immigration law. *See id.* at 605-06. In the largest federal operation against the sanctuary movement, eight defendants were convicted but eventually received suspended sentences and probation after a groundswell of public protest and support for leniency. *See id.* at 606-07.

206. *See, e.g.,* Eagly, *supra* note 17, at 1157 (describing the Los Angeles resistance model as one in which “criminal justice actors endeavor to make decisions that limit the potential effects of immigration status and enforcement on criminal adjudication”).

207. *See, e.g.,* MORTON, PROTECTING THE HOMELAND, *supra* note 126, at 14-15. *See also* California Trust Act, 2013 Cal. Stat. 4651 § 1(d) (“The Secure Communities program and immigration detainees harm community policing efforts because immigrant residents who are victims of or witnesses to crime, including domestic violence, are less likely to report crime or cooperate with law enforcement when any contact with law enforcement could result in deportation.”).

crime or approach police to exchange information, which significantly undermines community policing. The ultimate results are community unrest, increased levels of crime, and a decrease in public safety.<sup>208</sup> State and local officials explicitly identify these problems as reasons for their immigration resistance policies. Their position is strengthened by the Supreme Court's strong affirmation that states have a strong and continuing interest in the health and safety of their immigrant communities.<sup>209</sup>

Seeing state and local resistance policies as a federalist response to the pathologies of immigration policing puts these policies into a different and more fruitful light. While states imposing policies of unilateral noncooperation may not be optimal in form, the substantive policies themselves offer valuable lessons for successful immigration federalism. Moreover, that ICE has begun to change some of its policies in response to state resistance suggests that federal immigration officials are listening.

#### A. A New Federalist Response to Immigration Policing

It should be clear by now that state and local immigration policing is governed not only by federal law but by Fourth Amendment law. Immigration policing takes place through the mechanism of stops and arrests for ordinary crimes. And the rules that determine when a person may be stopped, arrested, or investigated in connection with suspected criminal conduct are determined in the first instance by constitutional rules of search and seizure, and secondarily, by state definitions of what constitutes a crime.

As a result, immigration policing and ordinary law enforcement share an important and problematic feature: In both contexts, police officers use stops and arrests for minor crimes as pretexts for investigating other violations for which they lack probable cause. The only thing that differs is the downstream benefit sought to be gained, in the one case investigation of ordinary crimes and in the other investigation of suspected immigration violations. For the reasons outlined in Part II, the pretextual use of stops and arrests in

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208. See MORTON, PROTECTING THE HOMELAND, *supra* note 126, at 24.

209. The Supreme Court has acknowledged that while the federal government has primary authority over immigration regulation, states and localities have a legitimate interest in the health and safety of immigrants in their jurisdictions. *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012).

each of these contexts has serious negative repercussions, especially for racial minority communities.

Fourth Amendment jurisprudence tells us that there are three basic factors that drive pretextual stops and arrests. Understanding these causes is the key to addressing pretextual immigration policing. The first factor is that state law, which governs the power to stop or arrest, criminalizes a broad range of minor street crimes and traffic offenses. This gives police broad discretion to use minor offenses to stop, investigate, or arrest individuals they suspect are illegal aliens.<sup>210</sup> Second, pretextual stops and arrests for minor crimes are attractive because of the capacious investigative authority that follows from them, including the promise of immigration investigation.<sup>211</sup> Third, even if police are acting pretextually—stopping or arresting minor offenders to trigger immigration enforcement—their actions are lawful if they have probable cause under the Fourth Amendment.<sup>212</sup>

This jurisprudence in turn suggests three possible strategies for eliminating or reducing the use of pretextual stops and arrests in immigration policing. The first would be to limit warrantless arrests for minor crimes under the Fourth Amendment. This solution was foreclosed by *Atwater v. City of Lago Vista*,<sup>213</sup> where the Supreme

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210. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (upholding warrantless arrests for minor offenses, including nonjailable offenses).

211. See *supra* notes 117-24 and accompanying text. With the exception of automobile searches, the Supreme Court has declined to limit under the Fourth Amendment the investigative perks that come with arrests for minor crimes. See, e.g., *Chimel v. California*, 395 U.S. 752 (1969) (holding that police may conduct a search incident to arrest of the grabbing area of a suspect); see also *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012) (upholding strip search of arrestee for minor crime who is detained in the general prison population); *United States v. Robinson*, 414 U.S. 218 (1973) (holding that arrest for a traffic offense permits full search incident to arrest of the person, including searching pockets and opening containers). The one exception is the Court's opinion in *Arizona v. Gant*, 556 U.S. 332 (2009), which held that police may do a search incident to arrest of an automobile only if they have reason to believe there is evidence of the crime of arrest in the automobile (or the arrestee is within grabbing distance of the automobile, which virtually never occurs because arrestees are virtually always handcuffed and placed in the patrol car). The holding in *Gant* essentially eliminates searches incident to arrest following arrest for minor traffic offenses.

212. See *United States v. Whren*, 517 U.S. 806 (1996). As noted earlier, stops or arrests based on invidious motives such as racial discrimination theoretically can be challenged under the Fourteenth Amendment, but such suits are difficult to bring and difficult to win.

213. See *Atwater*, 532 U.S. at 318. In *Atwater* the defendant challenged her warrantless arrest and jailing for failing to wear a seatbelt. One of the concerns

Court upheld against a Fourth Amendment challenge warrantless arrests for minor offenses (committed in the officer's presence) if defined as crimes by state law. A second solution would be to decouple ordinary stops and arrests (especially for minor crimes) from the promise of immigration enforcement, a strategy reflected in many state resistance policies. A third possible solution would be to attack pretext directly by monitoring actual motivations for police actions. This solution, which is also designed to address racial profiling, has been adopted as part of some state and local policies. It holds less promise, however, for reasons I explain in the next Section.

## B. Addressing Pretextual Policing

The most important cause of pretextual policing is that stops and arrests for minor crimes come with the promise of immigration enforcement. One solution is to break or weaken the connection between policing and immigration enforcement. This undermines the incentives for police officers to make law enforcement decisions motivated by the implicit promise of downstream federal involvement. States and municipalities have sought to disentangle ordinary policing from immigration enforcement by declining to honor federal immigration detainers,<sup>214</sup> which are the principle mechanism by which ICE seeks to obtain information about, or to request custody of, suspected immigration violators who have been arrested by state and local officials.<sup>215</sup>

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raised by the case was that arrests for minor crimes could and would be used as pretexts to harass people or to investigate other crimes for which police lacked probable cause. The Supreme Court declined the invitation to address pretext by prohibiting warrantless arrests for minor crimes. *See Atwater*, 532 U.S. at 355. In her dissent, Justice O'Connor worried that pretextual arrests create the risk of racial profiling. *See id.* at 363-64 (O'Connor, J., dissenting). Some states have attempted to address the *Atwater* problem by defining some minor offenses as non-arrestable offenses. The Supreme Court has held, however, that arrests in violation of state law do not violate the Fourth Amendment. *See Virginia v. Moore*, 553 U.S. 164 (2008). The Supreme Court has waded into the problem of crime definition in *City of Chicago v. Morales*, 527 U.S. 41, 41 (1999), but the holding was based on a judgment that the law at issue was vague. The holding in *Morales* does not address the problems raised by clear laws that are underenforced, which was the issue in *Atwater*.

214. DECLINED DETAINER REPORT, *supra* note 94, at 1 (listing nearly 300 jurisdictions with such policies). A partially redacted copy of the report was obtained by the Center for Immigration Studies.

215. *See supra* note 112 and accompanying text.

State resistance was triggered in large part by a dramatic rise in the use of detainers in the years after Secure Communities was launched. In fiscal year 2007—the first year of Secure Communities—ICE filed 15,000 detainers.<sup>216</sup> By 2013, the number had risen to over 250,000 per year.<sup>217</sup> Even more alarming to state officials was the issuance of more immigration detainers for persons at earlier stages of criminal proceedings. In addition, there were more detainers for minor criminal offenders than ever before.<sup>218</sup> State resistance to detainers was especially vehement during a period when ICE appeared to treat them as demands for officials to retain custody of detainees beyond the end of authorized state or local custody. This reading raised Tenth Amendment anti-commandeering issues as well as Fourth Amendment concerns. While there has been some dispute over whether detainers constitute “orders” or “requests,” ICE has recently made explicit that it views detainers as requests.<sup>219</sup>

In response to the focus on minor offenders and offenders who had merely been arrested or charged, state and local officials began to use control over detainers to limit the connection between policing and immigration enforcement. One option adopted by a number of jurisdictions is to honor detainers for individuals in state or local custody *only* if the suspected illegal immigrant has been *convicted* of or *charged* with (not merely arrested for) a *serious crime*.<sup>220</sup> This strategy has a two-fold purpose: The first is to decouple mere arrests from immigration enforcement. This discourages police from arresting minor offenders or individuals unlikely to be charged or prosecuted in order to expose them to federal immigration authorities. The second is to avoid facilitating the deportation of individuals who have been arrested for minor crimes such as traffic offenses but are otherwise law-abiding individuals with no criminal record. Importantly, this helps to dispel the perception in immigrant communities that any interaction with police could lead to deportation.

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216. Lasch, *supra* note 90.

217. *See id.*

218. *See generally* MANUEL, *supra* note 91.

219. It is now settled that detainers must be deemed requests only in order to satisfy Tenth Amendment concerns. *See* cases cited *infra* note 234. ICE has changed its detainer forms to reflect this understanding. In response to Fourth Amendment concerns, ICE now asks states to provide notification of impending release rather than demanding or requesting that an individual be detained beyond the period authorized by state law or the terms of a criminal sentence.

220. *See* MANUEL, *supra* note 91, at 28.

For example, California and Connecticut have each passed legislation providing that an individual who has become eligible for release from custody may be detained on the basis of an immigration hold *only* if the individual has been convicted of a crime contained in a specifically defined list of serious or violent crimes.<sup>221</sup> New York City law permits compliance with ICE detainers only for an individual who has been convicted of specified felonies or misdemeanors, is a criminal defendant in a case involving specified felonies or misdemeanors that meet specific criteria, has an outstanding criminal warrant, is a known gang member, or is a match in the terrorist screening database.<sup>222</sup>

The Los Angeles Police Department (LAPD) and the Los Angeles County Sheriff's Department have each announced that they will not turn over to immigration authorities individuals arrested for petty crimes.<sup>223</sup> In interdepartmental correspondence recommending the adoption of this policy, the Chief of the LAPD referenced a survey demonstrating that a significant number of ICE detainer requests had been issued for individuals arrested on low-level misdemeanor charges with no prior felony conviction or gang affiliation.<sup>224</sup> The LAPD has taken the additional step of negotiating a 287(g) agreement with ICE that explicitly delays immigration verification by local deputies until after the detainee has been convicted of the crime of arrest, a change from the normal routine of immigration verification at booking.<sup>225</sup> At least sixteen other states and localities have adopted policies declining to honor ICE detainers unless the individual has been charged or convicted of a serious

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221. See CAL. GOV'T CODE §§ 7282-7282.5 (Deering 2014); CONN. GEN. STAT. ANN. § 54-192h (West 2014).

222. See NEW YORK, N.Y., ADMIN. CODE § 14-154 (2016).

223. Memorandum from Chief of Police, Los Angeles Police Department, to The Honorable Board of Police Commissioners (Nov. 30, 2012), [http://www.lapdpolicecom.lacity.org/121112/BPC\\_12-0462.pdf](http://www.lapdpolicecom.lacity.org/121112/BPC_12-0462.pdf) [<https://perma.cc/8DCE-4V8X>].

224. See *id.* The Chief recommended that the LAPD decline to honor detainer requests for “public nuisance or low level misdemeanor crimes (e.g., drunk in public, vendor sales on sidewalk, unlicensed driver, etc.”). *Id.*

225. See Eagly, *supra* note 17, at 1162. Eagly does not discuss the LAPD's approach to Secure Communities immigration verification, which is also triggered at booking when fingerprints are taken and sent to be compared with the FBI criminal history database. With Secure Communities in place, state and local police might continue to associate traffic stops with immigration verification.

crime or, in some cases, multiple less serious crimes, including DUI but excluding other traffic offenses.<sup>226</sup>

Other jurisdictions have sought to insulate police actions from immigration consequences by limiting federal immigration access to state or local prison facilities.<sup>227</sup> For example, a Chicago ordinance prohibits ICE agents from accessing local jails and detainees unless they are acting for legitimate law enforcement purposes not related to civil immigration enforcement.<sup>228</sup> Officials at New York City's Rikers Island jail complex have adopted a policy requiring ICE officials operating in the jail to wear uniforms, identify themselves, and give prisoners the option of whether to talk to them.<sup>229</sup> A Santa Fe, New Mexico, jail has adopted a policy of denying ICE access to prisoners and prisoner lists.<sup>230</sup>

These strategies go a long way toward reducing incentives for pretextual policing. That detainer-limiting policies are enshrined in formal laws and ordinances means that police officers are likely to know about them and act accordingly. If police officers know that arrests for minor crimes no longer lead to immigration enforcement, they will not arrest with hidden immigration motives. Similarly, if only individuals who are actually convicted of crimes are subject to immigration enforcement, police will know they cannot use arrests they would not otherwise have made in order to funnel suspected illegal aliens into the federal enforcement system. Limiting the downstream immigration consequences of police actions creates disincentives for upstream pretextual conduct.

### C. Pretext and Political Accountability

The above strategies for reducing pretextual policing also increase political accountability.<sup>231</sup> The more police take actions such as stops and arrests based on transparent law enforcement

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226. See generally CATHOLIC LEGAL IMMIGRATION NETWORK, INC., STATES AND LOCALITIES THAT LIMIT COMPLIANCE WITH ICE DETAINER REQUESTS (Aug. 2014), [https://cliniclegal.org/sites/default/files/anti-detainer\\_policies\\_11\\_21\\_14.pdf](https://cliniclegal.org/sites/default/files/anti-detainer_policies_11_21_14.pdf) [<https://perma.cc/B9PB-8PK8>].

227. See generally *id.*

228. See CHICAGO, IL, MUN. CODE § 2-173-042 (2013).

229. See NAT'L IMMIGRATION LAW CENTER, HOW ICE USES LOCAL CRIMINAL JUSTICE SYSTEMS TO FUNNEL PEOPLE INTO THE DETENTION AND DEPORTATION SYSTEM (Mar. 2014), <https://www.nilc.org/issues/immigration-enforcement/localjusticeandice/> [<https://perma.cc/669Z-WZDM>].

230. See *id.*

231. See *supra* notes 221-30 and accompanying text.

justifications (rather than hidden immigration motivations), the more they are accountable to the public for those decisions. Conversely, when police get out of the business of direct immigration enforcement, federal officials must take the heat for the policies and shape of immigration regulation.

Some jurisdictions have taken additional actions to force immigration officials to articulate their justifications for immigration enforcement: They have adopted policies that decline to honor ICE detainers unless federal officials make a showing of probable cause to believe the suspect has violated federal criminal immigration law. This forces immigration officials to make the prosecutorial decision and articulate the reasons why a state or local detainee should be held and transferred to federal custody. Some states and localities have gone even further, requiring not only probable cause but also a judicial warrant issued by a magistrate before officials will honor an ICE detainer.<sup>232</sup> The benefit for political accountability of requiring a warrant is not so much judicial review—warrant review is *ex parte* and not extremely rigorous—but rather that it forces federal officials to articulate to state officials (and ultimately to the public) the federal immigration interests behind their detainer-hold requests.

In addition to concerns about pretext and political accountability, these policies address an additional concern, namely that immigration holds of individuals in state or local custody may violate the Fourth Amendment. The Fourth Amendment requires that all custodial seizures be supported by probable cause of criminal activity. As a detainer is a request for state officials to keep an individual in custody for “48 hours beyond the time when he or she would otherwise have been released from your custody,” it is a new

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232. They include counties surrounding Buffalo, Miami, Denver, El Paso, Los Angeles, and Seattle. It bears noting that the current I-247D, Immigration Detainer Request for Voluntary Action, includes the statement “Probable cause exists that the subject is a removable alien” and a series of checkboxes to explain the basis for that statement, including the following justifications:

a final order of removal against the subject; the pendency of ongoing removal proceedings against the subject; biometric confirmation of the subject’s identity and a records check of federal databases that affirmatively indicate . . . that the subject either lacks immigration status or . . . is removable under U.S. immigration law; and/or statements made voluntarily by the subject that affirmatively indicate the subject either lacks immigration status . . . or is removable.

DEP’T OF HOMELAND SECURITY, IMMIGRATION DETAINER—REQUEST FOR VOLUNTARY ACTION, <http://trac.syr.edu/immigration/reports/402/include/I-247D.pdf> [<https://perma.cc/DH9P-7NUR>] (last visited Dec. 12, 2016).

seizure.<sup>233</sup> Lower courts that have considered the question have held that immigration holds pursuant to federal request, but without any showing of probable cause, violate the Fourth Amendment.<sup>234</sup>

Some lower courts have cast doubt on whether state and local officials can honor detainers without a judicial warrant. While Fourth Amendment law permits *warrantless* arrests based on probable cause for *criminal activity* (felonies, or misdemeanors observed by the officer), many federal immigration offenses are civil rather than criminal. (The very definition of probable cause is reason to believe that a crime has been committed.) It is not at all clear that state and local officials have the power to make warrantless arrests (or seizures) based on probable cause that a *civil offense* has been committed.<sup>235</sup> Requiring probable cause and a judicial warrant addresses these concerns.

#### D. Racial Profiling and Motivation

Perhaps the most intractable feature of pretextual immigration policing is the risk of racial profiling. The most obvious strategy for addressing racial profiling—but also the least likely to succeed—is to regulate motivation directly by forbidding stops or arrests premised on the race of the suspect. A number of jurisdictions have attempted to do so. For example, the LAPD has a written policy—“Special Order 40”—which forbids police to initiate police action *for*

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233. This language comes from the DHS Immigration Detainer form I-247D. The most recent form makes it clear that the detainer is a request, not a demand. *See id.*

234. *See, e.g.,* Villars v. Kubiowski, 45 F. Supp. 3d 791, 807-08 (N.D. Ill. 2014); Galarza v. Szalczyk, No. 10-cv-06815, 2012 WL 1080020, at \*9, \*14 (E.D. Pa. Mar. 30, 2012), *rev'd on other grounds*, 745 F.3d 634 (3d Cir. 2014); Miranda-Olivares v. Clackamas Cty., No. 3:12-cv-02317-ST, 2014 WL 1414305, at \*14 (D. Or. Apr. 11, 2014); Morales v. Chadbourne, 996 F. Supp. 2d 19, 29 (D.R.I. 2014), *aff'd in part*, 793 F.3d 208 (1st Cir. 2015). *See also, e.g.,* Cervantez v. Whitfield, 776 F.2d 556, 560 (5th Cir. 1985) (stipulation by ICE predecessor INS that a detainer is a warrantless arrest that must be justified by probable cause that the individual “to be held (a) is an alien, (b) is in the United States in violation of the immigration laws, and (c) is likely to escape before a warrant can be obtained”). In 2012, DHS revised the Immigration Detainer form to provide a checkbox for federal officials to assert that ICE had “reason to believe” that the individual was in the country illegally. *See* 2012 Memorandum, *supra* note 42, at 2. At least one court concluded that “reason to believe” was not sufficient to satisfy the Fourth Amendment standard.

235. *Compare supra* Section I.A., with *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012).

*the purpose of* investigating suspected immigration violations.<sup>236</sup> To facilitate this policy, LAPD “officers have [the] authority to cite and release suspects arrested for low-level crimes and accept foreign consulate identification cards as a legitimate form of identification.”<sup>237</sup>

While this policy is laudable, it is unlikely to be successful in addressing pretextual stops and arrests. As laid out in detail in Part II, police officers virtually always have a legitimate reason to stop any automobile by waiting until the driver commits a traffic offense.<sup>238</sup> Minor street crimes and *Terry* stops offer the same options for stopping pedestrians. Thus, once police know that it is verboten to stop or arrest *for the purpose of* investigating suspected illegal status, they can hide any unlawful motivations by relying on an objectively reasonable justification for the stop or arrest.<sup>239</sup>

The best hope for decreasing the incidence of racial profiling is to decrease the possibility of pretextual policing in the ways described above rather than to regulate motivation directly. Recall that police are tempted to use race as a proxy for illegal presence, stopping and arresting foreign-looking individuals in order to funnel them into the immigration system. If police realize that arrests for minor crimes do not result in immigration enforcement, they will be less likely to target suspected immigrants with such arrests. This conclusion comports with recommendations by the Department of Homeland Security Task Force on Secure Communities, a broad-based panel of experts convened to address claims that Secure Communities had negatively impacted policing and triggered racial profiling. Addressing the rise in deportation of minor offenders, the Task Force recommended that ICE withhold “enforcement action based solely on minor traffic offenses.”<sup>240</sup> The recommendation was

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236. See Eagly, *supra* note 17 at 1158; see also DARYL F. GATES, CHIEF OF POLICE, SPECIAL ORDER NO. 40, L.A. POLICE DEP’T 1 (Nov. 27, 1979), [http://assets.lapdonline.org/assets/pdf/SO\\_40.pdf](http://assets.lapdonline.org/assets/pdf/SO_40.pdf) [<https://perma.cc/NF74-4VYP>] (“Officers shall not initiate police action with the objective of discovering the alien status of a person.”). Eagly describes the Los Angeles model as one in which “criminal justice actors endeavor to make decisions that limit the potential effects of immigration status and enforcement on criminal adjudication.” Eagly, *supra* note 17, at 1157.

237. Eagly, *supra* note 17 at 1158-59.

238. See *supra* Section II.C.

239. See *Terry v. Ohio*, 392 U.S. 1, 12-14 (1968). (recognizing and lamenting the difficulty of ferreting out invidious motivations for searches and seizures by police).

240. HOMELAND SECURITY ADVISORY COUNCIL, DEP’T OF HOMELAND SECURITY, TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS

designed to “discourage minor arrests undertaken only to channel noncitizens into the ICE system, when [a] local jurisdiction has no real intention to expend its own prosecutorial and judicial resources on such a case.”<sup>241</sup> A secondary and related purpose was to “reduce the risk of racial profiling or other distortions of standard arrest practices followed by arresting or correctional officers.”<sup>242</sup>

#### E. Federal Response to the New Immigration Federalism

Federal responses to the new immigration federalism have taken two radically different forms. Federal immigration officials have adopted a largely constructive response to state and local resistance, taking seriously the conclusion of the Task Force on Secure Communities that current immigration enforcement policies have resulted in an “unintended negative impact” on local policing.<sup>243</sup> The Task Force made the following observations:

Secure Communities and other federal enforcement and removal programs do not operate in a vacuum. In many localities, police leaders have said that immigration enforcement policies are disrupting police-community relationships that are important to public safety and national security. . . . When communities perceive that police are enforcing immigration laws, especially if there is a perception that such enforcement is targeting minor offenders, th[e] trust [between police and immigrant communities] is broken . . . and victims, witnesses and other residents may become fearful of reporting crime or approaching the police to exchange information. . . . To the extent that Secure Communities may damage community policing, the result can be greater levels of crime.<sup>244</sup>

The Task Force concluded that “DHS must be willing to adjust its enforcement programs to minimize the risk that they will adversely impact local law enforcement efforts.”<sup>245</sup>

The Task Force was divided about whether these deficiencies were enough to require termination of Secure Communities, and ICE

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22 (2011), <https://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities-findings-and-recommendations-report.pdf> [https://perma.cc/555K-KMJJ]. The Task Force comprised “local and state law enforcement and homeland security officials, attorneys with expertise in immigration practice and criminal law, academics, social service agency leaders and others.” *Id.* at 4.

241. *Id.* at 22.

242. *Id.*

243. *Id.* at 24.

244. *Id.*

245. *Id.* at 26.

initially defended the program.<sup>246</sup> But as criticism continued and state resistance dramatically increased, ICE eventually discontinued Secure Communities, replacing it with the Priority Enforcement Program (PEP). PEP was designed to address one of the most significant objections to Secure Communities by reducing immigration enforcement against individuals arrested for minor offenses. Under PEP, federal officials are directed to enforce immigration law against illegal immigrants in state custody only if they have been *convicted*, not merely *charged*, unless they otherwise pose a danger to national security.<sup>247</sup> They are also instructed not to pursue aliens convicted of traffic offenses or misdemeanors, except those involving DUI, drugs, firearms, domestic violence, sexual abuse or exploitation, or misdemeanors resulting in at least three months incarceration.<sup>248</sup> These policies create disincentives for police to use pretextual stops and arrests to funnel suspected immigrants into the federal system.

PEP also addresses other features of federal detainer policy that have fueled state resistance. ICE has directed immigration officials to issue detainers only if an alien is subject to a final order of removal or ICE has probable cause of removability,<sup>249</sup> which may alleviate some Fourth Amendment concerns. Otherwise, officials are directed to seek “transfers” of suspected aliens or to request

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246. MORTON, PROTECTING THE HOMELAND, *supra* note 126, 6 (arguing that minor offenders who were deported under Secure Communities satisfied other priorities).

247. Compare Memorandum from John Morton, Dir. of U.S. Immigration & Customs Enforcement, to All ICE Employees (Mar. 2, 2011), <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> [<https://perma.cc/D6M5-FZHX>] (permitting detainers to be issued against an individual who has been charged with a felony offense or charged with one of an enumerated list of misdemeanor offenses), with Memorandum from Jeh Charles Johnson, Sec’y of U.S. Dep’t of Homeland Security, to Thomas Winkowski, Acting Dir. of U.S. Immigration & Customs Enforcement 2-3 (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) [<https://perma.cc/7TEW-WVBQ>] [hereinafter Policies Memorandum] (permitting a request for transfer only if the alien has been “convicted of an offense classified as a felony in the convicting jurisdiction” or the alien has been “convicted of three or more misdemeanor offenses”).

248. See Memorandum from John Morton, *supra* note 247, at 2; Policies Memorandum, *supra* note 247, at 3-4.

249. See *supra* note 247 and accompanying text. This change responds to a series of adverse federal court judgments holding that detentions subject to detainers not supported by probable cause violate the Fourth Amendment. See, e.g., *Miranda-Olivares v. Clackamas Cty.*, 2014 WL 1414305 (D. Or. Apr. 11, 2014); *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 29 (D.R.I. 2014).

“notifications” of pending releases of aliens rather than issuing detainers. Even transfers are to be limited to circumstances that would promote specified federal immigration priorities or “when, in the judgment of an ICE Field Office Director, the alien otherwise poses a danger to national security.”<sup>250</sup>

If strictly implemented, these changes would go some distance toward addressing the issues that have led states to enact sanctuary laws. Unfortunately, many state and local jurisdictions have responded to federal assurances with disbelief and distrust. Quite a number have already opted out of the new PEP program. These reactions result from suspicion that ICE will be unable or unwilling to fulfill its asserted priorities as seems to have occurred under Secure Communities. Only if federal agents both *publicize* these priorities and *implement* them carefully over time will states find it unnecessary to take measures into their own hands. For now, many states and localities remain unconvinced and the new immigration federalism continues to hold sway.

Significantly, in its FY 2015 Enforcement and Removal Operations Report, ICE explicitly recognized the continuing need to reestablish a constructive relationship with state and local partners. To that end, Secretary of Homeland Security Jeh Johnson, Deputy Secretary Alejandro Mayorkas, and ICE Director Sarah Saldana met with elected officials and law enforcement personnel from some of the largest police jurisdictions with the result that “many law

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250. Policies Memorandum, *supra* note 247, at 2. Current federal immigration enforcement policy, announced on the same day that PEP was inaugurated, describes three priority levels in descending order of importance: Priority 1: threats to national security, border security, and public safety; Priority 2: misdemeanants and new immigration violations; and Priority 3: other immigration violations. *Id.* at 3-4. Under PEP, ICE may request transfer under Priority 1(a) for aliens who are “engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security,” 1(c) for aliens who have been “convicted of an offense for which an element was active participation in a criminal street gang,” 1(d) for aliens who have been “convicted of an offense classified as a felony in the convicting jurisdiction,” and 1(e) for aliens who have been “convicted of an ‘aggravated felony’” as defined by immigration law. *Id.* at 3. In addition, they can request transfer under Priority 2(a) for aliens who have been “convicted of three or more misdemeanor offenses, other than traffic offenses or state or local offenses for which an essential element was the alien’s immigration status” and 2(b) for aliens who have been convicted of specified “significant misdemeanors” including, among other things, domestic violence, sexual abuse, firearms offenses, and drug trafficking or for unspecified offenses for which the individual was sentenced to time in custody of ninety days or more. *See id.* at 3-4. The first of the two memoranda explicitly repeals the earlier memoranda from John Morton. *See id.* at 2.

enforcement agencies, including previously uncooperative jurisdictions, are now cooperating with ICE through PEP.”<sup>251</sup>

The constructive response of immigration officials contrasts with that of some national legislators and executive officials, including President Trump, who have vowed to cut off federal funding for states and localities that have adopted so-called sanctuary laws.<sup>252</sup> Such threatened national action ignores the findings and recommendations of the expert Task Force that was commissioned to study precisely these issues. It ignores the Task Force recommendation that *DHS* (and not states and localities) must change the way it does business. It flies in the face of ongoing efforts by ICE and the Department of Homeland Security to reestablish a cooperative, working relationship with state and local police. It undervalues the wisdom and experience of state and local officials who are on the ground with immigrant communities. It ignores that federal courts have judged some features of federal detainer policy to be illegal under federal immigration law and the United States Constitution. And, finally, it fails to wrestle with the likelihood that *forcing* states and localities to enforce federal immigration law would be unconstitutional.<sup>253</sup>

#### CONCLUSION: STATE RESISTANCE AS THE NEW IMMIGRATION FEDERALISM

The first wave of immigration federalism enlisted states and localities in active immigration enforcement. More recently, many states and localities have sought to distance themselves from immigration policing by adopting policies that limit their cooperation with federal–state immigration enforcement. They have done so in

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251. ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT FISCAL YEAR 2015, *supra* note 95, at 6.

252. *See, e.g.*, Alan Neuhauser, *Sanctuary Cities Brace for Trump Crackdown on Immigration*, U.S. NEWS & WORLD REPORT, (Nov. 18, 2016), <http://www.usnews.com/news/national-news/articles/2016-11-18/sanctuary-cities-brace-for-trump-crackdown-on-immigration> [<https://perma.cc/X7YE-V42Q>]; Jim Vertugo, *GOP Again Eyes Sanctuary Cities Ban Due to Political Tide*, ASSOCIATED PRESS, (Dec. 18, 2016), <http://elections.ap.org/content/gop-again-eyes-sanctuary-cities-ban-due-political-tide> [<https://perma.cc/UU32-8SVB>].

253. *See generally* Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012); Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992). *See also* Memorandum to Karol V. Mason, *supra* note 97. A full consideration of these anti-commandeering arguments is beyond the scope of this Article.

order to address certain negative consequences of immigration policing. These resistance policies are best seen as a new wave of immigration federalism—the rejection of one way to structure state–federal relations around immigration for another. Seeing state and local resistance policies as a federalist response puts these policies into a different and more constructive light.

First, state resistance to immigration enforcement cannot be explained away as simple intransigence or as resistance to immigration enforcement writ large. It is a response to enforcement pathologies that threaten the health of policing in local communities. States and localities will continue to resist as long as these pathologies are not addressed in some way. State resistance should be acknowledged as a serious attempt to solve real problems rather than as a movement to be condemned by ad hominem attacks and quashed by heavy-handed tactics.

Second, federal immigration enforcement cannot function without state and local cooperation. Given that police are more numerous and have more routine contacts with immigrant communities than federal officials, some form of immigration policing is probably inevitable, despite the risks it poses. If so, federal legislators and immigration officials cannot treat immigration reform as if it were merely a federal concern. That state and local officials familiar with conditions on the ground have identified serious problems resulting from immigration policing and have implemented laws and policies designed to address these problems is reason to invite them to be part of the conversation and the broader solution.

Third, state and local officials are more likely than federal ones to be successful in addressing certain distortions resulting from the merged law enforcement/immigration enforcement system. While ICE has declared it will hew more closely to its stated priority of targeting aliens who pose a risk to public safety, the distortions this Article has identified result, in large part, from street-level decisions by police officers. This means that reform measures must come, at least in part, from the state and local level. That state and local officials and police leaders are taking action is a good sign: The most successful reform efforts in policing have required top-down leadership strong enough to counteract organizational pressures that push practices in the wrong direction.<sup>254</sup>

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254. See generally Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004).

Finally, the new immigration federalism offers insight about solutions. The resistance policies that have been adopted by states and localities are specifically designed to address the destructive features of immigration policing, namely deportation of minor offenders, which leads to pretextual policing, compromise of political accountability, racial profiling, and destruction of trust in immigrant communities. These policies do so *directly* by narrowing the population of detainees that state and local officials are willing to hold pending ICE action. They do so *indirectly* by decoupling stops and arrests for minor offenses from immigration enforcement, which creates disincentives for targeting foreign-looking individuals. Making these resistance policies public helps to dispel the perception in immigrant communities that police are actively involved in immigration enforcement.

There are hopeful signs that the new immigration federalism may be having an effect on federal immigration policy. Officials at U.S. Immigration and Customs Enforcement have adopted new policies that could—if publicized and implemented consistently—address some of the concerns raised by state and local sanctuary laws. Most importantly, ICE has directed its officials to enforce immigration law against illegal immigrants in state custody only if they have been *convicted* of (not merely arrested for) a *serious crime* (not a minor crime or traffic offense) unless detainees pose a danger to national security. In addition, ICE has adopted new detainer policies that address some Fourth Amendment concerns raised by new federalist policies. That federal immigration officials are attending to the concerns of the new immigration federalism may bode well for the future of state–federal immigration partnerships. By contrast, unenlightened threats to crack down on new federalist jurisdictions ignores the wisdom and insight that states and localities offer in formulating workable immigration enforcement policies while preserving the health and safety of local communities.