

Criminalizing Immigration

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Over the past two decades, criminal justice systems at both the federal and the state level have been transformed to serve the goals of immigration law. Criminal justice reform efforts therefore must attend to the interdependence of the immigration and criminal enforcement systems. This chapter maps out those interdependencies and identifies resulting problems and pathologies. The chapter then proposes modest reforms, including an explicit move away from tolerance for racial profiling in immigration policing; sub-federal disentanglement from federal immigration enforcement; and greater willingness on the part of federal immigration enforcement officials to accept cues of leniency from state criminal justice actors when exercising federal immigration enforcement discretion. Generous immigration reform and the decriminalization of many migration-related offenses are needed to truly overcome the ongoing criminalization of millions of people whose only error was taking up work and residency in the U.S. without civil authorization. But the narrower proposals offered here provide a starting point for avoiding the burgeoning second wave of racialized mass incarceration spurred by this new wave of mass criminalization.

INTRODUCTION

For the past 20 years, scholars working at the intersection of criminal law and immigration law have documented the effects that these two bodies of law have on one another. Serious criminal convictions have long triggered possible deportation or exclusion (collectively known in immigration law as “removal”). But in the mid-1990s, Congress significantly expanded the range of removable offenses and eliminated many possible avenues of relief. This spurred great introspection in immigration scholarship about the criminalization of migration.

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The changes to immigration laws did not happen in isolation. Criminal enforcement systems have changed as well. These changes are not just the increasing severity in both the immigration and criminal sphere, although the well-documented severity turn in both spheres is an important part of the story. Criminal laws, procedures and enforcement practices also have changed—sometimes protectively but often punitively—in response to concerns about immigration.

The federal criminal system, for example, has increasingly focused prosecutorial resources on immigration-related crimes, particularly on misdemeanor illegal entry and felony reentry. The resulting high-volume prosecution of immigration crimes has converted federal courts along the southern border into sites of mass criminal processing. This, in turn, has produced a significant demographic shift in the federal penal system.

At the sub-federal level, the looming back-end consequence of removal has prompted state and local officials to revise their own criminal laws and procedures. Some jurisdictions have done so in ways intended to protect residents from undesirable entanglement with the immigration system, while many others have sought to strengthen the pipeline from the criminal enforcement system to the immigration system.

Motivated by immigration law-related goals, legislators and administrators have: changed states' substantive criminal law; incentivized new forms of criminal prosecutions; influenced county officials' bail determinations and decision-making about access to diversionary programs; constrained and shaped plea negotiations; and, ultimately, set the stage for the differential punishment of foreign nationals. Street-level policing practices have also changed to accommodate immigration goals, with some jurisdictions targeting immigrant communities for more aggressive enforcement efforts, and others revising their arrest and detention policies to minimize contact between their systems and the federal immigration enforcement apparatus.

This chapter explores these developments. Part I explains the changes in the areas of immigration and criminal law at the federal level. Part II focuses on the sub-federal criminalization of migration in both its substantive and procedural forms. Part III then synthesizes the available information concerning the nexus of criminal and immigration law to offer some reform proposals.

I. FEDERAL “IMMIGRATIONIZATION” OF CRIMINAL PROCESS

For well over a century, the immigration laws of the United States have made criminal convictions a key criterion for sorting immigrants.¹ Defined classes of criminal convictions are removable offenses, and removal for such offenses is sometimes mandatory under the statute.² At the dawn of the 20th century, such removals were limited by statute to a defined period of years after entry, but that has changed dramatically over the past century.³ Many convictions now trigger removal regardless of how long ago an individual entered the country or how long ago the offense was committed. Convictions can also be made into deportable offenses retroactively. Daniel Kanstroom described these changes in law as creating a shift from deportation as a means to correct errors in the admissions process to deportation as a form of post-entry social control.⁴ Adhering to the 19th-century legal doctrines that predated this shift, constitutional case law treats immigration as a civil system rather than a form of punishment.⁵ In reality, deportation and its contingent processes, including immigration detention, have been used punitively for many decades.⁶ But recent trends have made this far more plain to see.

In 1996, Congress broadened significantly the class of criminal convictions that can result in removal and severely narrowed the availability of discretionary relief.⁷ Congress also expanded the category of individuals subject to mandatory civil detention during removal proceedings and pending their ultimate removal.⁸ Following the reorganization of the Immigration and Naturalization Service (INS) into three different agencies within the Department of Homeland Security (DHS) in 2003, congressional appropriations for immigration enforcement

1. “Removal” is a legal term of art that includes both deportation and exclusion. Generally speaking, deportation grounds apply to individuals who have been formally admitted. *See* 8 U.S.C. § 1227. Individuals who have not been formally admitted to the United States (regardless of length of residency) are governed by the statute’s inadmissibility grounds. *See* 8 U.S.C. § 1182.

2. *See, e.g.*, 8 U.S.C. § 1227(2)(A)(iii).

3. DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 200-13 (2007).

4. *Id.*

5. *Id.*

6. *See, e.g.*, Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000); *see also* Cesár Cuauhtémoc García Hernandez, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014).

7. Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1843-46 (2007).

8. *See, e.g.*, Margaret H. Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, in IMMIGRATION STORIES 343 (David A. Martin & Peter H. Schuck eds., 2005).

soared.⁹ As a result of these developments, increasing numbers of foreign nationals—particularly those lawfully present—have experienced the harsh effects of changes in law and policy that target “criminal aliens,” broadly defined.

Immigration scholars have been attentive to this punitive turn in the realm of civil immigration law. Many have noted that the close linkage between criminal conduct and removal, and legislators’ assertions that the linkage was intended as a punitive measure, call into question the legal framing of removal as “civil.”¹⁰ This, in turn, suggests that immigration proceedings ought not to be immune from many of the procedural protections attached (at least theoretically) to the criminal process. Immigration scholars also have raised questions about the harsh immigration detention system. Federal legislators and executive-branch officials have justified the ongoing rapid expansion of immigration detention on both retributive and general deterrence grounds that seem ill-suited to a purportedly civil system.

But the civil immigration system is not the only place where this punitive turn in immigration policy has taken hold. The nation’s criminal enforcement systems also have been transformed to manage migration through the enforcement of criminal laws. The discussion below examines these changes at the federal level. Part A focuses on federal criminal prosecutions of migration crimes. Part B focuses on aspects of the federal civil immigration system that rely upon sub-federal criminal justice enforcement mechanisms.

A. FEDERAL CRIMINALIZATION OF MIGRATION

Immigration offenses like human smuggling and harboring have been on the books for decades, but historically, prosecution rates were negligible in the federal criminal scheme. Over the past two decades, the federal government has prioritized the prosecution of immigration and immigration-adjacent offenses over all other offenses. By 2011, immigration offenses were the single largest category of federal criminal prosecutions, and the bulk of those prosecutions were for misdemeanor illegal entry and felony reentry.¹¹ The aggressive

9. See, e.g., Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 630-35 (2012); see also DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY (2013).

10. Cf. *Padilla v. Kentucky*, 559 U.S. 356 (2010) (rejecting efforts to characterize deportation as a criminal sanction but noting that it was also different from other civil collateral consequences).

11. See, e.g., U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2016 (June 2017); see also Chacón, *supra* note 9 (summarizing earlier trends).

expansion of immigration prosecutions leveled off at that time, but in 2016, immigration offenses were still the second-largest category of federal offenses (29.3%), barely trailing federal drug offenses (31.6%).¹²

Moreover, as Mona Lynch has observed, the drug prosecutions in the southern border region are structured to maximize immigration-control effects. As she puts it, “immigration policy has become so criminalized here that the immigrant status rather than criminal status of the defendants in drug cases drives the adjudicatory logics and practices.”¹³ Prosecutors use high-volume drug plea strategies as a blunt instrument to support border control goals. A single southern border district accounted for 83% of the federal government’s felony drug possession convictions at the time of Lynch’s study,¹⁴ and these drug convictions are serving as part of a broader immigration control strategy.

The federal strategy of disproportionately deploying criminal enforcement resources to the southern border has changed the complexion of the federal prison system. By 2016, the Federal Sentencing Commission reported that 52.7% of all federal prisoners were Hispanic.¹⁵ The focus on the southern border region also helps to explain why more than 40% of federal prisoners are foreign nationals. This is particularly jarring given the extensive literature documenting the fact that foreign nationals are less likely to commit crimes than their citizen counterparts and that cities with substantial immigrant populations tend to be safer than those with small immigrant populations.¹⁶

The mass prosecutions of immigration and immigration-adjacent crimes in the southern border region have also transformed criminal court processes and logics in federal criminal courts. Misdemeanor illegal-entry pleas are counseled only nominally, with 6 to 10 defendants pleading at a time with the assistance

12. See U.S. SENTENCING COMM’N, *supra* note 11, at 2, 9.

13. Mona Lynch, *Backpacking the Border: The Intersection of Drug and Immigration Prosecutions in a High Volume U.S. Court*, 57 BRIT. J. CRIMINOLOGY 112, 117 (2015).

14. *Id.* at 120.

15. U.S. SENTENCING COMM’N, *supra* note 11. For a discussion of the impact of race on sentencing, see Cassia Spohn, “Race and Sentencing Disparity,” in Volume 4 of the present Report.

16. Robert Adelman et al., *Urban Crime Rates and the Changing Face of Immigration: Evidence Across Four Decades*, 15 J. ETHNICITY IN CRIM. JUST. 52 (2016) (discussing how immigration is consistently linked to decreases in violent (e.g., murder) and property (e.g., burglary) crime throughout the time period); Bianca Bersani, *An Examination of First and Second Generation Immigrant Offending Trajectories*, 31 JUST. Q. 315 (2012) (“Foreign-born individuals exhibit remarkably low levels of involvement in crime across their life course”); Robert J. Sampson, *Rethinking Crime and Immigration*, CONTEXTS, Jan. 2008, at 28.

of one public defender.¹⁷ The Federal Rules of Criminal Procedure concerning plea agreements are violated systematically in these procedures.¹⁸ Equities like family ties and work connections in the U.S. are used against defendants in sentencing rather than in their favor; courts view evidence of community ties as proof that an individual is likely to “recidivate” by attempting to return to their families in the U.S.¹⁹ Meanwhile, felony reentrants are sentenced much more harshly than similarly situated defendants without a prior immigration history, and the terms to which they are sentenced vary greatly depending on where they are sentenced.²⁰

There is no good empirical evidence that this costly prosecution approach acts as a deterrent to unauthorized migration, let alone that it is cost-effective. As with the drug war, a social phenomenon that might be more productively and humanely addressed through other legal and social mechanisms is instead wrongheadedly managed through the criminal justice system. Society is only now awakening to the notion that the war on drugs might have been better fought through public-health and economic programs.²¹ We should not wait for many years and witness millions of additional incarcerations, largely of Latinos prosecuted along the southern border, before we recognize that unauthorized migration would be better managed through effective labor policy, foreign policy, and civil and administrative migration management policies.

B. FEDERAL CIVIL IMMIGRATION ENFORCEMENT THROUGH SUB-FEDERAL CRIMINAL SYSTEMS

The discussion above involves federal immigration enforcement actors working in the federal criminal system, but the federal government has also enticed and drafted sub-federal criminal enforcement actors into the project of civil migration control. For many years, the federal government used its own personnel to screen arrestees in the nation’s prisons and jails through the “Criminal Alien Program,” or CAP. CAP officials identify foreign nationals

17. Jennifer M. Chacón, *Managing Migration through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 142 (2009). Cf. Alexandra Natapoff, “Misdemeanors,” in the present Volume; Eve Brensike Primus, “Defense Counsel and Public Defense,” in Volume 3 of the present Report.

18. See, e.g., *United States v. Escamilla Rojas*, 640 F.3d 1055 (9th Cir. 2011); *United States v. Roblero-Solis*, 588 F.3d 692, 694–700 (9th Cir. 2009).

19. See, e.g., Lynch, *Backpacking the Border*, *supra* note 13, at 129. Cf. John Monahan, “Risk Assessment in Sentencing,” in Volume 4 of the present Report.

20. *Id.*; see also Alison Seigler, *Disparities and Discretion in Fast-Track Sentencing*, 21 FED. SENT’G REP. 299 (2009).

21. For discussions of the drug war and legalization efforts, see Jeffrey A. Miron, “Drug Prohibition and Violence,” in the present Volume; and Alex Kreit, “Marijuana Legalization,” in the present Volume.

who are potentially removable and initiate removal proceedings when they deem it appropriate. In 2009, 48% of individuals apprehended by the DHS were screened through CAP.²²

In recent years, CAP screening has been supplemented by more comprehensive database screening under the moniker of “Secure Communities.” This program, which was operating nationwide by 2013, required the fingerprints of all state and local arrestees to be run through the DHS’s IDENT database to determine the immigration history of the arrestee.²³ Unlike CAP, which places federal agents in state and local facilities either physically or virtually, Secure Community effectively makes state and local law enforcement front-line immigration screeners. Their arrest decisions are the “discretion that matters” when it comes to determining whether or not the DHS receives information about the individuals with whom they interact.²⁴ If an individual is found to be in violation of immigration law, federal agents can issue a detainer request (known informally as an “ICE hold”), asking the state or local entity to hold the individual for up to 48 additional hours while ICE makes arrangements to take custody.²⁵ This is true whether or not the state or local jurisdiction decides to pursue criminal charges, meaning that any contact with law enforcement is sufficient to trigger potential federal intervention regardless of criminal culpability.

After its rollout, the Secure Communities program faced a barrage of criticisms. Researchers found that the program had no effect on crime rates,²⁶ advocates argued that it decreased community trust of state and local law enforcement, and the government’s own statistics revealed that the majority of foreign nationals removed as a result of the program were low enforcement priorities.²⁷ The criticisms ultimately prompted the Obama administration to scale back the program, replacing it with the “Priority Enforcement Program,”

22. MEISSNER ET AL., *supra* note 9 at 101.

23. *Id.*; see also Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 93 (2013).

24. Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011).

25. See, e.g., Christopher Lasch, *The Faulty Legal Arguments Behind Immigration Detainers*, PERSPECTIVES, Dec. 2013, at 1.

26. See, e.g., Cox & Miles, *supra* note 23.

27. *Secure Communities and ICE Deportation: A Failed Program?*, TRAC, <http://trac.syr.edu/immigration/reports/349> (last visited Apr. 8, 2017).

which would continue the mandatory database screening but would more rigorously adhere to stated enforcement priorities in setting determinations about whom to detain and deport.²⁸

Notwithstanding the robust evidence of the shortcomings of Secure Communities, in his executive order of January 25, 2017, President Trump reinstated the program and eliminated the enforcement priorities set by the previous administration. Trump's executive order prioritizes anyone with a criminal record, anyone arrested, anyone who commits criminal acts (whether or not arrested), anyone with a purported gang affiliation,²⁹ and anyone deemed by an immigration judge to be a threat to public safety. Any foreign national whose data flows through the Secure Communities program will be an enforcement priority by definition because of their arrest, apparently regardless of their immigration status, and regardless of whether they are ever charged with, let alone convicted of, a crime.

Another set of criticisms of Secure Communities concerned the immigration detainers that create the pipeline between the state or local prison or jail and the immigration detention and removal system. ICE would issue detainer requests to localities when a database screening identified a person of interest to immigration enforcement officials, and the state or local entity that had custody of the individual was asked to hold the person for up to 48 hours to give ICE an opportunity to take custody.

Some states and localities bristled when forced to bear the costs of federal immigration enforcement by detaining individuals beyond their release date at the request of ICE.³⁰ In many of these jurisdictions, matters came to a head when detainees began to sue county facilities for holding them beyond their release date on the basis of nothing more than a federal request. Courts began to award damages to redress this violation of their Fourth Amendment right against unreasonable seizure, holding that detainer requests issued without a warrant or probable cause provided no basis for prolonged detentions.³¹ As a

28. See, e.g., Memorandum from Jeh Charles John, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement et al. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

29. On the dangers of over-ascription of gang membership to Black, Latino and Asian youth, see generally SAMUEL WALKER ET AL., *THE COLOR OF JUSTICE: RACE, ETHNICITY AND CRIME IN AMERICA* 459-60 (5th ed. 2012).

30. Christopher Lasch, *Preempting Immigration Detainer Enforcement*, 3 *WAKE FOREST J. L. & POL'Y* 281, 288-89 (2013).

31. *Miranda-Olivares v. Clackamas County*, No. 3:12-CV-02317-ST, 2014 WL 1414305, *4-*8 (D. Or. Apr. 11, 2014) (finding holds executed pursuant to an ICE request lacked basis in law and constituted a Fourth Amendment unreasonable seizure).

result, many states and localities have now enacted policies instructing officials not to prolong detentions based on an ICE detainer request.

Some sub-federal cooperation in immigration enforcement is governed by contract. In section 287(g) of the Immigration and Nationality Act (INA), Congress authorized state and local law enforcement agents to act in the capacity of federal immigration enforcement agents when trained and supervised by DHS agents.³² The resulting “287(g) agreements” proliferated during the Bush administration. But after a January 2009 report by the U.S. Government Accountability Office (GAO) found serious shortfalls in supervision, documentation, and data collection under these agreements,³³ the Obama administration scaled back the 287(g) programs. The federal government canceled agreements that purported to give local agents the capacity to investigate immigration status as part of their ordinary policing functions, leaving in place only those agreements that allowed certain local agents to screen inmates for immigration violations in jails.

Several studies concluded that 287(g) agreements fueled racial profiling, and the DOJ also initiated investigations into jurisdictions where there were credible reports that 287(g) investigative powers were being used in racially discriminatory ways. An agreement with Maricopa County, Arizona, was canceled when experts found that Latino drivers were four to nine times as likely as similarly situated drivers of other races to be stopped by the police. Critics continue to observe substantial variation in how 287(g) agreements are implemented across jurisdictions, and overall, “the program does not target primarily or even mostly serious or dangerous offenders.”³⁴ One study concluded that about half of the individuals identified for removal through 287(g) programs were guilty of misdemeanors and traffic violations.³⁵

Obama’s rollback of the 287(g) program was initiated in response to the problems identified by studies of the program. President Trump’s executive order of January 25 calls for reinvigoration of the 287(g) program, however, raising questions as to whether the federal government plans to screen out localities that engage in racial profiling and whether the administration will prioritize training and data collection that was found lacking in prior iterations of the program.

32. 8 U.S.C. § 1357(g) (codifying section 287(g)).

33. U.S. GOV’T ACCOUNTABILITY OFFICE, BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (2009), <http://www.gao.gov/products/GAO-09-109>.

34. RANDY CAPPS ET AL., MIGRATION POL’Y INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 2 (2011).

35. Matthew Coleman, *The “Local” Migration State: The Site-specific Devolution of Immigration Enforcement in the U.S. South*, 34 LAW & POL’Y 159 (2012).

II. SUB-FEDERAL CRIMINALIZATION OF MIGRATION

In addition to their participation in federal immigration enforcement schemes, state and local law enforcement also play an independent role in shaping immigration policy through the choices they make in their own criminal-enforcement practices. First, as previously noted, states and localities are effectively required to share arrest data with the DHS through Secure Communities and related programs. This has prompted some localities to change their arrest and detention practices to minimize immigration screening for residents on the basis of minor offenses and infractions. Santa Clara County, California, for example, initiated changes to its arrest and detainer policies when county officials were informed that they could not opt out of Secure Communities.³⁶ Other municipalities followed suit.³⁷ California later passed legislation prohibiting state and local law enforcement from detaining individuals pursuant to an ICE detainer request unless the individual fit into certain statutorily defined categories of higher-risk detainees.³⁸ At this time, at least 4 other states and 18 other cities and counties have done the same.³⁹ In contrast, states and localities that do not wish to shield immigrant residents from immigration enforcement have added incentives to arrest suspected foreign nationals, and some choose to comply with detainer requests notwithstanding the liability risks involved.

States and localities can and do exercise immigration discretion at every stage of the criminal process, including investigative practices, arrest decisions, booking practices, bail determinations, pretrial diversion decisions, charging,

36. EDGAR AGUILASOCHO ET AL., MISPLACED PRIORITIES: THE FAILURE OF SECURE COMMUNITIES IN LOS ANGELES COUNTY 4-7 (2012), http://www.law.uci.edu/academics/real-life-learning/clinics/MisplacedPriorities_aguilascho-rodwin-ashar.pdf.

37. *Id.*

38. CAL. GOV'T CODE § 7282.5 (California TRUST Act).

39. *Locally Policies Nationally*, CAL. TRUST ACT, <http://www.catrustact.org/local-policies-nationally.html> (last visited Apr. 8, 2017). The site lists Miami-Dade County, but that county has recently withdrawn its protections in the face of the Trump administration's threats to withdraw funds from "sanctuary cities." See also Patricia Mazzei, *Miami-Dade Mayor Orders Jails To Comply With Trump Crackdown On 'Sanctuary' Counties*, MIAMI HERALD (Jan. 26, 2017), <http://www.miamiherald.com/news/local/community/miami-dade/article128984759.html#storylink=cpy>. Policies like the California TRUST Act are not actually "sanctuary" policies at all. Trump's executive order defines that concept as involving a violation of 8 U.S.C. §1373, and that provision does not appear to be violated in any way by the non-detainer policy outlined in the TRUST Act. But some states, cities and counties, including California, are now contemplating the passage of even more protective ordinances in the wake of Trump's election.

plea bargaining, sentencing, and corrections.⁴⁰ At each stage of the process, criminal-enforcement actors can take immigration status into account in ways that either maximize or minimize the impact of immigration status on the criminal process.⁴¹ For example, prosecutors can work with defenders to structure pleas that do not trigger mandatory deportation, or they can aggressively pursue pleas that maximize the likelihood of deportation in addition to the criminal punishment. A neutral stance toward immigration status in the criminal process can result in unintended and harsh immigration consequences for relatively minor criminal charges, so efforts to minimize the immigration consequences of criminal proceedings often require explicitly taking alienage into account in order to ensure the avoidance of immigration consequences when that outcome is seen as desirable.⁴²

Some states and localities have actively sought to use their criminal-enforcement systems to promote immigration enforcement. Arizona's S.B. 1070, which sought to create a number of immigration crimes that purportedly complemented federal immigration law, is the best known example.⁴³ In *Arizona v. United States*, the Supreme Court struck down portions of S.B. 1070 that would have made it a state crime to work without authorization or to solicit day labor.⁴⁴ But the Court left intact a provision that required law enforcement agents in Arizona to enquire about immigration status during otherwise lawful stops and to communicate this information to the federal government whenever practicable.⁴⁵ By leaving open the door for sub-federal immigration policing, *Arizona v. United States* creates only a limited check on the practice of using state law tools to target immigrants assumed to be unauthorized. The decision may rule out state immigration laws, but the same effect can often be achieved through alternative routes.

40. For an excellent discussion of the ways that immigration policy preferences can affect each stage of the proceedings, see Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variations in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1146-55 (2013).

41. *Id.* at 1157-1195 (describing three models for jurisdictions with differing practices: an "alienage neutral model," which attempts to neutralize the effects of immigration status on the criminal process by discouraging investigations into immigration status during routine policing and when structuring bail, pleas and sentences to minimize the impact of immigration status; an "illegal alien punishment model," which seeks to use the levers of the criminal justice system to ensure that unauthorized migrants are treated more harshly in the system than other defendants; and an "immigration enforcement model," which actively seeks to use state law to create potential immigration consequences and to funnel foreign nationals into federal detention and removal).

42. *Id.*

43. ARIZ. REV. STAT. ANN. § 11-1051.

44. *Arizona v. United States*, 567 U.S. 387 (2012).

45. *Id.*

For many years before S.B. 1070, jurisdictions like Arizona used their human-smuggling laws, anti-trafficking laws, and identity-theft laws to target unauthorized migrants. Arizona's practice of prosecuting immigrants for self-smuggling so clearly served as immigration enforcement tools that courts found that the self-smuggling law was pre-empted by federal immigration law.⁴⁶ But the state's identity theft laws, which have also blatantly been used to target undocumented residents, have managed to survive judicial challenge, suggesting that states and localities have significant capacity to manipulate their criminal laws and enforcement policies to serve their own immigration enforcement objectives.

III. RETHINKING CRIMMIGRATION

The above discussion illustrates the many linkages and synergies between the nation's criminal justice systems and the immigration enforcement system. Federal immigration agents and federal courts and agencies obviously play a role in enforcing immigration law. But this discussion reveals the extent to which beat police officers, state prosecutors, probation officers, county sheriffs, state court judges, and federal prosecutors all make decisions that structure the priorities and shape the reach of the nation's immigration enforcement system. In some ways, they are just as important as the federal immigration bureaucracy in structuring U.S. immigration priorities. Immigration judges hear only about 17% of removal cases⁴⁷ and have very little discretion to stay removal in the cases that they do hear. Once individuals enter the removal system through the criminal justice system, there are few exit ramps. Numerically, state and local law enforcement agents are also more influential than federal immigration agents, who are responsible for far fewer front-line detentions of removable foreign nationals. Unsurprisingly, sub-federal law enforcement agents have been identified as important "force multipliers" in immigration enforcement efforts.

Scholars of immigration law and policy generally tend to agree that the immigration enforcement system is inhumane,⁴⁸ costly,⁴⁹ and surprisingly

46. See generally Ingrid V. Eagly, *Local Immigration Prosecutions: A Study of Arizona Before S.B. 1070*, 58 UCLA L. REV. 1749 (2011).

47. ACLU, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM 2 (2014), <https://www.aclu.org/report/american-exile-rapid-deportations-bypass-courtroom>.

48. See, e.g., BILL ONG HING, *DEPORTING OUR SOULS: VALUES, MORALITY AND IMMIGRATION POLICY* (2006).

49. See, e.g., MEISSNER ET AL., *supra* note 9 (estimating that the U.S. spends over \$18 billion on immigration enforcement each year).

counterproductive.⁵⁰ There is no good empirical evidence that substantiates the effectiveness of ongoing efforts to manage migration through the criminal justice system. Unfortunately, public opinion on immigration is often premised upon serious misconceptions concerning the U.S. immigrant population.⁵¹ Given the resulting political popularity of this approach among certain political constituencies, one might wonder whether the laws and policies at the heart of the criminal-immigration nexus are actually a worthy focus for bipartisan criminal justice reform. In many quarters, the widespread diffusion of enforcement responsibilities and the resulting ubiquity of immigration enforcement are politically popular, particularly when such efforts are perceived as targeting “criminal aliens.”⁵²

But in fact, the success of broader criminal justice reform depends upon our ability to achieve some degree of bipartisan consensus to reform the laws and policies that criminalize migration and migrants. The current focus on punishing immigration through the criminal justice systems at the federal and state levels does not just echo the policies of the failed war on drugs, but it actually opens up a new front in that war,⁵³ raising the specter of a new wave of racialized mass incarceration.⁵⁴ Those hoping to reform criminal justice systems without paying attention to the increasing criminalization of migration are unlikely to succeed, because systemic choices around migrant criminalization are increasingly fueling the wide-scale criminalization and incarceration of Latinos.⁵⁵

50. See, e.g., Douglass Massey, Jorge Durand & Karen A. Pren, *Why Border Enforcement Backfired*, 121 AM. J. SOC. 1557 (2016) (concluding that hard line border enforcement policies perversely increased the size of the settled unauthorized population in the U.S.).

51. Vivian Yee et al., *Here's the Reality About Illegal Immigrants in the United States*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/interactive/2017/03/06/us/politics/undocumented-illegal-immigrants.html> (reporting that more than 60% of the unauthorized population has been present for 10 years or more and less than 20% of that population has been present for less than 5 year). Mexicans account for over half of these unauthorized residents, although individuals from parts of Central America, China and India are also well-represented. *Id.*

52. For an early endorsement of the devolution of immigration enforcement authority in this context, see Peter Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J. L. & PUB. POL'Y 367 (1999).

53. Lynch, *supra* note 13.

54. See César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. Rev. 1457 (2014); Yolanda Vazquez, *Constructing Crimmigration: Latino Subordination in a Post-Racial World*, 76 OHIO ST. L.J. 599 (2015). For a discussion of mass incarceration, see Todd R. Clear & James Austin, “Mass Incarceration,” in Volume 4 of the present Report.

55. See, e.g., Vazquez, *supra* note 54.

Developments in criminal-enforcement systems that unfurled during the war on drugs supply the mechanisms for the current overcriminalization of migration. Vast federal enforcement resources are shuffled between the federal prosecution of drug and immigration crimes in border regions, but they also fuel the efforts of sub-federal enforcement agencies. The severity of federal immigration law is amplified when the federal government steps in to prevent states from engaging in drug decriminalization⁵⁶ or the creation of immigration “sanctuaries.”⁵⁷

As with the war on drugs, now that issue entrepreneurs have encouraged states and localities to view immigration enforcement as one of their own enforcement prerogatives, and one that is inextricably linked with anti-crime efforts aimed at controlling risky populations, the federal government has lost some of the levers necessary to exert control over the specific dimensions of sub-federal immigration enforcement efforts. The federal government can ramp up, but often cannot scale back, the use of sub-federal criminal-enforcement resources on immigration control.⁵⁸ Also, as with the war on drugs, when the federal government encourages the ramping up of enforcement efforts at all levels of government, the results are costly and punitive policies that have no beneficial effect on public safety commensurate to the harms they generate.

To prevent the ongoing criminalization of migration from ultimately paralleling the worst failures and excesses of the war on drugs, there are three issues that require immediate attention and reform: the insufficient restrictions on racial profiling in immigration policing; the growing lack of state and local

56. The removal provisions pertaining to drug use are some of the harshest and most irrational in the immigration code. See Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163 (2008). State decriminalizations of drugs do not necessarily solve this problem for foreign nationals because the federal government can still prosecute these removable offenses. See *Gonzalez v. Raich*, 545 U.S. 1 (2005) (upholding Congress’s ability to regulate the cultivation of marijuana for personal, compassionate use, notwithstanding state law permitting such use). Attorney General Sessions has suggested that he does not intend to be bound by state drug decriminalizations, although he seemed to back away from his stronger prohibitionist stance during his confirmation hearings. See Tom Huddleston, Jr., *What Jeff Sessions Said About Marijuana in His Attorney General Hearing*, FORTUNE (Jan. 10, 2017), <http://fortune.com/2017/01/10/jeff-sessions-marijuana-confirmation-hearing>.

57. President Trump has been very vocal about his opposition to sanctuary cities, and has threatened to cut off federal funding to them, although the targets of these possible funding cuts are very narrowly defined in his executive orders to date. See Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 30, 2017) (defining sanctuary jurisdictions as those that “willfully refuse to comply” with the requirement in 8 U.S.C. § 1373 that states not interfere with the ability of their employees to communicate with federal immigration agents). Few if any jurisdictions colloquially labeled “sanctuary cities” actually fall within this definition.

58. Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS J. 577 (2012).

autonomy to pursue integrationist public safety policies; and the need for greater rationalization of the criminal-immigration law nexus. Reforms around the first two issues can be achieved at the state and local level without federal intervention, although federal participation would be beneficial; however, the last will require federal action.

A. RACIAL PROFILING

First, immigration policing is one of the few areas where the courts and the executive branch continue to expressly sanction the use of racial profiling.⁵⁹ This has remained true even after the Department of Justice prohibited the use of racial profiling in other forms of policing; the exception for immigration policing was retained by the Department of Justice in its 2014 memorandum prohibiting racial profiling.⁶⁰

The enabling case law and the policies implementing it rest upon stated assumptions that the law-enforcement agents relying on these forms of profiling will have a certain level of expertise in immigration enforcement that will allow them to assimilate the information about race into their superior training to attain accurate results.⁶¹ In other words, these cases generally assume that trained federal immigration agents are responsible for immigration enforcement and that they know when and how racial markers provide evidence of immigration status. If this were ever true even as applied to federal officers, it is increasingly difficult to credit as society becomes more multi-racial and multi-ethnic.⁶² It is also impossible to justify the extension of this notion of expertise to every state and local law-enforcement agent with an interest in immigration enforcement.

59. *Id.* at 606-07; Kevin R. Johnson, *How Racial Profiling in America Became the 'Law of the Land': United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L. J. 1005 (2010); Kevin R. Johnson, *Racial Profiling in the "War on Drugs" Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder*, 48 MICH. J. L. REFORM 967 (2015).

60. U.S. DEP'T OF JUSTICE, GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY (2014) [hereinafter DOJ GUIDANCE], <https://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>.

61. *See, e.g.*, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

62. *See, e.g.*, *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000) (finding Mexican appearance an inadequate justification for a stop given the large, lawfully present population of Latinos in Southern California). *But see* *United States v. Manzo-Jurado*, 457 F.3d 928 (9th Cir. 2006) (applying *Brignoni-Ponce* and affirming a stop based largely on racial profiling in Montana, where the Latino population is small).

The harms of racial profiling are discussed extensively in other chapters of this volume.⁶³ Racial profiling is largely ineffectual as an investigative strategy, and it is also quite costly. It undermines community trust of law enforcement and it sends a repeated and insidious signal to some members of the community that they are considered outsiders more worthy of suspicion than protection.⁶⁴ In an age when the overbreadth of the criminal law makes charging easy, decisions about whom to stop and arrest are critical to determining the composition of the population of low-level offenders who wind up in prisons and jails. When those efforts are focused on Latinos out of a misguided sense that Latinos are the appropriate target of immigration enforcement,⁶⁵ it is unsurprising that Latinos are increasingly overrepresented in prisons, jails and removal proceedings.⁶⁶

Courts and policymakers cling to the misguided notions that you can make judgments about legal status based on appearance and that racial profiling is necessary for effective immigration enforcement.⁶⁷ In fact, effective street policing of immigration status is an impossibility, and any attempt to achieve it should be discouraged among state and local law enforcement agents engaged in street policing activities. Immigration policing requires not a “sense” about national origin, but an awareness of an individual’s immigration status—a complex legal determination that can never be made by watching someone go about their daily business.

63. See, e.g., David A. Harris, “Racial Profiling,” in Volume 2 of the present Report; Jeffrey Fagan, “Race and the New Policing,” in Volume 2 of the present Report; Devon W. Carbado, “Race and the Fourth Amendment,” in Volume 2 of the present Report.

64. See generally CHARLES R. EPPS ET AL., *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* (2014).

65. There are almost twice as many Hispanics in the U.S. who are native born (about 36 million) as there are foreign born Hispanics (fewer than 20 million). See Renee Stepler & Anna Brown, *Statistical Portrait of Hispanics in the United States*, PEW RES. CTR (Apr. 19, 2016), <http://www.pewhispanic.org/2016/04/19/statistical-portrait-of-hispanics-in-the-united-states/#current-population>. And, of course, many foreign born Hispanics are lawfully present and not currently removable. *Id.*

66. TANYA MARIA GOLASH-BOZA, *DEPORTED: POLICING IMMIGRANTS, DISPOSABLE LABOR AND GLOBAL CAPITALISM* (2015) (observing that Latino males are significantly overrepresented in the number of deportees relative to their percentage of the immigrant population and the unauthorized immigrant population).

67. See, e.g., *Maldonado v. Holder*, 763 F.3d 155 (2d Cir. 2014) (arguing that immigration enforcement relies on the ability to profile based on “national origin.”).

Consequently, federal racial-profiling guidelines should be revised. But even if this does not happen, state and local law enforcement agents should engage in training practices that discourage racial profiling in all law enforcement endeavors, including those that might link to immigration enforcement. And state legislatures should pass laws that encourage this move away from racial profiling.

B. ENCOURAGING LOCAL PUBLIC- SAFETY SOLUTIONS

Second, commonly acknowledged errors of over-federalization that were made in the war on drugs should be avoided in the immigration context.⁶⁸ This point is not intuitive given that immigration policy is largely set at the federal level. But the federal government is increasingly trying to structure state and local law enforcement efforts to suit its own enforcement goals. This should be avoided.

Some jurisdictions want to use their resources to enforce immigration law, and there is a robust structure under federal statute for them to do so.⁶⁹ As previously mentioned, these cooperative arrangements are problematic; researchers have highlighted the role that race played in driving localities to seek 287(g) agreements, and in shaping emerging patterns of racially biased policing on the ground.⁷⁰ Renewed research of this kind will grow in importance as the federal government positions itself to once again encourage and promote sub-federal immigration enforcement.⁷¹

State-federal cooperation around enforcement should be encouraged and allowed only if it can proceed without the unjust targeting of discrete minority communities. To date, we lack an effective example of such enforcement. What evidence we do have suggests that jurisdictions engaged in cooperative immigration enforcement are profiling Latinos in ways that expose them to low-level interactions with the criminal justice system and criminal prosecution regardless of their immigration status. It is ironic that this is happening at the very time that society is increasingly arguing for a retrenchment of the criminal justice system on other fronts.⁷²

68. For a discussion of the federalization of criminal law, see Stephen F. Smith, "Overfederalization," in the present Volume. See also WILLIAM STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

69. See 8 U.S.C. § 1357(g) (codifying section 287(g) of the Immigration and Nationality Act).

70. See *supra* notes 34-35 and accompanying text.

71. See, e.g., Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017); Memorandum from John Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Protection et al. (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

72. See, e.g., Yolanda Vazquez, *Crimmigration: The Missing Piece of the Criminal Justice System and its Reform in the 21st Century*, 51 U. RICH. L. REV. (forthcoming 2017).

Even if restrictionist jurisdictions are allowed or encouraged to continue to assist the federal government, jurisdictions that do not wish to do so should not be required to do so. All available academic evidence suggests that the presence of immigrants (including unauthorized immigrants) does not increase crime in neighborhoods, and in fact, has the opposite effect.⁷³ From a public-safety perspective, there is simply no reason that state or local law enforcement should be enforcing immigration laws. While some immigrants commit crimes, in the state and local context, those matters can be addressed like other crimes, using standard law enforcement tools.

Many law enforcement officials oppose federal efforts to draft them into immigration enforcement initiatives.⁷⁴ They argue that not only will such efforts not assist in addressing crime, but will actually undermine efforts to prevent or prosecute harmful activities because immigrant victims and witnesses may be afraid to collaborate with them.⁷⁵ These efforts to decouple state and local policing from immigration enforcement should be encouraged, not discouraged.

C. RATIONALIZATION

Finally, where the immigration enforcement system and the criminal justice system cannot be effectively disentangled, they should be rationalized, with criminal justice actors leading the way. The Supreme Court recognized this in its 2010 decision *Padilla v. Kentucky*, which required defense counsel to advise noncitizens of the clear immigration consequences of criminal convictions.⁷⁶ Noting the proliferation of severe collateral immigration consequences and the increasingly harsh way that these consequences were imposed upon longtime and lawful residents of the U.S., immigration scholars and advocates successfully argued for an understanding of deportation as something more than a typical collateral consequence. Although the Supreme Court stopped short of acknowledging that deportation is, indeed, a punitive sanction, the Court did acknowledge its severity and required a limited degree of counseling

73. See *supra* note 16 and accompanying text.

74. See, e.g., Tom Jackman, *Police Chiefs' Immigration Task Force Outlines Opposition to Trump Policy*, WASH. POST (Mar. 1, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/03/01/police-chiefs-immigration-task-force-outlines-opposition-to-trump-policy/?utm_term=.014b39a88c25 (including a copy of the letter composed by law enforcement officers opposed to enforcing immigration law).

75. *Id.* For a discussion of collateral consequences, see Gabriel J. Chin, “Collateral Consequences of Criminal Conviction,” in Volume 4 of the present Report.

76. *Padilla v. Kentucky*, 559 U.S. 356, 357 (2010) (citing numerous scholars in concluding that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation”).

on the clear immigration consequences of criminal convictions. The decision highlights how selective coordination of the criminal and immigration system can potentially generate more just outcomes in both systems.

As the Court's discussion in *Padilla* makes clear, some of the most severe and unjustifiable outcomes that arise at the intersection of the criminal and immigration system arise not because the systems are merging or working together, but because criminal justice systems substantially dictate immigration outcomes. Criminal justice actors are often unaware of the all-but-controlling weight of their decisions, although some certainly work to exploit it and others to mitigate it.⁷⁷ Regardless, because criminal justice inputs are so important in the immigration enforcement process, the current systemic overlay ensures that federal immigration policy is dictated to a large extent by local criminal justice policies and choices, resulting in a removal system that is superficially national, but operationally local, balkanized, and uneven. At the same time, the drive to achieve immigration control has restructured federal enforcement priorities in ways that also burden distinct geographies and populations. Although they result from systemic interplays that are ad hoc and sometimes accidental, the end results do bear the general features of a racial project.

The most effective way to address the problematic entanglements of the system would be for the federal government to enact comprehensive immigration reform that streamlined the list of removable offenses, restored discretion to immigration judges seeking to stay potential removals, and decreased the scope and penalties of federal immigration crimes on the books. By all indications, such reforms are a long way off. In the meantime, there may be more limited possibilities to ensure that the criminal justice system does not unfairly subject immigrants to overly harsh immigration consequences

Several scholars have offered suggestions for productive integration of criminal and immigration law to achieve this end. For example, over a decade ago, Margaret Taylor and Ronald Wright suggested that sentencing judges ought to have the ability to decide whether removal is an appropriate collateral consequence to a criminal sanction, and to impose that sanction themselves.⁷⁸ They argue that “[a] merger of sentencing and immigration determinations would ... yield less duplication of resources, quicker deportation, and lower detention costs. Deportable offenders would also benefit from quicker resolution of their claims, shorter detentions, the institutionalized use of prosecutorial discretion for immigration decisions, the presence of a truly

77. See, e.g., Eagly, *supra* note 40.

78. Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131 (2002).

neutral judge, and (most important) the provision of counsel and the other procedural protections of the criminal system.”⁷⁹

In fact, it seems problematic to bestow such broad immigration powers upon judges who are not trained in immigration law. But more limited forms of merger might be appropriate and useful. By way of example, Jason Cade has recently argued that the Department of Homeland Security ought to defer to findings by criminal court judges that removal is not an appropriate sanction in particular cases.⁸⁰ Allowing criminal court judges to make findings that favor immigration leniency, and encouraging DHS officials to defer to those findings, could go some way to alleviating the well-documented lack of proportionality in the immigration removal system.⁸¹ Greater rationality could be achieved if federal immigration enforcement actors paid more attention to efforts by state and local criminal justice actors to signal the appropriateness of leniency in certain cases.

States can also modulate unilaterally the collateral immigration impacts of criminal convictions by addressing the overpunitive aspects of their own criminal codes. California has done this by revising its criminal penalties to avoid triggering immigration law’s harsh aggravated felony consequences for state misdemeanors.⁸²

In the end, problems often labeled as “cimmigration” issues⁸³ need to be brought into mainstream criminal justice reform discussions. These issues relate to broader issues of race and policing, federalism and over- and under-criminalization. “Cimmigration” issues are not niche issues that arise at the edges of federal plenary power over immigration and national security, but issues at the heart of criminal justice policy. They are not that different from—

79. *Id.* at 1132.

80. Jason Cade, *Return of the JRAD*, 90 N.Y.U. L. REV. ONLINE 36 (2015). Cade’s proposal, which relies on DHS officials to give weight to criminal court judges’ indicia of leniency, may seem less politically viable in the current administration. In truth, however, there is no reason why any administration should resist efforts to rationalize the prioritization of scarce enforcement resources, and voluntary reliance on information provided by criminal court judges seems like a potentially useful way to channel this discretion.

81. For arguments that the immigration law lacks proportionality and should incorporate principles of proportionality, see, for example, Angela M. Banks, *The Normative and Historical Case for Proportional Deportation*, 62 EMORY L.J. 1243 (2013); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009); and Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415 (2012).

82. See e.g., Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12 (2017).

83. For the first scholarly use of this term and its concomitant description of rising immigration and criminal law severity, see Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 376 (2006).

and indeed are related to and intertwined with—many other developments in the field. Criminal justice reformers cannot hope to achieve effective reform of the criminal justice system without engaging these issues directly and incisively.

RECOMMENDATIONS

Effectively reforming the “crimmigration” system would require changes to both the immigration laws and the criminal laws. Some of the reforms most urgently needed involve reforms of federal immigration law, including scaling back many grounds of removability; restoring discretion to immigration judges to suspend removals in a broad range of cases; providing for adequate immigration adjudication for all individuals in removal proceedings; significantly reducing reliance on immigration detention; and enacting broad immigration reform that would legalize the existing unauthorized population and create a more effective means of managing future migration flows. But these are immigration reforms, not criminal justice reforms. In the spirit of this project, the following recommendations, which flow from the discussion in the previous section, are divided into recommendations for federal actors and for sub-federal actors. The recommendations are also presented in order from more modest to more sweeping.

A. FEDERAL CRIMINAL JUSTICE REFORM

1. **Revise and adhere to federal guidelines on racial profiling.** The current federal guidelines document on racial profiling explicitly “does not apply to interdiction activities in the vicinity of the border, or to protective, inspection, or screening activities.”⁸⁴ The constitutional cases that undergird this exemption were decided in the 1970s. Those cases were problematic when decided and completely untenable now. Interdiction efforts in the vicinity of the border—and all immigration enforcement efforts—should comply with standard prohibitions on racial profiling. And while it is often appropriate to consider nationality when engaged in border screenings and inspections, this does not require racial profiling or reliance on physical markers of presumed national origin.
2. **Local law enforcement agencies should not be pressured to engage in cooperative enforcement.** Many state and local police have made clear that they are better able to keep communities safe if they are not required to engage in federal immigration enforcement. Statistics concerning immigrants and crime bear this out. Local law enforcement should be allowed to make that choice without pressure or funding revocations from

84. DOJ GUIDANCE, *supra* note 60.

the federal government. States and localities should be able to declare to their residents that they do not engage in affirmative immigration investigations, and they should be able to ignore detainer requests when unaccompanied by a judicial warrant, particularly given the potential costs they will face in defending against strong Fourth Amendment claims.

- 3. End mass adjudication of misdemeanor illegal entry.** Scholars of migration have conclusively established that migration is driven by a host of factors, including economic and social conditions in the home countries, access to the necessary resources to migrate, opportunities in the receiving country, and social networks in the receiving country. There is no good evidence that criminal prosecution is a cost-effective deterrent of unauthorized migration. At most, it is but one factor in a complex and often highly constrained decision to migrate. Yet the federal government invests massive resources in the criminal prosecutions of individuals whose only offense is crossing the border without a visa. The legal regime that governs these prosecutions is irrational and racialized. It is a misdemeanor to cross the border without a visa but it is only a civil violation to overstay a visa, and the southern border is the site of the vast majority of illegal-entry prosecutions. In short, the criminal regime is aimed at Mexican migrants (despite the fact that migration from Mexico is currently net negative).

Lately, some members of Congress have proposed adding a criminal offense—making it a crime to overstay a visa. This might make the criminal code more rational, but it would also be immensely more costly, both socially and economically. Experience with the war on drugs counsels a move in the other direction—decriminalizing misdemeanor illegal entry and treating both illegal entry and visa overstays as a civil and administrative matter.

- 4. Substantially reduce federal sentences for illegal reentry.** When someone returns to the U.S., this is often indicative of the fact that they have substantial family or community ties here. Such factors are not good reasons for harsher punishment. Felony reentry prosecutions should target only individuals who pose a repeat threat to the community, and those individuals should be sentenced accordingly. Current sentencing practices purport to take into account community threat, but they do so in ways that are vastly overbroad and insufficiently attentive to individual equities.

B. STATE AND LOCAL REFORMS

1. **Leave federal immigration enforcement to the federal government.** Immigrants are less likely to commit crimes than their native counterparts, and communities with high concentrations of immigrants tend to have lower crime rates. In other words (and notwithstanding popular narrative), the presence of immigrants in communities generally enhances public safety. But if immigrants fear contact with law enforcement, this jeopardizes community safety; noncitizens will be less likely to report crimes, to serve as witnesses, and to help police proactively prevent criminal activity. For these reasons, state and local agencies are best served by creating clear demarcations between their functions and those of federal immigration enforcement agents. Rather than expending local resources to assist in federal immigration enforcement, these agencies should concentrate on enhancing public safety by leaving immigration enforcement to the federal agencies charged with that task.
2. **Take into account the immigration consequences of local choices.** Although the Supreme Court made clear in *Padilla* that defense counsel needed to inform clients of any clear immigration consequences of criminal pleas, this decision leaves many people without meaningful legal protection against future immigration consequences. Anyone serving as defense counsel should be required to complete a continuing legal education requirement at regular intervals concerning the immigration consequences of criminal pleas. Judges should also be made aware of the consequences of their decisions, since immigration consequences are often surprisingly severe and sometimes counterintuitive.
3. **Revise state criminal codes to eliminate the worst irrationalities of the immigration enforcement system.** Recently, California revised its criminal law to ensure that individuals were not liable to be deported as “aggravated felons” on the basis of a California misdemeanor conviction. State legislators should be aware that their decisions about how to define and sentence crimes in their jurisdictions will play a dispositive role in determining whether an individual in removal proceedings is deported or not, and they should define criminal conduct and sentences in a way that ensures that low-level offenders are not unnecessarily subjected to removal.

4. **Develop internal guidelines to penalize the inappropriate use of racial profiling by law enforcement agents.** Discussions of appropriate guidelines and their application can be found elsewhere in this volume. Here, suffice it to say that appropriate limits on the use of race in law enforcement are an important part of eliminating some of the worst social harms of the developing crimmigration system.