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Why Is the Policeman Asking for My Visa - The Future of Federalism and Immigration Enforcement

Anne B. Chandler
WHY IS THE POLICEMAN ASKING FOR MY VISA? THE FUTURE OF FEDERALISM AND IMMIGRATION ENFORCEMENT

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The allocation of power between the federal government and the states to control immigration has long been a subject of controversy in the United States. Likewise controversial has been the allocation of authority between federal criminal law and federal civil remedies in the regulation of federal immigration norms. Recent years have seen reallocations of regulatory authority along both of these axes. Through statute, regulation, and in some cases, fiat, the federal government has enlisted the states in the effort to control immigration. This invitation has been graciously accepted by some jurisdictions and resisted by others. The federal government has significantly expanded the scope of criminal law over immigration violations. The changes in the traditional allocations of authority have made the activities of local law enforcement a focal point of much immigration debate.

This article details the relationship between this historic change in immigration regulation and the activities of state and local law enforcement. It illustrates how criminal law has displaced civil procedures and remedies intended to curb illegal immigration. Further, this article details five significant ways in which the federal government has invited or compelled states and localities to participate in immigration enforcement. The article then discusses the wisdom of these changes: the case for and against decentralized law

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enforcement, the desirability of merging traditional state policing functions and federal immigration enforcement in single agencies, and the benefits and burdens of expanding the scope of the criminal law. The article concludes that states and localities should certainly be free to refrain from vigorous enforcement of the new boundaries of federal criminal immigration law. It concedes that the legal impediments against enforcement by state or local authorities are rather weak, however poor the policy decision to do so may be in many instances. It also concludes that at least some of the debate over local law enforcement is a disguised rehash of the important debate over the wisdom of current federal immigration policy. In many instances the issue is not the extent to which local law enforcement should be enforcing a federal immigration law, but whether that law should be on the books at all.

I. THE CURRENT LEGAL LANDSCAPE

A. The Sources of Federal Immigration Enforcement Power

Finding explicit textual authorization in the United States Constitution for the current extent of federal control over immigration is not as easy a task as might be supposed. The textual source perhaps most frequently cited, the “Naturalization Clause” is problematic because current federal immigration policy covers far more than naturalization. It addresses rights of entry and presence as well as the economic privileges of non-citizens while present. Moreover, even if the Naturalization Clause could be interpreted to empower the federal government to the boundaries of modern “immigration law,” it would not appear to make that power exclusive. The same provision of the Constitution authorizing uniform laws on the subject of naturalization also authorizes “uniform Laws on the subject of Bankruptcies,” yet the power conferred by this similarly worded provision has never been held exclusive. For many years, states were the primary source of American bankruptcy law and continue to be so today for some classes of bankrupts such as railroads and insurers.

2. U.S. CONST. art. I, § 8, cl. 4. The text of the clause reads, “[t]he Congress shall have Power . . . To establish a uniform Rule of Naturalization”.
3. Id.
5. See 11 U.S.C. § 109 (2007) (listing who may and may not be a “debtor” under federal bankruptcy law); Brown v. Smart, 145 U.S. 454, 457 (1892) (stating that states are free to enact their own insolvency laws unless Congress has enacted an applicable federal law).
Resting the expansive scope of contemporary federal immigration regulation on the “Migration Clause,”6 relies uncomfortably on a negative precedent and on a provision universally acknowledged to have focused primarily on slave trade that has more or less7 been abolished. To simply say that Congress did not have the power to regulate the migration of persons until 1808 does not conclusively establish that Congress had the power thereafter to do so. While the power may be implied, an argument can be made that it is not present unless it is incident to another explicit grant of federal power, such as the power to regulate commerce, the power to enforce the civil war amendments, or unless it is incident to some power recognized as implicit in the Constitution, such as the right of privacy.8 Moreover, as a matter of constitutional history, the migration clause has seldom been cited as authority for immigration regulation.

Other textual provisions cited as authority for immigration regulation have different deficiencies. The treaty, foreign commerce, and war powers provisions are often cited,9 but the relationship between those powers and the broad spectrum of federal regulation that now exists is often indirect at best.

In the absence of any clear textual support for broad and exclusive federal control over immigration policy, Congress has instead had to rely on notions that such power is implicit in the Constitution, in the very nature of sovereignty. The Supreme Court has been generally receptive to these arguments. From the late nineteenth century forward, the Supreme Court has held that the federal government has the power to control immigration.10

6. U.S. CONST. art. I, § 9, cl. 1. The text of the clause reads, “[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight.”


10. Henderson v. Mayor of New York, 92 U.S. 259, 272-74 (1875) (finding that exclusive control over immigration policies and practices allows for uniformity); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892). The court further stated that:

[I]t is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the constitution has committed the entire control of international relations, in peace as well as in war.
Consistent with what has generally been perceived as its plenary power, Congress has enacted the Immigration and Nationality Act (INA), a comprehensive immigration statute that sets forth in some detail the rules of naturalization and admission, as well as laws relating to the civil rights of non-citizens. An elaborate executive administrative structure, most recently centered at the Department of Homeland Security and its various components, has been developed to further define immigrant rights. The legislative and administrative branches have collaborated in the establishment of a large federal law enforcement apparatus to enforce these provisions through various schemes for the apprehension, detention, punishment and deportation of violators.

Not only have U.S. Courts held that the federal government has the power to control immigration, but that this power is held to the exclusion of the states. Thus, when California attempted to prohibit a legal permanent resident of Japanese nationality from acquiring a commercial fishing license, the Supreme Court invalidated the state statute. When states have attempted to tax foreign passengers entering the United States, Courts have struck down efforts by states to control aliens. Although sometimes the rejection of state efforts to control immigration is accomplished on a notion of “field preemption” (with respect to the admission and exit of non-citizens), courts frequently strike down state laws on grounds that they conflict with either a particular federal provision or some dormant federal policy. It has been the view for many years that immigration

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Nishimura Ekiu, 142 U.S. at 659 (citations omitted).
14. Chy Lung v. Freeman, 93 U.S. 275, 281 (1875) (striking down California statute taxing foreign passengers entering by vessel); Henderson v. Mayor of New York, 92 U.S. 259, 274-75 (1875) (voiding New York statute that had the same effect as a tax on foreigners entering the United States).
15. E.g., Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941) (invalidating the Pennsylvania Alien Registration Act because of the existence of the federal statutory scheme of registering aliens). The Court noted:

Pennsylvania’s law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. And in that determination, it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits[.]
control has been predominately the role of the federal government, when considered in light of the pervasive sense that immigration control belongs exclusively to the federal government, coupled with the potential for enforcement by non-federal agencies to subvert the balance of objectives often contained in immigration laws.

B. Federal Push Favoring Local and State Enforcement

Any tradition of federal exclusivity in immigration law enforcement has attenuated, however, over the past decade. Rather than regarding the states as adversaries encroaching on its exclusive turf, the federal government now enlists the aid of states and localities in immigration enforcement, including enforcement of violations the federal government perceives as civil rather than criminal. As outlined further below, this solicitation of aid has taken at least five prominent forms. First, Congress enacted Section 642(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, typically referred to as the IIRIRA. 16 This “prohibition on prohibition” provision bars states and localities from prohibiting their employees from communicating with federal agents about immigration matters. Second, Congress has partnered with states through amendments to section 287(g) of the INA 17 that essentially set up a rule book of permissible methods of immigration enforcement by states and localities. Third, Congress expressly authorized local and state agents to enforce two sections of the INA: sections 274 and 276. Section 274 of the INA prohibits the smuggling, transporting, or harboring of illegal immigrants. 18 Section 276 of the INA establishes criminal penalties for illegal reentry following deportation. 19 Fourth, various federal authorities have asserted a notion of “inherent authority” in the states to carry out immigration enforcement policies without even the need for specific authorization from the federal government. Finally, the Attorney General’s office expanded the scope of immigration violations reported to the

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Hines, 312 U.S. at 67-68 (citation omitted). See also, e.g., Graham v. Richardson, 403 U.S. 365, 376-80 (1971) (striking down state welfare restrictions on preemption and Equal Protection grounds); De Canas v. Bica, 424 U.S. 351, 354 (1976) (upholding a California statute that imposed penalties on employers for hiring undocumented workers, but stating that regulation of immigration with modest and explicit exceptions is “unquestionably exclusively a federal power.”). See Stephen H. Legomsky, Immigration Law and the Principle of Plenary Congressional Power, 1984 SUP. CT. REV. 255, 306 (concluding that for nearly a century the Supreme Court and lower federal courts have deferred to Congress’ plenary power over decisions relating to the admission of non-citizens and the rights they are afforded under the law).

16. 8 U.S.C. §1373(a) (2006), Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, § 642(a) (The entirety of this paper refers to section 642(a), despite its codification.).


National Crime Information Center (NCIC) database. Criminal and, to some extent civil, immigration violations are now added to various routine local law enforcement matters such as traffic stops.20

1. Section 642(a) Prohibition of Local Sanctuary Policies

The enactment of section 642 of the IIRIRA in 1996 heralded the federal government's renunciation of exclusivity in immigration law enforcement. Section 642(a) of that Act provides that:

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.21

This "prohibition on prohibition" provision does not require local enforcement agents to report undocumented individuals. The laws simply prohibit localities from restricting local officials from voluntarily reporting that information.

Although Congress did not provide any specific penalty for violation of section 642(a), the provision may nonetheless have consequence by giving free reign to local law enforcement officials who believe in vigorous implementation of federal immigration laws. The "bite" exists because of the number of municipalities and states that would, in the absence of this provision, and that have, notwithstanding the provision, enacted non-cooperation laws or policies (sometimes referred to as sanctuary policies). These policies discourage or prohibit law enforcement from inquiring into the immigration status of those with whom they come in contact during enforcement of primarily state or local law. Without section 642(a), states or localities might lawfully discipline police officers who, like many of their civilian compatriots and many contemporary political leaders, believed in strict enforcement of the punitive aspects of

20. See Lisa M. Seghetti et al, Enforcing Immigration Law: The Role of State and Local Law Enforcement, 24 (Congressional Research Service, RL32270, 2006), http://www.iliw.com/immigdaily/news/2005,1026-crs.pdf; The NCIC holds all of the records police rely upon when deciding whether to arrest. These records include arrest warrants, stolen vehicle reports, and criminal records. During traffic stops, the officer almost always queries NCIC to see whether the vehicle or license tags of the vehicle are stolen and to ascertain information regarding the driver. Should a warrant on the driver appear, the officer generally arrests the driver since the warrant from NCIC serves as probable cause for the arrest. See Nina Bernstein, Crime Database Misused for Civil Issues, Suit Says, N.Y. TIMES, Dec. 17, 2003, at A34 (reporting on NCIC arrests in New York, Los Angeles, Boston, and other cities). The NCIC and its use are governed by federal statute. See 28 U.S.C. § 534 (2006).

immigration policy. These officers might use their badge to extract information about immigration status from persons they stop and then turn the information on the suspect over to federal immigration officials. With section 642(a), however, an agent threatened with discipline for this particular exercise of zeal could presumably challenge the disciplinary action on grounds that the state disciplinary rule was preempted and prohibited by section 642(a). This is not an unlikely scenario; for example, in December 2007 a Roswell High School security officer called federal immigration agents to report an undocumented eighteen-year-old pregnant Mexican girl on campus. After federal immigration agents swiftly deported the girl, the Roswell Independent School District’s Superintendent removed the security officer from the school.22

The constitutionality of section 642(a) has not yet been fully litigated. A state or locality that enforces its sanctuary policy through the disciplining of a law enforcement official might defend its actions on grounds that section 642(a) was itself an unconstitutional usurpation by the federal government of powers reserved to the states by the tenth amendment. Section 642(a) does not, after all, control immigration directly. Rather, it attempts to control an area long in the control of states: the conduct of law enforcement. Thus, if a state believed that for financial, cultural or other reasons it did not wish to divert law enforcement resources into a primarily federal concern and took steps to enforce that belief, section 642(a) would prohibit that choice. The federal government would thus have to stretch existing grants of authority over immigration law to justify the intrusion into a traditional state sphere.

The case of Printz v. United States23 would provide some support for an attack on section 642(a).24 There, following a lengthy and vigorous review of both precedent and various parts of the Federalist Papers, the Supreme Court struck down, in a five to four decision, certain provisions of the Brady Handgun Violence Prevention Act that required the chief law enforcement officers of the states to conduct background checks on individuals seeking to purchase

23. Printz v. United States, 521 U.S. 898 (1997); see also New York v. United States, 505 U.S. 144 (1992) (striking down federal legislation which required states to accept ownership of radioactive waste or regulate it according to Congress’ instructions).
24. City of New York v. United States, 179 F.3d 29 (2d Cir. 1999) (explaining that the Second Circuit considered the constitutionality of section 642(a) of IIRIRA and section 434 of the Personal Responsibility and Work Opportunity and Reconciliation Act of 1996 (Welfare Reform Act), Pub. L. 104-193, 110 Stat. 2105 (1996)). Ultimately, the Court rejected New York’s constitutional challenge to both of the provisions explaining that, “[i]n the case of Sections 434 and 642, Congress has not compelled state and local governments to enact or administer any federal regulatory program. Nor has it affirmatively conscripted states, localities, or their employees into the federal government’s service.” 179 F. 3d at 35.
handguns. Justice Scalia’s majority opinion found this sort of “federal commandeering” of state law enforcement officials to be unprecedented and incompatible with the federalist vision of the nation’s founders. In it, he writes:

The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

The fact that few cases have arisen on this point, however, suggests that, constitutional or not, section 642(a) has to date “succeeded” in the transformation of American immigration law enforcement by effectively prohibiting local governments from “nullifying” too vigorously federal immigration laws with which they disagree. Indeed, at least one state, Colorado, has re-capitulated the ideas behind section 642(a) by passing a statute that mirrors its language. The statute prohibits Colorado localities from ignoring suspected immigration offenses when they arrest someone for any criminal offense except domestic violence.

2. Memorandum of Understanding Agreements

In the IIRIRA, Congress went beyond a prohibition on prohibition. It also detailed procedures under which state and local officers can actively participate in the enforcement of federal immigration laws. Section 133 of that Act, which amends section 287(g) of the Immigration and Nationality Act, contains enforcement guidelines setting forth ways in which local and state officers may enter into a “Memorandum of Understanding” with federal agents.

25. See Printz, 521 U.S. at 935.

26. Printz, 521 U.S. at 944 (arguing that, “[t]here is [no] clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I.”(Stevens, J., dissenting)). It is unclear how Justice Stevens’ view would extend to a situation such as immigration law in which the delegation of power to Congress is, as discussed above, less express. Also, given the five to four vote and the hotly-contested nature of the decision, it is unclear how it would extend to a review of section 642(a).

27. See COLO. REV. STAT. § 29-29-101 (2007) (prohibiting any state or local government from enacting legislation impeding law enforcement agencies from cooperating or communicating with federal officials concerning an arrestee who is suspected to be illegally present in the United States).

officers acting under the Memorandum of Understanding Agreements are given the authority to perform their immigration responsibilities only within the normal course of their duties, such as when they have reasonable suspicion that someone has broken a traffic ordinance or other criminal statute. Officers engaging in dual function roles pursuant to a Memorandum of Understanding Agreement should be trained in immigration law, civil rights and cultural sensitivity. If a state or locality enters into a 287(g) agreement, the agreement must describe the specific powers that are to be given to the local official, the duration of the authority, and the position of the federal agent required to supervise and direct the deputized state official.

The invitation contained in section 133 has been frequently, though not universally, accepted. According to the Immigration and Customs Enforcement Web site, as of March 2008, more than sixty municipal, county, and state agencies nationwide have requested 287(g) Memorandum of Understanding Agreements and more than 400 local and state officers have been trained under the program. Florida and Alabama have finalized Memorandum of Understanding Agreements, as have Los Angeles, San Bernardino and Riverside counties in Southern California and Mecklenburg County of North Carolina. In Florida, for example, officers had to graduate from a training program taught by Department of Homeland Security officials. Department of Homeland Security officers supervise these state law enforcement personnel as they perform their immigration related enforcement operations. Built into the 287(g) agreement is a requirement that complaint procedures translated in various languages are disseminated throughout the state of Florida. The 287(g) agreement also sets up a mechanism by which state and federal agents may form a steering committee to periodically review the effectiveness of the process and assures that the agreement remains focused on the investigation of domestic security and counter-terrorist related matters.

3. Arrest Authority for Violations of Sections 274 and 276 of the INA

Congress has expressly authorized local and state agents to directly enforce two sections of the INA: sections 274 and 276. Section 274 of the INA prohibits

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29. Arnold, supra note 28, at 139-140.


the smuggling, transporting, or harboring of illegal immigrants.\textsuperscript{33} Section 276 establishes criminal penalties for illegal re-entry following deportation. In regard to state and local enforcement of violations of section 276, the 1996 amendments to the INA provide "state and local law enforcement officials are authorized to arrest and detain an individual who (1) is an alien illegally present in the United States; and (2) has previously been convicted of a felony . . ." after law enforcement officials have obtained the appropriate status of the individual and only to the extent that immigration services are able to take the individual into federal custody.\textsuperscript{34} State and local enforcement of sections 274 and 276 has varied widely across the political landscape.\textsuperscript{35}

4. Inherent Authority Theory

More radical than section 133's somewhat careful delineation of the ways in which local law enforcement can acceptably cooperate with federal immigration policy, or the limited-though-explicit authorizations contained in sections 274 and 276, is the assertion by the Department of Justice that no Congressional authorization for this sort of state cooperation is needed at all. In a 2002 Memorandum, the confidentiality of which proved to be the subject of litigation, the Attorney General (through the Office of Legal Counsel) asserted that it had been mistaken when the same office asserted during the Reagan administration that state and local officers do not have the power to enforce purely civil immigration violations, such as overstaying a visa.\textsuperscript{36} The 2002 Memorandum provided that local officers have the "inherent authority" to make immigration arrests based on an individual's violation of civil immigration

\textsuperscript{33} Immigration and Nationality Act (INA) of 1952 § 274, 8 U.S.C. § 1324(g) (2006) (empowering federal agents and "all other officers whose duty it is to enforce criminal laws" to arrest violators of section 274 of the INA).


\textsuperscript{35} See Countywide Criminal Justice Coordination Committee, HI-CAAP Fact Sheet, Previously Deported Criminal Aliens, http://www.ccjcc.info/HI-CAAP_ProjectBackground.asp (on file with the Tulsa Journal of Comparative & International Law) Los Angeles County's Criminal Alien Apprehension and Prosecution Project, a local initiative, provides an example of a locality systematically attempting to tap into local, state and federal resources to identify and arrest section 276 violators - immigrants that have illegally re-entered after removal.

\textsuperscript{36} In 1996, the Department of Justice asserted that state and local agencies do not have the power to enforce civil immigration violations since Congress clearly delegated such authority to the federal government. Arnold, supranote 28, at 114 (citing Secret Justice Department Memo Released, 10 BENDER'S IMMIGRATION BULL. 19, at 5 (2005) (re-publishing the 2002 Office of Legal Counsel Memorandum that was ordered disclosed in Nat'l Council of La Raza v. Dep't of Justice, 411 F.3d 350 (2d Cir. 2005)).
laws. The Attorney General based this authority on the Declaration of Independence and the Tenth Amendment to the United States Constitution, as well as case law implicitly authorizing state law enforcement officers to make warrantless arrests of persons suspected of violating federal criminal law. Ultimately, the Attorney General found no meaningful difference for preemption purposes between state assistance in the enforcement of federal criminal provisions and federal civil matters.

The reversal of a long-standing view by the Attorney General’s Office regarding the inherent authority of local officers to make civil immigration arrests has sparked considerable debate. The constitutionality of the 2002 Office of Legal Counsel’s theory that a local officer has inherent authority to enforce immigration violations in the absence of a formal Memorandum of Understanding set forth in section 287(g) of the INA is unclear. The legal weight of the 2002 Office of Legal Counsel opinion is questionable. While it has made its way into an opinion letter and a public statement, it has not been

37. Seghetti et al., supra note 20, at 8.

When federal, state and local law enforcement officers encounter an alien of national security concern who has been listed on the NCIC for violating immigration law, federal law permits them to arrest that person and transfer him to the custody of the INS. The Justice Department’s Office of Legal Counsel has concluded that this narrow, limited mission that we are asking state and local police to undertake voluntarily – arresting aliens who have violated criminal provisions of the Immigration and Nationality Act or civil provisions that render an alien deportable, and who are listed on the NCIC – is within the inherent authority of states.


38. Gonzalez v. City of Peoria, 722 F.2d 468, 474-75 (9th Cir. 1983)(explaining that the Ninth Circuit distinguished between the civil and criminal provisions of the INA, stating that the former constitutes a pervasive and preemptive regulatory scheme, whereas the latter does not.) overruled by Hodgers-Durgin v. De la Vina, 199 F.3d 1037, 1040 n.1); but see United States v. Salinas-Calderon, 728 F.2d 1298, 1301, (10th Cir. 1984) (approving a state trooper’s arrest of persons who appeared to be illegal aliens, stating “[a] state trooper has general investigatory authority to inquire into possible immigration violations.”). See also Kris W. Kobach, The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests, 69 ALB. L. REV. 179, 184-88 (2005) (noting that if police had utilized this authority then the September 11th attacks may have been thwarted).
reproduced in Freedom of Information Act requests or made its way into federal regulations. Indeed, publication of the memorandum was fought vigorously by the Department of Justice.

While this debate goes on, at least one locality, Chandler, Arizona, has taken action. This town, situated 120 miles from the southern border, joined federal officials in what has been coined the "Chandler Roundup." The five-day joint operation resulted in the deportation of 432 Hispanic immigrants. The City of Chandler paid $400,000 in a legal settlement when the plaintiffs alleged the undocumented immigrants were stopped and questioned exclusively on their apparent Mexican descent.

5. ICE Access

As a practical matter, perhaps the most important step by federal officials in enlisting state and local law enforcement in the battle to enforce federal immigration norms has little formal justification at all. In the immediate aftermath of the September 11, 2001 mass terrorist killings by Islamic fundamentalists who had overstayed their visas, and without either legislation or formal administrative rule making, the federal government added "civil" immigration violations to the National Crime Information Center's database ("NCIC"), the FBI's principle criminal database. Local law enforcement official thus acquire the ability, any time they make a traffic or other stop, to check whether the suspect has, in addition to criminal law problems, any

40. See ACLU Memo, supra note 37, at 1 (stating that several "groups had to sue the Department under the Freedom of Information Act to obtain . . ." the Memorandum.).
42. This regulatory decision, first announced in 2001 by the INS Commissioner, James W. Ziglar, is arguably the most significant shift towards the decentralization of immigration law enforcement of the decade. See Shawn Zeller, Immigration and Naturalization Service: Mixed Mission, GOVERNMENT EXECUTIVE, at 93 May 15, 2002, available at http://www.govexec.com/story_page_pf.cfm?articleid=22928&printerfriendlyvers=1 (discussing Ziglar's role after September 11th as the INS Commissioner).
43. Other civil violations are not included in the NCIC database. Thus, if a civil tax penalty has been assessed against an individual and remains unpaid, that information is not in the NCIC database and thus does not subject persons with tax problems who are arrested for minor crimes such as traffic violations to potential treatment as a serious threat. See DEP'T. OF JUSTICE, NAT'L CRIME INFORMATION CENTER, http://www.fbi.gov/hq/cjisd/ncic_brochure.htm (noting that "a positive response from the NCIC is not probable cause for an officer to take action. NCIC policy requires the inquiring agency to make contact with the entering agency to verify the information is accurate and up-to-date.").
immigration information included in the database such as an order of removal. An individual officer can then use the other means outlined in this section to place the person stopped into a system that will ultimately deport him or administer other federal immigration remedies.

The inclusion of civil immigration violations in the NCIC database has proven popular with law enforcement. According to government testimony in 2005 (before the Subcommittee on Immigration, Border Security, and Citizenship), roughly 17,000 law enforcement agencies utilize the NCIC database daily with “an average of 3,775,678 transactions per day.” Advocates of the decision to include the immigration status of undocumented aliens into the NCIC argue that such inclusion assists local and state officers in carrying out their enforcement responsibilities efficiently and effectively.

Opponents argue that including immigration related data leads to state and local officials engaging in racial profiling, wrongfully arresting lawful immigrants through false-positives, and shift focus away from apprehending dangerous criminals. Statistics back up these arguments. By analyzing information obtained through the Freedom of Information Act, the Washington Square Legal Services, Inc. at the NYU School of Law for the Migration Policy Institute study documented that forty-two percent of immigration hits were false positives, meaning DHS could not confirm that the individual had violated immigration laws. The inclusion of immigration related data into the NCIC

44. On March 28, 2008, ICE announced “Secure Communities”, a multi-faceted approach that includes improved technology in jails to allow state and local authorities to have expanded access to ICE’s fingerprint database to quickly identify suspects with immigration violations. See James Pinkerton, Mass Deportations Coming for Jailed Illegal Immigrants, Houston Chronicle, April 10, 2008; U.S. Immigration and Customs Enforcement Office of Public Affairs, Fact Sheet: Secure Communities, March 28, 2008 (“Secure Communities will change immigration enforcement by using technology to share information between law enforcement agencies...” available at http://www.aila.org/content/default.aspx?docid=25045.

45. The NCIC Immigration Violators File established in mid-2005 includes a Deported Felon File (individuals convicted of a felony and previously deported), Absconder Files (individuals believed to be present in the US subject to a final deportation, exclusion, or removal order), and NSEERS violators (individuals who “have violated the requirements of the National Security Entry-Exit Registration System”). The FBI’s National Crime Information Center: Testimony Before the Subcomm. on Immigration, Border Security, and Citizenship of the H. Comm. on the Judiciary, United States Senate, Nov. 13, 2003 (statement of Michael D. Kirkpatrick, Assistant Director in Charge, Criminal Justice Division, FBI).

46. The lack of accuracy of the immigration-related information entered into the NCIC database spawned additional waves of criticism to what was already a controversial agency decision.

database also throws a bit of a monkey wrench into traditional immigration debates.

Some immigration advocates have long advocated greater protection for immigrants in proceedings such as detention or deportation that are deemed "civil" on grounds that the consequences are sufficiently severe as to be indistinguishable from criminal proceedings. Yet they cling to the "civil" label when objecting to the inclusion of immigration information in a law enforcement database. Some immigration conservatives have long denied the need for heightened legal protection or standards in immigration proceedings that have severe consequences on the individual on grounds that the process is "civil" in nature yet are happy when this civil information – unique among all other forms of civil liability – is included in a database of criminal behavior. The matter perhaps highlights problems with the existing delineation between "civil" and "criminal" law and the desirability of an approach under which the availability of an imprisonment punishment would play a more prominent role in the determination of legal rights.

C. Other Developments

Thus far, this article has identified various statutory and regulatory practices facilitating or compelling state involvement in federal immigration law enforcement. Often, however, it is the actual norms and practices on the ground that matter. Here too, the past ten years have seen change. Many states have availed themselves of the 1996 reforms described above – and more. They have enacted legislation requiring officials to verify the immigration status of those who are within their custody. They have enacted state criminal statutes


49. See generally Kobach, supra note 38.


51. E.g., N. C. Gen. Stat. § 162-62(a) (2007) (requiring that the administrator of a jail or other confinement facility ascertain the immigration status of all persons confined under felony or
to further penalize those who harbor, transport,\textsuperscript{52} shelter or conceal undocumented immigrants.\textsuperscript{53} They have enacted policies specifically authorizing state and local law enforcement personal to arrest and detain immigrants that have violated certain aspects of immigration law.\textsuperscript{54} They have passed laws requiring a no-bond warrant to be issued in criminal cases where the defendant is determined to be undocumented.\textsuperscript{55} And, some municipalities have even passed laws reinforcing or extending federal immigration policies by imposing financial penalties on those who engage in certain forms of business (employment, tenancy) with the undocumented.\textsuperscript{56}

\textsuperscript{52} E.g., TENN. CODE ANN. § 39-17-114 (2006 & Supp. 2007) (prohibiting the transportation of undocumented immigrants into the state and imposing a fine for each violation with the stipulation that the funds received from the fine should be applied to the costs associated with the deportation of undocumented immigrants); see also H.R. 47th Leg., 2d Reg. Sess. (Az. 2006) (creating a statute to criminalize an individual's act of being present in Arizona without valid immigration status. However, this bill was vetoed on June 6, 2006.).

\textsuperscript{53} OKLA. STAT. tit. 21, § 446(B) (2007) (effective Nov. 1, 2007).

\textsuperscript{54} With the climate increasingly hostile to illegal immigration in 2006, a few police departments have made unilateral decisions to get involved in immigration enforcement. See generally Randal C. Archibold, \textit{Arizona County Uses New Law To Look for Illegal Immigrants}, N.Y. TIMES, May 10, 2006, at A19 (noting that the sheriff of Maricopa County, Arizona, is using an interpretation of a new Arizona law to justify sending out a civilian posse of 300 volunteers to apprehend illegal immigrants); see also Associated Press, \textit{Stop Profiling, Area Sherriff Told}, TOLEDO BLADE, Oct. 27, 2005, available at http://toledoblade.com/apps/pbcs.dll/article?AID=/20051027/NEWS03/510270384 (noting that the sheriff of Allen County, Ohio, was accused in 1995 of ethnic profiling in the course of his extensive and very public efforts to enforce laws against illegal immigrants).

\textsuperscript{55} See COLO. REV. STAT. § 16-3-501(1) (2007) (effective June 1, 2007) (providing that if an individual is determined to be illegally present in the country, a no-bond warrant must be issued); see also COLO. REV. STAT. § 16-3-502(1) (2007) (prohibiting a court from dismissing the criminal charges against an illegal person until the individual is released to federal agents).

\textsuperscript{56} E.g., LA. REV. STAT. ANN. § 23-996(D) (1998 & Supp. 2008) (providing a mechanism by which a district attorney can issue an order for a contractor to fire undocumented workers, and, if the contractor fails to comply within ten days of receiving notice, the contractor is subject to penalties up to $10,000.); see also COLO. REV. STAT. § 39-22-604(18)(b) (2006) (mandating
Contrary to these innovations, some states and localities continue with a somewhat older mode of participation in immigration law enforcement. Under the Department of Homeland Security's Criminal Alien Program, formally called the Institutional Removal Program and Alien Criminal Apprehension Program, when a local official encounters an immigrant whose legal status is questionable, the officer notifies federal officials. Once notified, these officials then attempt to determine the individual's status and decide whether to take the individual into federal custody and to issue a detainer. The detainer prevents the immigrant from being released on bond until the federal agents determine the individual's status. In localities that have a large volume of immigrants, Immigration and Custom Enforcement officials populate their jails and interview immigrants to decipher whether any non-citizen has run a foul with federal immigration laws.

1. Cities and Localities Unwilling to Assist

The recitation of laws permitting state cooperation in immigration enforcement and the practices established hereunder should not create the impression of a homogeneous trend. States and localities have not universally accepted the invitation extended to them by the federal government to assist in immigration enforcement. There exists a significant number of what the press and the media have, usually with derision, labeled "sanctuary cities."}

employers withhold 4.63 percent from the wages of an employee without a valid Social Security number, a validated taxpayer identification number, or an IRS-issued taxpayer identification card for non-resident aliens).

57. An immigration detainer is an arrest without a warrant made pursuant to 8 USC § 1357(a)(2) made by a federal immigration officer who decides there is reason to believe the person is an alien present in the United States and is likely to escape before a warrant can be obtained for his arrest. If an undocumented individual is detained at a jail for a local or state violation, it is common practice for state and local officials to inquire into the individual's immigration status and then contact an Immigration and Customs Enforcement official who then often places an immigration detainer on the suspect. E.g., 8 U.S.C. 1357(a)(2) (2006); see also Strengthening Interior Enforcement: Deportation and Related Issues: Joint Hearing Before the Subcomm. on Immigration, Border Security and Citizenship and the Subcomm. on Terrorism, Technology and Homeland Security of the S. Comm. on the Judiciary, 109th Cong. 9-11 (2005) (statement of Victor X. Cerda, Acting Director of Detention and Removal Operations, U.S. Immigration and Customs Enforcement, Dep't of Homeland Security); Seghetti et al., supra note 20, at 6.

58. It is not clear how this neutral term has turned into a negative term. The concept of sanctuary has a long and often honorable history. The idea has been to provide a haven from the oppression of powerful groups, governmental or otherwise. For centuries, Church and English law recognized a right of "sanctuary" to be free from arrest for at least a time within a church or temple. See Trisha Olson, Of The Worshipful Warrior: Sanctuary and Punishment in the Middle Ages, 16 ST. THOMAS L. REV. 473, 475-78 (2003-2004); see also Jorge L. Carro, Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege, 54 U. CINN. L. REV. 747, 747 (1986) (noting that churches in Central America and
Regardless of the label, many localities and at least two states have adopted procedures that discourage local involvement in enforcement of immigration laws. Sometimes localities address these issues through resolutions, city ordinances, special orders from the police chief, or departmental policies. Many of these measures stipulate that the localities’ funds cannot either directly or indirectly be used for the purpose of enforcing immigration laws. Fresno, California, for example, passed a non-cooperation statute that “prohibits police from reporting undocumented immigrants to federal immigration authorities in cases where no other crimes have been committed.”

In 2003, Alaska passed a broadly worded non-cooperative statute prohibiting Alaskan agencies from using state resources to enforce federal immigration provisions. Cities, such as Seattle and San Francisco, have also passed ordinances restricting a police officer’s ability to inquire into a suspect’s immigration status when investigating criminal activity.

2. The Expansion of Criminal Law

The request that states expand their enforcement of criminal laws that their citizens and politicians play no direct role in passing might be controversial enough, particularly given traditions in the field, the fiscal implications of this changing use of scarce law enforcement resources, and the constitutional difficulties of requiring participation by the states. Compounding all of this, however, the federal government has in the past ten years expanded the scope of what constitutes a “criminal” violation of federal immigration laws. Prior to the major reforms of the 1980s and 1990s, a number of the most common immigration violations—fraudulent use of government issued documents

and for knowingly making a false claim of citizenship to obtain a benefit or to obtain employment—were deemed “civil” in nature. While this earlier classification had perhaps the unfortunate effect of setting the burden of proof low and denying the immigrant a number of procedural protections theoretically available elsewhere have protected families fleeing the violence in their homelands by providing “sanctuary”); but see Jordan J. Paust, Universally and the Responsibility to Enforce International Criminal Law: No U.S. Sanctuary for Alleged Nazi War Criminals, 11 Hous. J. Int’L L. 337, 342 (1989) (stating that, on the other hand, “sanctuary” has often been decried when used to describe protections offered by some nations against Nazi war criminals. Thus, the real issue ought not to be debated using the rhetoric of “sanctuary” but whether the claims of those seeking to benefit from the protection it offers are just.).


62. See id. § 215 (amending 18 U.S.C. § 1015 to add this category of persons to those subject to criminal penalties).
in criminal matters, it, coupled with the Justice Department’s earlier view as to federal preemption also narrowed the scope of what states were being asked to enforce. Even the most aggressive supporters of immigration law enforcement were wary of asking states to enforce what were deemed to be civil violations of the law. There were after all, few, if any, other civil violations of federal law that were addressed by anyone other than federal regulatory agencies. To illustrate, the person who cheated on his federal taxes and owed a civil penalty was not generally detained or questioned by state troopers about his account delinquencies when pulled over for an illegal right turn.

Many acts that previously only triggered civil consequences now trigger parallel criminal consequences. For example, unlawful entry often triggers civil consequences and criminal penalties. Likewise, if an individual illegally re-enters after an order of removal, the individual has committed a crime and simultaneously triggers severe civil immigration consequences. An individual identified by police to be illegally in the country is subject to a criminal offense for such unlawful presence only if the individual has been formally deported or illegally re-entered the United States after an order of removal. The Immigration Reform and Control Act of 1986 criminalized using false documents for the purpose of evading employer sanction laws and made it a

63. Non-citizens seeking admission at or near a port of entry without a valid visa or who are inadmissible at the time of entry are subject to expedited removal, a civil consequence where the individual is deported not by a judge but by a Customs and Border Patrol Officer.


65. Congress enacted a complex statutory scheme to punish non-citizens who illegally re-enter the United States after a removal order. The ranges of penalties for illegal re-entry range from two years to twenty years for individuals who have committed an act categorized as an “aggravated felony” under section 101 of the INA. 8 U.S.C. § 1326 (2006).

66. In 1996, Congress added § 212(a)(9)(C)(i) of the INA which makes an alien inadmissible at any time if the alien, on or after April 1, 1997, re-enters or attempts to re-enter without being admitted after having been ordered removed or having been unlawfully present for more than one year. In re Torres-Garcia, 23 I & N Dec. 866, 873 (Interim Decision B.I.A. 2006) (holding that an alien inadmissible under § 212(a)(9)(C) of the Act cannot even file for consent to re-apply for admission to the United States until he or she has been abroad for at least ten years).

67. Recent legislative proposals seek to expand the number of immigration violators subject to criminal prosecution. The bill was introduced by James Sensenbrenner and passed by the House in December of 2005. This bill would have made unlawful presence after a lawful entry a felony subject to imprisonment for a term of one year and one day. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 203 (2005).

68. Immigration Reform and Control Act (IRCA) of 1986, Pub. L. 99-603, § 103(a), 100 Stat. 3359 (1986) (beginning the trend towards criminalizing immigration violations); Immigration
criminal offense for employers to engage in a "pattern or practice" of knowingly hiring, or continuing to employ noncitizens who are not authorized to work. 69

One of the provisions of the Marriage of Fraud Amendments made it a crime to marry an individual for the purpose of evading the immigration laws. 70 The Immigration Act of 1990 enacted the crime of entrepreneurship fraud. The Violent Crime Control and Law Enforcement Act of 1994 made it a criminal offense for any non-citizen to attempt an unlawful re-entry into the United States after a conviction of three misdemeanors involving drugs or crimes against the person. By far the most sweeping laws attaching criminal consequences to immigrant violations came in 1996. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 created multiple immigration crimes: knowingly failing to disclose one's role in helping to prepare a false immigration application, 71 driving above the speed limit while fleeing an immigration checkpoint, 72 filing an immigration application containing no "reasonable basis in law or fact," 73 in certain circumstances, knowingly making a false claim of U.S. citizenship, 74 and failing to depart the United States after a removal order. 75

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The expansion in the scope of offenses deemed criminal thus now invites the states to participate in broader immigration law enforcement efforts. This expansion, coupled with the expansion of state enforcement activity, has led many to question (and confuse) the wisdom of both approaches. In some instances, this has led to a boomerang effect where the immigration policies are themselves questioned.

II. WEIGHING COSTS AND BENEFITS OF LOCAL LAW ENFORCEMENT

The wisdom of the twin changes in immigration law enforcement – an expanded role for states and an expanded scope for criminal law – is somewhat more complex than often perceived. And matters are not helped when distinct issues are lumped together. The vigor with which immigration laws should be enforced, for example, is a different issue than whether that enforcement should be administered largely at a national level or largely at a state and local level.76

The issue of whether enforcement should occur at a local level is likewise different than whether that enforcement should be handled by federal officials or those supervised by the state. The issue of whether enforcement should be handled by the state is different than the issue of what immigration policies should be enforced at all. And the issue of whether states should be permitted to enforce federal immigration laws is quite different than the issues of whether they should be compelled to do so. Thus, it is not inconceivable that one could end up supporting, permitting, but not requiring, states to enforce certain core immigration offenses, but believing that they should do so through enforcement agencies visibly distinct from the conventional "police." It is likewise not inconceivable that one could end up supporting permitting states to engage in this form of law enforcement while believing that the laws they are enforcing should be significantly amended.

A. How Vigorously Should Immigration Laws Be Enforced?

Enforcement of immigration laws, whether by the federal government or the states, is not a cost-free enterprise. If the current laws were taken seriously and enforced evenhandedly, the federal courts would swiftly be overwhelmed.77 Over twelve million individuals are estimated to be present in the United States additional immigration crimes."); see also Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

76. See infra notes and text accompanying 77-83.

77. Some might contend that this effect would be short lived because news of the greater enforcement would result in less immigration or perhaps even emigration. The magnitude of the marginal deterrence is difficult to predict, however. It would depend on factors such as: knowledge by entering immigrants, the penalties awaiting them, and the ability of potential entrants to weigh their current desperate plight with an American prison term.
unlawfully. A significant number of this estimated figure are criminal aliens by virtue of entry without inspection, failure to depart pursuant to an order of removal, or making a false claim of United States citizenship. Capturing and imprisoning more people for long periods of time consumes valuable and scarce resources that might be spent, among other things, on capture and imprisonment of other wrongdoers such as: murderers, drug dealers, bank robbers, tax cheats, and domestic terrorists. The indirect costs of imprisonment are enormous as well. To the extent economic migration is reduced, the economic benefits resulting from labor mobility are commensurately reduced. The United States would lose a source of low cost labor, and the nations from which the migrants originated would lose the remittances the migrants provide. This later point would be true regardless of whether we imprison the migrants once they arrive or whether the migrants are too scared to cross the borders. In addition, broader participation in the incarceration of economic migrants arguably creates a greater acceptance of cruelty, which has its own costs.


82. Animal cruelty statutes, for example, are sometimes justified not on the rights or interests of animals but because of their "tendency to dull humanitarian feelings and to corrupt the morals of those who observe or have knowledge of those act." Commonwealth v. Higgins, 178 N.E. 536, 538 (1931). If cruelty to conventional animals can corrupt human beings then so can cruelty to humans not blessed with American citizenship. Cf. Stephens v. State, 3 So. 458, 459 (1888) (upholding animal cruelty statute in part because "[t]o disregard the rights and feelings of equals, is unjust and ungenerous, but to willfully or wantonly injure or oppress the weak and helpless, is mean and cowardly. . . . Cruelty to them manifests a vicious and degraded nature, and it tends inevitably to cruelty to men." Again, it would be remarkable if cruelty to animals metamorphosed into cruelty to humans, but cruelty to humans from other nations sometimes did not result in cruelty to those with citizenship.).
There is also a second set of costs from vigorous enforcement of immigration norms: the fact that doing so may actually increase criminal behavior, at least in some portions of society. Suppose the police checked every time one reported potential criminal behavior to determine whether one (and one’s family members) had compulsory liability insurance on one’s vehicle, or whether one’s taxes had been filed, or whether a host of other regulatory requirements in the modern state had been followed. Suppose further that the penalty upon a finding of one of these violations was severe. It is not difficult to imagine that, while there might possibly be some increase in adherence to these regulatory requirements, cooperation by the populace in the control of serious crime would decline. The hypothetical is, in essence, the situation that would exist for many immigrants were local law enforcement to become more vigorously involved in enforcement of the broad spectrum of federal immigration norms. People whose immigration status is questionable or who have a family member with questionable status become reluctant to report serious crime. And this is true even if the individual reporting is ultimately able to establish their right to be present in the United States. The logical consequence is an increase in unreported crime against immigrants and the non-immigrant population. As occurs with ever-greater frequency in our melting pot society, the public perception of linking immigrants with crime would likewise continue.\textsuperscript{83}

To be sure, this second set of costs discussed above can, in theory, be minimized if law enforcement makes clear that the reporting of conventional crime—burglary, rape, murder—will not trigger an investigation into immigration status of the reporter or the reporter’s family members. Another way to minimize the cost is to create some sort of strong division between the state and local authorities that address conventional crime and those that assist the federal government in enforcement of immigration norms. And, indeed, as discussed below, this is the theory behind various visas available to immigrant victims of crime in the United States. If, however, the protections are only theoretically available, the second set of costs become quite serious. They are likewise serious if, as the federal government now appears to be advocating, the same local authorities who enforce federal immigration norms also enforce conventional criminal statutes.

There may, on the other hand, be benefits from more vigorous enforcement. Conceivably, deterrence through enforcement and prison terms may be cheaper than alternative methods of enforcement, such as high tech or low-tech fences or

compensatory actions by vigilante groups. Vigorous enforcement of immigration laws might also increase safety generally, assuming a correlation exists between immigration status and willingness to abide by other laws such as those governing: drug use, formation of criminal enterprises (gangs), or terrorism. In theory, it is possible that a greater investment in immigration enforcement could reap benefits beyond those that could be achieved by more generalized efforts at law enforcement.

B. Should The Enforcement Be Done Nationally or Locally?

Even assuming that there are marginal benefits from greater resources devoted to immigration law enforcement, the question remains whether that increased enforcement should be subject to centralized or decentralized control. Decentralized control permits greater sensitivity to the values and needs of their local communities. It also potentially takes advantage of local information about the nature of immigration crime. Second, decentralized decision making creates useful information. While a single system of law enforcement will generate information over time about successes and failures, it does not generate information about the success alternative methods would have achieved. Permitting decentralized approaches to the enforcement of immigration laws – like the enforcement of other laws – creates a natural experiment that is likely to permit a Darwinian evolution of enforcement methodologies. Although experiences from one locality may not be the same as another, it provides for better opportunities to gain empirical evidence as well as learning in law enforcement than does the use of a single, united approach. Decentralization has its costs too. Some methods of immigration enforcement may fail or even be counterproductive. The “Darwinian” benefits described above may take longer to achieve than can be justified by the short-term harms occasioned. Moreover, there is potentially room for the abuse that sometimes occurs when local groupthink goes unchecked by external examination. And, of course, the obverse of decentralization is unequal treatment.

84. Homeland Security Secretary Michael Chertoff makes the argument that more vigorous enforcement means decreasing illegal immigration. When describing Operation Streamline, he states:

[I]ndividuals who are caught at certain designated high-traffic, high-risk zones are prosecuted and if convicted are jailed. This has an unbelievable return effect. In Yuma sector, over the last – of the first quarter of 2008 fiscal year, which is to say October through December of last calendar year the Department of Justice prosecuted over 1,200 cases. And as a consequence, apprehension rates dropped nearly [seventy] percent.

C. Should Decentralized Enforcement Be Under The Control of States and Localities or the Federal Government?

The mere fact that decentralization can yield benefits does not imply that states or localities need be the ones formulating or implementing decentralized policies. The federal government itself can – and to a limited extent has already – decentralize enforcement methodologies with respect to immigration laws and other federal laws as well.\(^8\) Finding benefits from decentralized enforcement over immigration laws thus does not cinch the case for state or local involvement.

One argument in favor of state involvement simply proceeds from the assumed need for massively greater enforcement of immigration laws and the alleged impracticalities of achieving that goal without state involvement. The problem of illegal immigration is said to be so immense that we need the power of numbers. With federal border patrol agents numbering a mere 15,000\(^86\) spread over 1,969 miles of southern border (plus 5,522 miles of Canadian border). And with twenty-four hour vigilance and interior Immigration and Customs Enforcement agents numbering even fewer, it is said we need a multiplication of force.\(^87\) State and local officers being allowed to enforce immigration laws will increase borderland security and will help safeguard all of us during these dangerous times.

A second argument rests on the unique ability of state and local law enforcement to harness information already gained in fighting other forms of crime to fight immigration crime as well. Delegating enforcement to the state harnesses existing expertise. Local law enforcement has already invested

\(^85\) One methodology the federal government has utilized is the creation of multiple telecommunications networks and criminal justice information services to support local, state, and tribal agencies. These identify individuals in violation of federal law. See e.g. JAMES DEMPSEY, CENTER FOR DEMOCRACY & TECHNOLOGY, OVERVIEW OF CURRENT CRIMINAL JUSTICE INFORMATION SYSTEMS 101, 104-05 (2000), available at www.cdt.org/publications/overviewofcjis.pdf (detailing national systems such as: CODIS (Combined DNA Index System), NIBIN (National Integrated Ballistic Information Network), NDPIX (National Drug Pointer Index), and Federal Hazardous Material Information).

\(^86\) President George W. Bush, State of the Union Address (Jan. 28, 2008), available at http://www.whitehouse.gov/infocus/immigration/ (stating that “[t]he Administration has expanded the Border Patrol from approximately 9,000 agents in 2001 to more than 15,000 agents today. By the end of 2008, we will have more than 18,000 agents”).

considerable time in learning local patterns of legal and illegal behavior that is likely to prove useful in capturing those unlawfully present in the United States. Illegal immigration problems vary from locality to locality. Moreover, the balance to be struck over competing law enforcement priorities may vary across localities. In some localities, a policy that prohibits officers from inquiring into immigration status may lead to a large number of smuggling drop houses or may result in the failure to detect human trafficking. In others, vigorous pursuit of immigration law violations by local law enforcement may subvert enforcement of other local laws that the community may think more important: immigrant victims of crime may come to distrust the police to such an extent that they are unwilling to report crime or participate in the investigation of crime. Prohibiting those with specialized expertise in either detection of crime or in determining the local weight of varying effects would thus appear to be a significant waste of resources.

There are rejoinders and rebuttals to each of these points, however. First, training someone to fight immigration “crime” is not the same thing as getting them to detect traffic violations or more serious crimes such as robbery and homicide. The traditional forms of law enforcement tend to involve regulatory schemes that are orders of magnitude simpler than the labyrinths of complexity implicated by laws such as the tax code or the immigration laws. Enforcement by non-specialists, as state law enforcement officials are likely to be, creates a high risk of false apprehensions and the mislabeling of lawful immigrants as aliens subject to removal. Immigration law like the tax code is notorious for its statutory complexity.88

The problem of error resulting from having amateurs enforce federal immigration law is difficult to overstate. Even trained federal agents responsible for apprehending and arresting immigrants at U.S. borders often mislabel an individual’s status.89 Advocates working in the nations’ immigration detention centers routinely locate and free citizens and legal permanent residents whom

88. See Ira J. Kurzban, Kurzban’s Immigration Law Sourcebook (American Immigration Law Association, 10th ed. 2007) (arguing that the famous citizenship charts of Professor Ira Kurzban where one is forced to grapple through pages of charts to decipher whether an individual may have derived or acquired immigration status from a United States parent illustrate the complexity of our immigration laws).

89. See generally United States Commission on International Religious Freedom, Report on Asylum Seekers in Expedited Removal (2005) (giving a glimpse into Customs and Border Patrol’s mislabeling of immigrants status and failure to follow the procedures set forth by Congress. The Report found that while DHS established several sound procedures to prevent bona fide asylum seekers from being wrongfully expelled through expedited removal, serious and systemic problems in the implementation of the process at the border exist.).
have erroneously been labeled as non-residents.\textsuperscript{90} My own work as a clinician visiting various large and small immigration detention facilities in Texas is consistent with the experience of other advocates. People – generally of Hispanic origin and with little power – are often imprisoned for significant periods of time based on mistaken analysis by federal agents of the facts of the case and immigration law. These wrongly detained individuals have no currently recognized right to government funded counsel\textsuperscript{91} – because their wrong is “civil” – and have difficulty as a practical matter in finding counsel because they have limited ability to communicate to the outside world\textsuperscript{92} and perhaps even less ability to pay anyone to get them out. If trained federal agents with experience generate this level of error in their enforcement of immigration laws, relatively inexperienced and lesser trained cops on the beat, many of whom may have the wrong level of enthusiasm for this new task, are likely to do even worse.

Finally, while having local law enforcement be the same people that enforce immigration norms may create economies and efficiencies in certain respect, that merger is the very phenomenon that may, as described above, create crime by dissuading immigrants from reporting crime to law enforcement. There is thus a difficult-to-escape trade off between economic enforcement of immigration law and economic enforcement of conventional criminal law.

The costs of error are significant and not captured by the existing political calculus. Under the law as it is, state and local governments will rarely if ever have to pay for wrongly putting innocent people in detention, often for weeks or months. The qualified immunity accorded officials, coupled with the fact that in general the wrongful detentions are the result of mistake (fostered sometimes by zeal) rather than true malice, means that there are no damages available to those wrongly incarcerated. Notwithstanding the significant number of wrongful incarcerations that occur, no cases could be found in which victims of state or local police error were able to recover for the significant losses and humiliation that resulted from the detention. And while official immunity does not protect against injunctive actions, it would require considerable creativity and a fairly


\textsuperscript{91} Immigration and Nationality Act (INA) of 1952 § 240(b)(4)(a), 8 U.S.C. 1229(a)(4)(a) (2006) (stipulating an alien’s right to hire counsel “at no expense to the Government.”).

\textsuperscript{92} \textit{See Margaret H. Taylor, Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform, 29 Conn. L. Rev. 1647, 1663-1667 (1997).}
courageous judge to craft injunctive remedies that would seriously reduce the rate of error in enforcement.93 A second argument against deputizing the states even further is that they do not have a monopoly on innovation or experimentation: the federal government can adapt too. The FBI, ICE and other enforcement agencies have local offices and local practices. At least in the case of the FBI, their agents often develop specialized information about the locality and crime that synergizes well with immigration enforcement. Thus, arguments in favor of local enforcement on grounds of adaptability and experimentation may founder on the realities of modern federal law enforcement. The case for local law enforcement may thus rest less on anything having to do with efficiencies in enforcement than on the ease with which resources can be diverted to getting rid of those who look or act different than the majority in the community. In addition, arguments in favor of local enforcement seem to accept the not-so-occasional mistake in the process rather than face the explicit tax costs of creating a large and well-trained federal army needed to enforce immigration violations.

D. Merging General and Immigration Law Enforcement

Whether done by federal officials, state officials or some combination, the question remains as to whether immigration enforcement should be performed by, and as ancillary to, more general law enforcement, or whether it should be handled almost exclusively by specialists. One argument discussed above is training. If the model is the Internal Revenue Service, the argument in favor of specialized enforcement is strong. General law enforcement tends for good reason to handle only the most blatant forms of tax fraud.

There is a second cost, however, to merging immigration enforcement with general law enforcement. It is an argument advanced by a somewhat surprising alliance of immigration advocates and many local law enforcement officials opposed to the federal push for greater state involvement in immigration enforcement.94 They argue that involvement of their employees in federal enforcement personnel would not have access to databanks or information that would permit them to screen individuals at the same level of accuracy as their federal counterpart. However, recent changes to the NCIC databank and current practices of information sharing between local and federal law enforcement agents have helped dispel these concerns. Current law obligates DHS to respond to inquiries of a suspect’s immigration status from local law enforcement seeking to verify or ascertain the individual’s citizenship or immigration status. The NCIC is also recording an increasing amount of information on an alien’s immigration status. See generally IIRIRA § 642(c), 8 U.S.C. § 1373(c) (2006); see also National Crime Information Center, http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm (last visited Apr. 20, 2008).

93. Some of the arguments about the need for specialization and thus the undesirability of state involvement are weakening. A once common argument was that local or state law enforcement personnel would not have access to databanks or information that would permit them to screen individuals at the same level of accuracy as their federal counterpart. However, recent changes to the NCIC databank and current practices of information sharing between local and federal law enforcement agents have helped dispel these concerns. Current law obligates DHS to respond to inquiries of a suspect’s immigration status from local law enforcement seeking to verify or ascertain the individual’s citizenship or immigration status. The NCIC is also recording an increasing amount of information on an alien’s immigration status. See generally IIRIRA § 642(c), 8 U.S.C. § 1373(c) (2006); see also National Crime Information Center, http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm (last visited Apr. 20, 2008).

94. See Letter from Major Cities Chiefs Ass’n to the Honorable Barbara Mikulski, Chairwoman Subcomm. on Commerce, Justice and State (Oct. 16, 2007) (expressing opposition to the Vitter
immigration law enforcement materially hinders their ability to investigate and prevent crime— as defined by their states or localities—within their jurisdictions. This impediment occurs, they say, because immigration communities will shun contact with local police once they perceive them as involved with immigration enforcement. The result is that less crime is reported, and victims and witnesses are less likely to cooperate with the investigation and prosecution of crime. This consequence particular affects immigrants: rational criminals target undocumented immigrants when they know that their victims and the friends or neighbors of their victims are extraordinarily unlikely to cooperate with police who may have been enlisted by the federal government in the effort to inform federal immigration norms.  

Although the police chiefs who have opposed federal enlistment are motivated in part out of disapproval of criminal behavior regardless of the immigration status of the victim, they are also concerned about the spillover effects of crime against immigrants by the non-immigrant community, including the fostering of norms under which violence against individuals becomes acceptable. And while many of those crimes will target immigrants without legal status, the increase in criminal behavior will effect citizens and lawfully present aliens as well. Individuals that are legally present in the United States may be reluctant to contact the police or work with the legal system because they do not want to focus attention on their family member’s immigration status.

amendment that would act to strip localities of funds if they do not assist in the enforcement of immigration laws) (on file with the Tulsa Journal of Comparative & International Law; see also Judy Keen, Big Cities Reluctant to Target Illegals, USA TODAY, June 20, 2006, at 01a (noting that in June 2006 the Major Cities Chiefs Association, a national group representing fifty-seven big-city police chiefs warned President Bush and Congress that local enforcement of federal immigration policies can backfire. As explained by Houston's Police Chief Harold Hurtt, "[w]e have spent many years . . . getting special communities to talk to us, to report crime, to be witnesses. . . . If we stop individuals (to ask about immigration status), we would lose all of that.").

95. In her 2006 article discussing why undocumented crime victims are afraid to call the police, Orde F. Kittrie details over a half-dozen scenarios where criminals specifically target immigrants because of their lack of familiarity with the law and their perception that the local police may also wear the shoes of deportation officers. She reports: "[a]s one local law enforcement official put it, unauthorized aliens 'are almost the perfect victims . . . They cannot turn to authorities because they have problems with their legal status . . . They're prime for the picking.'" Orde F. Kittrie, Federalism, Deportation, and Crime Victims Afraid to Call the Police, 91 IOWA L. REV. 1449, 1454 (2006) (quoting James Hubert, Chief of the Antibias Unit of the Queens District Attorney’s Office, Wendy Lin, Immigrants Fear Fighting Back; 'Perfect Victims' Vulnerable to Crimes, Then Deportation, NEWSDAY, June, 10, 1991, at 23)).

96. See generally JEFFREY S. PASSEl, SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S., PEW HISPANIC CENTER, Mar. 7, 2006 (stating that a growing number of American families are of mixed immigration status where some family members are citizens while others are undocumented).
To some extent, Congress has recognized these concerns of local law enforcement: denial of "immigration immunity" to immigrants victimized by abhorrent criminal behavior will lead to a greater number of unsolved crimes. Congress has thus set forth various statutory schemes that offer the carrot of legal protection against deportation if the victim or witness cooperates with the investigation or prosecution of crime. Congress has enacted three well known visas to bring immigrant victims out of the shadows: the S visa for individuals that hold critical information concerning certain crimes, the U visa\(^\text{97}\) for certain crime victims, and the T visa for victims of slavery.

It is questionable, however, whether this attempt by Congress to palliate the effect of its own drafting of local law enforcement into enforcement of criminal and civil immigration matters has succeeded or has any realistic chance of success. Despite the high estimates of immigrant victims, only a few individuals have received these visas.\(^\text{98}\) Moreover, an immigrant victim of a crime whose status is doubtful or a similar immigrant witness to a crime who does the cost-benefit calculation may, as some of their attackers know full well, choose to keep silent. Getting involved will not undo the crime and may subject them to retaliation. The visa carrot will involve time with lawyers and immigration officials and, if the victim fails to receive it, may backfire by bringing their lack of status to the attention of authorities. And if my experience as a clinical attorney with the immigrant community is representative, the theoretical availability of these visas has done little to quell the fear and suspicion of local law enforcement. This fear is fostered by the federal moves over the past decade to enlist officers in efforts that deeply threaten many immigrants' economic livelihood and family stability. Indeed, in some cases, the consequences of heightened enforcement are life threatening.

There may be costs to local law enforcement initiatives by enforcing immigration laws that go beyond manufactured non-cooperation with the investigation of traditional crime. There may be a symbolic effect too. When localities choose to not enforce immigration laws they cite the importance of keeping what Justice Brennan coined the "shadow population" from going completely underground by cutting off contact with the police, health


\(^{98}\) Immigration and Nationality Act (INA) of 1952) § 101(a)(15)(T) (limiting T-visas to an annual cap of 5,000); see also OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEP'T OF STATE, U.S. GOVERNMENT DOMESTIC ANTI-TRAFFICKING EFFORTS (2007), available at http://www.state.gov/g/tip/rls/tiprpt/2007/82811.htm (stating that from the year 2000 to March of 2007, the Health and Human Services certified 1175 immigrants as victims of human trafficking. Official estimates of the number of victims of human trafficking in the United States annually ranged from fifty thousand to seventeen thousand. The number of victims receiving immigration benefits from the carrot offered by Congress is minuscule.).
departments, schools, city and country health agencies. When immigrants shun engagement with the police and legal process, they are less likely to enforce their rights as employees, students, and patients. There have been some efforts to quantify the chilling effect the 1996 legal immigration reforms have had on undocumented immigrants’ willingness to seek services. Mark L. Berk and Claudia L. Shur in the Journal of Immigrant and Minority Health attempt to document the degree to which one’s immigration status serves as a deterrent to seeking medical care. 99 Based on findings from in-person surveys of undocumented Latinos in Houston, El Paso, Fresno and Los Angeles, they found that thirty-nine percent of those surveyed feared seeking medical services because of their undocumented status.

III. POLICY CONSIDERATIONS IN LOCAL ENFORCEMENT

A. Should Congress Establish Uniform Rule for Localities to Follow

From the point of view of states and localities, the federal government’s exclusive power to prescribe immigration law does not preempt them from utilizing their independent authority to reject or embrace immigration enforcement activities. Courts have presumed that state and local officers may enforce the criminal provisions of immigration laws. 100 Many argue that courts have also permitted state and local officers to enforce civil provisions of immigration laws.

Of course, the mere fact that decentralization can yield benefits does not imply that states or localities need be the ones formulating decentralized policies. The federal government itself can – and to a limited extent has already – decentralized enforcement methodologies with respect to immigration laws and other federal laws as well. Still, so long as those methodologies are the progeny of a single agency, they are likely to be less diverse than if multiple constituencies are given authority over the matter. 101 Even a non-monolithic

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100. Non-federal enforcement of the criminal provisions of the INA has been found consistent with the state’s police power to make arrests for criminal acts and that there is an expectation that localities are expected to cooperate in the enforcement of federal criminal laws.

101. Peter Schuck has distinguished two ways which Congress can devolve its power to states and localities. The first and most common he terms “default decentralization” which entails “the federal policymaker simply allow[ing] the power to make and implement decisions that might constitutionally be made at the national level to remain instead where it already is – with a lower level of government or with private actors.” The second type is “affirmative decentralization” where a “federal policymaker actively delegates – downward or outward – power that she is
federal approach can stifle local creativity and problem solving. A decentralized approach may unleash many virtues, such as experimentation, local adaptability, greater accountability, competition and more avenues for local lobbying.102

B. Should Congress De-Criminalize Immigration Law?

Congress should redraft provisions of the law that muddy the waters between criminal acts and civil infractions. In 1996 when Congress last made substantial reforms to immigration laws, Congress took the approach that common immigration violations should be criminalized to deter immigrants from violating immigration rules. If one looks at the sheer rate of increase in immigrants committing violations that are now labeled as criminal, along with the increase of prosecutions for such acts, it is difficult to conclude that labeling immigration violations as criminal have acted as a deterrent.

As a growing number of undocumented immigrants fall into the category of “criminal aliens,” it becomes more difficult to articulate a sensible policy defining when local and state officials should enforce immigration laws. There are several reasons why this is true. First, as the number of immigrants labeled as “criminal aliens” fill national databases, local and state officials have to choose whether to devote precious time and resources to help deport someone that simply committed the crime of illegal entry or to decide not to get involved. Arguably, nearly everyone agrees that local and state officials should assist in enforcing immigration law when the immigrant suspect is a “criminal alien” known to have assisted in a terrorist organization or to have committed serious violent crimes outside of the United States. However, it should be noted that municipalities across the nation have enacted measures rejecting the notion that their officers should inquire or arrest individuals that have violated immigration laws. For those calling for increased state and local enforcement, making the category “criminal alien” means something more than an immigrant that entered presently exercising.” Peter H. Schuck, Introduction: Some Reflections on the Federalism Debate, 14 YALE L. & POL’Y REV. (SYMPOSIUM ISSUE) 1, 20 (1996).

102. A middle ground between a monolithic federal approach and decentralized decision making is what Peter Spiro has coined “cooperative federalism.” Cooperative federalism entails a “central government retaining primary control and supervision over immigration decision-making, but enlisting subnational authorities as junior partners and allowing them some discretion to assert or account for particular subnational needs.” Peter J. Spiro, Federalism and Immigration: Models and Trends, 53 INT’L SOC. SCI. J. No. 167, 67 (2001).
aliens, there is an increased likelihood that local and state participation in enforcing immigration rights will substantially disrupt the policies’ ability to develop community trust. If immigrant communities believe that officials will inquire about an individuals’ immigration status, victims’ willingness to report crime and to cooperate with investigations and prosecutions will plummet. Those trained in immigration law understand that not all immigrants that may have violated the criminal act of entering the United States without inspection should automatically be jailed and prosecuted. For example, international law and domestic statutory provisions provide measures were authorities are trained to treat certain individuals, such as individuals seeking asylum, battered spouses, or immigrants subject to forms of human slavery with special care during the initial law enforcement stages of apprehension and arrest. Given that the law is currently interpreted to permit state and local law enforcement officers to enforce criminal violations of immigration laws, state and local law enforcement officers that are not trained in immigration law may fail to exercise necessary discretion or to follow procedures that are carefully drafted to ensure the successful prosecutions of serious criminal activity and the protection of a victim’s safety.

Proponents arguments for continuing the trend of criminalizing immigrant violations and increasing immigration enforcement at the local and state level remind of us the deathly toll of policies in place in the months leading up to September 11, 2001. Three out of the four hijackers stopped by local police prior to September 11th violated the civil provisions of federal immigration laws. Arguably with the correct agreements and legal instruments in place, the local police that stopped the hijackers could have communicated with their federal counterparts and stopped the deadly attack. Such information sharing between the local officers and the federal officials need not be complex. Local police could have effortlessly checked the NCIC system, noted that the individuals were present without documentation, and could have followed the necessary procedures to transfer the individuals to federal detention centers.

It is important to note that all four of the hijackers had violated the civil as opposed to the criminal provisions of the INA. Absent a special MOU between the local and federal agency, Congress arguably preempted the officers that pulled over the four hijackers on routine traffic stops from arresting the hijackers based on their civil violations of the INA. The 9/11 Commission then called for increased local involvement in enforcing immigration violations.

The missed opportunities of police to apprehend the hijackers before the attack is not a sufficient justification for expanding state and local law enforcement of immigration violations. In 2005, police stopped more than eighteen million drivers. The police arrested roughly three percent of the
individuals with whom they had contact. The September 11th attacks were not caused by a breakdown of communication and cooperation between local and federal officers at the point of the traffic stop. Federal agencies did not have the intelligence in place to brand the hijackers as future hijackers. There was no developed intelligence that could have been imputed into a national database for local officers at the point of the traffic check to evaluate. Furthermore, in the months leading up to the attacks of September 11th there was not, and there still is not, a federal infrastructure in place to adequately transfer custody of all the undocumented immigrants from local jails to federal jails where they can be processed and deported.

IV. CONCLUSION

Although it is an important subject, the debate over local enforcement of immigration law is side effect and an artifact of the injustices of American immigration law and policy. To a significant effect it is a side-show created by the difficulty in reforming U.S. immigration laws and the prejudices that become revealed in efforts to do so. It is far easier to discuss the abstractions of federalism than it is to explain exactly why some impoverished child victim of gang violence in Honduras should not be permitted to work in the United States for stunningly low pay. If the immigration laws of the United States were just, few would object to state and local police efforts to enforce them any more than when local police capture a fleeing federal felon following a traffic stop.

The problem is that the accumulated hodge-podge of contemporary American immigration law fails to comport to virtually any norm of justice. Efforts to modernize the immigration system to match the laws of supply and demand, principles of family unity, and fundamental fairness have thus far failed. Angry voices of those opposed to any amnesty provisions have stifled any significant immigration reform. In the absence of comprehensive reform, hundreds and thousands of immigrants in the workforce are present in violation of civil and criminal laws.

The real question in the face of obvious injustice in immigration law and policy is whether one should launch a frontal attack on the policies themselves or whether one should attempt a flanking maneuver by casting the issue as whether state and local officials should be permitted or required to assist the federal government in enforcement of its policies. The problem with the flank attack is that it tends to entrap its soldiers. Those who favor enforcement of restrictions


104. Id. (noting that the transgressions of the hijackers were civil, not criminal violations and that INS had not developed a program to detect the hijacker’s civil immigrations violations).
on immigration often thus find themselves opposing the rights of states and localities to balance the costs and benefits of immigration law enforcement. That is a curious position for "conservatives." Those who favor liberalization of immigration rules find themselves in the uncomfortable position of arguing that local police should ignore even obvious violations of those portions of federal immigration policy with which only the most radical would disagree.

As someone who sees the consequences of choices in the enforcement arena on a daily basis, I see a middle ground. To begin with, although federalism issues are important, immigration advocates should focus their energies on the main issue: immigration policy. Second, the federal government should not dragoon states or localities into enforcement of immigration policies with which they disagree. The burden is of dubious constitutionality and of little wisdom. States and localities should decide for themselves how to weigh the advantages of enforcing federal immigration policy – criminal or civil – against its significant costs. They should do so, however, in a way that forces all of their constituents rather than a narrow class of individuals to: (a) bear the costs of the mistakes that will invariably result when non-experts enforce stunningly complex provisions, and (b) bear the costs of the increase in conventional criminal behavior likely to result when significant segments of the population are fearful of cooperating with law enforcement. I would be much more trusting of local government’s decisions to enforce federal immigration laws if they would give up their qualified immunity for mistakes that occur as a result and would spell out for the citizenry the heightened risks they face when those predisposed to conventional crime can take advantage of immigrant fears of cooperating with law enforcement. And while some of that increase in crime may be visited on those in the United States illegally, and thus arguably a lesser subject of concern for most, there is little doubt that some of that increase in crime will spill over into the rest of society.