Criminal Law & Migration Control: Recent History & Future Possibilities

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Immigration enforcement in the United States has undergone a revolutionary transformation over the past three decades. Once episodic, border-focused, and generally confined to the efforts of a relatively small federal agency, immigration enforcement is now exceedingly well-funded and integrated deeply into the everyday policing of the interior United States. Not only are federal immigration agents more numerous and ubiquitous in the interior, but immigration enforcement has been integrated into the policing practices of state and local officials who once saw their purview as largely distinct from that of federal immigration enforcement agents. This essay briefly explains these developments, from shortly before the passage of the Immigration Reform and Control Act of 1986 through the present day, and assesses their consequences. It includes a brief discussion of the ways states and localities have responded to federal enforcement trends, whether through amplification or constraint.

Even before the British colonies along the Atlantic Coast of North America openly rebelled against Great Britain in the 1770s, colonists like Benjamin Franklin were bemoaning the quality of incoming immigrants, and in particular, their criminality. Franklin famously warned about the "thieves" and "villains" transported from the jails of England to the colonies.[1] These concerns ironically ran alongside complaints that the Crown was unfairly restricting productive migrants from coming to the colonies.[2]

The notions of immigrant inferiority and criminality run through the story of this self-styled "nation of immigrants," always in tension with market systems that benefited from more robust immigrant flows. The desire for low-cost laborers to fuel capitalist expansion across North America existed alongside racialized fears of immigrant workers. Strong economic and political forces impelled migration into the United States even as residents who had arrived in the country a mere generation before decried succeeding waves of immigrants as unassimilable, racially "other," and morally degenerate. Immigration restrictions and criminal laws stood as twin methods to regulate these incoming immigrant groups, with the latter serving as a useful mechanism for controlling and containing populations that were often desired as workers, and therefore not barred from entry,

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but also not seen as political and social equals. These were the regulatory methods by which the new settler society strove to "block, erase, or remove racialized outsiders from their claimed territories," taken simultaneously with actions to eliminate the land's native nations and peoples and to contain the growing populations of Blacks descended from the enslaved Africans whom English settlers brought to the colonies in the early 1600s.[3]

The dual and selective use of immigration control and criminal law to optimize settler colonial goals while preserving racial hierarchy has been told in many ways, and with attention to many periods of U.S. history. This essay does not seek to cover the tremendous geographic and historical terrain already charted by many excellent, existing accounts. Instead, the focus here is on the last thirty years of immigration history, a period in which intertwined immigration and criminal law systems functioned to optimize the deportability of low-wage immigrants, disproportionately those from Mexico and Central America.[4]

It would not be an overstatement to claim that immigration enforcement in the United States has undergone a revolutionary transformation over the past three decades. Once episodic, border-focused, and generally confined to the efforts of a relatively small federal agency, immigration enforcement is now exceedingly well-funded and integrated deeply into the everyday policing of the interior United States. Not only are federal immigration agents more numerous and ubiquitous in the interior, but immigration enforcement has been integrated into the policing practices of state and local officials who once saw their purview as largely distinct from that of federal immigration enforcement agents.

This essay briefly explains these developments and assesses their consequences. The first section explores developments from shortly before the passage of the Immigration Reform and Control Act of 1986 through the early 2000s. This legislation and the budding war on crime laid the building blocks for the current approach to immigration policy. For the first time since the restrictionist 1920s, the criminal enforcement system was invoked not as an occasional adjunct to immigration enforcement, but as a central feature of the nation's immigration policy.[5] The second section explores the period from the early 2000s through 2014 – a period of immigration enforcement characterized by massive expansion, systematic devolution, and largely unalleviated severity. The final section covers the past seven years of immigration enforcement. It explores the moderating policies enacted near the end of President Barack Obama's second term. It explains how those moderating policies, which were themselves developed against a backdrop of criminalized migration, were reversed aggressively by the Trump administration, and describes the Biden administration's decidedly mixed record in fulfilling President Joe Biden's campaign promises to break from Trump-era policy. This discussion includes attention to the increasingly significant ways that states and localities have responded with efforts to either constrain or amplify federal enforcement trends.

The last year during which the U.S. Congress passed legislation to normalize the legal status of a large group of unauthorized migrants was 1986. The Immigration Reform and Control Act (IRCA) was a compromise legislative package.[6] There was the legalization component of the law, which allowed nearly three million residents present without legal authorization to regularize their immigration status and, eventually, to apply for citizenship. And on the other side of the compromise was the employer sanctions component of the law, which was conceptualized as a mechanism for ending the job magnet that was seen as the key "pull factor" driving migration, mostly from Mexico, into the United States.[7] The bill had the intended effect of regularizing the status of many – but not all – long-time immigrant residents.[8] It did not, however, demagnetize the border. This was partly due to the fact that the federal government did little to enforce the law's employer sanctions provisions.[9] Perhaps this was the inevitable outcome of a law that ignored the practical realities of labor migration in the United States.

From the nation's founding until shortly before the enactment of the IRCA, migration from Mexico into the United States was unrestricted numerically.[10] Indeed, from 1942 through 1964, the United States actively promoted labor migration from Mexico with a program designed to facilitate the immigration of temporary agricultural workers from Mexico known as the Bracero program.[11] But that program was phased out in the mid-1960s, and numerical quotas were imposed on Mexican migrants in the decade that followed. If members of Congress thought that the end of the guest worker program and the newly imposed quotas would dramatically change the labor market, they were wrong. As the U.S. economy hummed along, workers continued to come to the United States, but under different legal circumstances. Now subject to quotas, many came outside of regular channels. The nature of migration did not change, but changes in the law had changed the status of the incoming migrants from authorized to unauthorized.[12]

Increasingly, the presence of these migrants came to be viewed not simply as a competitive threat to domestic workers and a racialized threat to the White majority, but also a criminal threat. The 1986 turn to criminal law to regulate the employment of unauthorized workers (albeit through the criminalization of employers) and to regulate "marriage fraud" provided early warnings that the problem of migration outside of accepted channels would be increasingly managed through criminal enforcement.[13] In 1994, and again in 1996, Congress enacted significant legislation tethering immigration law to increasingly harsh criminal laws.[14] As I have written elsewhere:

> Age-old fears of migrants as the vectors of substance abuse found new manifestations in the laws of the mid-1990s. Almost any drug crime – no matter how minor – became a deportable offense. Congress expanded the list of other criminal offenses that came to be defined as "aggravated felonies": crimes that resulted in mandatory detention

during proceedings, mandatory removal, and a lifetime bar on return. The list grew to include not simply crimes like rape and murder, but also relatively minor theft offenses and the like, and the new deportability provisions applied retroactively.[15]

In fiscal year 2000, the total number of noncitizens removed from the United States was 188,467; in 2013, it was 432,000.[16] In fiscal year 2000, only about 17 percent of federal criminal prosecutions were for immigration crimes.[17] In December 2018, they made up 65 percent of federal prosecutions.[18] These dramatic changes were driven by changes in immigration enforcement policies at the federal level, of course, but also by changes in enforcement practices by state and local law enforcement agents throughout the nation.

The events of September 11, 2001, had a significant effect upon immigration enforcement. For a time, the discourse of national security subsumed many aspects of the immigration policy discussion. Detention and removal provisions that Congress had enacted during the previous decade facilitated the arrests, indefinite detentions, and relatively streamlined removals of thousands of immigrants under the guise of national security.[19] But the billions of dollars that Congress directed to the newly created Department of Homeland Security in the wake of September 11, purportedly in response to those security concerns, gave rise to a substantial federal enforcement effort aimed at a broad swath of immigrant residents.[20]

Record-breaking removal rates ran alongside legal strategies that increasingly criminalized immigrants whose only offenses were crimes of migration. After September 11, the administration of George W. Bush took a particular interest in ending unlawful border entries along the U.S. border with Mexico. To accomplish this goal, the administration ramped up prosecutions for misdemeanor illegal entry, revitalizing reliance on the misdemeanor provision enacted in the 1920s with the goal of preserving White racial purity against Mexican immigrants while leaving the doors open for workers to satisfy labor market demands.[21] The Bush-era strategy included the mass prosecution of illegal entrants along the Southern Border, in which detained migrants pled guilty, as a group, to the misdemeanor crime of illegal entry.[22] While the sentences were light, they carried severe consequences. Reentrants faced felony charges with potential sentences of up to twenty years,[23] and the record of a misdemeanor illegal entry prosecution complicates immigrants' future efforts to enter the United States lawfully.[24]

Thus, federal immigration policy during this period accomplished a dual criminalization of migrants. Long-time lawful permanent residents became removable on criminal grounds for a wide range of offenses, including many that would not have been deportable offenses at the time of commission. At the same time, individuals crossing the border without authorization became misdemeanants

and felons as a consequence of the very act of crossing the border. These changes to policy were both driven by and reified age-old notions of the racialized migrant as a criminal threat. Now, indeed, border crossers were criminals, though, circularly, their crime was crossing the border. And immigrants were increasingly seen as criminals at the very time the immigration system was being built up to detain them like criminals as a precursor to removing them, including for minor offenses.[25]

As a matter of constitutional law, immigration regulation is an exclusively federal concern. But while shifts in federal law and policy drove these developments, changing state and local law enforcement policies were key drivers of the ballooning removal rates during this period. State criminal law prosecutions had been on the rise since the 1970s, and the resulting state law convictions provided a basis for the potential removal of many noncitizens on the newly expanded list of criminal removal grounds.[26] The role played by states and localities in immigration enforcement also was not limited to these indirect effects. The federal government was incorporating state and local law enforcement directly into their immigration enforcement efforts at the very same time that some states and localities were adjusting their own policies and practices to further facilitate federal immigration enforcement efforts.

One provision of the immigration legislation that Congress passed in 1996 outlined a process whereby state and local governments could contract with the federal government to gain immigration enforcement authority.[27] Known as 287(g) agreements, named after the section of the Immigration and Nationality Act that outlines their legal authority, memoranda of understanding enacted pursuant to this provision allow state and local law enforcement agents trained and supervised by federal agents to perform immigration enforcement functions.[28] Although there was clearly some congressional enthusiasm for such collaborations, the executive branch did not enter into its first 287(g) agreement until 2002.[29]

But governmental reluctance to embrace the program changed after the terrorist attacks on the United States on September 11, 2001. Spurred in part by a push from states and localities and in part by increased federal interest in and capacity for immigration enforcement, the largely dormant 287(g) program took off. At the peak of the program in 2011, there were seventy-two 287(g) agreements.[30]

Many states and localities also maintained that they had the inherent authority, as part of their police powers, to engage in certain immigration enforcement activities even without the supervision of the federal government. Cities enacted laws that created local penalties for employers and landlords who hired or rented homes to undocumented immigrants.[31] Some states required state and local law enforcement agents to inquire into immigration status in the course of their

routine policing activities, and attempted to create state penalties for employers who hired unauthorized workers.[32] While courts found some of these laws preempted – that is, that states and localities could not engage in some of these efforts without overstepping their jurisdictional authority and usurping powers entrusted solely to the federal government – courts also left many of these practices intact. States were empowered to take away the state business licenses of employers who hired unauthorized workers, or to require their own police to inquire into immigration status during routine police stops.[33] These legal changes heralded a cultural shift in state and local policing. For some "state and local law enforcement officials and agents, the policing of immigration status changed from something that was solely within the purview of federal agents to something that was a legitimate – and sometimes a leading – aspect of their own policing mission."[34]

Not every jurisdiction, however, leapt into immigration enforcement efforts. Many states and localities adopted policies intended to signal their independence from and lack of involvement in federal immigration enforcement efforts. Some entities, like the Los Angeles Police Department (LAPD) – which had adopted a policy in 1979 prohibiting its officers from inquiring into the immigration status of those they stopped – continued or created prohibitions on immigration investigation notwithstanding the changes at the federal level.[35] Indeed, as federal enforcement efforts increased, some jurisdictions explored and adopted noncooperation policies for the first time. The rollout of the federal Secure Communities program complicated these efforts.

Many immigrants and their allies had hoped that the administration of President Barack Obama would reverse the trends that had increasingly criminalized their communities and encouraged the hyperpolicing of their neighborhoods. That did not happen. Throughout his first term and part of his second term, President Obama continued the policies and practices of the Bush administration : mass prosecutions continued on the border, long-time lawful permanent residents continued to be removed for relatively minor offenses, government lawyers continued to push for expansive judicial interpretations of crime-related grounds for removal, and the administration continued to expand its reliance on immigration detention.[36]

Indeed, the Obama administration actually tightened the linkage between criminal law enforcement and immigration enforcement with the nationwide rollout of the so-called Secure Communities program. Under this program, all state and local arrest data were automatically screened by the Department of Homeland Security (DHS) to determine whether to pursue the arrestees for immigration offenses. This was true regardless of whether the state or locality wanted to engage in this joint effort and whether the arrest that led to the screening ultimately resulted in charges, much less convictions.[37] Police officers' decisions to

arrest thus became the critical determinant of whether an immigrant would be screened by DHS.

Reaction to the Secure Communities program varied. Some jurisdictions unsuccessfully sought to opt out of the program.[38] Others, however, embraced their new role in immigration enforcement, "stepping up their policing and arrest efforts in immigrant communities, and holding individuals upon DHS or U.S. Immigration and Customs Enforcement (ICE) request, even in the absence of probable cause or a judicial warrant."[39]

Against the backdrop of these massive expansions in immigration enforcement capacity, the federal government exercised prosecutorial discretion to shield some immigrants from removal. Under President Bush, enforcement agents were purportedly guided by a series of enforcement priority memoranda.[40] The Obama administration used expanded and more explicit guidance on enforcement priorities to attempt to shield more immigrants from enforcement for humanitarian reasons.[41] The administration also developed more creative programs to shield immigrants deemed meritorious from removal. Over the past twelve years, more than 825,000 young immigrants have been temporarily deprioritized for deportation and granted work authorization under the Deferred Action for Childhood Arrivals (DACA) program.[42] The pairing of aggressive detention and removal policies on the one hand with protective policies for some immigrants on the other reinforced an age-old and powerful discourse that sorts immigrants into two categories: the immigrants worthy of mercy and those who are dangerous and deportable. These problematic and oversimplified categories have dominated recent immigration policy discussion.

With the DACA program in 2012, and more expansively in 2014, the Obama administration began to scale-back and critically rethink the evolving linkage between immigration efforts and routine policing. First, the administration revamped the Secure Communities program, calling it the Priority Enforcement Program (PEP). Under this program, fingerprint screening introduced through Secure Communities would no longer be used as an indiscriminate funnel into immigration enforcement, but as a means of identifying individuals who the administration labeled as high priority. State and local government officials were given a cooperative role in identifying enforcement priorities.[43]

Immigrants' rights advocates were skeptical of the change, since the screening mechanism – fingerprints run through databases at the time of arrest – remained unchanged and the priority system relied on DHS discretion. The number of individuals removed who lacked a criminal record or any other priority indicator began to fall decisively during this period, but it still seemed incongruous that

an administration so cognizant of the unfairness of the nation's criminal law enforcement systems as a sorting mechanism placed such uncritical reliance on using criminal justice contact as a reliable means of sorting migrants.[44]

In late 2014, in a move that would have further narrowed the enforcement discretion for line agents, DHS announced the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. DAPA would have extended work authorization to qualifying unlawfully present parents of U.S. citizens and lawful permanent residents, potentially covering millions of unauthorized residents.[45] But the program was never implemented. It was enjoined by a federal district court judge in February of 2015, a mere day before the program was scheduled to go into effect. The injunction was upheld by the Fifth Circuit and stayed in place when the Supreme Court split four-to-four on the question.[46] (Notably, even if it had gone into effect, that program also offered no relief to most immigrants who had contact with the criminal enforcement system.)[47]

Once President Obama left office, the Trump administration restored the Secure Communities program, re-expanded the number of 287(g) agreements, and attempted to rescind many of the discretionary policies that the Obama administration used to shield immigrants from removal. The racialized trope of migrant criminality was deployed by the Trump administration again and again to justify its harsh immigration policy choices, including its attempted revocations of DACA[48] and temporary protected status for certain Central American, Haitian, and Sudanese migrants,[49] and its orchestration of massive, spectacular workplace immigration raids.[50]

Jurisdictions interested in enforcing immigration law without federal oversight were able to engage in such efforts without friction from the federal government.[51] In those jurisdictions, the harsh effects of the Trump administration's federal enforcement policies were amplified.[52] On the other hand, many jurisdictions enacted or expanded upon noncooperative immigration enforcement policies during Trump's presidency. Even before Trump assumed office, but at a greatly accelerated pace after, many jurisdictions began to think more creatively about how they could protect their residents from unjust deportations and removals. Some jurisdictions responded by revamping arrest policies and limiting detainer cooperation.[53] Others engaged in more far-reaching noncooperation measures, such as working to reduce or eliminate federal immigration detention in their jurisdictions.[54]

In recent years, as jurisdictions searched for ways to decouple their own resources from federal immigration enforcement efforts, they found that decriminalization and criminal sentencing reform were important policy levers. During the Obama administration, California revised its laws to give undocumented residents access to state-issued driver's licenses, effectively decriminalizing the act of driving for individuals lacking legal authorization.[55] The state also amended

its criminal code to cap the maximum sentence for misdemeanor offenses at 364 rather than 365 days in an effort to ensure that misdemeanor offenses would never count as "aggravated felonies" for purposes of federal immigration law.[56] Such reforms of the state criminal codes benefit many communities, but they have significant immigration consequences. These efforts highlight the centrality of criminal law and policing reforms in the quest for fair and equitable immigration policies.[57] As federal immigration reform efforts stalled, and as the federal government rolled out increasingly harsh enforcement measures, the levers of state and local law quickly became the most important tools for immigration lenity.

Under President Biden, there are some small signs that the federal government may inject a degree of lenity back into the immigration system. DHS Secretary Alejandro Mayorkas has announced a ban on workplace raids.[58] He also issued guidelines for immigration enforcement that focus on the equities of individual cases and prohibit the invidious use of race, national origin, ethnicity, gender, gender identity, sexual orientation, religion, or political associations in enforcement decisions.[59]

Still, despite promises of a more humane immigration policy, the Biden administration has pushed back on sub-federal efforts to limit federal enforcement[60] and has argued in favor of restrictive interpretations of immigration law in federal courts.[61] The new administration also continued the Trump administration's harshest exclusionary policies at the Southern Border for months. The public health bar on entry, enacted by the U.S. Center for Disease Control under Title 42, purportedly in response to concerns about COVID-19 but lacking any real public health justification, remains in effect as of November 2021.[62] These policies, which dehumanize arriving immigrants at the border, continue to fuel restrictive enforcement policies against immigrants within the borders. Despite a change in tone in the White House, severity continues to define U.S. immigration policy.

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ENDNOTES

[1] Aristede R. Zolberg, *A Nation by Design : Immigration Policy in the Fashioning of America* (Cambridge, Mass. : Harvard University Press, 2008), 40–41.

[2] Thomas Jefferson et al., *Declaration of Independence*, July 4, 1776. ("He has endeavoured to prevent the population of these States ; for that purpose obstructing the Laws for Naturalization of Foreigners ; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.")

[3] Kelly Lytle Hernández, *City of Inmates : Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771 – 1965* (Chapel Hill : The University of North Carolina Press, 2017).

[4] On the concept and production of deportability, see, generally, Nick de Genova, "Migrant 'Illegality' and Deportability in Everyday Life," *Annual Review of Anthropology* 31 (1) (2002) : 419–447.

[5] In 1929, Congress passed a law that made it a misdemeanor offense to enter the country without inspection and a felony to return after deportation, for the first time criminalizing at the federal level the act of migration outside of lawful channels. These measures were introduced by Senator Coleman Livingston Blease, an avowed racist and immigration restrictionist from South Carolina. In a short period of time, the enforcement of these laws required the construction of new federal penitentiaries to hold those who were prosecuted and incarcerated. Hernández, *City of Inmates*, 137–140.

[6] The Immigration Reform and Control Act (IRCA), Public Law 99-603, 100 Stat. 3445 (1986).

[7] Michael J. Wishnie, "Prohibiting the Employment of Unauthorized Immigrants : The Experiment Fails," *University of Chicago Legal Forum* 193 (1) (2007) : 200–204.

[8] The family members of many IRCA beneficiaries were not covered by the program. To avoid the harsh effects of this reality, the Reagan administration deferred the removal of many of these individuals. Gene McNary, "Memorandum from Comm'r, Immigration & Naturalization Serv., to Reg'l Comm'rs," February 2, 1990, and "INS Reverses Family Fairness Policy," *Interpreter Releases* 67 (153) (1990). But these and other exclusions of the law and shortcomings in implementation ensured the continued presence of a substantial unauthorized migrant population, even immediately after the legalization agreement took effect.

[9] Ibid.

[10] Of course, qualitative bars, including health and literacy bars, restricted Mexican migration. Far from being consistently applied, these qualitative exclusions were wielded selectively to address conflicting demands and agency (and individual) prerogatives. Deborah Kang, *The INS on the Line : The Making of Law on the U.S.-Mexico Border, 1917 – 1954* (Oxford : Oxford University Press, 2017) ; and Kelly Lytle Hernández, *Migra ! A History of the U.S. Border Patrol* (Berkeley : University of California Press, 2010). Such enforcement efforts worked to produce a collective national conceptualization of Mexicans as the "iconic illegal alien." Mae Ngai, *Impossible Subjects : Illegal Aliens and the Making of Modern America* (Princeton, N.J. : Princeton University Press, 2014).

[11] Kitty Calavita, *Inside the State : The Bracero Program, Immigration, and the I.N.S.* (New Orleans : Quid Pro, LLC, 1992) ; Ernesto Galaraza, *Merchants of Labor : The Mexico Bracero Story* (Santa Barbara, Calif. : McNally and Loftin, 1972) ; and Ana Elizabeth Rosas, *Abrazando El Espiritu : Bracero Families Confront the U.S.-Mexico Border* (Berkeley : University of California Press, 2014).

[12] Douglas S. Massey and Karen A. Pren, "Unintended Consequences of U.S. Immigration Policy: Explaining the Post-1965 Surge from Latin America," *Population and Development Review* 38 (1) (2012): 1–29.

[13] On this early criminalizing move, see Isabelle Medina, "The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud," *George Mason Law Review* 5 (4) (1997): 688–695.

[14] Violent Crime Control and Law Enforcement Act of 1994, Public Law 108, Stat. 1796, 103–322; and Illegal Immigration Reform and Immigrant Responsibility Act, Public Law No. 104-208, 110 Stat. 3009, 543–724.

[15] Jennifer M. Chacón, "Race and Immigration," in *Oxford Handbook of Race and the Law in the United States*, ed. Khiara Bridges, Devon Carbado, and Emily Hough (Oxford: Oxford University Press, forthcoming 2022) (internal citations omitted).

[16] Department of Homeland Security, 2018 Yearbook of Immigration Statistics, Table 39: Aliens Removed or Returned–Fiscal Years 1892 to 2018, https://www.dhs.gov/immigration-statistics/yearbook/2018/table39.

[17] Doris Meissner, Donald M. Kerwin, Muzaffar Chishti, and Claire Bergeron, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery at 92* (Washington, D.C.: Migration Policy Institute, 2013).

[18] American Immigration Council, "Fact Sheet: Prosecuting People for Coming to the United States," August 23, 2021.

[19] For a discussion of the evolution and effects of these discursive and policy shifts, see generally Jennifer M. Chacón, "Unsecured Borders: Immigration Restriction, Crime Control and National Security," *Connecticut Law Review* 39 (2007).

[20] Meissner et al., *Immigration Enforcement in the United States*.

[21] Hernández, *City of Inmates*, 132–140. This paragraph draws from my chapter "Race and Immigration" in the *Oxford Handbook on Race and the Law in the United States*.

[22] Jennifer M. Chacón, "Managing Migration Through Crime," *Columbia Law Review Sidebar* 109 (2009): 142.

[23] 8 U.S.C. § 1326.

[24] American Immigration Council, "Fact Sheet: Prosecuting People for Coming to the United States" (noting that such prosecutions "may make it significantly more difficult for them to legally immigrate in the future").

[25] On the rise and criminalized nature of immigration detention, see, for example, Anil Kalhan, "Rethinking Immigration Detention," *Columbia Law Review Sidebar* 110 (2010): 42.

[26] Brennan Center for Justice, "The History of Mass Incarceration," July 20, 2018, https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration.

[27] 8 U.S.C. § 1387(g).

[28] Ibid.

[29] Office of the Inspector General, Department of Homeland Security, *The Performance of 287(g) Agreements* (Washington, D.C.: U.S. Department of Homeland Security, 2010), 2, https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf.

[30] Randy Capps, Marc R. Rosenblum, Muzaffar Chishti, and Cristina Rodríguez, *Delegation and Divergence : A Study of 287(g) State and Local Immigration Enforcement* (Washington, D.C. : Migration Policy Institute, 2011).

[31] Jennifer M. Chacón, "The Transformation of Immigration Federalism," *William & Mary Bill of Rights Journal* 21 (2) (2013) : 604–605.

[32] Ibid.

[33] Ibid., 582–588.

[34] Chacón, "Race and Immigration."

[35] Los Angeles Police Department, Office of the Chief of Police, Special Order 40, November 27, 1979.

[36] Jennifer M. Chacón, "Immigration and the Bully Pulpit," *Harvard Law Review Forum* 130 (7) (2017).

[37] Ibid.

[38] Tracy Seipel, "Santa Clara County Supervisors Vote to Opt Out of Secure Communities Program," *The Mercury News*, September 28, 2010.

[39] Chacón, "Race and Immigration."

[40] Shoba S. Wadhia, "The Role of Prosecutorial Discretion in Immigration Law," *Connecticut Public Interest Law Journal* 9 (2) (2010) : 258–261 (discussing the use of prosecutorial discretion during the George W. Bush administration).

[41] Meissner et al., *Immigration Enforcement in the United States*, 15. See also Office of the Director, U.S. Immigration and Customs Enforcement, "Memorandum : Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens," June 17, 2011, https ://www .ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

[42] See U.S. Department of Homeland Security, Deferred Action for Childhood Arrivals, *Federal Register* 86 (185) (2021) : 53736 ("more than 825,000 people have applied successfully for deferred action under this policy").

[43] Trevor George Gardner, "Right at Home : Modeling Sub-Federal Resistance as Criminal Justice Reform," *Florida State University Law Review* 46 (2018).

[44] U.S. Immigration and Customs Enforcement, *Fiscal Year 2016 ICE Enforcement and Removal Operations Report* (Washington, D.C. : U.S. Immigration and Customs Enforcement, 2016).

[45] Barack Obama, "Remarks by the President in Address to the Nation on Immigration," November 20, 2014, https ://www.whitehouse.gov/the-press-office/2014/11/20/remarks -president-address-nation-immigration ; and Jeh Charles Johnson, "Memorandum : Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents," November 20, 2014, https ://www.dhs.gov/ sites/default/files/publications/14_1120_memo_deferred_action_2.pdf. See also Anil Kalhan, "Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration," *UCLA Law Review Discourse* 63 (58) (2015) : 60–61.

[46] Adam Liptak and Michael D. Shear, "Supreme Court Tie Blocks Obama Immigration Plan," *The New York Times*, June 23, 2016.

[47] Johnson, "Memorandum: Exercising Prosecutorial Discretion."

[48] *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1917 (2020) (Sotomayor, dissenting in part, recounting President Trump's racist statements in explaining why she disagreed with the majority's dismissal of petitioners' equal protection claim).

[49] *Ramos et al. v. Wolf et al.*, 336 F. Supp.3d 1074, 1100-01 (N.D. Cal. 2018) (elaborating upon the President's contemporaneous racist statements). The Ninth Circuit ultimately rejected the petitioners' equal protection claims, citing the Supreme Court's decision in *DHS v. Regents* and *Ramos v. Wolf*, 975 F.3d 872, 897 (9th Cir. 2020).

[50] See, for example, Richard Gonzalez, "Mississippi Immigration Raids Lead to Arrests of Hundreds of Workers," NPR, August 7, 2019, https://www.npr.org/2019/08/07/749243985/mississippi-immigration-raids-net-hundreds-of-workers.

[51] This contrasts with the Obama administration's lawsuits and investigations of jurisdictions that enacted immigration enforcement policies more stringent than the federal government's. The U.S. government sued to prevent states' purportedly cooperative enforcement bills, as in *U.S. v. Arizona*, 567 U.S. 387 (2012), and also investigated departments accused of racial profiling in the service of immigration enforcement. See, for example, U.S. Department of Justice Office of Public Affairs, "Department of Justice Releases Investigative Findings on the Maricopa County Sheriff's Office–Findings Show Pattern or Practice of Wide-Ranging Discrimination Against Latinos and Retaliatory Actions against Individuals Who Criticized MCSO Activities," December 15, 2011.

[52] Randy Capps, Muzaffar Chishti, Julia Gelatt, et al., *Revving Up the Deportation Machinery: Enforcement under Trump and the Pushback* (Washington, D.C.: Migration Policy Institute, 2018).

[53] Ibid.

[54] The city of Santa Ana, California, voted to end its contract with ICE, which had permitted the agency to detain immigrants in its jail bedspace. Nick Gerda, "Immigration Agency Cancels Santa Ana Jail Contract," *Voice of OC*, February 24, 2017 (reporting that ICE announced its decision to end its contract after the city counsel had voted to "phase out the contract entirely by 2020" and to immediately reduce available beds for ICE). The state of California enacted legislation to bar private immigration detention facilities in the state, an effort that is currently being litigated in federal court. See *GEO Group v. Newsom*, ___ F. 4th ___, 2021 WL 4538668 (9th Cir. Oct. 5, 2021) (enjoining the ban, reversing the district court's dismissal of GEO Group's suit, and remanding to the district court for further adjudication).

[55] Assembly Bill (AB) No. 60 (Chapter 524, Statutes of 2013) (requiring the department to issue an original driver's license to an applicant who is unable to submit satisfactory proof of legal presence in the United States).

[56] Ingrid V. Eagly, "Criminal Justice in an Era of Mass Deportation," *New Criminal Law Review* 20 (1) (2017).

[57] On the various forms of "sanctuary" policies, see Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, et al., "Understanding 'Sanctuary Cities,'" *Boston College Law Review* 59 (5) (2018). On state criminal law reforms in California designed to mitigate immigration consequences, see Eagly, "Criminal Justice in an Era of Mass Deportation."

[58] DHS Secretary Alejandro N. Mayorkas, "Memorandum to Tae D. Johnson, et al., Worksite Enforcement: The Strategy to Protect the American Labor Market, the Condition of

the American Worksite, and the Dignity of the Individual," Policy Statement 065-06, October 12, 2021.

[59] DHS Secretary Alejandro N. Mayorkas, "Memorandum to Tae D. Johnson, et al., Guidelines for Enforcement of Civil Immigration Law," September 30, 2021.

[60] The Biden administration supported the GEO Group in its challenge to California's ban on private detention facilities. *GEO Group v. Newsom*, ___ F. 4th ___, 2021 WL 4538668 (9th Cir. Oct. 5, 2021). The Biden administration has also defended vigorously in court President Trump's migrant ban under Title 42. Joel Rose, "The Biden Administration is Fighting in Court to Keep a Trump-Era Immigration Policy," *All Things Considered*, NPR, September 20, 2021.

[61] See, for example, *Sanchez v. Mayorkas*, 593 U.S. __ (2021) (holding that federal immigration law unambiguously precluded treating a grant of TPS as an admission for purposes of immigration law, thus barring one potential path by which some TPS holders might gain a path to citizenship without facing lengthy bars to entry).

[62] Sarah Sherman-Stokes and Lindsay Harris, "Despite Promises, Biden Looks a Lot Like Trump on Border Issues," *Bloomberg Law*, October 20, 2021.