The Deportation Conundrum

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I. INTRODUCTION 108
II. THE OPTIMAL DEPORTATION REGIME 113
A. Functions of the Deportation Regime and Underenforcement 113
B. Deciding Whom to Deport 118
1. The Costs and Benefits of Deportation 118
2. The Indirect Consequences of Deportation 122
i. The Uneven Spatial Impact of Migrant Presence ... 123
3. The Necessity for Subjective Political Judgment..... 134
C. Who Should Decide Whom to Deport? 136
1. Decentralizing Priority Setting 136
2. Addressing Objections to Decentralization 141
III. THE DEPORTATION REGIME UNDER THE STATUS QUO 144
A. De Jure Federal Monopoly on Priority Setting..... 144
B. De Facto Sub-federal Subversion 147
1. 287(g) Partnerships..... 149
2. Substantive Criminal Law..... 151
3. Secure Communities and Ordinary Criminal Law Enforcement 155
4. Sanctuary and Non-Cooperation Policies 161
C. The Trouble with the Status Quo 162
D. A Path to Decentralization of Priority-Setting..... 165
IV. CONCLUSION 168

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I. INTRODUCTION

> "The concern over each of the[] symptoms of immigration—whether harmful or beneficial—can be traced to a single issue: the American people care about who the immigrants are. It matters if the immigrants might need social services or if they might instead contribute to the funding of the programs in the welfare state. It matters if the immigrants compete with disadvantaged workers in the labor market and take their jobs away, or if the immigrants do jobs that natives do not particularly want and would go unfilled in the immigrants' absence. . . . [I]t matters if the immigrants will want to adapt to the social, economic, and political environment of the United States, or if they will fight to maintain their language and culture for several generations."
>
> -George Borjas[1]

Immigration reform and the enforcement of immigration law have gained visibility in recent years. Even prior to the recent upsurge of attention to comprehensive immigration reform, the Supreme Court's decision in *Arizona v. United States*[2] and President Obama's Deferred Action towards Childhood Arrivals ("DACA") policy[3] thrust to the forefront of national attention the questions that define the deportation regime.[4] Deportation as a legal regime, rather than a specific sanction, is defined by answers to three core questions: how many people should be deported? Which people, or what types of people, should be deported? Finally, who should choose how many and what types of people should be deported? The battle

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[1] GEORGE BORJAS, HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY, 4–5 (1999).

[2] 132 S. Ct. 2492 (2012).

[3] DACA is the executive policy of deferring action with regard to some young people, who arrived prior to their 16th birthday, and have no criminal records. *See Deferred Action towards Childhood Arrivals*, DEPARTMENT OF HOMELAND SECURITY, *available at* http://www.dhs.gov/deferred-action-childhood-arrivals.

[4] In this Article, "deportation" refers to what that term meant until 1996: the removal of a non-citizen, who is already inside the country, as opposed to "exclusion," the removal of a non-citizen who is forbidden from entry at a border or port of entry. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) consolidated exclusion and deportation, and labeled the resulting proceedings "removal" proceedings. *See* Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, §§ 304, 308, 110 Stat. 3009, 3009–597 (codified at 8 U.S.C. § 1324c(e) (2006), 18 U.S.C. § 1546(a) (2006), and 18 U.S.C. § 1015(e)–(f) (2006)) §§ 304, 308. Because the concern here is exclusively with interior enforcement, this Article employs the legally outdated, but more appropriate term "deportation."

between the federal government and subnational authorities is waged largely over the first question, regarding the appropriate level of enforcement, and the third question, regarding who is authorized to determine levels of enforcement. So-called "restrictionist" jurisdictions proclaim their authority to "add [their] own resources to the enforcement of federal law," and thereby to apprehend a greater number of deportable individuals.[5] On the other hand, non-cooperating or "sanctuary" jurisdictions declare that they "don't do [the federal government's] job," and thereby limit federal access to deportable individuals.[6] The question of which of the many deportable non-citizens should be deported is largely relegated to the background.

This Article argues that it is the second question that ought to be at the forefront of deportation policy. In this respect, the deportation regime is analogous to the immigration admissions regime. Concerns over immigration, as George Borjas observes, "can be traced to the single" question of "who the immigrants are."[7] Similarly, concerns over interior immigration enforcement are at their core about the problem of selecting whom to deport. Grappling with this question—indeed, the very fact of asking it—requires accepting the impossibility and the undesirability of full enforcement, and the consequent necessity of a priority-based regime. A priority-based regime must target the least socially desirable types for expulsion, just as the immigration admissions regime purports to select the most socially desirable types for admission into the United States. The thorny problem of identifying and ranking "types" in terms of social desirability calls for evaluating the most serious consequences of immigrant presence, as judged by those who experience those consequences. The consequences of immigrant presence—and thus, the expected consequences of deporting some immigrants—are spatially variable and numerous. This fact has underappreciated implications for the third question defining the deportation regime, the question of who should choose whom to deport. This Article suggests that while functional considerations justify exclusive federal control over the *level* of enforcement, the nature of the most keenly experienced

[5] Brief for Petitioners at *26, *Arizona*, 132 S. Ct. 2492 (2012).

[6] *Santa Clara County Ends Collaboration with ICE*, NEW AMERICA MEDIA (Oct. 18, 2011), http://newamericamedia.org/2011/10/santa-clara-county-ends-collaboration-with-ice.php (quoting County Board Supervisor George Shirakawa).

[7] BORJAS, *supra* note 1, 4–5.

consequences of migrant presence calls for sub-federal participation in priority-setting.

Although there is a growing literature on immigration enforcement and immigration federalism,[8] it has thus far overlooked the question of how deportation priorities should be determined, and what implications the answers have for the division of labor among levels of governments. Some immigration scholars have been critical of most sub-federal involvement in immigration enforcement generally.[9] Others, by contrast, acknowledge that *some* state and local participation must take place and that this is not necessarily a cause for regret.[10] Scholars have called broadly for "learning to live with immigration federalism,"[11] "taking immigration federalism seriously,"[12] and embracing a "new power-sharing theory" of immigration federalism.[13] When this scholarship addresses the sub-federal role in the deportation regime, the focus is on the activities

[8] The term "immigration federalism" is usually credited to Hiroshi Motomura, in his article *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1361 (1999) (describing "immigration federalism" as a system in which sub-federal actors participate in making and implementing immigration law and policy).

[9] *See, e.g.*, Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS LAW J. 1673 (2011) (arguing against state experimentation with immigration enforcement in part on the grounds that states cannot fully internalize the costs of their experiments); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1613 (2008) (urging more critical evaluation of the use of state and local police powers to influence the enforcement of immigration laws); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 36 (2007) ("[T]here is no good or legitimate reason to extend immigration enforcement to non-federal authorities any more than current law already allocates."); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism,* 76 N.Y.U. L. REV. 493 (2001).

[10] *See, e.g.*, Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 634 (2008) (arguing for federal-state cooperation such as using agreements delegating enforcement power); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 71–77 (2007) (advocating "a more robust role for the states in certain areas of immigration policy" including enforcement).

[11] Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997).

[12] Schuck, *supra* note 10.

[13] Rodriguez, *supra* note 10, at 617; *see also* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 827 (2008) (arguing that as a constitutional matter, "immigration authority may be shared among levels of government," which should "open[] the door to weighing the interests and values traditionally implicated in debates over the respective roles of the national and subnational governments").

that states and localities have or are in fact engaged in, such as federal delegation of authority to local officials and unilateral immigration-status verification policies.[14]

Most scholars and commentators find existing modes of sub-federal influence on enforcement to be at least problematic, if not outright unconstitutional.[15] They may well be right. But there is no reason why participation of states and localities in the deportation regime must be limited to the kinds of activities these actors have thus far undertaken. This Article suggests that the purposes of the deportation regime would be best served by opening an alternative avenue for sub-federal influence. Because centrally crafted and nation-wide priorities are poor proxies for sorting migrants on the basis of social desirability, the deportation regime would be improved if sub-national governments were explicitly invited to articulate their priorities. At the same time, because states and localities do not bear the full costs of administering the deportation regime, they are not well-positioned to determine enforcement levels.

The de jure federal monopoly on setting priorities for deportation restricts the channels whereby states and localities may influence deportation outcomes. At present, states and localities cannot meaningfully influence which types of non-citizens the federal government chooses to deport. Thus, their opposition to federal policy takes the form of efforts to overwhelm federal immigration authorities with enforcement requests or obstruct federal

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[14] *See, e.g.*, Rodriguez, *supra* note 10, at 635 (arguing that federal/sub-federal cooperation—such as via 287(g) agreements—should be pursued); Schuck, *supra* note 10, at 74–75 (arguing for coordination between federal and sub-federal authorities via 287(g) agreements); Stumpf, *supra* note 9, at 1597–98 (discussing the rise of mandatory and non-verification policies with regard to immigration status, 287(g) agreements, and substantive criminal laws that parallel federal prohibitions).

[15] *See, e.g.*, Rodriguez, *supra* note 10, at 635 (noting that the constitutionally and statutorily permitted space for local participation in law enforcement is limited to express delegation via 287(g) agreements and standard law enforcement); Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. Rev. 1819, 1819 (2011) (cautioning that "[a]ny federal policy that . . . permit[s] state and local priorities to decide which noncitizens will be exposed to federal immigration enforcement [] risks abdication of federal authority over immigration"). For arguments about unconstitutionality of dominant modes of state and local involvement in immigration enforcement, *see, e.g.*, Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration through Criminal Law*, 61 DUKE L. J. 251 (2011), Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004). *But see* David Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 101, 107 (forthcoming 2013) (arguing that at least "nonbinding executive enforcement policies cannot, and should not, preempt sub-federal law").

enforcement through non-cooperation. In this way, all disagreements between the levels of government culminate in a stand-off regarding levels of enforcement. Disagreements over how many people the country should deport are unresolvable and unproductive. This general proposition applies with particular force to the present circumstances. To quote the former Governor of Mississippi, Haley Barbour, with regard to the prospects of deporting the entire ten to eleven million-strong population of unauthorized immigrants, "there's a 100% chance that it's not going to happen."[16] And ultimately, the disagreement over how many people to deport is divorced from the core reasons why anyone opposes, welcomes, or tolerates unauthorized immigration. People oppose or welcome immigration, legal or not, for substantive reasons. This is why people care about "who the immigrants are." For the same reasons, people care about who the deportees are. Inviting sub-federal participation in formulating priorities for deportation would reset the focal point of the (inevitable) federal/sub-federal disagreements about deportation policy to the more important questions of who, or which types of immigrants, should be selected for deportation, and which for forbearance. Such a prospect would make for a deportation regime that produces enforcement patterns more closely approximating societal preferences.

This Article proceeds as follows. Part II articulates a view of a well-functioning, or "optimal," deportation regime.[17] Though the deportation regime may be seen as serving two functions, screening and law enforcement, Part II.A and II.B show that both lead to harmonious conclusions regarding the key features of the regime, including the determination of which types of immigration violators should be subjected to a higher probability of deportation. Part II.C. then explains why the nature of costs and benefits relevant to setting priorities for deportation—that is, identifying types of immigration law violators that should be prioritized as targets for deportation—calls for sub-federal participation. Part III examines more closely the

[16] Governor Haley Barbour, Morning Keynote Address, 10th Annual Immigration Law and Policy Conference (Oct. 31, 2013).

[17] "Optimal" here invokes policies most conducive to the welfare of the host society under given constraints, such as constitutional limits on policy choices and the reality of widespread violations of the immigration laws. The Article adopts the welfare of the host society as the relevant criterion not because the welfare of immigrants or immigrant-sending societies is unimportant, but in recognition of the fact that it is the natives' welfare that overwhelmingly drives policy-making. The Article proceeds from the assumption that some violators will be deported, and takes no view as to the normative desirability of deportation as such.

way the deportation regime has been functioning on the ground. Under the status quo, energetic sub-federal subversion of federal policy makes it very difficult for federal authorities to actualize a regime based on their own unilaterally set priorities. States and localities are able to push for the deportation of individuals the federal government would not have pursued, or to obstruct federal authorities in pursuing those they have pursued. Crucially, however, sub-federal actors are not able to exert meaningful influence over the setting of priorities, the task that they are best equipped to take on. Thus, this Article suggests opening alternative avenues for sub-federal participation in priority-setting.

II. THE OPTIMAL DEPORTATION REGIME

This Part sets out a conception of an optimal deportation regime through the lens of its two dominant functions. It demonstrates that such a regime would be characterized by under-enforcement and priority-driven allocation of resources. It then proceeds to characterize the relevant costs and benefits that should inform priority-setting. Given the character and the distribution of the direct and indirect costs of deportation, the federal government is better situated to determine the answer to the first question defining the deportation regime—the "how many" question—while sub-federal governments are better situated to inform the answer to the second question of what types should be prioritized for deportation.

A. Functions of the Deportation Regime and Underenforcement

The deportation regime encompasses the detection and investigation of deportable non-citizens, their apprehension, their civil prosecution in an immigration court or other legal processing of their case, and their actual deportation out of the country. Deportation is not the only sanction that enforces the immigration laws, but it is an essential one, and one that is unique to immigration law.[18] As one of the mechanisms for enforcement of the immigration

[18] To be sure, deportation is not the only mechanism that enforces immigration laws: employer sanctions, border enforcement, and criminal prosecution, among others, also enforce the immigration laws. The present discussion does not take into account the possibility that these other mechanisms might beneficially supplant or augment deportation. Thinking about the immigration enforcement regime as a whole would certainly call for such consideration. *See* Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 68 (2009) (explaining that immigration enforcement entails answering a large number of questions, such as "should we beef up enforcement? If so, should we concentrate our resources at the

laws, the deportation regime may be seen through two lenses: as a *screening mechanism*, which is intended to advance the substantive purposes of the immigration regime, and as a *penalty* for the violations of the law, which vindicates the intrinsic rule-of-law values harmed by such violations. Although, at some level of abstraction, these two functions of deportation are conceptually distinct—the first aimed at selecting people who are not wanted as part of the national community, and the second aimed at penalizing violations of laws—they are not mutually exclusive. And as argued here, both perspectives lead to harmonious conclusions as to the characteristics of an optimal deportation regime.

The substantive purposes of the immigration regime encompass the reasons the United States, or any sovereign state, allows any in-migration at all. Immigration of non-citizens may serve valuable economic purposes, such as filling labor needs and increasing economic productivity. Immigration may rectify demographic imbalances, by, for example, introducing young people into an aging community. Immigration may reunite families and contribute to cultural diversity. And of course, immigration may serve purely political or expressive functions: taking in refugees, for example, expresses and affirms a nation's humanitarian values and signals disapproval of certain political regimes. To the extent that immigration is welcomed at all, it is because in some relevant sense it is seen to augment the well-being of the host society.

Allowing non-citizens into the country is not costless. Too much immigration and/or the wrong types of immigrants may harm, rather than augment, the well-being of the host society: it may cause economic harm, destabilize the social fabric, or present risks to national security. Thus, every sovereign state exerts some control over who may enter its borders and on what terms they may remain. Adam Cox and Eric Posner helpfully described these substantive goals of the immigration regime as entailing "first-order issues," or preferences as to how many and what types of people we want to admit and under what conditions.[19] At least in the abstract, there is some number and some types of immigrants that would best further those goals, while minimizing the costs.

border, in the interior, or both? Should we prioritize deportations, criminal prosecutions, or both? Should we strengthen the employer sanctions regime? . . . [S]hould we offer legal status to . . . the undocumented population and, if so, under what conditions?").

[19] Adam Cox & Eric Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 811 (2007).

The decisions regarding the number and types of immigrants that are formalized in admissions criteria are "second-order choices," which seek to implement first-order preferences.[20] Legal admissions criteria attempt to strike a favorable balance between the advantages of immigration and its costs by "screen[ing] applicants for admission so that the desired types are admitted and others are excluded."[21] The American immigration system largely relies on numerical limits to determine how many and which of the potential incomers are in fact allowed in. It would be nothing short of a miracle if statutory limits, notoriously slow and difficult to change, were to correspond to the levels and kind of immigration that would best advance the aims that justify immigration. There is no reason to suppose, then, that the distinction between legal and extralegal flows tracks the distinction between advantageous and harmful immigration. Most empirical scholarship does not distinguish between the effects of legal or extralegal arrivals on host societies, precisely on the presumption that the difference is merely legal and has no bearing on the extralegal effects of migration.[22] One need not believe that all extralegal migration is socially desirable to be convinced that at least some part of it may enhance the welfare of the recipient population.[23]

Because the presence of unauthorized migrants signals the inadequacy of legal admissions, the problem it presents is not merely one of punishing widespread violations of the law. Unauthorized immigration also presents another, ex ante screening opportunity to implement first-order preferences. In this light, the mass presence of unauthorized migrants in the country is no cause for regret. As Cox

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[20] *Id.*

[21] *Id.*

[22] *See, e.g.*, GORDON HANSON, *The Economic Logic of Illegal Immigration*, 26 Council Special Report (Apr. 14, 2007) ("[T]here is little evidence that legal immigration is economically preferable to illegal immigration."), *available at* http://www.cfr.org/immigration/economic-logic-illegal-immigration/p12969.

[23] *See, e.g.*, Stephen Legomsky, *The Removal of Irregular Migrants in Europe and America* 4 (Washington Univ. in St. Louis School of Law, Legal Studies Research Paper No. 11-10-03, 2011) ("[T]he level of non-compliance is evidence that the law itself is insufficiently accommodating the relevant competing interests."), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1945833. For arguments regarding the *economic* efficiency of illegal migration, *see*, Hanson, *supra* note 22 ("[I]llegal immigration more readily responds to market forces than legal immigration."); Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PENN. L. REV. 1147 (1997) (applying trade principles to immigration and concluding that liberalizing the immigration regime by, *inter alia*, eliminating quantitative immigration barriers, would enhance the national economic welfare as well as global economic welfare).

and Posner point out, ex post screening via deportation has an important informational advantage over ex ante screening via the admissions regime because more is known about the potential deportees than was the case before they entered the country.[24] If we focus on the screening function, it is virtually axiomatic that not all deportable persons should be deported. To say that the deportation regime serves a screening function is not merely an academic idiom. Surveying the case law as well as statutory evolution, Stephen Legomsky and Cristina Rodriguez note that the deportation regime cannot be realistically described as simply a corrective for "admissions errors" or penalties for "violations of conditions imposed on entry."[25] Instead, as the Supreme Court put it in 1924, the function of deportation is "to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society," and implicitly, to show forbearance towards those, whose continued presence would enhance such welfare.[26]

The view of deportation as a screening mechanism is not at odds with the view of it as a system of penalties for violations of the law. Even if a migrant otherwise contributes to the public welfare, the fact of his violation of the immigration laws undermines the rule of law and makes him a less socially desirable type.[27] The societal interest in maintaining the rule of law, however, is just one among many competing interests that migration implicates. Even if we elevate the intrinsic value of the law over all extrinsic social purposes migration serves, it would still not be optimal to seek deportation of all the violators. That is for the familiar reasons that make it undesirable to attempt total eradication of violations, rooted in both efficiency and normative considerations.[28]

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[24] *See* Cox & Posner, *supra* note 19.

[25] STEPHEN LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 518 (2009).

[26] Mahler v. Eby, 264 U.S. 32, 39 (1924).

[27] That proposition itself is contestable because violations of immigration law are not universally treated as violations of *mala in se* prohibitions. *See, e.g.*, Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2039 (2008) ("Is immigration outside the law a matter of egregious lawbreaking, or does it represent an invited contribution to the U.S. economy and society that the government tolerates?").

[28] *See, e.g.*, Louis Kaplow, *The Optimal Probability and Magnitude of Fines for Acts That Definitely Are Undesirable*, 12 INT'L REV. L. & ECON. 1 (1992) (showing that even when society would wish to deter all violations of some type, because they are undesirable in themselves, "the benefits from deterrence often will be insufficient to

In this light, the problem of deportation is no different from any problem of optimal enforcement: socially optimal enforcement calls for deportation until marginal costs of an additional deportation equal its marginal benefits. The social desirability of a particular migrant bears on the costs and benefits of deporting that migrant, and the full cost of deportation may outweigh the rule-of-law benefits thereof. As elaborated in the next section, screening to distinguish the more socially desired types from the undesirable types, and assessing the costs and benefits of deportation to optimally enforce the immigration laws are the same problem, not two separate ones.[29] Discretion in the enforcement of immigration law institutionalizes the recognition that forbearance from enforcement of the law, even against clear violators, will often be preferable to attempts at its enforcement.[30] Similar to criminal law enforcement, the executive's discretion in immigration enforcement is justified by the need to allocate scarce resources and by the need to ensure that the sanction

justify the expenditures on enforcement that would be required to deter everyone"), *available at* http://www.sciencedirect.com/science/journal/01448188/12/1; STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 488, 486 (2004) (explaining that "optimal law enforcement is characterized by underdeterrence—and perhaps substantial underdeterrence—due to the costliness of enforcement effort and limits on sanctions" and not due to the "social desirab[ility]" of the illegal act; indeed, "because of the costs of enforcement, it is possible that it will be optimal for there not to be any law enforcement, for society to countenance the harm in order to save the costs of law enforcement altogether").

[29] It is worth noting that the majority of the American public has never favored total deportation of all deportable individuals. Consider the answers to the following Gallup poll question: "Which comes closest to your view about what government policy should be toward illegal immigrants currently residing in the United States? Should the government: (1) deport all illegal immigrants back to their home country; (2) allow illegal immigrants to remain in the United States in order to work, but only for a limited amount of time; or (3) allow illegal immigrants to remain in the United States and become U.S. citizens, but only if they meet certain requirements over a period of time?" *Immigration*, GALLUP, http://www.gallup.com/poll/1660/immigration.aspx/#2 (last visited Oct. 16, 2013).

	Deport All	Remain in the U.S. to Work	Remain and Become a Citizen
2011 Jun 9-12	21%	13%	64%
2007 Mar 2-4	24%	15%	59%
2006 Jun 8-25	16%	17%	66%

[30] *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials."); Abuelhawa v. United States, 556 U.S. 816, 823 n.3 (2009) ("Congress legislates against a background assumption of prosecutorial discretion.").

does not wholly frustrate the extrinsic purposes of the law.[31] In both cases, we rely on the executive not to enforce laws against targets whose prosecution does not further the substantive goals of the relevant legal regime.[32]

B. Deciding Whom to Deport

1. The Costs and Benefits of Deportation

How should scarce resources be allocated to best serve both the screening function and the law enforcement function? How do we determine which types of migrants are socially undesirable, and with respect to whom the benefits of deportation are likely to exceed the costs? To answer these questions, it is useful to distinguish between the direct and indirect consequences (i.e., costs and benefits) of deportation. The *direct cost* of a deportation is its administrative cost, or the resources necessary to identify, apprehend, process, and actually remove a deportable person. The *direct benefit* of a deportation is the vindication of the rule of law. These costs and benefits are direct because they are invariably present for every potential deportation. Let us presume for the moment that the deportable population is homogeneous with respect to these costs and benefits: that is, the administrative costs of deporting any one migrant are equivalent to those of deporting another, and the rule-of-law benefit from penalizing one violation is equivalent to penalizing another. Assuming this kind of homogeneity, the cost and benefit curves would look the same as they do in the context of criminal law: the marginal cost of enforcement rises and the marginal benefits

[31] *See, e.g.*, Declaration of Daniel H. Ragsdale, Appendix B, at ¶ 28, Georgia Latino Alliance for Human Rights v. Deal, 793 F. Supp. 2d 1317 (N.D. Ga. 2011) (declaring that "ICE does not seek to arrest, detain, remove, or refer for prosecution, all aliens who may be present in the United States illegally," and exercises its discretion to "focus[] its enforcement efforts in a manner that is intended to most effectively further national security, public safety, and security of the border, and has affirmative reasons not to seek removal or prosecution of certain aliens").

[32] *See, e.g.*, Hedder v Chaney, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process is a decision generally committed to any agency's absolute discretion."). For these reasons, legal actions to compel enforcement of immigration laws fare no better than legal actions to compel criminal investigation or prosecution: all such suits were dismissed. *See* Huntington, *supra* note 13, at 789 n.42 (discussing the cases). For a discussion of the reasons the police and prosecutors have no general duty to investigate and prosecute crimes, *see* Wayte v. United States, 470 U.S. 598 (1985) (upholding "passive enforcement policy" that resulted in 16 prosecutions out of an estimated 674,000 violators of a federal criminal law against an impermissible "selective prosecution" challenge).

decline with each additional deportation, for the same reasons that apply to modeling the costs and benefits of criminal law enforcement. If the direct costs and benefits were the only relevant ones, and if we presumed a homogeneous migrant population, then the optimal enforcement level would be specified simply as a number of deportations.

But the deportable population is not fully homogeneous with respect to those costs and benefits. And importantly, the direct costs and benefits are not the ones most strongly influencing people's preferences about how to enforce immigration laws. The most profound disagreements about immigration enforcement stem primarily from disagreements over the relatively indirect consequences of deportation weighed against those of tolerating unauthorized migrant presence. People oppose, welcome, or tolerate unauthorized migration for reasons apart from its illegality. These reasons stem from beliefs about the consequences of unauthorized migrant presence, or of immigration generally.

The indirect consequences embrace the varied economic, social, demographic, and other effects that might accompany the choice to deport or forbear from deportation of violators. The benefits of deportation are often treated as simply the mirror image of the costs of unauthorized presence, and vice versa. That is, if unauthorized migrants are deemed to contribute to particular outcomes, desirable or not, deporting them would make those outcomes less likely.[33] These may be thought of as *indirect costs and benefits* of deportation because they do not inescapably accompany the removal of one or many people, but constitute more attenuated, speculative, and thus, contested phenomena. With respect to such indirect consequences of enforcement choices, the migrant population is heterogeneous.

That migrants are heterogeneous in this regard is intuitive at the individual level. All else being equal, the deportation of a violent felon with no community ties would be universally preferred to the deportation of an otherwise law-abiding long-term resident, who fell out of status and has extensive ties to the community.[34] Although

[33] This, of course, may not be entirely true: it is possible, e.g., that immigration adversely affects the labor outcomes of some native workers, but that deporting unauthorized workers does not improve the situation of the affected natives. Nonetheless, for the purposes of analytic simplicity here, I refer to the impact of deportation and the impact of unauthorized migrant presence interchangeably, unless explicitly distinguished.

[34] *See, e.g.*, *Arizona,* 132 S. Ct. 2492, 2499 (observing that "workers trying to support their families, for example, likely pose less danger than alien smugglers or

deporting the felon and the long-term resident entails comparable administrative costs and rule-of-law benefits, targeting the former also carries the benefit of removing a criminal offender from the community, potentially deterring other deportable individuals from committing crimes. Targeting the latter, on the other hand, creates no such additional benefits and may impose additional costs on the community in which the long-term resident is embedded. Because migrants are heterogeneous with respect to the indirect consequences of their removal, the optimal deportation regime cannot be specified completely by reference to the desired level or number of deportees.[35] Because the deportation of the felon confers a higher net benefit than the deportation of the long-term resident, it is not a matter of indifference which migrants are selected for deportation.

To say, as Borjas does, that the "American people care about who the immigrants are,"[36] is to assert precisely this: people feel differently about different types of immigrants because they perceive that some types impose net costs, while others confer net benefits. The most recent generation of empirical research supports Borjas's assertion, demonstrating that public attitudes towards immigrants are conditional on the characteristics of the immigrants in question.[37] Particular types of immigrants are welcomed or not depending on whether they contribute to the consequences of immigrant presence that are of gravest concern. An optimal deportation system would thus prioritize the individuals whose deportation would yield the highest net benefits (i.e., the less socially desired types), while forbearing from targeting those whose deportation would impose net costs (i.e., the more socially desired types). The notion that identifiable "types" may actually be arranged from least to most

aliens who commit a serious crime," and thus, the latter should be prioritized for deportation).

[35] *But see* Schuck, *supra* note 10, at 72 ("[O]nce the government has settled on an appropriate enforcement *level*, society has a compelling interest in seeing that the enforcement is carried out effectively at that level.") (emphasis added).

[36] Borjas, *supra* note 1, 4–5.

[37] *See* Jens Hainmueller & Daniel J. Hopkins *The Hidden American Immigration Consensus: A Conjoint Analysis of Attitudes Toward Immigrants* (Massachusetts Inst. of Tech., Pol. Sci. Dep't Working Paper No. 22, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2106116; Jens Hainmueller & Michael J. Hiscox, *Attitudes toward Highly Skilled and Low-skilled Immigration: Evidence from a Survey Experiment*, 104 AM. POL. SCI. REV. 62 (2010); G. H. Hanson et al., *Public Finance and Individual Preferences Over Globalization Strategies*, 19 ECON. & POL. 33 (2007).

desirable is, of course, an abstraction. But it is a useful abstraction if the deportation regime is to serve its purpose as a screening mechanism that selects people for deportation on the basis of how socially desirable their presence is.

It is a useful abstraction, too, if we focus on the law enforcement function. A priority-based deportation regime is optimal whether one is concerned with deterrence of violations or the just penalty for the violation. With respect to deterrence, the analogy with the criminal law enforcement system remains applicable. For the purposes of general, rather than specific deterrence, the optimal sanction should increase with the severity of the harm from the illegal act.[38] If enforcement of immigration laws via deportation has any deterrent effects,[39] it is preferable to target resources to deter those types, whose violations cause the greatest harm. In this regard, the immigration law enforcement problem may be conceptually harder than the criminal law enforcement problem because the social harm of crimes is usually readily identifiable and tied to the unlawful act (e.g., social harm of murder is the death of a human being). This is not so with immigration law violations. The social harm of immigration violations is rarely thought to inhere in the discrete act or omission that violated the law (e.g., unlawful entry, overstaying a visa) or its immediate consequences; rather, it is understood in terms of unlawful *presence* that ensues after the violation is committed. What makes an individual's continuing presence costly or beneficial are characteristics and circumstances that are largely exogenous to the legal status itself. An enforcement regime that succeeds in

[38] *See* Shavell, *supra* note 28, at 518–19, 525 (addressing marginal deterrence and general deterrence); Steven Shavell, *Specific versus General Enforcement of Law*, 99 J. POL. ECON. 1088 (1991), *available at* http://www.law.harvard.edu/faculty/shavell/pdf/99_J_Political_Econ_1088.pdf; Dilip Mookherjee & I. P. L. Png, *Monitoring vis-a-vis Investigation in Enforcement of Law*, 82 AM. ECON. REV. 556 (1992), *available at* http://www.er.uqam.ca/nobel/r20310/eco8510/Mookherjee-Png_AER1992.pdf.

[39] This proposition is itself contested. *See, e.g.*, Wayne A. Cornelius & Idean Salehyan, *Does Border Enforcement Deter Unauthorized Immigration? The Case of Mexican Migration to the United States of America*, 1 REG. & GOVERNANCE 139, 140 (2007) (finding that "tougher border controls have had remarkably little influence on the propensity of Mexican nationals to migrate illegally to the USA," and noting that the finding is in harmony with other recent empirical studies on enforcement effects); *see also infra* note 214. At the same time, there is some evidence that deportation has selection effects as to types of immigrants, and a deterrent effect on post-entry conduct. *See* Kristin F. Butcher & Anne M. Piehl, *Why Are Immigrants' Incarceration Rates so Low? Evidence on Selective Immigration, Deterrence, and Deportation* (Federal Reserve Bank of Chicago, WP-05-19, 2005) (showing that a broadening of the set of crimes that trigger deportation in the U.S. in the 1990s affected both the type of immigrants and their behavior once in the country).

marginally deterring violations that create greater social costs must prioritize enforcement against types that impose such costs. Unlike criminal law, immigration law enforcement cannot shape violators' incentives by calibrating the magnitude of the sanction to the severity of the violation.[40] Calibrating the probability of the sanction is the only tool available with which to affect incentives of immigration law violators.[41] Prioritizing certain types, therefore, means simply that more resources ought to be allocated to their apprehension and removal, raising the probability of the sanction relative to non-priority types.

A priority-based deportation regime remains optimal even if the deterrence value is discounted and the focus is instead on delivering a just or fitting sanction for the violation of the law. Several scholars have criticized relatively indiscriminate enforcement by appealing to principles of proportionality.[42] Indeed, some scholars have argued that since many of the grounds for deportation involve post-entry criminal behavior, deportation is in part a punitive measure, which is subject to constitutional proportionality principles.[43] Thus, if removing certain types of persons is grossly disproportionate to their offense, it is at least unjustifiable to deploy scarce resources on their deportation.

2. The Indirect Consequences of Deportation

That the optimal deportation regime should be priority-based is not a logically challenging proposition. The more complex question

[40] This is a simplification of reality that does not alter the main point: a person ordered removed may be precluded from returning to the United States for a period of 5, 10 or 20 years—or ever—depending on the grounds for his removal. *See* 8 U.S.C. § 1182(a)(9)(A)(i), (ii)(II) (2012). However, the length of the bar on return presents a very limited opportunity to calibrate sanctions, since in no event is legal return probable or likely.

[41] To be sure, immigration violators are not immune to ordinary criminal law, which should deter unauthorized immigrants from committing crimes. Indeed, there is some empirical evidence for these kinds of deterrence effects on immigrants' post-entry behaviors. *See generally* Butcher & Piehl, *supra* note 39.

[42] *See, e.g.*, Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1732 (2009) ("[A]ssigning deportation as the ubiquitous sanction renders it impossible to calibrate the gravity of the violation with the size of the sanction.").

[43] *See, e.g.*, Michael Wishnie, *Proportionality: The Struggle for Balance in U.S. Immigration Policy*, 72 U. PITT. L. REV. 431 (2011); Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1656 (2009) ("[T]he key question in determining whether or not a sanction is punishment is not whether it is criminal or civil, but whether it is remedial or punitive," because "[p]unitive measures in both contexts are subject to constitutional limitations.").

concerns how those priorities should be determined. As suggested above, Americans are not indifferent to the characteristics of deportees. Attitudes towards particular migrant types are likely to be informed by perceptions about the consequences of migration, which are inextricably linked to expectations about consequences of deportation. For example, if unauthorized immigrants impose an onerous tax burden by educating their children in public schools, and the community is seriously concerned about this particular effect of immigration, that community might prioritize deportation of families with school-aged children—or, for that matter, the children themselves—over the deportation of childless adults.[44] Building on that intuition, this section examines just a few of the potential consequences of migrant presence, and speculates about how these consequences might shape societal preferences for targeting particular migrant *types* for deportation (as opposed to preferences regarding immigration enforcement *levels*). In particular, this discussion suggests that the indirect consequences of migration are not uniform across the country. If societal determinations of more and less desirable types are linked to the variable consequences that migration produces, then considerable difficulty besets any attempt to create uniform nationwide priorities in a large and heterogeneous nation.

i. The Uneven Spatial Impact of Migrant Presence

Consider the most prominent consideration in public discourse regarding immigration, its economic impact. Classical economic theory, which does not distinguish between legal and illegal migration, predicts that migration increases the overall economic productivity of the host nation, but will have redistributive consequences including adverse impacts on wages and employment of some subset of native labor.[45] In particular, immigration is expected to lower the wages of competing native workers, but raise

[44] Deporting unaccompanied children is not just a fanciful hypothetical. *See* Julia Preston, *Young and Alone, Facing Court and Deportation*, N.Y. TIMES (Aug. 25, 2012), *available at* http://www.nytimes.com/2012/08/26/us/more-young-illegal-immigrants-face-deportation.html?pagewanted=all.

[45] *See, e.g.*, Howard F. Chang, *Immigration Restriction as Redistributive Taxation: Working Women and the Costs of Protectionism in the Labor Market*, 5 J.L. ECON. & POL'Y 1, 7 (2009); TIMOTHY J. HATTON & JEFFREY G. WILLIAMSON, GLOBAL MIGRATION AND THE WORLD ECONOMY: TWO CENTURIES OF POLICY AND PERFORMANCE 290 (2005); Hanson, *supra* note 22; Borjas, *supra* note 1, at 10, 12.

the wages of complementary workers.[46] And there is evidence that the hypothesized impact occurs.[47] The concern for the impact of immigration on native workers is already formalized in admissions criteria: applicants for certain employment-based visas need to show that their employment will not adversely impact the employment of U.S. workers.[48] These same considerations may inform priorities for deportation. In that regard, the prevailing economic wisdom is that low-skilled immigrants impose a greater net cost on the economy than high-skilled migrants because unskilled migrants do not complement the native labor needs, and therefore, produce a smaller immigrant surplus.[49] Thus, insofar as economic consequences of migrant presence may bear on deportation priorities, unskilled migrants might be prioritized over the more skilled.[50]

Consider next the fiscal impact of unauthorized migration. Unauthorized immigrants consume public goods, but they also contribute to tax revenue. Most estimates of the aggregate, national fiscal impact of immigration conclude that, over the long term, tax revenues generated by immigrants, both legal and unauthorized, exceed the cost of the services they use.[51] But, in the short term, the

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[46] GEORGE J. BORJAS, IMMIGRATION AND THE EFFECTS ON THE U.S. LABOR MARKET (1960-2000), DEP'T OF LABOR, ETA OCCASIONAL PAPER 2005–10, at 9 (2005).

[47] *See, e.g.*, *id.* at 13 ("[A]n immigration-induced 10 percent increase in the number of workers in each skill group . . . reduces the wage of native workers in that same skill group by 3.5 percent; it reduces the wage of native workers who have the same education but who differ in their experience by 0.7 percent; and it increases the wage of native workers with different educational attainment by 0.5 percent.").

[48] For employment based immigration, an immigrant must obtain from the Department of Labor a certification that (a) the job he proposes to take is one for which not enough qualified U.S. workers are available and (b) the immigrant's employment will not adversely affect the wages and working conditions of the U.S. workers. 8 U.S.C. § 1182(a)(5) (2013).

[49] *See, e.g.*, Hanson, *supra* note 22, at 21; Borjas's, *supra* note 46, at 13. *But see* Gianmarco Ottaviano & Giovanni Peri, *Rethinking the Effects of Immigration on Wages* (Nat'l Bureau of Econ. Research, Working Paper No. 12497, 2006), *available at* http://www.nber.org/papers/w12497 (identifying potentially problematic assumptions behind Borjas' methods of estimating wage impact); Chang, *supra* note 45 (same).

[50] This is not to imply that targeting unskilled migrants for deportation is a normatively or practically justifiable way to deal with the potentially differential impact of the skilled and unskilled workers on the U.S. economy. For the purposes of this discussion, this Article ignores all other remedies. But alternative enforcement mechanisms do exist. *See supra* note 18. These may be preferable to deportation for some subset of violations. For an argument that taxation is preferable to reducing the numbers of the low-skill workers—whether by deportation or restrictive admission, *see* Chang, *supra* note 45.

[51] CONG. BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE

fiscal burden of migrants may be a concern. The concern about the fiscal impact is also formalized in the ex ante admissions criteria, as the INA prohibits the entry of aliens if they are "likely at any time to become a public charge."[52] Addressing the same concerns, the PRWORA authorizes the states to deny or grant welfare benefits to immigrants, lawful and unlawful.[53] These concerns are also manifest in public opinion, with individuals who are more exposed to the public-finance consequences of immigration expressing more negative attitudes towards it.[54] Fiscal impact considerations also lead to the conclusion that unskilled, low-paid, or unemployed workers might be prioritized for deportation as they pay less in taxes, and perhaps, consume more in public goods than others.[55]

Prioritizing low- or unskilled migrants for deportation over the highly skilled as a nation-wide policy would produce a certain geography of enforcement. The skill levels of migrants vary across the country, and if this societal preference were to guide policy, more enforcement resources would be directed to areas with higher concentrations of lower-skilled migrants. So, for example, such a priority system might concentrate more enforcement resources on a state like California, where 37.2% of immigrants (legal and illegal) lacked a high school diploma in 2010, and fewer resources on a state like New Jersey, where that figure is 20.6%. In both states, the native population without a high school diploma—the population likely to be most disadvantaged on the labor market by migrant labor—is comparable, at 8.9% and 8.8%, respectively.[56]

Focusing on national economic or fiscal impact, however, obscures a great deal of variability across the nation's territory. It is not merely the *characteristics* of migrants that vary—for example,

BUDGETS OF STATE AND LOCAL GOVERNMENTS (2007).

[52] 8 U.S.C. § 1182(a)(4)(A) (2012).

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

[54] *See* GORDON HANSON, WHY DOES IMMIGRATION DIVIDE AMERICA?: PUBLIC FINANCE AND POLITICAL OPPOSITION TO OPEN BORDERS, Ch. 4 (2005).

[55] A societal preference for higher skilled migrants over lower skilled ones is not merely a hypothetical one, with experimental survey evidence showing that people prefer highly skilled immigrants. *See* Hainmueller & Hiscox, *supra* note 37.

[56] *See* MIGRATION POLICY INST., *American Community Survey and Census Data on the Foreign Born by State* (2011), http://www.migrationinformation.org/DataHub/acscensus.cfm#. Comparable data is not available specifically for the unauthorized or deportable population by state; for the present purposes, we may assume that the educational attainment of all immigrants is correlated with that of the unauthorized population.

California's immigrants are generally less educated than New Jersey's—but the *very impact* of migrants on the labor market itself. At the sub-national level, there are well-designed studies that come to different conclusions regarding the effects on labor markets. Borjas' analysis of Arizona, for instance, supports the notion that low-skilled migrants depress the wages and increase unemployment of native, low-skilled workers.[57] By contrast, studying California's experience between 1960 and 2004, Giovanni Peri found that "immigration has a positive effect on each single education group of native workers," with "[e]ven the least educated native workers gain[ing] 1.8% of their real wages and college dropouts gain[ing] 7.2%."[58] These results, Peri argues, put in doubt the view that low-skilled migrants always impose an economic burden on natives: "If immigration harms the labor opportunities of natives, especially the least skilled ones," then California, with its comparatively less educated migrant labor force, "was the place where these effects should have been particularly strong."[59]

These studies are illuminating not so much for the specific findings they present as for what they imply for deportation policy. There are several reasons why findings regarding the impact of migration on any outcome of interest diverge. In part, this is due to different methodological choices and assumptions underlying the analyses.[60] But in part, it is also because the impact of migration

[57] *See* Joint Appendix, Arizona v. United States, No. 11-182, 2012 WL 406205, at *36–37 (Feb. 6, 2012) (reporting findings that "unauthorized aliens in the Arizona workforce reduced the earnings of low-skilled authorized workers in Arizona by 4.7%," and "increased their unemployment rate by 1.4[%]").

[58] GIOVANNI PERI, IMMIGRANTS' COMPLEMENTARITIES AND NATIVE WAGES: EVIDENCE FROM CALIFORNIA 18 (Nat'l Bureau of Econ. Research, Working Paper No. 12956, 2007).

[59] *Id.* at 1; *see also* DAVID CARD, CTR. FOR RESEARCH & ANALYSIS OF MIGRATION, HOW IMMIGRATION AFFECTS U.S. CITIES, DISCUSSION PAPER SERIES NO. 11/07 (2007) (finding that "immigration exerts a modestly positive effect on the labor market outcomes of most natives" across 17 metropolitan areas); David Card, *The Impact of the Mariel Boatlift on the Miami Labor Market*, 43 INDUS. & LAB. REL. REV. 245 (1990) (finding that the 1980 arrival of 125,000 Mariel Cubans in Miami, which suddenly increased the local labor supply by 7%, had no discernible effects on native wages or employment).

[60] *See, e.g.*, Borjas, *supra* note 46, at 10 (arguing that the numerous cross-sectional studies, which converged towards a finding of no effect on natives' wages, were contrary to his results, in part because of immigrant clustering in cities with thriving economies—and thus, high wages—and in part because of the natives' own out-migration in response to migrant labor competition); Ottaviano & Peri, *supra* note 49 (arguing that Borjas's nation-level findings diverge from their own because he assumes that the supply of capital is fixed and that equally educated migrants and natives are perfect substitutes, and that these assumptions may not be justified).

actually differs from place to place, from one time period to another, and from short-run to long-run. Indeed, economic theory identifies the reasons why we should expect differential impact: the effect on the labor market depends on the extent to which migrant labor is a close substitute for native labor, the mobility of native labor, and the mobility of capital, among other factors.[61] It would be reasonable for some jurisdictions to conclude that the impact on the native labor market has been adverse, while others conclude that the impact in their communities has been positive. This implies that any nationwide priorities we might derive from the adverse impact of migrants on the labor market may not accurately capture the types that impose the greatest costs on the native community. While the deportation of a sufficient number of unskilled unauthorized migrants may alleviate the pressures on the natives' employment prospects in Arizona (if we believe Borjas), the same results are not likely to follow in California (if we believe Peri).

Likewise, the fiscal impact of migrants is uneven. While most estimates of the national fiscal impact of immigration conclude that even unauthorized immigrants generate more revenue than they consume in public services, the same is usually not the case at the state and local levels, especially in the short run. Because fiscal benefits accrue primarily to the federal government and the costs are borne disproportionately by state and local governments, at the sub-federal level, the net fiscal impact on the latter is often negative.[62] At

[61] *See* GEORGE J. BORJAS ET AL., SUBSTITUTION BETWEEN IMMIGRANTS, NATIVES, AND SKILL GROUPS (Nat'l Bureau of Econ. Research, Working Paper No. 17461, 2011) (explaining that "the wage impact of immigration depends crucially on the elasticity of substitution between similarly skilled immigrants and natives and the elasticity of substitution between high school dropouts and graduates," and that different estimates of these elasticities explain divergent findings); Chang, *supra* note 45, at 9 (noting that "the demand for labor does not remain fixed when immigrants enter the economy," and that adjustments in demand will condition the impact).

[62] *See* HANSON, *supra* note 54, at 42. This is so for a number of reasons. First, "most unauthorized immigrants are prohibited from receiving many of the benefits that the federal government provides through Social Security and such need-based programs," but state and local governments are required to provide certain services, in order to participate in some federal assistance programs. CONG. BUDGET OFFICE, *supra* note 51, at 1. Courts have also restricted the authority of state and local governments to deny certain public services to unauthorized immigrants. *See, e.g.*, League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244 (S.D. Cal. 1997) (striking down California's Proposition 187, which would have eliminated access for unauthorized immigrants to almost all public services). Second, "[i]n general, state and local governments bear much of the cost of providing certain public services—especially services related to education, health care, and law enforcement—to individuals residing in their jurisdictions." CONG. BUDGET OFFICE, *supra* note 51, at 1.

the same time, the fiscal burden on sub-federal governments is variable, and this variability is not wholly a function of the size of the unauthorized immigrant population or of different methodological approaches to its calculation.[63] As a Congressional Budget Office review of numerous state-level fiscal-impact studies found, "the impact in one jurisdiction cannot be generalized to other areas."[64] This is not surprising as states and localities differ greatly in the types of benefits they provide, the eligibility rules for the benefits, and the structure of their tax revenue.[65] Some jurisdictions spend more on educating unauthorized children than others; some spend more on incarcerating unauthorized migrants than others; some spend more on health care provisions than others.[66] For example, Colorado estimated that it spent 1.7 times as much on providing medical care for unauthorized migrants as it did on incarcerating them in 2006.[67] By contrast, Texas estimated that it spent more than twice as much on incarcerating unauthorized immigrants as it did on their medical care in 2006.[68] Because of such differences, as well as differences in

On the benefit side, by contrast, unauthorized migrants provide more federal tax revenue (from Social Security and federal income taxes) relative to state or local tax revenue.

[63] Although such differences certainly matter, *see* WILLIAM K. JAEGER, POTENTIAL ECONOMIC IMPACTS IN OREGON OF IMPLEMENTING PROPOSED DEPARTMENT OF HOMELAND SECURITY "NO MATCH" IMMIGRATION RULES, 35 (2008), *available at* http://immigrationworksusa.org/uploaded/file /CWO%20Economic%20Study%20-%20OSU%20-%20Jaeger.pdf (demonstrating inconsistent results of fiscal impact of the exodus of the entire unauthorized worker population "appear to be due to the distinction between a static analysis (estimated current tax contributions of undocumented immigrants) and a dynamic analysis (estimated change in revenues if undocumented immigrants departed)").

[64] CONG. BUDGET OFFICE, *supra* note 51, at 5.

[65] For a discussion of representative studies of fiscal impact, *see* JAEGER, *supra* note 63, at 9 (discussing results of studies from Colorado, Missouri, and Texas); National Conference of State Legislatures, http://www.ncsl.org/issues-research/immig/state-studies-on-fiscal-impacts.aspx (summarizing findings of many state-level fiscal impact studies).

[66] *E.g.*, CONG. BUDGET OFFICE, *supra* note 51, at 8 (noting that Minnesota estimates that it spent about $8,400 per child to educate unauthorized immigrant children in 2003–04, while New Mexico estimates that number for the same year to be around $7,280 per head); OFFICE OF JUSTICE PROGRAMS, https://www.bja.gov/ProgramDetails.aspx?Program_ID=86 (last visited Mar. 1, 2013) (noting that Texas pays $12,000 per inmate to incarcerate criminal aliens, while California pays $34,000 for the same).

[67] RICH JONES & ROBIN BAKER, COSTS OF FEDERALLY MANDATED SERVICES TO UNDOCUMENTED IMMIGRANTS IN COLORADO 1 (2006), *available at* http://www.bellpolicy.org/PUBS/IssBrf/2006/06ImmigCosts.pdf (expenditures of $31.3 million and $18 million, respectively).

[68] *See* CAROLE KEETON STRAYHORN, TEXAS OFFICE OF THE COMPTROLLER,

tax revenue, the characteristics of the greatest-public-goods consumer may differ from state to state.

Consider now the perceived consequences of unauthorized migration for crime. States and localities that adopt restrictionist measures often point to the crimes committed by migrants as one of the justifications for the measures.[69] Unlike concerns about the labor market and public expenditures, for which there is theoretical and some empirical support, the weight of empirical research indicates that late twentieth-century immigrants are less likely to commit crimes than the native born,[70] and that higher concentrations of immigrants at the aggregate level do not correlate with higher crime rates.[71] This is the case for immigrants in general and unauthorized

UNDOCUMENTED IMMIGRANTS IN TEXAS: A FINANCIAL ANALYSIS OF THE IMPACT TO THE STATE BUDGET AND ECONOMY 1, 9, 14 (2006), *available at* http://www.window.state.tx.us/specialrpt/undocumented/undocumented.pdf (expenditures of $130.6 million and $58 million, respectively).

[69] *See, e.g.*, Hazleton, Pa., Ordinance 2006-18 § 2 (Sept. 21, 2006) (finding that "[i]llegal immigration leads to higher crime rates"); Proposition 187 §1, 1994 Cal. Legis. Serv. Prop. 187 (Nov. 8, 1994) (overturned by a federal court) (claiming "[t]he people of California . . . have suffered and are suffering economic hardship caused by the presence of illegal aliens in this state," and "personal injury and damage caused by the criminal conduct of illegal aliens in this state") (quoted in League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 787 (C.D. Cal. 1995)). *See generally* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 507 (2007) (describing the common perception that immigration causes crime and citing studies demonstrating a lack of such a link).

[70] In the U.S., the proposition that late twentieth-century immigrants are less likely to offend than the native-born is very well-supported. *See, e.g.*, Robert J. Sampson, Op-Ed., *Open Doors Don't Invite Criminals: Is Increased Immigration Behind the Drop in Crime?*, N.Y. TIMES, Mar. 11, 2006, at A27 (describing results of a study that "revealed that Latin American immigrants are less violent and less likely than the second and third generations to commit crimes even when they live in dense communities with high rates of poverty"); Ruben G. Rubmaut et al., *Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men*, Invited Address to the "Immigration Enforcement and Civil Liberties: The Role of Local Police" National Conference, Police Foundation 2 (2008), *available at* http://papers.ssrn.com/abstract=1877365 ("[S]tudies, including official crime statistics and victimization surveys since the early 1990s, data from the last three decennial censuses, national and regional surveys . . .and investigations carried out by major government commissions over the past century, have shown . . . that immigration is associated with lower crime rates . . . ."); Ramiro Martinez, Jr. & Matthew T. Lee, *On Immigration and Crime*, in 1 CRIMINAL JUSTICE 2000, THE NATURE OF CRIME: CONTINUITY AND CHANGE, 485, 496 (Gary LaFree et al. eds., 2000) ("The major finding of a century of research on immigration and crime is that . . . immigrants nearly always exhibit lower crime rates than native groups.").

[71] The question of macro-level impact is more complex and has been the subject of fewer studies, although most find either a negative or no relationship between migrant concentration and crime. *See, e.g.*, John M. MacDonald et al., *The Effects of*

migrants specifically.[72] But some categories of crime may be potential byproducts of unauthorized migration: the process of illegal entry itself, for example, feeds the human trafficking industry. And because criminal acts are viewed as socially undesirable, it is reasonable to use criminal activity as a criterion for separating desirable from undesirable individuals without regard to the macro-level effects on crime rates. These concerns, formalized in admissions criteria, constitute formal deportation grounds, and form the basis for current federal deportation priorities.[73]

The relationship between unauthorized migration and crime also differs across the country. Contrary to nationwide or cross-sectional studies, the experience in specific parts of the country suggests a higher share of unauthorized migrants among convicted criminals. Maricopa County, for example, claims that unauthorized immigrants are overrepresented among the felon population relative to their share of the Arizona population.[74] The threats from crime

Immigrant Concentration on Changes in Neighborhood Crime Rates, 29 J. QUANT. CRIM. 191, 193 (2012) (finding that a higher concentration of immigrants is associated with "greater than expected reductions" in index and violent crimes across Los Angeles neighborhoods 2000–05); Lesley Williams Reid et al., *The Immigration-Crime Relationship: Evidence Across U.S. Metropolitan Areas*, 34 SOC. SCI. RES. 757, 772–74 (2005) (finding that "the greater the relative size of the recent foreign-born population," the lower the homicide rate across a representative sample of 150 U.S. metropolitan areas in 2000); Kristin F. Butcher & Anne Morrison Piehl, *Cross-city Evidence on the Relationship Between Immigration and Crime*, 17 J. POL'Y ANALYSIS & MGMT. 457 (1998) (finding no relationship between the percent of immigrants in the population and the crime rate across a sample of metropolitan areas between 1980 and 1990).

[72] *See, e.g.*, Ruben G. Rumbaut, *Undocumented Immigration and Rates of Crime and Imprisonment: Popular Myths and Empirical Realities*, *in* POLICE FOUNDATION 119, 126, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1877365 (finding that "the lowest incarceration rates among Latin American immigrants are seen for the least educated groups, who are also the groups who account for the majority of the undocumented: the Salvadorans[,] Guatemalans[], and the Mexicans").

[73] Criminal activity is a basis for both inadmissibility and a ground of deportability. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A) (2013) (removal on the basis of crimes of moral turpitude); 8 U.S.C. § 1227(a)(2)(iii) (2013) (removal on the basis of aggravated felony); 8 U.S.C. § 1227(a)(2)(A)(iv) (2013) (crime related to high-speed flight from an immigration checkpoint); 8 U.S.C. § 1227(a)(2)(B) (2013) (controlled substance violations). For a discussion of federal priorities, *see infra* Part III.A.

[74] Joint Appendix, Arizona v. United States, No. 11-182, 2012 WL 406205, at *299 (Feb. 6, 2012) ("Arizona's population is comprised of approximately 9% illegal immigrants, yet 21.8% of felonies sentenced in Maricopa County Superior Court are committed by illegal immigrants."); Stephen A. Camarota & Jessica M. Vaughan, *Immigration and Crime: Assessing a Conflicted Issue*, BACKGROUNDER (Cent. for Immigration Studies, Washington, D.C.), Nov. 2009, at 16 (estimating that unauthorized aliens comprise 8.9% of the population and are responsible for 21.8%

connected with unauthorized migration vary across the country: in particular, border states bear the burden of immigration-related crimes, such as smuggling and human trafficking.[75] Likewise, some areas struggle with a heavier presence of gangs with large numbers of unauthorized alien members, and other areas do not.[76] As Peter Schuck's synthesis of all available data shows, deportable non-citizens represent a highly variable share of the incarcerated population, and the composition of the incarcerated non-citizen population differs across jurisdictions.[77] For jurisdictions with a serious migration-linked crime problem, targeting criminal aliens above all other types—perhaps including those who have not committed very serious crimes—may be justifiable.

By contrast, the arrival of immigrants to some communities has had salutary effects on public safety and neighborhood social cohesion. Researchers have argued that the unexpected great American crime decline of the 1990s is not unrelated to the arrival of Latino and Asian immigrants.[78] The introduction of these

of the felonies in Maricopa County, which includes Phoenix). Such analyses should be treated with caution, since localities like Maricopa that make aggressive use of arrests to apprehend immigration violators are likely to disproportionately arrest members of this group.

[75] *See, e.g.*, CONG. BUDGET OFFICE, *supra* note 51, at 9 (noting the comparatively high cost of law enforcement activities in the border counties of California, Arizona, New Mexico, and Texas); Brief for Petitioners at 2–3, Arizona v. United States, No. 11-182, 2012 WL 416748 (Feb. 6, 2012) (documenting the disproportionate burden on Arizona created by the federal enforcement focus on the California and Texas borders, resulting in a "funneling of an increasing tide of illegal border crossings into Arizona," which are accompanied by "drug and human smuggling").

[76] For example, the notorious gang MS-13 is heavily concentrated in certain parts of the country. Although the common description of that group as an "alien gang" is not wholly accurate, *see* Jennifer Chacon, *Whose Community Shield? Examining the Removal of the "Criminal Street Gang Member,"* 2007 U. CHI. LEGAL F. 317, 327–29 (2007), it certainly has some unauthorized alien involvement. The "18th Street" association of criminal cliques, with an estimated membership of 30,000 to 50,000, operates across the country, in at least 44 cities. Only in California, however, are "approximately 80 percent of the gang's members . . . illegal aliens from Mexico and Central America." NATIONAL GANG INTELLIGENCE CENTER, NATIONAL GANG THREAT ASSESSMENT, at 23 (2009), *available at* http://www.fbi.gov/stats-services /publications/national-gang-threat-assessment-2009-pdf.

[77] Peter H. Schuck, *Immigrant Criminals in Overcrowded Prisons: Rethinking an Anachronistic Policy*, App'x 1–2 (Yale Law Sch. Pub. Law, Working Paper No. 266, 2013), *available at* http://ssrn.com/abstract=1805931.

[78] *See, e.g.*, Sampson, *supra* note 70, at A27 (arguing that the drop in crime that began in the United States in the early 1990s can be partially explained by increases in immigration). Systematic longitudinal studies have lent support to this connection. *See, e.g.*, Jacob I. Stowell et al., *Immigration and the Recent Violent Crime Drop in the United States: A Pooled, Cross-sectional Time-series Analysis of Metropolitan Areas,*

newcomers, with their "tight-knit families, economic entrepreneurship, and collective efficacy," may help explain why crime declined most steeply in major immigrant destination cities.[79] Overall, reviews of recent literature have concluded that, "[f]rom the limited research available, it appears that the concentration of immigration indirectly promotes reductions in crime and violence."[80] For jurisdictions where immigrant presence palpably benefits the host communities in this way, targeting criminal aliens for deportation is not costless. The indirect consequences of deportation in this regard are not simply mirror images of the consequences of forbearing from deportation. Many researchers—and police departments themselves—have pointed out that aggressive immigration enforcement aimed at deportation, especially when carried out with participation of the local law enforcement agencies ("LEAs"), also undermines the capacity of the LEAs for crime control.[81] Effective criminal law enforcement relies on the voluntary cooperation of the community with the police,[82] and the fear that police may be acting as immigration law enforcers makes immigrants less willing to report crimes and cooperate with investigations.[83]

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47 CRIMINOLOGY 889, 889 (2009) (finding support for the hypothesis that "the broad reductions in violent crime during recent years are partially attributable to increases in immigration").

[79] Vanessa Barker, *Explaining the Great American Crime Decline: A Review of Blumstein and Wallman, Goldberger and Rosenfeld, and Zimring*, 35 LAW & SOC. INQUIRY 489, 492 (2010).

[80] David S. Kirk & John H. Laub, *Neighborhood Change and Crime in the Modern Metropolis*, 39 CRIME & JUST. 441, 484 (2010); *see also* Graham C. Ousey & Charis E. Kubrin, *Exploring the Connection Between Immigration and Violent Crime Rates in U.S. Cities, 1980–2000*, 56 SOC. PROBS. 447, 454–65 (2009) (reviewing 11 aggregate-level quantitative studies on the immigration-crime relationship, and showing that only two studies find any positive relationship between a subset of immigrants and some categories of crime).

[81] DEBRA A. HOFFMASTER ET AL., POLICE EXEC. RESEARCH FORUM, POLICE AND IMMIGRATION: HOW CHIEFS ARE LEADING THEIR COMMUNITIES THROUGH THE CHALLENGES 43 (2010), *available at* http://www.policeforum.org/library/immigration/PERFImmigrationReportMarch2011.pdf.

[82] *See generally* WESLEY SKOGAN & KATHLEEN FRYDL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE (2003); TOM TYLER, WHY PEOPLE COOPERATE (2010).

[83] *See, e.g.*, David Kirk et al., *The Paradox of Law Enforcement in Immigrant Communities: Does Tough Immigration Enforcement Undermine Public Safety?* 641 ANNALS AM. ACAD. POL. & SOC. SCI. 79, 80–81 (2012) (cautioning that "increased and harsh enforcement of laws may undermine the ability of the police to control crime by reducing the willingness of immigrants to report crimes and cooperate with the police in criminal investigations"); Tom R. Tyler, Stephen Schulhofer, and Aziz Z. Huq, *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 L. & Society Rev. 365 (2010) (offering evidence that the trust required for cooperation is eroded in presence of (Muslim) immigrants' fear that any contact

As Peter Schuck points out, whether the risk of alienating immigrant communities really compromises the efficacy of crime control depends on the magnitude of that effect at the margin.[84] Schuck is right that the inferences to be drawn for immigration enforcement depend on the magnitude of the various effects attributed to enforcement actions, balancing the gains to crime control from targeting criminal aliens against the losses due to community alienation and resource diversion. There is no reason to suppose that weighing the costs and benefits of deportation for crime control would yield the same result for every community. Just as migrant involvement in crime varies across jurisdictions, so too the levels of cooperation with police vary across communities,[85] as does the impact of law enforcement on the willingness to cooperate and the overall efficacy of crime control.[86] While in some settings, targeting even minor criminal violators would reasonably be expected to lower crime rates, in others, the counter-productive effects of such targeting would probably overwhelm any boost to public order.

The consideration of the spatially heterogeneous impact of unauthorized presence on the native labor market, public expenditures, and crime should convey skepticism about the possibility of a single optimal priority scheme. Peoples' preferences about deportation are likely to be correlated with the consequences of migrant presence that are most keenly experienced by them. If social preferences were to be reflected in the identification of the least and most socially desirable types, the results would unlikely be

with the police may lead to deportation); Hoffmaster, *supra* note 81, at 4–7 (describing the New Haven PD's finding that immigrants were more often victims of crimes than perpetrators, and that diminishing their fears of deportation is far more helpful to the PD's crime control efforts than targeting even criminal aliens for arrest in order to hand them over to Immigration and Customs Enforcement (I.C.E.)); THOMAS M. GUTERBOCK ET AL., POLICE EXEC. RESEARCH FORUM, CTR. FOR SURVEY RESEARCH, EVALUATION STUDY OF PRINCE WILLIAM COUNTY'S ILLEGAL IMMIGRATION ENFORCEMENT POLICY 125 (2010), *available at* http://www.pwcgov.org/government/bocs/Documents/13188.pdf (finding a substantial drop in Hispanic respondents' satisfaction with the police in the wake of entering into an immigration enforcement agreement with the federal government).

[84] Schuck, *supra* note 10, at 72–74.

[85] *Compare* Kirk et al., *supra* note 83 (demonstrating a high level of cooperation and trust among non-citizens relative to natives in New York neighborhoods), *with* Hoffmaster, *supra* note 81, xvii (finding that, on the basis of case studies, "in some communities," migrants are "reluctant to engage with the police on crime prevention and community-building," owing in part to immigrants' negative experiences with law enforcement in their own countries).

[86] *See, e.g.*, Hoffmaster, *supra* note 81, xvii (noting that "no two communities are affected by immigration in the same way").

uniform nationally.

3. The Necessity for Subjective Political Judgment

It is not merely the spatially uneven consequences of migration that make a singular set of nation-wide priorities unlikely to capture the costs and benefits of migrant presence. Identifying the more and less desirable types in a given jurisdiction is complicated by the multiplicity of potential criteria for judging desirability of types, and by the necessity of subjective, political judgment regarding the trade-offs. For this reason, the suggestion that the federal government merely incorporate the variable consequences of migrant presence into enforcement policy would not fully address the problem.[87]

The multiple criteria according to which judgments about the relative desirability of different types of immigrants might be made necessitate trade-offs in setting enforcement priorities. Public debates and research on the consequences of immigration enforcement and unauthorized migrant presence range widely beyond the economic, fiscal, and crime impacts discussed above. Notably, there is a host of concerns about the impact of migrant presence, or their expulsion, on the social fabric of the community. Some worry about the possibility that a high concentration of immigrants undermines social cohesion, and others worry about damage done by removal of particular individuals on their families and communities.[88] Some worry about a loss of the American national culture or identity that accompanies massive changes in the ethno-demographic make-up of the population,[89] and others warn about the erosion of civil rights and the specter of racial profiling that accompany efforts to rid the country of unauthorized visitors.[90]

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[87] *See* Adam Cox & Eric Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1341 (2012) (addressing that suggestion in passing as a potential way to redress the old principal-agent problem while retaining federal access to superior sub-federal information about deportable individuals); Schuck, *supra* note 77, at 8 (proposing a reform of legal constraints on early deportations of convicted aliens, and suggesting that the costs and benefits of such are something only the federal government can figure out).

[88] *See, e.g.*, AJAY CHAUDRY ET AL., URBAN INST., FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT (2010), *available at* http://www.urban.org/UploadedPDF/412020_FacingOurFuture_final.pdf (examining the consequences of parental detention and deportation on children).

[89] *See, e.g.*, SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY (2004).

[90] *See, e.g.*, Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1104 (2004) ("[T]he permanent involvement of state and local police in routine immigration enforcement raises the further risk of

Some fear out-migration of the native population will accompany the arrival of non-citizens, and others predict that only immigrant in-migration can reverse decades of population loss in declining towns and rural areas.[91] The costs and benefits of deportation on the one hand, and of abiding a large unauthorized migrant presence on the other, which have been offered up in public discourse and scholarly debate, are legion.

How much weight to attach to any of the potential consequences of deporting or forbearing, and whether to consider particular consequences at all, are not questions that may be reduced to a solvable optimization problem. These questions do not lend themselves to technocratic accounting of quantifiable costs and benefits. The potential of depressed wages of native workers or the burdensome education expenditures may carry great weight in a populous, budget-strapped jurisdiction with high unemployment. That jurisdiction might target unauthorized workers thought to contribute to local unemployment or families with school-aged children. The same costs may not carry so much weight for cities or towns that are facing long-term economic decline and population loss and looking to immigration to reverse these perilous trends.[92] Such a jurisdiction may prioritize only the most serious criminals. A deportation regime attentive to the most serious consequences of migration where these consequences are most immediately

racial profiling and selective immigration enforcement beyond moments of real or perceived national threat.").

[91] Patrick J. Carr et al., *Immigration and the Changing Social Fabric of American Cities: Can Immigration Save Small-Town America? Hispanic Boomtowns and the Uneasy Path to Renewal*, 641 ANNALS AM. ACAD. POL. & SOC. SCI. 38; STEVE TOBOCMAN, GLOBAL DETROIT, SHORT REPORT 2 (2010) (setting out Detroit's development strategy and stating that "nothing is more powerful to remaking Detroit as a center of innovation, entrepreneurship and population growth, than embracing and increasing immigrant populations and the entrepreneurial culture and global connections that they bring and deliver," which "could include both documented and undocumented residents"), *available at* http://www.thecenterformichigan.net/wp-content/uploads /2010/05/GLOBAL_DETROIT.pdf.

[92] *See* Carr et al., *supra* note 91, at 40–44 (describing the revival of moribund economies and boost to declining populations delivering by immigration into small agricultural Midwestern towns); Carol Morello & Luz Lazo, *Baltimore Puts Out Welcome Mat for Immigrants, Hoping to Stop Population Decline*, WASH. POST, July 24, 2012, *available at* http://articles.washingtonpost.com /2012-07-24/local/35487100_1_immigration-status-immigration-checks-immigrant-population (reporting on Baltimore's policy of attracting immigrants to reverse decades of population loss even though Baltimore's unemployment rate is already high, including the Mayor's order prohibiting police and social agencies from asking anyone about immigration status).

experienced should accommodate both of those choices.

C. Who Should Decide Whom to Deport?

1. Decentralizing Priority Setting

The character of the costs and benefits of migrant presence and deportation addressed in the prior section has important implications for the third question defining the deportation regime: who should decide how many and which types of immigrants should be deported? The implications of the costs and benefits of immigration for "immigration federalism" generally have been noted in immigration scholarship. The fact that the costs and benefits of particular enforcement policies are not borne by the same level of government is often cited as problematic. From this fact, however, different scholars draw opposing conclusions. Some have criticized federal exclusivity in the realm of enforcement, as well as other immigration-related matters, on the grounds that the benefits of continuing migrant presence (e.g., tax revenue) are federal while costs (e.g., public goods provision) are local.[93] That line of argument suggests that the federal government would not adequately account for local costs in choosing immigration enforcement policies, and thus, states (and localities) should have a greater role in immigration related matters.

Others have criticized sub-federal participation in immigration regulation generally, and enforcement in particular, on the grounds that states and localities do not bear the full costs of their policies.[94] When a jurisdiction adopts aggressive enforcement policies, it externalizes part of the cost to the federal government and other jurisdictions: the federal government bears the administrative costs of processing people who sub-federal authorities insist on placing in deportation proceedings, and restrictionist policies drive the unauthorized migrants across borders into other jurisdictions.[95] The

[93] *See, e.g.*, Schuck, *supra* note 10, at 70; Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 460-61 (2008). For a discussion on the asymmetry of fiscal impact, *see supra* note 65; indeed, in the 1990s, the fiscal asymmetry gave rise to a series of unsuccessful lawsuits by six states against the federal government, seeking reimbursement, s*ee* Arizona v. United States, 104 F.3d 1095 (9th Cir. 1997); California v. United States, 104 F.3d 1086 (9th Cir. 1997); Texas v. United States, 106 F.3d 661 (5th Cir. 1997); New Jersey v. United States, 91 F.3d 463 (3d Cir. 1996); Padavan v. United States, 82 F.3d 23 (2d Cir. 1996); Chiles v. United States, 69 F.3d 1094 (11th Cir. 1995).

[94] *See* Cunningham-Parmeter, *supra* note 9.

[95] *See* Cunningham-Parmeter, *supra* note 9, at 1714–19; *see also* Margaret Hu,

conclusion that follows from this line of argument is that sub-federal governments should not engage in any immigration enforcement (and, according to some, much immigration-related regulation at all).[96]

Though no level of government may be perfectly competent and properly motivated to enforce the immigration laws, there is room for improvement over the status quo of de jure federal exclusivity. Given the character and the distribution of the direct and indirect costs of deportation, the federal government is better situated to determine the answer to the first question defining the deportation regime—the "how many" question—while sub-federal governments are better situated to inform the answer to the second question of what types should be prioritized for deportation.

The federal government bears the direct benefits and costs of deportation. It is the federal government that reaps the direct rule-of-law benefits of deportations because it is violations of *federal* law that are being sanctioned.[97] More importantly, although state and local authorities often apprehend immigration violators, by and large, the federal government bears the enforcement costs for each person placed in deportation proceedings. That the federal government has exclusive power of formal removal is a constitutionally required, immutable feature of the deportation system.[98] Because the federal government must bear the direct costs of deportation, it is best situated to determine how many people should be deported.

The direct costs and benefits of deportation, however, do not translate into helpful enforcement priorities. One inference that may be made is that the U.S. Immigration and Customs Enforcement

Reverse-Commandeering, 46 U.C. DAVIS L. REV. 535, 596 (2012) (arguing that states insisting on aggressive participation in immigration enforcement "reverse-commandeer" federal resources "that would not otherwise be committed").

[96] Cunningham-Parmeter, *supra* note 9, at 1714–19.

[97] Although sub-federal officials appear to care about violations of federal immigration law a great deal, it is far more likely that their dissatisfaction is related to the indirect consequences of federal enforcement patterns. If Congress were to pass universal amnesty tomorrow, making all current violators into legal residents, those who pushed for greater enforcement would not likely deem the problem solved, although the federal rule of law interest would be extinguished.

[98] *See, e.g.*, Galvan v. Press, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress."); Truax v. Raich, 239 U.S. 33, 42 (1915) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government.").

("ICE") should target those individuals who are easiest—cheapest—to locate. That approach might make the deportation regime more efficient, but ease of detection in itself does not correspond to any meaningful quality we would associate with the least desirable types. Another inference is that ICE should target repeat violators and absconders—that is, individuals who in some sense inflict greater harms to the rule of law. That is a more germane criterion. Were it the only relevant factor determining priority for deportation however, it would ignore some of the most keenly experienced consequences of unauthorized migration, which may have little to do with the fact of repeated violations.

This is not to claim that the public or public officials are unconcerned about the sheer fact of violation of immigration law. But vindicating the rule of law alone is insufficient to foreclose consideration of all other characteristics of migrants that bear on their social desirability. The findings of a recent study by Hainmuller and Hopkins are instructive in this regard. The authors tested the relative influence of nine immigrant attributes in driving respondents' support or opposition to the immigrants' admission in the U.S.[99] They found that a violation of immigration laws (prior unauthorized entry) does make hypothetical immigrants less likely to be chosen for admission by respondents, but that its effect was smaller than a number of other factors, such as having no plans to work, not speaking English, or being a native of one of the few strongly disfavored origin countries.[100] If the preferences Hainmuller and Hopkins find for immigration *admissions* are indicative of the preferences people harbor regarding *deportation*, then the case for prioritizing solely on the basis of the gravity of the legal violation is undermined.

If we believe that at some relevant level of abstraction there is a socially optimal priority scheme that identifies the least desired, or highest-net cost types, then identifying priorities requires weighing the relatively indirect consequences of deporting or forbearing. And the federal government is not well positioned to identify and assess most of the indirect costs and benefits associated with enforcement. That is so because, as the discussion above demonstrates, the indirect

[99] Hainmuller & Hopkins, *supra* note 37, at 1 (explaining that the "experiment puts . . . [American] citizens in the position of immigration policymakers and asks them to decide between pairs of immigrants applying for [naturalization,]" and "identify which immigrant attributes make immigrants more or less likely to be granted admission").

[100] *Id.* at 17–20.

consequences are experienced chiefly at the local level and are spatially variable. It is not wholly surprising that, in fact, the considerations the federal government takes into account in setting priorities for deportation exclude many of deep concern to their citizens.[101]

There is no ready hierarchy among the indirect consequences of deportation and migrant presence, whence a priority system might spring. As observed above, decisions concerning enforcement priorities entail weighing the costs and benefits of deporting any particular type and evaluating trade-offs entailed in targeting certain types and forbearing with regard to others. Perhaps with the exception of prioritizing the most serious security and criminal threats, an exceedingly small fraction of all deportable individuals,[102] these decisions would differ from community to community. This makes a singular, *nation-wide priority scheme* inadequate to the task. Nor could these decisions be derived in some way from ascertainable costs and benefits of unauthorized migration. This makes a singular *national decision-maker* inadequate to the task. One could not simply examine state budgets, for example, and determine the optimal priority ranking for immigrant types for each state.[103] Setting priorities calls for normative and political judgments that are responsive to the variable circumstances and preferences of communities experiencing the impact of unauthorized immigration and the deportation of migrants from their midst.

Immigration scholars offer arguments grounded in similar considerations when they seek to justify robust sub-federal participation in regulating and integrating immigrants (as opposed to enforcing the immigration law). Because the impact of migration varies spatially, Rodriguez and others have concluded that there are compelling functional reasons for states and localities to engage in policy-making concerning language education, job training, day labor centers, "sanctuary" laws, and so on.[104] Similarly, Cox and Posner

[101] *See infra* Part III.A.

[102] *See infra* note 210.

[103] For this reason, the problem is not amenable to the kinds of remedies suggested by the fiscal federalism literature. *See, e.g.*, Larry E. Ribstein & Bruce H. Kobayashi, *Introduction to the Economics of Federalism* 7 (George Mason Univ. Sch. of Law, Working Paper No. LE06-001, 2006) (discussing the literature on the use of grants to solve the spillover problems created by fiscal federalism).

[104] *See, e.g.*, Rodriguez, *supra* note 10, at 608–09 ("The effects of immigration are felt differently in different parts of the country, and the disruption immigration causes, as well as the viability of different immigration strategies, will vary, in part, according to the health of local economies and the existence of ethnic social

argue that forms of partial delegation of authority pertaining to immigration to "agents" (private and governmental) are justified on informational grounds. Just like "[e]mployers can often do a far superior job of evaluating the productivity of foreign workers," and family members "are generally in a better position . . . to evaluate the capability of potential migrants to integrate after arrival," "states have more information about local immigration conditions . . . than does the federal government."[105]

Similar considerations support the conclusion that sub-federal governments can better identify priorities for deportation. That conclusion does not depend on any particularly optimistic theory of state or local democratic politics. The lower levels of government are better positioned to formulate deportation priorities not simply because sub-federal governments might be more "democratic" or more responsive to their constituents. They are better positioned because of their superior access to informational inputs required for assessing the indirect consequences of migrant presence of greatest concern to their constituents and the unique capacity for making political choices about incommensurate goals. Beyond gathering information about the local impact of migration, all that is needed is that there be *some* mechanisms for sub-federal officials to elicit or discern constituents' attitudes towards consequences of unauthorized immigration and *some* mechanisms of accountability that would reflect the expression of opinions about priority decisions.[106]

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networks.").

[105] Cox & Posner, *supra* note 87, at 1289. It is worth emphasizing that empirical studies, such as that authored by Pratheepan Gulasekaram and S. Karthick Ramakrishnan, which show that local immigration policies are unrelated to measurable "regionally specific, immigration-induced policy concerns" do not necessarily undermine functional arguments for devolution. *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2080 (2013). We should not expect that observable factors, such as the growth of the foreign-born population or poverty levels, accurately predict local responses to immigration because different communities are liable to accord variable weights to the same demographic, economic, or cultural consequences of immigrant presence.

[106] The information-based advantage is certainly augmented if state and local governments are in fact more responsive to their constituents' preferences than the national government. *See, e.g.*, Roderick M. Hills, Jr., *Federalism and Public Choice* (N.Y.U. Sch. of Law, Working Paper No. 13625, 2009), *available at* http://mpra.ub.uni-muenchen.de/13625/1/MPRA_paper_13625.pdf (reviewing the basic theories why smaller governments are likely to be more accountable to their constituents than the national government); DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 91–106, 139 (Northwestern Univ. Press 1995) (stating the same). For an argument that at least some branches of sub-national governments are in fact less responsive and less accountable to voter preferences, *see* David Schleicher, *Why Is*

2. Addressing Objections to Decentralization

There are thus functional reasons to involve sub-federal authorities in the process of determining which types of immigrants to prioritize for deportation. That is not to say functional justifications for centralization are absent, or unworthy of consideration. The most common objection made to other modes of state and local participation in immigration enforcement is that it invokes spillover effects. This objection, however, does not apply with as much force to priority-setting.

The spillover-based argument raises legitimate concerns for other kinds of state and local enforcement measures. For example, Cunningham-Parmeter argues that states experimenting with "enforcement-based" restrictionist measures "encourage the mass exodus of unauthorized immigrants," thereby "export[ing] to their sister states the economic damage they claim illegal immigration causes."[107] Furthermore, these measures "demand additional resources from the federal government to assist with verifying the status of suspects" whom the state or local officials would like to deport.[108]

With regard to the spillovers in the form of "self-deporting" unauthorized immigrants, priority-setting poses no special problems, at least in principle. Even if we count the unauthorized immigrants themselves as an externality, whether it is positive or negative will depend on the priorities and preferences of the jurisdiction that the immigrants enter.[109] Consider what would theoretically follow if each state set and publicized deportation priorities, which Department of Homeland Security (DHS) officials then followed in their decisions to commence deportation proceedings. Mass exodus or self-deportation is hypothesized to occur when a jurisdiction engages in aggressive enforcement that raises the probability of deportation for

There No Partisan Competition in City Council Elections? The Role of Election Law, 23 J. LAW & POL. 419 (2007) (arguing that local, city-level legislatures are in fact poor at "translating voter preferences into government policy," and do "not provide voters with the ability to replace incumbents with opponents with different views and to have their views represented in local policies").

[107] Cunningham-Parmeter, *supra* note 9, at 1692.

[108] Cunningham-Parmeter, *supra* note 9, at 1678; *see also* Rodriguez, *supra* note 10, at 627 (discussing the possibility of overtaxing the federal system by local requests for status verification).

[109] *See* Rodriguez, *supra* note 10, at 639 ("Immigrants are different in kind from the paradigmatic externality example of pollution, largely because the presence of (even unauthorized) immigrants may be welcomed (or at least tolerated) in some communities but not in others.").

all or most migrants. If one state's deportation priorities were credible, in principle, only the prioritized types would be driven out.[110] If they chose to exit, they would choose a destination state with a better enforcement climate for their type. The influx of migrants, whose deportation the destination state does not value sufficiently highly, may not make this a positive spillover. However, it does mean that the particular costs these migrants might impose are less objectionable to the destination state than they are to the origin state. Thus, if state participation in priority setting would impose costs on other states, these would be less pronounced compared to the costs created by the kinds of aggressive enforcement measures aimed at complete self-deportation that states currently undertake. As will be illustrated in the discussion of the status quo in Part III, existing modes of state involvement are largely limited to measures intended to trigger deportation or self-deportation across the board at one extreme and sanctuary non-cooperation policies on the other. In a universe where jurisdictions legislate and/or enforce their laws in a manner that makes them either "hostile" or "receptive" to immigrants, unauthorized migrants would flee hostile jurisdictions for receptive ones. This, as Peter Spiro has argued, is not the worst state of affairs, as it is preferable "to be driven from a hostile California to a receptive New York than to be shut out of the United States altogether."[111] As has been emphasized throughout this Article, however, few jurisdictions are entirely hostile or receptive. As a general matter, most care about their immigrants. If every state articulated its enforcement priorities, sorting would better match immigrant types to communities receptive to, or at least tolerant of, their type.

With regard to costs externalized via pressure on federal

[110] The notion that localities are capable of communicating their enforcement priorities to the immigrant communities is not purely speculative. For example, when Prince William County entered into a 287(g) partnership with the federal government, which allowed its officers to carry out some immigration enforcement functions, *see infra* note 139 and accompanying text, the police department issued bilingual materials and conducted hundreds of briefings, to dispel the impression that the program represents an all-out campaign to apprehend all deportable aliens, and to explain that only criminal illegal immigrants would be targeted. *See* Randy Capps et al., *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement* 3 (2011), *available at* http://www.migrationpolicy.org/pubs/287g-divergence.pdf.

[111] Spiro, *supra* note 11, at 1635–36; *see generally* Hills, *supra* note 106 (explaining that exit-based arguments about federalism and inter-jurisdictional competition rely on the assumptions that people "flee[ing] oppressive subnational jurisdictions" have "some non-predatory jurisdiction to which they can flee").

enforcement resources, it is unclear whether decentralizing priority setting would alter sub-federal demands on these resources. Priority setting would not give states or localities any more control over *how many* immigrants are placed in deportation proceedings, and the cap on this figure would continue to be determined by the federal government. As suggested in the following section, states and localities place pressures on federal resources in part because it is the only avenue of influence open to them. If sub-federal priorities are honored in deportation decisions, incentives for states to either flood ICE with requests or to refuse to hand over individuals ICE requests may be diminished.

Other considerations might be contemplated in favor of centralized control. For present purposes, it is worth noting only that values generally invoked for federal authority have no obvious implications for the question of priority-setting. Centralized federal power is said to be appropriate to ensure uniformity.[112] In this context, an interest in uniformity appears absent. On the contrary, as suggested above, any reasonable attempt to prioritize the least socially desirable types for deportation cannot rest on a nationally uniform scheme. Centralized power is sometimes justified on the basis of its superior record of protecting civil rights.[113] An interest in protecting the rights of the nation's non-citizens is compelling; however, as several scholars have noted, it is not clear that the federal government is better at protecting non-citizens' civil rights than are sub-federal governments.[114] Moreover, insofar as sub-national actors do present a threat to the civil rights of immigrants or minorities, this threat is independent of which authority sets deportation priorities. Michael Olivas articulates the nature of the problem vividly: "We do not want . . . fifty immigration policies. We certainly do not want and cannot tolerate hundreds, allowing liberal Santa Fe, New Mexico to carve out a 'sanctuary' while Hazleton, Pennsylvania or Norcross, Georgia get to run every bilingual speaker or dark-complexioned person out of town after sundown."[115] As Part III will demonstrate,

[112] *See, e.g.*, Olivas, *supra* note 9, at 53–54 (arguing against state and local involvement in immigration matters because "[w]e do not want fifty foreign affairs policies, or fifty immigration policies").

[113] *See, e.g.*, Wishnie, *supra* note 9, at 526 (arguing that devolution of authority to sub-national levels threatens equal protection and civil rights of immigrants).

[114] *See, e.g.*, Huntington, *supra* note 13, at 831 (arguing that on the basis of recent experience, "it is by no means clear that the national government will better protect the interests of non-citizens"); Schuck, *supra* note 10, at 60 (stating the same).

[115] Olivas, *supra* note 9, at 53.

the problem Olivas describes is to some extent unavoidable. Even without formal authority over the key dimensions of the deportation regime, state and local actors have ample opportunity to control the fates and threaten the rights of non-citizens in their territories. There is little reason to believe that these problems would be aggravated by allowing sub-national officials to weigh in on priority setting.

III. THE DEPORTATION REGIME UNDER THE STATUS QUO

Part II of this Article set out a functional argument for sub-federal participation in setting priorities for deportation, on the grounds that uniform priorities are a crude way of identifying the least desirable types of immigration violators. Part III will review how the deportation regime has been functioning on the ground and demonstrates that sub-federal subversion of federal de jure control makes a uniform, centrally-set priority scheme unrealizable in practice. The deportation regime has been shaped by a de jure federal exclusivity with regard to both the number and type of migrants targeted for deportation. Despite being legally disabled from participating in priority-setting, sub-federal authorities have been employing every tool at their disposal to undermine federal control. What results is a federalist stand-off, in which sub-federal actors influence the level of enforcement within their jurisdictions, but neither federal nor sub-federal authorities can conform deportation patterns to their priorities.

A. De Jure Federal Monopoly on Priority Setting

Although the notion that immigration enforcement should be prioritized is not new,[116] only relatively recently did the DHS publicize a priority system that went beyond simply calling for a focus on criminal aliens.[117] DHS created a three-level priority scheme, with the

[116] *See* Doris Meissner, *Exercising Prosecutorial Discretion* (Nov. 17, 2000) (setting out priorities for the exercise of prosecutorial discretion in enforcement) [hereinafter Meissner Memo], *available at* http://iwp.legalmomentum.org/reference /additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf/view. Since the functions of the INS were folded into DHS, Congress repeatedly directed the Secretary of Homeland Security to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime." *See, e.g.*, Department of Homeland Security Appropriations Act, 2009, Pub. L. No. 110-329, 122 Stat. 3659 (2008).

[117] *E.g.*, John Morton, U.S. Immigration & Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* 2 (June 17, 2011)

first category being the highest priority, and the second and third constituting equal but lesser priorities. Priority 1 are aliens who pose a danger to national security or a risk to public safety. Priority 2 are recent illegal entrants. Lastly, priority 3 aliens are fugitives (i.e., have outstanding final removal orders) or otherwise obstruct immigration controls.[118] Priorities 1 and 3 are further subdivided into higher and lower priority sub-categories. For example, persons who committed more serious felonies are prioritized over those who committed minor crimes.[119]

Beyond the broad priority categories, a large list of individual factors is to be considered in deciding whether to deport an immigrant. These factors include, but are not limited to the following: the length of presence in the country; family ties to U.S. citizens; contribution to the community; military service; age; physical or mental disability; and status as a victim or witness to a crime.[120] "[N]o one factor is determinative," and discretion is to be exercised on a case-by-case basis "based on the totality of the circumstances."[121] The priority level and pertinent individual factors may be considered at any stage by DHS law enforcement agents or attorneys in their exercise of prosecutorial discretion.[122] Because prosecutorial discretion encompasses the allocation of investigative resources, these decisions too are to be guided by these priorities.

A regime that is effectively shaped by these priorities might still seek to maximize the number of deportations, but would do so

[hereinafter June 17, 2011 Memo] ("In light of the large number of administrative violations the agency is charged with addressing and the limited enforcement resources the agency has available, ICE must prioritize the use of its enforcement personnel, detention space, and removal resources to ensure that the removals the agency does conduct promote the agency's highest enforcement priorities, namely national security, public safety, and border security."), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

[118] John Morton, U.S. Immigration & Customs Enforcement, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011) [hereinafter March 2, 2011 Memo], *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

[119] *Id.* at 3.

[120] *Id.* at 3–4; June 17, 2011 Memo, *supra* note 117, at 5–6.

[121] *See* June 17, 2011 Memo, *supra* note 117, at 4. A favorable exercise of prosecutorial discretion with regard to some priority 1 individuals is statutorily foreclosed. *See* 8 U.S.C. § 1229b (2012) (The Attorney General "may cancel removal" only if, inter alia, the alien has not been convicted of "specified offenses").

[122] *See, e.g.*, June 17, 2011 Memo, *supra* note 117, at 5 ("ICE may exercise prosecutorial discretion at any stage of an enforcement proceeding.").

subject to the priority and resource constraints.[123] This does not mean that enforcement resources would be allocated in accordance with any precise solution to a constrained optimization problem. It does mean that effecting one high-priority deportation would be preferable to one low-priority deportation, all else being equal, but that no particular mix of priority levels must characterize the deported.[124] Moreover, discretionary judgments aimed at screening for highest priority individuals would be clustered at the front-end of the process. The earlier in the process high-priority individuals are identified, the fewer resources are expended on that determination later, and the greater the number of individuals deported at the end.[125] Concentrating discretion at the front-end also reinforces important political[126] and career pressures,[127] while potentially

[123] There is ample indication that the agency remains focused on delivering the highest possible number of deportations subject to the priority and resource constraints. *See, e.g.*, March 2, 2011 Memo, *supra* note 118, at 3 ("Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of other aliens unlawfully in the United States. ICE special agents, officers, and attorneys may pursue the removal of any alien unlawfully in the United States."); ICE, *Fact-vs.-Fiction*, http://www.ice.gov/news/fact-fiction/ ("Media have suggested that ICE is aggressively dismissing cases based on a directive from Director Morton. This just isn't true.").

[124] A regime shaped by federal priorities would be unlikely to concentrate all enforcement resources on deporting every last highest-priority alien. For this reason, criticisms asserting that the federal government is not following its own priorities, simply because an insufficiently large share of deportations consists of the highest priority individuals, are misguided. *See, e.g.*, AMALIA GREENBERG DELGADO ET AL., ACLU OF NORTHERN CALIFORNIA, COSTS AND CONSEQUENCES: THE HIGH PRICE OF POLICING IMMIGRANT COMMUNITIES 5, *available at* https://www.aclunc.org/docs/criminal_justice/police_practices/costs_and_consequences.pdf ("[S]tatistics reveal a failure to follow these priorities" because "[b]etween 2008 and 2010, of all those deported nationwide under a new DHS program . . . only 28 percent were . . . Level 1 Priority . . . and 25 percent were 'non-criminals.'"). At the same time, a priority-driven regime would not lead to the deportation of every individual who has come to the attention of the authorities. For that reason, criticisms such as Justice Scalia's regarding the administrative costs of President Obama's policy of deferring enforcement against young people are also misguided. *See* Arizona v. United States, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., dissenting) ("The husbanding of scarce enforcement resources can hardly be the justification for [this policy], since the considerable administrative cost . . . will necessarily be deducted from immigration enforcement").

[125] *See* June 17, 2011 Memo, *supra* note 117, at 5 ("[I]t is generally preferable to exercise . . . discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing the enforcement proceeding.").

[126] The political pressures on deportation policy arise from the need to navigate between the accusation of a sub-rosa amnesty and the accusation of draconian patterns of enforcement against sympathetic individuals. Accusations of a "back-door

sacrificing informational advantages.[128]

B. De Facto Sub-federal Subversion

Federal priorities are based on criminal history and the seriousness of the violation of immigration law. A central motivation for this, according to ICE, is to build on the "broad consensus in the nation that persons convicted of serious crimes who are in the United States illegally should be subject to deportation."[129] It might indeed seem that prioritizing criminal aliens is a "slam dunk," as Schuck has put it.[130] It is "hard to imagine a higher law enforcement priority than this."[131] Nonetheless, many sub-federal actors manifestly disagree. Their dissatisfaction with federal priorities is of great consequence for the government, because the federal government relies on their cooperation to identify and apprehend most deportable non-citizens and because sub-federal actors have ample avenues to influence the contours of the deportation regime.

The federal government relies on cooperation by state and local LEAs because the overwhelming majority of civilian-state contacts involve state or local forces.[132] Cooperation is especially vital for

amnesty" are much more likely to be aroused where the federal government has in fact identified deportable individuals whom they decide not to deport. Likewise, accusations of draconian enforcement will only arise if some initial enforcement action is actually taken against particular individuals.

[127] There is some evidence that DHS and DOJ disfavor affirmatively taking a deportable individual out of the deportation process. *See* Spencer S. Hsu & Andrew Becker, *ICE Officials Set Quotas to Deport More Illegal Immigrants*, WASH. POST, March 26, 2010 (reporting that a memorandum from an ICE official applauded enforcement officers for efforts to reach a record goal of 150,000 criminal alien removals in 2010), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032604891.html.

[128] *See* Cox & Posner, *supra* note 19.

[129] ICE OFFICE OF THE DIR., ICE RESPONSE TO THE TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS 5 (Apr. 27, 2012) [hereinafter ICE Response], *available at* http://www.dhs.gov/xlibrary/assets/hsac/ice-response-to-task-force-on-secure-communities.pdf.

[130] Schuck, *supra* note 10, at 72.

[131] *Id.* at 74.

[132] Although ICE is now the second largest investigative agency in the federal government, it employs only 20,000 officers, by comparison with about 765,000 sworn local law enforcers. Brian Reaves, U.S. Dep't of Justice Bureau of Justice Statistics, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES (2011). *See generally* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2006) (arguing in favor of a vigorous immigration enforcement role relying, inter alia, on the superior resources and access of state and local law enforcement).

identifying and deporting criminal aliens.[133] Sub-federal actors have ample avenues to influence deportation patterns because local law enforcement practices overwhelmingly determine who comes into initial contact with immigration enforcement. In principle, "the universe of opportunities to exercise prosecutorial discretion is large."[134] In practice, however, the exercise of discretion has been heavily concentrated in the earlier stages of the process. "The discretion that matters" for selecting the deportees, as Hiroshi Motomura put it, has been "the discretion to arrest."[135] This is especially true for the unauthorized population.[136] The chances that any given deportable person would be targeted for investigation and/or arrested are not overwhelming. The deportable population is large, and resource constraints allow the investigation and arrest of only a small fraction. Once a deportable individual is arrested, however, the probability that he will be placed in deportation

[133] *See, e.g.*, Schuck, *supra* note 10, at 72 ("[E]ffective federal immigration enforcement often depends upon the extensive participation of state and local officials . . . particularly [in] enforcement against [criminal immigrants]"); Cox & Posner, *supra* note 87, at 1337–40 (describing the vital advantages of delegation to state and local officials). To be sure, the necessity of sub-federal cooperation in immigration enforcement is not universally embraced. The unsuccessful attempts of the federal government to coax states into advancing its priorities lead some scholars to conclude that sub-federal participation in enforcement would only make the immigration enforcement regime less effective as a whole. *See, e.g.*, Olivas, *supra* note 9, at 35 ("[S]hifting immigration enforcement powers to sub-federal levels [will not compensate for the federal government's failure to enforce its laws, but] will more likely lead to weaker federal enforcement and even less effective national security resources aimed at immigration enforcement and administration. . . . [N]ot only is shifting immigration authority downward contrary to constitutional law and theory, it is bad policy and will lead to bad results both with immigration enforcement and local enforcement.").

[134] William J. Howard, Principal Legal Advisor for U.S. ICE, *Prosecutorial Discretion* 2 (Oct. 24, 2005), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092975-ICE-Guidance-Memo-Prosecutorial-Discretion-William-J-Howard-10-24-05.pdf/view.

[135] Motomura, *supra* note 15, at 1837; *see also* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 519 (2009) ("[C]harging decisions rather than either the formal legal rules or the exercise of judicial discretion determine who is deported and what collateral consequences attach to deportation.").

[136] As Stephen Lee explains, for *legally present* non-citizens who are arrested for a crime, the prosecutors' charging decisions represent another node of discretionary decision-making that dictate whether or not these non-citizens become deportable and are ultimately deported. *De Facto Immigration Courts*, 101 CAL. L. REV. 553, 586-87 (2013).

proceedings, and ultimately deported, is very high.[137] While recent developments in federal policy promise to shift the exercise of discretion to later stages of the deportation process,[138] the importance of the initial arrest or detention is little diminished.

The following sections emphasize the levers available to sub-federal authorities to thwart federal attempts to conform deportation patterns to their priorities. Dissatisfied sub-federal actors are able to decisively alter the mix of priority levels that characterize the deported population through participation in federal-local partnerships, state criminal law, and ordinary arrest, detention, and charging practices.

1. 287(g) Partnerships

ICE operates several programs that enlist local agencies in partnerships to enforce immigration law. Of these, 287(g) agreements involve local law enforcers most directly, and thus afford the clearest illustration of how local disagreement with federal priorities leads to their subversion.[139]

The 287(g) agreements enable trained local law enforcers to perform certain immigration functions, such as screening individuals for immigration status, issuing detainers to hold potential violators and even issuing charging documents that trigger removability

[137] While difficult to estimate with confidence, Motomura calculates that probability of deportation proceedings after arrest is between 75% and 100%, relying on some simplifying assumptions. Motomura, *supra* note 15, at 1836. The probability of Immigration Judges issuing a removal order was about 70% nationwide in 2011. *See* TRAC, Tracking Outcomes of ICE Deportation Filings (Oct. 21, 2011), *available at* http://trac.syr.edu/immigration/reports/263/. After a removal order is issued, discretion in the form of deferred action has been numerically insignificant: in 2010, deferred action was granted to 514 persons, or .1% of those ordered deported. *See* Dara Lind, *LA Opinion: Obama Has Granted a Record Low Number of Deferred Actions to Immigrants* (Apr. 28, 2011), *available at* http://americasvoiceonline.org/blog/la_opinion_obama_has_granted_a_record_low_number_of_deferred_actions/.

[138] Notably, the activation of Secure Communities, *see infra* note 163 and accompanying text.

[139] Section 287(g) of the Immigration and Nationality Act authorizes the Attorney General to deputize and train local law enforcement agencies to perform certain functions of federal immigration officers, at local expense. 8 U.S.C. § 1357(g) (2013). Other programs, such as the Criminal Alien Program (CAP) and the National Fugitive Operations Program (NFOP), are predominantly carried out by federal officers, but do rely on local actors mostly to facilitate ICE access to foreign-born inmates. DORIS MEISSNER ET AL., MIGRATION POLICY INSTITUTE, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 105 (Jan. 2013), *available at* http://www.migrationpolicy.org/pubs/enforcementpillars.pdf.

proceedings.[140] The stated purpose of these partnerships is to identify and apprehend serious criminals and fugitive aliens.[141] In practice, LEAs empowered to act by these agreements pursued a wider set of targets. LEAs that acquired the authority to arrest immigration violators, for example, employed it to indiscriminately sweep in many non-criminals. Maricopa County's Sheriff's Office ("MCSO"), under Sheriff Joe Arpaio, and Alamance County's Sheriff's Office ("ACSO"), under Sheriff Terry S. Johnson, furnish the most notorious examples. The MCSO employed its new authority to engage in policing driven by "bias-infected indicators," and MCSO deputies were found to "stop, detain, and/or arrest Latino drivers . . . without reasonable suspicion or probable cause."[142] Among other findings, the ACSO Sheriff was found to have explicitly directed officers "to arrest all Latinos who commit[ed] the traffic infraction of driving without a license" in order to "bring them into the Alamance County Jail to be run through immigration databases, rather than simply issuing them citations."[143] The Department of Justice (DOJ) investigated these LEAs and determined that both the MCSO and the ACSO violated the Constitution.[144] Maricopa and Alamance may be extreme

[140] Under the "jail model," these agreements deputize local officers to screen the immigration status of arrested individuals; under the "task force" model, officers are authorized to enforce immigration law "on the street," including the issuance of arrest warrants and detainers. For a detailed explanation, *see* Capps et al., *supra* note 110, at 13–16.

[141] Although the federal priority system was not spelled out until 2010, earlier declarations that criminal and fugitive aliens are to be prioritized were commonplace in Congress and the DHS. *See* RODRIGUEZ ET AL., MIGRATION POLICY INSTITUTE, A PROGRAM IN FLUX: NEW PRIORITIES AND IMPLEMENTATION CHALLENGES FOR 287(G) (2010), *available at* http://www.migrationpolicy.org/pubs/287g-divergence.pdf.

[142] U.S. DEP'T OF JUSTICE, REPORT RE: UNITED STATES' INVESTIGATION OF THE MARICOPA COUNTY SHERIFF'S OFFICE 3 (Dec. 15, 2011) [hereinafter DOJ MCSO Report] (finding evidence of racial profiling of Latino drivers, and of "immigration-related crime suppression activities" based on "complaints that described no criminal activity, but rather referred . . . to individuals with 'dark skin' congregating in one area, or individuals speaking Spanish"), *available at* http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf.

[143] U.S. DEP'T OF JUSTICE, REPORT RE: UNITED STATES' INVESTIGATION OF THE ALAMANCE COUNTY SHERIFF'S OFFICE 5 (Sept. 18, 2012) [hereinafter DOJ ACSO Report], *available at* http://www.justice.gov/iso/opa/resources/17120129181246248819 8.pdf.

[144] *Id.* at 2; DOJ MCSO Report, *supra* note 142, at 3. Reacting to MCSO's indiscriminant use of authority, ICE initially declined to renew the agreement granting the MCSO arrest authority in 2009, and ultimately, terminated the MCSO's involvement in immigration enforcement. *See* Office of the Press Secretary, *Statement by Secretary Napolitano on DOJ's Findings of Discriminatory Policing in Maricopa County* (Dec. 15, 2011), *available at* http://www.dhs.gov/news/2011/12/15/secretary-napolitano-dojs-findings-discriminatory-policing-maricopa-county.

examples. Yet, as numerous evaluations confirm, the apparent disregard for federal priorities has been widespread, and much of the local contribution to the deportation pipeline has consisted of people charged with or convicted of misdemeanors and traffic offenses.[145] This experience led DHS to revise the terms of the agreements to provide for more extensive federal oversight, and ultimately, to announce that it is scaling down the 287(g) program.[146]

While scaling down 287(g) programs constrains the most far-reaching authority granted to local actors, it does not foreclose the opportunities for sub-federal authorities to influence immigration enforcement. Even in the absence of delegated functions, substantive criminal laws and ordinary criminal law enforcement are sufficient to undermine federal attempts to affect its priorities.

2. Substantive Criminal Law

State criminal law not only determines which non-citizens become deportable, but also influences where individuals fit into the federal priority scheme. For example, whether an individual has been convicted of two or more felonies "punishable by more than one year," which would place him into level 1 of priority category 1,

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[145] *See, e.g.*, DEP'T OF HOMELAND SECURITY OFFICE OF THE INSPECTOR GENERAL, THE PERFORMANCE OF 287(G) AGREEMENTS: FY 2011 UPDATE 9 ("ICE cannot be assured that the 287(g) program is meeting its intended purpose, or that resources are being appropriately targeted toward aliens who pose the greatest risk to public safety and the community"), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_11-119_Sep11.pdf; RICHARD M. STANA, GAO, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (2009) (finding no evidence that 287(g) agreements advanced the federal enforcement priorities), *available at* http://www.gao.gov/new.items/d09109.pdf; DORA SCHRIRO, ICE, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS (2009) (finding that in 2008, 57% of the noncitizens in detention as the result of the 287(g) program were noncriminal, and 72% of the initial bookings were noncriminal, with those figures being 53% and 65% in 2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf; Capps et al., *supra* note 110, at 2 (finding that the 287(g) program is not targeted toward serious offenders, as about half of the program activity involves people who have committed misdemeanors or traffic offenses).

[146] *See* John Morton, *Statement Regarding a Hearing on U.S. Immigration and Customs Enforcement: Fiscal Year 2013 Budget Request to Congress* (Mar. 8, 2012) ("ICE will begin by discontinuing the least productive 287(g) task force agreements in those jurisdictions where Secure Communities is already in place and will also suspend consideration of any requests for new 287(g) agreements."), *available at* http://www.aila.org/content/fileviewer.aspx?docid=38896&linkid=244574; *see also Fact Sheet: Updated Facts on ICE's 287(g) Program*, ICE, http://www.ice.gov/news/library/factsheets/287g-reform.htm (last visited Oct. 15, 2013).

hinges in part on the application of state criminal laws. So does the existence of convictions for "crimes punishable by less than one year," which place a person into priority 1, level 2 (if for three such crimes) and level 3 (if fewer than three). As a number of scholars have noted, states can and do use their criminal laws to "facilitate the criminal prosecution of unauthorized migrants at the state and local level."[147] The same laws may trigger civil deportation proceedings and elevate, or lower, an individual's priority level.

Several states, for example, have enacted criminal laws that mirror the federal provision criminalizing smuggling or harboring undocumented aliens.[148] Maricopa County has adopted an ingenious interpretation of Arizona's smuggling law in order to prosecute immigrants who use the services of coyotes (smugglers) with conspiracy to violate that law, a felony.[149] Interpreting the law in that manner effectively "criminalizes unlawful presence,"[150] and raises the priority levels of a large class of aliens, who might not be guilty of any felony under federal law.[151] While this particular interpretation of the smuggling statute was recently enjoined by a federal judge on federal preemption grounds,[152] as was the South Carolina statute explicitly criminalizing self-smuggling,[153] there is no shortage of laws that may

[147] Jennifer M. Chacon, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 138 (2009).

[148] *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-2319; Okla. Stat. Ann. tit. 21, § 446 (West) (2012); Tenn. Code Ann. 39-17-114 (2012). *See generally*, Stumpf, *supra* note 9, at 1599 (discussing states that have "enacted laws similar to the federal prohibitions on smuggling or harboring undocumented immigrants").

[149] *See* Ariz. Rev. Stat. Ann. § 13-1003(A); Ariz. Rev. Stat. Ann. § 13-2319. For a fascinating account of these prosecutions, *see* Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749 (2011).

[150] Eagly, *supra* note 149, at 1773; United States v. S. Carolina, 720 F.3d 518, 529 (4th Cir. 2013) (addressing a South Carolina statutory provision that similarly made it a felony "for an unlawfully present person to allow himself or herself to be 'transported or moved' within the state or to be harbored or sheltered to avoid detection," and finding that it would be nearly impossible for such a person to avoid violating this provisions).

[151] That is, a person convicted of the conspiracy felony under Maricopa's interpretation might otherwise be guilty of illegal entry, a misdemeanor, which would put him into priority 2 under the federal scheme; a felony conviction for the same conduct instantly raises his priority level to 1.

[152] We Are Am. v. Maricopa Cnty. Bd. of Sup'rs, CIV 06-2816-PHX-RCB, 2013 WL 5434158 (D. Ariz. Sept. 27, 2013) (holding that federal law preempts and renders invalid the Maricopa policy of prosecuting unauthorized immigrants for smuggling themselves).

[153] United States v. S. Carolina, 720 F.3d 518, 530 (4th Cir. 2013) (affirming the district court's holding that plaintiffs established a substantial likelihood of success on the merits in their challenge to a provision, which made it a criminal offense for

be applied to similar effect. Laws that criminalize the use of false documents may have similar effects when applied to individuals who would not have been subject to federal prosecution. For example, Arizona's general identity theft law criminalizes as a felony the "taking the identity of another person . . . real or fictitious . . . whether or not the person . . . actually suffers any economic loss."[154] This law, as Chacon observed, "can be deployed as a means of prosecuting noncitizens who have used false identities to obtain employment," even if that noncitizen would not be prosecuted or found guilty under federal laws governing the use of such false documents.[155] The sole surviving provision of California's Proposition 187 makes the use of false documents a felony when done "to conceal . . . true citizenship or resident alien status."[156] As Stumpf observes, the state law relies on contentious concepts of "true citizenship or resident alien status;" thus, state interpretations of these may depart from federal understandings, leading to convictions of persons who would otherwise not be criminally liable.[157] Such laws offer disgruntled local actors a way to ensure that non-citizens, who do not engage in any conventionally criminal conduct, become prioritized for deportation.[158] The constitutionality of some state criminal laws that parallel immigration law, such as the criminalization of self-smuggling, has been put in doubt by *Arizona v. United States*.[159] Nonetheless, other laws that link criminal liability to

"a person unlawfully present in the United States to conceal, harbor, or shelter herself from detection, or allow herself to be transported within the state," on federal preemption grounds).

[154] Ariz. Rev. Stat. Ann. § 13-2008 (2008).

[155] Chacon, *supra* note 147, at 138.

[156] *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995) (holding that provisions of Proposition 187 criminalizing making and using false documents to conceal true citizenship or resident alien status of person were not preempted by federal law).

[157] *See* Stumpf, *supra* note 9, at 1599. Persons who are convicted under the California law might otherwise be subject to only civil penalties under the analogous federal law, 8 U.S.C. § 1324c (2013), which enacts civil and criminal penalties for a variety of violations regarding false immigration documents.

[158] For an account of a marked change in the patterns of enforcement of the false-documents crime in Los Angeles as the county's orientation towards immigration enforcement evolved, *see* Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 NYU L. REV. 1126, 1167–79 (2013).

[159] 132 S. Ct. 2492, 2501–05 (2012) (finding both challenged provisions that created new immigration-based state crimes preempted: the crime of non-compliance with federal registration law, on the ground that the state provision intruded into the field in which Congress has left no room for states to act; and the crime of working without authorization, on the ground that a state's criminalization

immigration status—notably, laws of general applicability and those that parallel generally applicable criminal law—appear to be on firmer footing.[160]

Local actors are further able to manipulate a deportable non-citizen's priority level through plea bargaining and sentencing. Prosecutors and courts have in the past structured plea bargains to avoid (or create) deportation consequences for some defendants.[161] Similarly, these actors may adopt plea bargaining practices to lower particular defendants' priority levels—by, for example, allowing them to plead guilty for crimes punishable by less than one year, rather

of that which Congress decided should be regulated civilly, presents an obstacle to the regulatory system).

[160] Several courts held that laws of general applicability applied to non-citizens, and laws that parallel generally-applicable prohibitions, are constitutionally sound. *See, e.g.*, Castillo-Solis v. State, 292 Ga. 755, 740 S.E.2d 583 (2013) (holding that a statute requiring a driver's license to be obtained within 30 days before driving within state was not preempted by federal immigration law); Hernandez v. State, 639 S.E.2d 473 (2007) (rejecting the alien defendant's claim that federal immigration law preempts the enforcement of a general identity fraud statute); State v. Hernandez-Mercado, 879 P.2d 283 (Wash. 1994) (holding that a statute criminalizing unlicensed possession of a firearm by an alien is not preempted). *See generally* Jennifer M. Chacon, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 628 (2012) ("State efforts that criminalize activities in order to affect migration indirectly," rather than directly by mirroring federal immigration prohibitions, "have, in many cases, avoided court scrutiny"); Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 274 (2011) ("[S]tates likely have the power to enact criminal laws that affect only undocumented noncitizens, so long as those laws are rational, are within traditional state power, seek a permissible goal, and are consistent with federal classifications. [E.g.,] state laws prohibiting the possession of firearms by undocumented noncitizens are likely constitutional."); Stumpf, *supra* note 9, at 1608 ("When there is a strong parallel with federal immigration law and no parallel criminal law applicable regardless of citizenship, the subnational criminal law is unlikely to survive[,]" but laws that parallel generally-applicable criminal law "stand[] a greater chance of surviving, even when the law singles out noncitizens and parallels existing immigration law."). For an account of how enforcement of such laws reflects local attitudes towards immigration enforcement, *see* Eagly, *supra* note 158, at 1167–68, 1185–87.

[161] *See* Lee, *supra* note 136, at 578–80 (describing instances of prosecutorial charging decisions adopted to avoid deportation of criminal defendants); Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1433–35 (2011) (describing charging and bargaining practices structured to avoid deportation consequences); Stumpf, *supra* note 9, at 1593–94 (explaining that "legislatures and courts can often affect whether . . . deportability grounds apply by adjusting the scope of the definition or length of the sentence"); Spiro, *supra* note 11, at 1634 n.28 (noting the ability of sub-national actors "to undermine enforcement . . . by adjusting criminal sentences to preclude deportation in individual cases").

than more than one year.[162]

3. Secure Communities and Ordinary Criminal Law Enforcement

LEAs most significantly exercise their influence on the selection of non-citizens for deportation in the course of ordinary criminal law enforcement. LEA policies and practices concerning arrests and investigations of immigration statuses matter a great deal in determining who comes into contact with the deportation system. This influence, moreover, is not neutralized by the gradual nationwide activation of Secure Communities, a data interoperability system that automatically transmits information on each arrest to ICE.[163]

Prior to its activation, whether an individual came into contact with the immigration enforcement system was to a great degree determined by local discretion. DHS is required by law to "respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status."[164] Thus, whenever a local official contacts ICE with such inquiries, the enforcement machinery is put in motion, with the corresponding increase in probability of deportation for that individual.[165] Jurisdictions seeking more aggressive enforcement needed only to adopt a policy or practice of regular verification of the immigration status of those arrested or detained, or other individuals encountered in the course of ordinary law enforcement.[166] In one survey of police

[162] *See* Lee, *supra* note 136, at 577–80 (offering examples of prosecutors structuring charges to "unsettle, dilute, or outright displace federal priorities"); Eagly, *supra* note 158, at 1164–65 ("[T]he Los Angeles District Attorney's Office has officially given deputy prosecutors the discretion to take collateral consequences," including deportation, "into account and depart from ordinary settlement policy in lower-level cases.").

[163] Under Secure Communities, fingerprints taken by LEAs are automatically transmitted to the FBI and then to DHS; if the person has been previously fingerprinted by an immigration official, the database will register a "match." ICE then reviews other databases to determine whether the person is deportable. *See The Secure Communities Process*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Oct. 9, 2013).

[164] 8 U.S.C. § 1373(c) (1996). DHS operates the Law Enforcement Support Center (LESC), which is responsible for answering status inquiries from various agencies. If LESC determines that a given individual is in violation of the immigration laws, ICE will have to expend resources determining whether or not to seek deportation. *See* David Palmatier, Decl. of Unit Chief for LESC, *Arizona*, 2012 WL 406205, at *91 (2012) [hereinafter Palmatier Declaration].

[165] *See* notes *supra* 135–137, and accompanying text.

[166] *E.g.*, ARIZ. REV. STAT. ANN. §11-1051(B) (West 2012) (requiring state officers to

chiefs and sheriffs, 59% of respondents indicated that it was their practice or policy to routinely check the immigration status of a possible victim of human trafficking, and 21% of police chiefs and 27% of county sheriffs would do so for individuals stopped as a traffic violation.[167]

The section of Arizona's SB 1070 that contained such a policy was the only one to survive the constitutional challenge. The mandate to determine immigration status—that is, to contact LESC—may therefore be triggered by seizures short of formal arrests (e.g., routine traffic stops). In this way, LEAs are able to compel ICE attention to potential immigration law violators who have not committed crimes, thereby diverting resources from federal priorities.[168] To be sure, ICE is still able to exercise discretion and take no action in these cases, as it threatened to do with regard to Arizona's inquiries after the Supreme Court's decision.[169] However, the volume diminishes the resources that ICE may devote to screen for and pursue higher priority violators, and compels ICE to choose between pursuing non-priority deportations and incurring the political cost of forbearance after a violator has been identified.[170]

On the other hand, localities that want no part in enforcing immigration laws adopted different policing and law enforcement

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make a "reasonable attempt . . . to determine the immigration status" of any person they stop or arrest on some other legitimate basis if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States," and "[a]ny person who is arrested shall have the person's immigration status determined before the person is released"); *see also* Rodríguez, *supra* note 10, at 591–92 (summarizing direct enforcement actions in Georgia, Oklahoma, Colorado, and Arizona); Huntington, *supra* note 13, at 801–02 (discussing the inherent enforcement authority of states and localities); Stumpf, *supra* note 9, at 1598 (discussing local attempts to exercise non-delegated immigration powers).

[167] Monica W. Varsanyi et al., *A Multilayered Jurisdictional Patchwork: Immigration Federalism in the United States*, 34 L. & POL'Y 146 (2011), *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9930.2011.00356.x/abstract.

[168] *See* Palmatier Declaration, *supra* note 164, at *91 (explaining in detail how the increased volume of queries from Arizona would impact priorities). The burden placed on LESC was one of the factors the United States emphasized in its attack on Arizona's SB 1070, arguing that Arizona's aggressive enforcement policy would be "hijacking" federal resources, "shift[ing] the allocation of federal resources away from federal priorities." United States v. Arizona, 703 F. Supp. 2d 980, 995 (D. Ariz. 2010).

[169] Jeremy Duda, *Homeland Security Revokes 287(g) Agreements in Arizona*, AZ CAP. TIMES (June 25, 2012), http://azcapitoltimes.com/news/2012/06/25/homeland-security-revokes-287g-immigration-check-agreements-in-arizona/#ixzz2jX7qglQC.

[170] *See supra* notes 126–127.

policies. "Sanctuary" or non-cooperation policies, implemented by statutes, executive orders, or police policies, aim to limit local or state officials' cooperation with DHS in apprehending and processing of immigration violators.[171] Congress sought in 1996 to curtail sub-federal non-cooperation by forbidding officials from restricting a voluntary exchange of information regarding immigration status between local officials and ICE.[172] Congressional action limited the forms that non-cooperation can take, but it could not counteract all such efforts.[173] The LAPD's non-cooperation policy, for example, which directed officers not to "initiate police action where the objective is to discover the alien status of a person," but did not prohibit voluntary communications between LA police and ICE, was found to be consistent with federal statute.[174] Similar policies guide law enforcement in numerous jurisdictions.[175] Prior to the activation of Secure Communities, these sorts of policies and practices withheld from ICE information about high- and low-priority immigration violators alike, diminishing the overall numbers of deportations in sanctuary-type jurisdictions.

The activation of Secure Communities was intended in part to constrain the impact of local practices on the size and composition of the population placed in deportation proceedings. That effect, however, relies on the expectation "that LEAs continue to enforce

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[171] *See* Rodriguez *supra* note 10, at 600–605; Huyen Pham, *The Constitutional Rights not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1382–95 (2006).

[172] 8 U.S.C. §1373, §1644 (1996); City of New York v. United States, 179 F.3d 29 (2d. Cir. 1999) (upholding the constitutionality of the federal restrictions on non-cooperation).

[173] *See* Printz v. United States, 521 U.S. 898 (1997).

[174] Sturgeon v. Bratton, 174 Cal. App. 4th 1407, 1421 (2009) (upholding the LAPD policy against a facial constitutional challenge, and reasoning that Special Order 40 "does not address communication with ICE; it addresses only the initiation of police action and arrests for illegal entry. [8 U.S.C.] Section 1373(a) does not address the initiation of police action or arrests for illegal entry; it addresses only communications with ICE").

[175] *See, e.g.*, New Haven, Conn., New Haven Police Department General Order 06-2 (Dec. 14, 2006) (prohibiting officers from inquiring about the immigration status of victims, witnesses, and anyone who approaches an officer for assistance, and prohibiting detention based on belief of illegal presence or civil immigration violation, including administrative warrants by ICE), *available at* http://www.cityofnewhaven.com/Mayor/ReadMore.asp?ID=%7B874974A9-AC89-465B-A649-57D122E9FAF9%7D; OR. REV. STAT. § 181.850(1) (2007) (providing that no Oregon law enforcement agency "shall use agency [resources] for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws").

the criminal law in exactly the same manner as they did before Secure Communities was activated," and that LEAs fully cooperate with ICE detainer requests.[176]

Neither expectation appears well-founded. Instead of diminishing their role, Secure Communities merely altered the manner in which sub-federal authorities could influence the deportation process.[177] LEAs intent on more aggressive enforcement have several avenues still open to them. They are able, in particular, to aggressively arrest for petty crimes (e.g., traffic violations) committed by foreign-appearing individuals.[178] The automatic process set off by Secure Communities makes it unnecessary for LEAs to incur any costs in effort or resources beyond arresting and fingerprinting suspected unauthorized aliens. States may even broaden the arrest authority of their police to the constitutional limits, allowing arrests upon probable cause to believe that the arrestee committed any misdemeanor, including the misdemeanor of illegal entry.[179] States may also expand the use of fingerprinting to all minor offenses. Moreover, Secure Communities does not affect Arizona-style mandates to verify immigration statuses of individuals detained in contexts short of formal arrests.

The power to arrest is complemented by the discretionary power to charge. The initial determination of an immigration violator's priority level is based in part on the offense of arrest, or offense charged, and not just convictions existing as of the time of arrest.[180]

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[176] *See* ICE Response, *supra* note 129, at 11.

[177] See Jennifer M. Chacon, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 603 (2012) (implying that the theorized shift of discretion back to the federal government from sub-federal actors may not be borne out in practice).

[178] Eagly documents examples of such arrest policies: in Harris County, Texas, for instance, police refuse to "cite and release" for petty offenses, choosing to take custody and book all such suspects. *See* Eagly, *supra* note 158, at 1173–74. Likewise, a public defender in Miami-Dade County, Florida, reports the increase in arrests "for charges we would not normally see," and of which "many are dismissed outright," after the activation of Secure Communities. Alex Stepick, FALSE PROMISES: THE FAILURE OF SECURE COMMUNITIES IN MIAMI-DADE COUNTY, RESEARCH INSTITUTE ON SOCIAL & ECONOMIC POLICY, CENTER FOR LABOR RESEARCH & STUDIES, FLORIDA INTERNATIONAL UNIVERSITY 9 (2013).

[179] *See, e.g.*, Sturgeon v. Bratton, 174 Cal. App. 4th at 1413 ("In theory, local police could arrest for misdemeanor improper entry into the United States.").

[180] As the GAO explains in its review of the program, "aliens are initially classified as Level 1, 2, or 3" based on "available information on the aliens' *arrest charges and any previous convictions*." GAO, SECURE COMMUNITIES, REPORT TO THE RANKING MEMBER, COMMITTEE ON HOMELAND SECURITY, HOUSE OF REPRESENTATIVES 22 (July 2012) (emphasis added) [hereinafter GAO 2012 Report], *available at*

LEAs intent on more aggressive enforcement may seek the most serious plausible charges, as this increases the likelihood that ICE will issue a detainer and seek custody of the individual.[181] Under Secure Communities, the decision to pursue more serious charges imposes few costs, because local officials can decide not to prosecute and instead, transfer the suspected violators to ICE custody promptly upon receiving a detainer request.[182]

The question of whether and how Secure Communities influenced local arresting and charging practices awaits systematic empirical investigation; yet, there is some indication that local actors are continuing to use the tools at their disposal to affect the deportation system. Available data suggests that most arrests are made for traffic offenses, where the discretion to arrest (or cite and release) is at its peak.[183] Preliminary studies also suggest the likelihood that Secure Communities lead some LEAs to engage in pretextual arrests of Hispanic individuals.[184] DHS officials are

http://www.gao.gov/assets/600/592415.pdf. Thus, aliens ultimately removed may not have "a criminal conviction known to ICE at the time ICE took custody," and ultimately, "may not . . . [be] convicted of the current criminal charge(s) for which they were arrested." *Id.* at 15 n.29. Because "ICE could change the classification if the alien's charges are dropped," removal statistics reveal that many of the deported are not convicted of any crime. *Id.* at 22 n.30. Nationwide, that share was 26% (October 2008 to March 2012), but there is variability across jurisdictions: for example, 41% of those identified and deported from Florida had no criminal convictions, while that share in Texas stood at 17%. *Id.* at 19. Although many factors likely contribute to these spatial differences, it is consistent with the possibility that LEAs in different jurisdictions are pursuing different arrest and charging strategies.

[181] *See* Eagly, *supra* note 158, at 1188("[P]rosecutors have gone further by actually choosing among potential charges with the objective of influencing immigration results."). While DHS generally cannot deport individuals who are convicted before they complete their sentence, *see* INA § 241(a)(4)(A), 8 U.S.C. 1231(a)(4)(A) (2006), there is no barrier to removal if the state criminal charges that led to the identification of a deportable individual via Secure Communities are not pursued.

[182] Eagly documents a related phenomenon in Maricopa County's enforcement of the smuggling law: the county "either transfers suspected self-smugglers directly to ICE or gives very low criminal sentences (of "time served" or probation), which facilitate immediate removal," while reducing law enforcement costs. Eagly, s*upra* note 158, at 1186.

[183] ICE did not collect data on arrest charges until October 2010, and since then, this data was missing for 56% of aliens identified and removed through Secure Communities. "For the 44 percent of aliens removed on whom ICE collected arrest charge data, traffic offenses, including driving under the influence of alcohol, were the most frequent arrest charges." GAO 2012 Report, *supra* note 180, at second cover page, 14.

[184] *See* Aarti Kohli et al., SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS, THE CHIEF JUSTICE EARL WARREN INSTITUTE ON LAW AND SOCIAL POLICY RESEARCH REPORT 3 (Oct. 2011) (finding some evidence that

concerned about the incentives created by Secure Communities. To curtail the possibility of local subversion of this sort, a monitoring system was put in place that is aimed at detecting jurisdictions that are making improper arrests.[185] How well such a monitoring system would detect and deter subversion of federal priorities remains to be seen. In view of the difficulties of making inferences on the basis of available data, which ICE recognizes,[186] the likely effects of monitoring on sub-federal subversion are ambiguous. ICE leadership also directed its officials not to issue detainers on the basis of "minor traffic misdemeanors or other relatively minor misdemeanors," unless the violations "reflect a clear and continuing danger to others or disregard for the law."[187] Such an approach might serve to screen out some low-level traffic violators—but not before limited resources are expended on the determination. Moreover, local officers determine the crime of arrest, with little standing in their way of identifying a non-traffic offense as the crime of arrest.[188] It is unclear, moreover, whether ICE at present possesses the capacity to base its initial detainer decisions on the nature of the crime of arrest.[189] In sum, aggressive jurisdictions still have a number of levers available to flood ICE with a large, low-priority pool of candidates.

Secure Communities lead law enforcement agencies "to engage in racial profiling through the targeting of Latinos for minor violations or pretextual arrests"), *available at* http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf; *see also supra* note 178.

[185] *See* DHS, SECURE COMMUNITIES: STATISTICAL MONITORING (Nov. 16, 2011), http://www.ice.gov/doclib/secure-communities/pdf/sc-statistical-monitoring.pdf [hereinafter Statistical Monitoring].

[186] *Id.* at 1 (noting that "some [statistical] anomalies [in arrest patterns] are likely to be pure artifacts of the limited data available," and outlining several important limitations of the data available for monitoring).

[187] JOHN MORTON, ICE, CIVIL IMMIGRATION ENFORCEMENT: GUIDANCE ON THE USE OF DETAINERS IN THE FEDERAL, STATE, LOCAL, AND TRIBAL CRIMINAL JUSTICE SYSTEMS 2 n.2 (Dec. 21, 2012), *available at* https://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf.

[188] *See, e.g.*, Eagly, *supra* note 158, at 1183 (quoting a Maricopa County public defense attorney, who explains that "an inoffensive traffic stop for some violation of the traffic code invariably turns into a felony forgery charge when the driver provides what the police officer believes is a fraudulent driver's license or identification either from Arizona or Mexico").

[189] *See* Statistical Monitoring, *supra* note 185, at 7 ("ICE does not currently receive analyzable data on the nature of the arrest for which a fingerprint submission is being made"; ICE does "not know in real time whether a submission is based on a traffic offense or a violent crime," and "rel[ies]on follow-up ICE investigations to make that data available").

4. Sanctuary and Non-Cooperation Policies

Nor does Secure Communities eviscerate the power of sanctuary jurisdictions to serve as gate-keepers to the deportation system. First, states can choose to keep minor offenders hidden from federal attention by not booking them[190] or by not taking fingerprints.[191] Second, criminal charges may be reduced or dropped, so as to lower the initial priority level of arrested non-citizens. Third, LEAs are able to exercise their own discretion when it comes to complying with ICE requests to hold suspected violators.[192] The most recent and most visible such measure is California's TRUST Act, which prohibits state and local law enforcement from holding certain low-level arrestees on the basis of ICE detainers.[193] A number of other jurisdictions have been adopting similar measures: Cook County, for instance, announced that the Sheriff's Office will honor ICE detainers only if ICE has a criminal warrant, ICE enters into a written agreement to reimburse Cook County for the cost of holding the detainees, or if Cook County has a law enforcement purpose not related to immigration to hold the person.[194] Santa Clara, CA, and Washington D.C. both limited compliance with ICE detainers to individuals over 18 years of age, and only to those convicted of a "serious or violent felony" ("dangerous crime or crime of violence" in DC) within 10 years of the request, or released after having served a sentence for such a felony within 5 years of the request.[195]

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[190] In many jurisdictions, the decision whether to make a custodial arrest or cite and release is left to the discretion of the officers, and a law enforcement agency may direct its officers not to book minor offenders, in part to avoid the Secure Communities screening. *See* Eagly, *supra* note 158, at 1158–59 (describing the Los Angeles policy of citing and releasing for low-level crimes).

[191] *See* ICE Response, *supra* note 129129, at 14 (noting that "states can choose not to submit to the federal government the fingerprints for individuals arrested for minor offenses").

[192] *See, e.g.*, Buquer v. City of Indianapolis, 797 F. Supp. 2d 905, 911 (S.D. Ind. 2011) *quoting* ("A detainer is not a criminal warrant, but rather a voluntary request that the law enforcement agency 'advise [DHS], prior to release of the alien, in order for [DHS] to arrange to assume custody.'") (quoting 8 C.F.R. § 287.7(d) (2011)).

[193] Patrick McGreevy, *Signing Trust Act is Another Illegal-immigration Milestone for Brown*, L. A. TIMES (Oct. 5, 2013), http://www.latimes.com/local/la-me-brown-immigration-20131006,0,5441798.story#axzz2jv4eEQdy.

[194] *See* Policy for Responding to ICE Detainers, COOK COUNTY LEGISLATIVE REFERENCE SERVICES (Sept. 7, 2011), http://cookcountygov.com /ll_lib_pub_cook/cook_ordinance.aspx?WindowArgs=1501.

[195] *Santa Clara County Resolution Adding Board Policy 3.54 Relating to Civil Immigration Detainer Requests*, http://www.immigrantjustice.org /sites/immigrantjustice.org/files/Santa%20Clara%20County%20Detainer %20Ordinance.pdf; COUNCIL OF THE DISTRICT OF COLUMBIA COMMITTEE ON THE

If aggressive enforcers undermine federal deportation policy by "diluting" the pool of deportation candidates and diverting resources from higher- to lower-priority candidates, jurisdictions with sanctuary measures undermine it by keeping potentially higher priority candidates away from ICE and diverting apprehension resources from other areas towards the task of re-apprehending individuals already in county custody. As a result of Cook County's non-cooperation, for example, 268 detainers for individuals charged or convicted of a crime were disregarded, and ICE was able to locate only 15 after release.[196]

Federal immigration enforcers are besieged on both sides. The ability of state and local police to use criminal law, arrest powers, and the discretion inherent in routine law enforcement "to decide who will be," and who will not be, "exposed to federal immigration enforcement," makes them the de facto "gatekeepers" of the deportation pipeline.[197]

C. The Trouble with the Status Quo

If, as was argued in Part I, centrally crafted and nation-wide priorities are poor proxies for sorting migrants on the basis of social desirability, why should sub-federal subversion of federal priorities be of any concern? There are a few reasons to regret the state of affairs. First, de jure federal exclusivity over priority setting fortifies incentives for states and localities to engage in problematic "criminalization" of immigration law.[198] More central to present

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JUDICIARY, REPORT ON BILL 19-585, IMMIGRATION DETAINER COMPLIANCE AMENDMENT ACT OF 2012 (May 8, 2012), *available at* http://dcclims1.dccouncil.us/images/00001/20120604161227.pdf; Mihir Zaveri, *D.C. Council Votes to Limit Reach of Federal Effort Aimed at Illegal Immigration*, WASH. POST (June 5, 2012), http://www.washingtonpost.com/local/dc-council-votes-to-limit-reach-of-federal-effort-aimed-at-illegal-immigration/2012/06/05/gJQAVgm5GV_story.html. *See also* Brent Begin, *San Francisco County Jail Won't Hold Inmates for ICE*, S. F. EXAMINER (May 6, 2011), http://www.sfexaminer.com/local/2011/05/san-francisco-county-jail-won-t-hold-inmates-ice; National Immigration Forum, *Community and Courtroom Responses to Immigration Detainers* (Jan. 2012), http://www.immigrationforum.org/images/uploads/2012/Detainers_Bonds_Litigation.pdf (describing policies in New York City, Sonoma, Santa Clara, and San Francisco Counties in California, and Taos and San Miguel Counties in New Mexico).

[196] *See* Toni Preckwinkle, Letter to John Morton 2 (Jan. 19, 2012) (discussing Morton's earlier letter to Preckwinkle) (on file with author).

[197] Motomura, *supra* note 15, at 1822.

[198] Insofar as the increasing entanglement of criminal and immigration law is worrisome, as many immigration scholars argue, the incentives created by federal

concerns, under the status quo, the deportation regime does not do a good job of prioritizing the least socially desirable violators of immigration laws. Critics of sub-federal involvement in immigration enforcement point out that instead of advancing federal priorities, local officials are pursuing their own local preferences.[199] Scholars who are less critical note that this is not necessarily pernicious, as it allows for local conditions and information to bear on the screening function that deportation is intended to serve.[200]

If the status quo actually allowed states and localities to assert local societal preferences over the federally imposed ones, there might not be a need to formally decentralize priority setting. However, the sense in which states and localities may be said to pursue "their own priorities" is markedly different from the sense in which DHS attempts to pursue federal priorities. The actual effect of rebellious jurisdictions' activity is on the *level* of enforcement. Cook County may decrease the level of immigration enforcement on its territory by keeping some people out of the deportation pipeline. Cook County cannot ensure, however, that the particular immigrants or types are not in fact deported as a result of ICE's independent effort. Nor does it fully internalize the consequences of forbearance with regard to all categories of migrants it declines to hand over to ICE. Since ICE does in fact pursue enforcement on its territory, it may well remove individuals whose presence would have aroused the community's opposition. Moreover, because local officials distance themselves from deportation policy decisions, communities are unlikely to perceive local officials as important and responsive policy-

prioritization of criminal aliens are problematic. *See, e.g.*, Stumpf, *supra* note at 9, 1613–15; Legomsky, *supra* note 70. The obvious path for sub-federal actors who disagree with federal deportation practices is to use its criminal laws and law enforcement to turn as many unauthorized migrants into criminals (or accused) as possible, raising their priority levels. As others have pointed out, the fact that states and localities are able to criminally prosecute deportable non-citizens for state crimes, but are unable to formally initiate civil deportation proceedings creates the same incentives. *See, e.g.*, Eagly, *supra* note 149, at 1755. For a comprehensive account of how federal criminalization of immigration law drew subnational actors into the business of immigration regulation and enforcement, *see* Stumpf, *supra* note 9, at 1587–1600.

[199] *See, e.g.*, Rodriguez et al., *supra* note 141, at 13 ("This devolution [of authority via 287(g) agreements] arguably has permitted local officials, including elected sheriffs, to set enforcement priorities to meet local concerns rather than to contribute to a broader national enforcement agenda.").

[200] *See* Cox & Posner, *supra* note 87, at 1337–42 (explaining the advantages and disadvantages of delegating immigration enforcement authority to states and localities).

makers in this arena. Restrictionist jurisdictions, such as Maricopa, may force some into the pipeline whose deportation ICE would not have otherwise pursued. Just like Cook County, however, Maricopa has no meaningful way to ensure that particular types of violators among those they identify are prioritized. Any disagreements about the "which ones" question are reduced to a tug of war regarding the "how many" question.

Sub-federal actors opposed to federal policy are rarely put in a position to assess and articulate their own priorities in a manner that exposes them to the democratic pressures of their constituents. Instead, arrest patterns might follow the priorities asserted by a sheriff or a chief of police. In most jurisdictions, even such agency-level guidance is absent, and the officer on the street exercises the authority to determine who comes into contact with the immigration enforcement apparatus.[201] LEAs and their officers are certainly not unaccountable. But in an arena characterized by overlapping jurisdictional authority, it is difficult to ascertain what level of government and what actors are responsible for policing choices that drive deportation patterns.[202]

As a result, the toughest questions about deportation do not get asked or answered explicitly by those levels of government that are in the best position "to assess and manage the tradeoffs among conflicting public goals peculiar to their polities."[203] Inducing sub-federal authorities to grapple explicitly with the tradeoffs that attend deportation choices would subject these choices to some level of public scrutiny and input. Opening the debate in this way, and explicitly identifying particular sub-federal government branches as those responsible for setting priorities, is preferable to a de facto ceding of enforcement policy to the opaque discretion of LEAs and other actors within the local criminal justice apparatus.

Are there any reasons to value the status quo? Might the stand-

[201] According to one survey, 51% of city police departments and 44% of county sheriffs had no policies with regard to whether and when officers should seek to investigate an individual's immigration status. Varsanyi et al., *supra* note 167, at 146; *see also* Rick Su, *Police Discretion and Local Immigration Policymaking*, 79 UMKC L. REV. 901, 923 (2011) (arguing that nearly any "transparent policy to guide police discretion," whether it emanates from the federal, state, or local levels of government, is preferable to "none at all").

[202] Because an LEA might be subject to different city-, county-, and state-level policies, any of these may be used to justify the exercise of street-level discretion. *See, e.g.*, Varsanyi et al., *supra* note 167, at 151 (describing how multijurisdictional overlap allows individual officers to use their discretion without direct accountability).

[203] Schuck, *supra* note 10, at 70.

off between the federal government and states and localities be tolerable, or even valuable, as an exercise in uncooperative federalism?[204] Incontestably, there is value in this sort of disagreement, in the "institutional equivalent of civil disobedience."[205] But if the value of non-cooperation is not solely to "throw[] a wrench"[206] into the enforcement of federal law, but also "to change national policy,"[207] then its value is contingent on its outcomes.

Doubtless, many sub-federal political actors, dissatisfied though they may be with federal policy, find their own lack of de jure authority quite advantageous. De jure disempowerment allows sub-federal officials to engage in blame-shifting, and it allows rebellious jurisdictions to set or frame the agenda. As Rick Su argues, Arizona and other restrictionist actors succeeded in focusing the public debate on the "amnesty"/"attrition by enforcement" dichotomy, ascribing to the federal government the unwillingness to enforce the law.[208] If a success for Arizona, it is largely a symbolic one: framing the choice as one between amnesty and attrition is a dead-end proposition as a practical matter. And as argued in Part I, the choice between deporting the entire deportable population and deporting none fails to capture what is actually at stake in managing migration. It fails to capture the substantive reasons why people oppose, welcome, or tolerate immigrants in their midst.

D. A Path to Decentralization of Priority-Setting

This Article offered a functional argument for decentralizing priority setting, and an account of the status quo that highlights the practical shortcomings of centrally determined, nation-wide priorities. While a fully worked-out proposal for decentralizing priority-setting is beyond the scope of this Article, a few observations are useful to demonstrate the feasibility of such a proposal.

How might decentralized priority-setting be instituted? It might

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[204] *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, YALE L. J. 1256, 1264 (2009) (arguing that there is "a normative case for valuing such resistance"). The invocation of uncooperative federalism here is not intended to imply that any one of the dominant models of federalism describes or should inform the relationship between federal and sub-federal states. As Huntington, *supra* note 13, at 830, rightly observes, "[c]urrent state and local immigration regulation does not fall neatly into any one model of federalism but instead embodies strains of many of the models."

[205] Bulman-Pozen & Gerken, *supra* note 204, at 1271.

[206] *Id.* at 1280.

[207] *Id.* at 1272.

[208] Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339 (2013).

be accomplished by simply offering states or localities the option to formulate their own priorities, or to default to the federal priorities. The jurisdictions that choose to formulate their own might generate them by a legislative, administrative, or some other process. At present, ICE officers and attorneys in every field office must consult federal priorities every time a deportable immigrant is brought to their attention. There is no overriding reason why the priorities of the jurisdiction that identified the individual cannot be considered in the same manner. Though doubtless more administratively complex, this sort of determination is not all that different from what was required of INS officials prior to the creation of DHS.[209]

Some jurisdictions are likely to refuse to go through the exercise. A county that is unwavering in its adherence to "attrition by enforcement" may carry on the same subversive tactics described above in the face of the default federal priorities. In such a case, the situation would be at worst unchanged. At best, however, constituents who harbor distinct concerns related to unauthorized immigration might pressure their officials to opt out from the federal default and craft more locally appropriate priorities. In a regime where sub-federal levels of government have the option to meaningfully influence deportation patterns, shifting the blame for misplaced priorities onto the federal government would not be quite as advantageous.

What kinds of priorities might jurisdictions choose? A jurisdiction that places no value on targeting aggravated felons or national security risks would be a rare phenomenon indeed. With regard to these cases, the federal invocation of a "broad consensus" is plausible. These cases, however, are a small share of all deportees.[210]

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[209] *See* CHALLENGES TO IMPLEMENTING THE INS INTERIOR ENFORCEMENT STRATEGY: TESTIMONY BEFORE THE SUBCOMM. ON IMMIGRATION AND CLAIMS, HOUSE COMM. ON THE JUDICIARY 2 (2002) (statement of Richard Stana, Director, Justice Issues) (In 1999, INS identified five non-mutually-exclusive priorities for interior enforcement. The third consideration, in order of importance, called upon INS officials to "[r]espond to community reports and complaints about illegal immigration. In addition to responding to local law enforcement issues and needs, this strategic priority emphasizes working with local communities to identify and address problems that arise from the impact of illegal immigration, based on local threat assessments."), *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA402860.

[210] While opinions differ on which felonies are dangerous, examining the crimes for which aliens are most commonly deported is instructive. In 2011, criminal aliens made up 48% of all removals. Only 15% of all removals are for crimes such as assault, larceny, robbery, burglary, and sexual and family offences. Over 65% of criminal aliens (about 31% of all removals) were convicted of criminal traffic offenses, drug crimes (including possession), or criminal immigration violations

And some "sanctuary" jurisdictions are likely to have no further priorities. For the remainder, jurisdictions may choose to target enforcement resources on any number of bases. Those bases may be geographic, with priority accorded to deportations from a township rather than another. They may be occupational, with priority accorded to deporting, say, construction workers (who are perceived to compete with the native work force in a given area) over agricultural workers (who address an otherwise unmet demand for labor). They may depend on familial status, focusing on adults without children, but forbearing with regard to families with children in areas where school enrollment is otherwise insufficient. Or, priorities may be based on any other basis that is plausibly related to the consequences of migrant presence of most serious concern to the particular community (and does not run afoul of constitutional protections).[211] It is not easy to predict what criteria priorities would be based on precisely because this is not an exercise sub-federal authorities have engaged in often. One might suspect however, that remaining in the country after a final removal order, a priority for DHS, does not correlate very well with any consequences of immigration that are likely to concern citizens most.

This is not an argument for devolving final control over deportation decisions, to which there are binding legal obstacles. DHS would retain control over final orders, including the ability to forbear from action with respect to categories of migrants that present specific and compelling national interests. For example, local priorities would yield before a determination of a Temporary Protected Status for a particular group of immigrants or the need to deport individuals who present a threat to national security. ICE may even continue to exercise discretion on the basis of humanitarian factors. None of these categories are likely to be numerically significant. Even the long list of humanitarian factors ICE identifies as grounds for forbearance rarely result in such: the systematic review

(including entry and reentry). JOHN SIMANSKY & LESLEY M. SAPP, DHS, IMMIGRATION ENFORCEMENT ACTIONS: 2011 6 (Sept. 2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf.

[211] Formal priority-setting would be no more immune from constitutional equal-protection constraints than law enforcement practices: to the extent that racial profiling and discriminatory enforcement practices run afoul of constitutional protections, so would priorities based on grounds of race or nationality. Moreover, an attempt to prioritize immigrants of a particular ethnicity or nationality over others is not a practically useful criterion, insofar as the majority of immigrants in most areas are homogenous in this regard.

of all pending cases for conformance with federal priorities closed about 2% of those reviewed.[212] A considerable share of deportees may be selected in accordance with sub-federal priorities without interfering with the focus on the most dangerous felons or forbearance with regard to humanitarian factors.

IV. CONCLUSION

Immigration and immigration enforcement laws manage unavoidable demographic change. Some commentators have claimed that there is no "fixing" the immigration enforcement system until we fix the immigration system, by pushing through comprehensive immigration reform. It is imprudent to think, however, that even a significant liberalization of the legal admission criteria and a wide-reaching amnesty would obviate the need to think hard about the deportation conundrum.[213] Legal constraints on immigration are not futile. But what we have learned about migration suggests strongly that it is considerably more responsive to economic factors and push factors than legal constraints in source countries.[214] As two prominent scholars of migration conclude,

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[212] *See* TRAC, ICE PROSECUTORIAL DISCRETION PROGRAM (June 28, 2012) (On August 11, 2011, DHS announced a comprehensive review of all removal cases pending before (and incoming to) the EOIR, to separate priority from non-priority cases, and administratively close the latter.), *available at* http://trac.syr.edu/immigration/reports/287/.

[213] *See* T. Alexander Aleinikoff, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 36 HOFSTRA L. REV. 1313, 1314 (2008) (Lest mistaken hopes be repeated, recall that the claim in 1986 was "that we were going to end illegal immigration forever. . . . This story does not sell today. There is no reasonable claim that the package of measures that were debated in the House and the Senate and supported by the President will have any material impact on undocumented migration.").

[214] *See, e.g.*, Douglas S. Massey & Fernando Riosmena, *Undocumented Migration from Latin America in an Era of Rising U.S. Enforcemen*t, 630 ANNALS AM. ACAD. POL. & SOC. SCI. 294 (2010) ("Available data have consistently pointed up the failure of U.S. policies to reduce undocumented migration from Latin America. . . . Our estimates suggest that undocumented migration is grounded more in mechanisms posited by social capital theory and the new economics of labor migration . . . . As a result, U.S. efforts to increase the costs of undocumented entry and reduce the benefits of undocumented labor have proven unsuccessful given the widespread access of Latin Americans to migrant networks. The main effect of U.S. enforcement efforts has been to reduce the circularity of Latin American migration."); Angela S. García, *Return to Sender? A Comparative Analysis of Immigrant Communities in 'Attrition Through Enforcement' Destinations*, 2012 ETHNIC & RACIAL STUD. 1 (2012) ("[T]he analysis indicates that immigrants do not alter the duration of time they spend in receiving locales or change their state of residence due to restrictive subnational policies. Rather, economic and social factors more prominently shape immigrants' settlement and residency patterns."), *available at* http://ccis.ucsd.edu/wp-

"migration flows can become self-sustaining and virtually unstoppable."[215] The Gallup Poll estimates that:

> [a]bout 13% of the world's adults—or more than 640 million people—say they would like to leave their country permanently. Roughly 150 million adults say they would like to move to the U.S.—giving it the undisputed title as the world's most desired destination for potential migrants since Gallup started tracking these patterns in 2007.[216]

The United States will continue to be a magnet for people all over the world. This is so in large part for reasons beyond the nation's control.[217] In that light, our immigration laws and enforcement policies are not simply mechanisms to select new members of the national community at our leisure, but indispensable tools to manage inevitable demographic change. The feasible choices entail selecting which types of people the country will welcome, or at least tolerate, and which it will seek to expel—not the choices between complete enforcement and minimal enforcement. Focusing the national conversation almost exclusively on the latter dimension is both divisive and counterproductive. Inviting sub-federal governments to participate in a conversation about priorities in immigration enforcement would be a step towards changing that conversation.

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content/uploads/2012/08/Garcia-2012-ERS_Return-to-Sender.pdf; Emilio A. Parrado, *Immigration Enforcement Policies, the Economic Recession, and the Size of Local Mexican Immigrant Populations*, 641 ANNALS AM. ACAD. POL. & SOC. SCI. 16 (2012) ("The study finds that outside of four influential outliers . . . there is no evidence that the 287(g) program impacted the size of the Mexican immigrant population," and "highlights the limited efficacy of immigration enforcement as a way to resolve the issue of the undocumented immigrant population.").

[215] ALEJANDRO PORTES & RUBEN RUMBAUT, IMMIGRANT AMERICA: A PORTRAIT 18 (3d ed. 2006); *see also* Peter Andreas, *The Making of Amerexico (Mis)Handling Illegal Immigration*, 11 WORLD POL'Y J. 45 (1994), *available at* http://www.brown.edu/Departments/Political_Science/documents/Making_of_Amerexico.pdf.

[216] Jon Clifton, *150 Million Adults Worldwide Would Migrate to the U.S.*, GALLUP (Apr. 20, 2012), http://www.gallup.com/poll/153992/150-Million-Adults-Worldwide-Migrate.aspx?ref=more.

[217] *See supra* note 214; *see also* Antje Ellermann, *The Limits of Unilateral Migration Control: Deportation and Inter-state Cooperation*, 43 GOV'T & OPPOSITION 168 (2008), *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1477-7053.2007.00248.x/abstract; James F. Hollifield, *The Emerging Migration State*, 38 INT'L MIGR. REV. 885 (2004).