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## CHAPTER THREE

### POLICING IMMIGRANT COMMUNITIES

José Antonio Elena Rodriguez was sixteen in October 2012 when a border patrol officer shot him repeatedly in the back and head. The officer — officials did not release his name for more than two years after the killing<sup>1</sup> — claimed José had thrown rocks at him from the Mexican side of the border. Prosecutors brought no charges.

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Anastasio Hernandez Rojas was killed on May 28, 2010. Immigration officials deported him after twenty-seven years of living in San Diego, and officers caught him trying to return to his wife and five children. A cell phone video captured the events that led to his death.<sup>2</sup> Officers tazed the forty-two-year-old Rojas five times while he was handcuffed and surrounded by a dozen agents. They demanded he “quit resisting”<sup>3</sup> as he cried for help.<sup>4</sup> The coroner declared his death a homicide, but prosecutors did not convene a grand jury until two years later.<sup>5</sup> They never announced an indictment.

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Policing is at an inflection point. Police killings of unarmed African American men inspired the national conversation about policing, and those killings are, appropriately, the conversation’s focus.<sup>6</sup> The conversation requires context, though — not only background,<sup>7</sup> but

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<sup>1</sup> Bob Ortega, *Name of Border Agent Who Shot Teen Released by Judge*, AZCENTRAL (Nov. 13, 2014, 9:22 PM), <http://www.azcentral.com/story/news/local/arizona/2014/11/13/border-agent-shot-teen-name-released/18993997> [<http://perma.cc/DB8E-LXKC>].

<sup>2</sup> The video is available online. *Need to Know, April 20, 2012: Crossing the Line*, PBS (Apr. 20, 2012) at 2:53, <http://www.pbs.org/wnet/need-to-know/video/need-to-know-april-20-2012-crossing-the-line/13640> [<http://perma.cc/X882-YKWF>]. For an investigation of the merits of recording police and its potential effects (or lack thereof) on police behavior, see generally *infra* ch. IV.

<sup>3</sup> *Need to Know, supra* note 2, at 2:53.

<sup>4</sup> Richard Allyn, *Families Want Answers in Deaths Involving Border Patrol*, CBS 8 (Feb. 22, 2013, 12:04 PM), <http://www.cbs8.com/story/21307139/families-want-answers-in-deaths-involving-border-patrol> [<http://perma.cc/H6NU-DKKF>].

<sup>5</sup> Elisabeth Ponsot, *Web Exclusive: Grand Jury to Investigate Death at the Border*, PBS (July 20, 2012), <http://www.pbs.org/wnet/need-to-know/video/video-web-exclusive-grand-jury-to-investigate-death-at-the-border/14290> [<http://perma.cc/QZ52-44GZ>].

<sup>6</sup> See *supra* Introduction, pp. 1707–10.

<sup>7</sup> Many actors, political moments, and policies formed the American criminal justice system as it exists in 2015. A recent book by Professor Naomi Murakawa argues that well-intentioned liberal reform efforts influenced modern enforcement trends, incarceration rates, and the severity

foreground.<sup>8</sup> This Chapter highlights the policing of immigrants. What was once a civil-enforcement regime has developed alongside the modern criminalization, enforcement, and incarceration regime. It is now executed by federal, state, and local officers.<sup>9</sup> It is the majority of federal criminal work.<sup>10</sup> It shares the goals of criminal enforcement: immigration enforcement is used to manage crime, and criminal enforcement is used to manage immigration.<sup>11</sup> And like the victims of police violence, immigration policing's victims have little recourse. In some ways, they have even fewer remedies.

This Chapter describes developments in policing immigrants, identifies a gap between police officers' capacity to do harm and victims' rights to a remedy, and proposes enforcement consolidation as a means to bridge that gap. The argument proceeds in three sections. Section A describes immigration enforcement's roots and growth. In important ways, that enforcement is now indistinguishable from policing. Section B identifies an accountability deficit — a gulf between police's capacity to harm immigrants and immigrants' access to any sort of remedy. That section further argues that the gulf is widened by immigrants' limited access to constitutional protections. Section C offers a way forward: consolidating immigration policing in the federal government to increase transparency and facilitate reform.

#### A. *Developments in Policing Immigrants*

Certain features of the immigration-enforcement regime have remained static over the last two centuries; others have changed dramatically. The forces driving the immigration regime, for instance, have not changed: regulation has always been driven in part by an image of immigrant criminality,<sup>12</sup> an image which itself has been driven by rac-

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of criminal punishments. *See generally* NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014).

<sup>8</sup> Police killings are an egregious manifestation of violence in a system that is violent even in its day-to-day functions. *See generally* Jonathan Rapping, *It's Not Just the Cops*, *THE NATION* (Jan. 12, 2015), <http://www.thenation.com/article/194633/its-not-just-cops> [<http://perma.cc/TNC9-AEJF>].

<sup>9</sup> *See infra* section A.2. Not only has the federal government promulgated a series of immigration-related laws and enlisted state actors to assist in enforcement, but also states have relied on “mirror-image theory,” which provides a legal foundation for states to mirror federal regulations, to enact laws of their own. *See* Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 *DUKE L.J.* 251, 253–55 & nn.1–14 (2011) (listing examples).

<sup>10</sup> *See infra* notes 35–37 and accompanying text. This Chapter will describe in detail federal enforcement trends.

<sup>11</sup> *See* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 *COLUM. L. REV. SIDEBAR* 135, 135–36 (2009), <http://www.columbialawreview.org/articles/managing-migration-through-crime> [<http://perma.cc/J9AM-86GU>].

<sup>12</sup> “The notion of the outsider as a threat is as old as human history . . . . The trope has played itself out in U.S. law and politics throughout the history of the nation.” Jennifer M. Chacón,

ism.<sup>13</sup> The tools to implement those forces, though, have changed. The modern criminal justice system and immigration enforcement regime have fused together,<sup>14</sup> and today it is possible to say that immigration enforcement is the work of police generally. This is due not only to an explosion of criminal laws governing migration, but also to the extent to which federal, state, and local police enforce both these criminal laws and the civil provisions of the immigration law. This section describes these changes from two perspectives: the laws that are enforced and the actors who enforce them.

1. *The Laws Enforced.* — Immigration law is complex, and this section describes developments only as they have intertwined civil immigration enforcement with the criminal law. Criminal law began to filter into the civil immigration-enforcement regime in 1917 when Congress created a “narrow class of deportable offenses.”<sup>15</sup> Congress expanded the class with the Immigration and Nationality Act of 1952,<sup>16</sup> the Anti-Drug Abuse Act of 1988,<sup>17</sup> the Immigration Act of 1990,<sup>18</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996<sup>19</sup> (IIRIRA). The immigration laws now identify

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Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1835 (2007). “[T]he notion that immigrants have a propensity toward general criminality has a surprising degree of currency in public discussion and policy debates, even though there is virtually no empirical data to support this conclusion.” *Id.* at 1839–40.

<sup>13</sup> For a historical vantage point on the racial animus of immigration regulation, see Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1119–44 (1998). It was not until 1888, for instance, that a United States law effectively authorized deportation. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 487 (2007). The next year, the Supreme Court approved the practice as applied to long-time resident Chae Chan Ping. Congress could exclude the Chinese pursuant to the Chinese Exclusion Act, wrote the Court, because “[i]t seemed impossible for [Chinese Americans] to assimilate with our people or to make any change in their habits or modes of living.” *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889).

<sup>14</sup> See Chacón, *supra* note 12, at 1843 & n.79. Two laws passed in 1996 exemplify the trend. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.), “represented some of the most significant procedural and substantive changes in U.S. immigration law since the early 1920s,” affecting primarily *legal* immigrants by increasing the circumstances under which those immigrants could be deported, Chacón, *supra* note 12, at 1842; see also *id.* at 1842–43.

<sup>15</sup> See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010).

<sup>16</sup> Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

<sup>17</sup> Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of the U.S. Code).

<sup>18</sup> Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C. and at 29 U.S.C. § 2920).

<sup>19</sup> IIRIRA, 110 Stat. 3009-546.

broad categories of criminal “convictions”<sup>20</sup> — like “aggravated felonies” and “crimes involving moral turpitude” — that trigger sharp and inevitable civil-immigration consequences. Since the 1990s these categories have included many minor offenses.<sup>21</sup> The “aggravated felony” category, for instance — which originally included only severe crimes like murder, drug trafficking, and firearms trafficking — now includes crimes like misdemeanor drug possession.<sup>22</sup>

As the authority to deport expands, the power to stop deportation contracts. Congress’s initial removal regime afforded courts “broad discretionary authority to prevent deportation.”<sup>23</sup> By 1990, Congress had eliminated that discretion.<sup>24</sup> And in 1996 Congress eliminated the Attorney General’s power to prevent deportation.<sup>25</sup> The consequences of criminal conviction, then, are not only severe but also inevitable. The Supreme Court has now said that criminal defense attorneys are constitutionally incompetent if they do not advise their clients of these consequences.<sup>26</sup>

In addition to adding civil-immigration consequences to otherwise criminal behavior, Congress has labeled immigration violations as criminal.<sup>27</sup> The Immigration Reform and Control Act of 1986<sup>28</sup> (IRCA) criminalized certain violations of immigration law,<sup>29</sup> and the scope of criminal immigration law has continued to expand.<sup>30</sup> In 2005, Customs and Border Protection (CBP) and the Department of Justice piloted “Operation Streamline,” a zero-tolerance program that files

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<sup>20</sup> The immigration laws sometimes consider continuances without a finding, pleas of nolo contendere, admissions to sufficient facts, and even submission to probation or drug treatment programs to be “convictions.” See SUSAN CHURCH, ILANA GREENSTEIN & PAROMITA SHAH, NAT’L LAWYERS GUILD, IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS 1–2 (2002), <http://www.nlgmass.org/home/immigration.pdf> [<http://perma.cc/3G45-YJ5G>].

<sup>21</sup> See Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1758 (2013).

<sup>22</sup> *Id.* at 1759.

<sup>23</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010).

<sup>24</sup> See *id.* at 1480.

<sup>25</sup> See *id.*

<sup>26</sup> See *id.* at 1482–84.

<sup>27</sup> This labeling can be considered part of a trend. See Legomsky, *supra* note 13, at 475 (“A series of seemingly unrelated recent developments can now be seen to form a clear, emerging trend in U.S. immigration law — heightened use of criminal enforcement strategies, both in setting immigration priorities and in executing them.”).

<sup>28</sup> Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

<sup>29</sup> IRCA prohibits, among other things, knowingly hiring or continuing to employ noncitizens who are not authorized to work. 8 U.S.C. § 1324a(a)(1)–(2) (2012).

<sup>30</sup> IIRIRA created many new crimes, including driving in excess of the speed limit while fleeing an immigration checkpoint, 18 U.S.C. § 758 (2012), and making a false citizenship claim for certain purposes, *id.* § 1015(e)–(f). “Improper entry” into the United States can yield six months of imprisonment, 8 U.S.C. § 1325(a), and unauthorized reentry after an order of removal can yield two years of imprisonment, *id.* § 1326.

criminal charges against people arrested by CBP officials.<sup>31</sup> Men, women, and children are automatically charged with illegal entry, a misdemeanor punishable by six months in federal prison.<sup>32</sup> Others are charged with illegal *reentry*,<sup>33</sup> a felony offense that could, if the reentrant has a criminal record, result in twenty years in prison.<sup>34</sup>

It is hard to overstate the significance of these legislative changes to immigration enforcement for criminal justice enforcement, prosecution, adjudication, and incarceration. Immigration crimes like illegal entry and reentry did not exist before the 1980s, but since 2004 they have “topped the list of federal prosecutions.”<sup>35</sup> Since 2009, they have constituted more than half of the entire federal criminal docket.<sup>36</sup> In some parts of the country the numbers are more dramatic: eighty-eight percent of all federal prosecutions in the Southern District of Texas are for illegal entry or reentry into the United States.<sup>37</sup> A surge in immigration policing has stretched courts thin<sup>38</sup> and changed the face of American prisons.<sup>39</sup>

2. *The Actors Enforcing Immigration Laws.* — The federal government enforces federal immigration laws, and today states and cities do too. State and local police have the authority to enforce immigration laws by two broadly defined sources. Section (a) describes federal delegation, and section (b) describes enforcement by state authority.

(a) *Enforcement by Federal Delegation.* — Immigration enforcement is the prerogative of the federal government, but Congress has defined circumstances under which the federal government may delegate immigration-enforcement authority to state and local police. The biggest federal delegation program, the 287(g) program, allows the Attorney General to grant immigration enforcement authority to state

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<sup>31</sup> See JOANNA LYDGATE, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, UNIV. OF CAL. BERKELEY LAW SCH., ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE (2010), [https://www.law.berkeley.edu/files/Operation\\_Streamline\\_Policy\\_Brief.pdf](https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf) [http://perma.cc/7PME-9U82].

<sup>32</sup> See *id.* at 2 n.3 (citing 8 U.S.C. § 1325).

<sup>33</sup> See *id.* at 4 n.18 (citing 8 U.S.C. § 1326).

<sup>34</sup> See 8 U.S.C. § 1326(b)(1)–(2).

<sup>35</sup> See Chacón, *supra* note 11, at 139.

<sup>36</sup> TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIV., FY 2009 FEDERAL PROSECUTIONS SHARPLY HIGHER: SURGE DRIVEN BY STEEP JUMP IN IMMIGRATION FILINGS (2009), <http://trac.syr.edu/tracreports/crim/223> [http://perma.cc/Z59W-AUWQ].

<sup>37</sup> AM. CIVIL LIBERTIES UNION, WAREHOUSED AND FORGOTTEN: IMMIGRANTS TRAPPED IN OUR SHADOW PRIVATE PRISON SYSTEM 23 (2014).

<sup>38</sup> *Federal Courts Hit Hard by Increased Law Enforcement on Border*, U.S. COURTS (July 2008), [http://www.uscourts.gov/News/TheThirdBranch/08-07-01/Federal\\_Courts\\_Hit\\_Hard\\_by\\_Increased\\_Law\\_Enforcement\\_on\\_Border.aspx](http://www.uscourts.gov/News/TheThirdBranch/08-07-01/Federal_Courts_Hit_Hard_by_Increased_Law_Enforcement_on_Border.aspx) [http://perma.cc/AJ78-YWM8].

<sup>39</sup> For a discussion of civil- and criminal-immigration enforcement’s relationship with and impact on American incarceration, see César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. (forthcoming 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2501704](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2501704) [http://perma.cc/H2HC-Z2HC].

and local police departments that sign Memoranda of Understanding (MOU) with Immigration and Customs Enforcement (ICE).<sup>40</sup> These MOUs allow state and local police to enforce civil immigration laws<sup>41</sup> so long as they participate in ICE training, agree to ICE supervision, and abide by certain ICE rules.

The Secure Communities Program (SCP) is another increasingly important federal delegation program.<sup>42</sup> Under SCP, ICE can issue “detainers”<sup>43</sup> to state and local police authorizing them to keep certain people incarcerated while ICE decides whether to detain them itself. State and local jails do not have to use this authority,<sup>44</sup> but they may, if ICE asks them to, incarcerate people who have not been and will not be charged with a crime.

(b) *Enforcement by State Authority.* — States and cities often enforce federal immigration laws — and their own immigration policies — without federal authority. States, at times joined by the federal government,<sup>45</sup> claim an “inherent authority” to enforce federal criminal

<sup>40</sup> 8 U.S.C. § 1357(g) allows the Attorney General to grant, pursuant to agreement by a state or local government, immigration-enforcement authority to specific officers subject to the Attorney General’s direction and supervision. 8 U.S.C. § 1357(g)(3) (2012).

<sup>41</sup> See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Feb. 24, 2014), <http://www.ice.gov/news/library/factsheets/287g.htm> [<http://perma.cc/QT7D-STNS>]. There are three models of the 287(g) program, all of which are in use:

(1) the jail model, in which officials screen for immigration status and issue detainers when booking arrestees into jails on criminal . . . charges; (2) the task force model, in which state and local officials screen for status and issue detainers in the field during policing operations; and (3) the hybrid model, in which jurisdictions maintain both jail and task force authority.

RANDY CAPPS ET AL., MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT I (2011), <http://www.migrationpolicy.org/pubs/287g-divergence.pdf> [<http://perma.cc/8GKK-XJSQ>].

<sup>42</sup> See *Secure Communities (June 2011)*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/secure-communities> (last updated July 18, 2013) [<http://perma.cc/8F5M-VJ7L>].

<sup>43</sup> U.S. DEP’T OF HOMELAND SEC., IMMIGRATION DETAINER-NOTICE OF ACTION (2012), <https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf> (last visited Mar. 1, 2015) [<http://perma.cc/E6NR-LW4J>].

<sup>44</sup> See generally Recent Legislation, 127 HARV. L. REV. 2593 (2014) (defending the California Trust Act, 2013 Cal. Stat. 4650 (codified at CAL. GOV’T CODE §§ 7282–7282.5 (West Supp. 2014)), which limited California state and local officers from prolonging detention pursuant to detainers, as a permissible exercise of state sovereignty).

<sup>45</sup> Several decades ago, the U.S. Attorney General determined that only the Department of Justice and its delegates could execute immigration warrants. See Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1111–12, 1112 n.21 (2013) (collecting sources). A decade later the Department loosened the limit and maintained that state and local authorities could, by the authority of state and local law, enforce the *criminal* provisions of federal immigration law. See Memorandum from Jay S. Bybee, Assistant Att’y Gen., to the Att’y Gen. 2 (Apr. 3, 2002), <http://www.aclu.org/files/FilesPDFs/ACF27DA.pdf> [<http://perma.cc/J663-8WQF>]. And in 2002 the Department unraveled the restriction altogether, maintaining that state arrest authority was not preempted “in any respect.” *Id.* President Obama’s administration has reasserted the federal government’s exclusive

laws. The purported authority stems from the Tenth Amendment<sup>46</sup>: one sovereign has the authority to assist another sovereign in arrests and, since states retain their sovereignty under the Constitution, they have the power to arrest for violations of federal criminal law.<sup>47</sup> Additionally, states often enact laws that target immigrants and allow officers to regulate immigration. For instance, many states have “human smuggling” laws that prohibit transporting consenting unauthorized immigrants into the state.<sup>48</sup> Others restrict undocumented-immigrant employment. Arizona, for instance, amended its identity theft laws to criminalize the use of false information to get a job, whether the identity belonged to a “real or fictitious person.”<sup>49</sup> And some states and cities target the jobs that immigrants can get.<sup>50</sup> Together, inherent arrest authority and independent state laws mean police target and detain suspected immigrants and their communities without the authorization or oversight of the federal government.

At the most basic level, there are now more federal and state laws governing migration and migrants, and more police — from federal to local officers — enforcing those laws than ever before. This policing is not immune from the problems afflicting other policing. Indeed, features of immigration enforcement exacerbate these problems.

### *B. Exacerbated Impunity in Immigration Enforcement*

As immigration enforcement increasingly looks like criminal enforcement and is managed by the same actors, it is increasingly susceptible to the same abuses of discretion and the same impunity as other policing. Moreover, the unique nature of immigration enforcement exacerbates these problems. First, immigrants are entitled to fewer constitutional protections than citizens, and the dual criminal-civil nature of immigration law limits the applicability of constitutional protections further. Second, the structure of immigration law, as inherently

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civil immigration enforcement power, but it has not challenged state and local authority to make arrests for criminal immigration law violations. *Arizona v. United States*, 132 S. Ct. 2492 (2012), exemplifies the Obama administration’s position.

<sup>46</sup> See Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on Arizona v. United States*, 9 STAN. J. C.R. & C.L. 1, 20 (2013) (“The principal proponents of inherent authority trace its constitutional roots to the Tenth Amendment police power, which reserves for the states powers not enumerated in the Constitution.”).

<sup>47</sup> See *United States v. Di Re*, 332 U.S. 581, 589 (1948) (“There is no reason to believe that state law is not an equally appropriate standard by which to test arrests without warrant, except in those cases where Congress has enacted a federal rule.” *Id.* at 589–90.).

<sup>48</sup> See, e.g., García Hernández, *supra* note 39, at 120 (discussing state human smuggling laws).

<sup>49</sup> ARIZ. REV. STAT. ANN. § 13-2009(A)(3) (2014).

<sup>50</sup> Commonly, states leverage anti-loitering laws to target day laborers. See *Maldonado v. Holder*, 763 F.3d 155, 159 (2d Cir. 2014) (considering the propriety of a joint ICE–local law enforcement anti–day laborer program); *Doe v. Vill. of Mamaroneck*, 462 F. Supp. 2d 520 (S.D.N.Y. 2006).

racialized, political, and divided among multiple overlapping actors, limits accountability.

1. *Police Discretion and Its Abuse.* — While there are likely multiple causes of recent police violence, this section focuses on what can be done about such violence. A problem with policing is not only that police can perpetrate violence, but also that they can do so with limited or no accountability.

Policing requires discretion. It requires considerable discretion, by both departments and line officers, to determine which laws to enforce and against whom to enforce them. The federal law includes more than 3000 crimes.<sup>51</sup> States criminalize thousands of additional acts. In the words of Professor William Stuntz, Americans are moving toward “a world in which the law . . . makes everyone a felon.”<sup>52</sup> And it requires considerable discretion to determine how officers will enforce those laws. “[P]olice officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.”<sup>53</sup> They make these judgments before the background of violence against the police.<sup>54</sup> These judgments and the context in which — and the background against which — they are made, are the reasons why Professor Stephen Carter warns his first-year law students “never to support a law they are not willing to kill to enforce.”<sup>55</sup> Abuses arise within these categories of discretion. Police can set the wrong priorities. Communities can be disproportionately targeted. And police can enforce laws with excessive force.

In balancing the police’s need for discretion and victims’ rights to a remedy, the legal system weighs in favor of the police. In the criminal system, prosecutors use special investigations, deploy special grand juries, and exercise discretion not to indict officers who have allegedly violated the law.<sup>56</sup> There are no comprehensive analyses of police kill-

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<sup>51</sup> Stephen L. Carter, *Law Puts Us All in Same Danger as Eric Garner*, BLOOMBERG VIEW (Dec. 4, 2014, 10:56 AM), <http://www.bloombergview.com/articles/2014-12-04/law-puts-us-all-in-same-danger-as-eric-garner> [<http://perma.cc/T3NW-4A9P>].

<sup>52</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 511 (2001).

<sup>53</sup> *Graham v. Connor*, 490 U.S. 386, 397 (1989).

<sup>54</sup> In 2013, seventy-six police officers were killed in line-of-duty incidents. Twenty-seven of these officers lost their lives to felonious conduct, all but one to a firearm. Press Release, Fed. Bureau of Investigation, FBI Releases 2013 Statistics on Law Enforcement Officers Killed and Assaulted (Nov. 24, 2014), <http://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2013-statistics-on-law-enforcement-officers-killed-and-assaulted> [<http://perma.cc/CQA7-8KRN>].

<sup>55</sup> Carter, *supra* note 51.

<sup>56</sup> James C. McKinley Jr. & Al Baker, *Grand Jury System, With Exceptions, Favors the Police in Fatalities*, N.Y. TIMES, Dec. 8, 2014, <http://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html>.



ings in the United States.<sup>57</sup> Twenty-six hundred police homicides were reported to voluntary databases between 2005 and 2011.<sup>58</sup> This number likely undercounts actual police homicides over the same period by hundreds.<sup>59</sup> All of these killings were reported as “justified,” and the data suggest officers rarely faced trial. For 2600 reported homicides, there were forty-one charges of murder or manslaughter.<sup>60</sup>

The civil system is similarly tilted against victims. It is almost impossible to get injunctive relief against police departments and officers because the Supreme Court has substantially narrowed the class of victims who can get such relief.<sup>61</sup> It is equally difficult to get money damages against police departments and officers. Certain government officials are absolutely immune from civil litigation for damages.<sup>62</sup> Police have “qualified immunity” — they cannot be sued unless they have perpetrated an especially egregious wrong.<sup>63</sup> To be liable, the officer must have so clearly violated a constitutional right “that *any* reasonable official in the [officer’s] shoes would have understood that he was violating [the right].”<sup>64</sup> The violation must have been “beyond de-

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<sup>57</sup> Instead, there are three separate recordkeepers — the FBI, the Centers for Disease Control and Prevention, and the Bureau of Justice Statistics — that get data only if police departments choose to give it. See Rob Barry & Coulter Jones, *Hundreds of Police Killings Are Uncounted in Federal Stats*, WALL ST. J. (Dec. 3, 2014, 11:26 AM), <http://www.wsj.com/articles/hundreds-of-police-killings-are-uncounted-in-federal-statistics-1417577504>.

<sup>58</sup> See McKinley Jr. & Baker, *supra* note 56.

<sup>59</sup> See Barry & Jones, *supra* note 57. The problem of underreporting might be fixed. In the wake of 2014 protests, Congress passed a bill requiring police to report “every police shooting and other death at their hands.” Matt Connolly, *Congress Just Passed a Bill Addressing Police Killings While No One Was Looking*, NEWS.MIC (Dec. 13, 2014), <http://mic.com/articles/106392/congress> [<http://perma.cc/RUM6-ZHRW>].

<sup>60</sup> McKinley Jr. & Baker, *supra* note 56.

<sup>61</sup> See, e.g., Shakeer Rahman & Sam Barr, Op-Ed, *Eric Garner and the Legal Rules that Enable Police Violence*, N.Y. TIMES (Dec. 5, 2014), <http://www.nytimes.com/2014/12/06/opinion/eric-garner-and-the-legal-rules-that-enable-police-violence.html>. When Los Angeles police officers choked Adolph Lyons, a black man, without provocation or resistance during a routine traffic stop, Lyons asked the federal court to enjoin the allegedly unconstitutional practice. See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). Because Lyons could not show that he would again be stopped for a traffic violation or illegally choked into unconsciousness, the Supreme Court voted 5–4 that he had no standing to seek an injunction. *Id.* at 110.

<sup>62</sup> See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (the President); *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978) (judges); *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (prosecutors). Absolute immunity is limited to actions taken in an official capacity. See, e.g., *Sparkman*, 435 U.S. at 356–57.

<sup>63</sup> Courts ask two questions to determine whether immunity applies. See, e.g., *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001). First, they ask whether, if the allegations are true, the injured party’s constitutional rights have been violated. *E.g., id.* Second, they ask whether those constitutional rights were “clearly established” when the officer acted. *E.g., id.*

<sup>64</sup> *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014) (emphasis added) (citing *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)).

bate.”<sup>65</sup> These requirements place a high hurdle in front of recovery. The cumulative effect of low criminal indictment and civil recovery rates is an accountability deficit.

2. *Impunity in Immigration Policing.* — At the highest level of generality, the broad sweep of immigration laws and the force of law accorded to enforcement officers open immigration enforcement to the same abuses of discretion as other forms of policing. Developments in immigration policing, however, have so fundamentally altered immigration enforcement that it is no longer possible to discuss policing without understanding police’s impact on immigrant communities. Indeed, immigrants are uniquely vulnerable to abuse, whether police enforce the civil or the criminal provisions of the immigration law. This vulnerability stems from constitutional and structural features of immigration enforcement.

(a) *The Limits of Constitutional Protection.* — Many constitutional protections have limited force for immigrants, due both to doctrinal developments and practical realities. As a matter of doctrine, constitutional prohibitions on unreasonable searches and seizures and certain checks against constitutional violations (like access to a trial, the production of evidence, and rights to counsel) do not apply in civil enforcement. The Constitution does apply, however, in the strictly criminal regime.

Officers enforcing immigration law can raid work sites,<sup>66</sup> target day laborers,<sup>67</sup> or set up checkpoints in public housing units. During these raids, they can factor in race,<sup>68</sup> and they can arrest without individual probable cause,<sup>69</sup> whereas arrests normally require “evidence which

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<sup>65</sup> *Al-Kidd*, 131 S. Ct. at 2083 (“We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.”).

<sup>66</sup> *E.g.*, D.S. Woodfill & Megan Cassidy, *Judge Weighs Whether to Halt Arpaio’s Workplace Raids*, AZCENTRAL (Oct. 16, 2014, 9:32 PM), <http://www.azcentral.com/story/news/politics/immigration/2014/10/17/judge-weighs-whether-halt-arpaios-workplace-raids/17398527> [<http://perma.cc/ZJJ5-5MUT>].

<sup>67</sup> *E.g.*, *Maldonado v. Holder*, 763 F.3d 155, 161 & n.3 (2d Cir. 2014).

<sup>68</sup> *E.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–86 (1975) (noting that “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor” in determining whether to seize a subject, *id.* at 886–87). The Ninth Circuit has since decided that, due to demographic shifts and changes in Fourteenth Amendment jurisprudence, the Court’s statement is no longer applicable, *United States v. Montero-Camargo*, 208 F.3d 1122, 1132–33 (9th Cir. 2000) (en banc), but even within the Ninth Circuit’s jurisdiction federal immigration-enforcement officials still use — and train their delegates to use — race as a factor, *see Melendres v. Arpaio*, 989 F. Supp. 2d 822, 825 (D. Ariz. 2013) (noting that the federal government instructs officers participating in its 287(g) training to consider race as a factor).

<sup>69</sup> *See Int’l Molders’ & Allied Workers’ Local Union No. 164 v. Nelson*, 799 F.2d 547, 552 (9th Cir. 1986) (“The requirement to ‘identify the suspect(s) by name’ or to provide ‘enough specific identifying information to assure that the search for that person is reasonably likely to result in finding that person’ imposes an unreasonable and impractical burden on the INS.” *Id.* at 553

would ‘warrant a man of reasonable caution in the belief’ that a felony has been committed.”<sup>70</sup>

Criminal enforcers are more limited. Though the Fourth Amendment’s restriction on unreasonable searches and seizures has been read to allow significant police discretion,<sup>71</sup> it ostensibly checks police conduct.<sup>72</sup> However, not every police-civilian interaction is a constitutionally limited “seizure.” The line between constitutionally limited “seizures” and “consensual” encounters is a thin<sup>73</sup> but extremely important<sup>74</sup> one. Without the Fourth Amendment’s restrictions on searches and seizures, the constitutional bases of analysis change, ultimately affording policymakers and officers greater discretion. As Professor Kevin R. Johnson characterized it:

Noncitizen racial minorities, as foreigners not part of the national community, generally have been subject to similar cruelties [as citizen racial minorities] but also have suffered deportation, indefinite detention, and more. The differential treatment is permitted, if not encouraged, by the disparate bundles of legal rights afforded domestic minorities and noncitizen minorities.<sup>75</sup>

In any case, doctrinal divisions melt away in practice. The interchangeability of the civil and criminal immigration-enforcement regimes limits the protection of constitutional rights in both contexts.<sup>76</sup> Criminal law goals have infiltrated civil removal without bringing criminal law protections. The Fourth Amendment exclusionary rule

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(quoting *Int’l Molders’ & Allied Workers’ Local Union No. 164 v. Nelson*, 643 F. Supp. 884, 903 (N.D. Cal. 1986), amended by *Int’l Molders’*, 799 F.2d 547).

<sup>70</sup> *Wong Sun v. United States*, 371 U.S. 471, 479 (1963) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

<sup>71</sup> To police immigrants, for instance, officers can check the identity of every passenger in a stopped car. A passenger in a car stopped by the police is seized within the meaning of the Fourth Amendment, see *Brendlin v. California*, 551 U.S. 249, 263 (2007), but the seizure is justified by the probable cause necessary to stop the driver. Certain demands made of passengers, like requests for identification to determine immigration status, “fall[] within the purview of a lawful traffic stop and do[] not constitute a separate Fourth Amendment event.” *United States v. Soriano-Jarquín*, 492 F.3d 495, 500 (4th Cir. 2007).

<sup>72</sup> The exclusionary rule is the main remedy for the Fourth Amendment’s violation. See generally William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL’Y 443 (1997).

<sup>73</sup> If people are free to leave — whether they know they can leave or not — an interaction is “consensual.” *Florida v. Bostick*, 501 U.S. 429, 434 (1991).

<sup>74</sup> See *id.* (noting that the Fourth Amendment has no bearing on consensual police-civilian encounters).

<sup>75</sup> Johnson, *supra* note 13, at 1112–13 (footnotes omitted).

<sup>76</sup> Because both regimes target criminal aliens, “[l]aw enforcement agents, prosecutors, and immigration officials are encouraged to see criminal law and immigration law simply as different kinds of tools, and to use whichever tool works best against a particular offender or suspect.” David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 202 (2012).

does not protect people in the immigration-enforcement regime.<sup>77</sup> In other words, even if police misconduct bars criminal prosecution, an exonerated defendant can be funneled into civil detention and removed.<sup>78</sup> Deportation is not considered a punishment,<sup>79</sup> so there is no right to counsel in immigration proceedings.<sup>80</sup> And in any event, most immigrants never get the removal hearings where these constitutional rights could (but do not) apply. In 2013, the United States deported 438,421 people.<sup>81</sup> More than 363,279 of those deportations — eighty-three percent — occurred without a hearing: deportees never saw an immigration judge, and the “immigration officer acted as the prosecutor, judge, and jailor.”<sup>82</sup> A police force that wanted to, then, could abuse investigation and arrest authority to funnel immigrants into removal proceedings with impunity.<sup>83</sup>

Far from introducing criminal law protections into civil removal, the merger of the two systems has diminished the significance of criminal law protections in criminal prosecutions. Innocent or guilty, arrested immigrants have strong incentives to plead guilty. The Fourth Amendment allows warrantless arrests based on probable cause of any crime, including a misdemeanor.<sup>84</sup> Every immigrant arrested anywhere in the United States has his or her information run through fed-

<sup>77</sup> See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984).

<sup>78</sup> The Supreme Court declined to say whether the exclusionary rule could apply to “egregious violations of [the] Fourth Amendment” in removal proceedings, *id.* at 1050–51, but several appellate courts and the Board of Immigration Appeals have held that immigrants in removal proceedings *never* have suppression claims against state and local police, no matter how egregious the conduct. “[C]ommon sense,” quoted the Second Circuit, “dictates that the deterrent effect of the exclusion of relevant evidence is highly attenuated when the ‘punishment’ imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by . . . a different sovereign.” *Maldonado v. Holder*, 763 F.3d 155, 166 (2d Cir. 2014) (alternation and omission in original) (quoting *United States v. Janis*, 428 U.S. 433, 457 (1976)) (internal quotation marks omitted).

<sup>79</sup> See *Wong Wing v. United States*, 163 U.S. 228, 237 (1896).

<sup>80</sup> Fewer than one-fifth of immigrants in removal proceedings are represented. See AM. BAR ASS’N, REFORMING THE IMMIGRATION SYSTEM 5–8 (2010), [http://www.americanbar.org/content/dam/aba/migrated/immigration/PublicDocuments/aba\\_complete\\_full\\_report\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/immigration/PublicDocuments/aba_complete_full_report_authcheckdam.pdf) [<http://perma.cc/R6WB-VMRT>].

<sup>81</sup> John F. Simanski, *Immigration Enforcement Actions: 2013*, U.S. DEP’T HOMELAND SECURITY ANN. REP., (Sept. 2014), at 7, [http://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2013.pdf](http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf) [<http://perma.cc/Q72U-EVFL>].

<sup>82</sup> AM. CIVIL LIBERTIES UNION, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM 2 (2014), [https://www.aclu.org/sites/default/files/assets/120214-expeditedremoval\\_o.pdf](https://www.aclu.org/sites/default/files/assets/120214-expeditedremoval_o.pdf) [<http://perma.cc/M96T-9H5G>].

<sup>83</sup> Whether officers are abusing their power to manage migration in their jurisdictions is a normative question (what conduct constitutes abuse?) that generates an empirical question (how often is power abused to manage migration?). This Chapter raises these questions without answering them.

<sup>84</sup> See *Atwater v. City of Lago Vista*, 532 U.S. 318, 327 (2001).

eral immigration databases.<sup>85</sup> ICE can then choose to initiate removal proceedings. If the arrestee is convicted of certain offenses, removal becomes mandatory, and prosecutors can use immigration consequences as leverage to secure alternative pleas.<sup>86</sup>

Further, criminal immigration enforcement now relies on truncated procedures. Under “Operation Streamline” — the “zero tolerance” approach to immigration — fast-track pleas offer immigration-crime defendants a reduced sentence in exchange for quickly consenting to removal.<sup>87</sup> Within this scheme, discovery is provided, and a preindictment plea offer made, within twenty-four hours of arraignment.<sup>88</sup> To cope with the volume of cases, defense counsel represent from six to as many as forty defendants at a time.<sup>89</sup> And Streamline proceedings are group proceedings. Courts take guilty pleas en masse, with between forty and eighty men and women, shackled hand and foot, pleading together.<sup>90</sup> Though pleas must be knowing, intelligent, and voluntary, courts have blessed Streamline group pleas.<sup>91</sup> Under these conditions, police abuses — if they occur — are unlikely to be unearthed. Defense counsel are unlikely to discover abuses, arresting officers and witnesses are unlikely to testify, busy prosecutors are more likely to drop cases than to argue constitutional claims, and migrants are unlikely to bring civil suits after prosecution and removal.<sup>92</sup> Together, this means that, even in the criminal-immigration context, constitutional claims are unlikely to be litigated and officers are unlikely to be held accountable for wrongdoing.

(b) *Structural Barriers to Accountability in Immigration Enforcement.* — The structure of immigration enforcement adds significant

<sup>85</sup> U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ACTIVATED JURISDICTIONS (2013), <https://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf> [<http://perma.cc/CAQ4-QF5H>].

<sup>86</sup> See Cade, *supra* note 21, at 1755 (“The risk that deportation will ensue if a conviction is fought or delayed puts tremendous pressure on potentially removable noncitizens to take almost any plea offer that avoids contact with ICE . . .”).

<sup>87</sup> See Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 301 (1998).

<sup>88</sup> *Id.*

<sup>89</sup> See Chacón, *supra* note 11, at 143.

<sup>90</sup> AM. CIVIL LIBERTIES UNION, *Statement on Human Rights Violations on the United States-Mexico Border*, 3 (2012), [https://www.aclu.org/files/assets/121024\\_aclu\\_written\\_statement\\_ochcr\\_side\\_event\\_10\\_25\\_12\\_final\\_o.pdf](https://www.aclu.org/files/assets/121024_aclu_written_statement_ochcr_side_event_10_25_12_final_o.pdf) [<http://perma.cc/PJ2F-9VTS>].

<sup>91</sup> See, e.g., *United States v. Diaz-Ramirez*, 646 F.3d 653 (9th Cir. 2011) (finding that group plea hearing did not violate defendant’s Fifth Amendment right to due process); *United States v. Escamilla-Rojas*, 640 F.3d 1055 (9th Cir. 2011) (same). *But see* *United States v. Roblero-Solis*, 588 F.3d 692 (9th Cir. 2009) (finding that procedure in which the district court took defendants’ guilty pleas en masse did not comport with Rule 11 of the Federal Rules of Criminal Procedure, which establishes the conditions and procedures for guilty pleas, but noting that the error did not affect defendants’ rights).

<sup>92</sup> See Chacón, *supra* note 11, at 146.

barriers to police accountability. First, disaggregated enforcement — enforcement by federal, state, and local officers under federal, state, and local laws — unfetters line-officer discretion. The federal government, posits one line of doctrine, cannot commandeer state and local officers. State and local governments, posits another, are limited in their capacity to make immigration policy. These competing doctrines complicate policymaking and, rather than reduce enforcement, unbind individual officer discretion.<sup>93</sup>

Second, disaggregated enforcement complicates public and private checks on police discretion. It is difficult in the current regime to assign responsibility for particular enforcement policies or decisions.<sup>94</sup> Assigning responsibility is crucial to both political and legal accountability. Courts can enjoin only policies.<sup>95</sup> Within that limitation, courts are “reluctant to enjoin law enforcement agencies[, which are] entitled to ‘the widest latitude in the “dispatch of [their] own internal affairs.’”<sup>96</sup> They are especially reluctant to do so when “the exercise of authority by *state* officials is attacked” in a federal court.<sup>97</sup>

Finally, disaggregated enforcement frustrates police-community relations. Public safety depends on public trust in the police,<sup>98</sup> and Latino communities trust police less now that police increasingly perform the functions of federal immigration officers.<sup>99</sup> Fragmented enforcement allows police to enforce immigration law and potentially alienate Latino and immigrant communities. Worse, it reduces police control over that relationship. Imagine a local government believes that safe,

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<sup>93</sup> For an article discussing the intersection of these trends and its impact, see Rick Su, *Police Discretion and Local Immigration Policymaking*, 79 UMKC L. REV. 901 (2011).

<sup>94</sup> “Among the largest challenges posed by crimmigration may be keeping the government’s treatment of noncitizens reasonably visible, and laying down new lines of responsibility for decisions taken both with regard to individual immigrants and with regard to the overall operation of the system.” Sklansky, *supra* note 76, at 215.

<sup>95</sup> Courts cannot enjoin “ambiguous, isolated incident[s].” *INS v. Delgado*, 466 U.S. 210, 218 n.6 (1984).

<sup>96</sup> *International Molders’ & Allied Workers’ Local Union No. 164 v. Nelson*, 799 F.2d 547, 551–52 (9th Cir. 1986) (alteration in original) (quoting *Rizzo v. Goode*, 423 U.S. 362, 378–79 (1976)).

<sup>97</sup> *Goode*, 423 U.S. at 378 (emphasis added).

<sup>98</sup> See, e.g., Kevin M. Drakulich & Robert D. Crutchfield, *The Role of Perceptions of the Police in Informal Social Control: Implications for the Racial Stratification of Crime and Control*, 60 SOC. PROBS. 383, 383–84 (2013) (connecting lack of faith in the police to neighborhood crime).

<sup>99</sup> See NIK THEODORE, DEP’T OF URBAN PLANNING & POLICY, UNIV. OF ILL. AT CHI., INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT (2013), [http://www.policylink.org/sites/default/files/INSECURE\\_COMMUNITIES\\_REPORT\\_FINAL.PDF](http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF) [<http://perma.cc/MEP8-BWW7>]. A survey of Latinos in Cook, Harris, Los Angeles, and Maricopa counties (the largest Latino population centers in the United States) revealed that forty-four percent of Latinos hesitate to contact police officers if they are victims of a crime because they fear that police will ask about their contacts’ immigration status. *Id.* Seventy percent of undocumented immigrants are hesitant to call the police for the same reason. *See id.*

employed, and housed immigrants benefit a town more than immigrants who fear police interaction, are unauthorized to work, and are unable to rent housing. The local government may try to structure its relationship with immigrants accordingly, but that relationship can be undercut by factors outside its control. If the county feels differently about immigrants' rights than the city does, the county police can subsume municipal police jurisdiction. State police can subsume county jurisdiction. And federal jurisdiction is pervasive; as demonstrated when sixty heavily armed county deputies raided the City Hall in Mesa, Arizona to detain employees without the city's knowledge or control,<sup>100</sup> the conflict is not hypothetical. Enforcement regimes overlap as means to competing ends, frustrating one another.

Limited constitutional protections and structural barriers to accountability and reform widen the gulf between police power to do harm and victims' access to a remedy.

### *C. Consolidation of Immigration-Enforcement Policymaking as a Way Forward*

This Chapter offers enforcement consolidation as a first step toward bridging the gulf. Though the proposal addresses directly only the structural barriers to accountability, there are reasons to believe it can revitalize constitutional protections for immigrants. Part of the failure of constitutional protections arises in practice, and practice arises in part out of structural features of the immigration-enforcement regime.<sup>101</sup> Local policymakers can internalize the benefits and externalize the costs of immigration enforcement. This accounts for the gap between the perception of immigrant criminality and the “substantially higher [enforcement for total, violent, and property crimes] in places with greater proportions of immigrants,”<sup>102</sup> and the reality that there is no connection between immigrants — including undocumented immigrants — and crime.<sup>103</sup> Consolidation creates a single, nationally salient policy that can be monitored and challenged by a national constit-

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<sup>100</sup> Paul Giblin, *Arizona Sheriff Conducts Immigration Raid at City Hall, Angering Officials*, N.Y. TIMES, Oct. 18, 2008, <http://www.nytimes.com/2008/10/18/us/18immig.html>.

<sup>101</sup> For an article arguing that politics determines and controls policing as much as formal legal constraints do, see William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781 (2006).

<sup>102</sup> Garth Davies & Jeffrey Fagan, *Crime and Enforcement in Immigrant Neighborhoods: Evidence from New York City*, 641 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 112 (2012).

<sup>103</sup> Concentrations of immigrants have been shown to decrease crimes and violence. See *id.* at 104–06 (compiling sources). Immigrants are five times less likely to be in prison than native-born Americans. See IMMIGRATION POLICY CTR., FROM ANECDOTES TO EVIDENCE: SETTING THE RECORD STRAIGHT ON IMMIGRANTS AND CRIME 2–3 (2013), [http://www.immigrationpolicy.org/sites/default/files/docs/setting\\_the\\_record\\_straight\\_updated\\_2.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/setting_the_record_straight_updated_2.pdf) [<http://perma.cc/Q6DV-RM8G>]. Many of those immigrants who are in jail are there for immigration crimes. See *id.* at 3–4.

uency. For instance, national politics has successfully shifted federal enforcement priorities<sup>104</sup> and increased limitations on federal immigration police. As a result, the Obama administration is considering placing body cameras on enforcement officials,<sup>105</sup> restricting racial profiling in general policing,<sup>106</sup> and reassessing its state and local police militarization programs.<sup>107</sup> It is more difficult to monitor local policies, and to extract such concessions on a piecemeal basis. Moreover, a policy, and especially a national policy, can more easily be enjoined; federal immigration police have “no discretion with which to violate constitutional rights.”<sup>108</sup> Thus federal litigation secured a settlement in which federal enforcement officials agreed to follow the Fourth Amendment in immigration sweeps.<sup>109</sup> By removing barriers to transparency and accountability and creating opportunities for political and legal reform, enforcement consolidation is a powerful first step toward checking the immigration police. Without consolidation, efforts toward reforming police policy and checking police behavior are unlikely to succeed and, at best, reforms will come at a greater cost.

Section 1 offers the legal arguments. Section 2 identifies the limits to these arguments — the federal executive may reclaim the immigration-enforcement power, but it cannot obligate state and local police to enforce alongside it.

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<sup>104</sup> About one in three noncitizens is deportable, *Developments in the Law — Immigrant Rights & Immigration Enforcement*, 126 HARV. L. REV. 1565, 1570 (2013), and President Obama has prioritized the removal of immigrants who have broken criminal laws, see, e.g., *Secure Communities: Get the Facts*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/secure-communities/get-the-facts> [<http://perma.cc/UWK7-AZN2>]. He also promised to defer prosecutions of immigrants with families, immigrants who came to the United States as children, see, e.g., *DACA (Deferred Action for Childhood Arrivals)*, IMMIGR. EQUALITY, <http://immigrationequality.org/get-legal-help/our-legal-resources/path-to-status-in-the-u-s/daca-deferred-action-for-childhood-arrivals> [<http://perma.cc/4D67-HW7T>], and others. See Nedra Pickler, *Obama Tries to Reassure Immigrants to Register*, ASSOCIATED PRESS (Dec. 9, 2014, 6:32 PM), <http://bigstory.ap.org/article/ocf65abe68ac44aa954bd4e8b73bb8ae/obama-touting-immigration-measures-tennessee> [<http://perma.cc/9C9A-PZZE>].

<sup>105</sup> See Associated Press, *Border Patrol to Begin Testing Body Cameras*, FOXNEWS.COM (Sept. 18, 2014), <http://www.foxnews.com/politics/2014/09/18/border-patrol-to-begin-testing-body-cameras> [<http://perma.cc/9ZNP-MG4G>]; see also *infra* ch. IV.

<sup>106</sup> See Matt Apuzzo & Michael S. Schmidt, *U.S. to Continue Racial, Ethnic Profiling in Border Policy*, N.Y. TIMES, Dec. 6, 2014, <http://www.nytimes.com/2014/12/06/us/politics/obama-to-impose-racial-profiling-curbs-with-exceptions.html>.

<sup>107</sup> Warner Todd Huston, *Washington Reassessing Militarized Police*, BREITBART (Aug. 24, 2014), <http://www.breitbart.com/big-government/2014/08/24/washington-reassessing-militarized-police> [<http://perma.cc/F674-42BF>].

<sup>108</sup> *International Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547, 552 (9th Cir. 1986) (quoting *LaDuke v. Nelson*, 762 F.2d 1318, 1325 (9th Cir. 1985), *amended by* 796 F.2d 309 (9th Cir. 1986)) (internal quotation marks omitted).

<sup>109</sup> See *Stipulation & Order of Dismissal & Settlement, Aguilar v. Immigration & Customs Enforcement*, No. 1:07-cv-08224-KBF (S.D.N.Y. Apr. 4, 2013).



1. *Independent State and Local Immigration Policing Violates Constitutional Immigration-Federalism.* — Litigation based on constitutional separation of powers is one means toward consolidation. It is a “fundamental principle of the Constitution [] that Congress has the power to preempt state law,”<sup>110</sup> and that power is particularly strong with reference to immigration regulation.<sup>111</sup> Congress may preempt state laws in a number of ways.<sup>112</sup> It may do so even in legal areas traditionally regulated by states.<sup>113</sup> The federal government’s “undoubted power over the subject of immigration and the status of aliens”<sup>114</sup> rests on the constitutional authority to establish a national naturalization rule<sup>115</sup> and on the sovereign authority to conduct foreign relations. This section will describe two categories of state immigration enforcement and argue that laws within these categories can be preempted.

(a) *State “Inherent Authority” to Enforce Criminal Immigration Laws.* — State and local police generally may enforce federal criminal laws.<sup>116</sup> That “inherent authority,” though, is subject to congressional preemption — state and local police cannot enforce federal criminal laws if doing so counters federal purposes.<sup>117</sup>

State enforcement of criminal immigration law, unless authorized by the federal government, may impermissibly distort federal immigration-enforcement policies. The most thorough analysis of states’ inherent authority to enforce criminal immigration laws is the Ninth Circuit’s decision in *Gonzales v. City of Peoria*.<sup>118</sup> The *Gonzales* court found that, though the civil provisions of the Immigration and Nationality Act constituted a pervasive regulatory scheme — thus preempting parallel state regulation — the criminal provisions of the Act did not.<sup>119</sup> Yet changes to immigration law have undercut *Gonzales*’s foundation. It is not only that federal criminal-immigration law

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<sup>110</sup> *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022 (9th Cir. 2013) (alteration in original) (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000)) (internal quotation marks omitted).

<sup>111</sup> See *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.”).

<sup>112</sup> See generally Note, *Preemption as Purposivism’s Last Refuge*, 126 HARV. L. REV. 1056, 1057–58 (2013) (describing the categories of preemption and their bases).

<sup>113</sup> See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230–36 (1947).

<sup>114</sup> *Arizona*, 132 S. Ct. at 2498.

<sup>115</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>116</sup> See, e.g., *Ker v. California*, 374 U.S. 23, 31 (1963).

<sup>117</sup> Cf. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963) (noting that a state regulation was impermissible if it conflicted with congressional objectives).

<sup>118</sup> 722 F.2d 468 (9th Cir. 1983), *overruled by* *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc).

<sup>119</sup> *Id.* at 474–75.

is pervasive in a way it was not in 1983,<sup>120</sup> but also that criminal immigration enforcement distorts civil-immigration regulation.

Today the line between criminal and civil immigration enforcement — the boundary on which the *Gonzales* court relied — is blurrier than ever before. Criminal arrests, whether or not they are based on federal immigration priorities, and even if they do not result in a criminal charge, open the door to civil removal. The distortive effect of state and local enforcement is clear as an empirical matter. In 2010, for instance, ICE placed detainers on nearly four times as many people arrested by state and local police as people it arrested itself.<sup>121</sup> According to one empirical analysis, police — more than federal prosecutors or judges — have the “discretion that matters” in immigration enforcement.<sup>122</sup> They determine who gets deported.

Police discretion is not the end of the process — federal officials retain the final say — but its distortive effect is constitutionally troubling. Either immigration officials do not deport after police arrest, or immigration officials do deport notwithstanding federal enforcement priorities. In the former case, local policing harasses immigrants in a way that infringes on the federal government’s plenary immigration-enforcement power.<sup>123</sup> In the latter, state and local policing effectively overtake the federal government’s enforcement discretion. This overtaking may occur gently, by political forces.<sup>124</sup> Or it may occur bluntly: some crimes lead to mandatory detention and mandatory deportation. Knowing this, some immigrants will either “believe it futile and not worth the cost to contest minor criminal charges while detained, even if they are innocent, have strong defenses, or have been arrested

<sup>120</sup> The Ninth Circuit itself has said that the 1996 Immigration and Nationality amendments undermine its prior preemption analysis, such that state and local arrest authority is “doubtful.” *Mena v. City of Simi Valley*, 332 F.3d 1255, 1265 n.15 (9th Cir. 2003), *vacated sub nom.* *Muehler v. Mena*, 544 U.S. 93 (2005).

<sup>121</sup> *Developments in the Law — Immigrant Rights & Immigration Enforcement*, *supra* note 104, at 1647. The distortive effect persists even without a state conviction:

[T]he overwhelming proportion of detainers — 82% — were issued for individuals who either had no convictions, or had at most been convicted of a misdemeanor or petty offense of some type. Traffic violations, including driving while intoxicated, were the most common offenses. Illegal entry was the next most common, followed by marijuana possession and miscellaneous drug violations.

*Targeting of ICE Detainers Varies Widely by State and by Facility*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, (Feb. 11, 2014), <http://trac.syr.edu/immigration/reports/343> [<http://perma.cc/CS9Y-7JBU>].

<sup>122</sup> See generally Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil–Criminal Line*, 58 UCLA L. REV. 1819 (2011).

<sup>123</sup> See *Arizona v. United States*, 132 S. Ct. 2492, 2506 (2012).

<sup>124</sup> Even if the federal government retains discretion about whether to begin investigations, prosecutions, and deportations, local arrests force the federal government’s hand: “The federal government will, in the end, bear the political blowback, whether it chooses to see through immigration enforcement . . . or whether it declines to enforce.” Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535, 606 (2012).

through racial profiling or other constitutional rights violations,<sup>125</sup> or waive their right to contest their removal in a plea agreement.<sup>126</sup>

The foundational assumptions of inherent authority are thus no longer true in the immigration-enforcement regime. Courts should reconsider the role of state and local police in immigration enforcement.

(b) *State Human Smuggling Laws.* — Human smuggling laws are a common means by which states indirectly regulate immigration.<sup>127</sup> Texas's and Arizona's laws are representative of other states' laws. Both make it a criminal violation to facilitate the transport of undocumented immigrants for profit or commercial purpose. Both also share the purpose of bolstering or supplanting federal immigration enforcement. Texas — without the request or authorization of the federal government — patrols the border with armed guards.<sup>128</sup> “[W]hile Texas taxpayers should not have to bear the burden of fulfilling the federal government’s responsibility to secure the border,” said a spokesperson for then-Governor Rick Perry, “we cannot wait for action while our border remains porous and our communities are at risk.”<sup>129</sup> Arizona similarly enforces its anti-smuggling law. “I’m the only agency enforcing this law because it is the law,” said Maricopa County Sheriff Joe Arpaio.<sup>130</sup> “I’m going to put tents up from here to Mexico if I have to to keep these illegals incarcerated.”<sup>131</sup>

Though both Texas's and Arizona's laws tread into a field extensively regulated by the federal government, there have been very few challenges to their legality. Of the handful of court decisions that have addressed the Arizona law — none have challenged the Texas law — only one lower court decision,<sup>132</sup> from November 2014, has found the

<sup>125</sup> Cade, *supra* note 21, at 1755.

<sup>126</sup> See *id.* at 1754–55.

<sup>127</sup> See, e.g., *Arizona Sheriff Uses Anti-smuggling Law to Target Illegal Immigrants*, FOXNEWS.COM (May 11, 2006), <http://www.foxnews.com/story/2006/05/11/arizona-sheriff-uses-anti-smuggling-law-to-target-illegal-immigrants> [<http://perma.cc/AXZ4-MQY6>]; Manny Fernandez, *Texas Bolsters Border Patrol with Its Own*, N.Y. TIMES, Aug. 7, 2014, <http://www.nytimes.com/2014/08/07/us/texas-is-accused-of-overreaching-and-overspending-to-police-border.html> (discussing Texas's enforcement of its own human smuggling laws on the Texas-Mexico border). Many states also have human trafficking laws. See *Human Trafficking Overview*, NAT'L CONF. ST. LEGISLATURES (May 9, 2014), <http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-overview.aspx> [<http://perma.cc/JT8K-RB4D>].

<sup>128</sup> See Fernandez, *supra* note 127.

<sup>129</sup> *Id.* (internal quotation mark omitted).

<sup>130</sup> *Arizona Sheriff Uses Anti-smuggling Law to Target Illegal Immigrants*, *supra* note 127.

<sup>131</sup> *Id.* (internal quotation marks omitted).

<sup>132</sup> See Rick Rojas, *Arizona Law on Immigrant Smuggling Is Struck Down*, N.Y. TIMES, Nov. 9, 2014, <http://www.nytimes.com/2014/11/09/us/immigrant-smuggling-law-in-arizona-is-struck-down.html>.

law to be preempted.<sup>133</sup> The permissibility of these laws should be revisited in light of developments in immigration law.

First, federal immigration regulation is sufficiently extensive to preempt state regulation in the field. “[E]ven complementary state regulation is impermissible,” said the Supreme Court in *Arizona v. United States*,<sup>134</sup> if the federal government has its own comprehensive regulation.<sup>135</sup> The federal government has such comprehensive regulation. The Immigration and Nationality Act thoroughly addresses the transportation and harboring of unauthorized immigrants. In relevant part, it provides that any person who “knowing . . . of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise” shall be punished.<sup>136</sup> Federal law “makes a single sovereign responsible” for investigating, arresting, and detaining people arrested at the border.<sup>137</sup> Human smuggling laws, by which states generate independent authority to prosecute offenses criminalized by the federal government, “diminish[] the [Federal Government]’s control over enforcement” and “detract[] from the ‘integrated scheme of regulation’ created by Congress.”<sup>138</sup>

Second, federal law is comprehensive as to the manner of enforcement. The United States Border Patrol employed 21,444 agents in 2011, more than double the 9212 agents employed in 2000 and more than five times the 4028 agents on duty in 1993.<sup>139</sup> The number of agents does not include other CBP officers, ICE enforcers, Drug Enforcement Agency enforcers, Federal Bureau of Investigation agents, or Bureau of Alcohol, Tobacco, Firearms and Explosives personnel who also operate at the border. When states determine to interject their officers into this enforcement scheme, they make a political judgment with consequences for individual rights and, in turn, federal foreign relations prerogatives. State enforcement can, like all enforcement, become violent. And state enforcement can increase violence in-

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<sup>133</sup> See, e.g., *State v. Barragan-Sierra*, 196 P.3d 879 (Ariz. Ct. App. 2008) (upholding Arizona’s human-smuggling law against a preemption challenge). In *Barragan-Sierra*, for instance, the Arizona Court of Appeals held that Arizona’s human-smuggling statute did not “regulate immigration.” *Id.* at 889–90. Even still, wrote the court, Arizona’s human-smuggling law “serv[ed] the same purposes” as federal law. *Id.* at 890.

<sup>134</sup> 732 S. Ct. 2492 (2012).

<sup>135</sup> *Id.* at 2502.

<sup>136</sup> 8 U.S.C. § 1324(a)(1)(A)(ii) (2012).

<sup>137</sup> *Arizona*, 132 S. Ct. at 2502.

<sup>138</sup> *Id.* (second alteration in original) (quoting Wis. Dep’t. of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282, 288–89 (1986)) (internal quotation marks omitted).

<sup>139</sup> U.S. CUSTOMS & BORDER PROT., BORDER PATROL AGENT STAFFING BY FISCAL YEAR (2014), [http://www.cbp.gov/sites/default/files/documents/BP%20Staffing%20FY1992-FY2014\\_0.pdf](http://www.cbp.gov/sites/default/files/documents/BP%20Staffing%20FY1992-FY2014_0.pdf) [<http://perma.cc/V796-A2A3>].

to the future. Increased border enforcement efforts have “change[d] the nature of the problem along the Mexico-United States border from one of irregular immigration to one of smuggling of migrants.”<sup>140</sup> As immigration restrictions continue to increase, “the sophistication and violence of the organizations that promote the illicit movement of people across borders — whether in the form of smuggling or trafficking — have also grown.”<sup>141</sup> Comprehensive federal enforcement provides one basis for preemption. Preventing the externalities caused by state enforcement provides another.

2. *The Limits of Federal Preemption and Residual State Power.* — To consolidate immigration enforcement in the federal government is not to say local governments have no motivation to control nor power to determine their relationships with immigrant communities. Local governments can choose not to enforce federal immigration law — they can effectively pass certain kinds of sanctuary laws<sup>142</sup> or limit the enforcement of Secure Communities detainers.<sup>143</sup> Consolidation thus improves immigration policing and functions as a one-way ratchet — the arguments in the Chapter cannot be used to increase immigration enforcement. The federal government is less interested in prohibiting, and state and local governments are more interested in preserving, state and local nonenforcement power, and these interests influence the preemption analysis.

The federal government is more interested in prohibiting state and local immigration enforcement. The harms to the federal division of power present in local immigration policing are not present in local immigration nonenforcement. State and local police do not abuse rights and harass if they are not enforcing. They do not funnel immigrants into the federal removal system if they are not enforcing. And states and cities internalize whatever harms of nonenforcement might exist.

To the extent nonenforcement impairs federal enforcement prerogatives, it does so in a constitutionally valid way. In *Printz v. United States*,<sup>144</sup> the Supreme Court struck down as unconstitutional a federal

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<sup>140</sup> UNITED NATIONS OFFICE ON DRUGS & CRIME, SMUGGLING OF MIGRANTS: A GLOBAL REVIEW AND ANNOTATED BIBLIOGRAPHY OF RECENT PUBLICATIONS 27–28 (2011), [http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Smuggling\\_of\\_Migrants\\_A\\_Global\\_Review.pdf](http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Smuggling_of_Migrants_A_Global_Review.pdf) [<http://perma.cc/NFK9-3REL>].

<sup>141</sup> Jennifer M. Chacón, *Tensions and Trade-offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1611 (2010).

<sup>142</sup> “Sanctuary laws” are local efforts to create safe havens for immigrant communities. Broadly, there are three types of sanctuary laws: (1) “don’t ask” policies limit police investigations of a person’s immigration status; (2) “don’t tell” policies limit communications between officers and federal authorities; and (3) “don’t enforce” policies limit officers’ ability to arrest and detain for purposes of immigration enforcement.

<sup>143</sup> See Recent Legislation, *supra* note 44, at 2598.

<sup>144</sup> 521 U.S. 898 (1997).

requirement that local police run background checks on handgun purchasers.<sup>145</sup> As the Supremacy Clause allows the federal government to preempt state laws, the Tenth Amendment prohibits the federal government from “command[ing] the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”<sup>146</sup> The Court’s holding bars any federal effort to enlist state and local police, which includes efforts related to immigration. Such enlistment would threaten “structural protections of liberty” by “augment[ing] immeasurably” the “power of the Federal Government.”<sup>147</sup>

The federal government is less interested in preventing state and local nonenforcement, and state and local police are more interested in preserving their power not to enforce. While immigration regulation is a federal concern, states — and especially counties and cities — regulate police-civilian relationships.<sup>148</sup>

In short, state and local entities cannot keep ICE out of their jurisdictions, but they can keep their police and their jails from doing the work of the federal government.<sup>149</sup>

#### D. Conclusion

The federal prerogative in immigration enforcement is inextricably interlinked with the treatment of immigrants and their communities. Over time, the Supreme Court has identified independent roots for the federal government’s exclusive control over immigration. The federal

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<sup>145</sup> *Id.* at 933–34.

<sup>146</sup> *Id.* at 935.

<sup>147</sup> *Id.* at 921–22.

<sup>148</sup> The Police Foundation launched a national effort to examine the implications of local law enforcement of immigration laws, and many police chiefs expressed concern about the “impact on the relationship between immigrant communities and police and the probability of reduced cooperation of witnesses and victims of crime,” with its attendant impact on public safety. ANITA KHASHU, POLICE FOUND., THE ROLE OF LOCAL POLICE, EXECUTIVE SUMMARY 4 (2009). Police chiefs were also concerned about “increased victimization and exploitation of immigrants, a possible increase in police misconduct, the fiscal impact on law enforcement budgets, the high possibility of error given the complexity of immigration law, the possibility of racial profiling and other civil lawsuits, and the effect on immigrant access to other municipal services.” *Id.*

<sup>149</sup> There is an important caveat to the distinction between over- and underenforcement. States and localities cannot stem the flow of voluntary information from officers or from the Federal Bureau of Investigation to federal immigration officials. Congress passed a pair of laws in 1996 prohibiting states and localities from restricting the voluntary provision of information to federal immigration authorities. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7, 8, 21, 25, and 42 U.S.C.) (prohibiting state and local governments from limiting employee interaction with the Immigration and Naturalization Service); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 and 18 U.S.C.) (same). The laws stated that “no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from [INS] information regarding the immigration status, lawful or unlawful, of an alien in the United States.” 8 U.S.C. § 1644 (2012).

government's "undoubted power over the subject of immigration and the status of aliens"<sup>150</sup> rests partly in the sovereign's authority to control and conduct foreign relations. With regard to the laws police enforce and where they enforce them, the Supreme Court has noted the importance of foreign communication about the "status, safety, and security of their nationals" with one national sovereign, rather than with the "50 separate States."<sup>151</sup> And with regard to the manner of enforcement, the Court has said that immigration enforcement "can affect . . . the perceptions and expectations of aliens in this country who seek the full protection of its laws. Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad."<sup>152</sup> Through this lens, immigration enforcement affects not only individual rights but also the structure of constitutional separation of powers and dual sovereignty.<sup>153</sup>

Consolidation is an important first step toward protecting immigrants' rights and the rights of the communities they live in. As a first step, the proposal is necessarily limited. Immigration officials will continue to enforce harsh laws. They may continue to do so with little regard for the system — criminal or civil — in which they are operating. And they may continue to do so violently. But consolidation is a first step in a larger movement toward reform. It permits a single policy to determine what laws may be enforced and how. That national policy will be more transparent than thousands of disparate enforcement policies. It will be subject to political and legal checks. It can be reformed alongside other efforts toward improving the structure of police accountability. The step is thus worthwhile.

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<sup>150</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* (citations omitted).

<sup>153</sup> There is a natural connection between police discretion, individual rights, and the Supreme Court's immigration-federalism doctrine. "It is true that the federal structure serves to grant and delimit the prerogatives . . . of the States and the National Government," wrote Justice Kennedy in *Bond v. United States*. 131 S. Ct. 2355, 2364 (2011). It also "secures the freedom of the individual." *Id.* People — and not just the federal government or states — can challenge government action that upsets the balance between federal and state power.