

# CRIMINAL JUSTICE FOR NONCITIZENS: AN ANALYSIS OF VARIATION IN LOCAL ENFORCEMENT

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*The growing centrality of “criminal aliens” to American immigration enforcement is one of the most significant historical shifts in the federal immigration system. However, little is known about how this dramatic restructuring of federal immigration priorities affects local criminal justice systems. Do noncitizens experience the same type of criminal justice as citizens? This Article seeks to answer this question by offering the first empirical study of how local criminal process is organized around immigration enforcement and citizenship status. It accomplishes this task by analyzing the criminal justice systems of the three urban counties that prosecute the highest number of noncitizens: Los Angeles County, California; Harris County, Texas; and Maricopa County, Arizona.*

*Comparative review of law, procedure, and practice in these three counties reveals that immigration’s interaction with criminal law has a far more powerful impact on local criminal practice than previously understood. Across all three counties, the practical effects of the federal government’s reliance on arrests and convictions in making enforcement decisions are felt at every stage of the criminal process: Immigration status is part of routine booking at local jails, “immigration detainees” impede release on criminal bail, immigration officials encourage criminal prosecutors to secure plea agreements that guarantee removal, and noncitizens are sometimes deported before their criminal cases are completed. Yet, there is surprising variation in how these three counties have structured their criminal practices in light of the consistently deep connections between criminal process and immigration enforcement. As this Article develops, the three jurisdictions have adopted distinct models of noncitizen criminal justice—what I term alienage neutral, illegal-alien punishment, and immigration enforcement. Each model reflects significant agreement across county agencies about the appropriate role of noncitizen status in criminal case adjudication and of local involvement in deportation outcomes. These findings have important implications for the institutional design of both local criminal systems and federal immigration enforcement.*

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INTRODUCTION

“Immigration kind of hogties you.”

—Assistant district attorney, Houston, Texas<sup>1</sup>

“Very little for most people is scarier than the thought of losing a green card.”

—Deputy county public defender, Los Angeles, California

“People will voluntarily deport and we keep track of that. We move them to the administrative caseload to be sure they don’t come back.”

—Adult probation officer, Phoenix, Arizona

<sup>1</sup> Except where otherwise indicated, quotations cited to introduce sections of this Article are from interviews I conducted with criminal justice participants in Los Angeles, Maricopa, and Harris Counties. See *infra* note 31 (detailing interview protocol).

The deportation of “criminal aliens”<sup>2</sup> is now the driving force in American immigration enforcement. In recent years, the Congress,<sup>3</sup> the Department of Justice,<sup>4</sup> the Department of Homeland Security,<sup>5</sup> and the White House<sup>6</sup> have all placed criminals front and center in establishing immigration-enforcement priorities. By fostering immigration screening at local jails and courthouses, federal authorities have filled the deportation pipeline with migrants arrested by local police and prosecuted in county courtrooms.<sup>7</sup> Criminals and others identified during criminal arrests, such as “repeat immigration violators” and “fugitives from warrants,” now constitute a full ninety percent of all persons removed from the country.<sup>8</sup> In effect, federal immigration enforcement has become a criminal removal system.<sup>9</sup>

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<sup>2</sup> “Criminal aliens” are generally defined as noncitizens convicted of a crime. See *infra* notes 50–51 and accompanying text. Throughout this Article, I use the terms “aliens,” “noncitizens,” and “immigrants” interchangeably to refer to persons who are not citizens or nationals of the United States. See 8 U.S.C. § 1101(a)(3) (2012) (defining “alien” as “any person not a citizen or national of the United States”).

<sup>3</sup> See, e.g., 8 U.S.C. § 1182(a)(2) (setting forth criminal grounds of inadmissibility); *id.* § 1227(a)(2) (setting forth criminal grounds of deportability); *id.* §§ 1231(a)(6), 1226(c) (allowing for the detention of certain “criminal aliens”).

<sup>4</sup> See, e.g., Memorandum from the U.S. Attorney Gen. to All Fed. Prosecutors, *Deportation of Criminal Aliens* (Apr. 28, 1995), available at <http://www.justice.gov/ag/readingroom/deportation95.htm> (advising federal prosecutors that they “can make a major contribution to this effort [to deport criminal aliens] by effectively using available prosecutive tools for dealing with alien defendants”).

<sup>5</sup> See, e.g., Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All ICE Employees, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011) [hereinafter *Morton Memo on Civil Immigration Enforcement*], available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> (announcing new “civil enforcement priorities” to address the “rapidly increasing number of criminal aliens”).

<sup>6</sup> See, e.g., Cecilia Muñoz, *In the Debate over Immigration and Deportations, the Facts Matter*, THE WHITE HOUSE BLOG (Aug. 16, 2011), <http://www.whitehouse.gov/blog/2011/08/16/debate-over-immigration-and-deportations-facts-matter> (announcing that “for the first time ever” the President is directing that “people who have been convicted of crimes” be prioritized in immigration enforcement).

<sup>7</sup> Since 1996, the immigration law has used the term “removal” to refer to both the “exclusion” of a noncitizen seeking admission into the United States and the “deportation” of a person present within the United States. *Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)*, Pub. L. No. 104-208, div. C, § 304(a), 110 Stat. 3009-587. In this Article, I use the terms “removal” and “deportation” interchangeably to refer to the expulsion of noncitizens.

<sup>8</sup> Comments of Homeland Security Secretary before House Appropriations Security Subcommittee, Feb. 15, 2012, at 13, available at [http://www.micevhill.com/attachments/immigration\\_documents/hosted\\_documents/112th\\_congress/TranscriptOfHouseAppropriationsSubcommitteeOnHomelandSecurityHearingOnFY13BudgetForDHSNapolitano.pdf](http://www.micevhill.com/attachments/immigration_documents/hosted_documents/112th_congress/TranscriptOfHouseAppropriationsSubcommitteeOnHomelandSecurityHearingOnFY13BudgetForDHSNapolitano.pdf) (quoting former Homeland Security Secretary Janet Napolitano explaining that “in F.Y. ’11, ninety percent of all of those deported were in one of our categories. They were criminal aliens, recent border crossers, repeat violators, [and] fugitives from warrants.”).

<sup>9</sup> By referring to the federal system for immigration enforcement as a “criminal removal system,” I do not mean to suggest that all noncitizens who are removed are

The growing centrality of criminality to immigration enforcement is one of the most significant historical shifts in the federal immigration system. Yet, the influence of this transformation on the everyday practice of criminal law remains underexplored. The nascent scholarship in this area has concentrated on the treatment of criminals within the immigration system,<sup>10</sup> rather than on noncitizens within the criminal system. Thus, although there is a body of research about the effects of criminal convictions on immigration adjudication, scholars have largely ignored the effects of immigration enforcement on bread-and-butter criminal charges brought in local criminal courts.<sup>11</sup>

This lack of attention to the role that immigration plays in criminal adjudication is reinforced by two common misperceptions: The first pertains to the immigration system and the second to the criminal system. The first misperception is that immigration enforcement is restricted exclusively to the federal government. According to this description of the federal immigration system, local criminal justice agencies have no formal role in immigration enforcement.<sup>12</sup> The

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criminals. Rather, I use the term to refer to the increasing removal of noncitizens who come into contact with the criminal system, only some of whom are convicted. See discussion *infra* Parts I–II.

<sup>10</sup> For a small sampling of influential works in the field, see Anil Kalhan, *Immigration Enforcement and Federalism After September 11, 2001*, in IMMIGRATION, INTEGRATION AND SECURITY: AMERICA AND EUROPE IN COMPARATIVE PERSPECTIVE 181 (Ariane Chebel d'Appollonia & Simon Reich eds., 2008); Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); and Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

<sup>11</sup> In previous work, I have explored the relationship between criminal process and the immigration system in the context of immigration crime prosecution. See Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749 (2011) [hereinafter Eagly, *Local Immigration Prosecution*] (analyzing local criminal immigration prosecution through a case study of Maricopa County's alien smuggling law); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1283 (2010) [hereinafter Eagly, *Prosecuting Immigration*] (examining the consequences of the federal government's criminal immigration prosecution for "the criminal justice system, the civil immigration system, and the rights of noncitizen defendants themselves"). This Article turns to the rest of criminal law—state *nonimmigration* crimes—as enforced at the local level by sheriffs, police officers, and county and city prosecutors.

<sup>12</sup> The federal government, for example, has fully embraced the description of state criminal law and immigration enforcement as functioning independently. See, e.g., OFFICE OF THE DIR., U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, PROTECTING THE HOMELAND: ICE RESPONSE TO THE TASK FORCE ON SECURE COMMUNITIES 11 (2012) [hereinafter SCOMM TASK FORCE], available at <http://www.ice.gov/doclib/secure-communities/pdf/hsac-sc-taskforce-report.pdf> (emphasizing that, even under Secure Communities, criminal law and immigration enforcement remain separate). Whether, as a doctrinal matter, separation ought to exist is a distinct question that has been addressed by a number of immigration scholars. See, e.g., Huyen Pham, *The Constitutional Right Not to*

second misperception is that immigration status and the desire to inform immigration outcomes are not factors in the adjudication of criminal cases. By this account, how crimes are charged or sanctions imposed at the local level, although fraught with race and class disparities,<sup>13</sup> does not single out noncitizens for different treatment within the criminal system.<sup>14</sup>

As this Article demonstrates, however, neither of these descriptions reflects the reality of criminal practice. Rather than restricted to the federal domain, immigration enforcement is now deeply intertwined with the local enforcement of criminal law.<sup>15</sup> Indeed, the federal government has formally enlisted state and local authorities to assist with enforcement through, among other initiatives, cooperative agreements with local law enforcement.<sup>16</sup> The idea that immigration is not part of the local criminal process is also losing credibility.<sup>17</sup> Far from remaining blind to the immigration status of defendants, some states and localities direct law enforcement to inquire about status while policing neighborhoods, whereas other states and localities

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*Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373 (2006) (arguing that local authorities have the right to refuse to cooperate with federal immigration enforcement initiatives); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 59 (contending that state immigration laws “should be upheld by the courts so long as they reflect a legitimate state interest and do not interfere with the goals of federal immigration policy”); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (concluding that immigration enforcement authority should remain solely within the domain of the federal government).

<sup>13</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (critiquing the racial impact of the American incarceration system); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998) (arguing that the criminal system’s disproportionate impact on racial minorities has more to do with class than race).

<sup>14</sup> While criminal law scholars have generally not addressed the influence of immigration and alienage status on criminal process, see, e.g., *supra* note 13, immigration law scholars have focused on the increasing criminalization of noncitizens in the immigration process, see, e.g., *supra* note 10.

<sup>15</sup> As David Sklansky’s recent work has shown, local criminal systems can achieve instrumental goals through partnerships with federal immigration enforcement. David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 202 (2012).

<sup>16</sup> One prominent example of a state-federal cooperative immigration enforcement program is the 287(g) program, whereby local law enforcement officers stationed in county jails are granted certain federal immigration enforcement powers. See *infra* notes 130–31 and accompanying text (describing the 287(g) program).

<sup>17</sup> Gabriel Chin’s recent work makes an important contribution to this discussion, identifying some of the ways that immigration status is used in routine criminal proceedings to both benefit and disadvantage noncitizens. Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417 (2011).

explicitly prohibit the practice.<sup>18</sup> Judges presiding over criminal cases,<sup>19</sup> prosecutors,<sup>20</sup> parole and probation officers,<sup>21</sup> jail personnel,<sup>22</sup> and court clerks<sup>23</sup> are also increasingly subject to specific rules and policies regarding whether and how to think about immigration status in processing cases.

Together, these two parallel developments—federal solicitation of local criminal system involvement in immigration removal and criminal system consideration of alienage in the processing of state crimes—represent a sea change in criminal justice. Appreciating how local criminal justice is structured in this era of immigration policing therefore requires examining how system participants actually go about their day-to-day work. How are the programs, priorities, and procedures of the new criminal removal system integrated into the institutional structure of local criminal justice agencies? How do immigration-oriented concerns (such as deportation and migration control) interact at the local level with criminal justice-oriented concerns (such as criminal punishment and crime control)?

In examining the criminal–immigration enforcement nexus, this Article explores the criminal justice systems in three large urban centers: Los Angeles County, California; Harris County, Texas; and Maricopa County, Arizona. I chose to study these three counties because each ranks among the top in the nation on three separate

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<sup>18</sup> Compare, e.g., ARIZ. REV. STAT. ANN. § 11-1051(B) (2012) (requiring officers to make a reasonable attempt to determine the immigration status of a person lawfully stopped, detained, or arrested), with Special Order No. 40, Office of the Chief of Police, L.A. Police Dep't at 1 (Nov. 27, 1979), available at [http://www.lapdonline.org/get\\_informed/pdf\\_view/44798](http://www.lapdonline.org/get_informed/pdf_view/44798) (“Officers shall not initiate police action with the objective of discovering the alien status of a person.”).

<sup>19</sup> See, e.g., GA. CODE ANN. § 17-10-1.3(c) (2008) (allowing a court to decline to probate a sentence if the person to be sentenced would be subject to deportation); CAL. R. CT. 4.414(b)(6) (allowing judges to consider adverse immigration consequences in sentencing offenders).

<sup>20</sup> For a survey of prosecutorial policies regarding how to weigh collateral consequences and status in resolving criminal cases, see discussion *infra* Part II.D.

<sup>21</sup> See, e.g., CONN. GEN. STAT. § 54-130b(b) (2011) (allowing the Board of Pardons and Paroles to commute the sentence “of any person incarcerated in a correctional facility in the state who is an alien and transfer such person . . . for deportation”); VA. CODE ANN. § 19.2-294.2(A) (West 2008) (mandating that probation and parole officers inquire into citizenship status).

<sup>22</sup> See, e.g., N.D. CENT. CODE § 44-04-04 (2007) (requiring that jail officials inquire into the nationality and citizenship of people in their custody and notify federal immigration officials); OKLA. STAT. tit. 22, § 171.2(A)–(B) (2011) (requiring officials to make “a reasonable effort” to determine citizenship and immigration status of detainees charged with a felony or DUI).

<sup>23</sup> See, e.g., FLA. STAT. § 943.0535 (2012) (requiring court clerks to give federal immigration officers the records of cases involving felony or misdemeanor convictions of aliens); R.I. GEN. LAWS § 11-47-29 (2012) (requiring that court clerks notify the federal immigration agency if noncitizens are convicted of certain firearms offenses).

indices of criminal alien enforcement: (1) number of arrests of non-citizens by local police and sheriffs,<sup>24</sup> (2) size of criminal alien population housed in local jails,<sup>25</sup> and (3) volume of fingerprint matches found through the federal government's new jail-based immigration screening program, known as Secure Communities.<sup>26</sup> This steady flow of noncitizens is perhaps not surprising given that these southwestern urban counties are among the most populous in the nation<sup>27</sup> and manage massive criminal caseloads.<sup>28</sup> Each county is also located close to the Mexican border and has a significant noncitizen population.<sup>29</sup> The geography and demographics of these three jurisdictions

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<sup>24</sup> CRIMINAL ALIEN POPULATION PROJECTION ANALYSIS, U.S. DEP'T OF HOMELAND SEC., PROJECTED ARRESTS AND RELEASES—COUNTY LEVEL (2010), available at <http://www.ice.gov/doclib/foia/reports/cappa-projected-arrests-releases-county-level.xls> (forecasting, by county, the annual number of noncitizens that will be arrested by “non-immigration” law enforcement).

<sup>25</sup> Here, I rely upon county-level 2010 data for the number of “ICE Eligible Inmates” in each county under the State Criminal Alien Assistance Program (SCAAP). *FY 2010 SCAAP Awards*, BUREAU OF JUSTICE ASSISTANCE PROGRAMS (2010), <https://www.bja.gov/Funding/10SCAAPawards.xls> [hereinafter *SCAAP 2010 Awards*]. SCAAP provides federal reimbursement to localities for a portion of the correctional costs incurred for undocumented persons convicted of a felony or two or more misdemeanors and incarcerated for at least four days. 8 U.S.C. § 1231(i)(3) (2012) (providing federal compensation for costs associated with incarcerating certain “undocumented criminal aliens”); BUREAU OF JUSTICE ASSISTANCE, STATE CRIMINAL ALIEN ASSISTANCE PROGRAM (SCAAP) (2012), available at [https://www.bja.gov/Funding/12SCAAP\\_Guidelines.pdf](https://www.bja.gov/Funding/12SCAAP_Guidelines.pdf) (detailing SCAAP eligibility guidelines).

<sup>26</sup> U.S. Dep't of Homeland Sec., *Secure Communities Monthly Statistics Through March 31, 2012* (on file with author) [hereinafter *SCOMM Statistics*] (documenting, as of March 2012, the number of fingerprint matches generated in every county where Secure Communities is activated).

<sup>27</sup> According to data from the 2010 Census, Los Angeles is the largest county in the nation with 9,818,605 residents. *Data Table*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/data/counties/totals/2011/tables/CO-EST2011-07.csv>. Harris is the third-largest county with 4,092,459 residents. *Id.* Maricopa is the fourth-largest with 3,817,117 residents. *Id.*

<sup>28</sup> In 2010, Los Angeles filed 57,697 felony cases, followed by 48,030 in Harris County and 34,362 in Maricopa County. ARIZ. JUDICIAL BRANCH, SUPERIOR COURT CASE ACTIVITY: FISCAL YEAR 2010, at 31 (2010), available at <http://www.azcourts.gov/Portals/39/2010DR/SuperiorTemporary.pdf#page=31>; L.A. SUPERIOR COURT, 2011 ANNUAL REPORT 30 (2011), available at [http://www.lasuperiorcourt.org/courtnews/Uploads/142011311939312011AnnualReport\\_2007AnnualReport.qxd.pdf](http://www.lasuperiorcourt.org/courtnews/Uploads/142011311939312011AnnualReport_2007AnnualReport.qxd.pdf) (providing data for the 2009–2010 fiscal year); TEX. COURT ONLINE, DISTRICT COURTS: REPORTED CRIMINAL ACTIVITY BY COUNTY FROM SEPTEMBER 1, 2009 TO AUGUST 31, 2010, at 17, available at <http://www.courts.state.tx.us/pubs/AR2010/dc/15-dc-cr-activity-by-co.pdf>. In accordance with their large caseloads, Los Angeles has 1000 county prosecutors, followed by Maricopa's 300 and Harris's 268. E-mail from David H. Pendle, Senior Attorney, Nat'l Dist. Attorneys Ass'n, to author (July 16, 2012) (on file with author).

<sup>29</sup> The United States Census Bureau estimates that between 2009 and 2011, noncitizens comprised 19.1% of Los Angeles County's population, 17.1% of Harris County's population, and 10.0% of Maricopa County's population. *Data Table*, AMERICAN COMMUNITY SURVEY, U.S. CENSUS BUREAU, [http://factfinder2.census.gov/faces/nav/jsf/pages/guided\\_](http://factfinder2.census.gov/faces/nav/jsf/pages/guided_)

thus afford them significant experience with the criminal processing of noncitizens.<sup>30</sup>

To document local practices, I rely on eighty-four interviews I conducted with stakeholders in the three counties—prosecutors, public defenders, private attorneys, judges, pretrial services officers, probation officers, and jail personnel.<sup>31</sup> I also draw on other relevant data, including local laws and procedures, criminal court documents and forms, criminal and immigration-enforcement statistics, and prosecution policies and training materials. Many of these materials were

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search.xhtml (select “I’m looking for information about people,” then select “Next,” then select “Origins,” then select “Citizenship,” then select “Next,” then select “. . . . County,” then select “California,” then select “Los Angeles County, California,” then select “Add to Your Selections,” then repeat, selecting “Texas” and “Harris County, Texas,” and then “Arizona” and “Maricopa County, Arizona,” then select “Next,” then select “Next,” then select the file “Selected Social Characteristics in the United States – DP02 – 2011 ACS 3-year estimates”) (last visited Mar. 22, 2013) (reporting total population and noncitizen population as 9,834,410 and 1,881,911 in Los Angeles County, 4,108,374 and 704,188 in Harris County, and 3,836,286 and 382,667 in Maricopa County, respectively). An even higher percentage of residents in the three counties are foreign born, a category that includes both noncitizens and naturalized citizens. A full 35.6% of Los Angeles residents are foreign born, followed by 25.0% in Harris County, and 15.6% in Maricopa County. *State and County QuickFacts 2010*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/index.html> (last visited Apr. 1, 2013) (select “California,” then select “Go,” then select “Los Angeles County,” then select “Go,” then repeat from main page for “Texas” and “Harris County,” then “Arizona” and “Maricopa County”) (based on a five-year estimate from 2007 to 2011).

<sup>30</sup> Between 2001 and 2010, the number of criminal aliens processed for removal through Immigration and Customs Enforcement (ICE) field offices in Los Angeles, Houston, and Phoenix tripled. Data Table, U.S. Immigration & Customs Enforcement (2001–2012) (obtained by author with Freedom of Information Act request on Apr. 26, 2012) [hereinafter ICE Criminal Removal Data Table] (providing a breakdown of criminal removals by ICE Area of Responsibility).

<sup>31</sup> All interviews for this Article were conducted with the informed consent of participants, pursuant to a semi-structured interview protocol approved by the UCLA Institutional Review Board. Participants in this Article’s study all practice in the counties of Los Angeles, Harris, and Maricopa. Interviewees principally include criminal defense attorneys (including public defenders, contract attorneys, and private counsel), criminal prosecutors (at both the county and city level), criminal judges (in both misdemeanor and felony courts), and court personnel (including pretrial services and probation officers). Interviews were conducted in person or over the telephone and generally lasted between thirty minutes and two hours. In order to identify persons with knowledge in the field suitable for participation in the study, I contacted individuals in supervisory positions at district attorney and public defender offices, leaders of state bar associations, and persons quoted in secondary sources as experts in the field. I also employed a snowball sampling technique, by which study participants assisted in identifying additional knowledgeable persons within the criminal justice community. To control for reporting bias, I contacted individuals from competing institutions, conducted interviews with multiple individuals in each county, and confirmed information with other primary and secondary sources. For consistency, the title and employer of participants quoted in this Article are provided as of the date of the interview.



obtained through the Freedom of Information Act and state public records acts.

My research on these three counties reveals two important findings. The first finding is that criminal law's integration with immigration enforcement has a far more powerful impact on local criminal process than previously understood. Across all three counties, criminal law officials are keenly aware of both the immigration status of defendants and the practical effects of the federal government's reliance on convictions in making immigration-enforcement decisions. Federal immigration agents are a continuous presence in the local law enforcement system: They are often physically present in local jails, impede release on criminal bail, train prosecutors on how to secure plea agreements that guarantee removal, and sometimes deport non-citizen defendants prior to their criminal trials. Deportation also poses unique challenges for plea bargaining and sentencing because non-citizens are often deported before they are able to complete probation, community service, or other similar requirements imposed by the criminal court.

My second finding is that, despite these consistently deep connections between federal and local officials across all three counties, each county has navigated this criminal-immigration integration in a strikingly different way. At the county level, I find that criminal justice for noncitizens is influenced by two somewhat overlapping sets of discretionary decisions. One set includes local practices that weigh alienage status at different points in the criminal process (such as enhancing a criminal sentence if a defendant is undocumented). The other set of discretionary decisions includes criminal policies and procedures adopted in response to federal immigration-enforcement efforts (such as reporting arrestees to immigration authorities or fashioning a plea agreement to avoid deportation). Significantly, within each county, I find that the various criminal system participants (including prosecutors, defense attorneys, judges, and probation officers) have developed a shared understanding of the local criminal system's role in both sets of discretionary decisions.

Drawing on my research, I provide a framework for conceptualizing the varied approaches of these three influential counties. As I describe, Los Angeles has adopted an *alienage-neutral model* that seeks to shield the criminal process from consideration of immigration status and the disproportionate effects of immigration enforcement on criminal bargaining and sentencing outcomes. Harris County has implemented an *illegal-alien-punishment model* in which judges and prosecutors allocate harsher criminal system punishments for those who commit crimes while in violation of this country's immigration

laws. Finally, Maricopa County has created an *immigration-enforcement model* in which local law enforcement, prosecutors, judges, and probation officers attempt to discern immigration status at every stage in the criminal process and bring all potentially deportable noncitizens to the attention of federal immigration officials.

In each jurisdiction, federal immigration enforcement and local criminal practice form a coherent, interlocking system that advances distinct conceptions of noncitizen criminal justice. Although, as I explain, there can be some divergence between what local actors say and what they do in a particular case, at the level of criminal justice policy and articulated practice, each county has developed a unique understanding of how immigration status relates to criminal punishment and the appropriate role of local law enforcement in attaining immigration-enforcement goals. As a result, each of the three models affects different categories of noncitizens at different points in the criminal process.

The remainder of this Article is divided into four parts. Part I provides a theoretical structure for understanding the rise of the criminal alien category. Part II turns to the local criminal process and explains how immigration removal is now integrated with criminal adjudication at every stage in the criminal process. Part III introduces original data from the three counties—Los Angeles, Harris, and Maricopa—that show how each jurisdiction has merged its criminal justice system with federal immigration enforcement in different ways.

In Part IV and the Conclusion, I address the significance of my findings for the institutional design of both the criminal and immigration systems. For the criminal justice system, the three counties teach us that the treatment of noncitizens incorporates different local understandings of how to achieve equality in criminal sanctioning across alienage lines and eliminate the perceived impact of immigration on crime control. Disentangling these two issues makes it possible to entertain with more clarity what policies and practices are at stake in crafting a local approach to noncitizen justice. For the federal immigration system, the distinct county models challenge the assumption of national uniformity that drives much of federal immigration policy. If uniformity is indeed the desired federal approach, this research demonstrates that more careful thought must be applied to both the exercise of discretion in making deportation decisions and the federal supervision of local criminal justice practices. In short, in this era of unprecedented immigration enforcement against suspected criminals, this Article's on-the-ground inquiry recalibrates our understanding of both criminal justice and immigration federalism.

Before proceeding further, two caveats are in order. First, this Article does not attempt to resolve the normative debate regarding how immigration ought to affect criminal practice. Rather, my goal is to identify how choices made on the ground within the criminal justice process inform both criminal sanctioning of noncitizens and deportation as an ultimate outcome. By introducing a framework for analysis, this Article offers a fact-based understanding of how the merger of criminal and immigration law has fostered alternative and localized designs for noncitizen justice. Second, although my review covers three counties at the epicenter of the intersection of immigration and criminal justice, it does not examine other localities. Readers familiar with other criminal justice systems may nonetheless find that the Article's description of local noncitizen practices mirrors those of other jurisdictions. To be sure, the integration of criminal process and immigration enforcement may develop unique contours in other localities. Yet, regardless of the specific features that evolve, the theoretical contribution of this Article should provide a valuable typology for categorizing both present and future enforcement efforts.

## I

### THE TRANSFORMATION FROM "ILLEGAL ALIEN" TO "CRIMINAL ALIEN"

For some time now, American thinking about immigration has articulated a sharp distinction between "lawful immigrants" and so-called "illegal aliens."<sup>32</sup> Lawful immigrants reside in the United States with official permission from the federal government. Illegal aliens, on the other hand, have no established right to remain in the United States: They may have crossed the border without permission or may have allowed their once-lawful status to lapse.<sup>33</sup> This popular

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<sup>32</sup> For a discussion of the important ways that rights are allocated between citizens and noncitizens, see generally LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006); and HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2007).

<sup>33</sup> Throughout this Article, I rely on a range of terms to refer to noncitizens without legal permission to reside in the United States, including "illegal," "unlawful," "unauthorized," and "undocumented." In doing so, I do not mean to suggest that I am unaware of the criticisms that have been levied against these terms. Rather, I have consciously chosen to introduce a range of terminology to describe the category of migrants that lack legal status. Later in this Article, it will become clear that practitioners quoted from the three counties similarly employ a range of vocabulary to refer to immigration status. For a thoughtful discussion of the broader context surrounding the labeling of noncitizens, see Gerald P. López, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711, 1728 (2012) (critiquing United States immigration policy for encouraging "undocumented" migration, while simultaneously employing practices that punish migrants for their "illegal" status).

dichotomy between lawful and unlawful status has resulted in a routine classification of immigrants based on whether they have “papers” to reside in the United States.<sup>34</sup>

### A. *The Alienage Spectrum*

On the ground, however, the practical meaning of the line between lawful and unlawful status in immigration law is far less clear. Under established immigration law, even unauthorized immigrants can, over time, develop a relationship with American society that protects them from many forms of unequal treatment.<sup>35</sup> And, if past immigration reforms are any guide, some migrants unlawfully present today will later gain lawful status, and possibly even United States citizenship. President Barack Obama’s proposal for immigration reform, like earlier amnesty programs,<sup>36</sup> would create a pathway to citizenship for millions of undocumented immigrants.<sup>37</sup> Therefore, rather than two sharply divided categories of noncitizens (“lawful” and “unlawful”), noncitizen status can more accurately be understood as existing along a spectrum.<sup>38</sup>

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<sup>34</sup> For a sampling of the foundational immigration scholarship identifying and critiquing the legal-illegal line, see MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004); Kevin R. Johnson, “*Aliens*” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 *INTER-AM. L. REV.* 263, 276 (1996); Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 *UCLA L. REV.* 615 (1981); and Hiroshi Motomura, *Immigration Outside the Law*, 108 *COLUM. L. REV.* 2037, 2047–55 (2008). For a timely review of the literature in this area, see Susan Bibler Coutin, *The Rights of Noncitizens in the United States*, 7 *ANN. REV. L. & SOC. SCI.* 289 (2011).

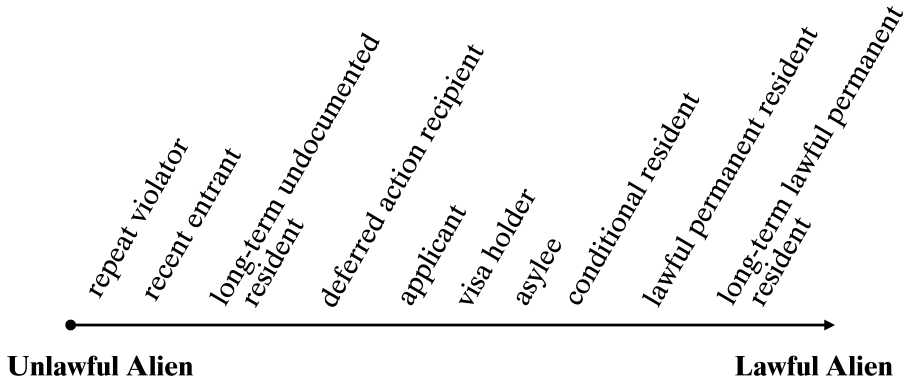
<sup>35</sup> See generally Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 *N.Y.U. L. REV.* 1047, 1055 (1994) (“At times, the law treats alienage as an irrelevant and illegitimate basis on which to justify the less favorable treatment of persons.”); Peter H. Schuck, *The Transformation of Immigration Law*, 84 *COLUM. L. REV.* 1, 41–44 (1984) (describing the relationships that undocumented aliens form with employers, civil institutions, and family as a “central social fact” about immigration).

<sup>36</sup> For example, over two million undocumented immigrants were legalized by the 1986 amnesty law. Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 *STAN. L. REV.* 809, 848–49 & n.139 (2007).

<sup>37</sup> Julia Preston, *Obama Will Seek Citizenship Path in One Fast Push*, *N.Y. TIMES*, Jan. 12, 2013, at A1.

<sup>38</sup> As Laura Gómez and Cheryl Harris have demonstrated in the related sphere of race, sharp distinctions among “black,” “white,” and “Latino” fail to capture the full continuum along which racial categories are constructed. LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* 83–105 (2007) (exploring the contradictory constructions of Mexican Americans as legally white, but socially nonwhite); Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1709, 1710–13 (1993) (discussing the phenomenon of “passing,” meaning black persons with “white” features presenting themselves as racially white).

FIGURE 1  
The Alienage Spectrum



As Figure 1 depicts, between the two endpoints of lawful and unlawful status, there are numerous possibilities for status differentiation. For example, lawfully present noncitizens possess different rights to remain in the United States, ranging from the most stable status of a lawful permanent resident to more temporary statuses, such as a visa holder or conditional resident.<sup>39</sup> Many noncitizens find themselves in what David Martin has aptly called “twilight statuses,”<sup>40</sup> meaning that they hold a claim to lawful status because they are either relatives of lawful permanent residents or have “temporary protected status.”<sup>41</sup> Similarly, although some undocumented individuals have not yet applied for lawful status, they may nonetheless qualify for various forms of relief, such as asylum, cancellation of removal, or adjustment of status.<sup>42</sup> The Obama Administration’s new policy to grant certain undocumented youth “deferred action”<sup>43</sup> provides another vivid example of the alienage spectrum. Under this new program, young

<sup>39</sup> For example, individuals seeking lawful residence based on marriage receive status on a “conditional basis” that is valid for two years, and persons coming to the United States to fill certain jobs may be granted temporary, nonimmigrant visas. For a discussion of these and other temporary status categories, see THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 306–13, 387–450 (7th ed. 2012).

<sup>40</sup> DAVID A. MARTIN, *MIGRATION POL’Y INST., TWILIGHT STATUTES: A CLOSER EXAMINATION OF THE UNAUTHORIZED POPULATION 1* (2005) (describing various categories of immigrants with claims to lawful permanent resident status).

<sup>41</sup> “Temporary protected status,” as David Martin explains, is available to certain migrants “owing to political upheaval or natural disaster in their home countries.” *Id.*

<sup>42</sup> For a description of the legal requirements to qualify for these and other forms of relief from removal, see DAN KESSELBRENNER & LORY D. ROSENBERG, *IMMIGRATION LAW AND CRIMES* §§ 9–10 (2012).

<sup>43</sup> “Deferred action” in immigration law is “an act of administrative convenience to the government which gives some cases lower priority.” 8 C.F.R. § 274a.12(c)(14) (2012). Immigrants granted deferred action may be given employment authorization. *Id.*

persons who were brought to this country as children are declared a low priority for removal and may receive work authorization, despite their lack of formal immigration papers.<sup>44</sup> The bottom line, as the alienage spectrum reflects, is that undocumented status alone does not necessarily mean that an immigrant can or will be deported from the United States.

### B. *The Criminal Alien*

As federal immigration policy increasingly incorporates an alienage spectrum, it has become progressively more difficult, both practically and politically, for the federal government to revert to the traditional legal-illegal dichotomy in selecting noncitizens for removal. With the declining significance of immigrant “illegality,” criminality has made a dramatic appearance. When the actual operation of the immigration system is analyzed, it is clear that it is suspected criminal status, rather than noncitizen status, that triggers deportation. A criminal conviction—or, sometimes, even just a criminal arrest—functions as a selection mechanism for choosing which of the millions of undocumented residents will be deported.<sup>45</sup> Likewise, a criminal conviction can result in the removal of a lawfully present noncitizen.<sup>46</sup> In

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<sup>44</sup> In order to qualify for the new program, known as as Deferred Action for Childhood Arrivals (DACA), immigrants must be under the age of thirty, have come to the United States before the age of sixteen, and satisfy various other requirements. Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs. & John Morton, Dir., U.S. Immigration & Customs Enforcement 1 (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. A federal lawsuit brought by a group of ICE officers alleging that DACA violates the Administrative Procedure Act and usurps congressional power was recently dismissed for lack of subject matter jurisdiction. See *Crane v. Napolitano*, No. 3:12-cv-03247-O (N.D. Tex. July 31, 2013). The legal issues raised in the *Crane* challenge sparked a lively academic debate regarding the President’s articulated policy of exercising enforcement discretion. See, e.g., Robert Delahunty & John Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013) (contending that the President’s decision to offer deferred action to certain undocumented youth “threatens to vest the Executive Branch with broad domestic policy authority that the Constitution does not grant it”); David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach’s Latest Crusade*, 122 YALE L.J. ONLINE 167, 169 (2012), <http://yalelawjournal.org/images/pdfs/1119.pdf> (arguing that the position articulated by the plaintiffs in the *Crane* lawsuit “represents both unwise policy and deeply flawed legal analysis”).

<sup>45</sup> Under the Secure Communities program, which screens for immigration status at the point of booking into the local jail, many of those who are deported are not convicted of a crime. See *infra* notes 81, 401, and Figure 8.

<sup>46</sup> See *infra* notes 55–56, Figure 2, and accompanying text.

effect, the immigration law's traditional fixation on immigration status has been eclipsed by the criminal law's allocation of criminal status.

The salience of criminal status to the functioning of the immigration system is seen in the rise of the so-called "criminal alien."<sup>47</sup> This term, as conventionally defined, merges the dictionary definitions of each component—criminal and alien. An alien is any person who is not a citizen or national of the United States.<sup>48</sup> A criminal is someone who has been convicted of a crime in a criminal court.<sup>49</sup> The resulting composite definition of criminal alien—a noncitizen convicted of a crime—is consistently relied on by federal agencies in reporting criminal alien removals<sup>50</sup> and criminal alien inmate populations.<sup>51</sup>

The conventional definition of criminal alien thus ignores the standard dichotomy between lawful and unlawful aliens. Instead, what matters here is the noncitizen's criminal status. Regardless of where an immigrant falls on the alienage spectrum, all noncitizens with criminal convictions are formally defined as criminal aliens. The term criminal alien, again as conventionally defined, also makes no distinctions based on the severity of the criminal conviction. Instead, the criminal alien category includes all noncitizens convicted of crimes—from misdemeanors to serious felonies. For example, the criminal

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<sup>47</sup> For a sampling of the small but growing literature that has specifically discussed the "criminal alien" category, see Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member,"* 2007 U. CHI. LEGAL F. 317, 343–44 (2007) (highlighting the unintended consequences of focusing immigration enforcement on "criminal street gang[s]"); Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 CRIM. L. BULL. 550 (2004) (documenting the post-9/11 focus on removing criminal aliens); Bill Ong Hing, *Providing a Second Chance*, 39 CONN. L. REV. 1893, 1893 (2007) (critiquing the "disturbing credibility" given to "criminal alien" enforcement strategies); Teresa A. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 632 n.99 (2003) (identifying "criminal punitiveness within the immigration system" against "criminal aliens"); and Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 375–76 (1999) (arguing that at least some devolution of immigration enforcement to states is necessary to solve "the criminal-alien problem").

<sup>48</sup> 8 U.S.C. § 1101(a)(3) (2012).

<sup>49</sup> BLACK'S LAW DICTIONARY 430 (9th ed. 2009). It is important to clarify that mere illegal presence in the United States is not a crime. See *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States.").

<sup>50</sup> See, e.g., *Removal Statistics*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/removal-statistics/> (last visited Mar. 2, 2013) (defining "criminal aliens" as a category of noncitizens "convicted of a variety of felonies and misdemeanors").

<sup>51</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-1187, CRIMINAL ALIEN STATISTICS: INFORMATION ON INCARCERATIONS, ARRESTS, AND COSTS 1 n.2 (2011), available at <http://www.gao.gov/new.items/d11187.pdf> (defining "criminal aliens" as "non-citizens convicted of crimes while in this country legally or illegally").

alien category includes migrants convicted of petty traffic offenses.<sup>52</sup> The criminal alien category also includes those convicted of “immigration crimes,”<sup>53</sup> that is, crimes based on violations of the civil immigration law.<sup>54</sup>

In large part, the increased significance of the criminal alien category is due to changes in the statutory structure of immigration law. Over the past two decades, Congress has steadily expanded the types of crimes that can lead to removal from the United States.<sup>55</sup> At the same time, grounds for discretionary relief for those convicted of crimes have been narrowed or, in some cases, eliminated.<sup>56</sup> These shifts in the legal terrain for noncitizens convicted of crimes are further promoted by the federal decision to prioritize the removal of noncitizens who come into contact with the criminal justice system, including those convicted of crimes, previously removed from the United States, or otherwise considered to “pose a danger.”<sup>57</sup>

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<sup>52</sup> See *infra* notes 424–25 and accompanying text (discussing the inclusion of traffic violators in federal “criminal alien” statistics).

<sup>53</sup> According to data obtained by the author from DHS’s Office of Immigration Statistics, the percentage of all “criminal alien removals” that have an immigration crime as their most serious conviction has hovered between fourteen and twenty-four percent over the past decade. See Data Table, Office of Immigration Statistics, U.S. Dep’t of Homeland Sec. (2000–2010) (obtained by author with Freedom of Information Act request on Feb. 24, 2012) [hereinafter DHS Criminal Alien Data Table].

<sup>54</sup> “Immigration crime” is thus distinct from the balance of the criminal law, which I refer to as “nonimmigration crime.” The majority of immigration crimes are prosecuted by the federal government. Eagly, *Prosecuting Immigration*, *supra* note 11, at 1346. However, in recent years, states have increasingly incorporated immigration crimes into their own criminal codes. See, e.g., LA. REV. STAT. ANN. § 14:100.14 (2004) (prohibiting the falsification of information by an “alien student or nonresident alien” for the purposes of obtaining a driver’s license); MISS. CODE ANN. § 71-11-3(8)(c)(i) (2009) (making it a felony “for any person to accept or perform employment for compensation knowing or in reckless disregard that the person is an unauthorized alien”). State immigration crimes have been subject to constitutional attack. The United States Supreme Court invalidated two such crimes adopted by Arizona on preemption grounds. *Arizona v. United States*, 132 S. Ct. 2492, 2501–07 (2012).

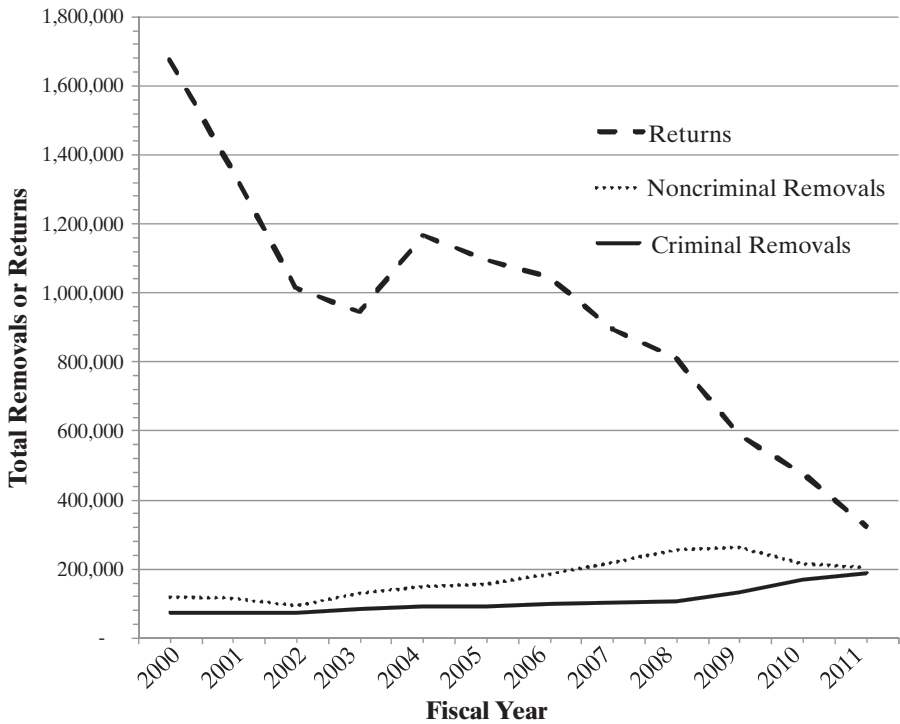
<sup>55</sup> Compare, e.g., 8 U.S.C. § 1101(a)(43) (2012) (containing the current, broad definition of “aggravated felony” grounds for deportation), with 8 U.S.C. § 1101(a)(43) (1994) (containing a narrower definition of aggravated felonies).

<sup>56</sup> Compare, e.g., 8 U.S.C. § 1229b (2012) (providing for a restricted form of relief from deportation called cancellation of removal), with 8 U.S.C. § 1182(c) (1994) (allowing for a generous form of relief from deportation known as 212(c) relief).

<sup>57</sup> See Morton Memo on Civil Immigration Enforcement, *supra* note 5, at 1–4 (providing guidance on the exercise of prosecutorial discretion in federal immigration enforcement).



FIGURE 2  
Total United States Criminal Removals,  
Noncriminal Removals, and Returns (2000–2011)



Source: United States Department of Homeland Security<sup>58</sup>

The overwhelming focus of the federal immigration system on criminals can be seen quite vividly when civil immigration-enforcement efforts are placed in context. Figure 2 tracks the three most significant categories of immigration enforcement from 2000 to 2011: criminal removals, noncriminal removals, and returns. As illustrated in Figure 2, since 2000, the number of criminal alien removals has more than doubled—from 72,061 in 2000 to a record high of 188,382 in 2011. The rise in criminal removals is particularly striking given that it occurred in the context of a proportional decrease in the other two major categories of immigration enforcement: returns and noncriminal removals. Figure 2 displays the precipitous decline in “returns,” an enforcement tool whereby the migrant agrees to leave

<sup>58</sup> U.S. DEP’T OF HOMELAND SEC., 2011 YEARBOOK OF IMMIGRATION STATISTICS 102 tbl.39, 106 tbl.41 (2012), available at [http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois\\_yb\\_2011.pdf](http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf); U.S. DEP’T OF HOMELAND SEC., 2009 YEARBOOK OF IMMIGRATION STATISTICS 97 tbl.38 (2010), available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois\\_yb\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf).

the United States without a court order and at the migrant's own expense.<sup>59</sup> In addition, Figure 2 demonstrates that, since 2009, non-criminal removals (those deported without a known criminal conviction) have similarly declined in proportion to criminal removals. It is therefore clear that criminal alien removals have not only increased in absolute numbers, but also now constitute a much larger percentage of the overall immigration-enforcement docket.

### C. *The Criminal Removal System in Practice*

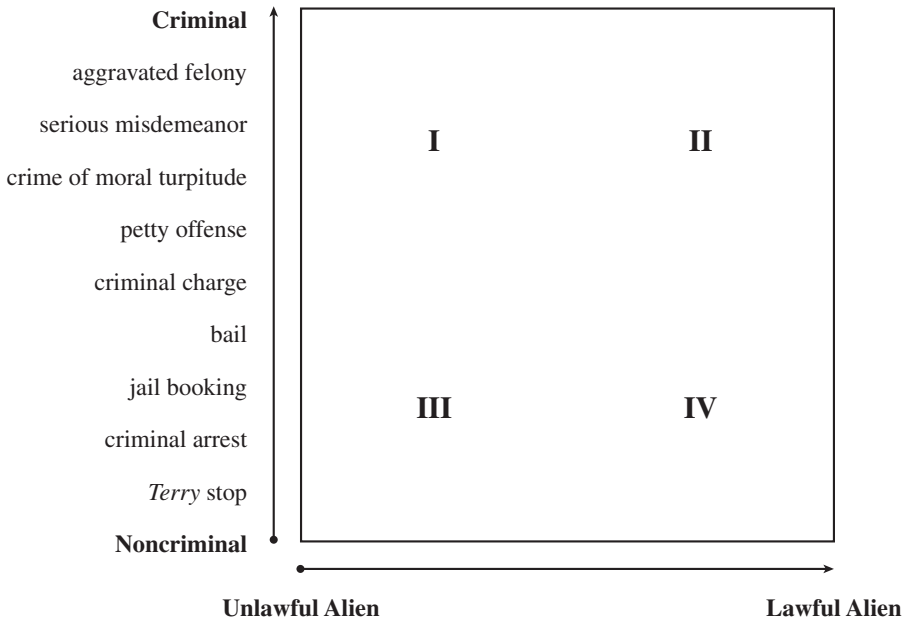
The formal definition of criminal alien as a generic classification for noncitizens convicted of crimes is useful in interpreting official trends in immigration enforcement. However, it fails to appreciate the full breadth and complexity of criminal immigration enforcement on the ground. As a first step toward understanding how the criminal removal system functions, the relationship between alienage and criminal status requires a more detailed description.

Figure 3, which shows a “criminal alien matrix,” provides this more detailed graphic display of the relationship between immigration status and criminal status. On the x-axis, the matrix reproduces the concept of the alienage spectrum introduced earlier in Figure 1. On the y-axis, this diagram introduces the basic steps for processing defendants within the criminal system. The lower half of the y-axis captures that, prior to any conviction, suspects may be stopped, arrested, booked in the jail, and released on bail. The upper half of the y-axis captures that, as individuals continue through the criminal process, they may be convicted of a range of criminal offenses—from a petty offense to an aggravated felony.

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<sup>59</sup> “Returns” are defined by DHS as the “confirmed movement of an inadmissible or deportable alien out of the United States not based on an order of removal.” U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2010, at 2 (2011), *available at* <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>. Returns can thus be contrasted with “voluntary departure,” which is generally considered a form of removal and therefore captured in the “noncriminal removal” trend line of Figure 2. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2011 STATISTICAL YEAR BOOK, at Q1 (2012), *available at* <http://www.justice.gov/eoir/statspub/fy11syb.pdf> (“Voluntary departure is considered a form of removal, not a type of relief.”). *See generally* ALEINIKOFF ET AL., *supra* note 39, at 788–89 (explaining that most “returns” reported by DHS “are not voluntary departures under INA 240B,” but rather “are accomplished by CBP based on apprehension at or near the border”).

FIGURE 3  
The Criminal Alien Matrix



To assist in conceptualizing how noncitizens can be categorized vis-à-vis criminal status, the matrix is divided into four quadrants. Quadrants I and II include noncitizens with varying levels of criminal convictions. Quadrants III and IV include those noncitizens who have been brought into the criminal process but have not yet been convicted.

The matrix thus allows noncitizens to be charted based on their specific immigration status as well as the present nature of their contact with the criminal justice system. For example, an undocumented youth granted deferred action status convicted of a petty offense resides in quadrant I. A conditional resident requesting pretrial release on bond resides in quadrant IV. A lawful permanent resident convicted of a crime of moral turpitude resides in quadrant II, as would an aggravated felon granted asylum. A long-term undocumented resident subjected to a *Terry* stop resides in quadrant III.<sup>60</sup> Indeed, countless different combinations of immigration and criminal status are represented on the matrix.

<sup>60</sup> A temporary, warrantless seizure of a person—known as a *Terry* stop—has been found to survive constitutional scrutiny if the officer “observes unusual conduct which leads him reasonably to conclude . . . that criminal activity may be afoot.” *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

Note that Figure 3 does not include a fixed “criminal alien” category. By not specifying the precise bounds of this category, the criminal alien matrix recognizes that the functional meaning of criminal alien is variable and based on the intricacies of immigration law, enforcement policies, and discretionary decisions made in both the criminal and immigration systems. Criminal status does not guarantee removal.<sup>61</sup> Nor does noncriminal status protect against inclusion in the criminal alien removal system.<sup>62</sup>

Consider the complexities that arise at the intersection of criminal and immigration status. The commission of a single crime classified under immigration law as a “crime of moral turpitude”<sup>63</sup> does not trigger the removal of a lawful permanent resident who has lived in the United States for more than five years.<sup>64</sup> Similarly, in some cases, relief from removal may be available for undocumented persons notwithstanding a criminal conviction.<sup>65</sup> At the same time, DHS can exercise its discretion to remove deportable noncriminals arrested by local law enforcement, even if their arrest does not result in conviction.<sup>66</sup> Enforcement data document this reality: A full twenty-six percent of

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<sup>61</sup> See, e.g., 8 U.S.C. § 1227(a)(2)(B)(i) (2012) (providing that “a single offense involving possession for one’s own use of 30 grams or less of marijuana” is not a ground of deportability).

<sup>62</sup> As this Article develops, once brought into the criminal system, noncitizens who do not sustain a conviction may nonetheless be removed on noncriminal grounds. See *infra* Parts II & IV.A.

<sup>63</sup> A “crime of moral turpitude” lacks a clear definition but is generally understood to refer “to conduct that is inherently base, vile, or depraved” and contrary to moral rules and societal duties. *In re Tobar-Lobo*, 24 I. & N. Dec. 143, 145–46 (B.I.A. 2007) (citing *In re Lopez-Mesa*, 22 I. & N. Dec. 1188 (B.I.A. 1999)).

<sup>64</sup> 8 U.S.C. § 1227(a)(2)(A)(i)–(ii) (defining treatment of those convicted of crimes involving moral turpitude). Should the lawful resident leave the country, however, upon attempted reentry, the crime of moral turpitude conviction would render him inadmissible. *Id.* § 1182(a)(2)(A) (stating that any alien who is convicted of a crime involving moral turpitude is inadmissible).

<sup>65</sup> See, e.g., *id.* § 1158(b)(2)(A)(ii) (requiring conviction of a “particularly serious crime” to defeat an asylum claim); *id.* § 1229b(a) (limiting the criminal bar for certain cancellation of removal claims to “aggravated felony” convictions); *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=f2ef2f19470f7310VgnVCM10000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM10000082ca60aRCRD> (last updated Jan. 18, 2013) [hereinafter *Childhood Arrivals Process*] (allowing certain undocumented youth convicted of two or fewer “non-significant misdemeanors” to qualify for deferred action under DACA).

<sup>66</sup> Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Officer Dirs., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 5 (June 17, 2011) [hereinafter Morton Memo on Exercising Prosecutorial Discretion], available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

noncitizens deported after a local criminal arrest have never been convicted of a crime.<sup>67</sup>

As Part I has shown, all four quadrants on the criminal alien matrix are actively engaged in the criminal removal system. The matrix thus begins to focus our attention on how the policy choices of the integrated criminal-immigration system can affect who becomes a “criminal alien” in practice. Part II develops this concept further by examining how standard aspects of local criminal process, including arrest, booking, and charging, influence whether a noncitizen is ultimately subjected to deportation proceedings.

## II

### IMMIGRATION ENFORCEMENT AND CRIMINAL PUNISHMENT AS INTEGRATED PROCESS

Classic studies of the criminal process have demonstrated the complexity and discretion inherent in the functioning of criminal justice.<sup>68</sup> According to the standard account, the typical criminal case begins with a police decision to enforce the criminal law and then flows through the criminal process, encountering a range of institutional actors along the way. Scholars have described these various actors—police, courts, and corrections—as a single “system” of social control.<sup>69</sup>

Borrowing from this tradition, immigration scholars have begun to identify how discretion operates in the context of immigration enforcement.<sup>70</sup> As this new research demonstrates, decisions similar to those made in the criminal system are made at every stage of

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<sup>67</sup> SCOMM Statistics, *supra* note 26, at 2, 55 (tracking the criminal conviction status of persons screened after arrest under the Secure Communities program).

<sup>68</sup> For some of the foundational works identifying the inner workings of the criminal justice system, see ABRAHAM S. BLUMBERG, *CRIMINAL JUSTICE* (1967) (demonstrating how procedures and pressures of the criminal process promote a system of guilty pleas rather than trials); KENNETH CULP DAVIS, *POLICE DISCRETION* (1975) (studying the Chicago Police Department to understand American police discretion and selective enforcement more broadly); MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 30–31 (1979) (concluding, based on a study of a lower criminal court in New Haven, Connecticut, that “the process itself is the punishment” for low-level crimes because the costs to defendants of being “caught up in the system can quickly come to outweigh the penalty that issues from adjudication and sentence”); and JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES* (1968) (identifying three different organizational approaches of local police departments to order maintenance problems).

<sup>69</sup> See PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 7–12 (1967).

<sup>70</sup> See, e.g., Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010) (identifying the underutilized practice of exercising prosecutorial discretion within the immigration system).

immigration enforcement by immigration agents,<sup>71</sup> immigration prosecutors,<sup>72</sup> and immigration judges.<sup>73</sup> Together, these new academic accounts yield an understanding of the immigration case as beginning with the agency's decision to enforce the immigration law and then flowing through the administrative removal process.

The lack of substantive overlap between these parallel criminal law and immigration law literatures might suggest that processes in these two domains function on independent procedural tracks. In practice, however, the two systems proceed on a single track.<sup>74</sup> Contact with local law enforcement begins the noncitizen's journey. From this point forward, the noncitizen is simultaneously exposed to both immigration and criminal enforcement.<sup>75</sup> The discussion that follows traces the processing of noncitizen defendants along this integrated criminal-immigration track. At this point, I focus on providing a general framework without taking into account how specific local practices in the three counties inform the integrated system.

### A. *Crime Detection*

Particularly crucial to this Article's inquiry is the merger of criminal and immigration enforcement at the initial investigatory stage of the criminal process. Procedures for crime detection—including the stopping and questioning of suspects—are highly discretionary and rest largely with street-level law enforcement officers.<sup>76</sup> In some cases, the federal government formally delegates immigration arrest

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<sup>71</sup> See Janet A. Gilboy, *Deciding Who Gets In: Decisionmaking by Immigration Inspectors*, 25 LAW & SOC'Y REV. 571 (1991).

<sup>72</sup> See Margaret H. Taylor, *Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 272–74 (2002).

<sup>73</sup> See Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

<sup>74</sup> I have previously made this argument with respect to the federal justice system in some detail. See Eagly, *Prosecuting Immigration*, *supra* note 11, at 1291–337. For examples of other immigration scholarship that has begun to integrate the two tracks, see Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011) (discussing arrest authority); and Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705 (2011) (discussing sentencing).

<sup>75</sup> Some scholars have argued that the increasing integration between immigration enforcement and criminal prosecution may necessitate the application of fuller due process rights—or even Sixth Amendment protections—to deportation proceedings. See generally Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282 (2013) (analyzing the evolving right to appointed counsel for indigent noncitizens in immigration proceedings).

<sup>76</sup> The discretion inherent in crime detection makes it a stage in the criminal process particularly ripe for racial profiling. See Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1553–55 (2011).

authority to local law enforcement.<sup>77</sup> In other instances, localities take the initiative without federal supervision to initiate immigration screening during the crime detection phase.<sup>78</sup> Because such officer-initiated inquiries take place in person, they can sweep broadly to identify noncitizens potentially subject to removal before local criminal charges are filed or federal immigration screening has begun.<sup>79</sup> To facilitate early immigration screening, the federal government has set up a call center that is open twenty-four hours a day to handle inquiries from officers in the field.<sup>80</sup>

### B. Booking

Although the investigatory stage of the criminal process marks the earliest potential inquiry into citizenship status, the jail booking process is often the first site for immigration screening. Booking refers to the process by which an arrestee is fingerprinted and otherwise admitted into the local jail. Under the federal Secure Communities program now operational throughout the country, when localities forward an arrestee's fingerprints to the FBI, prints are automatically forwarded to DHS for comparison against a database of those with outstanding criminal and immigration violations.<sup>81</sup> If a fingerprint taken during the booking process matches a fingerprint in federal immigration databases, DHS officials may issue a written notice

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<sup>77</sup> For additional discussion of federal delegation of authority through the 287(g) program, see *infra* note 130.

<sup>78</sup> The United States Supreme Court's recent *Arizona* decision confirmed that early inquiries into a suspect's immigration status by law enforcement are proper, so long as they are conducted within the bounds of routine enforcement of state criminal laws. *Arizona v. United States*, 132 S. Ct. 2492, 2508–10 (2012) (holding that Section 2(B) of SB 1070, which requires state police officers to make a reasonable attempt to determine the immigration status of a person stopped, detained, or arrested, is not facially preempted by federal law). As Jennifer Chacón has warned, by empowering Arizona officials to investigate immigration status, the Court's ruling "invites inevitable discrimination and harassment of minority citizen groups." Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 581 (2012).

<sup>79</sup> The Supreme Court has granted wide latitude in questioning suspects regarding immigration status in the course of police investigations. See, e.g., *Muehler v. Mena*, 544 U.S. 93, 102 (2005) (concluding that officers did not need reasonable suspicion to inquire regarding an individual's "name, date and place of birth, or immigration status"). For analysis of the Fourth Amendment's application to interior immigration enforcement, see Carbedo & Harris, *supra* note 76; and Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137 (2008).

<sup>80</sup> *Law Enforcement Support Center*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/lesc/> (last visited Jan. 20, 2013). See generally 8 U.S.C. § 1373(c) (2012) (providing that the federal immigration agency "shall respond to an inquiry" by a government agency "seeking to verify or ascertain the citizenship or immigration status of any individual").

<sup>81</sup> *Secure Communities*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (last visited Jan. 20, 2013).

requesting that the locality hold the individual for transfer into immigration custody.<sup>82</sup> Such requests to hold noncitizens in local jails for future deportation are known in practice as “ICE holds” or “immigration detainees.”<sup>83</sup>

There are three key areas where local criminal policy intersects with jail-based immigration screening programs. First, particularly for lower-level offenses, localities generally have the discretion to issue a citation without booking suspects through the jail. This process, often referred to as “cite and release,” bypasses jail-based immigration screening programs. Second, localities can treat compliance with the federal detainer request as optional.<sup>84</sup> Under this approach, noncitizens with holds are released as citizens would be, according to local bail rules. Third, localities can elect to make early charging decisions before booking into the jail takes place. Such a practice limits Secure Communities database checks to those cases where criminal charges are actually filed.<sup>85</sup>

### C. Pretrial Release

The decision by federal immigration authorities to lodge an immigration detainer also complicates the next stage in the criminal process: pretrial release. When a defendant with an immigration detainer posts a criminal bond,<sup>86</sup> the detainer generally results in the inmate’s transfer from the local jail cell directly into federal immigration

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<sup>82</sup> See 8 C.F.R. § 287.7(a) (2012) (explaining that an “authorized immigration officer” may provide written notice to “advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien”).

<sup>83</sup> For a copy of the official immigration detainer form, see DHS Form I-247 (Dec. 2012), available at <http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf>. Current guidance advises care be exercised when issuing detainers against lawful permanent residents but does not prohibit the practice. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, INTERIM POLICY NO. 10074.1: DETAINERS, § 4.6 (2010), available at [https://www.aclunc.org/docs/legal/interim\\_detainer\\_policy.pdf](https://www.aclunc.org/docs/legal/interim_detainer_policy.pdf). For a discussion of potential legal challenges to the federal practice of lodging immigration detainers, see Christopher N. Lasch, *Litigating Immigration Detainer Issues*, in 1 COLO. BAR ASS’N, IMMIGRATION LAW FOR THE COLORADO PRACTITIONER § 34.1 (Nancy B. Elkind et al. eds., 2011).

<sup>84</sup> Such a policy of declining federal detainer requests has been adopted in Los Angeles. See *infra* notes 119–20 and accompanying text. Other major cities, including New York and Chicago, have also limited local involvement in the enforcement of detainers against undocumented individuals with no criminal record. See, e.g., CHI., ILL., MUN. CODE ch. 2-173 (2013); N.Y.C., N.Y., ADMIN. CODE § 9-131(b) (2013).

<sup>85</sup> For an argument in favor of enhanced, pre-charge prosecutorial screening, see Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 48–58 (2002).

<sup>86</sup> Because transfer out of criminal custody may complicate communication with counsel and because time spent in immigration detention might not be credited toward an eventual criminal sentence, in practice some noncitizens decide against seeking or posting



custody. There, release is governed by a separate set of immigration rules and procedures.<sup>87</sup> A few noncitizens may obtain bond from an immigration judge, but most will remain detained in immigration custody.<sup>88</sup> Moreover, because immigration authorities have taken the position that federal deportation proceedings can effectively preempt local criminal prosecutions,<sup>89</sup> sometimes defendants who post criminal bond will be deported before their criminal case is fully adjudicated.<sup>90</sup> This situation occurs because Immigration and Customs Enforcement (ICE) does not have authority to hold noncitizens for the purpose of a criminal prosecution. Instead, it can only hold the noncitizen for deportation.<sup>91</sup> Accordingly, ICE has instructed local criminal

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criminal bond. Eagly, *Prosecuting Immigration*, *supra* note 11, at 1307 & n.156 (citing interviews with defense attorneys in California, Arizona, and Texas).

<sup>87</sup> For a thorough discussion of the rules governing immigration bond and detention, see KESSELBRENNER & ROSENBERG, *supra* note 42, §§ 8:9–8:21. For an analysis of issues related to crime-based immigration detention, see Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137 (2013) (examining the institutional design of the immigration detention system); and Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149 (2004) (analyzing the executive branch's power to detain immigrants).

<sup>88</sup> A recent study found that only two percent of persons transferred to immigration custody through the Secure Communities program were granted an immigration bond. AARTI KOHLI ET AL., CHIEF JUSTICE WARREN INST. ON LAW & POLICY, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 8 (2011), available at [http://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf).

<sup>89</sup> See, e.g., U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, PROTECTING THE HOMELAND: TOOL KIT FOR PROSECUTORS 9 (2011) [hereinafter ICE PROSECUTOR TOOL KIT], available at <http://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf> (“In some circumstances, if the state or federal prosecutors are unable to secure the release of the alien or their own custody of the alien witness, ICE may remove the alien from the United States. For example, a writ requesting the alien’s presence for a trial in six months will not be honored if the alien is subject to removal and can be removed.”); Letter from Karen E. Lundgren, Chief Counsel, U.S. Immigration & Customs Enforcement, to Mariette Parker, Acting U.S. Attorney, Dist. of Kan. (Feb. 20, 2009) (on file with author) (refusing to withhold deportation until the conclusion of the criminal proceedings at issue); Interview with Robert Naranjo, Assistant Field Office Dir., Enforcement & Removal Operations, U.S. Immigration & Customs Enforcement, in L.A., Cal. (May 30, 2012) [hereinafter Naranjo Interview] (agreeing that federal immigration proceedings may proceed more quickly than the criminal case, requiring removal).

<sup>90</sup> See, e.g., Naranjo Interview, *supra* note 89 (explaining that if state court representatives do not ask for custody of the alien and “if the immigration case is moving right along and [the immigrant] says ‘I just want the removal,’” sometimes the immigrant is deported before the criminal case is completed). See generally SCOMM Statistics, *supra* note 26 (including data on individuals removed after a criminal arrest, but without a criminal conviction); ICE PROSECUTOR TOOL KIT, *supra* note 89, at 29 (“[A]liens who lack a lawful immigration status may potentially be subject to removal proceedings regardless of any convictions.”).

<sup>91</sup> See ICE PROSECUTOR TOOL KIT, *supra* note 89, at 9 (“Furthermore, it is important to understand that ICE has restriction[s] and requirements as part of its civil detention standards. Such rules will not allow ICE to hold an alien solely for the prosecution of a case unrelated to ICE’s specific authority for civil detention.”); Letter from Karen E.

prosecutors who wish to complete their criminal prosecution after the initiation of deportation proceedings to obtain an order from the state judge to produce the alien for the purpose of the criminal prosecution.<sup>92</sup> Local law enforcement must then transport the noncitizen from federal immigration custody to the criminal court proceeding.<sup>93</sup>

#### D. Plea Bargaining

For some time now, scholars have documented the rise of plea bargaining in the criminal justice system.<sup>94</sup> Indeed, today almost all criminal defendants are convicted through plea bargaining rather than trial.<sup>95</sup> In recognition of plea bargaining's dominance, the Supreme Court's 2010 *Padilla v. Kentucky* decision solidified the Sixth Amendment obligation of defense counsel to advise noncitizen defendants of the potential immigration consequences of a guilty plea.<sup>96</sup> In so ruling, the Court acknowledged that defense counsel "may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence."<sup>97</sup>

The importance of plea bargaining to noncitizen defendants raises important questions concerning whether and how prosecutors,

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Lundgren to Mariette Parker, *supra* note 89, at 2 ("ICE has no statutory authority to hold aliens in our custody unless we are attempting to effect their departure as required by INA § 241, 8 U.S.C. § 1231.").

<sup>92</sup> See Naranjo Interview, *supra* note 89 (describing ICE trainings for local prosecutors in Los Angeles on the logistics of completing criminal prosecutions when ICE has custody of the alien); see also Telephone Interview with Judge Robin Brown, Presiding Judge, Harris Cnty. Criminal Court, Hous., Tex. (May 23, 2012) [hereinafter Brown Interview] (noting that "a couple times a month" she has to "bench warrant" defendants back from ICE so that the criminal case can continue).

<sup>93</sup> See Naranjo Interview, *supra* note 89.

<sup>94</sup> A significant body of scholarship has explored the evolution of plea bargaining and documented its dominance in criminal practice. See, e.g., GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003) (exploring the significance of plea bargaining's rise over jury trials); LYNN M. MATHER, PLEA BARGAINING OR TRIAL?: THE PROCESS OF CRIMINAL-CASE DISPOSITION (1979) (examining the dominance of plea bargaining in urban courts with a specific focus on plea practices in the Los Angeles County Superior Court). Although these authors do not address plea bargaining with noncitizens, their work provides an important framework for understanding the causes and implications of bargained case resolutions.

<sup>95</sup> As the United States Supreme Court recently noted, guilty pleas constitute ninety-seven percent of federal criminal convictions and ninety-four percent of state criminal convictions. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

<sup>96</sup> 130 S. Ct. 1473 (2010) (holding that a defense attorney's failure to advise his client of the immigration consequence of a guilty plea falls below the minimum standard for effective counsel).

<sup>97</sup> *Id.* at 1486.

who hold the cards in plea bargaining,<sup>98</sup> will develop standards for considering immigration consequences in case resolution.<sup>99</sup> To test how prosecutors address noncitizen plea bargaining in practice, in July 2011 I submitted public records requests to fifty county-level prosecutor offices located in the five states with the highest levels of noncitizen prisoners: Arizona, California, Florida, New York, and Texas.<sup>100</sup> Each of these requests sought all prosecution policies regarding noncitizens, immigration status, immigration consequences, and *Padilla*. Out of the fifty offices contacted, forty-two offices shared information regarding their noncitizen plea practices.

A review of these policies provides insight into how prosecutors use knowledge of immigration status in making plea bargaining decisions. It also allows these policies to be further categorized into more specific subcategories. As detailed in Table 1, the majority of the offices (twenty-nine in total) have no written plea policy that mentions

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<sup>98</sup> For examples of scholarship that underscores the tremendous discretion given to criminal prosecutors in the adjudication of criminal cases, see Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009) (documenting the prevalence of prosecutorial overreach and providing suggestions for how to curb future abuse of prosecutorial power); and Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 225 (2006) (exploring why “prosecutors have become some of the main de facto adjudicators of U.S. criminal procedure”).

<sup>99</sup> For some interesting recent literature relating to these and other questions raised by the *Padilla v. Kentucky* decision, see Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 9 (2012) (arguing that “lead prosecutors [ought] to adopt office-wide policies that normalize the consideration of immigration penalties and the use of alternative plea offers, when appropriate, to preserve noncitizen defendants’ immigration status”); Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1770–802 (2013) (contending that, contrary to the Court’s assumption in *Padilla*, lawful permanent residents charged with misdemeanors are often unable to obtain immigration-safe pleas); César Cuauhtémoc García Hernández, *Criminal Defense After Padilla v. Kentucky*, 26 GEO. IMMIGR. L.J. 475 (2012) (delineating the practical mandate of *Padilla* for defense counsel); and Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 608 (2013) (demonstrating that *Padilla* “increased the ability of prosecutors to act as gatekeepers within the larger [immigration] removal system”).

<sup>100</sup> I relied on data from the State Criminal Alien Assistance Program (SCAAP) to identify those states with the highest levels of noncitizens in their prisons and jails. As noted earlier in this Article, under SCAAP, the federal government reimburses states for a portion of the costs associated with incarcerating criminal aliens for local criminal prosecutions. See *supra* note 25 (describing SCAAP). By sorting the SCAAP grant recipients for fiscal year 2010 by total dollar amount received, I identified Arizona, California, Florida, New York, and Texas as the five states that received the most SCAAP funding for incarcerating criminal aliens. See *SCAAP 2010 Awards*, *supra* note 25. Within each of these five states, I then selected the ten counties that received the highest level of federal reimbursement for housing criminal aliens. See *id.* (listing the amount of funding received by grant recipients, broken down by county). The total of fifty selected counties, which are listed on Table 1, were sent public record requests.

immigration status or immigration consequences.<sup>101</sup> This omission does not necessarily mean, however, that prosecutors lack informal practices or routines for plea bargaining with noncitizens.

TABLE 1  
 Prosecution Policies for Plea Bargaining with Noncitizens,  
 by Leading SCAAP County (2011)

	No Noncitizen Policy	Do Not Consider Immigration Status	Consider Immigration Consequences	Undocumented Immigrant Plea Exclusions	Did Not Participate
Arizona	Maricopa Mohave Navajo Santa Cruz Yuma	Cochise	Gila	Pinal Yavapai	Pima
California	Orange Tulare Ventura	San Mateo	Los Angeles Santa Clara Alameda		San Diego Sacramento San Bernardino
Florida	Collier Hillsborough Lee Manatee Martin Orange Palm Beach Pinellas Sarasota		Broward		
New York	Broome Erie Oneida Orange Suffolk Westchester		New York Schenectady		Nassau Warren
Texas	Collin Dallas Denton Fort Bend Tarrant Travis			Harris Hidalgo	Cameron El Paso

<sup>101</sup> The fact that a majority of county prosecutors’ offices have no formal noncitizen plea bargaining policy is not surprising. Marc Miller and Ronald Wright have demonstrated that peering inside the “black box” of internal prosecutorial regulation is rare given that “the absence of controlling statutes or case law makes it possible for prosecutors to do their daily work without explaining their choices to the public.” Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008). Research on police department immigration policies has similarly found that nearly half of departments have no written policy. Paul G. Lewis et al., *Why Do (Some) City Police Departments Enforce Federal Immigration Law?: Political, Demographic, and Organizational Influences on Local Choices*, 23 J. PUB. ADMIN. RES. & THEORY 1, 11 (2013).

Those offices that do have office policies regarding plea bargaining and immigration status (thirteen in total) reveal three distinct categories of noncitizen plea policies. Seven offices have adopted a policy that allows prosecutors to consider the adverse collateral immigration consequence of deportation,<sup>102</sup> along with other applicable plea factors (such as the defendant's conduct, prior criminal history, and social history), when deciding on an appropriate plea offer.<sup>103</sup> Four offices have plea policies that bar undocumented defendants from being offered certain types of plea bargains, but otherwise do not specify how prosecutors should weigh immigration status or the collateral effect of deportation. Finally, only two county prosecutor offices, Cochise (Arizona) and San Mateo (California), have policies that explicitly prohibit prosecutors from considering immigration status or future deportation during the course of plea bargaining.<sup>104</sup>

### E. Sentencing and Corrections

Alienage can also be relevant to the last stage of the criminal process—sentencing and corrections.<sup>105</sup> For example, parties may raise the issue of potential exposure to deportation with the judge at a sentencing hearing. Or a judge may, on her own initiative, rely on immigration status in arriving at an appropriate sentence. In addition, depending on state law and local practice, noncitizen-specific requirements may apply to judges, court personnel, or probation and parole

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<sup>102</sup> “Collateral consequences,” including the immigration consequence of deportation, can be distinguished from “direct consequences” of a criminal conviction or guilty plea, such as a period of incarceration, supervision, or a fine. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 698 (2002).

<sup>103</sup> For example, under the policy adopted by the District Attorney of Santa Clara County, California, prosecutors are directed to weigh collateral consequences, including collateral immigration consequences, if these consequences are “significantly greater than the punishment for the crime itself.” Santa Clara Cnty. Dist. Attorney’s Office, Policy Procedures Manual § 5.02(b)(x)(6) (updated Sept. 14, 2011) (obtained by author with public records request on Sept. 26, 2011).

<sup>104</sup> Of the fifty offices surveyed and shown in Table 1, only one office (Santa Clara County, California) adopted a new policy for addressing the immigration consequences of guilty pleas post-*Padilla*. Similar public records requests to over thirty local city attorney offices handling misdemeanor prosecutions in Los Angeles, Maricopa, and Harris Counties also yielded no policy changes following *Padilla*.

<sup>105</sup> For an early discussion of the central link between sentencing and deportation, see Stephen H. Legomsky, *The Alien Criminal Defendant: Sentencing Considerations*, 15 SAN DIEGO L. REV. 105 (1977). More recently, Stephen Lee has revived the idea that perhaps Congress should delegate authority to state court sentencing judges to participate in deportation decisionmaking. Lee, *supra* note 99, at 598–601. See generally Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1143–51 (2002) (describing the now-abandoned practice of allowing sentencing judges to issue judicial recommendations against deportation).

officers, such as mandatory reporting of “criminal aliens” to federal immigration officials.<sup>106</sup>

The federal immigration detainer discussed earlier also affects the sentencing and corrections processes. With mounting fiscal pressure and declining crime rates, local criminal justice systems increasingly rely upon nonincarceration sentences such as probation, drug treatment, or counseling.<sup>107</sup> Despite the rehabilitative aim of such programs, participation in them by noncitizens may still constitute a conviction that triggers collateral immigration consequences.<sup>108</sup> Moreover, the federal government can (and routinely does) deport noncitizens prior to successful completion of a standard term of probation.<sup>109</sup> Such interference with criminal justice programming by immigration authorities forces local courts to consider whether alternatives to incarceration for noncitizens can satisfy criminal justice goals. Although the answer generally remains a topic for plea bargaining and sentencing judges, a few states have barred potentially deportable noncitizens from participation in certain correctional programs.<sup>110</sup>

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<sup>106</sup> See, e.g., *supra* notes 22–23 (collecting examples).

<sup>107</sup> See generally ADRIENNE AUSTIN, VERA INST. OF JUSTICE, CRIMINAL JUSTICE TRENDS: KEY LEGISLATIVE CHANGES IN SENTENCING POLICY, 2001–2010, at 8–15 (Sept. 2010), available at <http://www.vera.org/pubs/criminal-justice-trends-key-legislative-changes-sentencing-policy-2001-2010-0> (exploring varied state models for pursuing alternatives to incarceration).

<sup>108</sup> See 8 U.S.C. § 1101(a)(48)(A) (2012) (defining the term “conviction” for immigration purposes). See also Alina Das, *Immigrants and Problem-Solving Courts*, 33 CRIM. JUST. REV. 308, 313 (2008) (describing the “unique challenge” that faces problem-solving courts working with immigrant communities).

<sup>109</sup> As ICE attorneys explained in a training session given to Harris County prosecutors, “just because an alien is put on probation does not mean that the DHS will wait for him or her to complete it (or mess it up and get revoked, whichever comes first).” U.S. Immigration & Customs Enforcement, Presentation to Harris County, Texas District Attorney’s Office: Overview of Immigration Law Relating to Immigration Offenses 13 (Apr. 17, 2009) (obtained by author with public records request on June 7, 2012) [hereinafter Harris County ICE Training]. Rather, “DHS will more than likely serve the alien with an NTA and go ahead with removal proceedings.” *Id.*; see also 8 U.S.C. § 1231(a)(4)(A) (explaining that “[p]arole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal”). For an argument that immigration authorities should deport noncitizens before completion of a prison sentence in order to reduce costs associated with incarcerating criminal aliens, see Peter H. Schuck, *Immigrant Criminals in Overcrowded Prisons: Rethinking an Anachronistic Policy* (Yale Law Sch., Pub. Law Working Paper No. 266, 2012).

<sup>110</sup> See, e.g., KAN. STAT. ANN. § 21-6824(2)(h)(B) (2012) (providing that those “not lawfully present in the United States and being detained for deportation” are ineligible for nonprison drug treatment); WASH. REV. CODE §§ 9.94A.662, 690(3)(d) (2008) (prohibiting offenders “subject to a deportation detainer or order” from eligibility for the state’s “work ethic camp program” and “prison-based drug offender sentencing alternative”).

Part II has introduced an integrated account of how criminal process and immigration enforcement function in practice. When it comes to noncitizens, the criminal justice system includes new institutional actors (such as immigration agents), law enforcement tools (such as immigration detainers), and punishments (such as deportation). These new elements can realign the decisionmaking of criminal justice actors at every stage—investigation, booking, bail, plea bargaining, and sentencing. In addition, at each stage in the criminal process there are opportunities for local criminal actors to interact with the federal immigration-enforcement system in ways that can further or hinder federal immigration-enforcement goals. As Part III makes clear, however, the three counties studied in this Article have each navigated the integration of criminal punishment and immigration enforcement in different ways.

### III

#### THREE MODELS OF NONCITIZEN CRIMINAL JUSTICE

My description of federal immigration involvement with local criminal justice does not yet explain how individual localities operate in practice. Deeper understanding flows from exploring the practical relationships between criminal justice actors and federal immigration-enforcement agents in local jails and county courthouses. To undertake this inquiry, this Part turns to analysis of the three counties: Los Angeles, Harris, and Maricopa. In each county, state law provides a basic rule-based framework for consideration of alienage. Specific local procedures, such as court structures and the practices of various institutional actors, also inform the relationship between immigration and adjudication.

Each of the counties studied, as this Part discusses, has an institutionally coherent approach to immigration. For example, in each county the noncitizen sentencing practices of judges tend to mirror the plea policies of criminal prosecutors. Similarly, probation, pretrial, and police agencies within each county have adopted similar views about the appropriate level of immigration screening to include in their work. Even defense attorneys, by and large, have accommodated their practices to the standard local arrangements. In effect, each county's criminal system reflects shared understandings about non-citizen adjudication.

Starting from this institutional coherence, I conceptualize the approaches of the counties as establishing three distinct models for noncitizen criminal justice. Here, I chose to build three models rather than simply describe the on-the-ground practices of the three counties

so as to frame the animating principles and policy choices of the counties as normative, collective decisions regarding the significance of immigration enforcement and alienage status for local criminal justice. In introducing each model, I rely on the criminal alien matrix introduced in Part I to graphically illustrate the three distinct approaches to noncitizen justice that emerge: alienage neutral, illegal-alien punishment, and immigration enforcement.

### A. *Alienage-Neutral Model*

“Inquiry as to immigration status is prejudicial.”

—Criminal court judge, Los Angeles County

“There is no probative value in immigration status.”

—Deputy district attorney, Los Angeles County

“I think at every stage in the proceeding, [immigration] is not taken into account.”

—Deputy alternate public defender, Los Angeles County

Under the alienage-neutral model developed in Los Angeles County, California, criminal justice actors endeavor to make decisions that limit the potential effects of immigration status and enforcement on criminal adjudication. Police officers do not affirmatively inquire about immigration violations; judges do not ask defendants to divulge their statuses in court; prosecutors charge and dispose of cases without purposefully pulling immigration information; and probation officers supervise probationers free from interaction with immigration agents. Los Angeles defense attorneys and prosecutors routinely describe their court system as “neutral” and “blind” to immigration status.<sup>111</sup>

On the criminal alien matrix, the Los Angeles model functions along the y-axis of the criminal process in the same way for all defendants. As the x-axis of alienage status fades away, the alienage-neutral model can be reduced to the single dimension of criminal versus non-criminal (the y-axis). In other words, the model seeks to treat all defendants as citizens of the criminal process by not relying on immigration status in investigating, charging, and adjudicating crimes.<sup>112</sup> At

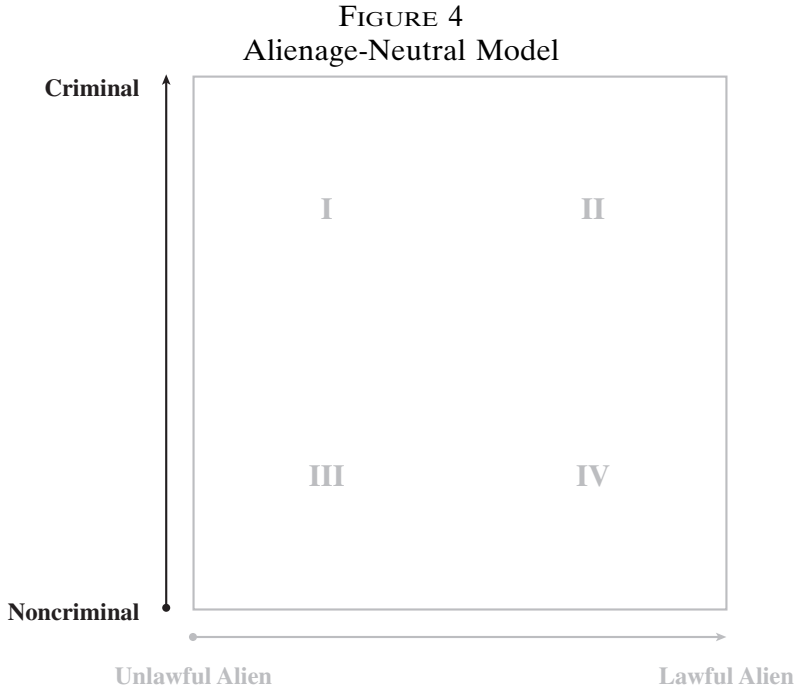
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<sup>111</sup> See, e.g., Telephone Interview with George Castello, Assistant Head Deputy, L.A. Dist. Attorney’s Office, L.A., Cal. (Sept. 9, 2010) [hereinafter Castello Interview] (explaining that immigration status is “never inquired into”); Telephone Interview with Lara Kislinger, Deputy Pub. Defender, Misdemeanor Div., Law Offices of the L.A. Cnty. Pub. Defender, L.A., Cal. (May 10, 2012) [hereinafter Kislinger Interview] (“I do feel that the general [prosecutorial] position is that we don’t treat people better—we don’t give people breaks—because they have immigration issues. They are blind to that.”).

<sup>112</sup> The fact that noncitizens are formally incorporated as de facto citizens of the criminal process does not mean that they receive equal treatment on all dimensions. Like other criminal defendants, once inside they confront the many ills of the criminal system, including race and class inequities. As Devon Carbado has noted in analyzing the



times, however, ensuring alienage-neutral treatment of all defendants requires Los Angeles to be deeply immigration-conscious and consider how certain defendants may be unfairly disadvantaged by federal immigration enforcement.



A few illustrations of how the alienage-neutral model operates across different points illuminate the overall framework. Consider first the Los Angeles Police Department's (LAPD) policy that limits the affirmative enforcement of immigration law by patrol officers. Since 1979, the LAPD has followed a policy that places immigration enforcement outside the bounds of local police involvement.<sup>113</sup> The policy, known as Special Order 40, focuses on the investigation stage of the criminal process by barring police officers from initiating police action undertaken with the objective of discovering immigration status.<sup>114</sup> In furtherance of this policy, officers have authority to cite

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American naturalization process, even "the acquisition of formal citizenship" does not insulate the former noncitizen from the reality of racialized social inequality. Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633, 639–42 (2005).

<sup>113</sup> See Special Order No. 40, *supra* note 18, at 1 (memorializing the Los Angeles Police Department's (LAPD) policy not to initiate any police action with the sole objective of discerning an individual's immigration status).

<sup>114</sup> Consistent with federal law, however, Special Order 40 does not prohibit local police from communicating with federal officials regarding immigration status should an

and release suspects arrested for low-level crimes<sup>115</sup> and accept foreign consulate identification cards as a legitimate form of identification.<sup>116</sup>

In addition to policies that guard against relying on immigration status in making policing decisions, the LAPD has reordered certain practices in reaction to the perceived unfairness of federal immigration policy. For example, in early 2012 the LAPD limited its enforcement of a state law mandating that the cars of unlicensed drivers be impounded because of the law's effect on noncitizen drivers barred by federal law from obtaining a driver's license.<sup>117</sup> The Los Angeles Police Commission explained that the new nonenforcement policy demonstrated "humanity" and "compassion" toward undocumented

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individual's immigration status become known. *See Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 725 n.5 (Cal. Ct. App. 2009) (explaining that, regardless of the policy detailed in Special Order 40, when an individual is booked, his place of birth must be noted as well as "the placement and disposition of ICE holds").

<sup>115</sup> *See* CAL. PENAL CODE §§ 853.5(a), 853.6(a)(1) (West 2008 & Supp. 2013) (authorizing a police officer to cite and release an arrestee for infractions and misdemeanors, respectively); CAL. VEH. CODE § 40500 (West 2000 & Supp. 2013) (instructing an officer arresting a suspect under a nonfelony section of the Vehicular Code to cite and release the defendant upon verification of his or her identity, or failing that, after taking a thumbprint); *see also* VERA INST. OF JUSTICE, LOS ANGELES COUNTY JAIL OVERCROWDING REDUCTION PROJECT: FINAL REPORT vii (2011), available at [http://www.vera.org/sites/default/files/resources/downloads/LA\\_County\\_Jail\\_Overcrowding\\_Reduction\\_Report.pdf](http://www.vera.org/sites/default/files/resources/downloads/LA_County_Jail_Overcrowding_Reduction_Report.pdf) (reporting that, although usage rates vary across departments, Los Angeles County police officers do exercise their cite-and-release authority).

<sup>116</sup> Letter from William J. Bratton, Chief of Police, L.A. Police Dep't, to Frank T. Martinez, Exec. Officer, Office of the City Clerk (May 28, 2004), available at <http://cityclerk.lacity.org/consulate/pdf/LAPDSecurityGuidelines.pdf> (clarifying that the LAPD "accepts, as legitimate forms of identification, Foreign Consulate Identification Cards . . . from Mexican and Argentine foreign nationals"). In fact, under the Los Angeles Administrative Code, all city departments, including the City Attorney, are required to accept consular identification cards. L.A., CAL., ADMIN. CODE § 19.150; Memorandum from J. Michael Carey, City Clerk, to All Elected Officials and Department Heads (Mar. 22, 2004), available at <http://cityclerk.lacity.org/consulate/pdf/foreignconsulatedepteletter.pdf> (notifying all city departments "to accept officially issued Foreign Consulate Identification Cards" as "valid identification"). In addition, the Los Angeles City Council recently approved a proposal to create a universal identification card that allows all city residents, including the undocumented, to access library and banking services. L.A., Cal., Council File No. 12-1282 (Nov. 7, 2012), available at [http://clkrep.lacity.org/onlinedocs/2012/12-1282\\_ca\\_11-07-12.pdf](http://clkrep.lacity.org/onlinedocs/2012/12-1282_ca_11-07-12.pdf).

<sup>117</sup> Joel Rubin, *LAPD: New Impound Law Shows "Compassion" for Illegal Immigrants*, L.A. TIMES BLOGS (Feb. 28, 2012), <http://latimesblogs.latimes.com/lanow/2012/02/lapd-new-impound-law-shows-compassion-for-illegal-immigrants.html>. *See generally* CAL. VEH. CODE § 14602.6 (West 2010) (requiring the impounding of a vehicle driven without a license); REAL ID Act of 2005 § 202, Pub. L. No. 109-13, 119 Stat. 302, 312-15 (codified at 49 U.S.C. § 30301 note (2006)) (requiring state-issued driver's licenses to comply with certain federal guidelines, including a requirement that the state obtain evidence of the applicant's lawful status before issuing the license).

immigrants living in the city.<sup>118</sup> More recently, both the LAPD<sup>119</sup> and the Los Angeles County Sheriff's Office<sup>120</sup> announced that they will no longer turn over individuals arrested for petty offenses to federal immigration authorities. Together, these local policies have immigration significance because they limit the impact of federal immigration law on noncitizens.<sup>121</sup>

Los Angeles's bail process also incorporates the alienage-neutral approach. Regardless of immigration status, defendants are assigned a monetary bail amount based on the substantive charge pursuant to the county's bail schedule.<sup>122</sup> Although prosecutors have the discretion to argue that the judge should deviate from the bail schedule by taking individualized factors into account,<sup>123</sup> the written bail schedule does not impose any citizenship distinctions.<sup>124</sup> Furthermore, in practice Los Angeles judges do not raise a defendant's bail based on

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<sup>118</sup> Rubin, *supra* note 117.

<sup>119</sup> News Release, L.A. Police Dep't, Chief Charlie Beck Announces Proposed Changes to the Way the L.A.P.D. Handles ICE Detentions of Some Undocumented Immigrant Arrests (Oct. 4, 2012), available at [http://www.lapdonline.org/newsroom/news\\_view/52079](http://www.lapdonline.org/newsroom/news_view/52079); Agenda, Bd. of Police Comm'rs, at 3 (Dec. 11, 2012), available at <http://www.lapdonline.org/assets/pdf/121112%20Board%20Meeting%20Agenda.pdf> (approving LAPD Chief of Police's proposed modified procedures for handling ICE detainer requests).

<sup>120</sup> Cindy Chang, *Baca Will No Longer Turn Over Low-Level Offenders to Immigration*, L.A. TIMES BLOGS (Dec. 5, 2012), <http://latimesblogs.latimes.com/lanow/2012/12/baca-immigration-secure-communities.html>.

<sup>121</sup> Like the LAPD, several other city police departments within Los Angeles County have adopted alienage-neutral policies that allow local police to cite and release offenders without considering immigration status. *See, e.g.*, Azusa Police Dep't, City of Azusa, Policy Manual § 428.3.4 (2012) (obtained by author with public records request on May 23, 2012) (instructing an arresting officer to release a noncitizen upon verification of his identity in situations where a citizen would be released); Baldwin Park Police Dep't, City of Baldwin Park, Policy Manual § 428.3.4 (2011) (obtained by author with public records request on May 2, 2012) (same); Culver City Police Dep't, City of Culver City, Policy Manual § 428.3.4 (2011) (obtained by author with public records request on May 10, 2012) (same).

<sup>122</sup> Interview with Lee Rosen, Deputy Alternate Pub. Defender, Cnty. of L.A. Alternate Pub. Defender, in L.A., Cal. (Nov. 18, 2010) [hereinafter Rosen Interview] (describing Los Angeles's local bail process as one that relies on a bail schedule that does not distinguish based on immigration status); *see also* CAL. PENAL CODE § 1269b(c) (West 2004) ("It is the duty of the superior court judges in each county to prepare, adopt, and annually revise a uniform countywide schedule of bail for all bailable felony offenses and for all misdemeanor and infraction offenses except Vehicle Code infractions.").

<sup>123</sup> Telephone Interview with Richard Doyle, Dir., Bureau of Specialized Prosecutions, L.A. Cnty. Dist. Attorney's Office, L.A., Cal. (Aug. 20, 2010) [hereinafter Doyle Interview] (explaining that, in Los Angeles County, a prosecutor who wants to deviate from the bail schedule must file a formal request so that the court may determine if a deviation is appropriate); *see also* CAL. PENAL CODE § 1275 (West 2004) (allowing the judge considering a bond deviation request to "take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or hearing of the case").

<sup>124</sup> L.A. CNTY. SUPERIOR COURT, FELONY BAIL SCHEDULE (2013), available at <http://www.lasuperiorcourt.org/criminal/pdf/felony.pdf> (outlining the rules to determine bail for

immigration status.<sup>125</sup> Prosecutors explain that to argue that alienage predetermines flight risk would be a local “faux pas.”<sup>126</sup> Defense attorneys agree that immigration status is simply not relevant to bail hearings.<sup>127</sup> To be sure, other factors—such as having a stable address, employment, and family ties—are all pertinent to a specialized finding of flight risk.<sup>128</sup> But immigration status alone is not considered a reliable characteristic upon which to assume flight risk and thereby justify raising a defendant’s bail.<sup>129</sup>

The Los Angeles County Sheriff’s participation in a state-federal cooperative immigration screening program known as 287(g) is also notable.<sup>130</sup> The standard jail-based 287(g) agreement between the

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felony charges, which are based on the nature of the charge and enhancements that do not include immigration status).

<sup>125</sup> Rosen Interview, *supra* note 122 (explaining that immigration status is not considered by judicial officers in making bond determinations); Telephone Interview with Antonio Villegas, Deputy Pub. Defender, Law Offices of the L.A. Cnty. Pub. Defender, L.A., Cal. (Sept. 13, 2010) [hereinafter Villegas Interview] (“No judge in East L.A. would consider increasing bail because of immigration status.”).

<sup>126</sup> Castello Interview, *supra* note 111 (“I have never heard it said that ‘this person is an illegal alien and might flee to Mexico.’ The system is full of political correctness.”); *see also* Telephone Interview with Greg Dorfman, Deputy City Attorney, Gang Unit, L.A. City Attorney’s Office, L.A., Cal. (Apr. 12, 2012) [hereinafter Dorfman Interview] (explaining that in making bail recommendations he “never thinks about” immigration status, but rather asks: “Does he have an address? Or, is he a transient? How many warrants are on his rap sheet?”); Telephone Interview No. 1, Deputy City Attorney, L.A. City Attorney’s Office, L.A., Cal. (Mar. 20, 2012) [hereinafter Interview No. 1] (“We’re so liberal here I would honestly never bring it up, at least never on the record. . . . Your immigration status, even for bail, is something we [as prosecutors] don’t look at.”).

<sup>127</sup> *See, e.g.*, Telephone Interview with Amy Loeliger, Deputy Pub. Defender, Law Offices of the L.A. Cnty. Pub. Defender, L.A., Cal. (Mar. 23, 2012) [hereinafter Loeliger Interview] (“I would say that in my experience immigration never comes up at bail . . . .”); Telephone Interview with Graciela Martinez, Deputy Pub. Defender and Immigration Advisor, Appellate Div., Law Offices of the L.A. Cnty. Pub. Defender, L.A., Cal. (Aug. 13, 2010) [hereinafter G. Martinez Interview] (agreeing that immigration status is not discussed at bail hearings).

<sup>128</sup> *See* CAL. PENAL CODE § 1275 (West 2004) (instructing the judge to take into account the likelihood that the defendant will return to court when setting bail).

<sup>129</sup> Such an approach to bail has been adopted by the Ninth Circuit in interpreting the federal Bail Reform Act. *United States v. Townsend*, 897 F.2d 989, 995 (9th Cir. 1990) (finding that federal courts must not assume that a noncitizen is a flight risk, but rather must weigh enumerated factors provided in the Act to determine a defendant’s ties to the community). In the related context of the Fourth Amendment, Carolina Núñez’s recent work has similarly concluded that courts must move away from a status-based approach and instead adopt a “multi-faceted approach to membership that evaluates community ties, mutuality of obligation, and community preservation.” D. Carolina Núñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85, 138–39 (2011).

<sup>130</sup> Under the federal 287(g) program local police, sheriffs, and corrections departments are granted the authority to enforce the civil immigration law, subject to the supervision of the DHS and the specific terms of a written agreement. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION

federal government and local law enforcement allows for immigration screening at the point of booking into the facility.<sup>131</sup> However, Los Angeles officials expressed concern that this standard 287(g) arrangement would place “potentially innocent individual[s]” into immigration proceedings and would improperly turn the sheriff into “an arm of the immigration service.”<sup>132</sup> As a result, Sheriff Lee Baca became the only sheriff in the United States to negotiate a 287(g) agreement that delays immigration screening by local deputies until after the point of conviction.<sup>133</sup> Understood in terms of the criminal alien matrix, immigration screening takes place in quadrants I and II, rather than in quadrants III and IV.

Los Angeles’s alienage-neutral approach extends to other stages of the criminal process. In fact, attorneys consistently report that immigration status is almost never discussed in court.<sup>134</sup> As one county prosecutor explained: “Our focus is on obtaining justice in each case, not on someone’s immigration status.”<sup>135</sup> A senior public defender similarly commented: “I don’t find that the prosecutors

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& CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited July 28, 2013). As of this writing, there are thirty-six such agreements in effect in eighteen different states. *Id.*

<sup>131</sup> U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP’T OF HOMELAND SEC., DRAFT MEMORANDUM OF AGREEMENT, APPENDIX D, 21–22 (2013), available at [http://www.ice.gov/doclib/detention-reform/pdf/287g\\_moa.pdf](http://www.ice.gov/doclib/detention-reform/pdf/287g_moa.pdf) (providing no limitation on the timing of immigration screening in the “standard operating procedure” for jail-based 287(g) agreements). For a detailed description of how one 287(g) program in Tennessee uses local law enforcement to screen arrestees for immigration status at the point of booking, see Amada Armenta, *From Sheriff’s Deputies to Immigration Officers: Screening Immigrant Status in a Tennessee Jail*, 34 L. & POL’Y 191, 196–97 (2012).

<sup>132</sup> L.A. CNTY. BD. OF SUPERVISORS, TRANSCRIPT OF JANUARY 25, 2005 MEETING OF THE LOS ANGELES COUNTY BOARD OF SUPERVISORS 279 (2005), available at [http://lacounty.info/BOS/SOP/TRANSCRIPTS/01-25-05%20Board%20Meeting%20Transcript%20\(C\).pdf](http://lacounty.info/BOS/SOP/TRANSCRIPTS/01-25-05%20Board%20Meeting%20Transcript%20(C).pdf). See generally MERRICK J. BOBB, POLICE ASSESSMENT RES. CTR., L.A. CNTY. SHERIFF’S DEP’T 28TH SEMI-ANNUAL REPORT 1–16 (2009), available at [http://www.parc.info/client\\_files/LASD/28th%20Semiannual%20Report.pdf](http://www.parc.info/client_files/LASD/28th%20Semiannual%20Report.pdf) (stressing the unique protective aspects of the Los Angeles Sheriff’s policies for dealing “with unauthorized immigrants from initial arrest until release,” including under the 287(g) program).

<sup>133</sup> U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP’T OF HOMELAND SEC., MEMORANDUM OF AGREEMENT BETWEEN U.S. IMMIGRATION & CUSTOMS ENFORCEMENT AND THE COUNTY OF LOS ANGELES 17 (2010), available at [http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r\\_287losangelescountysheriffsoffice101012.pdf](http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287losangelescountysheriffsoffice101012.pdf) (prioritizing “aliens convicted of” certain offenses for immigration screening); Inmate Reception Center, Corr. Servs. Div., L.A. Cnty. Sheriff’s Dep’t, Immigration & Customs Enforcement 287(g) Program Procedures (on file with author) (“The Sheriff’s “287(g) interviews will only be conducted if the inmate has received a conviction . . . . Non-convicted inmates shall not be interviewed.”).

<sup>134</sup> See, e.g., Castello Interview, *supra* note 111 (explaining that immigration status is “never inquired into”); G. Martinez Interview, *supra* note 127 (stating that immigration status is not discussed at bail hearings).

<sup>135</sup> Doyle Interview, *supra* note 123.

themselves are ever just targeting the illegal immigrant. They usually don't make reference to the immigration status [in court]."<sup>136</sup> An assistant city attorney agreed: "For the most part, city attorneys stay out of immigration because we don't have jurisdiction over it anyway. L.A. is not out to deport people. That is not our goal here. We are a liberal jurisdiction."<sup>137</sup>

This practice of courtroom silence about immigration status may stem from a decades-old California state law.<sup>138</sup> Since 1978, the California Penal Code has barred criminal courts from demanding disclosure of immigration status at the time of the change of plea.<sup>139</sup> In keeping with this rule, prosecutors stress that in most cases they never become aware of immigration status.<sup>140</sup> They do not make plea offers based on status. Instead, applying an alienage-blind framework, all defendants are routinely offered probation, drug treatment, counseling, and other nonincarceration options.<sup>141</sup> As one public defender reflected: "I don't think I can think of a case where I was able to get a deal because a prosecutor took immigration into consideration and some equivalently positioned person without that would have been offered a different deal."<sup>142</sup>

A central piece of Los Angeles's alienage-neutral approach is that prosecutors engaged in plea bargaining consider the collateral immigration-enforcement consequence of deportation. Since 2003, the Los Angeles District Attorney's Office has officially given deputy prosecutors the discretion to take collateral consequences into account and depart from ordinary settlement policy in lower-level

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<sup>136</sup> Interview with Tom McLarnon, Head Deputy, Cnty. of L.A. Alternate Pub. Defender, in L.A., Cal. (Nov. 18, 2010).

<sup>137</sup> Interview No. 1, *supra* note 126.

<sup>138</sup> See Telephone Interview with Judge Peter Espinoza, Supervising Judge of the Criminal Div., Superior Court of Cal., L.A. Cnty., L.A., Cal. (Sept. 8, 2010) [hereinafter Espinoza Interview] (discussing the judicial practice of not inquiring as to the defendant's immigration status); G. Martinez Interview, *supra* note 127 (explaining that Los Angeles Superior Court judges do not normally inquire as to immigration status).

<sup>139</sup> CAL. PENAL CODE § 1016.5(d) (West 2008) ("It is further the intent of the Legislature that at the time of the plea no defendant shall be required to disclose his or her legal status to the court.").

<sup>140</sup> See, e.g., Telephone Interview with Janice L. Maurizi, Dir., Bureau of Fraud & Corruption Prosecution, L.A. Cnty. Dist. Attorney's Office, L.A., Cal. (Oct. 22, 2010) [hereinafter Maurizi Interview] ("In ninety-nine percent of cases, we don't know whether a person is here legally or not. It is not known unless the defense attorney makes it known and wants it to be considered.").

<sup>141</sup> See *id.* (stressing that if a certain disposition is available to a citizen, under the right set of circumstances the same disposition will be extended to a noncitizen).

<sup>142</sup> Kislinger Interview, *supra* note 111.

cases.<sup>143</sup> In keeping with the county's neutral framework, the policy is not limited to immigration consequences. Rather it applies to all potentially severe collateral consequences that could be suffered by citizens and noncitizens alike—including the loss of a professional license or employment.<sup>144</sup>

Under the written policy, deviation from standard settlement rules is considered to be “in the interest of justice” when “indirect or collateral consequences to the defendant in addition to the direct consequences of the conviction” constitute “unusual or extraordinary circumstances.”<sup>145</sup> Los Angeles prosecutors describe this directive as a “nuanced refinement” of “dispositional policies” that existed informally well before the policy's adoption.<sup>146</sup> The purpose of issuing a directive was to more explicitly “alert prosecutors to the possibility that there could be sanctions above and beyond the sanctions that would be applied to anyone else.”<sup>147</sup> The written policy does not apply to serious or violent felonies. Nor could it, as California law prohibits plea bargaining in such cases, subject to a few narrow exceptions.<sup>148</sup>

Applying the policy, prosecutors weigh collateral consequences on a “sort of sliding scale.”<sup>149</sup> When the crime is more significant or the circumstances less compelling, a plea deviation is unlikely.<sup>150</sup> With respect to immigration consequences, one felony prosecutor elaborated:

Usually, immigration consequences of the defendant are not going to impact the plea agreement, at least from our point of view. We

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<sup>143</sup> Special Directive 03-04 from Steve Cooley, Dist. Attorney, L.A. Cnty., to All Deputy Dist. Attorneys (Sept. 25, 2003) (obtained by author with public records request on July 2, 2012).

<sup>144</sup> For an essential introduction to collateral consequences of criminal convictions, see Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585 (2006).

<sup>145</sup> Special Directive 03-04, *supra* note 143.

<sup>146</sup> See, e.g., Maurizi Interview, *supra* note 140.

<sup>147</sup> *Id.* Prior to adopting the directive, “immigration consequences were not routinely considered by prosecutors.” *Id.*

<sup>148</sup> See CAL. PENAL CODE § 1192.7(a)(2), (c) (West 2004 & Supp. 2013) (barring plea bargaining for felonies involving use of a firearm, for any offense involving driving under the influence of alcohol or drugs, and for serious felonies as defined in the statute, except in cases when there is insufficient evidence, a material witness cannot be obtained, or a plea would not substantially reduce the sentence). In practice, plea bargaining still occurs in serious felony cases, but now takes place earlier in the proceedings (prior to the preliminary hearing) or is justified by one of the exceptions to the plea bargaining ban. See generally Jeff Brown, *Proposition 8: Origins and Impact—A Public Defender's Perspective*, 23 PAC. L.J. 881, 939–44 (1992) (discussing the practical effects of California's plea bargaining ban).

<sup>149</sup> See, e.g., Maurizi Interview, *supra* note 140.

<sup>150</sup> See G. Martinez Interview, *supra* note 127.

are not, as a matter of course, going to come down on what we are doing in the plea because of concern for the defendant's immigration consequences. But, it is really a case-by-case decision. If the crime is minor, not violent, and the person has led a crime-free life, or a plea would result in deportation of someone here for a long time with little children . . . that is something the D.A. would take into consideration.<sup>151</sup>

The Los Angeles City Attorney's Office, which handles the majority of the city's misdemeanors, does not have a formal policy on collateral consequences.<sup>152</sup> But its attorneys emphasize the value of treating "everybody the same" and a willingness to consider tailored dispositions for noncitizens and citizens alike when mitigation is present.<sup>153</sup>

It is important to acknowledge that some readers may view Los Angeles's collateral consequences plea policy as inconsistent with an alienage-neutral approach. Indeed, by modifying plea arrangements for certain noncitizens, a collateral consequences policy may be critiqued as providing a unique "benefit" for noncitizens,<sup>154</sup> thereby discriminating against citizens. On the other hand, given that citizens and noncitizens do not have a level playing field with respect to the

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<sup>151</sup> Castello Interview, *supra* note 111. The Los Angeles prosecutorial practice of favorably weighing long-term legal residence and a crime-free life when making a plea that could result in deportation mirrors an argument made by Daniel Kanstroom that lawful permanent residents convicted of minor crimes after entry ought to be insulated from deportation. DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 243 (2007).

<sup>152</sup> Dorfman Interview, *supra* note 126.

<sup>153</sup> *Id.* ("[I]f the defendant has something else that mitigates the charge—that is something I would consider. What is his job? Is he going to school?"). See also Interview No. 1, *supra* note 126 ("If I see someone with no priors and this is the first time—it is just like a teacher with a license. It is something that I think could be mitigating. I have to take the totality of the circumstances into consideration."). It is important to acknowledge, however, that many defense attorneys interviewed expressed frustration as to what they perceived as the limited reach of the Los Angeles collateral consequences policy. See, e.g., Telephone Interview with Rigoberto Arrechiga, Supervising Attorney, Law Offices of the L.A. Cnty. Pub. Defender, L.A., Cal. (Sept. 1, 2010) [hereinafter Arrechiga Interview] ("Padilla hasn't changed much. They don't care normally. . . . But, each courthouse is different."); Interview with Gabriel Silvers, Deputy Alternate Pub. Defender, Cnty. of L.A. Alternate Pub. Defender, in L.A., Cal. (Nov. 18, 2010) [hereinafter Silvers Interview] ("Their canned answer is: 'That has nothing to do with us. Whatever happens in immigration afterwards doesn't concern us.'"); Telephone Interview with Eric J. Luce, Partner, Law Offices of DeBro & Luce, L.A., Cal. (May 6, 2012) [hereinafter Luce Interview] (lamenting that in Los Angeles immigration "tends not to get you much love," but noting that practices vary "from courthouse to courthouse").

<sup>154</sup> Gabriel Chin has made precisely this argument. Chin, *supra* note 17, at 1421 (explaining that consideration of immigration status in criminal cases "impos[es] disadvantages . . . on those without legal status" because a "noncitizen might serve less prison time" than a citizen that shares "the same level of culpability").



collateral consequences of a conviction, one could also view the failure to implement a collateral consequences policy as discriminatory.<sup>155</sup> Interviewees in Los Angeles agree with this latter interpretation. As they see it, a collateral consequences policy guards against the citizenship discrimination that would otherwise result if prosecutors willfully ignored only one aspect of a defendant's background and characteristics (exposure to deportation),<sup>156</sup> while considering a wide range of other relevant factors (such as conduct, remorse, age, and work history).<sup>157</sup> The alienage-neutral model thus conceptualizes the consideration of deportation consequences as necessary to ensure equality in the adjudication of criminal cases.<sup>158</sup>

In Los Angeles, alienage neutrality continues during the sentencing and corrections phase. Immigration status is rarely, if ever, argued as a sentencing aggravator.<sup>159</sup> To avoid inquiring into immigration status in court, prosecutors warn every single defendant—without regard to citizenship status—that the plea “will have the consequence of deportation” if “you are not a citizen of the United States.”<sup>160</sup> Similarly, Los Angeles judges generally consider the same range of nonincarceration options for all defendants.<sup>161</sup> Moreover, because

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<sup>155</sup> This debate over whether immigration collateral consequences policies discriminate against citizen defendants can be analogized to the debate regarding race-based affirmative action. As David Strauss has noted, some have criticized race-based affirmative action policies as discriminatorily disadvantaging whites. Strauss critiques this conclusion, pointing out how the “myth of colorblindness” has prevented proper analysis of affirmative action, which in his view is not at odds with the principle of nondiscrimination. David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 100 (1986).

<sup>156</sup> For examples of counties that have adopted such an approach of prohibiting the consideration of collateral immigration consequences, see *supra* Table 1.

<sup>157</sup> The American Bar Association encourages prosecutors engaged in plea bargaining to consider the circumstances of the individual case and ensure that “[s]imilarly situated defendants [are] afforded equal plea agreement opportunities.” AM. BAR. ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY 14-3.1 (3d ed. 1999).

<sup>158</sup> As Heidi Altman has argued, “prosecutorial ethics and interests are best met via direct engagement with immigration-related penalties during plea bargaining.” Altman, *supra* note 99, at 54. In analyzing plea bargaining dynamics, Máximo Langer has made the broader point that guilty pleas become more “coercive” when prosecutors make “unilateral” determinations, rather than engage with the defense in what he calls “de facto bilateral adjudication.” Langer, *supra* note 98, at 224 (emphasis omitted).

<sup>159</sup> Dorfman Interview, *supra* note 126 (explaining that he has never seen immigration argued as a mitigating or aggravating factor in Los Angeles criminal courts); Luce Interview, *supra* note 153 (“You couldn’t get away with [arguments about immigration status at sentencing] in L.A.”); Silvers Interview, *supra* note 153 (agreeing that immigration is never taken into account at sentencing).

<sup>160</sup> L.A. Cnty. Dist. Attorney’s Office, Cunningham Long Plea Script 5 (2007) (obtained by author with public records request on July 2, 2012); L.A. Cnty. Dist. Attorney’s Office, Calendar Deputy Manual app. 9 (2004) (obtained by author with public records request on July 2, 2012).

<sup>161</sup> See, e.g., Espinoza Interview, *supra* note 138 (agreeing that probation is available for all defendants regardless of immigration status); Loeliger Interview, *supra* note 127

criminal judges do not order the probation department to cooperate with ICE,<sup>162</sup> probation officers do not enforce immigration rules while supervising their caseloads.<sup>163</sup> As one official at the county's probation department explained, the "unstated policy" of the office is that it is "not our job to be immigration officers."<sup>164</sup>

Mirroring prosecutorial policy, Los Angeles judges do at times entertain arguments regarding collateral consequences at sentencing. For instance, a lawful permanent resident pleading to a crime of violence might request a term of less than a year to avoid deportation.<sup>165</sup> An out-of-custody undocumented defendant might request a non-incarceration sentence to avoid jail-based immigration screening programs.<sup>166</sup> The judicial practice of weighing collateral consequences in sentencing can be traced in part to a state court rule that requires consideration of "adverse collateral consequences on the defendant's life" resulting from a felony conviction in deciding the appropriate sentence.<sup>167</sup>

Another important example of Los Angeles alienage neutrality is found in the county's rejection of California's own immigration crimes. Adopted in the early 1990s by the California legislature and in a popular ballot initiative known as Proposition 187, California's immigration crimes punish the manufacture or use of false documents to conceal one's immigration status.<sup>168</sup> As displayed below in Figure 5,

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(arguing that "immigration can't be a bar" to probation and alternative sentencing); Interview No. 1, *supra* note 126 (Probation is used for all defendants, regardless of immigration status: "That's the whole point of probation—to keep them on the straight and narrow.").

<sup>162</sup> See, e.g., L.A. Cnty. Probation Dep't, Grant of Probation 1203 PC (2012) (on file with author) (including multiple potential orders in the standard probation department recommendation form, but nowhere listing anything relating to immigration); L.A. Cnty. Superior Court, Sample Probation Terms (2012) (on file with author) (including the standard probation terms for Los Angeles County, which do not include any mention of immigration enforcement or referrals to ICE).

<sup>163</sup> Telephone Interview No. 2, Representative, Adult Field Servs. Div., L.A. Cnty. Probation Dep't (May 18, 2012) ("Probation only addresses issues by order of the court and this is provided in the conditions of probation. Probation cannot and does not enforce anything that is not a condition of probation.").

<sup>164</sup> *Id.* ("We are following the orders of the court. The court has never ordered us to do immigration issues.").

<sup>165</sup> 8 U.S.C. § 1101(a)(43)(F) (2012) (categorizing a "crime of violence" with a "term of imprisonment" of at least a year as an aggravated felony).

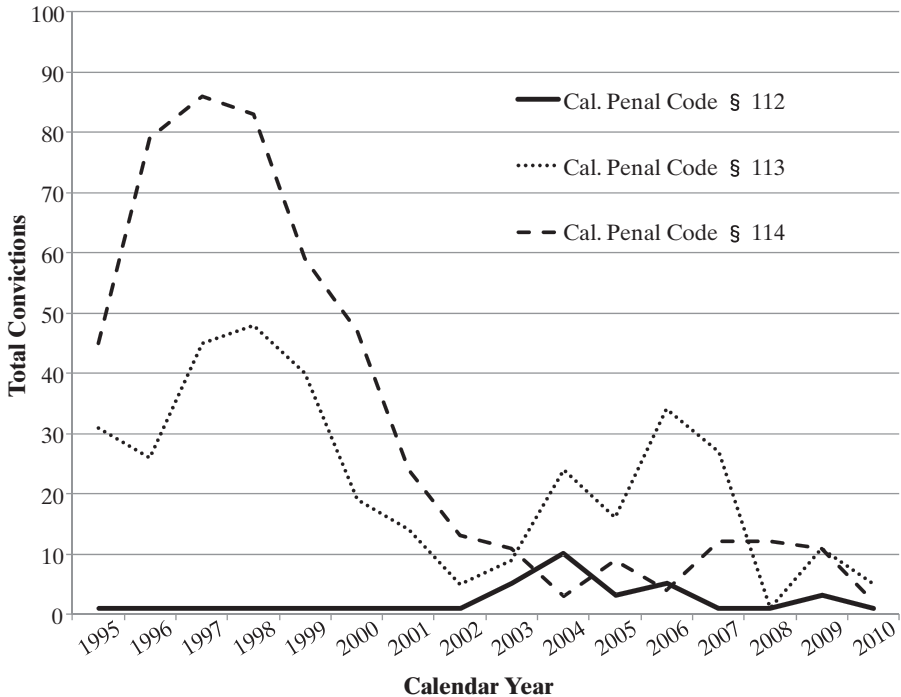
<sup>166</sup> Kislinger Interview, *supra* note 111. Although the defense attorney's goal here is to protect the client from deportation, such an argument may be framed for the court in more neutral terms, emphasizing the benefits of rehabilitative programming for the individual client. *Id.*

<sup>167</sup> CAL. R. CT. 4.414(b)(6).

<sup>168</sup> CAL. PENAL CODE §§ 112–114 (West 1999 & Supp. 2013). Current Penal Code section 112 was adopted by the legislature in 1994, making it a misdemeanor to manufacture or sell any false government document with the intent to conceal citizenship or resident

Los Angeles County briefly enforced these immigration crimes immediately after they were first enacted.<sup>169</sup> Beginning in 1999, however, the county's charging of immigration crimes began to decline. Today, these crimes are rarely, if ever, prosecuted.

FIGURE 5  
Total Convictions of Immigration Document Fraud,  
Los Angeles County (1995–2010)



SOURCE: Los Angeles District Attorney's Office<sup>170</sup>

alien status. Act of Sept. 15, 1994, ch. 17, § 1, 1994 Cal. Stat. 1st Ex. Sess. 8578. Shortly thereafter, California voters approved Penal Code sections 113 and 114, making it a felony to manufacture, distribute, sell, or use "false documents to conceal the true citizenship or resident alien status." Proposition 187, §§ 2–3, 1994 Cal. Legis. Serv. Prop. 187 (West). Although these crimes were challenged on grounds of federal preemption, they were ultimately upheld as part of the "legitimate exercise of the police power of the state." *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 775 (C.D. Cal. 1995), *aff'd in relevant part on reconsideration*, 997 F. Supp. 1244 (C.D. Cal. 1997).

<sup>169</sup> Gil Garcetti, the Los Angeles District Attorney at the time, explained that his office "made a policy decision" that the new immigration crimes "will be enforced." Patrick J. McDonnell, *Garcetti Vows to Seek Prison in Fake-ID Cases*, L.A. TIMES, Mar. 3, 1995, at B3.

<sup>170</sup> Figure 5 contains all convictions pursuant to California Penal Code Sections 112, 113, or 114 for the period January 1, 1995 through August 8, 2010. However, because the Los Angeles District Attorney's current electronic database was not fully implemented until

Local public opposition may have prevented Los Angeles from aggressively pursuing California's immigration crimes. Looking back, defense attorneys explain that vigorous motion practice by public defenders alleging racial profiling of Latinos by law enforcement made bringing these cases in a majority-Latino city politically problematic.<sup>171</sup> Tensions intensified in 1999 after a scandal unfolded in the LAPD's Rampart Division, which polices the densely populated immigrant community in the Pico-Union neighborhood of Los Angeles.<sup>172</sup> Among other findings of misconduct, the scandal revealed collaboration between local police and federal immigration officers designed to deport gang members and witnesses of police abuse.<sup>173</sup> During the period following the investigation of Rampart, the LAPD was placed under formal federal supervision, a new Chief of Police was appointed, and the department turned toward community-oriented policing.<sup>174</sup>

This section has introduced the key features of the alienage-neutral model, which strives throughout the adjudication of the case to treat all defendants the same regardless of alienage.<sup>175</sup> The model also seeks to equalize the effects of criminal prosecutions across citizens and noncitizens by shielding low-level offenders and non-criminals from the potential harshness of federal immigration enforcement. The other two models that emerge—illegal-alien

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January 1, 1996, some convictions based on charges filed prior to that date may be omitted. Data Table, Dist. Attorney's Office, L.A. Cnty. (1995–2010) (on file with author).

<sup>171</sup> Telephone Interview with Luis Rodriguez, Acting Div. Chief, Law Offices of the L.A. Cnty. Pub. Defender, L.A., Cal. (Sept. 14, 2010).

<sup>172</sup> For an overview of how a Los Angeles County public defender's suspicion that her client was framed by Rampart Division cops led to the exposure of widespread police abuses, see Lou Cannon, *One Bad Cop*, N.Y. TIMES MAG., Oct. 1, 2000, at 32.

<sup>173</sup> Eager to crack down on gang violence and the narcotics trade that plagued Los Angeles in the early 1990s, LAPD formed an elite anti-gang enforcement team known as CRASH—an acronym for “Community Resources Against Street Hoodlums.” *Id.* at 34. Unhinged from department supervision, Rampart's CRASH team gradually became involved in criminal activity—ultimately resulting in criminal prosecutions of several officers and the exonerated of hundreds of prisoners. *Id.* at 34–37, 62–66; see also Anne-Marie O'Connor, *Rampart Set Up Latinos to Be Deported*, INS SAYS, L.A. TIMES, Feb. 24, 2000, at A1 (discussing the methods CRASH officers used to have suspected gang members deported).

<sup>174</sup> Patrick McGreevy, *Bratton OKs Task Force for Reforms*, L.A. TIMES, July 19, 2006, at B4. See generally JEROME H. SKOLNICK & DAVID H. BAYLEY, *THE NEW BLUE LINE: POLICE INNOVATION IN SIX AMERICAN CITIES* viii (1986) (identifying a shift in urban police departments “away from a distant, technically oriented professionalism” and toward more “community-oriented, crime-prevention-oriented policing”).

<sup>175</sup> The norm of alienage equality inherent in the Los Angeles approach contains elements of what Hiroshi Motomura has termed “immigration as affiliation”—the idea that the ties that immigrants build with the United States make them deserving of equal treatment. Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 376–77 (2012).

punishment and immigration enforcement—present quite different approaches to noncitizen justice.

*B. Illegal-Alien-Punishment Model*

“Probation is off the counter for illegal aliens: you are looking at prison time.”

—Criminal court judge, Harris County

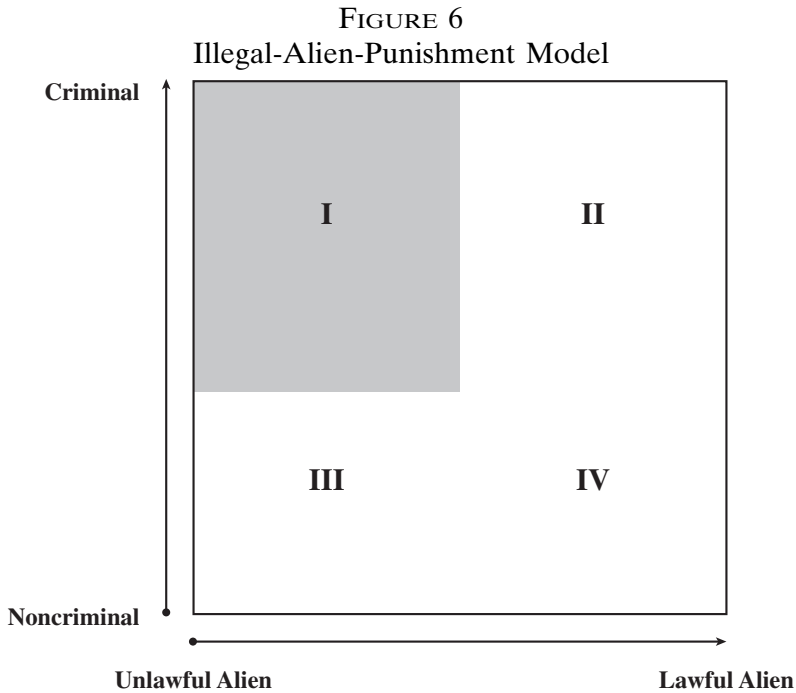
“Prosecutors flip through the file to see where you were born before offering a plea.”

—Former assistant district attorney, Harris County

“In situations where a person is ‘guilty’ of committing a crime and is deportable, I think the general sentiment is more negative if they did it when they had immigration issues. It just seems to exacerbate the stupidity or mens rea of the person.”

—Deputy public defender, Harris County

The illegal-alien-punishment model, as implemented in Harris County, Texas, segregates undocumented defendants charged with crimes from the rest of the offender population. As the discussion that follows makes clear, Harris County treats illegal alien defendants more punitively—with respect to bail eligibility, plea bargaining, and sentencing—compared with the rest of the criminal defendant population. Seen graphically in the criminal alien matrix, the Harris County illegal-alien-punishment model primarily affects those undocumented immigrants in quadrant I (when conviction occurs) and the northern portion of quadrant III (when criminal charges are filed).



There are three key design elements that facilitate Harris County’s focus on undocumented aliens charged with crimes. The first element is investigative policy. Like the LAPD, the Houston Police Department (HPD) does not affirmatively investigate immigration status during routine police work.<sup>176</sup> Also like in Los Angeles, officers in Houston accept foreign identification cards.<sup>177</sup> These policies are important to Harris County’s immigration approach because they guard against immigration screening that is not tethered to suspected criminal conduct. As Houston Police Chief Charles McClelland explains, such policies are necessary to encourage immigrant crime victims and witnesses to come forward without fear of deportation.<sup>178</sup>

<sup>176</sup> Gen. Order No. 500-05, Hous. Police Dep’t (June 25, 1992) (obtained by author with public records request on Apr. 2, 2013) (“Undocumented alien status is not, in itself, a matter for local police action.”).

<sup>177</sup> HOUS. POLICE DEP’T, HPD IMMIGRATION POLICY QUESTIONS & ANSWERS 2 [hereinafter HPD IMMIGRATION POLICY], available at [http://www.houstontx.gov/police/pdfs/immigration\\_facts.pdf](http://www.houstontx.gov/police/pdfs/immigration_facts.pdf) (last visited Mar. 2, 2013) (“[O]fficers are advised that a ‘Matricula Consular’ card issued by the Mexican Consulate is presumed valid unless the totality of the circumstances calls the validity of the card into question.”); see also *supra* note 116 and accompanying text (describing a similar LAPD policy of accepting foreign identification).

<sup>178</sup> See Peggy Fikac & Austin Bureau, ‘Sanctuary City’ Bills Catching Heat, HOUS. CHRON., Feb. 18, 2011, at B2 (quoting Houston’s Police Chief explaining that “[i]f you are a crime victim in this city or you witness a crime, I want you to report that to the Houston Police Department, regardless of your immigration status”).

Unlike Los Angeles, however, the HPD has not adopted a policy to protect low-level offenders from immigration enforcement.<sup>179</sup> Instead, as a full participant in the Secure Communities program, the HPD stresses that in all cases it allows ICE to “determine whether or not someone is removed from the country.”<sup>180</sup>

The second key design element of Harris County’s model is a direct-filing system.<sup>181</sup> Under this peculiar local procedure, prosecutors, rather than arresting officers, determine whether there is probable cause to jail a suspect.<sup>182</sup> Prosecuting attorneys in the county’s “Intake Unit” are available twenty-four hours a day, seven days per week, to review allegations from officers in the field, before the defendant is booked.<sup>183</sup> If the prosecutor declines charges, the individual must be released.<sup>184</sup> If the prosecutor accepts charges, then the individual is brought before a criminal law hearing officer for an initial hearing, known locally as magistration.<sup>185</sup>

Harris County’s front-end prosecutorial screening system effectively eliminates questionable cases that prosecutors do not intend to

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<sup>179</sup> That is, the HPD does not have a policy of disregarding immigration detainees lodged against low-level offenders. *Cf. supra* notes 84, 119–20 (citing examples of such policies adopted in Chicago, Los Angeles, and New York).

<sup>180</sup> HPD IMMIGRATION POLICY, *supra* note 177, at 3 (“HPD does not make decisions in regards to removing people from the country.”).

<sup>181</sup> Brown Interview, *supra* note 92; Telephone Interview with Nicole DeBorde, Partner, The DeBorde Law Firm, Hous., Tex. (Aug. 17, 2010) [hereinafter DeBorde Interview]; Telephone Interview with Eric Clayton, Supervisor, Harris Cnty. Pretrial Servs., Hous., Tex. (Apr. 25, 2012) [hereinafter Clayton Interview].

<sup>182</sup> Telephone Interview with Lieutenant Patrick L. Dougherty, Jail Div., Hous. Police Dep’t, Hous., Tex. (May 22, 2012) [hereinafter Dougherty Interview] (“Harris County is a direct filing county. It is one of the few in the United States where the officer makes a call to the District Attorney’s 24-7 Intake Office from either the scene or right after he gets to the jail and tells him what his probable cause is.”).

<sup>183</sup> DeBorde Interview, *supra* note 181.

<sup>184</sup> DOTTIE CARMICHAEL ET AL., PUB. POL’Y RES. INST., EVALUATING THE IMPACT OF DIRECT ELECTRONIC FILING IN CRIMINAL CASES: CLOSING THE PAPER TRAP 18–20 (2006), available at <http://www.yourhonor.com/dwi/courtadministration/finalsji.pdf> (“At the time of arrest, law enforcement officers contact prosecutors available at all hours, day or night, to screen cases for sufficient evidence. If, after hearing the events of the offense, it is determined charges will not be filed, defendants are released at the scene.”); Dougherty Interview, *supra* note 182 (“The arrestee will not be charged and booked unless the prosecutor first agrees to accept charges and has directed the officer what charge to file.”).

<sup>185</sup> CARMICHAEL ET AL., *supra* note 184, at 21 (explaining that if the prosecutor determines that charges are warranted, the defendant is “magistrated” before a criminal law hearing officer). See generally TEX. CODE CRIM. PROC. ANN. art. 15.17(a) (West 2005 & Supp. 2012) (providing that “the person arrested shall without unnecessary delay, but not later than 48 hours after the person is arrested,” be taken “before some magistrate of the county where the accused was arrested”); *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975) (“[T]he Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible.”).

pursue.<sup>186</sup> According to one study, Harris County's District Attorney intake process results in prosecutors discharging twenty-six percent of misdemeanors before booking.<sup>187</sup> For noncitizens, the important point here is that prosecutorial screening of criminal charges takes place at a very early point in the criminal process, prior to routine federal immigration screening.<sup>188</sup>

Interestingly, although Houston's up-front prosecutorial screening mechanism protects noncitizens arrested on questionable grounds from immigration enforcement, it was not designed with the goal of influencing immigration outcomes. Rather, the program was initiated by the county in the 1970s to control jail overcrowding.<sup>189</sup> Direct filing and the prosecution's 24-7 intake process is widely heralded as resulting in one of the fastest prosecutorial filing programs in the country.<sup>190</sup> The resulting system saves the county money by declining "cases that cannot be successfully prosecuted," thereby reducing the "time and expense of unnecessary transportation to county jail, booking, detention, and unnecessary appointment of counsel."<sup>191</sup> Even with direct filing in place, however, county jails remain oversubscribed, placing continued pressure on the county to avoid unwarranted bookings.<sup>192</sup>

The third important aspect of Harris County's model is its refusal to cite and release petty suspects without first booking them into

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<sup>186</sup> Telephone Interview with Ed Wells, Court Manager, Harris Cnty. Criminal Courts at Law, Hous., Tex. (May 23, 2012) (stressing that the "direct filing" system of Harris County "reduces overcharging and helps ensure sufficient information is available for probable cause for further detention while awaiting magistration").

<sup>187</sup> CARMICHAEL ET AL., *supra* note 184, at B-6 (citing data from 2004).

<sup>188</sup> This aspect of the Harris County model approaches David Martin's proposal that immigration enforcement ought to be delayed until someone is "legitimately arrested for involvement in non-immigration offenses." DAVID A. MARTIN, IMMIGRATION ENFORCEMENT: BEYOND THE BORDER AND THE WORKPLACE 12 (2006) (emphasis added), available at [http://www.migrationpolicy.org/ITFIAF/TF19\\_Martin.pdf](http://www.migrationpolicy.org/ITFIAF/TF19_Martin.pdf).

<sup>189</sup> Harris County's pretrial screening system was in part a response to a federal district court's finding that "[s]evere and inhumane overcrowding" in the county's jail facilities necessitated immediate action to "reduce the inmate population." *Alberti v. Sheriff of Harris Cnty.*, 406 F. Supp. 649, 654, 668-82 (S.D. Tex. 1975) (concluding that overcrowding in the county jail "occurs in violation of the law and according to the record costs the taxpayers of Harris County over \$1,500,000 annually in unnecessary detention"). The *Alberti* decision is also credited with establishing an improved organizational framework for pretrial release in Harris County. BARRY MAHONEY & WALT SMITH, JUSTICE MGMT. INST., PRETRIAL RELEASE AND DETENTION IN HARRIS COUNTY: ASSESSMENT AND RECOMMENDATIONS 9 (2005), available at <http://www.pretrial.org/Docs/Documents/site%20submissions/reportfinalharriscountypretrial2.pdf>.

<sup>190</sup> MAHONEY & SMITH, *supra* note 189, at 12 ("The initial stages of the criminal justice process in Harris County function very rapidly. Indeed, in some respects the 'front-end' practices in Harris County are among the best in the United States.").

<sup>191</sup> CARMICHAEL ET AL., *supra* note 184, at 8, 19.

<sup>192</sup> See *infra* Table 3 and accompanying text.



jail.<sup>193</sup> Texas law does permit police to implement cite-and-release procedures for lower-level crimes.<sup>194</sup> Nonetheless, as a matter of local practice, Harris County police agencies still book into the local jail all individuals charged with crimes that carry potential jail time.<sup>195</sup> It is estimated that if cite-and-release procedures were adopted in Harris County, twenty-two percent of misdemeanor defendants would not be booked into the jail.<sup>196</sup>

Together, these three design elements—police investigative policy, direct filing by prosecutors, and mandatory booking procedures—facilitate federal jail-based immigration screening of all felony and misdemeanor defendants, but only after a prosecutor first decides that criminal charges are warranted. From the point of magistration forward, Harris County’s approach to noncitizen justice distinguishes itself by treating “illegal aliens” differently from lawfully present aliens or citizens.<sup>197</sup>

The bail system begins the process. Under the bond schedule approved by the court,<sup>198</sup> all felony defendants “with deportation history or undocumented presence in [the] United States” automatically receive a minimum bond of \$35,000.<sup>199</sup> Described by one former prosecutor as “higher than some murder bonds,”<sup>200</sup> this minimum \$35,000 bond applies based solely on immigration status, regardless of the severity of the felony charge or other characteristics of the

<sup>193</sup> For a general discussion of cite-and-release policies, see *supra* Part II.B.

<sup>194</sup> TEX. CODE CRIM. PROC. ANN. art. 14.06 (West 2005 & Supp. 2012).

<sup>195</sup> Brown Interview, *supra* note 92 (“Nobody is cited and released on A and B misdemeanors.”); Dougherty Interview, *supra* note 182 (agreeing that all jailable misdemeanors are booked into the local jail).

<sup>196</sup> Marcia Johnson & Luckett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas*, 7 NW. J. L. & SOC. POL’Y 42, 56 & n.96 (2012) (citing May 2011 statistics retrieved from the Case Master Files of Harris County’s Justice Information Management Systems).

<sup>197</sup> The distinction drawn between documented and undocumented criminals in Harris County’s model has parallels to what Hiroshi Motomura has called “immigration as contract.” According to this way of viewing immigration as a contractual relationship, unauthorized migrants can be understood to “have no persuasive claims to being treated as Americans in waiting” because they have already broken the social contract. Motomura, *supra* note 175, at 373–78.

<sup>198</sup> HARRIS CNTY. DIST. COURTS, DISTRICT COURT BAIL SCHEDULE (2007) [hereinafter DISTRICT COURT BAIL SCHEDULE], available at <http://www.justex.net/BailBondSchedule.aspx>. In contrast to the felony bail schedule, the county’s misdemeanor bail schedule does not include an enhancement for illegal aliens. HARRIS CNTY. CRIMINAL COURTS AT LAW, MISDEMEANOR BAIL SCHEDULE (2012), available at <http://www.ccl.harriscountytexas.gov/criminal/Misdemeanor%20Bail%20Schedule.pdf>.

<sup>199</sup> DISTRICT COURT BAIL SCHEDULE, *supra* note 198.

<sup>200</sup> Telephone Interview with Mekisha Walker, Attorney, Hous., Tex. (Apr. 19, 2010) [hereinafter Walker Interview].

defendant.<sup>201</sup> Determination of a defendant's immigration status during his first court appearance is aided by ICE officers stationed in the jail<sup>202</sup> and by immigration status information provided by the defendant during a pretrial interview.<sup>203</sup>

Harris County District Attorney policy similarly identifies undocumented defendants as deserving heightened bail. The office's written policy instructs county prosecutors in all cases to "be mindful of the defendant's citizenship status" when recommending bond<sup>204</sup> because a "person with an undocumented presence in the United States" or "someone with a deportation history" may pose a flight risk.<sup>205</sup> In practice, regardless of the severity of the charge, prosecutors generally request a minimum bond of \$35,000<sup>206</sup>—or simply "no bond"<sup>207</sup>—for all illegal alien defendants.

Under the illegal-alien-punishment model, differential treatment of suspected illegal aliens continues during plea bargaining. Under the

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<sup>201</sup> Telephone Interview with Judge James Anderson, Criminal Court Judge, Harris Cnty. Criminal Courts at Law, Hous., Tex. (Apr. 18, 2012) [hereinafter Anderson Interview]; Telephone Interview with Reynaldo Ramirez, Attorney, Hous., Tex. (Aug. 5, 2010); Telephone Interview with Stanley Schneider, Attorney, Hous., Tex. (Aug. 11, 2010) [hereinafter Schneider Interview].

<sup>202</sup> A Pretrial Services official for Harris County put it this way: "Once ICE places a hold, that is the end of the line for a personal bond release." Clayton Interview, *supra* note 181.

<sup>203</sup> Telephone Interview with Toni Alviar, Court Liaison Officer, Harris Cnty. Probation Dep't, Hous., Tex. (May 22, 2012) [hereinafter Alviar Interview]; Clayton Interview, *supra* note 181.

<sup>204</sup> E-mail from Lynne Parsons, Div. Chief, Intake Division, Harris Cnty. Dist. Attorney's Office, to all Prosecutors (Apr. 16, 2010) (obtained by author with public records request on Aug. 22, 2011).

<sup>205</sup> Interoffice Memorandum from Jim Leitner, First Assistant, Harris Cnty. Dist. Attorney's Office, to All Prosecutors, Bonds and Enhancements at Intake (July 27, 2010) (obtained by author with public records request on Aug. 22, 2011). Demonstrating the fluidity of alienage categorization, the District Attorney's bond policy also mentions that noncitizens here on a more tentative, albeit legal, status—namely "a foreign national here on a visa"—may also pose a flight risk. *Id.*

<sup>206</sup> *See, e.g.*, Telephone Interview with Stephen Touchstone, Attorney, Hous., Tex. (Aug. 11, 2010) (explaining that, in practice, judges set bonds for misdemeanors and felonies at \$35,000 if they suspect the person is undocumented); Telephone Interview with Daniel Worlinger, Chief Prosecutor, Misdemeanor Div., Harris Cnty. Dist. Attorney's Office, Hous., Tex. (Apr. 25, 2012) [hereinafter Worlinger Interview] ("If he is illegal we request a higher bond of \$35,000 for misdemeanors. . . . We look to see if there is an ICE hold. . . . Most judges will grant it.")

<sup>207</sup> DeBorde Interview, *supra* note 181 (explaining that the district attorneys often recommend that bond be set at "zero" for defendants who are suspected of being undocumented); Dougherty Interview, *supra* note 182 (agreeing that prosecutors often request "no bond" for arrestees with ICE holds); Telephone Interview with Mark Hochglaube, Trial Chief, Harris Cnty. Pub. Defender, Hous., Tex. (Apr. 11, 2012) [hereinafter Hochglaube Interview] (emphasizing that the District Attorney's Office "doesn't want people who might be deported to post bond").

official policy of the Harris County District Attorney, plea bargains to probation are not available for persons “in this country illegally.”<sup>208</sup> Under the written policy, prosecutors are directed “[a]s a general rule . . . not [to] offer community supervision as a part of a plea agreement with a defendant who is a foreign national in this country illegally.”<sup>209</sup> As one trial attorney described the office’s approach: “We offer jail time only, or we say you can go to the judge without an agreed recommendation.”<sup>210</sup>

Harris County defense attorneys uniformly agree that the possibility of getting probation or other nonincarceration dispositions for a client with questionable immigration status is “basically zero.”<sup>211</sup> Nor are undocumented defendants able to participate in treatment programs offered by specialty courts (such as drug court and DUI court)<sup>212</sup> or participate in programs designed for first-time offenders (such as “deferred adjudication”<sup>213</sup> or “pretrial diversion”<sup>214</sup>). At its

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<sup>208</sup> Harris Cnty. Dist. Attorney, Operations Manual § 10.4 (2011) (obtained by author with public records request on Aug. 22, 2011) [hereinafter Harris Dist. Attorney Operations Manual].

<sup>209</sup> *Id.* The only formal exception to the written policy is “where the defendant is charged with a nonviolent offense, the defendant agrees to voluntary deportation and agrees to serve the term of probation in the country to which he is deported.” *Id.* However, although this provision exists in the written policy, it has not been implemented in practice. Letter from Scott A. Durfee, Assistant General Counsel, Harris Cnty. Dist. Attorney’s Office, to author (Mar. 27, 2012) (on file with author) (“Although there is a reference to such agreements in the Operations Manual, I checked with the First Assistant District Attorney and he is unaware of any defendant actually having requested voluntary deportation to facilitate probation.”).

<sup>210</sup> Telephone Interview with Traci Bennett, Chief Felony Prosecutor, Trial Bureau, Harris Cnty. Dist. Attorney’s Office, Hous., Tex. (Apr. 18, 2012) [hereinafter Bennett Interview]. See also Worlinger Interview, *supra* note 206 (confirming the jail-only plea practice of the Harris County District Attorney’s Office for undocumented defendants).

<sup>211</sup> Hochglaube Interview, *supra* note 207. See also Telephone Interview with Alexander Bunin, Chief Pub. Defender, Harris Cnty. Pub. Defender, Hous., Tex. (May 27, 2012) [hereinafter Bunin Interview] (describing the District Attorney’s plea policy as not offering probation to someone with an ICE hold); Telephone Interview with Monica Gonzales, Trial Attorney, Harris Cnty. Pub. Defender, Hous., Tex. (Mar. 30, 2012) (explaining that, although “nothing in the law says you can’t give [an undocumented] noncitizen probation,” judges and district attorneys will exercise discretion not to offer it because they “don’t believe they can meet the terms and conditions”); Telephone Interview with Herman Martinez, Attorney, Hous., Tex. (Mar. 29, 2012) [hereinafter H. Martinez Interview] (“All prosecutors are handcuffed from offering probation or deferred adjudication to an undocumented person.”); Telephone Interview with Patrick F. McCann, Attorney and Past President, Harris Cnty. Criminal Lawyers Ass’n, Hous., Tex. (Aug. 23, 2010) [hereinafter McCann Interview] (discussing District Attorney’s “informal policy” not to offer probation to the undocumented).

<sup>212</sup> Telephone Interview with Franklin Bynum, Trial Attorney and Immigration Specialist, Harris Cnty. Pub. Defender, Hous., Tex. (Mar. 27, 2012) [hereinafter Bynum Interview].

<sup>213</sup> Deferred adjudication is provided in the criminal code, TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(a) (West 2006 & Supp. 2012), but is not a realistic option for

most extreme, the “no plea” policy operates even when state law mandates probation.<sup>215</sup> For example, since 2003, Texas law has mandated that sentences for certain low-level felonies be limited to probation rather than prison time.<sup>216</sup> County prosecutors avoid this requirement for undocumented offenders by requesting a sentence to “county time” (that is, incarceration in local county jails) rather than “state jail time.”<sup>217</sup>

Judicial sentencing practice aligns with the plea bargaining policy of the District Attorney’s office. Throughout the county, illegal aliens are sentenced to jail time rather than probation or deferred adjudication.<sup>218</sup> For those defendants who “slip through the cracks” and are given a probationary sentence because their status is not discovered,<sup>219</sup> probation officials will inquire into immigration status and refer any questionable cases to ICE.<sup>220</sup>

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undocumented immigrants, McCann Interview, *supra* note 211 (“Immigrants don’t get deferred adjudication.”).

<sup>214</sup> Although Texas law makes room for pretrial diversion of criminal charges, TEX. GOV’T CODE ANN. § 76.011(a)(1) (2011), in Harris County, undocumented immigrants are not offered this type of case resolution, McCann Interview, *supra* note 211 (explaining that prosecutors in the District Attorney’s Office do not offer pretrial diversion “to anyone perceived to be undocumented,” but that “[i]nstead, they will give you straight time”). Both pretrial diversion and deferred adjudication, *see supra* note 213, allow for dismissal of the criminal charge after successful completion of a probationary period. Pretrial diversion is a particularly attractive option for noncitizens because, unlike deferred adjudication, it would not count as a criminal conviction under the immigration law. *See* 8 U.S.C. § 1101(a)(48)(A) (2012) (defining “conviction” for purposes of the immigration law).

<sup>215</sup> Bennett Interview, *supra* note 210 (“We do not offer probation to undocumented immigrants. In those cases that are mandatory probation we would leave it to the court to give those cases probation.”); Bynum Interview, *supra* note 212 (explaining that the District Attorney’s Office does not give “immigrants the benefit of probation”).

<sup>216</sup> TEX. CODE CRIM. PROC. ANN. art. 42.12, § 15(a)(1) (providing that under certain conditions the “judge *shall suspend* the imposition of the sentence” for crimes classified as “state jail felonies” and instead “place the defendant on community supervision” (emphasis added)). *See generally* Charlie Savage, *Trend to Lighten Harsh Sentences Catches On in Conservative States*, N.Y. TIMES, Aug. 13, 2011, at A14 (discussing Texas’s move to reduce sentencing exposure for low-level drug offenders).

<sup>217</sup> *See, e.g.*, Hochglaube Interview, *supra* note 207 (describing the local practice of sentencing undocumented offenders to “county time”).

<sup>218</sup> *See, e.g.*, Alviar Interview, *supra* note 203 (agreeing that the judge in her courtroom offers jail time to undocumented defendants); Anderson Interview, *supra* note 201 (“We have two options. We have probation and forms of probation like deferred adjudication. Simple incarceration is on the other side. Probation is off the counter for illegal aliens—you are looking at prison time.”); Telephone Interview with Paul B. Kennedy, Attorney, Hous., Tex. (Apr. 12, 2012) [hereinafter Kennedy Interview] (explaining that “some judges would not consider probation for an [undocumented] noncitizen because that person shouldn’t be here in the first place”); Schneider Interview, *supra* note 201 (agreeing that judges do not sentence illegal aliens to probation).

<sup>219</sup> Worlinger Interview, *supra* note 206.

<sup>220</sup> Alviar Interview, *supra* note 203.

Harris County's prosecutorial focus on illegal immigrant defendants is no secret. Patricia Lykos, who served as Harris County's District Attorney until January 2013, made a tough stance on illegal immigration a central theme of her election campaign. "[T]here will be no sanctuary cities in Harris County when I'm D.A.," she reassured voters.<sup>221</sup> After winning the race on the GOP ticket in 2008, Lykos proclaimed that ICE needed to be at the Harris County courthouse "24-7" to screen illegal immigrants so that prosecutors could have more reliable information when making bond and plea recommendations.<sup>222</sup>

In practice, Harris County prosecutors regularly turn to federal officers located in the jails and courthouses for immigration status information. They also rely on their own investigations, information gathered at booking by police officers and sheriffs, and reports written by pretrial services court personnel. If the line deputy believes that immigration status is questionable, the burden shifts to the defendant to come forward with evidence of lawful residence in the United States in order to become eligible for a standard plea deal. For those defendants who can establish that they are "in the gray area"—meaning, "here legally but there are collateral consequences" (quadrant II of the matrix)—the official policy allows prosecutors to offer probation or other alternative sentences.<sup>223</sup>

In determining the proper criminal case resolution for a "gray area" defendant, prosecutors are instructed to take the same factors into consideration as they would for all cases—including the seriousness of the crime, the defendant's background, participation in the offense, and the expectation of rehabilitation.<sup>224</sup> However, unlike in Los Angeles, prosecutors are careful to stress that immigration consequences are not part of what a case is "worth" and therefore are not considered when making a plea offer.<sup>225</sup> As one prosecutor elaborated:

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<sup>221</sup> Alan Bernstein, *Campaign 2008: D.A. Candidates Focus on Immigration Issue*, HOUS. CHRON., Apr. 3, 2008, at B1.

<sup>222</sup> Susan Carroll, *Perry Demands Action by Feds*, HOUS. CHRON., Nov. 19, 2008, at A1. Harris County District Attorney Patricia Lykos was recently replaced by Mike Anderson, who ran in part on a promise to prosecute "trace" drug cases as felonies rather than misdemeanors. Brian Rogers, *Anderson Rolls in D.A.'s Race*, HOUS. CHRON., Nov. 7, 2012, at B1.

<sup>223</sup> Worlinger Interview, *supra* note 206; *see also* Hochglaube Interview, *supra* note 207 (also using the term "gray area" to describe defendants whose deportation remains uncertain).

<sup>224</sup> Harris Dist. Attorney Operations Manual, *supra* note 208, at 343–44.

<sup>225</sup> *See, e.g.*, Worlinger Interview, *supra* note 206 ("It is not fair for a citizen to get a worse plea recommendation and then bend over backwards for someone here under tenuous circumstances—and on top of that committing crimes."). Some defense attorneys

I'm not going to give your client a benefit that a citizen wouldn't get. I look at the case based on the facts and the evidence. Either it is a case that we could put before the jury as charged—and that is appropriate. Or, we don't think the case is as strong so we might offer something reduced for that reason. . . . For me, immigration consequences should not be a consideration . . . . We should be looking at the case based on what the case is worth.<sup>226</sup>

Thus, in Harris County, the happenstance of a plea that may be favorable to the quadrant II defendant in retaining lawful status depends on the strength of the evidence,<sup>227</sup> traditional plea factors, and rules governing plea bargaining.<sup>228</sup> Defense attorneys have adjusted their plea practice to fit these rules of local noncitizen practice, acknowledging that “[p]rosecutors don't give you flexibility based on immigration. . . . It doesn't play well with prosecutors to say ‘I need this to be reduced . . . for immigration reasons.’”<sup>229</sup> Accordingly, defense attorneys “try not to bring it up,” reflecting the practical reality that raising immigration issues “doesn't change what [prosecutors] do at all.”<sup>230</sup>

As mentioned earlier, prosecutorial refusal to consider the collateral consequence of deportation could be characterized as a form of “neutrality.” Indeed, prosecutors in Harris County describe their practice of not considering the deportation impact of criminal convictions as one that fosters equal treatment of all defendants, regardless of immigration status. Alternatively, viewed through the lens of the Los Angeles model, Harris County's approach could be understood as discriminatory because it blinds itself to a key factor (deportation)

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expressed agreement with this rationale. *See, e.g.*, Walker Interview, *supra* note 200 (“I agree with that argument—why should John Smith get a worse plea agreement than someone who hopped the fence? They say: ‘I don't care.’ They want him gone.”).

<sup>226</sup> Bennett Interview, *supra* note 210.

<sup>227</sup> The concept of “what the case is worth,” *id.*, was described frequently by interviewees as the strength of the evidence. When evidence is weak, the case is “worth” less than when evidence is strong and easily proven at trial. Over forty years ago, in his classic study of the prosecutor's role in plea bargaining, Albert Alschuler similarly found that prosecutors described reducing their initial plea offer based on “a weak case.” Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 59 (1968).

<sup>228</sup> It is important also to note that immigration plea bargaining is constrained by the Harris County District Attorney's general policy against reducing the level of misdemeanors during plea bargaining. For example, prosecutors cannot offer someone charged with a Class A misdemeanor a downward bargain of a plea to a Class B or C misdemeanor. *See, e.g.*, Walker Interview, *supra* note 200 (emphasizing that immigration plea bargaining has been affected by the general policy against reducing misdemeanors: “That whole Class C thing has been taken away.”); Worlinger Interview, *supra* note 206 (explaining that his office “wants to keep [misdemeanor] charges the way they come into court as much as possible”).

<sup>229</sup> H. Martinez Interview, *supra* note 211.

<sup>230</sup> Bynum Interview, *supra* note 212.

that dramatically impacts how a plea affects a certain subset of defendants.<sup>231</sup>

The illegal-alien-punishment model's focus on undocumented defendants is further reinforced by Texas state law. For example, Texas judges are required to report all illegal criminal aliens convicted of felonies to federal immigration authorities.<sup>232</sup> Similarly, Texas parole officials must order all illegal criminal aliens to depart the United States and not return, even if not formally ordered by ICE to deport.<sup>233</sup>

In summary, within the illegal-alien-punishment model, defendants with questionable immigration statuses are treated as outsiders to the normal criminal process: They are subject to a separate system of heightened bond, not offered plea bargains, and always incarcerated. In contrast, lawful residents who are charged with crimes and who can prove their status are treated as citizens: They can access all the bond, plea bargaining, and sentencing arrangements available within the county. As the next section describes, Maricopa County takes yet a different approach.

### C. *Immigration-Enforcement Model*

“Because of Arizona law, there is a check [of immigration status] from the arrest stage on.”

—Criminal court judge, Maricopa County

“The idea that state and local law enforcement can successfully and legally combat illegal immigration has moved from a provocative theory a few years ago to reality today.”

—Former county attorney, Maricopa County<sup>234</sup>

“We’ve been doing that in this state for many, many years. . . . The cops just assume that—if you are brown—‘there is a good chance I can drag you in.’ . . . Sometimes, they hit the ‘trifecta’: misdemeanor, felony, and immigration.”

—Contract public defender, Maricopa County

The immigration-enforcement model, as implemented in Maricopa County, Arizona, is designed to affirmatively maximize the immigration-enforcement potential of local policing power and state

<sup>231</sup> See generally *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010) (recognizing that “deportation is a particularly severe penalty” and that “recent changes in our immigration law” have made it “most difficult to divorce the [deportation] penalty from the conviction”).

<sup>232</sup> TEX. CODE CRIM. PROC. ANN. art. 2.25 (West 2006 & Supp. 2012).

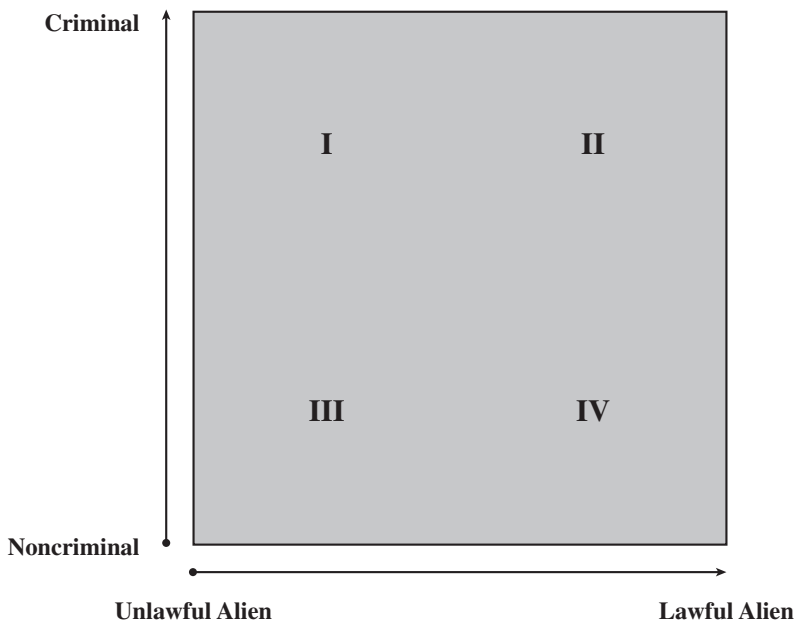
<sup>233</sup> TEX. GOV'T CODE ANN. § 508.192 (West 2011).

<sup>234</sup> MARICOPA CNTY. ATTORNEY'S OFFICE, ANNUAL REPORT 2 (2009), available at <http://www.maricopacountyattorney.org/pdfs/annual-reports/2009-MCAO-Annual-Report.pdf> (last visited Apr. 3, 2013).

criminal process. The approach incorporates the identification of civil immigration law violators into the standard mission of the criminal justice system. In addition, rather than focus on enhanced criminal punishment for noncitizens, the model first turns to the federal government with anticipation that the alien may be deported.

The immigration-enforcement model operates in all four quadrants of the criminal alien matrix. In quadrants III and IV, the model uses police officers to identify immigration status and to refer potentially deportable noncitizens to federal authorities. In quadrants I and II, the model relies on a sophisticated understanding of the collateral consequences doctrine to trigger federal deportation and bar immigrants from lawful entry in the future.

FIGURE 7  
Immigration-Enforcement Model



The Maricopa County model is supported by an intricate set of state laws designed to maximize the federal immigration-enforcement potential of criminal court process.<sup>235</sup> For example, state law mandates attention to alienage through police investigation of alienage

<sup>235</sup> See, e.g., Telephone Interview with Judge Warren J. Granville, Criminal Dep't Assoc. Presiding Judge, Superior Court of Ariz., Maricopa Cnty., Phx., Ariz. (Mar. 30, 2012) [hereinafter Granville Interview] (discussing how state law has shaped state criminal court process).



status,<sup>236</sup> early and systematic referral to immigration authorities,<sup>237</sup> detention without bond for unauthorized migrants,<sup>238</sup> and differential sentencing according to immigration status.<sup>239</sup> Under the most famous of Arizona's immigration laws, SB 1070, the official policy of Arizona is to produce a regime of "attrition through enforcement."<sup>240</sup>

There are several distinctive features of the affirmative enforcement model. First, consider the role of local police. In Maricopa County, police conduct affirmative investigations of immigration status, report every suspected immigration law violator to federal officials, and fill out internal reports on deportability. Since 2008, the Phoenix Police Department (PPD) has directed its force to ask all lawfully-detained suspects about their immigration status.<sup>241</sup> The PPD contends that one of the benefits of this enforcement policy is that officers can transport suspected migrants directly to immigration authorities, rather than booking them for a crime through their county

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<sup>236</sup> ARIZ. REV. STAT. ANN. § 11-1051(B) (2012) (mandating police inquiry into immigration status). The United States Supreme Court has found that Arizona's mandatory immigration screening of all persons stopped, detained, or arrested by local law enforcement is not facially preempted by federal immigration law. *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012).

<sup>237</sup> ARIZ. REV. STAT. ANN. § 13-3906(A) (2010) ("[A]fter a person is brought to a law enforcement agency for incarceration, the law enforcement agency shall . . . determine that person's country of citizenship.").

<sup>238</sup> As a result of a successful 2006 ballot initiative known as Proposition 100, Arizona amended its constitution to deny bond to certain undocumented immigrants. ARIZ. CONST. art. II, § 22(A)(4) (exempting from Arizona's "bailable offenses" those "serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge"); *see also* ARIZ. REV. STAT. ANN. § 13-3961(A)(5) (2010 & Supp. 2012) (same). A divided Ninth Circuit panel recently affirmed the dismissal of a federal court challenge to the constitutionality of Proposition 100. *Lopez-Valenzuela v. Cnty. of Maricopa*, 719 F.3d 1054 (9th Cir. 2013).

<sup>239</sup> ARIZ. REV. STAT. ANN. § 13-701(D)(21) (2010 & Supp. 2012) (making violations of federal immigration crimes, such as illegal entry and alien smuggling, into state sentencing aggravators).

<sup>240</sup> The term "attrition through enforcement" refers to the official Arizona policy to vigorously enforce the immigration laws in order to drive unauthorized immigrants out of the state. Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070), S. 1070, 49th Leg., 2d Reg. Sess. § 1 (Ariz. 2010) ("The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona."). For an early example of the "attrition through enforcement" term, *see* MARK KRİKORIAN, CTR. FOR IMMIGRATION STUDIES, DOWNSIZING ILLEGAL IMMIGRATION: A STRATEGY OF ATTRITION THROUGH ENFORCEMENT 3 (2005), *available at* <http://www.cis.org/sites/cis.org/files/articles/2005/back605.pdf> (advocating increased enforcement and other policies that foster "self-deportation").

<sup>241</sup> For the current version of the policy, *see* PHX. POLICE DEP'T, IMMIGRATION ENFORCEMENT, OPERATIONS ORDER § 4.48(5)(B)(1) (July 20, 2012) [hereinafter PPD OPERATIONS ORDER], *available at* [http://phoenix.gov/webcms/groups/internet/@inter/@dept/police/documents/web\\_content/066268.pdf](http://phoenix.gov/webcms/groups/internet/@inter/@dept/police/documents/web_content/066268.pdf).

jail.<sup>242</sup> After the PPD adopted this policy of direct delivery to ICE in 2008, the number of Phoenix jail bookings with immigration detainers declined by thirteen percent, saving the city from expenses normally associated with booking and jailing deportable criminal suspects.<sup>243</sup> In terms of the criminal alien matrix, these police policies can be understood as bringing noncitizens to the attention of federal immigration officials early in the criminal process (quadrants III and IV).

If federal authorities decline immediate custody based on a civil immigration violation, Maricopa County officials can detain immigrants in the local jail, often on very minor offenses.<sup>244</sup> Defense attorneys in Maricopa County repeatedly described the same scenario: A noncitizen presents a Mexican consular identification card during questioning from the police only to be arrested for document fraud<sup>245</sup> because the foreign document looks “suspicious.”<sup>246</sup> As one public defense attorney explained, “an inoffensive traffic stop for some violation of the traffic code invariably turns into a felony forgery charge when the driver provides what the police officer believes is a fraudulent driver’s license or identification either from Arizona or Mexico.”<sup>247</sup> In this way, the immigrant can be brought into local criminal custody, even in the absence of additional criminal conduct.

Once detained, the immigrant will be categorically ineligible for bond if found to have “entered or remained in the United States

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<sup>242</sup> See Michael Ferraresi, *Phoenix Police Union Seeks Holder’s Support on SB 1070*, ARIZ. REPUBLIC, June 9, 2010, at B1 (explaining that the policy of bringing suspects directly to ICE is cost effective because otherwise the city has to pay \$192 for each booking, plus associated jail costs); see also PPD OPERATIONS ORDER, *supra* note 241, at § 4.48(6)(A)(1)(c) (providing that PPD officers may obtain a “voluntary consent” from a suspect “to transport [the individual directly] to ICE”).

<sup>243</sup> Ferraresi, *supra* note 242. See generally Telephone Interview with Matthew Buesing, Assistant City Prosecutor III, Phx. City Prosecutor’s Office, Phx., Ariz. (Apr. 14, 2012) [hereinafter Buesing Interview] (describing process by which criminal suspects are booked into Phoenix city jail and subject to immigration screening).

<sup>244</sup> The United States Supreme Court has found that even custodial arrests for minor fine-only offenses (like failure to wear a seatbelt) can survive constitutional scrutiny. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

<sup>245</sup> See ARIZ. REV. STAT. ANN. § 13-2002(A) (2010 & Supp. 2012) (possession or presentation of a false document); *id.* § 13-2006 (2010) (criminal impersonation); *id.* § 13-2008 (taking the identity of real or fictitious person); *id.* § 13-2009 (aggravated taking of the identity of another); *id.* § 13-2310 (fraud schemes).

<sup>246</sup> See, e.g., Telephone Interview with Tim Agan, Attorney, Office of the Legal Advocate, Phx., Ariz. (Aug. 13, 2010) [hereinafter Agan Interview] (describing such a case in Maricopa County); Telephone Interview with Barbara Cerepanya, Contract Attorney, Phx. Pub. Defender’s Office, Phx., Ariz. (Apr. 27, 2012) [hereinafter Cerepanya Interview] (describing a similar case).

<sup>247</sup> Telephone Interview with Elmer Parker, Deputy Pub. Defender, Reg’l Court Ctr., Maricopa Cnty. Pub. Defender’s Office, Phx., Ariz. (Jan. 3, 2011).

illegally” and charged with a “serious felony offense.”<sup>248</sup> Since Arizona defines the “serious felony” category broadly to include any class one, two, three, or four felony, the document fraud scenario just described qualifies for mandatory detention without bond.<sup>249</sup> Even if the immigrant is not charged with a qualifying felony, Arizona law provides that immigration status can be considered in making individualized bail assessments.<sup>250</sup>

To assist the judge with immigration status determinations, every arresting officer in the county completes a “Release Questionnaire” setting forth whether the person is unlawfully present in the United States.<sup>251</sup> Judges and pretrial services officers also look to federal immigration officers at the jail for assistance in investigating status.<sup>252</sup> For example, under a federal initiative known as the Criminal Alien Program (CAP),<sup>253</sup> fourteen federal officers are currently stationed in the Maricopa County jail to identify potentially deportable arrestees.<sup>254</sup> The number of CAP officers stationed in the Maricopa County jail is higher than the eleven CAP officers stationed in the Harris County jail or the seven stationed in Los Angeles County jail, where average jail populations are significantly larger.<sup>255</sup> This process of early and intensive identification of noncitizens in the Maricopa County jail helps to ensure that eligible arrestees are processed for deportation.<sup>256</sup>

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<sup>248</sup> See *supra* note 238 (containing relevant citations to the Arizona law that categorically denies bond to certain undocumented immigrants).

<sup>249</sup> ARIZ. REV. STAT. ANN. § 13-3961(A)(5)(b) (2010 & Supp. 2012) (“‘Serious felony offense’ means any class 1, 2, 3 or 4 felony or any violation of § 28-1383.”).

<sup>250</sup> *Id.* § 13-3967(B)(11) (2010). As a result, judges consider immigration status even for misdemeanor defendants. See, e.g., Telephone Interview with Commissioner Charles Donofrio, Presiding Initial Appearance Comm’r, Superior Court of Ariz., Maricopa Cnty., Phx., Ariz. (Apr. 24, 2012) [hereinafter Donofrio Interview] (“If we have an EWI there is a chance we are going to put a bond on them because if we don’t we will lose them because ICE would take them for deportation . . .”).

<sup>251</sup> See State of Ariz., Cnty. of Maricopa, Release Questionnaire Supplemental—Prop. 100 Questions (Jan. 9, 2012) (on file with author).

<sup>252</sup> Telephone Interview with Barbara Broderick, Chief Adult Prob. Officer for Maricopa Cnty., Phx., Ariz. (Apr. 25, 2012) [hereinafter Broderick Interview] (“Exactly what the immigration status is, only [ICE] can make that determination.”).

<sup>253</sup> See generally *Criminal Alien Program*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/criminal-alien-program> (last visited Mar. 2, 2012) (describing the jail-based CAP program).

<sup>254</sup> Data Table, Criminal Alien Program Officer by County Jail, U.S. Immigration & Customs Enforcement (obtained by author with Freedom of Information Act request on Aug. 10, 2012).

<sup>255</sup> *Id.* For the average daily jail populations in Los Angeles, Harris, and Maricopa Counties, see *infra* Table 3.

<sup>256</sup> While Secure Communities is used to place immigration “holds,” Criminal Alien Program officers are in charge of ensuring that “everyone that gets released from our county facilities are processed” for deportation. See Naranjo Interview, *supra* note 89

Another distinctive aspect of Maricopa County's immigration-enforcement model is the prosecution of state immigration crimes—that is, crimes that make alienage an element of the criminal offense.<sup>257</sup> Although the Supreme Court invalidated two Arizona immigration crimes (failure to carry registration documents and working without legal documentation)<sup>258</sup> and the Ninth Circuit has enjoined the enforcement of two others (making it unlawful to seek work or hire someone from a motor vehicle),<sup>259</sup> other Arizona immigration crimes remain in effect. For example, in Arizona it is a felony to possess handguns while undocumented,<sup>260</sup> to smuggle human beings with the knowledge that they are not lawfully present in the state,<sup>261</sup> or to induce an unlawful alien to come to Arizona while committing another crime.<sup>262</sup> Indeed, immediately after the Supreme Court's decision, Maricopa County Attorney Bill Montgomery reassured constituents that “[a]lleged violations of provisions of SB 1070” could still “be submitted to the Maricopa County Attorney's Office.”<sup>263</sup> In sharp contrast to Arizona, Texas has no state immigration crimes<sup>264</sup> and, as previously discussed, California's immigration crimes are not enforced, at least not in the state's largest county.<sup>265</sup>

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(stressing that the purpose of immigration custody is only to hold an immigrant with the intent of removal, rather than for criminal prosecution).

<sup>257</sup> See generally MARICOPA CNTY. ATTORNEY'S OFFICE, ILLEGAL IMMIGRATION REPORT 8 (Sept. 2008), available at [http://intellectualconservative.com/images/MCAO\\_report\\_on\\_illegal\\_immigration.pdf](http://intellectualconservative.com/images/MCAO_report_on_illegal_immigration.pdf) (last visited Mar. 27, 2013) (discussing the establishment of a “Special Crimes Bureau” to focus “on criminal activity that violates immigration law”).

<sup>258</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012).

<sup>259</sup> *Valle del Sol, Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013) (enjoining on First Amendment grounds the enforcement of Arizona's day laborer solicitation crimes).

<sup>260</sup> ARIZ. REV. STAT. ANN. § 13-3101(A)(7)(e) (2010 & Supp. 2012).

<sup>261</sup> *Id.* § 13-2319.

<sup>262</sup> *Id.* § 13-2929(A)(3) (Supp. 2012).

<sup>263</sup> News Release, Bill Montgomery, Maricopa Cnty. Attorney, County Attorney Comments on U.S. Supreme Court Ruling on SB 1070 (June 25, 2012) [hereinafter Montgomery News Release], available at <http://www.maricopacountyattorney.org/newsroom/2012-06-25-County-Attorney-Comments-on-SB1070-Ruling.pdf>.

<sup>264</sup> Texas has made human trafficking a crime, but this crime does not require proof of alienage and therefore is not classified here as an immigration crime. TEX. PENAL CODE ANN. § 20A.02 (West Supp. 2012). Additionally, over the past decade, only ten human trafficking cases have been prosecuted in Harris County. Data Table, Dist. Clerk, Harris Cnty., Tex. (1999–2010) [hereinafter Harris Cnty. Dist. Clerk Data Table] (obtained by author with public records request on Apr. 27, 2011) (providing case filing and disposition data).

<sup>265</sup> See *supra* Figure 5 and note 170 (containing immigration crime prosecution data obtained by author from the Los Angeles County District Attorney's Office).

Crucial to Maricopa County's affirmative immigration arsenal is Arizona's human smuggling crime.<sup>266</sup> Under an expansive interpretation of the smuggling law,<sup>267</sup> this crime has been used in Maricopa County to pursue "class four" felonies against immigrants for the crime of "conspiring" to smuggle themselves.<sup>268</sup> By adopting a broad interpretation of the smuggling crime to apply to the migrants being smuggled, Maricopa County enables its officers to patrol immigrant communities for illegal entrants in the absence of express federal delegation of such power.<sup>269</sup> In enforcing the smuggling law, the county either transfers suspected self-smugglers directly to ICE or gives very low criminal sentences (of "time served" or probation), which facilitate immediate removal.<sup>270</sup> Understood in terms of the criminal alien matrix, the state smuggling law allows Maricopa County to rely on a state-crafted immigration violation to convert "illegal aliens" (quadrant III) into "criminal aliens" (quadrant I).

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<sup>266</sup> ARIZ. REV. STAT. ANN. § 13-2319(F)(3) (Supp. 2012) (defining the "smuggling of human beings" as including the transportation of persons with knowledge "that the person or persons transported or to be transported are not United States citizens, permanent resident aliens or persons otherwise lawfully in this state or have attempted to enter, entered or remained in the United States in violation of law").

<sup>267</sup> For additional detail on the legal interpretation of the human smuggling law in Maricopa County, see Letter from Andrew P. Thomas, Maricopa Cnty. Attorney, to Joseph Arpaio, Maricopa Cnty. Sheriff (Sept. 29, 2005) (obtained by author with public records request on Dec. 28, 2010).

<sup>268</sup> This approach merges Arizona's human smuggling law with the law of conspiracy. See generally ARIZ. REV. STAT. ANN. § 13-1003(A) (2010) ("A person commits conspiracy if, with the intent to promote or aid the commission of an offense, such person agrees with one or more persons that at least one of them or another person will engage in conduct constituting the offense and one of the parties commits an overt act in furtherance of the offense . . .").

<sup>269</sup> For a detailed discussion of Maricopa County's "I smuggled myself" prosecutions, see Eagly, *Local Immigration Prosecution*, *supra* note 11, at 1760-1805. Although the practice of prosecuting migrants for smuggling themselves has been challenged as preempted by federal law, to date the practice has not been sanctioned by the courts on preemption grounds. *Id.* at 1752 & n.12-16 (citing court decisions upholding Maricopa County's power to pursue such prosecutions). A federal court preemption challenge to the Maricopa County smuggling prosecution practice is still pending. See *We Are America/Somos America, Coalition of Arizona v. Maricopa Cnty. Bd. of Supervisors*, 809 F. Supp. 2d 1084 (D. Ariz. 2011). However, ongoing police enforcement of the smuggling law will now be subject to a permanent injunction that prevents officers of the Maricopa County Sheriff's Office from "detaining any person based only on knowledge or reasonable belief, without more, that the person is unlawfully present within the United States." *Melendres v. Arpaio*, 695 F.3d 990, 994, 1000 (9th Cir. 2012) (internal quotation marks omitted). In affirming the district court's ruling, the Ninth Circuit was careful to clarify that, under the Fourth Amendment, "illegal presence, without more" cannot give rise to "reasonable suspicion of violation of Arizona's human smuggling statute." *Id.* at 1001.

<sup>270</sup> See Eagly, *Local Immigration Prosecution*, *supra* note 11, at 1775 & n.182 (describing high guilty plea rate in Maricopa County's immigration crime prosecutions); *id.* at 1803-04 & fig.4 (documenting that the average sentence for smuggling in Maricopa County is two months or less).

The Maricopa County Attorney's Office has been particularly vigorous in pursuit of the human smuggling crime, securing hundreds of convictions over the past few years.<sup>271</sup> In the aftermath of the Supreme Court's 2012 decision in *United States v. Arizona*, Maricopa County Sheriff Joe Arpaio announced that his deputies would continue to use the smuggling crime tool and immediately thereafter arrested nine immigrants traveling in a vehicle on suspicion of "smuggling themselves."<sup>272</sup> Maricopa County Attorney Bill Montgomery was also quick to announce in the wake of the Supreme Court's decision that "Arizona still has its human smuggling statute, which has been used to prosecute illegal immigrants as their smugglers' co-conspirators" along with other immigration crimes, such as the prohibition "on transporting illegal immigrants."<sup>273</sup>

The plea-bargaining approach of Maricopa County prosecutors is also different from those of the other two counties. While Harris County has an illegal alien exclusion policy and Los Angeles County has a collateral consequences policy, Maricopa County has no written policy on noncitizen plea bargaining.<sup>274</sup> However, interviews with practicing attorneys in the county indicate that often immigration consequences are an express prosecutorial goal of the conviction. Conventional wisdom in Maricopa County dictates that defense attorneys not raise immigration issues because doing so may actually reduce the willingness of prosecutors to negotiate a disposition.<sup>275</sup> As one defense attorney explained: "It doesn't matter to prosecutors if they have immigration consequences. Apparently there are things that they can't do. They don't reduce a charge. And they don't dismiss unless they have a really good reason. Immigration status, for them, is

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<sup>271</sup> Data Table, Maricopa Cnty. Attorney's Office (2004–2010) (obtained by author with public records request on May 26, 2011).

<sup>272</sup> Press Release, Maricopa Cnty. Sheriff's Office, Immigration Agents Take Custody of Suspected Illegal Aliens Following Traffic Stop by Sheriff Arpaio's Deputies (July 2, 2012), available at <http://www.mcso.org/MultiMedia/PressRelease/First%20Encounter%20Since%20SCOTUS%20Ruling.pdf>.

<sup>273</sup> Jeremy Duda, *Supreme Court, Feds Gut SB 1070 Enforcement*, ARIZ. CAPITOL TIMES, June 29, 2012, at 1, 9.

<sup>274</sup> See E-mail from Debbie MacKenzie, Custodian of Records, Maricopa Cnty. Attorney's Office, to author (Sept. 1, 2010) (explaining that the office does not have any records responsive to author's public records request for, among other things, policies on plea bargaining with citizens versus noncitizens).

<sup>275</sup> See, e.g., Agan Interview, *supra* note 246 (stressing that the "state is not sympathetic" to efforts by defense attorneys "to negotiate away deportation consequences"); Telephone Interview with Kara Hartzler, Criminal Immigration Consultant & Legal Dir., Florence Immigrant & Refugee Rights Project, Florence, Ariz. (Aug. 25, 2010) [hereinafter Hartzler Interview] (explaining that, in general, if defense attorneys "bring up immigration, prosecutors are going to be less likely to negotiate").

not a good reason.”<sup>276</sup> Accordingly, to the extent that immigration-safe pleas do result, they are reached without discussing immigration and tend to be confined to “lateral moves”—that is, pleas to equally or more serious crimes than those originally charged.<sup>277</sup>

A key difference between Maricopa County and the other two counties is the extent to which prosecutorial inflexibility in the area of plea bargaining is articulated in immigration-enforcement terms. Public records reveal that Harris County prosecutors are interested in ensuring that there are no technical errors in the plea record that could inadvertently make immigration removal difficult.<sup>278</sup> In Maricopa County, however, prosecutors have gone further by actually choosing among potential charges with the objective of influencing immigration results. For example, county prosecutors may insist on pleas to aggravated felonies or crimes of moral turpitude with the explicit aim of increasing the odds of deportation and application of criminal bars on reentry.<sup>279</sup> Indeed, pursuing felony convictions to make noncitizens ineligible for immigration relief is articulated as a prosecutorial goal in Maricopa County—a “no-amnesty” approach to criminal justice.<sup>280</sup>

Maricopa County’s focus on ensuring criminal deportations continues during the sentencing and corrections process. Three examples are noteworthy. First, sentencing judges must make a “finding of fact”

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<sup>276</sup> Cerepanya Interview, *supra* note 246.

<sup>277</sup> Hartzler Interview, *supra* note 275 (stressing that plea agreements must give prosecutors “what they want,” such as a “lateral move” or sometimes a plea to “more serious crimes”); *see also* Telephone Interview with Margarita Silva, Attorney, Phx., Ariz. (Mar. 28, 2012) (emphasizing that “as long as sentence and level of felony can be the same and it is a similar offense, they may be willing to extend an offer”).

<sup>278</sup> For example, in assault cases that could result in automatic deportation because of the family relationship between the perpetrator and the victim, Harris County prosecutors are reminded to “plead the family relationship in the indictment and misdemeanor information” and to “ask for an affirmative finding of family violence on the judgment.” E-mail from Jane Waters, Assistant Dist. Attorney, Harris Cnty. Dist. Attorney’s Office, to Harris Cnty. Dist. Attorney’s Office Prosecutors (Sept. 25, 2006) (obtained by author with public records request on Aug. 22, 2011). In narcotics cases, the Harris County Appellate Division advises its trial attorneys confronted with a noncitizen “repeat offender” that “abandonment of the enhancement paragraph will make it much more difficult for the Government to subject that defendant to future deportation from the United States.” E-mail from Alan Curry, Appellate Div. Chief, Harris Cnty. Dist. Attorney’s Office, to Harris Cnty. Dist. Attorney’s Office Prosecutors (July 20, 2010) (obtained by author with public records request on Aug. 22, 2011).

<sup>279</sup> *See, e.g.*, Schneider Interview, *supra* note 201 (noting that sometimes prosecutors seek a felony conviction so that the person will not come back to the United States).

<sup>280</sup> MARICOPA CNTY. ATTORNEY’S OFFICE, ANNUAL REPORT 4 (2007), *available at* <http://www.maricopacountyattorney.org/pdfs/annual-reports/2007-MCAO-Annual-Report.pdf> (last visited Apr. 3, 2013) (clarifying that the “felony conviction greatly undermines the ability of such defendants to immigrate to the country legally or become a U.S. citizen”).

as to whether a defendant is “unlawfully present.”<sup>281</sup> As a result, Maricopa County judges routinely include the following order in non-citizen criminal files:

The Court has been informed that defendant was born in Mexico. In addition, the Court has been presented with sufficient evidence that defendant has been identified by federal authorities or a 287(g) officer as a person who is unlawfully present in the United States. . . . [T]he clerk shall send a copy of this order to the United States Immigrations and Customs Enforcement.<sup>282</sup>

A second distinctive aspect of Maricopa County sentencing is the use of probation for noncitizen defendants. Maricopa judges do grant probation for noncitizens but require that all probationers comply with federal immigration law as one of the standard probation terms.<sup>283</sup> Probation in the immigration-enforcement model thus has a different function than in Los Angeles’s alienage-neutral model, which does not check immigration status or otherwise refer probationers to ICE.<sup>284</sup> In Maricopa County, probation officers have taken

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<sup>281</sup> In order to comply with Arizona law, ARIZ. REV. STAT. ANN. § 11-1051(C) (2012), when an “unlawfully present” immigrant in Arizona is “convicted of a violation of state or local law,” judges must “include a finding of this fact [of unlawful presence] in the sentencing order and the clerk shall send a copy of the order to an ICE office identified by the Administrative Office of the Courts.” Arizona Supreme Court Administrative Order 2010-91, available at <https://www.azcourts.gov/Portals/22/admorder/Orders10/2010-91.pdf>. By requiring evidence of status to be presented by “federal authorities or a 287(g) officer,” *id.*, this practice avoids tension with a long-standing Arizona procedural rule that prohibits defendants from being required to disclose their immigration status to the court, ARIZ. R. CRIM. P. 17.2(f) (“The defendant shall not be required to disclose his or her legal status . . . to the court.”).

<sup>282</sup> Maricopa County Sentencing Minute Order, Form R109B-10 (dated Apr. 23, 2012) (on file with author). See generally Granville Interview, *supra* note 235 (“Our default position is that we will send [the notice required by state law] to them under the theory that if ICE looks at it and says ‘he’s fine, why are you sending this to us?’ That is their call. It is not our call. Whether that impacts the person’s status—that is not our call. That is going to be the feds’ call.”); Telephone Interview with Jeremy Mussman, Deputy Dir., Maricopa Cnty. Pub. Defender, Phx., Ariz. (Aug. 16, 2010) (“In a nutshell, what the new law means is that if the state court becomes aware—based on information they get from the feds—that there is a basis that person is here illegally, then they need to tell the feds.”); Telephone Interview with Mikel Steinfeld, Deputy Pub. Defender, Maricopa Cnty. Pub. Defender’s Office, Phx., Ariz. (Jan. 12, 2011) [hereinafter Steinfeld Interview] (describing the process by which courts use information from the presentence report to make a finding of illegal status to forward to ICE).

<sup>283</sup> See, e.g., Donofrio Interview, *supra* note 250 (explaining that Maricopa County probation “term number 20” requires deportable noncitizens to leave voluntarily and not return illegally); Hartzler Interview, *supra* note 275 (describing the standard probation requirement that “says you can’t illegally return”); Telephone Interview with Kathleen Mead, Comm’r, Reg’l Court Ctr., Superior Court of Ariz., Maricopa Cnty., Phx., Ariz. (May 22, 2012) (“One of the terms of our probation is that if you are not in the country legally you may not remain and can’t return illegally.”).

<sup>284</sup> See *supra* notes 162–64 and accompanying text.



on their judicially-mandated immigration-enforcement role by developing a “very good working relationship with ICE,” with whom they exchange “weekly lists” of noncitizen probationers.<sup>285</sup>

The third noteworthy aspect of sentencing in the immigration-enforcement model is the early release of sentenced noncitizens for deportation. Under state law, certain noncitizens consenting to deportation can have their prison sentence cut in half.<sup>286</sup> According to an official at the Arizona Department of Corrections, the presence of 287(g) officers in the prisons has greatly facilitated interviewing of inmates and allowed for an “exponential” expansion in the early release deportation program.<sup>287</sup> This policy promotes the immigration-enforcement approach by reducing criminal system’s costs associated with prosecuting noncitizens, while at the same time guaranteeing deportation.<sup>288</sup>

In sum, the immigration-enforcement model of noncitizen justice tethers the local criminal justice system to federal immigration enforcement. From the earliest investigative stage, the model maximizes the immigration-enforcement potential of local criminal justice decisions. Further along in the criminal process, the prosecution of state-level crimes that trigger immigration consequences ensures deportation and bars future reentry. Finally, probation and reduced prison sentences are important aspects of the model, aiding the county’s efficient and speedy transfer of noncitizen defendants into immigration custody for deportation.

#### D. *Pressure on the Margins*

“Sometimes I personally ask if they have a ‘hold’ [from ICE] because it is different for my negotiations. I know they will take my deal and get out.”

—Deputy city prosecutor, Los Angeles, California

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<sup>285</sup> Broderick Interview, *supra* note 252.

<sup>286</sup> ARIZ. REV. STAT. ANN. § 41-1604.14(A) (2011).

<sup>287</sup> E-mail from Dawn M. Northup, Gen. Counsel, Ariz. Dep’t of Corr., to author (May 29, 2012) (on file with author).

<sup>288</sup> Some Maricopa County defense attorneys suggest that the availability of “50 percent time” has resulted in “tougher” plea bargains for deportable defendants. Knowing that the time will be reduced significantly on the back end, prosecutors may increase their initial plea offer. *See* Steinfeld Interview, *supra* note 282. At the same time, defense attorneys explained that the availability of a sentencing reduction in exchange for deportation may make defendants “more likely to take the plea” since they are only going to do half the time. Telephone Interview with Theron Hall III, Attorney, The Hall Law Firm, P.C., Phx., Ariz. (Mar. 29, 2012).

“Sometimes you can get informal leniency.”

—Former president, Harris County Criminal Lawyers Association, Houston, Texas

“The city has different perspective than they might have in the Maricopa County Attorney’s Office.”

—City public defender, Phoenix, Arizona

Up to this point, Part III has established that each county has developed a framework for dealing with the predictable questions of immigration status and immigration enforcement that arise in the criminal context. Given efficiency concerns and the routinized nature of criminal practice, it is perhaps not surprising that cohesive views about noncitizen adjudication emerge in these high-volume, immigrant-dense counties.<sup>289</sup> However, in identifying these three distinct models of noncitizen justice, I do not mean to suggest that there is perfect countywide uniformity in how every noncitizen’s case is resolved, nor that the models govern every possible interaction with noncitizens.<sup>290</sup> Prosecutorial and judicial discretion still exist and defense attorneys still represent each client zealously.<sup>291</sup> In this section, I explore how prosecutorial discretion, agency policy, and criminal practices at times place pressure on the margins of each model to accommodate those cases that do not fit neatly into the overall approach.

First, consider prosecutorial discretion. Individual actors may at times push the boundaries of the immigration party line when compelling, unique factors are present. Such decisions are often made in the moment based on individualized assessment of equities and personal relationships among actors.<sup>292</sup> For example, despite Los Angeles’s

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<sup>289</sup> In a similar vein, over thirty years ago, James Eisenstein and Herbert Jacob compared three urban criminal justice systems and concluded that constant interaction among repeat players in lower-level courts fostered collegial “workgroups” that promoted predictable case outcomes. JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* 134–35 (1977).

<sup>290</sup> As Máximo Langer has noted, the rise of a particular criminal justice “model” for case adjudication “does not mean . . . that every single rule, decision, and practice” fits neatly into that model, nor does it mean that “there has not been resistance to” the model. Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835, 903–05 (2005).

<sup>291</sup> Similar to the argument presented by John Hagan and his co-authors regarding criminal justice more generally, it might be helpful to think of the noncitizen criminal justice models as a “loosely coupled” organization rather than one that acts in unison at all levels and across all actors. John Hagan et al., *Ceremonial Justice: Crime and Punishment in a Loosely Coupled System*, 58 SOC. FORCES 506, 508 (1979).

<sup>292</sup> As Josh Bowers’s research on misdemeanor prosecutors highlights, although many decisions are made based on broad policy rationales, others are a result of contextualized discretion. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1703 (2010). Stephanos Bibas has similarly found

overall alienage-neutral approach, an individual prosecutor may desire deportation as a form of incapacitation for a particular offender. Although the prosecutor may not seek deportation “just because someone is here illegally,” he may nonetheless “want someone deported because of cocaine or child molestation.”<sup>293</sup> As one prosecutor admitted with respect to serious felony offenders, “Most of the time I want them out; I want them to go.”<sup>294</sup> A Los Angeles defense attorney mused that a few prosecutors “do seem excited to try to get our clients deported.”<sup>295</sup> Because of the variability of prosecutor views on criminal alien status, defense attorneys stress the importance of context: “It depends on your prosecutor. If you know someone is very anti-immigrant or has voiced the issue, you are not going to go and tell them ‘My client is undocumented.’”<sup>296</sup>

A parallel commentary emerged at the margins of Harris County’s model. Although, as a general rule, “most people think immigration status is a negative,” seasoned defense attorneys agreed that, in limited cases, prosecutors might grant “informal leniency.”<sup>297</sup> One Houston defense attorney explained that, despite the general sense within the county that “status isn’t playing much of a role in terms of how the D.A.’s are handling the cases,” he might nonetheless bring up the issue with the “right prosecutor”—as a “by the way kind of thing.”<sup>298</sup> Another defense attorney explained that she would consider approaching a prosecutor with this type of noncitizen argument: “Look, this person has lived here since he was two; his mom brought him here when he was a baby. . . . He didn’t illegally enter. He was

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that multiple “structural distortions” affect plea bargaining, including agency costs, attorney competence, sentencing and bail rules, and information deficits. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2467–69 (2004).

<sup>293</sup> G. Martinez Interview, *supra* note 127.

<sup>294</sup> Castello Interview, *supra* note 111.

<sup>295</sup> Kislinger Interview, *supra* note 111.

<sup>296</sup> Interview with Rosa Fregoso, Deputy Alternate Pub. Defender, Cnty. of L.A. Alternate Pub. Defender, in L.A., Cal. (Nov. 18, 2010). Almost every Los Angeles defense attorney interviewed for this Article made similar statements. *See, e.g.*, Loeliger Interview, *supra* note 127 (“It totally depends on the district attorney. . . . I’ve had some prosecutors who are flexible and I’ve had other prosecutors who could just care less and there is almost a mindset like ‘why would I want to help this person given what they have done?’”); Silvers Interview, *supra* note 153 (“It depends on the case and depends on the prosecutor.”); Villegas Interview, *supra* note 125 (“Most prosecutors understand [about collateral consequences]. A minority will be very difficult and won’t give anybody a break and [immigration status] might make them more upset against your client.”).

<sup>297</sup> DeBorde Interview, *supra* note 181. *See also* Bunin Interview, *supra* note 211 (acknowledging that, in the right case, a resident alien who could retain status “may get an exception” to the District Attorney’s general plea bargaining approach).

<sup>298</sup> Kennedy Interview, *supra* note 218.

brought here.”<sup>299</sup> Such comments suggest there is room for the occasional exercise of mercy for those who have developed considerable ties to the United States or who may hold a future claim to lawful residence. These “twilight statuses”<sup>300</sup> challenge the traditional distinction between “illegal aliens” and “lawful immigrants” and thus require prosecutors to probe the precise boundaries of their policies that affect individuals who fall in the “gray area”<sup>301</sup> along the spectrum of alienage status.<sup>302</sup>

Second, there is potential for deviation from the county-wide approach to noncitizen justice within individual criminal justice agencies. Such deviations are more likely with criminal justice actors who do not regularly interact with one another—such as in the case of county- and city-level agencies.<sup>303</sup> For example, across the three counties, subtle distinctions emerged between the county attorneys who handle felonies and the multiple city prosecutors’ offices that handle low-level misdemeanors. The most pronounced difference was observed in Maricopa County, where city and county prosecutors are selected pursuant to a different political process,<sup>304</sup> practice in separate courts,<sup>305</sup> and prosecute different types of crimes.<sup>306</sup> In contrast to

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<sup>299</sup> Walker Interview, *supra* note 200 (emphasis added).

<sup>300</sup> See MARTIN, *supra* note 40 (using the term “twilight” to refer to intermediate immigrant residence statuses).

<sup>301</sup> Worlinger Interview, *supra* note 206 (using the term “gray area” to refer to non-citizens who cannot easily be classified as “lawful” or “illegal”).

<sup>302</sup> For a diagram of the “alienage spectrum” introduced in this Article, see *supra* Figure 1 and accompanying text.

<sup>303</sup> Recent research on local police policy has shown that county governments have different organizational and political structures than city governments, which can lead to different approaches to immigration decisionmaking. Monica W. Varsanyi et al., *A Multilayered Jurisdictional Patchwork: Immigration Federalism in the United States*, 34 L. & POL’Y 138, 144–47 (2012).

<sup>304</sup> Whereas the Maricopa County Attorney is selected in a popular election, the Phoenix City Prosecutor is an appointed position. Phx., Ariz., Ordinance No. G-5444, § 2 (Oct. 21, 2009) (designating the City Attorney as Director of the Law Department, which includes the City Prosecutor’s Office); Buesing Interview, *supra* note 243 (clarifying that the Phoenix City Prosecutor is an appointed position). County and city political leanings also diverge somewhat. While Barack Obama lost the Presidential election in Maricopa County by a margin of 10.7% in 2012, the recent election of Phoenix Mayor Greg Stanton (a candidate who did not support SB 1070) is thought to reflect the city’s more Democratic tilt. See generally *Maricopa — Elections Results*, MARICOPA CNTY. RECORDER, <http://results.enr.clarityelections.com/AZ/Maricopa/42059/113367/Web01/en/summary.html> (last visited Apr. 1, 2013) (2012 Presidential results); Lynh Bui, *Party Politics Seen in Races*, ARIZ. REPUBLIC, July 3, 2011, at B1 (discussing Phoenix Mayor’s race).

<sup>305</sup> The City Prosecutor’s Office practices in the city of Phoenix’s municipal court system, also known as “city courts.” In contrast, the Maricopa County Attorney’s Office practices in the county’s superior courts and justice courts. See ARIZONA JUDICIAL BRANCH, <http://www.azcourts.gov> (last visited Oct. 10, 2012) (select “AZ Courts,” then choose “Superior Court,” “Justice Courts,” and “City Courts”) (distinguishing between

county attorneys that will not accommodate plea bargains to avoid deportation,<sup>307</sup> Phoenix prosecutors will occasionally consider such requests submitted by defense counsel.<sup>308</sup> If the line prosecutor is not receptive, defense attorneys can “go up the ladder” and petition the Phoenix City Prosecutor’s “Hardship Committee” for relief.<sup>309</sup> The Hardship Committee’s occasional consideration of collateral immigration concerns reflects a deviation from the overall immigration-enforcement approach of the county—at least with respect to legal residents charged with very minor crimes.

It is also important to note that the internal coherence of these noncitizen justice models may, over the long term, stimulate alternative approaches to case resolution. Working within their county’s model, institutional actors may attempt to compensate for what they perceive to be the unjust results of the county’s overall approach. Two particularly interesting examples of practices that have already emerged are cooperation between Los Angeles prosecutors and federal United States Attorneys prosecuting immigration crime and an increased reliance on the part of Harris County defense attorneys on jury determinations.

Under the alienage-neutral regime, the Los Angeles District Attorney became the only county prosecutor’s office in the nation to send its attorneys to work for the Office of the United States Attorney on immigration crime cases brought in federal court. Under the program, local district attorneys work exclusively on “illegal reentry”

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types of Arizona courts). *See also* Buesing Interview, *supra* note 243 (highlighting the distinctions between city- and county-level prosecutors in Maricopa County).

<sup>306</sup> The Phoenix City Prosecutor handles only misdemeanors. *City of Phoenix Prosecutor’s Office*, CITY OF PHX., <http://phoenix.gov/law/prosecutor/index.html> (last visited July 28, 2013).

<sup>307</sup> *See supra* notes 274–80 and accompanying text.

<sup>308</sup> *See* Telephone Interview with Gary Kula, Dir., Phx. Pub. Defender’s Office, Phx., Ariz. (Apr. 11, 2012) [hereinafter Kula Interview].

<sup>309</sup> *Id.*; *see also* Buesing Interview, *supra* note 243 (acknowledging case-specific consideration of hardship in plea bargaining, including for noncitizens); Cerepanya Interview, *supra* note 246 (describing experiences plea bargaining in Phoenix city courts); Telephone Interview with Ana Sanchez, Contract Attorney, Phx., Ariz. (Apr. 13, 2012) (explaining that in misdemeanor practice in Phoenix, she will sometimes write a “letter of hardship” asking for a “deviation” based on immigration and other factors). There is a similar level of flexibility in Tolleson (another city in Maricopa County), where the city’s lead prosecutor describes immigration status as a Los Angeles prosecutor might—as “one additional factor to take into consideration in trying to figure out what is the most appropriate disposition of the charges.” Telephone Interview with Aaron Kizer, City Prosecutor, Office of the City Attorney, Tolleson, Ariz. (May 7, 2012); *see also* Sanchez Interview, *supra* (agreeing that noncitizen plea bargaining is somewhat more flexible in the city of Tolleson than with the county-level felony prosecutors).

cases<sup>310</sup>—prosecuting felons and suspected gang members who reenter the United States without permission under the federal immigration law.<sup>311</sup> The District Attorney’s immigration crime initiative is unique in that it gives local prosecutors the ability to use federal immigration law to incapacitate persons perceived to pose criminal threats, without infecting local criminal proceedings with immigration concerns. As District Attorney Steve Cooley explained when the collaboration with the United States Attorney’s Office was introduced in 2007, “[t]his is an initiative I have decided to undertake and encourage because a good chunk of our gang problem in Los Angeles County is committed by individuals who have been previously deported and then re-entered the country.”<sup>312</sup> This creative use of state prosecutorial resources allows county prosecutors to address the criminal dimension of immigration. However, consistent with the county’s alienage-neutral approach, it sharply segregates such activity from the county-level criminal court system.

Similarly, there is evidence that Harris County’s illegal immigrant punishment model may be informing case adjudication. While criminal justice is usually a plea bargained system, noncitizen defendants who are not offered any accommodation in the bargaining process may be disproportionately inclined to take their cases to trial.<sup>313</sup> Anecdotal evidence from Harris County suggests that noncitizens may indeed be rolling the dice with juries more often.<sup>314</sup> As one misdemeanor prosecutor observed, more immigrant defendants are electing “the nuclear option” of trial.<sup>315</sup> A criminal court judge in Houston agreed, explaining that “every day” he sees more cases go to trial

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<sup>310</sup> For a detailed discussion of the federal practice of prosecuting the crime of “illegal reentry,” see Eagly, *Prosecuting Immigration*, *supra* note 11, at 1320–36.

<sup>311</sup> See Doyle Interview, *supra* note 123 (describing a cooperative program whereby Assistant District Attorneys were cross-designated as Assistant United States Attorneys to prosecute gang members with certain prior felony convictions for illegal reentry).

<sup>312</sup> Troy Anderson, *Prosecutors Join Anti-Gang Effort*, L.A. DAILY NEWS, Apr. 6, 2007, at N4.

<sup>313</sup> Unlike the citizen defendant that is focused on length of sentence, when immigration status is at stake, noncitizen defendants may perceive that they “lose nothing by going to trial.” Kislinger Interview, *supra* note 111. In Los Angeles, where alienage neutrality prevails, defense attorneys agreed that if immigration were to take a punitive bent, they would just go to trial more often. See, e.g., Arrechiga Interview, *supra* note 153 (“Here in East L.A. we would just set everything for trial. They need to work with us on this or the system collapses. We win a lot of our trials here. Our weapon is to set it for trial.”).

<sup>314</sup> Texas has preserved the right to jury trial in all criminal cases that carry jail time. TEX. CONST. art. 1, § 10.

<sup>315</sup> Worlinger Interview, *supra* note 206; see also Hochglaube Interview, *supra* note 207 (explaining that prosecutors “only change pleas when really forced to. They don’t do it because they are trying to be flexible or helpful to the defense, but rather because if they can’t get [a] plea, they will be stuck trying a case that they will lose.”).

because of immigration consequences.<sup>316</sup> The same effects can be observed with “sentencing juries,” which in Texas can be empanelled in all cases, even when a defendant pleads guilty to a judge.<sup>317</sup> For example, a prosecutor described a case in which a Texas sentencing jury gave probation to a noncitizen defendant despite the fact that deportation would render him unable to successfully complete probation. To the prosecutor, who requested a sentence of incarceration, probation would be “tantamount to no punishment at all because the defendant would not have to serve the probation once deported.”<sup>318</sup> However, the jury members “weren’t looking at punishment in the same way” as the assistant district attorney and sentenced the defendant to probation.<sup>319</sup>

In conclusion, like any model that promotes consistency on an issue of such political and human complexity, at times individual cases will not fit neatly into the model. This discussion has provided important examples of how discretion can continue to operate within each county’s overall approach to noncitizen justice. With the contours of the three counties now fully set forth, Part IV analyzes the implications of this Article’s findings for both the structure of local criminal justice systems and immigration federalism.

#### IV

#### THE SIGNIFICANCE OF VARIATION IN NONCITIZEN CRIMINAL JUSTICE

As this Article has helped uncover, the criminal-immigration merger is an area that is based on policies and practices that are often hidden from view. The intersection of criminal prosecution and immigration enforcement is also highly unregulated. Aside from the post-*Padilla* Sixth Amendment obligation of defense counsel to provide immigration advice and federal preemption at the extreme end of Arizona’s approach, criminal justice actors have yet to face significant

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<sup>316</sup> Anderson Interview, *supra* note 201; *see also* Kislinger Interview, *supra* note 111 (“The cardinal rule for most public defenders is that any risk of losing a green card is usually not worth it.”).

<sup>317</sup> TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b) (West 2006 & Supp. 2012). For a recent argument that Texas state law is in fact “progressive” with respect to its procedural protections for criminal defendants, *see* Adam M. Gershowitz, *Is Texas Tough on Crime but Soft on Criminal Procedure?*, 49 AM. CRIM. L. REV. 31 (2012).

<sup>318</sup> Bennett Interview, *supra* note 210.

<sup>319</sup> *Id.* *But see* Anderson Interview, *supra* note 201 (“Texas juries are sometimes harder on illegal aliens. . . . They look at why is he in our country; it is a significant factor in sentencing.”).

constitutional constraints in navigating immigration issues.<sup>320</sup> The evolving doctrine of Fourth and Fourteenth Amendment limitations on local immigration enforcement will likely play an increasingly important role in the future.<sup>321</sup>

Yet, Los Angeles, Harris, and Maricopa Counties have each converged on a different version of noncitizen criminal justice. Each model—alienage neutral in Los Angeles County, illegal-alien punishment in Harris County, and immigration enforcement in Maricopa County—reflects considerable internal agreement across individual actions, agency policies, state law, and local criminal procedures.<sup>322</sup> The responses of the three counties can best be understood as distinct frameworks for operationalizing noncitizen criminal justice at the local level.

This variation has important implications for the design of both local criminal justice systems and the federal immigration bureaucracy. To set forth these implications, I first explore some possible rationales underlying each institutional approach. I then reflect on the significance of these different local approaches for immigration federalism.

### A. *Criminal Justice's Response to Immigration*

“Our border crisis is directly fueling Arizona’s crime rates.”

—Former Maricopa County Attorney Andrew Thomas<sup>323</sup>

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<sup>320</sup> Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (holding that defense counsel has an obligation to advise noncitizen clients if a guilty plea carries the risk of deportation); Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.”).

<sup>321</sup> As Lucas Guttentag has noted, the Supreme Court’s *Arizona* decision was “enveloped in judicial admonitions that [SB 1070’s] implementation will be subject to Fourth Amendment and other constraints.” Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on Arizona v. United States*, 9 STAN. J. C.R. & C.L. 1 (2013). A civil rights suit brought by Latino motorists subject to race-based stops in Maricopa County is one important example of the potential for greater articulation of constitutional limitations in the immigration enforcement context. See *supra* note 272 and *infra* note 371 (discussing *Melendres v. Arpaio*).

<sup>322</sup> It is perhaps not surprising that each of the three counties has established criminal justice coordinating councils to streamline communication between the different institutional players at the local level. *About CCJCC*, COUNTYWIDE CRIMINAL JUSTICE COORDINATION COMMITTEE, L.A. CNTY., [http://www.ccjcc.info/about\\_ccjcc.asp](http://www.ccjcc.info/about_ccjcc.asp) (last visited Apr. 1, 2013); *Online Directory—Department Listings*, HARRIS CNTY., [http://www.harriscountytexas.gov/hc\\_phone\\_dir/deptinfo.asp?DropDown=43](http://www.harriscountytexas.gov/hc_phone_dir/deptinfo.asp?DropDown=43) (last visited Apr. 1, 2013); *About ICJIS*, INTEGRATED CRIMINAL JUSTICE INFORMATION SYSTEM, MARICOPA CNTY., <http://www.maricopa.gov/icjis/about.aspx> (last visited Apr. 1, 2013).

<sup>323</sup> MARICOPA CNTY. ATTORNEY’S OFFICE, ANNUAL REPORT 10 (2008), available at <http://www.maricopacountyattorney.org/pdfs/annual-reports/2008-MCAO-Annual-Report.pdf> (last visited Apr. 3, 2013).



“We are not Arizona. We are California . . . We have a right to say that we’re going to take a different path.”

—Former Los Angeles Mayor Antonio Villaraigosa<sup>324</sup>

Several scholars have sought to explain the increased merger between immigration enforcement and crime control. For example, some academics have theorized that the merger is part of the general trend toward overcriminalization.<sup>325</sup> Others have argued that it is due to American concerns about foreign terrorism,<sup>326</sup> general economic unease, or racial anxiety.<sup>327</sup> An alternative view is that the growing integration of immigration and crime control is driven by a need for enhanced expedience in achieving institutional aims—what David Sklansky calls “ad hoc instrumentalism.”<sup>328</sup>

Such explanations of criminal-immigration integration rely almost exclusively on national trends. In these accounts, authors note several indicators that immigration and criminal law have become inextricably intertwined—namely, the overall rise in criminal alien removals, the dramatic climb in federal immigration crime prosecutions, the growing role of state-federal cooperative enforcement programs, and the rapid expansion of immigration detention. Missing, however, from the metadata on immigration enforcement is an appreciation of local enforcement practices.

What do these three counties teach us about why local criminal justice systems have varied institutional responses to immigrants and immigration enforcement? Part of the answer is that the models reflect different understandings of how immigration status relates to the standard function of the criminal justice system in applying blame and allocating criminal punishment. A second part of the answer is that the models are grounded in different conceptions of local government’s proper role vis-à-vis immigration enforcement. I discuss each of these considerations in turn.

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<sup>324</sup> Kate Mather, “No Way to Implement” *Arizona Immigration Law, Villaraigosa Says*, L.A. TIMES (June 26, 2012), <http://latimesblogs.latimes.com/lanow/2012/06/immigration-rights-arizona-los-angeles.html>.

<sup>325</sup> See Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 614 (2012) (arguing that “contemporary immigration policy is a site of overcriminalization”).

<sup>326</sup> See Asli Ü. Bâli, *Scapegoating the Vulnerable: Preventive Detention of Immigrants in America’s “War on Terror,”* 38 STUD. L. POL. & SOC’Y 25, 54 (2006) (describing the increase in immigrant detentions following September 11th as being based not in security needs, but in a “complex web of rationalizations for the heightened scapegoating of immigrant communities”).

<sup>327</sup> See Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 110 (2012).

<sup>328</sup> Sklansky, *supra* note 15, at 202–08.

## 1. *Immigration Status as Crime*

The relation between immigrants and criminality has long been of intense interest. The perceived problem of “foreign criminality” and “imported criminals” has shaped both criminal and immigration policy since the turn of the century.<sup>329</sup> Yet, despite the depth of American experience with the issue, immigrant criminality remains a subject of popular debate.

Comparing the Los Angeles and Harris County models is particularly helpful in demonstrating how local practices are rooted in distinct understandings of whether immigrants merit different treatment or have greater criminal propensity than citizens. Consider first the alienage-neutral model. By adjudicating routine aspects of criminal cases without regard to alienage, the Los Angeles approach views the relation between noncitizen status and criminal propensity as neutral. That is, because immigrants do not pose a greater criminal threat than citizens, adjudicating cases along status lines makes little sense. As a Los Angeles deputy district attorney explained, although some immigrants may commit crimes, others are themselves victims of crimes or may help solve crimes by serving as witnesses.<sup>330</sup> In a city of immigrants—like Los Angeles—policing and prosecuting would become severely compromised if immigrants stopped cooperating with law enforcement.<sup>331</sup> From this perspective, immigrant fear of deportation at the hands of the police or prosecutors would reduce necessary reporting of crime by victims and cooperation by immigrant witnesses.

In contrast to Los Angeles, the Harris County punishment paradigm answers in the affirmative the question of whether immigrants—particularly illegal immigrants—have a heightened criminal propensity. Because illegal immigrants are more criminogenic, so the argument goes, enhanced criminal sanctioning is necessary for deterrence. Harris County’s association of illegal immigrants with crime appears to be longstanding. For example, according to a 1987 General Accounting Office (GAO) study, Harris County officials reported “a criminal alien problem” and the district attorney’s office complained of “a substantial relationship between drug crimes and aliens.”<sup>332</sup> The GAO study also offered some statistical support for the conclusion

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<sup>329</sup> See, e.g., NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON CRIME AND THE FOREIGN BORN 44 (1931) (offering a history of public mistrust of immigrants).

<sup>330</sup> Doyle Interview, *supra* note 123.

<sup>331</sup> *Id.*

<sup>332</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/GGD-88-3, CRIMINAL ALIENS: INS’ ENFORCEMENT ACTIVITIES 19–20 (1987), available at <http://www.gao.gov/assets/150/145875.pdf>.

that immigrants might pose more of a local criminal problem than citizens. As of 1987, twenty-one percent of arrested individuals in Harris County were foreign born,<sup>333</sup> although foreign-born individuals made up only eight percent of the overall population of Harris County at the time.<sup>334</sup> Highly-publicized crimes committed by illegal immigrants—such as the murder of police officer Rodney Johnson<sup>335</sup>—have further stimulated the view that Houston is a hub for crime committed by immigrants. As a reporter for the Houston evening news recently described the problem, “the flood of illegal immigrants is not letting up.”<sup>336</sup>

Which county has a valid theory of the relation between immigrants and criminality? A factor complicating social scientific understanding in this area is that while immigration authorities are deporting more criminal aliens than ever before, the nation is in the midst of “the great American crime decline.”<sup>337</sup> Could a reduction in the criminal alien population and the crime decline be connected?

TABLE 2  
Change in Crime Rate (per 100,000 inhabitants),  
by Major City (2000–2010)

	<i>Houston</i>	<i>Los Angeles</i>	<i>Phoenix</i>	<i>National Average</i>
2000 Crime Rate	6742	4887	7380	4125
2000 Violent Crime Rate	1100	1360	738	507
2000 Property Crime Rate	5642	3527	6642	3618
2000 Murder Rate	12	15	12	6
2010 Crime Rate	6564	2932	4802	3345
2010 Violent Crime Rate	1071	567	554	403
2010 Property Crime Rate	5493	2365	4248	2942
2010 Murder Rate	13	8	8	5
Percent Change in Crime Rate, 2000–2010	0%	-40%	-35%	-19%

Note: Crime rates are taken from the Federal Bureau of Investigation’s Uniform Crime Reports. Violent crime offenses include murder, forcible rape, robbery, and aggravated assault. Property crime offenses include burglary, larceny, motor vehicle theft, and arson. Murder rates are a subset of violent crime offenses.<sup>338</sup>

<sup>333</sup> *Id.* at 18. At the time of the 1987 GAO study, data were only available based on “foreign born” status, a broad category that includes undocumented aliens, lawful aliens, and naturalized citizens. *Id.* at 14.

<sup>334</sup> *Id.* at 18. In contrast, in Chicago, Denver, Los Angeles, Miami, and New York City, the percentage of foreign-born individuals arrested was very close to the percentage of foreign-born individuals in the general population. *Id.*

<sup>335</sup> See *ODMP Remembers Officer Rodney Joseph Johnson*, OFFICER DOWN MEMORIAL PAGE, <http://www.odmp.org/officer/18510-officer-rodney-joseph-johnson> (last visited Mar. 1, 2013) (discussing Officer Johnson’s murder by an “illegal alien”).

<sup>336</sup> Andrew Horansky, *Agents See Rise in the Number of Illegal Immigrants*, KHOU, July 24, 2012, available at <http://www.khou.com/news/Houston-agents-see-rise-in-illegal-immigrants-163625656.html>.

<sup>337</sup> FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE*, Preface (2007).

<sup>338</sup> *Uniform Crime Reporting Data Tool*, FED. BUREAU OF INVESTIGATION, <http://www.ucrdatatool.gov/Search/Crime/State/StatebyState.cfm> (choose state “United States -

In fact, there is no general consensus about the causes of the crime decline. Although criminal justice actors are eager to claim that their policies are responsible for the falling crime rates, statistical models taking into account different criminal justice approaches across jurisdictions cannot fully account for crime's steady downward trend.<sup>339</sup> The 1990s witnessed marked crime decline across the entire United States—including within the three counties analyzed in this Article. From 1990 to 2000, Los Angeles experienced a 47% decline in the overall crime rate, Houston 41%, and Phoenix 31%.<sup>340</sup> However, as Table 2 reports, since 2000, Houston's rates of both violent crime and property crime have remained static, while Los Angeles's and Phoenix's rates have continued to plunge: Los Angeles's overall rate declined by an additional 40% and Phoenix's by 35%. The differential rate of decline across the three cities continues when murder rates are considered separately.<sup>341</sup> As Table 2 demonstrates, while homicide rates declined between 2000 and 2010 in both Los Angeles and Phoenix, they increased slightly in Houston during the same period.

Yet, comparative crime statistics fail to account for the relation between crime rates and criminal justice approaches to noncitizens. As experts studying the subject recognize, localized variation in incarceration and crime do not provide consistent explanatory power. Instead, regional studies have found that correlations between crime

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Total"; then choose variables "Violent crime rate," "Property crime rates"; then choose years 1990 to 2010; then follow "Get Table"); *Uniform Crime Reporting Data Tool*, FED. BUREAU OF INVESTIGATION, <http://www.ucrdatatool.gov/Search/Crime/Local/TrendsInOneVarLarge.cfm> (choose group "Cities 1,000,000 or over"; then follow "Next"; choose agencies "AZ - Phoenix Police Dept," "CA - Los Angeles Police Dept," and "TX - Houston Police Dept"; choose variable "Murder rate"; choose years 1990 to 2010; then follow "Get Table"); *Uniform Crime Reporting Data Tool*, FED. BUREAU OF INVESTIGATION, <http://www.ucrdatatool.gov/Search/Crime/Local/TrendsInOneVarLarge.cfm> (choose group "Cities 1,000,000 or over"; then follow "Next"; choose agencies "AZ - Phoenix Police Dept," "CA - Los Angeles Police Dept," and "TX - Houston Police Dept"; choose variable "Property crime rate"; choose years 1990 to 2010; then follow "Get Table"); *Uniform Crime Reporting Data Tool*, FED. BUREAU OF INVESTIGATION, <http://www.ucrdatatool.gov/Search/Crime/Local/TrendsInOneVarLarge.cfm> (choose group "Cities 1,000,000 or over"; then follow "Next"; choose agencies "AZ - Phoenix Police Dept," "CA - Los Angeles Police Dept," and "TX - Houston Police Dept"; choose variable "Violent crime rate"; choose years 1990 to 2010; then follow "Get Table") [hereinafter, collectively, *Uniform Crime Reports*].

<sup>339</sup> See ZIMRING, *supra* note 337, at 41–42.

<sup>340</sup> *Uniform Crime Reports*, *supra* note 338 (data based on overall crime rate, which includes both violent crime and property crime as defined in the *Uniform Crime Reports*).

<sup>341</sup> Because of their seriousness and higher incidence of reporting, murder and homicide rates are sometimes considered an especially reliable metric of crime. ZIMRING, *supra* note 337, at 5–9.

and punishment style are weak.<sup>342</sup> Severity does not always equal less crime.<sup>343</sup> And much about causation is still poorly understood.

The majority of academic research in this area has analyzed whether foreign-born individuals are overrepresented in United States prison populations. Such studies have consistently found that foreign-born groups have a lower crime rate than native-born groups.<sup>344</sup> The competing illegal immigrant criminality thesis has received comparatively less academic attention, in part due to data deficits. Studies of immigrant criminality have usually examined available foreign-born census data, controlling for factors such as age and gender.<sup>345</sup> However, as proponents of the illegal immigrant criminality thesis point out, the “foreign-born” category includes naturalized citizens and lawful immigrants. We still know little about the criminal propensities of undocumented immigrants, given the obvious difficulty in counting this group both in the offender and general populations.<sup>346</sup>

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<sup>342</sup> See VANESSA BARKER, *THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS* 16 (2009) (concluding, in her state-level study of criminal punishment, that “Washington, California, and New York have all maintained relatively high crime rates for nearly thirty years but pursued different kinds of penal regimes”).

<sup>343</sup> WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 248, 244–81 (2011) (“[I]n the United States as a whole, criminal punishment has varied more than crime, not less.”).

<sup>344</sup> Rubén G. Rumbaut et al., *Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men*, *MIGRATION INFORMATION SOURCE* (June 2006), <http://www.migrationinformation.org/usfocus/display.cfm?ID=403>. See generally Ramiro Martinez, Jr. & Matthew T. Lee, *On Immigration and Crime*, 1 *CRIM. JUST.* 2000 485 (2000) (summarizing research concluding that “immigrants are typically underrepresented in criminal statistics”).

<sup>345</sup> See, e.g., Kristin F. Butcher & Anne Morrison Piehl, *Crime, Corrections, and California: What Does Immigration Have to Do with It?*, *CAL. COUNTS: POPULATION TRENDS & PROFILES*, Feb. 2008, at 12, 19 (stressing that available California incarceration data do not include the immigration status of the foreign-born prison population); John Hagan & Alberto Palloni, *Sociological Criminology and the Mythology of Hispanic Immigrant Crime*, 46 *SOC. PROBS.* 617, 621 (1999) (noting that available prison data for Hispanic immigrants combines naturalized citizens and noncitizens); Rumbaut et al., *supra* note 344 (comparing imprisonment rates of foreign-born and U.S.-born generations).

<sup>346</sup> See generally STEVEN A. CAMAROTA & JESSICA M. VAUGHAN, *CENTER FOR IMMIGRATION STUDIES, IMMIGRATION AND CRIME: ASSESSING A CONFLICTED ISSUE* 17 (2009) (attempting to estimate county populations of illegal immigrants by using local arrest records and Census Bureau data); JACK MARTIN, *FED’N FOR AM. IMMIGRATION REFORM, ILLEGAL ALIENS AND CRIME INCIDENCE* 13–14 (2007), available at <http://www.fairus.org/site/DocServer/crimestudy.pdf?docID=2321> (describing the difficulty in estimating the population of adult illegal aliens in the United States). For one important exception, see Laura J. Hickman & Marika J. Suttorp, *Are Deportable Aliens a Unique Threat to Public Safety? Comparing the Recidivism of Deportable and Nondeportable Aliens*, 7 *CRIMINOLOGY & PUB. POL’Y* 59, 77 (2008) (finding that the recidivism rate of deportable aliens in Los Angeles County was not greater than that of nondeportable aliens).

Aggregate data obtained for this Article based on pretrial interviews conducted by Harris County Pretrial Services indicates that 8.8% of defendants jailed in Harris County from 2009 to 2011 self-reported as having “no papers.”<sup>347</sup> If accurate, this percentage would be slightly higher than the state’s estimated undocumented population of 6.7%.<sup>348</sup> However, reflecting the ambiguities of research on illegal immigrant criminality, it is impossible to draw any conclusions from this statistic for three reasons. First, the undocumented may be over-represented in the sample due to local bail practices that make them more likely to remain in custody than citizens.<sup>349</sup> Second, the 8.8% calculation is based on self-reporting and therefore may not be an accurate count of undocumented status. Third and most important, there is no reliable estimate of Harris County’s overall undocumented population from which to interpret these data.<sup>350</sup> In sum, there are numerous challenges to quantifying the crime rates of undocumented immigrants, leading some experts studying the question to conclude that any level of crime by illegal immigrants is too much.<sup>351</sup>

Divergent understandings of the relationship between immigrants and crime have thus informed the development of distinct models of noncitizen justice. These differences are particularly striking given

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<sup>347</sup> Harris Cnty. Pretrial Servs., Interviews with Jailed Defendants 2009–2011 (obtained by author from Harris County Pretrial Services on July 24, 2012). An additional 2.5% of defendants interviewed by Pretrial Services during the time period studied reported that their citizenship was “unknown,” refused to be interviewed, or otherwise declined to answer the citizenship question. *Id.* Finally, not all defendants prosecuted in Harris County during this time period were interviewed by Pretrial Services. *Id.* (reporting that 86.9% of defendants were interviewed by Pretrial Services in 2009, 88.0% in 2010, and 85.0% in 2011).

<sup>348</sup> JEFFREY PASSEL & D’VERA COHN, UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, at 15 tbl.5 (2010), available at <http://www.pewhispanic.org/files/reports/133.pdf> (estimating the percent of unauthorized immigrants by state in 2010).

<sup>349</sup> John Hagan & Alberto Palloni, *Sociological Criminology and the Mythology of Hispanic Immigration and Crime*, 46 SOC. PROBS. 617, 619 (1999) (arguing that pretrial detention policies are “less neutral than they might seem” and “operate to the systematic disadvantage of members of immigrant groups” by leading to higher conviction rates). It is also possible that illegal immigrant communities are subject to enhanced policing. MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA 16–25 (2011) (arguing that racial profiling and choice of enforcement priorities and practices have increased policing in communities of color).

<sup>350</sup> There are no county-level data available which estimate the population of illegal immigrants. At the state level, all three states have roughly the same percentage of unauthorized immigrants: California’s unauthorized population is 6.8%, Texas’s is 6.7%, and Arizona’s is 6.0%. PASSEL & COHN, *supra* note 348, at 15 tbl.5.

<sup>351</sup> As Indiana University economist Eric Rasmusen has argued, when it comes to illegal immigrants, “what matters is how much crime they commit in total . . . .” Eric Rasmusen, *Illegal Immigrants Cause 6% of Crime, Which Costs \$24 Billion*, ERIC RASMUSEN’S WEBLOG (Apr. 30, 2008), <http://www.rasmusen.org/t/2008/04/illegal-immigrants-cause-21-of-crime.html>.

that all three counties are located in states that share similar “tough on crime” policies. California, the home of “three strikes and you’re out” sentencing, has earned a reputation for abandoning rehabilitation in favor of high rates of incarceration.<sup>352</sup> Arizona and Texas have similar reputations. Mona Lynch has described Arizona’s system as “cheap and mean”—distant from rehabilitative ideals, rooted in racial inequality, and defended with claims of states’ rights.<sup>353</sup> By Robert Perkinson’s account, Texas’s criminal justice system has always been “Texas tough”—aligned with slavery’s past and resistant to notions of rehabilitation.<sup>354</sup> All three states have incarceration rates above the national median.<sup>355</sup> And, although there is little research on how statewide penal policy is implemented at the county level, some indicators suggest that Los Angeles, Harris, and Maricopa counties have not shied away from their states’ reputations for severity. For example, each county is a national leader in imposing the death penalty.<sup>356</sup>

From a criminal justice standpoint, part of the difference in approaches to immigrant criminality may reflect Los Angeles’s move toward rehabilitative ideals. Fueled by a budget crisis, falling crime rates, and enthusiasm about community policing, Los Angeles shows some signs of dialing back its retributive stance. As Los Angeles’s new District Attorney Jackie Lacey told the *Los Angeles Times* during her election campaign, “Thank goodness the days are gone when people said, ‘I’m going to lock everyone up and throw away the key.’”<sup>357</sup> The

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<sup>352</sup> BARKER, *supra* note 342, at 43 (describing California’s criminal punishment approach as one that emphasizes “retribution” by punishing criminals “in the name of victim rights and public safety”).

<sup>353</sup> MONA LYNCH, SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 212–15 (2010).

<sup>354</sup> ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA’S PRISON EMPIRE 7, 286–356 (2010) (describing Texas as at the “epicenter” of the “punitive revolution,” with “one of the roughest penal regimes in American history”); *see also* Michael C. Campbell, *Ornery Alligators and Soap on a Rope: Texas Prosecutors and Punishment Reform in the Lone Star State*, 16 THEORETICAL CRIMINOLOGY 289, 290 (2012) (discussing the evolution of Texas as “a state where offenders were certain to face harsh punishments, even for minor crimes.”).

<sup>355</sup> In 2010, the national median state incarceration rate was 437 persons per 100,000 residents, compared with 648 in Texas, 572 in Arizona, and 439 in California. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.6.29.2010 (2010), available at <http://www.albany.edu/sourcebook/pdf/t6292010.pdf>.

<sup>356</sup> Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 239–40 (2012) (reporting that between 2004 and 2009 Maricopa County imposed thirty-eight death sentences, followed by Los Angeles County’s thirty-three, and Harris County’s twenty-one).

<sup>357</sup> Jack Leonard, *D.A. Candidates Take a Nuanced View on Crime-Fighting*, L.A. TIMES (June 3, 2012), <http://articles.latimes.com/2012/jun/03/local/la-me-da-race-20120604>.

Supreme Court’s warning to California that its “criminogenic prison system” is so extreme that it “threatens public safety” has led to other systemic statewide changes in incarceration.<sup>358</sup> For example, in 2009 the state adopted a policy of non-revocable parole for certain low-level offenders to reduce churning of parolees back into the prison system.<sup>359</sup> In 2012, California voters overwhelmingly repealed the harshest aspects of the state’s three strikes law.<sup>360</sup>

TABLE 3  
Change in Jail Population, by County (2002–2010)

	Harris	Los Angeles	Maricopa
Average Daily Jail Population, Year Ending June 30, 2002	6641	19,258	8008
Average Daily Jail Population, Year Ending June 30, 2010	10,242	18,036	8055
Percent Change in Average Daily Jail Population, 2002–2010	+54%	-6%	+1%

Note: Average daily jail populations were taken from the Bureau of Justice Statistics’ Prison and Jail Inmates at Midyear (2002 & 2010).<sup>361</sup>

<sup>358</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1922–23 (2011). It remains unclear whether, over the long term, *Plata* will decrease incarceration or merely shift the burden of incarceration from the state prison system to local jails. See Don Thompson, *California Prison Realignment Plan Broadly Defines Crimes*, HUFFINGTON POST (Oct. 4, 2011), [http://www.huffingtonpost.com/2011/10/04/california-prisonrealignment\\_n\\_995075.html](http://www.huffingtonpost.com/2011/10/04/california-prisonrealignment_n_995075.html) (explaining that under California’s new sentencing approach, more offenders will serve their time in county jails rather than state prisons); see also Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 210 (2013) (warning that the Supreme Court’s “chopping the head off of unconstitutional prison conditions could cause many of the fifty-eight counties to, in turn, develop unconstitutional conditions of jail confinement”).

<sup>359</sup> *Division of Adult Parole Operations: Non-Revocable Parole*, CAL. DEP’T OF CORR. & REHAB., [http://www.cdcr.ca.gov/Parole/Non\\_Revocable\\_Parole/index.html](http://www.cdcr.ca.gov/Parole/Non_Revocable_Parole/index.html) (last visited Mar. 1, 2013). See generally Cecelia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415, 439–41 (2012) (describing measures taken by the California legislature to reduce the state prison population).

<sup>360</sup> Jack Leonard & Maura Dolan, *Priming Cases for 3-Strikes Review*, L.A. TIMES, Nov. 8, 2012, at AA1 (reporting that about sixty-nine percent of California voters approved a proposition to modify the three-strikes sentencing law to require that the third strike be serious or violent).

<sup>361</sup> PAIGE M. HARRISON & JENNIFER C. KARBERG, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2002, at 10 tbl.12 (2003), available at <http://www.bjs.gov/content/pub/pdf/pjim02.pdf>; TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, JAIL INMATES AT MIDYEAR 2010—STATISTICAL TABLES 10 tbl.9 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim10st.pdf>. Recently, the jail population in Harris County has declined, but levels still remain significantly higher than in 2002. See E-mail from Alan Bernstein, Dir. of Pub. Affairs, Harris Cnty. Sheriff’s Office, to author (Jan. 7, 2013) (on file with author) (reporting an average Harris County jail population for 2012 of 8880). This decline in jail population is attributed in part to the District Attorney’s decision as of 2010 to no longer



Changes in jail population across the three counties also suggest that Los Angeles may be moving away from its punitive past. As seen in Table 3, Los Angeles County's average jail population declined by 6% since 2002,<sup>362</sup> while Maricopa's inched up by 1% and Harris's swelled by 54%. At least some of the increase in Harris County can be linked to the county's mandatory policy of sentencing otherwise probation-eligible undocumented defendants to county jail time.<sup>363</sup>

Thus, noncitizen justice reflects, in part, different institutional understandings of the relevance of immigration status for distributing penal sanctions. However, these divergent beliefs about immigration status are only one part of the explanation for why noncitizen justice has played out so differently at the local level. A second aspect of the dynamic derives from divergent views about the appropriate role for local government in immigration enforcement.

## 2. *Criminal Enforcement as Immigration Enforcement*

What does this Article's study teach us about how local criminal systems are structured around immigration-enforcement concerns? On this second question, comparing the approaches of Los Angeles and Maricopa counties is particularly useful. Indeed, both Los Angeles and Maricopa have taken steps to affect immigration outcomes. However, they have done so in different ways.

At one end of the enforcement spectrum, Maricopa County has vigorously embraced Arizona's overall move, through laws like SB 1070, to maximize the use of the local criminal law to increase deportation levels. An overarching criminal policy of "attrition through enforcement" and a county prosecutor's office attuned to using criminal convictions to deny immigrants "amnesty" are key elements of this approach.<sup>364</sup> The use of local law enforcement to inquire as to immigration status and make arrests based on local immigration

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file state felony charges against those found with only trace amounts of narcotics. Brian Rogers, *DA Plans Change in Drug Penalties*, HOUS. CHRON., Dec. 8, 2009, at A1.

<sup>362</sup> The jail population in Los Angeles County is expected to increase as a result of California's new prison realignment law, which directs that non-serious, non-violent felony sentences be served in the county jail, rather than state prison. A.B. 109, 2011–2012 Leg. Sess. (Cal. 2011), available at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0101-0150/ab\\_109\\_bill\\_20110329\\_enrolled.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_109_bill_20110329_enrolled.html); see also Robert Greene, Opinion, *A Year After California's Criminal Justice System Realignment*, L.A. TIMES (Oct. 2, 2012), <http://articles.latimes.com/2012/oct/02/news/la-ol-california-criminal-justice-system-realignment20121002> (noting that "the state's new so-called non-non-nons" are serving their time in Los Angeles County Jail and are not, according to the Sheriff, being released early).

<sup>363</sup> See *supra* notes 208–17 and accompanying text (describing Harris County's plea policies for undocumented defendants).

<sup>364</sup> Eagly, *Local Immigration Prosecution*, *supra* note 11, at 1755–60.

crimes is another important component of the immigration-enforcement model.<sup>365</sup>

At the opposite end of the enforcement spectrum, Los Angeles has implemented a collateral consequences plea bargaining policy to spare certain immigrants from deportation consequences.<sup>366</sup> Local law enforcement offices have adopted policies to not honor federal immigration detainers in certain low-level cases.<sup>367</sup> Similarly, at the state level, the California legislature is currently considering a bill, known as the TRUST Act, to limit the operation of Secure Communities within the state.<sup>368</sup> The TRUST Act's approach received a major boost when California Attorney General Kamala Harris announced that local law enforcement agencies are not obligated to honor federal immigration detainers, and instead can "make their own decisions about whether to fulfill an individual ICE immigration detainer."<sup>369</sup>

Understood in terms of the criminal alien matrix, laws like SB 1070 increase federal immigration enforcement in quadrants III and IV. Prosecutorial policies, like that implemented in Maricopa County, similarly increase federal discretion in enforcement in quadrants I and II. In contrast, policies like that of the LAPD to not honor certain immigration detainers constrain federal enforcement in quadrants III and IV and the southern region of quadrants I and II. Similarly, a policy to consider immigration consequences in plea bargaining limits the deportation authority of the federal government, particularly for lawful immigrants in quadrant II.

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<sup>365</sup> See *supra* notes 240, 280 and accompanying text.

<sup>366</sup> See *supra* notes 143–51 and accompanying text.

<sup>367</sup> See *supra* notes 119–20 and accompanying text.

<sup>368</sup> Under the proposed law, noncitizens released by local law enforcement would not be held on an ICE detainer unless first convicted of a serious or violent felony. A.B. 4, 2013–14 Reg. Sess. (Cal. 2012), *available at* [http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab\\_0001-0050/ab\\_4\\_bill\\_20121203\\_introduced.pdf](http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0001-0050/ab_4_bill_20121203_introduced.pdf). Los Angeles city officials have been particularly vocal in their support of the TRUST Act. Press Release, LA Voice, LA Voice Jewish and Latino Faith Leaders Stand with Mayor Villaraigosa and Police Chief Beck and Call for State Fix to Federal Immigration (June 10, 2012), *available at* [http://lavoicepico.org/LA\\_Voice\\_PICO/LA\\_Voice\\_Update\\_files/Press%20Release%20June%202012%20.pdf](http://lavoicepico.org/LA_Voice_PICO/LA_Voice_Update_files/Press%20Release%20June%202012%20.pdf). An earlier version of the bill was passed by the legislature but vetoed by Governor Jerry Brown due to drafting technicalities. Leslie Berestein Rojas, *California's 'Anti-Arizona' TRUST Act is Back for Another Round*, S. CAL. PUB. RADIO (Dec. 3, 2012), <http://www.scprr.org/blogs/multiamerican/2012/12/03/11368/californias-anti-arizona-trust-act-back-another-ro/>.

<sup>369</sup> Information Bulletin from Kamala Harris, Cal. Attorney Gen., Cal. Dep't of Justice, to Executives of State and Local Law Enforcement Agencies, Responsibilities of Local Law Enforcement Agencies Under Secure Communities (Dec. 4, 2012), *available at* <http://www.immigrationpolicy.org/sites/default/files/docs/Kamala-Harris-guidance-on-immigration-detainers.pdf>.

Los Angeles County and Maricopa County fundamentally disagree about the appropriate role of local criminal justice actors in immigration enforcement. Maricopa County's immigration-enforcement approach is oriented around the view that immigration is intimately tied to rising crime rates. Consider Maricopa County Sheriff Joe Arpaio's "crime suppression operations," which use techniques such as routine traffic stops and civilian "posses" to target immigrant communities.<sup>370</sup> The Sheriff describes these immigration-enforcement initiatives as part of a "pure program" designed "to go after illegals, not the crime first."<sup>371</sup> County Attorney Bill Montgomery similarly explains the county's overarching criminal justice concern as one about immigration: "the failure of the federal government to enforce our laws regarding the proper manner and method for immigrants to come to America."<sup>372</sup> Advocates of the Maricopa County-style approach to criminal justice argue that Arizona's declining crime rate derives from the state's affirmative immigration-enforcement policies.<sup>373</sup>

Los Angeles County's approach to immigration enforcement is quite different. Unlike Maricopa, Los Angeles takes the view that

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<sup>370</sup> News Release, Maricopa Cnty. Sheriff's Office, Maricopa County Sheriff Joe Arpaio Plans Crime Suppression Operation as Smuggling Operations Show No Sign of Slowing 1 (Feb. 16, 2011), <http://www.mcso.org/MultiMedia/PressRelease/2-16-11%20CS%20operation%20Gear%20Up%20News%20Release.pdf> (quoting the Sheriff as explaining he is "gearing up for another crime suppression operation" to go after illegal aliens); News Release, Maricopa Cnty. Sheriff's Office, Sheriff Joe Arpaio Launches Illegal Immigration Posse 1 (Nov. 17, 2010), <http://www.mcso.org/MultiMedia/PressRelease/Immigration%20Posse%20News%20Release.pdf> (announcing the swearing in of fifty-six new civilian volunteers to a "new illegal immigration operations posse" to "help his deputies enforce all of the immigration laws").

<sup>371</sup> Fernanda Santos, *Arizona Sheriff's Trial Begins with Focus on Complaints About Illegal Immigrants*, N.Y. TIMES, July 19, 2012, at A11 (citing court documents filed by the Sheriff's office in response to a civil rights suit). A federal judge in Arizona has found that Sheriff Arpaio violated the constitutional rights of Latinos by relying on racial profiling in enforcing criminal laws and illegally detaining Latinos based solely on suspected civil immigration violations. *Melendres v. Arpaio*, No. PHX-CV-07-02513-GMS, 2013 WL 2297173, \*77 (D. Ariz. May 24, 2013) (granting the plaintiff class of Latinos a permanent injunction against the Maricopa County Sheriff).

<sup>372</sup> Montgomery News Release, *supra* note 263.

<sup>373</sup> See generally Julia Preston, *Immigration Decreases, but Tensions Remain High*, N.Y. TIMES, Mar. 11, 2012, at A15 (citing police chiefs in Arizona claiming that crime rates are down due to immigration enforcement). Not only did city crime rates in Phoenix decline by thirty-five percent between 2000 and 2010, see *supra* Table 2, but also the overall Maricopa County crime rate dropped by thirty-one percent during the same period. *Compare* ACCESS INTEGRITY UNIT, ARIZ. DEP'T OF PUB. SAFETY, CRIME IN ARIZONA: 2010, at 53 (2010), available at [http://www.azdps.gov/About/Reports/docs/Crime\\_In\\_Arizona\\_Report\\_2010.pdf](http://www.azdps.gov/About/Reports/docs/Crime_In_Arizona_Report_2010.pdf), with ACCESS INTEGRITY UNIT, ARIZ. DEP'T OF PUB. SAFETY, CRIME IN ARIZONA: 2002, at 47 (2002), available at [http://www.azdps.gov/about/reports/docs/Crime\\_In\\_Arizona\\_Report\\_2002.pdf](http://www.azdps.gov/about/reports/docs/Crime_In_Arizona_Report_2002.pdf).

shielding witnesses and low-level offenders from immigration enforcement is necessary to ensure overall community welfare and public safety. LAPD Chief Charlie Beck has described his immigration policies as “public safety” measures that are “vital to the LAPD’s crime-fighting efforts.”<sup>374</sup> Beck has even gone so far as to argue that increasing local immigration enforcement would have the perverse effect of causing crime rates to “go up.”<sup>375</sup> The Los Angeles County Sheriff’s Office also turned to a public safety rationale in justifying its policy of not turning over illegal immigrants suspected of low-level crimes to federal authorities: “The last thing we want is victims to be frightened to come forward.”<sup>376</sup> The Los Angeles City Council has similarly publicly declared that shielding police action from immigration-conscious thinking prevents “victimization of undocumented immigrants” and increases police “ability to protect and to serve the entire community.”<sup>377</sup>

Yet, despite the variation in their approaches to the enforcement side of noncitizen justice, Maricopa and Los Angeles have both enjoyed significant crime declines.<sup>378</sup> What does the academic research have to say? Compared to the immigrant criminal propensity question previously discussed, far less attention has been given to the separate question of immigration’s overall effect on community-wide crime rates. While there is strong evidence that individual immigrants are not more likely to commit crime than citizens,<sup>379</sup> we know much less about whether high levels of immigration increase neighborhood crime rates (that is, crime committed by citizens and noncitizens alike). As sociologists Charis Kubrin and Hiromi Ishizawa explain the distinction, “[a]lthough studies on the individual-level association between immigrant status and criminal offending are plentiful, there is a comparative shortage of research on the macro-level relationship between immigration and crime, including studies published at the neighborhood, city, and metropolitan levels . . . .”<sup>380</sup>

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<sup>374</sup> Joel Rubin, *Chief’s Core Belief: L.A. Policing Reality Dictates Beck’s Immigration Strategy*, L.A. TIMES, Oct. 24, 2012, at A1, A14.

<sup>375</sup> Spencer S. Hsu, *U.S. Police Chiefs Say Arizona Immigration Law Will Increase Crime*, WASH. POST, May 27, 2010, at A3.

<sup>376</sup> Chang, *supra* note 120.

<sup>377</sup> L.A., Cal., City Council Resolution Reaffirming Special Order 40 (June 12, 2007), available at [http://clkrep.lacity.org/online/docs/2007/07-0002-S133\\_ca\\_06-12-07.pdf](http://clkrep.lacity.org/online/docs/2007/07-0002-S133_ca_06-12-07.pdf).

<sup>378</sup> See *supra* Table 2 (showing that from 2000 to 2010, the City of Los Angeles’s overall crime rate decreased by forty percent and Phoenix’s by thirty-five percent).

<sup>379</sup> See *supra* notes 344–45 and accompanying text.

<sup>380</sup> Charis E. Kubrin & Hiromi Ishizawa, *Why Some Immigrant Neighborhoods Are Safer than Others: Divergent Findings from Los Angeles and Chicago*, 641 ANNALS AM. ACAD. POL. & SOC. SCI. 148, 149 (2012).

The emerging consensus among researchers that have begun to examine the less studied immigration-crime question is that immigration has a neutral or even protective effect on local crime rates.<sup>381</sup> To be sure, immigrant communities experience a greater degree of policing,<sup>382</sup> and certain high-density, poor immigrant communities may have relatively higher crime rates.<sup>383</sup> Yet, studies have found that more immigration does not necessarily mean more crime is attracted to the neighborhood. One reason for this generalization is that immigrants are characteristically helpful and cooperative in solving crime.<sup>384</sup> Another reason is that certain structural features of immigrant families—such as intact, two-parent households—are associated with neighborhood crime rate stabilization.<sup>385</sup>

Although much of the academic scholarship to date points to a neutrality thesis,<sup>386</sup> the contrary view—that immigration increases overall crime rates—is not without its followers. The “immigration causes crime” thesis is most closely associated with social

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<sup>381</sup> See, e.g., Garth Davies & Jeffrey Fagan, *Crime and Enforcement in Immigrant Neighborhoods: Evidence from New York City*, 641 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 116–17 (2012) (concluding that immigrant neighborhoods have less crime than native-born neighborhoods, but that the level of reduction varies across racial and ethnic groups); Ramiro Martinez, Jr. & Jacob I. Stowell, *Extending Immigration and Crime Studies: National Implications and Local Settings*, 641 ANNALS AM. ACAD. POL. & SOC. SCI. 174, 186 (2012) (finding no evidence, based on a comparative study of San Antonio and Miami, “that more immigrants meant more homicide or that more neighborhood immigration meant more violence”); Jacob I. Stowell et al., *Immigration and the Recent Violent Crime Drop in the United States*, 47 CRIMINOLOGY 889, 889 (2009) (reporting that violent crime rates in certain metropolitan areas tended to decrease as the immigrant concentration increased over time); Tim Wadsworth, *Is Immigration Responsible for the Crime Drop? An Assessment of the Influence of Immigration on Changes in Violent Crime Between 1990 and 2000*, 91 SOC. SCI. Q. 534, 546 (2010) (concluding that cities with the largest increases in immigration in the 1990s experienced the largest decreases in violent crime). As David Sklansky has argued, exceptionally low crime rates in border cities like San Diego, Brownsville, and El Paso also provide support for the view that immigration does not increase crime. Sklansky, *supra* note 15, at 191–93.

<sup>382</sup> Davies & Fagan, *supra* note 381, at 113–15 (finding increased policing in immigrant communities in New York City).

<sup>383</sup> Kubrin & Ishizawa, *supra* note 380, at 150 (finding that, even within the same city, crime rates in immigrant neighborhoods vary).

<sup>384</sup> David Kirk et al., *The Paradox of Law Enforcement in Immigrant Communities: Does Tough Immigration Enforcement Undermine Public Safety?*, 641 ANNALS AM. ACAD. POL. & SOC. SCI. 79, 92–93 (2012).

<sup>385</sup> Graham C. Ousey & Charis E. Kubrin, *Exploring the Connection Between Immigration and Violent Crime Rates in U.S. Cities, 1980–2000*, 56 SOC. PROBS. 447, 463–64 (2009) (arguing that immigration lowers violent crime rates because it is correlated with the stabilizing effect of two-parent family structures).

<sup>386</sup> As Garth Davies and Jeffrey Fagan have argued, there is an “emerging consensus that immigration does not lead to higher rates of crime, and in some instances protects against crime.” Davies & Fagan, *supra* note 381, at 104, 119.

disorganization theory.<sup>387</sup> According to this perspective, immigration breeds residential segregation, poverty, and weak social ties—social problems that are linked to criminality and general social decay.<sup>388</sup> Social disorganization theorists also point to studies on the children of immigrants—the “second generation”—who are associated with significantly higher crime rates than their immigrant parents.<sup>389</sup> By this approach, order maintenance policing of immigration and other low-level offenses is thought to ward off future crime.<sup>390</sup> Even the United States Supreme Court referenced the connection between immigration and crime as important “background” to the immigration preemption debate. As the Court noted in the *Arizona* decision, the “problems posed to the State by illegal immigration” include “an ‘epidemic of crime.’”<sup>391</sup>

This Article’s county-level analysis thus offers new insights for identifying competing theories of what Juliet Stumpf has labeled “crimmigration.”<sup>392</sup> That such divergent approaches can result from criminal systems known for relative penal severity suggests that divergence is not just a reflection of differing criminal policy. It is also about local immigration-enforcement policy.<sup>393</sup> States and localities

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<sup>387</sup> Kubrin & Ishizawa, *supra* note 380, at 151 (noting sustained support among social disorganization theorists for the argument that immigration causes crime). See generally PATRICK J. BUCHANAN, *STATE OF EMERGENCY: THE THIRD WORLD INVASION AND CONQUEST OF AMERICA* (2006) (arguing that immigration and ethnic diversity are tied to social decay); Gerald F. Seib, *Backlash over Immigration Has Entered Mainstream This Year*, WALL ST. J., Sept. 27, 1996, at A20 (quoting Brookings Institution scholar Peter Skerry as saying voters think that immigration is linked to “a fraying of the social order”).

<sup>388</sup> Robert J. Sampson et al., *Social Anatomy of Racial and Ethnic Disparities in Violence*, 95 AM. J. PUB. HEALTH 224, 231 (2005) (concluding that racial and ethnic disparities in crime rates “are largely social in nature”).

<sup>389</sup> Rumbaut et al., *supra* note 344 (finding that incarceration rates “increase significantly” between the first and second generation, and pointing out an especially notable eight-fold increase for Mexicans).

<sup>390</sup> An influential essay by George Kelling and James Wilson, which introduced what they call “broken windows” policing, reflects the belief that law enforcement must start from the bottom and stringently enforce petty infractions to maintain order and prevent crime. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29. But see Martinez & Stowell, *supra* note 381, at 889–928 (noting that “immigration researchers generally interpret the unexpected negative impact of immigration on crime as a limitation of social disorganization theory”).

<sup>391</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012) (citing the petitioners’ brief).

<sup>392</sup> Stumpf, *supra* note 10, at 376.

<sup>393</sup> As immigration scholars have begun to realize, immigration policy is no longer an exclusively federal affair. See, e.g., Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008) (arguing that state and local actors have an important role in integrating immigrants into the broader community); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2008) (documenting the “domestication” of immigration law and predicting increased future tolerance of subnational regulation of immigration); Rick Su, *A Localist*

increasingly have become involved in regulation, albeit in very different ways. State-level research completed by Huyen Pham and Pham Hoang Van attempts to quantify these differences across states. Relying on an index that assesses the “restrictiveness” of state immigration laws, Pham and Van conclude that Arizona has the most restrictive immigrant climate in the nation.<sup>394</sup> Texas ranks eleventh and California (somewhat surprisingly, the authors say) ranks forty-ninth.<sup>395</sup> This state-level variation in overall immigration policy corresponds to the position on immigration enforcement reflected in each criminal justice model. Los Angeles has the most protective criminal immigration approach, Harris lies in the middle, and Maricopa maximizes its immigration influence.

Recently released Secure Communities enforcement data provide illuminating detail regarding the relationship between county-level criminal justice adjudication and federal immigration-enforcement patterns.<sup>396</sup> These data include all individuals, by county, removed following Secure Communities screening.<sup>397</sup> Critically, these data also classify individuals into different “levels” according to the severity of their criminal records at the time of removal.<sup>398</sup> Those with the most serious convictions are classified as “Level 1” or “Level 2.”<sup>399</sup> Those with only one misdemeanor are classified as “Level 3.”<sup>400</sup> Finally,

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*Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1624 (2008) (demonstrating that local immigration regulations “are products of, and complicated by, how localism organizes and defines the powers and interests of local governments”).

<sup>394</sup> Huyen Pham & Pham Hoang Van, *Measuring the Climate for Immigrants: A State-by-State Analysis*, in *ILLEGALS IN THE BACKYARD: STATE AND LOCAL REGULATION OF IMMIGRATION POLICY* (G. Jack Chin & Carissa Hessick eds., forthcoming 2013).

<sup>395</sup> *Id.*; see also Paul G. Lewis & S. Karthick Ramakrishnan, *Police Practices in Immigrant-Destination Cities: Political Control or Bureaucratic Professionalism?*, 42 URB. AFF. REV. 874, 895 (2007) (finding that California police departments have “developed policies that are generally supportive of immigrants” and that “gaining trust and serving the community’s unique needs were the spur for such policies”).

<sup>396</sup> See SCOMM Statistics, *supra* note 26.

<sup>397</sup> Under the federal government’s staged rollout of the Secure Communities program, each county activated the technology on a different date. On October 27, 2008, Harris County became the first county in the nation to activate Secure Communities. Maricopa County and Los Angeles County followed in the next wave of activations: Maricopa on January 16, 2009 and Los Angeles on August 27, 2009. *Activated Jurisdictions*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Aug. 22, 2012), <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated2.pdf>.

<sup>398</sup> Morton Memo on Civil Immigration Enforcement, *supra* note 5, at 2 (specifying three “offense levels” of prioritization for “the removal of aliens convicted of crimes”).

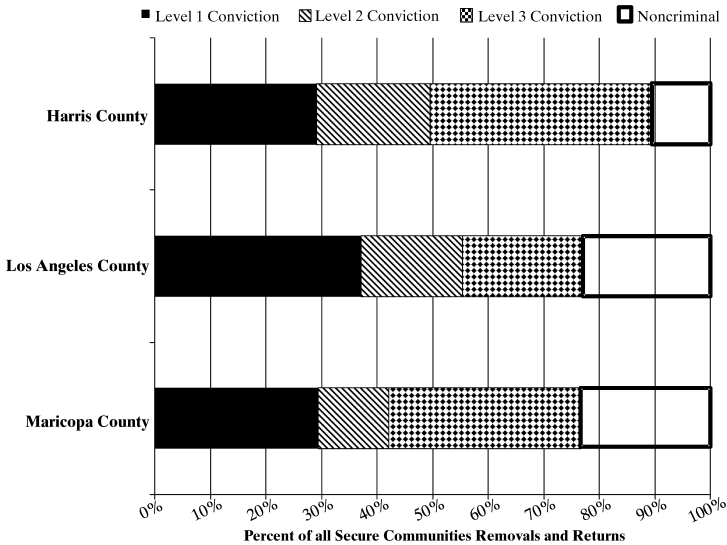
<sup>399</sup> *Id.* (defining “Level 1 offenders” as aliens convicted of an aggravated felony or two or more felonies, and “Level 2 offenders” as aliens convicted of any felony or three or more misdemeanors).

<sup>400</sup> *Id.*

those with no criminal record are classified as “non-criminal.”<sup>401</sup> With this high degree of detail, Secure Communities data represent the first time that county-level immigration-enforcement actions can be mapped onto the criminal alien matrix.<sup>402</sup>

An analysis of Secure Communities data released from the three counties offers clues regarding the relationship between the county’s model of noncitizen justice and deportation outcomes. Strikingly, as displayed in Figure 8,<sup>403</sup> Maricopa County’s immigration-enforcement

FIGURE 8  
Secure Communities Enforcement in Three Leading Counties, by Level of Criminal Conviction (October 2008–March 2012)



SOURCE: United States Department of Homeland Security<sup>404</sup>

<sup>401</sup> U.S. DEP’T OF HOMELAND SEC., SECURE COMMUNITIES MONTHLY STATISTICS THROUGH FEBRUARY 28, 2011, available at <http://ccrjustice.org/files/nationwideinteroperabilitystats-fy2011-feb28.pdf> (distinguishing between Level 1, Level 2, Level 3, and “non-criminal” removals and returns).

<sup>402</sup> Prior to Secure Communities, there was no publicly available data set that linked local criminal arrests to the severity level of a noncitizen’s criminal record, nor was there any federal reporting of county-level immigration enforcement. Cf. ICE Criminal Removal Data Table, *supra* note 30 (reporting the lead charge of conviction for criminal alien removals only by the larger geographic ICE “Area of Responsibility,” not by county); see also Naranjo Interview, *supra* note 89 (defining the Los Angeles field office’s “Area of Responsibility,” or AOR, as including seven southern California counties).

<sup>403</sup> Figure 8 includes data released by ICE for the time period from October 2008 through March 2012. SCOMM Statistics, *supra* note 26. In describing the data contained in Figure 8, I use the term “deportation” to refer to both “removals” and “returns,” which are aggregated in the Secure Communities data. *Id.* For an explanation of the terms “removal” and “return,” see *supra* notes 7, 59 and accompanying text.

<sup>404</sup> SCOMM Statistics, *supra* note 26.



model includes the highest proportion of low-level offenders among county deportees. As Figure 8 highlights, in Maricopa County only forty-two percent of individuals screened through Secure Communities and later deported had felonies or multiple misdemeanors. The remaining fifty-eight percent of Maricopa deportees only had a single misdemeanor conviction or were never convicted of a crime. In other words, noncitizens in the southern region of the criminal alien matrix are subject to increased enforcement under the immigration-enforcement model, as compared with the alienage-neutral or illegal-alien-punishment models. This result is consistent with the immigration-enforcement model's turn to petty crime and state-level immigration crimes as a means for enforcing immigration.

In contrast, under the regime of alienage neutrality, Los Angeles has the largest percentage of deportations of serious Level 1 offenders. In addition, Los Angeles's overall percentage of deportations that result from low-grade misdemeanors (Level 3) is about half that of the other two counties.<sup>405</sup> Recall that Los Angeles relies on a cite-and-release policy for low-level offenses, thereby allowing some individuals arrested for petty offenses to avoid Secure Communities screening altogether.<sup>406</sup> It is true that Los Angeles still has over twenty percent of Secure Communities-initiated deportations occurring without any criminal conviction at all.<sup>407</sup> However, as Los Angeles policies that limit cooperation with federal detainees are implemented, this noncriminal category is expected to shrink.<sup>408</sup>

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<sup>405</sup> This pattern could reflect a tendency by Los Angeles police and prosecutors not to subject as many low-level misdemeanants to immigration screening. It could also possibly reflect hesitancy in Harris and Maricopa Counties to decline misdemeanor prosecutions. As evidence collected by Josh Bowers has shown, local prosecutorial declination rates are inversely related to the severity of the crime. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1716–18 (2010).

<sup>406</sup> See VERA INST. OF JUSTICE, *supra* note 115, at vii (reporting that police in Los Angeles County have cite-and-release authority).

<sup>407</sup> See *supra* Figure 8.

<sup>408</sup> See *supra* notes 84, 119–20, 368 (discussing local and state policies to limit cooperation with the Secure Communities program). Further study is certainly needed to identify Secure Communities enforcement patterns in other jurisdictions and potential causes of variation. Adam Cox and Thomas Miles are currently undertaking such empirical research. See Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87 (2013) (identifying a positive correlation between ICE's early activation of the Secure Communities program and the size of local Hispanic population). In addition, the federal government has announced an initiative to statistically monitor criminal removals. See *Secure Communities: Statistical Monitoring*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (NOV. 16, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/sc-statistical-monitoring.pdf> (explaining that the program checks fingerprints submitted by police against DHS databases, revealing which arrestees may be "removable aliens").

In conclusion, noncitizen criminal justice requires that localities balance immigration control and criminal control. This three-county analysis suggests that the balance between competing enforcement goals and values cannot be predicted by merely examining how status informs criminal adjudication. Instead, as immigration enforcement becomes increasingly triggered by criminal decisions, immigration-oriented concerns about the integration of immigrants into broader society also shape criminal justice policy.<sup>409</sup> The next section explores what this local independence means for immigration federalism.

### B. *Immigration's Response to Criminal Justice*

“We do not engage in the criminal process, we merely initiate the immigration process after they are in our custody.”

—Representative, Enforcement and Removal Operations,  
U.S. Immigrations and Customs Enforcement

“[O]nly federal DHS officers and agents make immigration enforcement decisions, and they do so only after a completely independent decision by state and local law enforcement to arrest and book an individual for a criminal violation of state or local law separate and apart from any violations of immigration law.”

—Office of the Director, U.S. Immigrations and Customs  
Enforcement<sup>410</sup>

One of the key questions in the cooperative system of immigration federalism is the extent to which the federal government can uniformly implement national immigration policy. Putting aside whether uniformity is normatively desirable,<sup>411</sup> it is certainly true that the federal government routinely cites uniformity as a core goal of its immigration enforcement. For example, in the context of the Arizona preemption litigation, the Department of Justice argued that Arizona’s attempt to enforce civil immigration rules was improper because it amounted to the state’s “own immigration policy” that paid “no heed to the multifaceted judgments that the INA provides for the Executive Branch to make.”<sup>412</sup> Similarly, the federal government has touted the nationwide implementation of the Secure Communities

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<sup>409</sup> See generally Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 781–82 (2009) (noting that cultural predispositions—such as a hierarchical worldview as opposed to an egalitarian one—exert a powerful influence over views relating to criminal law).

<sup>410</sup> SCOMM TASK FORCE, *supra* note 12, at 11.

<sup>411</sup> For a view that states and localities should have an increased role in immigration matters, see Rodríguez, *supra* note 393, at 609–40; and Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT’L L. 121, 153–74 (1994).

<sup>412</sup> Brief for the United States at 14, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182).

program as a mechanism for replacing the “ad hoc approach of the past” with the federal government’s now well-defined priorities.<sup>413</sup> The federal government has insisted that enforcement under Secure Communities rests entirely with the federal government, thereby freeing local criminal justice agencies to go about their business, screened off from any consideration of federal immigration priorities.<sup>414</sup>

Notably, the federal government has little to say about one aspect of noncitizen justice identified in this Article—local criminal practices that treat defendants differently based solely on immigration status. Whether sentences are longer or bond amounts greater based on immigration status remain questions for local criminal judgment. In contrast, local attempts to influence federal immigration enforcement by customizing plea agreements, prosecuting cases that would not otherwise be brought, or refusing to cooperate with immigration screening has become a matter of intense federal concern.

The federal government has taken a two-track approach to local attempts to influence enforcement. The first track is discretion—the declination of prosecutions brought to the federal government’s attention by local law enforcement. The second track is supervision—direct involvement of federal immigration officials with local criminal agencies to foster uniform treatment of noncitizens across jurisdictions.

### 1. *Discretion*

When it comes to deporting noncitizens, the federal government has always held the power to enforce, or decline to enforce, immigration laws.<sup>415</sup> Recently, the federal government has taken an important step to clarify how it exercises discretion by publicly articulating the

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<sup>413</sup> Julia Preston, *Despite Opposition, Immigration Agency to Expand Fingerprint Program*, N.Y. TIMES, May 12, 2012, at A10 (quoting ICE spokeswoman Barbara Gonzalez explaining the Secure Communities program); *see also* Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, All Chief Counsel, Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems 1 (Dec. 21, 2012) [hereinafter Morton Memo on the Use of Detainers], available at <http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf> (stressing that “it is of critical importance” that ICE’s immigration priorities are “uniformly, transparently, and effectively pursued”).

<sup>414</sup> *See generally* SCOMM TASK FORCE, *supra* note 12.

<sup>415</sup> *See* Naranjo Interview, *supra* note 89 (clarifying that ICE has always used prosecutorial discretion “on a daily basis”); Interview with James Pilkington, Chief of Staff, Enforcement and Removal Operations, U.S. Immigration & Customs Enforcement, in L.A., Cal. (May 30, 2012) [hereinafter Pilkington Interview] (“Prosecutorial discretion has always been there.”).

type of criminal alien that will be prioritized for removal.<sup>416</sup> On the ground, prosecutorial discretion is an “additional tool” that federal agents use on a daily basis to “focus” their immigration priorities.<sup>417</sup> Given a “finite amount of resources,” ICE “employs prosecutorial discretion throughout the whole process . . . from the very beginning . . . in terms of taking enforcement actions—to the very end of the process.”<sup>418</sup>

It remains to be seen, however, whether this tool of individualized assessment will be exercised aggressively in practice. If localities bring deportable noncitizens to the attention of federal authorities, will those authorities really refuse to remove them because their criminal records are not sufficiently severe? As immigration scholar Hiroshi Motomura has shown, in the past federal immigration agents have rarely exercised their discretionary authority once deportable noncitizens are in custody.<sup>419</sup>

If national uniformity is to be achieved by the federal immigration system, discretionary decisionmaking would have to increase. Only with a discerning eye—by declining referrals from local law enforcement—can federal immigration authorities compensate for variation in local noncitizen justice. The exercise of discretion not to enforce the immigration law is especially important for those with quasi-legal status that the federal government wants to protect—such as young people, asylum seekers, crime victims, or others that fall outside federal enforcement priorities.<sup>420</sup> The devolution of uniform immigration enforcement becomes most pronounced when individuals who do not meet federal priorities for enforcement are nonetheless selected for deportation as a result of the preferences and peculiar practices of local law enforcement.

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<sup>416</sup> See Morton Memo on Exercising Prosecutorial Discretion, *supra* note 66, at 5 (explaining that a serious criminal record is a negative factor in determining whether to exercise prosecutorial discretion); Pilkington Interview, *supra* note 415 (noting that although prosecutorial discretion has always been used, “now we have quantified it . . . and everybody knows why we employ prosecutorial discretion in the process”).

<sup>417</sup> Naranjo Interview, *supra* note 89 (describing prosecutorial discretion as an “important tool in our process”); Pilkington Interview, *supra* note 415 (explaining that “[a]t the end of the day, [prosecutorial discretion] is a tool”).

<sup>418</sup> Pilkington Interview, *supra* note 415.

<sup>419</sup> Motomura, *supra* note 74, at 1833 (“DHS can exercise prosecutorial discretion and not proceed against a removable noncitizen who is in custody, but this has happened only in a small percentage of cases.”).

<sup>420</sup> As Solicitor General Donald B. Verrilli, Jr. argued before the United States Supreme Court, it would be “affirmatively harmful” for the government to criminally prosecute noncitizens who are technically here in violation of the law, but who have a pending application for protected status. Transcript of Oral Argument at 68–69, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182).

The federal government's 2012 decision that it will not remove individuals based solely on a charge for a minor traffic offense suggests some movement toward increased exercise of discretion.<sup>421</sup> Similarly, ICE has clarified that traffic violations will not be a factor in granting deferred action for certain undocumented persons who were brought to the United States as children.<sup>422</sup> More significantly, ICE announced in late 2012 that it would no longer issue detainers under the Secure Communities program for some minor misdemeanors.<sup>423</sup>

These changes, if implemented, represent a consequential shift in policy. Data obtained from DHS reveal that the single largest source of the rise in criminal alien removals over the past decade is traffic convictions.<sup>424</sup> Indeed, the category of criminal aliens removed as a result of a traffic offense increased ten-fold over the past decade, accounting for nearly thirty percent of the overall rise in criminal alien removals.<sup>425</sup>

Eliminating low-level traffic crimes from the removal queue would certainly affect immigration enforcement in the three counties. Judges, prosecutors, and defense attorneys in Los Angeles, Harris, and Maricopa Counties consistently describe driving without a license as a "common immigrant crime" in their courts.<sup>426</sup> The LAPD's decision to cease impounding the vehicles of persons arrested for driving without a license reflects an awareness of the impact of such crimes on

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<sup>421</sup> See SCOMM TASK FORCE, *supra* note 12, at 13–14 ("ICE agrees that enforcement action based solely on a charge for a minor traffic offense is generally not an efficient use of government resources.").

<sup>422</sup> See *Childhood Arrivals Process*, *supra* note 65 (noting that a "minor traffic offense" will not be considered a misdemeanor for purposes of granting deferred action to childhood arrivals).

<sup>423</sup> See Morton Memo on the Use of Detainers, *supra* note 413 (emphasizing that detainers must be issued consistent with federal enforcement priorities, which includes more serious misdemeanors, such as offenses involving violence or driving under the influence).

<sup>424</sup> See DHS Criminal Alien Data Table, *supra* note 53 (providing a breakdown of criminal alien removals based on most serious conviction).

<sup>425</sup> From 2000 to 2010, the number of traffic conviction criminal alien removals increased by 27,961 (from 2847 to 30,808), *id.*, which represents almost a third of the increase in total removals during the same period, *supra* Figure 2.

<sup>426</sup> See, e.g., DeBorde Interview, *supra* note 181 (explaining that the typical scenario for Texas "driving while license invalid" occurs when individuals are pulled over and are unable to provide a driver's license); Espinoza Interview, *supra* note 138 (describing the crime of driving with a suspended license as a "common immigrant crime" that provides an "obvious example of disproportionate impact on the undocumented population"); Kula Interview, *supra* note 308 (explaining that driving without a license "is one of the most prevalent crimes filed" against immigrants in Phoenix municipal court); Interview No. 1, *supra* note 126 (noting that vehicle code crimes, like driving without a license, are "all straight out just because you are undocumented").

undocumented residents.<sup>427</sup> Available data on the prevalence of criminal traffic matters support these observations. For example, in 2009 Maricopa County handled a total of 73,266 criminal traffic cases in its Justice Courts and an additional 127,159 criminal traffic cases in its Municipal Courts.<sup>428</sup> Over the past ten years, Harris County courts have processed over 17,500 convictions for driving without a license.<sup>429</sup>

As immigration and criminal practice become increasingly interlaced, this Article has shown that local criminal systems can have a significant influence on immigration outcomes. Local actors decide who to investigate, screen for immigration status, criminally charge, and ultimately refer to federal authorities. If the federal government wants to combat this localized influence over the criminal removal system, part of the solution must include firm exercise of prosecutorial discretion, particularly on lower-level cases.

## 2. *Supervision*

The second track for reasserting federal control over immigration enforcement is through enhanced federal supervision of local criminal justice actors. The divergence in local criminal justice practices has led the federal government—despite its public stance of sphere separation—to directly involve itself in the criminal prosecutor’s role. One notable example of this assumption of supervisory responsibility is the removal of individuals by federal officials while their local criminal case is still pending.<sup>430</sup> This sequence is especially likely with low-level cases in which the individual has bonded out of criminal custody, but is transferred into immigration custody on an immigration detainer. Here, the federal system acts as a supervisor over the local system that fails to engage immigration enforcement as actively as the federal government would like (for example, by holding noncitizens during the pendency of the criminal case for easy removal after conviction).

In addition to exercising authority to preempt local prosecutions, ICE is now directly training local prosecutors on immigration issues. ICE has created a national training “Tool Kit” for local prosecutors

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<sup>427</sup> Joel Rubin & Paloma Esquivel, *With Illegal Immigrants in Mind, LAPD to Change Impound Rules*, L.A. TIMES, Dec. 14, 2011, at LATEXtra 1.

<sup>428</sup> ARIZ. CRIMINAL JUSTICE COMM’N, ARIZONA CRIME TRENDS: A SYSTEM REVIEW 47–50 (2011), available at [http://www.azcjc.gov/ACJC.Web/Pubs/Home/Crime%20Trends%202011\\_Final.pdf](http://www.azcjc.gov/ACJC.Web/Pubs/Home/Crime%20Trends%202011_Final.pdf).

<sup>429</sup> Harris Cnty. Dist. Clerk Data Table, *supra* note 264.

<sup>430</sup> See *supra* notes 89–93 and accompanying text (discussing the federal government’s official position that immigration deportation can take precedence over local criminal prosecution).

that sets forth the basics of the federal approach.<sup>431</sup> A paramount concern is that local prosecutors properly charge and plead their criminal cases to maximize ICE's chance of obtaining removal when desired.<sup>432</sup> Within Los Angeles, Harris, and Maricopa Counties, ICE has begun to tailor its approach to the peculiarities of local practice.<sup>433</sup> In particular, public records requests reveal that ICE has conducted office-wide trainings of prosecutors in each of the three county-level prosecution offices.<sup>434</sup>

During the course of such trainings, ICE teaches prosecutors about the technical immigration meaning of local criminal statutes. Given the complexity of the law governing crime-based removal, conveying the type of criminal conviction needed to ensure removal is a particularly important aspect of these federally-sponsored trainings.<sup>435</sup> For example, ICE informed Houston prosecutors that the Texas version of driving while intoxicated "is not a crime of violence because there is no requirement under Texas law that the act be committed

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<sup>431</sup> ICE PROSECUTOR TOOL KIT, *supra* note 89 (noting that "[f]ostering and sustaining relationships with our external stakeholders, including federal and state prosecutors, is a pivotal priority of ICE" and setting forth the general parameters of immigration enforcement as it pertains to local criminal prosecutions).

<sup>432</sup> *See id.* at 2 (explaining that ICE "seeks the support and assistance of federal and state prosecutors to ensure that foreign nationals who engage in criminal conduct are expeditiously removed from the United States").

<sup>433</sup> As discussed earlier, these three counties were chosen for further research because of their high rank on a number of datasets that measure criminal alien populations. *See supra* notes 24–26 and accompanying text.

<sup>434</sup> *See* Malgorzata Gasior et al., U.S. Immigration & Customs Enforcement, Saturday Seminar Presentation at Los Angeles County District Attorney's Office: Immigration Process and Law (May 19, 2012) (obtained by author with public records request on July 2, 2012) [hereinafter Los Angeles County ICE Training]; Harris County ICE Training, *supra* note 109; Jennifer Wiles et al., U.S. Immigration & Customs Enforcement, Office of Chief Counsel, Brown Bag CLE Presentation at Maricopa County Attorney's Office: Immigration Consequences of Common Arizona Convictions (Jan. 6, 2012) [hereinafter Maricopa County ICE Training] (obtained by author with public records request on Apr. 9, 2012). In addition to the three counties under review, my public record requests to fifty other county prosecutor offices revealed at least one other major county—Orange County, California—has been trained by federal immigration officials. *See* Los Angeles Office of the Chief Counsel, U.S. Immigration & Customs Enforcement, Presentation at Orange County District Attorney's Office: Prosecutor's Outreach Program (obtained by author with public records request on Sept. 30, 2011).

<sup>435</sup> The so-called "categorical approach," as applied by courts to analyze whether a conviction triggers an immigration sanction, requires analysis of the statutory elements of the crime, not the facts of the particular case. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684–85 (2013); *Taylor v. United States*, 495 U.S. 575, 600–02 (1990). As scholars have noted, the categorical approach is both complicated and contested. *See generally* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011); Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257 (2012); Lee, *supra* note 99, at 601–07.

intentionally.”<sup>436</sup> Similarly, ICE advised Maricopa County prosecutors that, for a child abuse case, the record of conviction needs to reflect that the victim was a child.<sup>437</sup> When local convictions fail to contain a necessary charge or sufficient documentation, they create what federal authorities call an “ICE litigation challenge”—either ICE is unable to secure removal or the process of doing so is more cumbersome.<sup>438</sup>

ICE attorneys also stress the deportation difficulties posed by certain local criminal practices. A prime example is Los Angeles’s reliance on what is known as a “*West* plea.”<sup>439</sup> Under this common plea practice, the defendant does not expressly admit to the conduct, but rather consents to be punished for the alleged conduct. Defendants entering *West* pleas do stipulate to a factual basis. However, such bare-bones pleas can potentially pose a problem for deportation proceedings because “ICE cannot prove the underlying facts unless the plea specifically states the facts or references the complaint or police report.”<sup>440</sup>

Finally, these federal trainings educate local prosecutors about defense approaches to avoid deportation. At the Los Angeles training, for example, ICE critiqued “10 Ways that Criminal Aliens Avoid

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<sup>436</sup> Harris County ICE Training, *supra* note 109, at 8. In *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004), the United States Supreme Court held that a felony DUI committed with a mens rea of negligence or less does not constitute a “crime of violence” under the immigration law. For an excellent review of criminal grounds of deportability, see NORTON TOOBY & JOSEPH JUSTIN ROLLIN, *TOOBY’S CHECKLISTS ON CRIMINAL IMMIGRATION LAW* (2010).

<sup>437</sup> Maricopa County ICE Training, *supra* note 434; *see also In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 512 (B.I.A. 2008) (holding that, assuming the Washington state statute under review was “divisible,” in order to qualify as a “crime of child abuse” under the immigration law, the record of conviction must contain admissible proof that the “convicted conduct” was committed against a minor). As the United States Supreme Court recently clarified, courts may apply a “modified categorical approach” to “divisible statutes” that set forth alternative sets of elements. *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). In determining which set of elements forms the basis of the plea, courts may consider “a limited class of documents, such as indictments and jury instructions.” *Id.* For a timely analysis of the potentially far-reaching implications of *Descamps* for the immigration field, see Dan Kesselbrenner et al., Practice Advisory, *Descamps v. United States* and the Modified Categorical Approach, available at [http://www.nationalimmigrationproject.org/legalresources/practice\\_advisories/cd\\_pa\\_Descamps\\_Practice\\_Advisory\\_7-17-2013.pdf](http://www.nationalimmigrationproject.org/legalresources/practice_advisories/cd_pa_Descamps_Practice_Advisory_7-17-2013.pdf).

<sup>438</sup> Maricopa County ICE Training, *supra* note 434.

<sup>439</sup> *See People v. West*, 477 P.2d 409 (Cal. 1970).

<sup>440</sup> Los Angeles County ICE Training, *supra* note 434. ICE therefore advises that Los Angeles County prosecutors specifically incorporate “the police report in the plea and the criminal docket as part of the plea in *People v. West* pleas.” *Id.* Litigation regarding what exactly courts can consider in determining whether a *West* plea triggers removal is ongoing. *See, e.g., Cabantac v. Holder*, 693 F.3d 825, 827 (2012) (concluding that where a defendant pleads guilty pursuant to *People v. West* and the “abstract of judgment or minute order specifies that a defendant pleaded guilty to a particular count of the criminal complaint or indictment, we can consider the facts alleged in that count”).



Immigration Consequences for Their Convictions.”<sup>441</sup> The underlying federal concern appears to be the fact that some “criminal aliens” cannot be removed under the immigration law because of the technical nature of their conviction or relief for which they remain eligible. A better result, from the federal perspective, would be to ensure that convictions are sufficient to ensure removability, thus resting enforcement discretion exclusively with the federal government.

In conclusion, over the long term, increased attention to ICE’s supervisory role and corresponding exercise of federal discretion could influence both local criminal practices and immigration outcomes. As the National District Attorneys Association can attest, most local prosecutors are currently “unaware that omissions or slight changes in pleas make a world of difference in whether a defendant is later removed.”<sup>442</sup> A review of the trends emerging from the three influential counties discussed in this Article suggests that, although significant variation is evident in current practice, the federal government is attempting to alter this dynamic. By closely monitoring and influencing local criminal justice practices, federal authorities seek a more consistent baseline for the criminal removal system.

#### CONCLUSION

American criminal justice plays out at the local level. At the same time, federal immigration enforcement increasingly takes place in partnership with local police, prosecutors, jailers, and probation officers. The consequences of this new dynamic are surprisingly understudied.

This Article has demonstrated that, regardless of which system technically has custody of an immigrant defendant, criminal and immigration law work together as a single, integrated system that rations both criminal and immigration sanctions. This integrated system determines the immigration screening that occurs, the type of charge that is levied, the characteristics of the eventual plea and sentence, and the sanction of deportation. The integrated process not only shapes the criminal system outcome but also determines the immigration outcome. In short, it defines the criminal alien.

Yet, three of the largest criminal jurisdictions in the nation have approached noncitizen criminal justice in quite different ways. Each county has crafted its own special brand of noncitizen policing, prosecuting, and sanctioning that is far more complex and internally

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<sup>441</sup> Los Angeles County ICE Training, *supra* note 434.

<sup>442</sup> E-mail from David H. Pendle, Senior Attorney, Nat’l Dist. Attorneys Ass’n, to author (June 22, 2012) (on file with author).

coherent than scholars would anticipate or than the federal government would like to acknowledge. This diversity of approaches raises important institutional design questions that are in need of future study.

For the criminal system, this Article makes clear that actors within the various criminal justice agencies all exercise considerable discretion in deciding how to weigh alienage status in their day-to-day work of booking suspects, filing criminal charges, setting bond, sentencing defendants, and revoking probation. In addition, each jurisdiction recognizes the capacity to directly inform federal immigration enforcement, including by policing immigration status, prosecuting immigration crimes, and plea bargaining in cases that involve collateral deportation consequences.

For the immigration system, this Article's findings demonstrate that a criminal removal system is susceptible to considerable fluctuation across different localities. Such variation takes the form of distinct, coherent approaches to noncitizen justice. It also results from the happenstance of existing criminal justice structures that were part of local practice long before criminal removals became as pronounced as they are now. Federal attempts to reorder local customs by more carefully training prosecutors or sifting through criminal court results may have some success in smoothing out these differences. However, such measures are unlikely to create true national uniformity. So long as the criminal removal system continues, local variation will remain a defining feature of the modern "criminal alien."

Although the three counties studied for this Article have made clear decisions about the meaning of alienage status and immigration enforcement within their criminal justice systems, most counties have not been forced to think about noncitizen justice for as long, or as routinely. As the criminal removal system expands and the demographics of immigration diversify, more jurisdictions will soon confront the central questions of noncitizen justice. By uncovering how these three significant counties have dealt with these challenging issues, this Article begins an important conversation regarding what is at stake in structuring criminal justice for noncitizens.