

# Roundtable on the Future of Justice Policy

## Examining Criminalization, Punitive Excess and the Courts in the United States: Implications for Justice Policy and Practice

Co-hosted by Merritt College and the Justice Lab at Columbia University

### Criminal Law and Migration Control: Recent History and Reform Possibilities

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Even before the British colonies along the Atlantic Coast of North America openly rebelled against Great Britain in the 1770s, colonists like Benjamin Franklin were complaining about the quality of incoming immigrants, and in particular, about their criminality. Franklin famously complained about the “thieves” and “villains” transported from the jails of England to the colonies.<sup>1</sup> These complaints ran alongside complaints that the Crown was unfairly restricting productive migrants from coming to the colonies.<sup>2</sup>

The notions of immigrant inferiority and criminality runs through the story of this self-styled “nation of immigrants,” always in tension with market systems that benefited from more robust immigrant flows. The desire for low-cost laborers to fuel capitalist expansion across North America existed alongside racialized fears of immigrant workers. Strong economic and political forces impelled migration into the U.S. even as residents who had arrived in the U.S. a mere generation before decried succeeding waves of immigrants as unassimilable, racially “other,” and morally degenerate. Immigration restrictions and criminal laws stood as twin methods to regulate these incoming immigrant groups, with the latter serving as a useful mechanism for controlling and containing populations that were often desired as workers, and therefore not barred from entry, but also not seen as political and social equals. These were the regulatory methods by which the new settler society strove to “block, erase, or remove racialized outsiders from their claimed territories” while simultaneously eliminating the land’s native nations and peoples, and containing the growing populations of Blacks descended from the enslaved Africans that English settlers brought to the colonies in the early 1600s.<sup>3</sup>

The dual and selective use of immigration control and criminal law to optimize settler colonial goals while preserving racial hierarchy has been told in many ways, and with attention to many periods of U.S. history. This brief paper does not seek to cover the tremendous geographic and historical terrain already charted by many excellent, existing accounts. Instead, the focus here will be on the last thirty years of immigration history – a period in which intertwined immigration and criminal law systems functioned to optimize the deportability of low-wage immigrants, disproportionately those from Mexico and Central America.<sup>4</sup>

It would not be an overstatement to claim that immigration enforcement has undergone a revolutionary transformation over the past three decades in the United States. Once episodic, border-focused, and generally confined to the efforts of a relatively small federal agency, immigration enforcement is now exceedingly well-funded and integrated deeply into the everyday policing of the interior United States. Not only are federal immigration agents more numerous and ubiquitous in the interior, but immigration enforcement has been integrated into the policing practices of state and local officials who once saw their purview as largely distinct from that of federal immigration enforcement agents.

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<sup>1</sup> Aristede R. Zolberg, *A Nation by Design: Immigration Policy in the Fashioning of America*, 40-41 (2006).

<sup>2</sup> The Declaration of Independence (U.S. 1776) (“He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.”).

<sup>3</sup> Kelly Lytle Hernández, *City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771-1965* (2017).

<sup>4</sup> On the concept and production of deportability see generally Nick de Genova, *Migrant “Illegality” and Deportability in Everyday Life*, 31 *Ann. Rev. Anthropology* 419 (2002).

This paper briefly explains these developments and assesses their consequences. The first section explores developments from shortly before the passage of the Immigration Reform and Control Act of 1986 through the early 2000s. During this period, the building blocks for the current approach to immigration policy were laid. For the first time since the restrictionist 1920s,<sup>5</sup> the criminal enforcement system was invoked not as an episodic adjunct to immigration enforcement, but as a central feature of the nation's immigration policy. The second section of the paper explores the period from the early 2000s through 2014—a period of immigration enforcement characterized by massive expansion, systematic devolution, and largely unalleviated severity. The final section covers the past five years of immigration enforcement. It explores the moderating policies enacted near the end of President Barack Obama's second term. It also explains how those moderating policies, which were themselves developed against a backdrop of criminalized migration, have been reversed aggressively by the Trump Administration. The paper concludes with a brief discussion of the increasingly significant ways that states and localities have responded with efforts to either contain or amplify federal enforcement trends.

### **The Criminalization of Migrants: 1986-2002**

The last year during which the U.S. Congress passed legislation to normalize the legal status of a large group of unauthorized migrants was 1986. The Immigration Reform and Control Act (IRCA) was a compromise legislative package.<sup>6</sup> There was the legalization component of the law – which allowed nearly three million residents present without legal authorization to regularize their immigration status and, eventually, to apply for citizenship. On the other side of the compromise was the employer sanctions component of the law which was conceptualized as a mechanism for ending the job magnet that was seen as the key “pull factor” driving migration, mostly from Mexico, into the United States.<sup>7</sup> The bill had the intended effect of regularizing the status of many – but not all – long-time immigrant residents.<sup>8</sup> It did not, however, dry up the job magnet. This was partly due to the fact that there was little political will and little funding to fully enforce employer sanctions against those who employed unauthorized workers.<sup>9</sup> But it was also likely the inevitable outcome of a law that ignored the practical realities of labor migration in the United States.

From the founding until shortly before the enactment of IRCA, migration from Mexico in the U.S. was unrestricted numerically.<sup>10</sup> From 1942 through 1964, some labor migration from Mexico was also actively encouraged and facilitated through the Bracero program, which allowed Mexican workers to enter the country

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<sup>5</sup> In 1929, Congress passed a law that made it a misdemeanor offense to enter the country without inspection and a felony to return after deportation, for the first time criminalizing at the federal level the act of migration outside of lawful channels. These measures were introduced by Senator Coleman Livingston Blease, an avowed racist and immigration restrictionist from South Carolina. In a short period of time, the enforcement of these laws required the construction of new federal penitentiaries to hold those who were prosecuted and incarcerated. Hernández, *supra* note 3, at 137-140.

<sup>6</sup> The Immigration Reform and Control Act (IRCA), Pub.L. 99–603, 100 Stat. 3445 (1986).

<sup>7</sup> See Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL. F. 193, 200-04.

<sup>8</sup> The family members of many IRCA beneficiaries were not covered by the program. To avoid the harsh effects of this reality, the Reagan Administration deferred the removal of many of these individuals. Memorandum from Gene McNary, Comm'r, Immigration & Naturalization Serv., to Reg'l Comm'rs (Feb. 2, 1990); *INS Reverses Family Fairness Policy*, 67 Interpreter Releases 153 (1990). But these and other exclusions of the law and shortcomings in implementation ensured the continued presence of a substantial unauthorized migrant population, even immediately after the legalization.

<sup>9</sup> *Id.*

<sup>10</sup> Of course, qualitative bars, including health and literacy bars, restricted Mexican migration. Far from being consistently applied, these qualitative exclusions were wielded selectively to address conflicting demands and agency (and individual) prerogatives. Deborah Kang, *The INS on the Line: The Making of Law on the U.S.-Mexico Border, 1917-1954* (2017); Kelly Lytle Hernández, *Migra!: A History of the U.S. Border Patrol* (2010). Such enforcement efforts worked to produce a collective national conceptualization of Mexicans as the “iconic illegal alien.” Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (2014).

temporarily to engage in agricultural work.<sup>11</sup> But the Bracero program was phased out in the mid-1960s, just before legal changes to the immigration laws subjected Mexicans to the same numerical quotas that were imposed on other nations. If members of Congress thought that end of the guest worker program and the newly imposed quotas would dramatically change the labor market, they were wrong. As the U.S. economy hummed along, workers continued to come to the U.S., but under different legal circumstances. Now subject to quotas, many came outside of regular channels. The nature of migration did not change, but changes in the law had changed the status of the incoming migrants from authorized to unauthorized.<sup>12</sup>

Increasingly, the presence of these migrants came to be viewed not simply as a competitive threat to domestic workers and a racialized threat to the white majority, but also as a criminal threat. The 1986 turn to the criminal law to regulate the employment of unauthorized workers (albeit through the criminalization of employers) and to regulate “marriage fraud” provided early warnings that the problem of migration outside of accepted channels would be increasingly managed through criminal enforcement channels.<sup>13</sup> As the federal “war on crime” heated up, Congress enacted legislation in 1994<sup>14</sup> and again in 1996<sup>15</sup> that yoked immigration control objectives to crime control objectives, generating unprecedented severity in both spheres. Age-old fears of migrants as the vectors of substance abuse<sup>16</sup> found new manifestations in the laws of the mid-1990s. Almost any drug crime – no matter how minor – became a deportable offense.<sup>17</sup> Congress expanded the list of other criminal offenses that came to be defined as “aggravated felonies” – crimes that resulted in mandatory detention during proceedings, mandatory removal and a lifetime bar on return. The list grew to include not simply crimes like rape and murder, but also relatively minor theft offenses and the like, and the new deportability provisions applied retroactively.<sup>18</sup>

### **The Securitization of Immigration and the Immigration of Criminal Enforcement 2002-2013<sup>19</sup>**

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<sup>11</sup> Kitty Calavita, *Inside the State: The Bracero Program, Immigration, and the I.N.S.* (1992); Ernesto Galaraza, *Merchants of Labor: The Mexico Bracero Story* (1972).

<sup>12</sup> Douglass S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 *Popul. Dev. Rev.* 1 (2012) (“Illegal migration rose after 1965 not because there was a sudden surge in Mexican migration, but because the temporary labor program had been terminated and the number of permanent resident visas had been capped, leaving no legal way to accommodate the long-established flows.”)

<sup>13</sup> On this early criminalizing move, see Isabelle Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 *Geo Mason L. Rev.* 669 (1997).

<sup>14</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796.

<sup>15</sup> Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009, 543-724 [hereinafter IIRIRA].

<sup>16</sup> See, e.g., Lucy Salyer, *Laws as Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Laws* 88-89 (1995) (recounting the fears of Chinese opium use that served as one justification for harsh, exclusionary anti-Chinese immigration laws), Jayesh Rathod, *Distilling Americans: The Legacy of Prohibition on U.S. Immigration Law*, 51 *HOUSTON L. REV.* 781 (2014) (recording how concerns about migrants as drunkards shaped both immigrant exclusions and criminal prohibitions).

<sup>17</sup> Jeff Yates *et al.*, *A War on Drugs or a War on Immigrants? Expanding the Definition of "Drug Trafficking" in Determining Aggravated Felon Status for Noncitizens*, 64 *Maryland L. Rev.* 875 (2005).

<sup>18</sup> See, e.g., Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 *ST. MARY'S L.J.* 833, 838-43 (1997); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 *Harv. L. Rev.* 1889, 1890-91 (2000) (explaining and criticizing the 1996 expansion of deportability and excludability); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 *Harv. L. Rev.* 1936 (2000).

<sup>19</sup> To my knowledge, this term was first use by Teresa Miller. Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 *Geo. Immigr. L.J.* 611 (2003) (describing the rising severity turn in both criminal and immigration law and noting scholarly disagreement over whether this constitutes a criminalization of immigration or an immigrationization of criminal law).

In fiscal year 2000, the total number of noncitizens removed from the U.S. was 188,467; by 2011, that number was 391,953,<sup>20</sup> and in 2013, it was 435,000.<sup>21</sup> In fiscal year 2000, only about 17% of federal criminal prosecutions were for immigration crimes.<sup>22</sup> By 2010, they made up more than 50% of federal prosecutions.<sup>23</sup> And the numbers of removals and of criminal prosecutions for immigration crimes did not peak until 2013.<sup>24</sup> These dramatic changes were driven by changes in immigration enforcement policies at the federal level, of course, but also by changes in enforcement practices by state and local law enforcement agents throughout the nation.

## 1. Federal Policy Changes

The events of September 11, 2001, had a significant effect upon immigration enforcement. For a time, the discourse of national security subsumed many aspects of the immigration policy discussion. Detention and removal provisions that Congress had enacted during the previous decade facilitated the arrests, indefinite detentions and relatively streamlined removals of thousands of immigrants under the guise of national security.<sup>25</sup> But the flood of resources that Congress directed to the newly-created Department of Homeland Security in the wake of September 11, purportedly in response to those security concerns, gave rise to an exceptionally well-funded and federally integrated enforcement machine aimed at a broad swath of immigrant residents in the decade that followed.<sup>26</sup>

Skyrocketing removal rates ran alongside legal strategies that increasingly criminalized immigrants whose only offenses were crimes of migration. After September 11, the administration of George W. Bush took a particular interest in ending unlawful border entries along the U.S. border with Mexico. To accomplish this goal, the administration ramped up prosecutions for misdemeanor illegal entry, revitalizing reliance on the misdemeanor provision enacted in the 1920s with the goal of preserving white racial purity against Mexican immigrants while leaving the doors open for workers to satisfy labor market demands.<sup>27</sup> The strategy included the mass prosecution of illegal entrants along the Southern Border, in which detained migrants pled guilty *en masse* to the misdemeanor crime of illegal entry – generally for a sentence of the two to three days they had already served in federal custody pending trial.<sup>28</sup> While the sentences were light, they carried severe future consequences. Reentrants faced felony charges with potential sentences of up to twenty years,<sup>29</sup> and the record of a misdemeanor illegal entry prosecution complicated immigrants’ future efforts to enter the U.S. lawfully.

Thus, federal immigration policy during this period accomplished a dual criminalization of migrants. Long-time lawful permanent residents became removable on criminal grounds for a wide range of offenses, including many that would not have been deportable offenses at the time of commission. At the same time, individuals crossing the border without authorization became misdemeanants and felons as a consequence of the very act of crossing the border. These changes to policy were both driven by and reified age-old notions of the racialized migrant as a criminal threat. Now, indeed, border crossers were criminals—though, circularly, their crime

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<sup>20</sup> Doris Meissner, et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, Migration Policy Report 11 (2013).

<sup>21</sup> Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. immigration deportations decline in 2014, but remain near record high*, Pew Research Organization, Aug. 31, 2016. Available from <http://www.pewresearch.org/fact-tank/2016/08/31/u-s-immigrant-deportations-declined-in-2014-but-remain-near-record-high/>.

<sup>22</sup> MPI, *A Formidable Machinery*, *supra* note 20 at 92.

<sup>23</sup> *Id.*

<sup>24</sup> TRAC Reports, *Criminal Immigration Prosecutions Down 14% in 2017*, December 6, 2017. Available from <https://trac.syr.edu/tracreports/crim/494/>.

<sup>25</sup> For a discussion of the evolution and effects of these discursive and policy shifts, see generally Jennifer M. Chacón, *Unsecured Borders: Immigration Restriction, Crime Control and National Security*, 39 Conn. L. Rev. 1827 (2007).

<sup>26</sup> See generally MPI, *A Formidable Machinery*, *supra* note 20.

<sup>27</sup> Hernandez, *supra* note 2 at 132-140.

<sup>28</sup> Jennifer M. Chacón, *Managing Migration Through Crime*, 109 Colum. L. Rev. Sidebar 135, 142 (2009)

<sup>29</sup> 8 U.S.C. § 1326.

was crossing the border. And immigrants were increasingly seen as criminals at the very time the immigration system was built up to detain them like criminals<sup>30</sup> as a precursor to removing them, including for minor offenses.

Although shifts in federal law and policy drove these developments, the changing role of state and local law enforcement in interior immigration were crucial drivers of ballooning removal rates.

## **2. State and Local Immigration Enforcement Policies and Practices**

As a matter of constitutional law, immigration regulation is an exclusively federal concern. Yet state and local law enforcement policies were key drivers of the rapid rise in removal rates during this period.

State criminal law prosecution were soaring across the U.S. during this period. The resulting state law convictions provided the basis for the potential removal of many noncitizens on the newly-expanded list of criminal removal grounds. But the role played by states and localities in immigration enforcement was not limited to these indirect effects. During the 2000s, the federal government took deliberate and unprecedented efforts to incorporate state and local law enforcement directly into their immigration enforcement efforts. At the same time, some states and localities adjusted their own policies and practices to further facilitate federal immigration enforcement efforts.

### **a. 287(g) Agreements and the Rise of Local Immigration Policing**

One provision of the immigration legislation that Congress passed in 1996 outlined a process whereby state and local governments could contract with the federal government to gain immigration enforcement authority.<sup>31</sup> Known as 287(g) agreements, named after the section of the Immigration and Nationality Act that outlines their legal authority, memoranda of understanding enacted pursuant to this provision allow state and local law enforcement agents to perform immigration enforcement functions with the same authority as federal immigration agents provided they were trained and supervised by the federal government.<sup>32</sup> Although there was clearly some Congressional enthusiasm for such collaborations, the Executive Branch did not enter into its first 287(g) agreement until 2002.<sup>33</sup>

But governmental reluctance to embrace the program changed radically after the terrorist attacks on the United States in September 11, 2001. Spurred in part by a push from states and localities and in part by increased federal interest in and capacity for immigration enforcement, the largely dormant 287(g) program took off. By 2011, there were 72 such agreements, the vast majority of which formed after 2006.<sup>34</sup>

Although the existence of section 287(g) of the Immigration and Nationality Act might be read to suggest that state and local agents acting outside of the contractual structure of that section were not empowered to enforce immigration law, many states and localities also maintained that they had the inherent authority, as part of their police powers, to engage in certain immigration enforcement activities even without the supervision of the federal government. Cities as widely dispersed as Farmer's Branch, Texas, and Hazelton, Pennsylvania, enacted laws that created local penalties for employers and landlords who hired or rented homes to undocumented immigrants.<sup>35</sup> States like Arizona and Georgia attempted to create state penalties for employers who hired unauthorized workers and also created state law requirements that state and local law enforcement agents inquire

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<sup>30</sup> On the rise and criminalized nature of immigration detention, see, e.g., Anil Kalhan, *Rethinking Immigration Detention*, 110 Colum. L. Rev. Sidebar 42 (2010).

<sup>31</sup> 8 U.S.C. § 1387(g).

<sup>32</sup> *Id.*

<sup>33</sup> Department of Homeland Security Office of Inspector General, *The Performance of 287(g) Agreements at 2* (March 2010) (available at [https://www.oig.dhs.gov/assets/Mgmt/OIG\\_10-63\\_Mar10.pdf](https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf))

<sup>34</sup> Randy Capps et al., *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*, Migration Policy Institute Report (2011).

<sup>35</sup> Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 Wm & Mary Bill of Rts J. 577, 604-605 (2013).

into immigration status in the course of their routine policing activities.<sup>36</sup> While courts found some of these laws preempted – that is, that states and localities could not engage in some of these efforts without overstepping their jurisdictional authority and usurping powers entrusted solely to the federal government – courts also left many of these practices intact. States were empowered to take away the state business licenses of employers who hired unauthorized workers, or to require their own police to enquire into immigration status during routine police stops.<sup>37</sup> These legal changes heralded a cultural shift in state and local policing. For some state and local law enforcement officials and agents, the policing of immigration status changed from something that was solely within the purview of federal agents to something that was a legitimate – and sometimes a leading – aspect of their own policing mission.

Not every jurisdiction, however, leapt into immigration enforcement efforts. Many states and localities adopted policies intended to signal their independence from and lack of involvement in federal immigration enforcement efforts. Some entities like the Los Angeles Police Department (LAPD), which had adopted a policy in 1979 under which its officers were prohibited from inquiring into the immigration status of those they stopped,<sup>38</sup> continued or created prohibitions on immigration investigation notwithstanding the changes at the federal level. Indeed, as federal enforcement efforts increased, some jurisdictions explored and adopted non-cooperation policies for the first time. The rollout of the federal Secure Communities program complicated these efforts.

#### **b. Secure Communities and the Marriage of Federal Enforcement and Local Policing**

Many immigrants and their allies had hoped that the administration of President Barack Obama would reverse the trends that had increasingly criminalized their communities and encouraged the hyperpolicing of immigrant neighborhoods. That did not happen. Throughout his first term and part of his second term, President Obama continued the policies and practices of the Bush administration: mass prosecutions continued on the border, long time lawful permanent residents continued to be removed for relatively minor offenses, government lawyers continued to push for expansive judicial interpretations of crime-related removal grounds, and the administration continued to expand its reliance on immigration detention.<sup>39</sup>

Indeed, the Obama administration actually tightened the linkage between criminal law enforcement and immigration enforcement with the nationwide rollout of a program called “Secure Communities. Under this program, all state and local arrest data were automatically screened by the Department of Homeland Security (DHS) to determine whether arrestees had any immigration offenses. This was true whether or not the state or locality wanted to engage in this joint effort and whether or not the arrest that led to the screening ultimately resulted in charges, much less convictions.<sup>40</sup> Police officers’ decisions to arrest thus became the critical determinant of whether an immigrant would be screened by DHS, giving local police officers much of the “discretion that matters” when it comes to immigration enforcement.<sup>41</sup>

Reaction to the Secure Communities program varied. Some jurisdictions sought (sometimes in vain) to opt out of the program.<sup>42</sup> But other jurisdictions, particularly those that had earlier enacted restrictionist policies of their own, embraced their new role in immigration enforcement, stepping up their policing and arrest efforts in immigrant communities, and holding individuals upon DHS or U.S. Immigration and Customs Enforcement (ICE) request, even in the absence of probable cause or a warrant.

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 582-88.

<sup>38</sup> Los Angeles Police Department, Office of the Chief of Police, Special Order 40, November 27, 1979.

<sup>39</sup> Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 Harv. L. Rev. F. 243 (2017).

<sup>40</sup> *Id.*

<sup>41</sup> Hiroshi Motomura, *The Discretion that Matters*, 58 UCLA L. Rev. 1819 (2011).

<sup>42</sup> See, e.g. *County wants feds to keep hands off fingerprints*, ABC7 Archive, San Jose, California, September 28, 2010. ([abc7news.com/archive/7694228/](http://abc7news.com/archive/7694228/)).

### 3. Prosecutorial Discretion as Modulation

Against the backdrop of these massive expansions in immigration enforcement capacity, the federal government exercised prosecutorial discretion to shield some immigrants from removal. Under President Bush, enforcement agents were purportedly guided by a series of enforcement priority memoranda.<sup>43</sup> The Obama administration used expanded and more explicit guidance on enforcement priorities to attempt to shield more of the immigrants from enforcement for humanitarian reasons.<sup>44</sup> The Administration also developed more creative programs to shield from removal immigrants deemed meritorious. In the period from 2012-2014, more than 800,000 young immigrants were temporarily deprioritized for deportation and granted work authorization under the Deferred Action for Childhood Arrivals (DACA) program.<sup>45</sup> The pairing of aggressive detention and removal policies on the one hand with protective policies for some immigrants on the other reinforced an age-old and powerful discourse that sorted immigrants into two categories: the immigrants worthy of mercy and those who were dangerous and deportable. These problematic and oversimplified categories have dominated immigration policy discussion in recent years.

#### **c. The Last Five Years: The Scaling Back and Redoubling of the Enforcement Machine, and the “Resistance”**

With the DACA program in 2012 and more expansively in 2014, the Obama administration began to scale-back and critically re-think the evolving linkage between immigration efforts and routine policing. First, the administration revamped the Secure Communities program, calling it the Priority Enforcement Program (PEP). Under PEP, the fingerprint screening program would no longer be used to serve as an indiscriminate funnel into immigration enforcement, but as a means of identifying individuals who the administration identified as high-priority. In a significant shift, the PEP program was designed to allow local government officials to play a collaborative role in identifying enforcement priorities even during this reform period.<sup>46</sup>

Immigrants’ rights advocates were skeptical of the change, since the screening mechanism – fingerprints run through databases at the time of arrest – remained unchanged and the priority system relied on DHS discretion. The number of individuals removed who lacked a criminal record or any other priority indicator did begin to fall decisively during this period,<sup>47</sup> but it still seemed incongruous that an administration so cognizant of the unfairness of the nation’s criminal law enforcement systems as a sorting mechanism placed such uncritical reliance on using criminal justice contact as a reliable means of sorting migrants.

In late 2014, in a move that would have further narrowed the enforcement discretion for line agents, DHS announced the Deferred Action for Parents of Citizens and Lawful Permanent Residents (DAPA) program. DAPA would have extended work authorization to qualifying unlawfully present parents of U.S. citizens and LPRs

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<sup>43</sup> Shoba S. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, Conn. Public Interest L. J. 258-261 (discussing the use of Prosecutorial discretion during the George W. Bush administration).

<sup>44</sup> A Formidable Machinery, Migration Policy Institute, supra note \_\_ at 15 ; see also ICE, Memorandum Re: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens (June 17, 2011). Available from <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

<sup>45</sup> U.S. Citizenship and Immigration Services, Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics and Case Status Fiscal Year 2012-2017 (March 31). Available from [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca\\_performancedata\\_fy2017\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2017_qtr2.pdf).

<sup>46</sup> Trevor Gardner, *Right at Home: Modeling Sub-Federal Resistance as Criminal Justice Reform*, 46 Fla. St. L. Rev. (forthcoming) (2019).

<sup>47</sup> See, e.g., U.S. Customs and Immigration Enforcement, FY 2016 ICE Immigration Removals. Available from <https://www.ice.gov/removal-statistics/2016>.

– potentially covering millions of unauthorized residents.<sup>48</sup> But the program never went into effect. It was enjoined by a federal district court judge in February of 2015, a mere day before the program was scheduled to go into effect. The injunction was upheld by the Fifth Circuit and stayed in place when the Supreme Court split 4-4 on the question.<sup>49</sup> (Notably, even if it had gone into effect, that program also offered no relief to most immigrants who had contact with the criminal enforcement system.<sup>50</sup>)

Collectively, the efforts of the Obama Administration to slow the immigration enforcement machinery were too little and too late to have any lasting effect on the muscular new immigration enforcement regime, particularly once President Obama left office. Most unauthorized residents remained unable to work lawfully and vulnerable to deportation. Meanwhile, the doubling down on the deportation of individuals with criminal convictions ensured that long-time residents continued to be removed for old and minor offenses, in many cases without regard for the equities of their individual cases. The same populations that were overrepresented in the criminal justice system unsurprisingly came to be overrepresented in the immigration system that increasingly relied on that same criminal justice system as a purportedly accurate screening mechanism through which to determine an immigrant's desirability and worthiness.<sup>51</sup>

Most importantly, the massive apparatus of integrated enforcement was never dismantled, or even significantly downsized. It stood at the ready, and indeed, already in operation, when a President far more committed to aggressive and indiscriminate immigration enforcement took the helm in January 2017.<sup>52</sup>

The Trump administration restored the Secure Communities program, re-expanded the number of 287(g) agreements, increased spending on immigration enforcement, and attempted to rescind many of the discretionary policies that the Obama Administration used to shield immigrants from removal.<sup>53</sup> The trope of migrant criminality has been deployed by the Trump administration again and again to justify harsh policies that violate international law, including the use of family separation to deter and punish Central American migrants seeking asylum at the U.S.-Mexico border,<sup>54</sup> and requiring desperate migrants to wait in dangerous conditions on the

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<sup>48</sup> President Barack Obama, Remarks in Address to the Nation on Immigration (Nov. 20, 2014) Available from <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>. [https://perma.cc/47FB-2L44]; Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., for Leon Rodriguez et al., *Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children and With Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014). Available from [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [http://perma.cc/9TKR-4FC2] [hereinafter Johnson, DAPA Memorandum]; see also Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. Rev Disc. 58, 60-61 (2015).

<sup>49</sup> Adam Liptak & Michael D. Shear, *Supreme Court Tie Blocks Obama Immigration Plan*, N.Y. TIMES, A1 (June 23, 2016). Available from <https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html>.

<sup>50</sup> See Johnson, DAPA Memorandum, *supra* note 48.

<sup>51</sup> Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder*, 48 U. Mich. J.L. Reform 967, 968–69 (2015) (noting the layering effect of a racially skewed criminal justice system upon a harsh and overinclusive removal system); see also Tanya Maria Golash-Boza, *Deported: Immigrant Policing, Disposable Labor, and Global Capitalism* 9–11 (2015).

<sup>52</sup> Randy Capps et al., *Revving Up the Deportation Machinery: Enforcement Under Trump and the Pushback*, Migration Policy Institute 5 (May 2018) ([file:///C:/Users/chacon/Downloads/ImmigrationEnforcement-FullReport\\_FINALWEB.pdf](file:///C:/Users/chacon/Downloads/ImmigrationEnforcement-FullReport_FINALWEB.pdf)) (“The machinery of interior enforcement that had been dialed down during the final Obama years has been revved back up by the Trump administration.”).

<sup>53</sup> The administration has cut back on the use of prosecutorial discretion in many cases that likely would have benefited from such discretion under President Obama. Capps et al., *Revving Up the Deportation Machinery*, *supra* note 52 at 51-55.

<sup>54</sup> Miriam Jordan, *Family Separation May Have Hit Thousands More Migrant Children Than Reported*, N.Y. TIMES at A1 (Jan. 17, 2019). Available from <https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html>.

“The family separations were a key part of the Trump administration’s effort to deter migrant families from trying to enter the country at the Southwest border, where they have been arriving in large numbers, most of them fleeing violence and deep poverty in Central America.”).



Mexican side of the U.S.-Mexico border while their asylum claims are slowly addressed.<sup>55</sup> Racialized notions of migrant criminality have also undergirded Trump Administration policy changes aimed at destabilizing the tenuous stability of long-time black and Latinx immigrant residents, including through the attempted revocation of DACA<sup>56</sup> and the attempted revocation of Temporary Protected Status for certain Central American and Haitian and Sudanese migrants.<sup>57</sup>

At the moment, efforts to modulate (or amplify) the effects of these federal policy changes are in the hands of state and local governments. In contrast to the situation under President Obama, jurisdictions interested in enforcement cooperation and enhancement are currently able to engage in such enforcement efforts without friction from the federal government.<sup>58</sup> These jurisdictions have amplified the effects of the Trump Administration's enforcement policies in some places.<sup>59</sup>

More interesting and varied are ongoing noncooperative efforts. Even before Donald J. Trump assumed office, but at a greatly accelerated pace since he assumed office, many jurisdictions began to think more creatively about how they could protect their residents from immigration consequences. Some jurisdictions have responded in a relatively limited way, by revamping arrest policies and limiting detainer cooperation. Others have engaged in more far-reaching non-cooperation measures.<sup>60</sup>

As jurisdictions look for ways to decouple their own resources from federal immigration enforcement efforts, they are finding that decriminalization and criminal sentencing reform are important policy levers. During the Obama administration, California had revised its laws to allow undocumented residents access to state-issued driver licenses, effectively decriminalizing the act of driving for individuals lacking legal authorization.<sup>61</sup> The state also amended its criminal code to cap the maximum sentence for misdemeanor offenses at 364 rather than 365 days in an effort to ensure that misdemeanor offenses would never count as "aggravated felonies" for purposes of

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<sup>55</sup> Glenn Thrush, *U.S. to Begin Blocking Asylum Seekers from Entering Over Mexican Border*, N.Y. TIMES at A 16 (Jan. 24, 2019). Available from <https://www.nytimes.com/2019/01/24/us/politics/migrants-blocked-asylum-trump.html>.

<sup>56</sup> President Trump rescinded DACA. Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES at A1 (Sept. 05, 2017). The rescission has been enjoined by federal courts in the Eastern District of New York and the Northern District of California, so USCIS continues to process renewal applications (but no new applications). U.S. Citizenship and Immigration Services, *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction*. Available from <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction>.

<sup>57</sup> President Trump's Secretary of the Department of Homeland Security, Kirstjen Nielsen, also announced the non-renewal of Temporary Protected Status for nationals of Sudan, Nicaragua, Haiti, and El Salvador, but that action was also enjoined in federal court, including on grounds that the revocation was motivated by impermissible racial animus. *Ramos, et al. v. Nielsen, et al.*, No. 18-cv-01554 (N.D. Cal. Oct. 3, 2018) (PDF, 458 KB); *see also* U.S. Citizenship and Immigration Services, *Temporary Protected Status*. Available from <https://www.uscis.gov/humanitarian/temporary-protected-status> (noting the injunction and related agency actions).

<sup>58</sup> This contrasts with the Obama administration's lawsuits and investigations of jurisdictions that enacted immigration enforcement policies more stringent than the federal government's. The U.S. government sued to prevent states purportedly cooperative enforcement bills, as in *U.S. v. Arizona*, 567 U.S. 387 (2012), and also investigated departments accused of racial profiling in the service of immigration enforcement. *See, e.g., Department of Justice Releases Investigative Findings on the Maricopa County Sheriff's Office -- Findings Show Pattern or Practice of Wide-ranging Discrimination Against Latinos and Retaliatory Actions Against Individuals Who Criticized MCSO Activities*, U.S. Department of Justice Office of Public Affairs, December 15, 2011. Available from <https://www.justice.gov/opa/pr/departments-justice-releases-investigative-findings-maricopa-county-sheriff-s-office>.

There is no evidence that such investigations or lawsuits are currently ongoing or planned, and indeed, President Trump pardoned Sheriff Arpaio for his conviction for criminal contempt of court in a lawsuit relating to his discriminatory conduct. Devlin Barrett & Abby Phillip, *Trump pardons former Arizona sheriff Joe Arpaio*, WASH. POST, Aug 25, 2017.

<sup>59</sup> Randy Capps et al., *Reving Up the Deportation Machinery*, *supra* note 52 at 2.

<sup>60</sup> *Id.*

<sup>61</sup> Assembly Bill (AB) 60 (Chapter 524: Statutes of 2013) (requiring the department to issue an original driver license to an applicant who is unable to submit satisfactory proof of legal presence in the United States).

federal immigration law.<sup>62</sup> Reforms of the state criminal codes benefit many communities. These reforms help to highlight the fact that such reforms can be effective means of protecting immigrant residents against grossly disproportionate immigration consequences in an era of immigration enforcement severity.<sup>63</sup>

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<sup>62</sup> Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation*, 20, *New Criminal L. Rev.* 12 (2017).

<sup>63</sup> On the various forms of “sanctuary” policies, see Christopher N. Lasch, et al., *Understanding “Sanctuary Cities”*, 59 *B.U. L. REV.* 1703 (2018). On state criminal law reforms in California designed to mitigate immigration consequences see Eagly, *supra*.