

THE 1996 IMMIGRATION LAWS COME OF AGE

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ABSTRACT

Twenty-one years ago, in direct response to an attack perpetrated by Timothy McVeigh, a U.S. citizen and anti-government terrorist, Congress perversely enacted a set of punitive laws aimed not at white nationalists, but at immigrants. These 1996 laws generated three important shifts in immigration law and policy by radically expanding grounds for deportability while shrinking paths to deportation relief, creating a substantial role for sub-federal governmental entities in immigration investigation and enforcement, and rendering lawful permanent resident status more precarious. Simultaneously, Congress prompted the ad hoc creation of a host of liminal legal statuses bestowed by Executive Branch officials seeking to moderate the harsh effects of the laws. The 1996 laws significantly expanded the reach of the carceral state, particularly with respect to foreign nationals, while simultaneously kneecapping federal and state social support for immigrants. In short, the legal regime established in 1996 ushered in a new era of immigration severity and the resulting enforcement policies soon followed the path laid out in the misguided criminal enforcement policies of the wars on crime and drugs. Like the sweeping crime bills that had preceded them, the 1996 laws generated a highly racialized system of enforcement purportedly justified by crime control imperatives. Like those earlier laws, the 1996 laws have had little measurable impact on public safety, even as they have normalized vast systems of carceral control over immigrant communities. By systematically promoting a narrative that equated immigrants and crime, these laws laid the groundwork for the ultimate electoral triumph of Donald J. Trump in the presidential election of 2016.

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“Whatsoever a man soweth, that shall he also reap. . . .”¹

INTRODUCTION

In the 2016 presidential election, the Democratic Party reaped what it had sown. The seeds of this election were scattered over many years, but pivotal to the harvest were seeds planted in 1996. That was the year that a Republican Congress passed and President Bill Clinton signed three pieces of bipartisan legislation that fundamentally changed the narrative about immigrants in the U.S. Although the effects were not immediate, they were clear.

The 1996 laws in question are three pieces of legislation – the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”),² the Antiterrorism and Effective Death Penalty Act (“AEPDA”)³ and the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”)⁴ – that passed together and had related goals.

1. *Galatians* 6:7 (King James).

2. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009, 543-724 [hereinafter IIRIRA].

3. Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

4. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

Grouping these laws, one can see triumph of the ideology encapsulated in the mid-1990s “Contract with America.”⁵ These three bills advanced the goal of purportedly “small-government” neoliberalism.⁶ In fact, these bills expanded the state—particularly the carceral state—using neoliberal rhetoric to justify doing so at the expense of the welfare state.⁷ They stripped poor immigrant and minority communities of resources while simultaneously creating mechanisms through which these same communities would be monitored, policed, incarcerated, and excluded from political participation, and even from the physical borders of the nation.⁸ In this way, the 1996 laws fed into and amplified trends already established in the 1994 Crime Bill.⁹ Ultimately, the legal regime produced by these laws normalized a national discourse that positions all immigrants, and particularly those perceived as “illegal Mexican immigrants,”¹⁰ as a

5. For a sympathetic view of “Contract with America,” see JEFFREY GAYNER, *THE CONTRACT WITH AMERICA: IMPLEMENTING NEW IDEAS IN THE U.S.* (The Heritage Foundation, 1995). For a brief and insightful history of that document, see David Balz, *GOP ‘Contract’ Pledges 10 Tough Acts to Follow*, WASH. POST (Nov. 20, 1994), https://www.washingtonpost.com/archive/politics/1994/11/20/gop-contract-pledges-10-tough-acts-to-follow/50fdd611-035e-41d9-8827-e0231de5c105/?utm_term=.6c4fd3978e46.

6. David Harvey has defined neoliberalism as “a theory of political economic practices that proposes that human wellbeing can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade.” DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 2 (2005); see also WENDY BROWN, *EDGEWORK* 39–40 (2005). Neoliberalism is associated with political platforms premised upon “deregulation, the creation of stable and well-protected private-law systems, and the dismantling of the welfare state—shifting the primary role of government from public law to private law.” Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 *LAW & CONTEMP. PROBS.* 71, 83 (2014) (citing David Kennedy, *The ‘Rule of Law,’ Political Choices, and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 95, 138 (David M. Trubek & Alvaro Santos eds., 2006)). Blalock further explains that [n]eoliberalism is more principled and totalizing than a mere policy platform, but it is also not reducible to a set of philosophical ideas; it is embodied in the mode of governance. It is a set of principles that have been so incorporated into the experience of the world that the dominant discourse no longer sees them as points of contention.

Id. at 84–85.

7. See, e.g., MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 10–14 (2015) (arguing that the vast carceral state in the U.S. is the product of neoliberalism “filtered through specific electoral, party and other institutional developments and arrangements at the local and state levels.”); cf. BERNARD HARCOURT, *THE ILLUSION OF THE FREE MARKET* (2011) (honing in on that fact the neoliberalism has actually been used to promote not “free markets” but heavily regulated ones).

8. GOTTSCHALK, *supra* note 7, at 220–21.

9. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796; see *id.*

10. GOTTSCHALK, *supra* note 7, at 221 (noting that critics of IIRIRA called it the “Mexican Exclusion Act”). Long before the passage of the 1996 laws, social and legal practices conspired to make Mexican migrants into the “iconic illegal alien.” MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 7–8 (2004).

crime and security problem that needs solving,¹¹ rather than an integral part of the national community.

These laws, and the era of immigration severity that has followed,¹² helped to ensure the failure of Hillary Clinton's candidacy for the presidency. Donald Trump tapped into the fear and loathing of immigrants that was not only reflected in these laws, but fueled by them.¹³ At the same time, Clinton was hemmed in by a reality that her husband helped to create when he signed legislation that required foreign nationals to bear the brunt of the consequences of a terrorist attack perpetrated by a white nationalist U.S. citizen.¹⁴

11. Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); see also Kevin R. Johnson and Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347, 1364–68; 1373–76 (2005) (charting the history of anti-Mexican racism in the U.S. and arguing that Huntington's depiction of Mexican immigrants as a national threat is fundamentally flawed).

12. For a discussion of the severity turn, see Chacón, *supra* note 11, at 1828; see also Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th 'Pale of Law'*, 29 N.C. J. INT'L L. & COM. REG. 639, 640–50 (2004) (discussing the citizen/non-citizen and criminal/civil lines in the post-September 11 regime and the criminalization of unlawful presence in the United States); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007) (arguing that immigration law has been absorbing the theories, methods, perceptions, and priorities associated with criminal enforcement while rejecting the procedural elements of criminal adjudication); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11*, 25 B.C. THIRD WORLD L.J. 81 (2005) (discussing the social control dimension of the escalating criminalization of immigration law); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003) (describing the rising severity turn in both criminal and immigration law and noting scholarly disagreement over whether this constitutes a criminalization of immigration or an immigrationization of criminal law); Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (theorizing a "convergence of immigration and criminal law" that "brings to bear only the harshest elements of each area" resulting in an "ever-expanding population of the excluded and alienated.").

13. By expanding significantly the category of crimes that could result in deportation, the law expanded the number of "criminal aliens." At the same time, the 1996 laws cut off formerly available avenues by which unauthorized migrants could regularize their status. Rachel E. Rosenbloom, *Policing the Borders of Birthright Citizenship: Some Thoughts on the New (and Old) Restrictionism*, 51 WASHBURN L.J. 311, 327 (2012) ("[T]he road to obtaining lawful status is increasingly unclear. Amendments to the immigration laws over the past two decades have eliminated or severely narrowed many of the provisions through which undocumented immigrants were formerly able to obtain lawful status."). Thus, more and more immigrants are colloquially understood to be "illegal immigrants," and that status increasingly and problematically has been conflated with criminality. Chacón, *supra* note 11, at 1839–43. Even as the association between immigrants and crime is fueled by the manipulation of legal categories, immigrants continue to commit crimes at rates significantly lower than their native born counterparts. See Yolanda Vazquez, *Constructing Crimmigration*, 76 OHIO STATE L. J. 599, 609–611 (2015).

14. The passage of IIRIRA and AEDPA, in particular, were galvanized by Timothy McVeigh's 1996 bombing of the federal building Oklahoma City. Chacón, *supra* note 11, at 1851–52.

Due to the 1996 laws, which perpetrated a sense that immigrant communities were drains on public funds and a risk to the health and safety of the nation, many citizens now imagine that there will be substantial social and economic benefits to be gained from the deportation of millions of long-time community members.¹⁵ Economists state that any such promises economic gains are ill-founded, and that mass deportations will be costly for the government, and for almost all who remain behind.¹⁶ Criminologists assert that mass deportations are unlikely to have any effect on crime rates, and may, in fact, worsen them.¹⁷ Widely held beliefs about immigration and immigration enforcement bear little relationship to the truth, yet these beliefs have played an important role in shaping policy.

The 1996 laws, and the enforcement practices that flowed out of them, help to explain why Donald Trump found such fertile campaign soil in his presidential campaign announcement, in which he broadly labeled Mexicans as murderers and rapists.¹⁸ Trump's averral of widespread Mexican criminality had deep historical roots, and rested on a set of assumptions that have been fueled by laws and enforcement policies that treat all foreign nationals as suspicious and

15. The outcome of public opinion polls on immigration policy turn largely on how the questions are phrased. One 2013 Reuters/Ipsos poll concluded that "[m]ore than half of U.S. citizens believe that most or all of the country's 11 million illegal immigrants should be deported." Rachele Younglai, *Majority of U.S. citizens Say Illegal Immigrants Should be Deported*, REUTERS (Feb. 20, 2013, 8:09 PM), <http://www.reuters.com/article/us-usa-immigration-idUSBRE91K01A20130221>. On the other hand, a CNN/ORC International poll taken in February 2014 found that about 80% of polled citizens believed that unauthorized immigrants who have been in the country for years and are employed, speak English, and would pay back taxes should be allowed to become citizens. Philip E. Wolgin & Evelyn Galvan, *Immigration Polling Roundup: Americans of All Political Stripes Want Congress to Pass Immigration Reform*, CTR. FOR AM. PROGRESS (Mar. 4, 2014, 9:37 AM), <https://www.americanprogress.org/issues/immigration/news/2014/03/04/85102/immigration-polling-roundup-americans-of-all-political-stripes-want-congress-to-pass-immigration-reform/>. While the polls are inconsistent, they do suggest that a substantial number of citizens (albeit not necessarily a majority) do support wide scale deportation. *Id.*

16. See Ryan Edwards & Francesc Ortega, *The Economic Impact of Removing Unauthorized Immigrant Workers*, CTR. FOR AM. PROGRESS (Sept. 21, 2016), <https://www.americanprogress.org/issues/immigration/reports/2016/09/21/144363/the-economic-impacts-of-removing-unauthorized-immigrant-workers>.

17. Charis E. Kubrin & Scott A. Desmond, *The Power of Place Revisited: Why Immigrant Communities Have Lower Levels of Adolescent Violence*, 13 YOUTH VIOLENCE & JUV. JUST. 345, 360 (2015); Ruben Rumbaut, *Undocumented Immigration and Rates of Crime and Imprisonment: Popular Myths and Empirical Realities*, in THE ROLE OF LOCAL POLICE: STRIKING BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES (Mary Malina ed. 2008), https://www.policefoundation.org/wp-content/uploads/2015/06/Appendix-D_0.pdf; Robert J. Sampson, *Rethinking Crime and Immigration*, 9 CONTEXTS 28, 28-33 (2008).

18. *Donald Trump Doubles Down on Calling Mexicans 'Rapists'*, CNN, (June 25, 2015) <http://www.cnn.com/videos/tv/2015/06/25/exp-presidential-candidate-donald-trump-immigration-intv-erin.cnn>.

that conflate civil immigration violations with life-threatening conduct.¹⁹

This Article explores how the 1996 laws put in place the structures and discourse that gave birth to a rising tide of hatred and fear of foreign nationals. Understanding these laws helps to explain the 2016 election results. This Article analyzes three distinct but interrelated effects of the 1996 laws: (1) the over-criminalization of migrant communities at the federal level; (2) the normalization of immigration enforcement as a part of the standard sub-federal policing agenda; and (3) the rising tide of highly vulnerable liminal legal statuses as a response to powerful economic and political pressures. After briefly describing each of these phenomena, this Article closes on a hopeful note, drawing from the case of California in the mid-1990s.

I. OVER-CRIMINALIZATION OF IMMIGRANT COMMUNITIES AT THE FEDERAL LEVEL

For well over a century, the immigration laws of the United States have made criminal convictions a key criterion for sorting immigrants. Defined classes of criminal convictions are removable offenses.²⁰ At the dawn of the twentieth century, removals on criminal grounds were limited by statute to a defined period of years after entry, but that has changed dramatically over the past century.²¹ As a result of the 1996 laws, the civil immigration system has increasingly absorbed the punitive features of the criminal justice system,²² and the federal criminal enforcement system has increasingly targeted crimes of migration.²³

19. See generally César Cuahtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457.

20. "Removal" is a legal term that includes both deportation and exclusion. STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 428 (6th ed. 2015). Generally speaking, deportation involves expulsion from the interior of the country and exclusion means denial of entry at the border or port of entry. *Id.* at 427-28. However, individuals who have not been "admitted," as defined by INA § 101(a)(13), are subject to exclusion grounds, not deportation grounds. *Id.* This is true no matter how long the individual has been physically present in the country. 8 U.S.C. §§ 1101(a)(13), 1182(a)(6)(A)(i).

21. DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 4-15, 133-36 (2007).

22. See Legomsky, *supra* note 12, at 471-72 (providing an earlier exploration of this phenomenon).

23. Jennifer M. Chacón, *Symposium on Overcriminalization: Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 635-40 (2012) [hereinafter *Overcriminalizing Immigration*].

A. A Punitive Civil System

Many convictions now trigger removal regardless of how long ago an individual entered the country or how long ago the individual committed the offense. Convictions can also be made into deportable offenses retroactively. As Dan Kanstroom has argued, these changes in the law created a shift from deportation as a means to correct errors in the admissions process to deportation as a form of post-entry social control.²⁴ Adhering to the nineteenth-century legal doctrines that predated this shift, constitutional case law treats immigration enforcement as a civil resolution rather than a form of punishment.²⁵ In reality, deportation has been used punitively for many decades.²⁶ But the 1996 laws were the first to deploy the immigration code as a broad-ranging means of addressing a wide swath of low-level crimes.

In 1996, Congress significantly broadened the class of criminal convictions that can result in removal and severely narrowed the availability of discretionary relief.²⁷ Congress also expanded the category of individuals subject to mandatory civil detention during removal proceedings, pending their ultimate removal.²⁸ Following the reorganization of the Immigration and Naturalizations Service (“INS”) into three different agencies within the Department of Homeland Security (“DHS”) in 2003, Congressional appropriations for immigration enforcement soared.²⁹ As a result of these developments, increasing numbers of foreign nationals have experienced the harsh effects of changes in law and policy that target “criminal aliens,” broadly defined.³⁰ The impact has been felt particularly keenly by lawful permanent residents who would not otherwise be deportable.³¹

Immigration scholars have been attentive to this punitive turn in the realm of civil immigration law.³² Many have noted that the close

24. KANSTROOM, *supra* note 21, at 92, 121–22, 125–26, 158.

25. *See generally id.* (describing the different motivations for deportation explored by the Supreme Court).

26. *See Padilla v. Kentucky*, 559 U.S. 356, 357 (2010) (“[A] criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry adverse immigration consequences.”).

27. Chacón, *supra* note 11, at 1845–47. I also discuss these and other consequences of the 1996 legislation in Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARVARD L. REV. FORUM 243, 247–48 (2017) [hereinafter *Immigration and the Bully Pulpit*].

28. *Id.* at 1871.

29. *Overcriminalizing Immigration*, *supra* note 23, at 632–35.

30. *Id.* at 636.

31. *Id.*

32. *See supra* note 12 and accompanying text.

linkage between criminal conduct and removal, and legislators' assertions that the linkage was intended as a punitive measure, call into question the legal framing of removal as "civil."³³ This, in turn, suggests that immigration proceedings ought not to be immune from many of the procedural protections attached (at least theoretically) to the criminal process. Scholars also have raised questions about the legality and wisdom of the harsh immigration detention system.³⁴ Federal legislators and executive branch officials have justified the ongoing rapid expansion of immigration detention on both retributive and general deterrence grounds that seem ill-suited to a purportedly civil system.³⁵

The civil immigration system, however, is not the only place where this punitive turn in immigration policy has taken hold. In the post-1996 era, the nation's criminal enforcement systems have also been transformed to manage migration through the criminal law, and it is these changes that are the focal point of this section. The discussion below examines these changes at the federal level.

B. Managing Migration Through Federal Criminal Law

Immigration offenses—like human smuggling and harboring—have been on the books for decades, but historically, prosecution rates were negligible in the federal criminal scheme.³⁶ This changed recently. Over the past two decades, the federal government has prioritized the prosecution of immigration and immigration-adjacent offenses over all other offenses. As of 2011, immigration offenses were

33. KANSTROOM, *supra* note 21, at 10–12.

34. See, e.g., César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1458 (2015); César Cuauhtémoc García Hernández, *Invisible Spaces and Invisible Lives in Immigration Detention*, 57 HOW. L.J. 869, 869–70 (2014); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 47–50 (2010); Mariela Olivares, *Intersectionality at the Intersection of Profiteering and Immigration Detention*, 94 NEB. L. REV. 963, 972–73 (2016); DORA SCHIRO, U.S. DEP'T HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 18–21, 22–23 (2009); MARGARET H. TAYLOR, JUDICIAL DEFERENCE TO CONGRESSIONAL FOLLY: THE STORY OF DEMORE V. KIM 1 (David A. Martin & Peter H. Schuck eds., 2005).

35. Memorandum from Miller and Lembke to the Board of Immigration Appeals (B.I.A.) (Aug. 7, 2014) [hereinafter Miller and Lembke Memorandum], <https://innovationlawlab.org/wp-content/uploads/2014/12/miller-lembke-declarations.pdf>. *But see* Memorandum from Hiskey to the B.I.A. (Sep. 22, 2014) [hereinafter Hiskey Memorandum], https://www.aclu.org/sites/default/files/assets/hiskey_affidavit_9.22.14_final.pdf (refuting the use of his research in the Miller and Lembke memoranda).

36. *Overcriminalizing Immigration*, *supra* note 23, at 635–39.

the single largest category of federal criminal prosecutions,³⁷ and the bulk of those prosecutions were for misdemeanor illegal entry and felony reentry.³⁸ Around that time, the aggressive expansion of immigration prosecutions leveled off, but as of 2015, immigration offenses were the second largest category of federal offenses (29.3%), barely trailing federal drug offenses (31.8%).³⁹

Moreover, as Mona Lynch has observed, drug prosecutions in the southern border region are structured to maximize immigration control effects: “[T]he criminalization of immigration is so complete that immigration enforcement itself drives the adjudicatory strategies for prosecuting and sentencing drug defendants.”⁴⁰ Prosecutors use high-volume drug plea strategies as a blunt instrument to effectuate border control ends. A single southern border district accounted for 83 percent of the federal government’s felony drug possession convictions at the time of Lynch’s study⁴¹—these drug convictions serve as part of a broader migration control strategy.

The federal strategy of disproportionately deploying criminal enforcement resources to the southern border has changed the complexion of the federal prison system. By 2015, the Federal Sentencing Commission reported that “52.7 percent of all federal prisoners were Hispanic.”⁴² The focus on the southern border region also helps to explain why more than 40 percent of federal prisoners are foreign nationals.⁴³ This is particularly jarring given the extensive literature documenting the facts that foreign nationals are less likely to commit crimes than their citizen counterparts, and that cities with substantial immigrant populations tend to be safer than those with small immigrant populations.⁴⁴

37. U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2011, 5 (2012).

38. *Id.*

39. U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2015, 2, 9 (2016) [hereinafter SENTENCING COMM’N 2015].

40. Mona Lynch, *Backpacking the Border: The Intersection of Drug and Immigration Prosecutions in a High-Volume US Court*, 57 BRITISH J. CRIMINOLOGY 112, 113 (2015).

41. *Id.* at 9.

42. SENTENCING COMM’N 2015, *supra* note 39, at 3.

43. *Id.* at 4 (noting that 58.5% of federal offenders were U.S. citizens).

44. See Sampson, *supra* note 17 at 28–33; see also Robert Adelman, et al., *Urban Crime Rates and the Changing Face of Immigration: Evidence Across Four Decades*, 15 J. ETHNICITY CRIM. JUST. 52, 52–53 (2016) (“[I]mmigration is consistently linked to decreases in violent (e.g., murder) and property (e.g., burglary) crime throughout the time period.”); Bianca E. Bersani, *An Examination of First and Second Generation Immigrant Offending Trajectories*, 31 JUST. Q. 315, 315 (2012) (“Foreign-born individuals exhibit remarkably low levels of involvement in crime across their life course.”).

The mass prosecutions of immigration and immigration-adjacent crimes in the southern border region have also transformed criminal court processes and logistics in federal criminal courts. Misdemeanor illegal entry pleas are counseled only nominally, with six to ten defendants pleading at a time with the assistance of one public defender.⁴⁵ The Federal Rules of Criminal Procedure concerning plea agreements are systematically and routinely violated in these procedures.⁴⁶ Equities like family ties and work connections in the U.S. are used *against* defendants in sentencing rather than in their favor, since courts view evidence of community ties as proof that individuals are likely to “recidivate” by attempting to return to their families in the U.S.⁴⁷ Meanwhile, felony reentrants are sentenced much more harshly than similarly situated defendants without a prior immigration history, and their sentencing terms vary greatly depending on where they are sentenced, leaving little uniformity in immigration sentencing within the federal system.⁴⁸

Federal criminal enforcement policy resembles the drunken man who searches for his keys under the lamppost because that is where the light is. By flooding the border region with crime control dollars and federal law enforcement agents, federal officials ensure that criminal apprehensions and prosecutions will increase along the southern border. Resulting crime statistics help to fuel public fear, justifying in turn further increases in federal enforcement dollars for border enforcement. Because criminality under our expansive codes is ubiquitous, it can hardly be surprising that those in search of crime are able to find it. With a wealth of prosecutors and judges available to prosecute crimes along the border, the federal government now makes hundreds of criminals out of migrants every day. In so doing, they created a system that routinely cast economic migrants and refugees as dangerous threats to public safety – violators of federal criminal law deserving of a federal criminal sentence. President Trump’s Executive Order of January 25, 2017, calls for a doubling-down on this flawed approach.⁴⁹

45. Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 142 n.55 (2009) [hereinafter *Managing Migration*].

46. *E.g.*, *United States v. Roblero-Solis*, 588 F.3d 692, 694–700 (9th Cir. 2009); see *Managing Migration*, *supra* note 45, at 142–43.

47. Lynch, *supra* note 40, at 128.

48. Zoey T. Jones, Note, *Prescribing Disproportional Punishment: The Federal Sentencing Guidelines for Illegal Reentry*, 33 CARDOZO L. REV. 1217, 1245–48 (2012).

49. See Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017) (calling for increased prosecution of crimes with a nexus to the southern border region). For more detailed discussion of the travel bans, see *Immigration and the Bully Pulpit*, *supra* note 27, at 257–60.

In addition to its own increased focus on the southern border and migration-related crime, the federal government has also enticed and drafted sub-federal criminal enforcement actors into the project of civil migration control. As a consequence of those pressures from above, and similar pressures generated from below by some restrictionist states and localities, migration control has been transformed in the past twenty years from a federal prerogative into a state and local project. These themes are explored in the section that follows.

II. THE NORMALIZATION OF SUB-FEDERAL IMMIGRATION ENFORCEMENT

INA § 287(g), which allows state and local governments to contractually share immigration enforcement responsibility with the federal government, was a product of the 1996 laws.⁵⁰ Even at the program's peak in the late days of the second term of President George W. Bush, the program did not have a reach broad enough to transform the landscape of national immigration enforcement.⁵¹ But this provision of the 1996 laws—little noticed by commentators at the time—changed the landscape of immigration enforcement by not only allowing for contractual immigration enforcement federalism, but by diffusing the notion that states and localities could and should view federal immigration enforcement as a part of their routine law enforcement mandate. This section first explores federally imposed cooperative efforts that involve sub-federal agents in immigration enforcement, then examines locally generated cooperation initiatives that have naturalized sub-federal immigration enforcement over the past two decades.

A. Federally Imposed Enforcement Cooperation

Although states and localities have long played a role in shaping federal immigration enforcement,⁵² the 1996 laws formalized that cooperation. On one hand, the laws prohibited states and localities from

50. 8 U.S.C. § 1357(g) (2012).

51. At the peak of the program, there were just over seventy 287(g) agreements nationwide. AM. IMMIGRATION COUNCIL, FACT SHEET THE 287(G) PROGRAM: AN OVERVIEW 2 (2017) [hereinafter 287(G) FACT SHEET], https://www.americanimmigrationcouncil.org/sites/default/files/research/the_287g_program_an_overview_0.pdf.

52. See Rachel Rosenblum, *Policing Sex, Policing Immigrants: What Crimmigration's Past Can Tell Us About Its Present and Its Future*, 1 CALIF. L. REV. 149, 164–81 (2016).

interfering with communications between their agents and the federal government.⁵³ On the other hand, the law facilitated sub-federal cooperation in immigration enforcement through contract.⁵⁴ By passing what is now codified as § 287(g) of the INA, Congress authorized state and local law enforcement agents to act in the capacity of federal immigration enforcement agents when trained and supervised by DHS agents.⁵⁵ The resulting “287(g) agreements” proliferated during the Bush administration.⁵⁶

But after a January 2009 report by the Government Accountability Office (“GAO”) found serious shortfalls in supervision, documentation, and data collection under these agreements,⁵⁷ the Obama Administration scaled § 287(g) programs back.⁵⁸ The federal government cancelled agreements that gave local agents the capacity to investigate immigration status as part of their ordinary policing functions, leaving in place only those agreements that allowed certain local agents to screen inmates for immigration violations in jails.⁵⁹

Several studies concluded that 287(g) agreements fueled racial profiling,⁶⁰ and the Department of Justice (“DOJ”) also initiated investigations into jurisdictions where there were credible reports that 287(g) investigative powers were being used in racially discriminatory ways.⁶¹ An agreement with Maricopa County, Arizona, was cancelled when experts found that *Latino* drivers were four to nine times

53. 8 U.S.C. § 1373.

54. *Id.* § 1357(g).

55. *See id.*

56. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-109, BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 5 (2009) (reporting that Immigrations and Customs Enforcement received \$60 million for fiscal years 2006 through 2008 to train, supervise, and provide equipment to agencies who partnered with them through 287(g)).

57. *Id.*

58. *See* 287(G) FACT SHEET, *supra* note 51, at 2 (2017); *see also* FY 2012: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance to Further Focus Resources, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Dec. 20, 2012), <https://www.ice.gov/news/releases/fy-2012-ice-announces-year-end-removal-numbers-highlights-focus-key-priorities-and>.

59. *See* 287(G) FACT SHEET, *supra* note 51, at 1.

60. *See, e.g.,* SARAH WHITE & SALMUN KAZEROUNIAN, THE FORGOTTEN CONSTITUTION: RACIAL PROFILING AND IMMIGRATION ENFORCEMENT IN BEDFORD COUNTY, TENNESSEE 6 (2011), <http://static1.1.sqspcdn.com/static/f/373699/14215844/1316404529200/The+Forgotten+Constitution.pdf>; *see* WEISSMAN ET AL., THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS 8 (2009), <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf>.

61. *See* Department of Justice Releases Investigative Findings on the Maricopa County Sheriff's Office, U.S. DEP'T JUST., <https://www.justice.gov/opa/pr/departement-justice-releases-investigative-findings-maricopa-county-sheriff-s-office> (last updated Sept. 15, 2014).

more likely to be stopped by the police than similarly situated drivers of other races.⁶² Critics continue to observe substantial variation in how 287(g) agreements are implemented across jurisdictions, and overall, “the program does not target primarily or even mostly serious or dangerous offenders.”⁶³ One study concluded that about half of the individuals identified for removal through 287(g) programs had committed misdemeanors and traffic violations.⁶⁴

As previously noted, these and other criticisms ultimately prompted the Obama administration to roll back the program, thus beginning an incomplete effort to eliminate some of its biggest problems.⁶⁵ President Trump’s Executive Order of January 25, however, calls for reinvigoration of the 287(g) program.⁶⁶ After campaigning on a platform of aggressive immigration enforcement,⁶⁷ the new President seems unlikely to be concerned about screening out localities that engage in racial profiling, nor is he likely to prioritize training and data collection.

The Trump administration will also profit from Obama-era architecture designed to replace 287(g) cooperation with national data sharing of arrest information. For many years, the federal government used its own personnel to screen arrestees in the nation’s prisons and jails through the “Criminal Alien Program” (“CAP”).⁶⁸ CAP predated the 1996 laws, and provided a blueprint for prescribed cooperative efforts.⁶⁹ CAP officials identify potentially removable, incarcerated foreign nationals and initiate removal proceedings when

62. Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, to Bill Montgomery, Cty. 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.

63. DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 105 (2013) (citing RANDY CAPPES ET AL., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 2 (2011)), <http://www.migrationpolicy.org/sites/default/files/publications/enforcementpillars.pdf>.

64. CAPPES ET AL., *supra* note 63, at 2.

65. *See supra* text accompanying notes 57–58.

66. *See* Exec. Order No. 13767, 82 Fed. Reg. 8793, 8795 (Jan. 30, 2017).

67. *See supra* text accompanying notes 18–19.

68. *See* WILLIAM A. KANDEL, CONG. RESEARCH SERV., R44627, INTERIOR IMMIGRATION ENFORCEMENT: CRIMINAL ALIEN PROGRAMS 23 (2016) (CAP’s predecessor, the Alien Criminal Apprehension Program “forged partnerships with corrections facilities to identify deportable aliens convicted of crimes before their release from prison.”).

69. *Id.*; MEISSNER ET AL., *supra* note 63, at 100–01.

they deem them appropriate.⁷⁰ In 2009, 48% of individuals apprehended by DHS were screened through CAP.⁷¹

In the later years of the Obama administration, CAP screening was supplemented by more comprehensive database screening under the moniker of “Secure Communities.”⁷² This program, which was operating nationwide by 2013, required the fingerprints of all state and local arrestees to be run through DHS’s database to determine their immigration history.⁷³ Unlike CAP, which places federal agents in state and local facilities either physically or virtually, the Secure Communities program effectively makes state and local law enforcement front line immigration screeners. Their arrest decisions are the “discretion that matters” when it comes to determining whether DHS receives information about the individuals with whom they interact.⁷⁴ If an individual is found to be in violation of immigration law, federal agents can issue a detainer request (known informally as an “ICE hold”), asking the state or local entity to hold the individual for up to 48 additional hours while ICE makes arrangements to take custody.⁷⁵

After its rollout, the Secure Communities program faced a barrage of criticisms. Researchers found that the program had absolutely no effect on crime rates,⁷⁶ advocates and many law enforcement agents argued that it decreased community trust of state and local law enforcement, and the government’s own statistics revealed that the majority of foreign nationals removed as a result of the program were removed for misdemeanor offenses and immigration offenses, not for serious or dangerous crimes.⁷⁷ The criticisms ultimately prompted the

70. See KANDEL, *supra* note 68, at 9–10 (“CAP officers . . . may issue a *request for notification* . . . asking to be contacted prior to an alien’s release from [criminal] custody. Issuance of a request for notification depends on whether removal of the flagged individual accords with CAP priorities. CAP officers may issue an *immigration detainer* if an individual is subject to a final order of removal.”).

71. MEISSNER ET AL., *supra* note 63, at 101.

72. See KANDEL, *supra* note 68, at 17 tbl. 3 (noting that “Secure Communities was also known as the Comprehensive Identification and Removal of Criminal Aliens (CIRCA) program and received its first appropriation in FY2008. It was incorporated into the Criminal Alien Program in FY2015 and replaced with the Priority Enforcement Program (PEP) in the same fiscal year.”).

73. Adam B. Cox & Thomas J. Miles, Symposium, *Immigration Law and Institutional Design: Policing Immigration*, 80 U. CHI. L. REV. 87, 93 (2013). DHS’s Automated Biometric Identification System, also known as IDENT, houses the agency’s collection of fingerprints of every noncitizen fingerprinted as part of their interaction with immigration officials. *Id.* at 94.

74. Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1847–49 (2011) [hereinafter *Discretion That Matters*].

75. Cox & Miles, *supra* note 73, at 95.

76. *Id.* at 124.

77. U.S. DEP’T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2014 (2014).

Obama administration to scale back the program, replacing it with the “Priority Enforcement Program,” which would continue the mandatory database screening but would more rigorously adhere to stated enforcement priorities in setting determinations about who to detain and deport.⁷⁸

But with his Executive Order of January 25, 2017, President Trump eliminated the Priority Enforcement Program and reinstated the Secure Communities program.⁷⁹ Trump’s Executive Order prioritizes anyone with a criminal record, anyone arrested, anyone who commits criminal acts (whether or not arrested), and anyone deemed by an immigration judge to be a threat to public safety.⁸⁰ Individuals whose data flows through the Secure Communities program will, by definition, be an enforcement priority because of their arrest regardless of their immigration status, and regardless of whether they were ever charged with, let alone convicted of, a crime.⁸¹

Another criticism of Secure Communities involves the immigration detainers that create the pipeline between the state or local prison or jail and the immigration detention and removal system. Some states and localities bristled when forced to bear the costs of federal immigration enforcement by detaining individuals beyond their release date at the request of ICE.⁸² Detainees began to sue county facilities for holding them beyond their release dates on the basis of nothing more than a federal request. Courts began to award plaintiffs damages to redress these violations of their Fourth Amendment right against unreasonable seizure, holding that detainer requests issued

78. Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf’t 2 (Nov. 20, 2014) http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (directing ICE to continue to screen state and local arrests, but to “only seek transfer of the alien” from state and local custody when that noncitizen fits one of DHS’s high priority categories for removal).

79. See Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017); see also *Immigration and the Bully Pulpit*, *supra* note 27, at 250–51, 256–57.

80. See *id.*

81. See, e.g., MICHELE WASLIN, IMMIGRATION POLICY CTR., THE SECURE COMMUNITIES PROGRAM: UNANSWERED QUESTIONS AND GROWING CONCERNS 10 (2011), https://www.american-immigrationcouncil.org/sites/default/files/research/Secure_Communities_112911_updated.pdf (discussing the enforcement priorities of ICE based on the criminal convictions of detainees).

82. See, e.g., MATHEW SEAMON, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., THE COST OF STATE AND LOCAL INVOLVEMENT IN IMMIGRATION ENFORCEMENT 4 (2014), https://clincle.org/sites/default/files/cost_of_involvement_in_immigration_enforcement_version_5_mm.pdf (discussing, with reference to ICE, the protocol that the states are required to follow for the secure communities program); WASLIN, *supra* note 81, at 4–5, 13–14 (discussing the costs associated with the secure communities program and other concerns raised by the use of the program).

without a warrant or probable cause provided no basis for prolonged detentions.⁸³ As a result, many states and localities have now enacted policies instructing officials not to prolong detentions on the basis of an ICE detainer request.

Municipalities may soon be caught between a rock and a hard place on this issue. Members of the Trump administration have suggested that they view localities that refuse to comply with detainer requests as sanctuary jurisdictions that they seek to punish.⁸⁴ Municipalities will have to weigh the risk of successful Fourth Amendment claims by detainees against the risk of offending an administration that paints even these efforts to comply with the Federal Constitution as an impermissible exercise of “sanctuary.”⁸⁵ Unfortunately, it seems likely that some jurisdictions will decide it is safer to violate the constitutional rights of poor and disenfranchised residents than it is to attract wrath of the Trump administration. This is true even though the relevant constitutional case law prohibits the federal government from using the threat of funding cuts to coerce participation in federal programs.⁸⁶

B. Enforcement Efforts Initiated at the Sub-Federal Level

In addition to their participation in federal immigration enforcement schemes, state and local law enforcement officials also play an

83. *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 U.S. Dist. LEXIS 50340, at *26–33 (D. Or. Apr. 11, 2014) (finding holds executed pursuant to an ICE request lacked basis in law and constituted a Fourth Amendment unreasonable seizure); *see also* Christopher N. Lasch, *Preempting Immigration Detainer Enforcement Under Arizona v. United States*, 3 WAKE FOREST J.L. & POL’Y 281, 330 (2013); CRISTOPHER LASCH, IMMIGRATION & POLICY CTR., THE FAULTY LEGAL ARGUMENTS BEHIND IMMIGRATION DETAINERS 3 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/lasch_on_detainers.pdf.

84. *See* Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017). Note that the text of the order defines “sanctuary jurisdiction” as one in which the state or locality is in violation of 8. U.S.C. § 1373. *Id.* A refusal to comply with a detainer request would not qualify. *Id.* But the Trump administration’s threats have been extended to localities with policies of noncompliance with detainer requests. In other words, the new administration is making threats of loss of federal funding against jurisdictions that do not even meet the “sanctuary” definition provided by the EO. For a discussion of ongoing litigation relating to these provisions, *see Immigration and the Bully Pulpit*, *supra* note 27, at 265–67.

85. *See, e.g.,* Darla Cameron, *How Sanctuary Cities Work, and How Trump’s Executive Order Might Affect Them*, WASH. POST (Jan. 25, 2017), <https://www.washingtonpost.com/graphics/national/sanctuary-cities/>.

86. *See, e.g.,* Priscilla Alvarez, *Trump Cracks Down on Sanctuary Cities*, ATLANTIC (Jan. 25, 2017), <https://www.theatlantic.com/politics/archive/2017/01/trump-crack-down-sanctuary-city/514427> (highlighting that such a drastic reduction in funds may be held unconstitutional similar to the Supreme Court’s ruling on Obamacare that the government could not force states to accept the Medicaid expansion by threatening to withdraw all funds for Medicaid).

independent role in shaping immigration policy through the choices they make in their own criminal enforcement practices. First, as previously noted, states and localities are effectively required to share arrest data with DHS through Secure Communities and related programs.⁸⁷ This has prompted some localities to change their arrest practices in order to minimize immigration screening for residents on the basis of minor offenses and infractions. Santa Clara County, for example, initiated changes to their arrest policies when they were informed that they could not opt out of Secure Communities.⁸⁸ Other municipalities followed.⁸⁹ The State of California later passed legislation prohibiting state and local law enforcement from detaining individuals pursuant to an ICE detainer request unless the individual fit into certain statutorily defined categories of higher risk detainees.⁹⁰ At this time, at least four other states and eighteen other cities and counties have followed suit.⁹¹ In contrast, states and localities that do not wish to shield immigrant residents from immigration enforcement have incentives to make arrests, and may choose to comply with detainer requests notwithstanding the liability risks involved.⁹²

87. See *supra* Section II.A.

88. *Santa Clara Ends Collaboration with ICE, Creates Local Protections Against Controversial "Secure Communities" Program*, ALBERT COBARRUBIAS JUST. PROJECT (Oct. 19, 2011), <https://acjusticeproject.org/2011/10/19/santa-clara-county-ends-collaboration-with-ice-creates-local-protections-against-controversial-secure-communities-program>.

89. Edgar Aguilaoscho, David Rodwin, & Sameer Ashar, *Misplaced Priorities: The Failure of Secure Communities in Los Angeles County*, 4–7 (UC Irvine School Of Law Research Paper No. 2013-118), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012283 (discussing Santa Clara policies adopted in 2010 and in 2011); see also SANTA CLARA CTY., BD. OF SUPERVISORS, POLICY MANUEL § 3.54 (2011), https://www.ilrc.org/sites/default/files/resources/santa-clara_ordinance.pdf.

90. CAL. GOV'T CODE § 7283 (Deering 2017).

91. See *Text of Trust Acts*, CALIFORNIA TRUST ACT, <http://www.catrustact.org/text-of-trust-acts.html> (last visited May 3, 2017). Some counties, like Miami-Dade, for example, have recently withdrawn their protections in the face of the Trump administration's threats to withhold funds from "sanctuary cities." See, e.g., Alan Gomez, *Miami-Dade Commission Votes to End County's 'Sanctuary' Status*, USA TODAY (Feb. 17, 2017, 8:27 PM), <http://www.usatoday.com/story/news/nation/2017/02/17/miami-dade-county-grapples-sanctuary-city-president-trump-threat/98050976>. Policies like the TRUST Act are not actually "sanctuary" policies at all. Trump's executive order defines that concept as involving a violation of 8 U.S.C. § 1373, and that provision does not appear to be violated in any way by the non-detainer policy outlined in the TRUST Act. 8 U.S.C. § 1373 (2012) (lacking requirement for local authorities to comply with a detainer request). But some states, cities and counties, including California, are now contemplating the passage of even more protective ordinances in the wake of Trump's election. See Madison Park, *In a Trump-Defying Move, California's Senate Passes Sanctuary State Bill*, CNN (Apr. 4, 2017, 2:35 AM), <http://www.cnn.com/2017/04/04/politics/california-sanctuary-state-bill-sb-54/>.

92. See Elina Treyger, *Collateral Incentives to Arrest*, 63 U. KAN. L. REV. 557, 559 (2015).

States and localities also can and do exercise immigration discretion not just at arrest and booking, but at every stage of the criminal process, including investigative practices, booking practices, bail determinations, pretrial-diversion decisions, charging, and plea bargaining.⁹³ At each stage of the process, criminal enforcement actors can take immigration status into account in ways that either maximize or minimize the impact of immigration status on the criminal process.⁹⁴ For example, prosecutors can work with defenders to structure pleas that do not trigger mandatory deportation, or they can aggressively pursue pleas that maximize the likelihood of deportation in addition to the criminal punishment.⁹⁵ It is worth noting that efforts to minimize the immigration consequences of criminal proceedings often requires explicitly taking alienage into account to ensure the avoidance of immigration consequences.⁹⁶

Emboldened by the 1996 federal laws that foster sub-federal immigration enforcement, states and localities have actively sought to use their own criminal enforcement systems to promote immigration enforcement. Arizona's S.B. 1070, which sought to create a number of immigration crimes that purportedly complimented federal immigration law, is a well-known example.⁹⁷ In *Arizona v. United States*, the Supreme Court struck down portions of S.B. 1070 that would have made it a state crime to work without authorization or to solicit day labor.⁹⁸ But the Court left intact a provision that required law enforcement agents in Arizona to inquire about immigration status and communicate this information to the federal government whenever practicable.⁹⁹

93. See Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1146–55 (2013) (providing an excellent discussion of the ways that immigration policy preferences can affect each stage of the proceedings) [hereinafter *Criminal Justice for Noncitizens*].

94. See *id.* at 1157–90 (describing three models for jurisdictions with differing practices: an “alienage-neutral model,” which attempts to neutralize the effects of immigration status on the criminal process by discouraging investigations into immigration status during routine policing and by structuring bail, pleas, and sentences to minimize the impact of immigration status; an “illegal-alien-punishment model,” which seeks to use the levers of the criminal justice system to ensure that unauthorized migrants are treated more harshly in the system than other defendants; and an “immigration-enforcement model” which actively seeks to use state law to create potential immigration consequences and to funnel foreign nationals into federal detention and removal).

95. *Id.*

96. *Id.* at 1163–64 (discussing the Los Angeles County model).

97. S.B. 1070, 49th Leg., 2nd Reg. Sess. (Ariz. 2010).

98. 132 S. Ct. 2492, 2505 (2012).

99. See *id.* at 2509–10.

By leaving open the door for sub-federal immigration policing, *Arizona v. United States* creates only an imperfect check on the practice of using state law tools to target immigrants assumed to be unauthorized.¹⁰⁰ The decision may rule out state immigration laws, but states can achieve their immigration enforcement ends through alternative means. For many years before S.B. 1070, jurisdictions like Arizona used their human smuggling, anti-trafficking, and identity theft laws to target unauthorized migrants.¹⁰¹ Arizona's practice of prosecuting immigrants for self-smuggling so clearly served as an immigration enforcement tool that courts found that the self-smuggling law was preempted by federal immigration law.¹⁰² But Arizona's identity theft laws, which have also been used to blatantly target undocumented residents, have managed to survive judicial challenge.¹⁰³ This suggests that states and localities have significant capacity to manipulate their criminal laws and enforcement policies to serve their own immigration enforcement objectives.¹⁰⁴

C. On Criminality

The entire enterprise of treating immigration as a crime control problem was ill-conceived from the start. The inevitable effect was captured in a moment late in his presidency when President Obama announced an expanded deferred action program, and promised to target "felons not families"¹⁰⁵—apparently forgetting for a moment two important things of which he seems cognizant in other contexts.¹⁰⁶ First, felonies have been legally constructed with breathtak-

100. *Id.* (allowing state law enforcement officials to inquire about immigration status).

101. Jennifer M. Chacón, *Human Trafficking, Immigration Regulation and Subfederal Criminalization*, 20 NEW CRIM. L. REV. 96 (2017) (discussing comparable uses of state-level anti-trafficking laws, including in Arizona); see also Jennifer M. Chacón, *Tensions and Tradeoffs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 PENN. L. REV. 1609, 1647–1650, n. 166 (2010); Ingrid V. Eagly, *Local Immigration Prosecutions: A Study of Arizona before S.B. 1070*, 58 UCLA L. REV. 1749, 1753 (2011) (discussing state officials' use of Arizona identity theft laws to target unauthorized migrants).

102. *Id.* at 1767 (citing *United States v. Arizona*, 703 F. Supp. 2d 980, 1007–08 (D. Ariz. 2010)).

103. See *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1110 (9th Cir. 2016) (holding Arizona's identity theft laws, which prohibit using a false identity to obtain employment, are not federally preempted).

104. See *id.*

105. 2014 *Executive Action on Immigration*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/immigrationaction> (last updated Apr. 15, 2015).

106. President Obama's recent article on criminal justice reform in the Harvard Law Review recognizes both the problems of overcriminalization and the collateral neighborhood effects of overcriminalization. Unfortunately, he does not even mention the word immigration in his

ing breadth and these inherently flawed legal categorizations are unevenly parceled out through racially discriminatory patterns of prosecution.¹⁰⁷ Second, felons have families.¹⁰⁸

The United States' two-decade-old immigration enforcement strategy is premised on the notion that the criminal law enforcement system can effectively separate "good" immigrants from "bad." Yet, in the context of criminal justice reform conversations, there is a growing awareness that the criminal enforcement system is broadly over-inclusive in attaching stigmatizing labels to broad swaths of poor communities of color.¹⁰⁹

President Trump has no qualms about relying on the labels that have been legitimated by the policies of the Obama administration and previous administrations from both parties.¹¹⁰ When Trump vowed to target criminal aliens, he was focused not only on murderers and rapists that he excoriated in his campaign speech, but on a broad swath of individuals whose "criminal" conduct is inextricably intertwined with their efforts simply to live and work and support their families.¹¹¹ Indeed, one of his first targets was a woman whose only crime was the Arizona identity theft conviction that she incurred in 2008 because she used a false social security number to obtain work.¹¹² The groundwork for this method of enforcement was laid in

lengthy meditation on the injustices of the criminal law enforcement system. See Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811 (2017).

107. See Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder*, 48 U. MICH. J. L. REFORM 967, 967 n.2, 971 (2015) [hereinafter *Racial Profiling*]; Tanya Golash-Boza & Pierrette Hondagnue-Sotelo, *Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program*, 11 LATINO STUD. 271, 272 (2013).

108. See generally AJAY CHAUDRY ET AL., THE URBAN INSTITUTE, *FACING OUR FUTURE, CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT* (2010), <http://files.eric.ed.gov/fulltext/ED508226.pdf> (providing a study of the impact of U.S. detention and deportation policies on U.S. citizen children); JONATHAN BAUM ET AL., *IN THE CHILD'S BEST INTEREST?: THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION* (2010), <https://law.ucdavis.edu/news/images/childsbestinterest.pdf> (providing the same).

109. Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 596-601 (2016); *Racial Profiling*, *supra* note 108, at 978-79; Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 108-12 (2012).

110. See Brian Bennett, *Not Just "Bad Hombres": Trump is Targeting up to 8 Million People for Deportation*, L.A. TIMES (Feb. 4, 2017, 12:00 PM), <http://www.latimes.com/politics/la-na-pol-trump-deportations-20170204-story.html>.

111. Steve Almasey et. al, *"I did it for love," says Mother Deported in Arizona Immigration Case*, CNN, <http://www.cnn.com/2017/02/09/us/arizona-guadalupe-garcia-de-rayos-protests> (last updated Feb. 10, 2017).

112. *Id.*

1996 and reinforced by the enforcement choices made thereafter.¹¹³ Those choices helped deliver the White House to President Trump.

III. THE RISE OF LIMINAL LEGALITY

A final effect of the 1996 laws has been the emergence of a host of liminal immigration statuses.¹¹⁴ As a result of relatively recent changes to immigration law and law enforcement patterns, many individuals with lawful status, including lawful permanent residents (“LPRs”), have been forced into increasingly liminal spaces.¹¹⁵ Specific legal changes have operated to decrease the stability of the legal status of LPRs. Once treated as “Americans in waiting,”¹¹⁶ over the past two decades, lawful permanent residents have become increasingly vulnerable to deportation due to Congress’s creation of expansive (and retroactive) removal provisions in the 1996 laws.¹¹⁷ Registration requirements and the monitoring of lawful residents have also been on the rise.

At the same time, because the 1996 laws expanded removability and limited the possibility of discretionary relief for individuals otherwise removable, and because Congress has subsequently declined to pass legislation that would normalize the status of individuals now ineligible for relief,¹¹⁸ the past two administrations have increasingly relied upon executive discretion to allow immigrants to remain notwithstanding their removability. The paradigmatic example of this exercise of discretion is the Deferred Action for Childhood Arrival (“DACA”) of 2012. Under DACA, noncitizens who were under thirty-one on the date of the June 2012 announcement, who had entered the United States before June 15, 2007 as children under the age of sixteen, who had completed high school, and who did not have disqualifying criminal records were eligible for deferred action.¹¹⁹ These individu-

113. Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 734–35 (2015) [hereinafter *Producing Liminal Legality*].

114. The following paragraph is taken from my 2015 article: *Producing Liminal Legality*, *supra* note 113, at 731.

115. *Id.*

116. See generally HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006) [hereinafter *AMERICANS IN WAITING*].

117. *Id.* at 98–99.

118. See Rosenbloom, *supra* note 13.

119. Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot. et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children 1* (June 15, 2012) [hereinafter

als were deprioritized for removal and given access to work authorizations and driver's licenses.¹²⁰ DACA recipients joined a host of individuals who lacked a formal immigration status category, but who were permitted to remain on the theory that some form of immigration relief might be available to them eventually.¹²¹

This proliferation of liminal legal statuses occurring alongside the massive increase in immigration enforcement efforts has had the ironic effect of decreasing the value of citizenship. The 1996 laws sought to increase the relative value of citizenship, primarily through the devaluation of lawful immigration status.¹²² The laws created bright lines between citizens and everyone else, and sought to reserve federal largess for only the most worthy of citizens.¹²³ Ironically, however, by stringently limiting pathways to immigration relief and citizenship, the 1996 laws also heralded the declining salience of federal citizenship and immigration status.¹²⁴

Formal legal status and citizenship still matter, of course. Most obviously, citizenship can protect people from certain forms of banishment. But the 1996 laws have undercut the meaning of federal citizenship as a legal category in two ways.

First, the 1996 laws have ultimately created a paradigm where states and localities are exercising great power in shaping the lived experience of their residents as a result of their immigration status. This has happened at the very same time that immigration enforcement has ramped up and national borders have hardened. Consequently, state and local governments and their administrators have become both the primary enforcers of immigration law in the interior and the primary gatekeepers of social benefits for immigrants, including welfare, health care, and educational benefits. States and localities

Napolitano Memorandum], <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

120. *Id.* at 3.

121. See, e.g., *Guidance on Evidence for Certain Types of Humanitarian or Significant Public Benefit Parole Requests*, USCIS, <https://www.uscis.gov/humanitarian/humanitarian-parole/guidance-evidence-certain-types-humanitarian-or-significant-public-benefit-parole-requests> (last updated Nov. 23, 2016).

122. MOTOMURA, AMERICANS IN WAITING, *supra* note 116, at 51 ("Many changes affected citizens and noncitizens alike, but new eligibility limits hit noncitizens especially hard. Barred [from SSI] were not just future arrivals, but also noncitizens who were clearly lawful immigrants on the enactment date."). As Motomura notes, many benefits for individuals who were LPRS by 1996 were eventually restored, but no such benefits were instituted for new arrivals. *Id.* at 52–53.

123. See *supra* notes 2–10 and accompanying text.

124. See *Producing Liminal Legality*, *supra* note 113, at 732–34 (discussing the ways that liminality transcends formal legal categories, extending to certain citizens as well as certain noncitizens).

have exercised this authority in very different ways. Consequently, although there are parallels in the immigrant experience on an aggregate level, it means something very different to be undocumented in California than in Arizona or Georgia.¹²⁵ In some ways, state and local membership has begun to matter more while federal citizenship matters less in determining the basic quality of life experienced by immigrants.

Second, the 1996 laws have not only weakened the importance of formal federal citizenship vis-à-vis the states and state law, but they have also weakened (or, at least, failed to shore up) formal federal citizenship vis-à-vis ethnic nationalist visions of belonging. The 1996 laws did important work to reify existing, exclusionary notions of citizenship.

Focusing on the collective experiences of unauthorized migrants, LPRs and citizens today, one is struck by the ways that intersecting categories of race, place, and class are often more important than formal status in defining one's American experience. Given the way our immigration laws are enforced – through police actions based on collective racial understandings and folklores of illegality – race, class, and geography will often do more work than formal immigration status in determining who will suffer exclusionary governmental actions.¹²⁶ Our collective folk wisdom about who is an immigrant and who is a dangerous outsider shapes formal practices of inclusion and exclusion.

To be sure, the racial narratives that the 1996 legislation helped to shore up are not simple ones. The enforcement of these laws produces complex racial meaning on a daily basis. Latinos are constructed as the iconic illegal alien, but Latinos also make up a significant chunk of the policing agencies that enforce internal and external borders.¹²⁷ Migrants and their coethnics seek to forge alliances with the more privileged groups of society, or with the more marginalized groups, depending on their own political affiliations, their current situation, the perceptions of which groups belong here, and the justifications for their inclusion that subtly shift over time.¹²⁸ In other words, racial categories remain contested and fluid. But for hardline opponents of

125. See Motomura, *Discretion That Matters*, *supra* note 74 and accompanying text; S. 1070, 50th Leg., Reg. Sess. (Ariz. 2011).

126. See Chacón, *supra* note 11 at 1832–34, 1865–73 (discussing the racial narratives behind immigration laws and the groups who suffered exclusion based on these narratives and laws).

127. See Jennifer M. Chacón, *Producing Race Through Immigration Enforcement*, in *ENFORCING THE BOUNDARIES OF BELONGING: RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL* (Mary Bosworth, Alpa Palmar, and Yolanda Vázquez, eds.) (forthcoming 2017).

128. *Id.*

immigration, the battle lines are clear. Ultimately, the implementation of the 1996 laws laid the groundwork for Donald Trump's ability to appeal to a white nationalist sense of U.S. identity. Our ability to "[f]ix '96"¹²⁹ will require both the clear-eyed realism needed to name social problems with accuracy, and the willingness to forge solutions—be they technocratic or radical—that generate a more inclusive and fair architecture of social belonging.

IV. HOPE FOR THE FUTURE?

The 1996 laws, particularly when read along with the crime legislation that these laws mirrored and built upon,¹³⁰ helped to normalize the vilification of "illegals," "criminals," and "terrorists." These are terms that replaced other, more racially explicit derogatory terms for communities of color—justifying their surveillance, their disproportionate exclusion, their incarceration, and their banishment in a rhetoric that fits comfortably within a framework of post-civil rights era racism "without racists."¹³¹ The Constitution's equal protection guarantee, at least as currently interpreted by the Supreme Court, is a poor tool for sorting out the racial harms of this set of laws.¹³² Those waiting to be saved by the courts and the equal protection doctrine have a long wait ahead of them.

But perhaps there is hope for redemption through the democratic process. The 1996 laws emerged out of the ashes of California's Prop-

129. The Fix '96 slogan has frequently been invoked by immigration reform advocates, but the reform projects tend to focus on the procedural mechanisms of the law, not on their broader discursive effects. See, e.g., #Fix96: *End the Mass Criminalization of Immigrants*, IMMIGRANT JUSTICE NETWORK, <http://immigrantjusticenetwork.org/resources/fix96> (last visited Apr. 25, 2017); Frank Sharry, *Backlash, Big Stakes, and Bad Laws: How the Right Went for Broke and the Left Fought Back in the Fight Over the 1996 Immigration Laws*, 9 DREXEL L. REV. 269, 271 (2017).

130. See generally ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016) (tracing the racist assumptions that effectively transformed war on poverty programs into the failed punitive urban policing policies of the war on crime of the 1960s and 1970s and the war on drugs of the 1980s).

131. See generally EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM & RACIAL INEQUALITY IN CONTEMPORARY AMERICA* (3d ed. 2010) (chronicling the persistence of racism in a purportedly post-racial era); see also, Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) ("When the state regulates on the basis of 'facially neutral' criteria that have injurious effects on minorities or women, the Court presumes the regulation is constitutional and reviews it in a highly deferential manner.").

132. See, Siegel, *Why Equal Protection No Longer Protects*, *supra*, note 135, at 1129–46 (explaining that the Supreme Court's jurisprudence on equal protection fails to protect minorities, but instead perpetuates racial stratification).

osition 187, a virulently anti-immigrant initiative that sought to exclude migrants from all aspects of public life.¹³³ Much of that law was prevented by the courts from going into effect at the state level.¹³⁴ Restrictionists then sought to implement their agenda at the federal level, and successfully pushed through the 1996 laws. But back in California, the passage of the unfair, draconian, and racially-motivated Proposition 187 ultimately discredited and weakened the California Republican Party and the party leaders that had endorsed the law.¹³⁵ Today, California not only is not angling for new, restrictive immigration laws, but it has led the way in drafting legislation and creating programs designed to serve and protect foreign nationals in the state, regardless of immigration status.¹³⁶

With the inauguration of President Trump, we are poised to witness the implementation of the 1996 laws in the broadest possible terms. Advocates of a just immigration system should fight for legal change with confidence, knowing that the racial intolerance embodied in these laws may also contain the seeds of its own destruction.

133. 1994 Cal. Stat. A-317 (repealed 2014), *invalidated by* League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244 (C.D. Cal. 1997); Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 10-11 (2009).

134. See Wilson, 997 F. Supp. at 1261; Johnson, *Racial Profiling*, *supra* note 107, at 111.

135. See Alex Nowrasteh, *Proposition 187 Turned California Blue*, CATO INSTITUTE (July 20, 2016, 3:13 PM), <https://www.cato.org/blog/proposition-187-turned-california-blue>.

136. See Sharry *supra* note 129, at 275-76; Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12 (2017) (discussing a sampling of criminal justice initiatives that fit this description).