

LOCAL IMMIGRATION PROSECUTION: A STUDY OF ARIZONA BEFORE SB 1070

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Arizona's Senate Bill 1070 has focused attention on whether federal law preempts the prosecution of state immigration crime in local criminal courts. Absent from the current discussion, however, is an appreciation of how Arizona's existing body of criminal immigration law—passed well before SB 1070 and currently in force in the state—functions on the ground to regulate migration. Drawing on statistical data, prosecution policies, trial-level court records, and interviews with stakeholders, this Article is the first to investigate the practice of local immigration prosecution. It does so in the hotbed of immigration enforcement—Maricopa County, Arizona—through a detailed case study of the implementation of a 2005 Arizona alien smuggling law. Specifically, this Article reveals four key aspects of the national immigration system that have shifted in the face of state criminalization: the functional definition of immigration crime, the breadth of state immigration enforcement authority, the allocation of federal resources for criminal prosecution, and the exercise of executive control over immigration policy. Through this analysis, this Article shows how Arizona, despite the formal prohibition on state and local immigration regulation, has redefined and restructured the federal system for punishing immigration crime. In so doing, this Article fosters a richer and more accurate understanding of the role of the local prosecutor in immigration federalism.

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* Acting Professor of Law, UCLA School of Law. For their comments and helpful conversations, I am grateful to Norman Abrams, Asli Bâli, Devon Carbado, Ann Carlson, Jack Chin, Susan Bibler Coutin, Scott Cummings, Joseph Doherty, Sharon Dolovich, Alice Eagly, Allison Hoffman, Guy Iversen, Daniel Kanstroom, Sung Hui Kim, Stephen Lee, Karla McKanders, Allegra McLeod, Jon Michaels, Marc Miller, Vivek Mittal, Hiroshi Motomura, Joanna Schwartz, Juliet Stumpf, Rick Su, Cecillia Wang, Ian Weinstein, Ron Wright, Stephen Yeazell, Noah Zatz, and participants in the 2011 Law and Society meeting. For their excellent research assistance, I also thank Mariana Newman, Jenny Osborne, Zachary Thompson, and the staff of UCLA's Hugh & Hazel Darling Law Library.

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INTRODUCTION

Arizona’s Senate Bill 1070 (SB 1070) has focused national attention on the relationships between federal, state, and local governments in enforcing immigration law.¹ In a lawsuit against the State of Arizona, the United States seeks to enjoin much of SB 1070 on preemption grounds.² The federal challenge, which the U.S. Supreme Court may ultimately decide,³ has provoked renewed interest in the appropriate scope of federal immigration power and the permissible role, if any, of states and localities in impinging upon that power.⁴

1. Support Our Law Enforcement and Safe Neighborhoods Act, S. 1070 (SB 1070), 49th Leg., 2d Reg. Sess. (Ariz. 2010), amended by H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010). If implemented, SB 1070 would, among other things, expand state law enforcement authority to enforce federal immigration law and add immigration crimes to the Arizona code.

2. Complaint, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10 Civ. 1413). In addition to the federal suit, a coalition of civil rights groups has challenged the law on preemption and other constitutional grounds. See Order, Friendly House v. Whiting, No. CV 10-1061-PHX-SRB (D. Ariz. Oct. 8, 2010), <http://www.nilc.org/immlawpolicy/LocalLaw/Friendly-House-Order-on-Motion-to-Dismiss.pdf>.

3. For now, part of the law has been preliminarily enjoined by the federal district court. See *Arizona*, 703 F. Supp. 2d 980, *aff’d*, 641 F.3d 339 (9th Cir. 2011).

4. For examples of scholarship arguing that criminal immigration law should be preempted, see Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47 (2010); Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 60 DUKE L.J. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648685; Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939 (1995); Karla Mari McKanders, *Unforgiving of Those Who Trespass Against U.S.: State Laws Criminalizing Immigration Status*, 12 LOY. J. PUB. INT. L. 331 (2011). For contrary views,

According to conventional analysis, the immigration preemption standard is simple and clear: States and localities may neither directly select migrants nor impose burdens that conflict with federal immigration law.⁵ In this doctrinal context, the debate about the facial legitimacy of SB 1070 reasserts a familiar question,⁶ albeit in slightly different terms: Should localities be allowed to regulate immigration under the auspices of regulating crime?

Against this doctrinal background, the academic debate over immigration preemption reaches a stalemate. Those who favor state enforcement describe state immigration crimes⁷ as “force multipliers” that merely “mirror,” without

see Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57.

5. See *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”); Schuck, *supra* note 4, at 57 (“Probably no principle in immigration law is more firmly established, or of greater antiquity, than the plenary power of the federal government to regulate immigration.”). Some scholars have, however, critiqued the constitutional basis of exclusive federal power over immigration. See, e.g., Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 792, 811 (2008); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

6. For a sampling of the varied views on the subject, see Linda S. Bosniak, *Immigrants, Preemption and Equality*, 35 VA. J. INT’L L. 179 (1994); Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609 (2010); Adam B. Cox, *Immigration Law’s Organizing Principles*, 157 U. PA. L. REV. 341 (2008); Pratheepan Gulasekaram, *Aliens With Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891 (2007); Anil Kalhan, *Immigration Enforcement and Federalism After September 11, 2001*, in IMMIGRATION, INTEGRATION AND SECURITY: EUROPE AND AMERICA IN COMPARATIVE PERSPECTIVE (Ariane Chebel d’Appollonia & Simon Reich eds., 2008); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361 (1999); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27; Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373 (2006); Peter J. Spiro, *Learning to Live With Immigration Federalism*, 29 CONN. L. REV. 1627 (1997); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557 (2008); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 494 (2001); see also *supra* notes 4–5; *infra* note 9.

7. This Article uses the term “immigration crime” (and “criminal immigration law”) to refer to laws prosecuted in criminal courts that impose criminal sanctions of fines or incarceration for immigration law violations. See Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1282 n.3 (2010). Crimes such as illegal entry, illegal reentry, and alien smuggling—which all require proof of alienage or border crossing—fall within this definition of “immigration crime.” 8 U.S.C. §§ 1324–26 (2006). “Immigration crime” is thus distinct from nonimmigration crimes (such as murder or rape) prosecuted against noncitizens. Finally, by describing a specific category of substantive law, the term “immigration crime” is also distinct from other terms that have been valuable in identifying the broader institutional connection between immigration law and criminal law. See, e.g., Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669 (1997) (“criminalization of immigration law”); Teresa A. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 618–19 (2003) (“immigrationization of criminal law”); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (“crimmigration law”).

altering, federal law.⁸ In contrast, those who oppose such laws warn of potential societal ills, such as racial profiling and exploitation of unauthorized migrants, which could result from increased state enforcement.⁹ Somewhat surprisingly, despite extensive scholarly interest in immigration preemption, what actually happens when local district attorneys, sheriffs, U.S. Border Patrol agents, and public defenders come together in the enforcement of state criminal immigration law has yet to be explored.¹⁰

This Article—the first to examine the practice of local immigration prosecution—does so through an empirical study of the enforcement of an Arizona alien smuggling crime.¹¹ Since 2005, Arizona law has empowered state prosecutors to impose criminal sanctions on those who transport illegal immigrants into the state.¹² To date, the smuggling law has survived preemption challenges,¹³ with Arizona courts uniformly classifying it as core to state police powers,¹⁴ compatible with federal enforcement,¹⁵ and duplicative of federal objectives.¹⁶

8. See, e.g., Schuck, *supra* note 4, at 84–91 (concluding that state laws that “track” or “mirror” federal law should not be preempted); Rick Su, Commentary, *The Overlooked Significance of Arizona’s New Immigration Law*, 108 MICH. L. REV. FIRST IMPRESSIONS 76 (2010) (arguing that, with the exception of the mandate that localities enforce immigration, SB 1070 does not “radically alter the federal-state balance of immigration enforcement”); Kris W. Kobach, *Defending Arizona*, NAT’L REV., June 7, 2010, at 31 (“The Arizona law simply adds another layer of state penalty to what was already a crime under federal law.”).

9. See, e.g., Kevin R. Johnson, *A Case Study of Color-Blind Rhetoric: The Racially Disparate Impacts of Arizona’s S.B. 1070 and the Fall of Comprehensive Immigration Reform*, 1 ARIZ. ST. L.J. SOC. JUST. 3 (2011); Orde F. Kittrie, *Federalism, Deportation and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1487 (2006).

10. As Jennifer Chacón has noted, “there is very little evidence regarding how [state immigration] laws will be deployed” by the states that have enacted them. Chacón, *supra* note 6, at 1650.

11. In so doing, this Article responds to a challenge posed some time ago by Linda Bosniak: “If the states were empowered to regulate immigration, just what is it that they would be empowered to do?” Bosniak, *supra* note 6, at 181.

12. S. 1372, 47th Leg., 1st Reg. Sess. (Ariz. 2005) (codified as amended at ARIZ. REV. STAT. ANN. § 13-2319 (2010)). For a description of the elements of the smuggling crime, see *infra* note 57.

13. *State v. Barragan-Sierra*, 196 P.3d 879 (Ariz. Ct. App. 2008), *no appeal filed*; *State v. Flores*, 188 P.3d 706 (Ariz. Ct. App. 2008), *appeal denied*, No. CR-08-0252-PR (Ariz. Jan. 6, 2009); Ruling Denying Motions to Dismiss, *Arizona v. Salazar Hernández*, No. CR2006-005932-DT-003 (Ariz. Super. Ct. June 9, 2006), *special action declined*, Minute Order, *Salazar Hernández v. Hon. Thomas O’Toole*, No. 1 CA-SA 06-0145 (Ariz. Ct. App. July 18, 2006).

14. *Flores*, 188 P.3d at 712 (finding that the smuggling law “furthers the legitimate state interest of attempting to curb ‘the culture of lawlessness’ that has arisen around this activity by a classic exercise of its police power”).

15. *Barragan-Sierra*, 196 P.3d at 890 (“Arizona’s enforcement of its human smuggling law is compatible with the federal enforcement of its counterpart, serving the same purposes.”); Ruling Denying Motions to Dismiss, *supra* note 13, at 9 (“[C]oncurrent state and federal enforcement of illegal alien smuggling and conspiracy to smuggle illegal alien laws serves both federal and state law enforcement purposes and is highly compatible.”).

16. *Flores*, 188 P.3d at 712 (concluding that the Arizona smuggling law “mirror[s] federal objectives”). The United States seeks to invalidate a new, broader smuggling crime adopted as part of

In order to understand how the smuggling law operates on the ground, this Article studies its implementation in Arizona's largest county: Maricopa County. Located less than one hundred miles from the Mexican border, Maricopa County is home to nearly four million people and the fourth most populous county in the nation.¹⁷ Maricopa County, which includes the city of Phoenix, also accounts for over 60 percent of the state's violent crime.¹⁸ Finally, Maricopa County is an important locale for the study of immigration enforcement because of the high concentration of noncitizens detained in its jails¹⁹ and prosecuted in its courts.²⁰

Since Arizona's smuggling law was first passed, Maricopa County's local prosecutor and sheriff have used it to pursue hundreds of criminal cases. Central to the Maricopa County enforcement scheme is an unexpected series of prosecutions *against* migrants, for smuggling themselves.²¹ In order to enhance these self-smuggling prosecutions, a sophisticated procedural system has emerged. This system includes state alienage-based rules for criminal bail, sentencing, material witnesses, and jails. It also includes local policies for arresting, charging, detaining, and plea bargaining.

SB 1070, but thus far the federal district court has declined the government's request to enjoin enforcement. *United States v. Arizona*, 703 F. Supp. 2d 980, 1003 (D. Ariz. 2010). The United States suggests in its SB 1070 suit that it believes the 2005 alien smuggling statute ought to be preempted, Complaint, *supra* note 2, ¶¶ 50–51, but has not sought to invalidate the law, *Arizona*, 703 F. Supp. 2d at 986 n.2, 999–1000 & n.15.

17. Press Release, U.S. Census Bureau, U.S. Census Bureau Delivers Final State 2010 Census Population Totals for Legislative Redistricting (Mar. 24, 2011), <http://2010.census.gov/news/releases/operations/cb11-cn123.html>.

18. ARIZ. DEP'T OF PUB. SAFETY, CRIME IN ARIZONA 24, 53 (2009), http://www.azdps.gov/About/Reports/docs/Crime_In_Arizona_Report_2009.pdf.

19. See *infra* Figure 1 (reflecting that, as of 2009, 20 percent of Maricopa County Sheriff's jail inmates were identified as potentially subject to deportation); see also U.S. GOV'T ACCOUNTABILITY OFFICE, GOA-05-337R, INFORMATION ON CRIMINAL ALIENS INCARCERATED IN FEDERAL AND STATE PRISONS AND LOCAL JAILS 30 (2005), <http://www.gao.gov/new.items/d05337r.pdf> (identifying Maricopa County's jails as among those with the highest concentrations of noncitizens in the nation).

20. 2008 MARICOPA CNTY. ATT'Y'S OFFICE ANN. REP. 10, http://www.maricopacountyattorney.org/Annual_Reports_Protocols/2008.pdf (reporting that 21 percent of individuals sentenced for felonies in Maricopa County are undocumented immigrants).

21. A federal suit to challenge Maricopa County's use of the 2005 law to prosecute self-smuggling is still pending in federal district court. Initially, the district court dismissed the case pursuant to the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971), finding that the smuggling law was not preempted in a manner that is "readily apparent." *We Are Am./Somos Am., Coal. of Ariz. v. Maricopa Cnty. Bd. of Supervisors*, 594 F. Supp. 2d 1104 (D. Ariz. 2009) (rejecting field preemption); *We Are Am./Somos Am., Coal. of Ariz. v. Maricopa Cnty. Bd. of Supervisors*, No. CIV 06-2816 PHX RCB, 2007 WL 2775134 (D. Ariz. Sept. 21, 2007) (rejecting express and conflict preemption). Noting that "Arizona has an important interest in enforcing its criminal statutes," the Ninth Circuit affirmed as to the plaintiffs convicted of self-smuggling in Maricopa County but reversed and remanded as to the taxpayer and organizational plaintiffs. *We Are Am./Somos Am., Coal. of Ariz. v. Maricopa Cnty. Bd. of Supervisors*, 386 F. App'x 726 (9th Cir. 2010).

To understand how this Arizona model operates and relates to the federal immigration regime, I draw on a range of quantitative and qualitative data: federal and state prosecution statistics, lower-court criminal records, prosecution policies, and interviews with individuals practicing in Arizona's criminal justice system.²² What emerges from this research is a complex and quiet reality that has been obscured in the dramatic confrontation over SB 1070: Arizona has *already* altered federal power over immigration through its control over crime. First, the Arizona alien smuggling law gives local prosecutors the authority to control their own prosecutions in ways that federal law and policy would not allow. Second, the availability of state immigration law broadens local enforcement authority over immigration beyond that delegated by Congress. Third, federal resources are realigned because local prosecutors cannot prosecute immigration on their own. Instead, they must call upon federal authorities to search databases, pull documents, and even provide personnel to testify in court regarding immigration status. Fourth, the fierce independence of popularly elected city and county prosecutors dilutes the Executive's supervisory role in the area of immigration enforcement.

One implication suggested by these findings is the limited reach of traditional preemption analysis. As this study highlights, challenging criminal laws on preemption grounds presents practical barriers: Detained defendants almost uniformly accept plea bargains rather than engage in protracted preemption litigation, largely shielding such laws from formal review. Moreover, the Arizona preemption challenges—brought on behalf of individual defendants shortly after the alien smuggling law was adopted—did not have access to the full range of evidence regarding the law's implementation. This Article's *ex post* evaluation of the smuggling law's implementation thus provides an important new foundation to enrich future preemption analysis. This is particularly true with respect to conflict preemption, which evaluates whether state laws impede or frustrate congressional objectives.²³

Beyond preemption, by illuminating the role of the local prosecutor in the expanding landscape of immigration enforcement, this Article offers an

22. To identify persons with knowledge in the field suitable for participation in the study, I contacted individuals in supervisory positions at prosecutor and public defender offices, leaders of bar associations, and persons identified in secondary sources and elsewhere as experts in the field. I then used a snowball sampling technique to identify additional persons with expertise. Interviews were conducted with the informed consent of participants, pursuant to a protocol approved by the UCLA Institutional Review Board. In total, thirty-four individuals were interviewed, twenty-three of whom are directly quoted in this Article.

23. See *infra* note 76 and accompanying text (summarizing direct, field, and conflict preemption).

alternative view of “immigration federalism”²⁴—one that challenges the conventional understanding of the relationship between federal, state, and local spheres in regulating migration. In particular, the Maricopa County cases demonstrate that criminal immigration prosecution is no longer an exclusive federal domain, but instead may be prosecuted concurrently by both state and federal actors. With this new authority, local prosecutors can criminalize actions (such as self-smuggling) and calibrate punishment (such as probation for felony smuggling) in ways that federal prosecutors would not. Indeed, Arizona’s own alien smuggling caseload has broken down along lines familiar to scholars of criminal law: The majority of alien smuggling cases now go to state authorities at the local level,²⁵ with the federal government retaining jurisdiction for the most serious violators.²⁶

Appreciating the fact that states now adjudicate *criminal* immigration cases (but not *civil* immigration cases) is also of significant consequence. In practice, this “criminal only” state structure can incentivize the use of criminal law to achieve civil immigration objectives. In Maricopa County, for example, prosecutors pursued alien smuggling as a “no amnesty” policy designed to secure deportation. In this sense, Maricopa County is not just a bellwether of things to come, but a cautionary tale about what happens when local prosecutors adapt criminal law for immigration ends.

This Article proceeds in three Parts. Part I sets forth the Arizona model for prosecuting immigration, as implemented in Maricopa County. Part II analyzes in detail how local immigration prosecution has, in spite of preemption, redrawn and redistributed the established structure of immigration crime prosecution. Part III elaborates on the significance of these findings for immigration federalism.

I. THE EVOLUTION OF ALIEN SMUGGLING PROSECUTION IN MARICOPA COUNTY

When Andrew Thomas campaigned to be Maricopa County’s top prosecutor in 2004, he posted “Stop Illegal Immigration” signs around town.²⁷ A 1991 graduate of Harvard Law School, Thomas would later become one of

24. See Motomura, *supra* note 6, at 1361 (introducing the term “immigration federalism,” which he defines as the role that “states and localities play in making and implementing law and policy relating to immigration and immigrants”).

25. See *infra* Figure 2.

26. See *infra* Figure 4.

27. Telephone Interview With Jeremy Mussman, Deputy Dir., Maricopa Cnty. Pub. Defender (Aug. 16, 2010) [hereinafter Mussman Interview].

the principal architects of SB 1070.²⁸ But in 2004, when he was first elected county attorney, everyone in the criminal justice community was saying, “Immigration is a federal issue. How is he going to do that?”²⁹

Then there was the first case.

A. The Case of Patrick Haab

On April 10, 2005, at a deserted rest stop on Interstate 8 near the Arizona–Mexico border, Army reservist Patrick Haab held seven migrants at gunpoint.³⁰ Beyond this, accounts of what happened that night diverge. According to the twenty-four-year-old Haab, he stopped midway between Yuma and Phoenix to walk his dog when seven men rushed out of the brush in the dark.³¹ In fear for his life, his military training took over: He pulled his gun and ordered the men to lie on the ground.³² He then dialed 911 on his cell phone.³³

A contrasting account emerged from the Maricopa County Sheriff’s Office. According to the arresting officers, Haab used his car to block the men

28. 2009 MARICOPA CNTY. ATT’Y’S OFFICE ANN. REP. 19, http://www.maricopacountyattorney.org/Annual_Reports_Protocols/2009AR.pdf [hereinafter 2009 MCAO ANN. REP.]. Thomas has deep roots in the conservative movement, dating back to his time at Harvard Law School. See ANDREW PEYTON THOMAS, *THE PEOPLE V. HARVARD LAW: HOW AMERICA’S OLDEST LAW SCHOOL TURNED ITS BACK ON FREE SPEECH* (2005) (criticizing what he considers to be a left-leaning academic environment at Harvard Law School). Shortly after law school, he joined the Arizona Attorney General’s Office. In 2002, before becoming the head prosecutor for Maricopa County, he lost a bid for Arizona Attorney General to Terry Goddard. Christina Leonard, *Goddard Is Victorious Following Seesaw Tally*, ARIZ. REPUBLIC, Nov. 6, 2002, at A20.

29. Mussman Interview, *supra* note 27.

30. I am grateful to Jeremy Mussman, Deputy Director of the Maricopa County Public Defender’s Office, for first bringing the Patrick Haab case to my attention. *Id.* Subsequently, several other local attorneys assisted in deepening my understanding of the significance of the Haab case to the evolution of local control over migration. See, e.g., Telephone Interview With Paul K. Charlton, Former U.S. Att’y, Dist. of Ariz. (Jan. 13, 2011) [hereinafter Charlton Interview] (recalling that Arizona’s U.S. Attorney’s Office was asked to comment on the Haab case); Telephone Interview With Adrian Paulino Fontes, Law Offices of Adrian P. Fontes, PLC (Mar. 7, 2011) [hereinafter Fontes Interview] (recalling the issues raised by the controversial Haab case, which was “all over” the local news); Telephone Interview With German Salazar, Former Maricopa Cnty. Indigent Def. Contract Att’y (Mar. 25, 2011) [hereinafter Salazar Interview] (recounting Thomas’s actions in the Haab case and indicating that the Hispanic community “felt that this whole issue wasn’t about immigration, it was about racism”); Telephone Interview With Jon Sands, Fed. Pub. Defender, Dist. of Ariz. (Dec. 16, 2010) [hereinafter Sands Interview] (remembering the Haab case as marking the first time the Arizona smuggling law emerged onto the legal scene in Maricopa County).

31. Robert Anglen, *Reservist Arrested in Migrant Case Sues Arpaio*, ARIZ. REPUBLIC, Dec. 8, 2005, at B1.

32. *Haab v. Cnty. of Maricopa*, 191 P.3d 1025, 1026 ¶ 3 (Ariz. Ct. App. 2008).

33. *Id.*; Appellees’ Answering Brief at 3, *Haab*, 191 P.3d 1025 (No. 1 CA-CV 07-0562), 2007 WL 4694150.

from leaving the rest stop and then ordered them out of their car at gunpoint.³⁴ Attempting to make the migrants believe he was a Border Patrol officer, Haab directed the men to lie on the ground and threatened to kill them. As he waited for law enforcement to respond, he searched their vehicle.³⁵

When sheriff's deputies and Border Patrol agents responded to the location, everyone was arrested. The seven men, who were later determined to be undocumented, were moved to a federal immigration detention facility in Yuma, Arizona.³⁶ Haab, on the other hand, was held in Sheriff Joe Arpaio's "Tent City" jail on seven counts of aggravated assault with a deadly weapon.³⁷ Unable to afford the \$10,000 bond, he held a press conference from the jail.³⁸ After four nights, a stranger who heard about the case in the news posted his bond, and Haab was released.³⁹

Patrick Haab became an overnight folk hero. He appeared on conservative talk radio was heralded by the emerging civilian border patrol movement, including a new grassroots group, the Minuteman Project.⁴⁰ During all the media attention, Haab was famously quoted complaining that undocumented immigrants were turning the United States into "Americo," a combination of America and Mexico.⁴¹

Legal authorities wrangled over what to do. Not wanting to follow through with Sheriff Arpaio's referral for criminal charges, County Attorney Andrew Thomas looked for a legal justification for Haab's actions. If the incident could fit into the legal requirements for a "citizen's arrest" under Arizona law, Thomas reasoned, Haab's holding of the men at gunpoint would be entirely justified.⁴² In Arizona, a citizen may make an arrest if a felony, or a misdemeanor amounting to a breach of the peace, has been committed. In contrast to arrests by peace officers, arrests by private persons require more than

34. Robert Anglen & Susan Carroll, *Case Sounds Vigilante Alarm*, ARIZ. REPUBLIC, Apr. 13, 2005, at B1.

35. Robert Anglen, *Soldier Overwhelmed by Support Since Arrest*, ARIZ. REPUBLIC, Apr. 16, 2005, at B1.

36. Appellees' Answering Brief, *supra* note 33, at 4; Anglen & Carroll, *supra* note 34. The seven men told deputies that they had been afraid for their lives and wanted Haab prosecuted. Appellees' Answering Brief, *supra* note 33, at 4.

37. Robert Anglen & Yvonne Wingett, *Feds Question Freeing Reservist*, ARIZ. REPUBLIC, Apr. 23, 2005, at B1. As Mona Lynch has found, "tent compounds" have been used in Arizona since the early 1980s but were publicized by Arpaio as if they were his own novel invention. MONA LYNCH, SUNBELT JUSTICE 164 (2010).

38. *Haab*, 191 P.3d at 1026 ¶ 3.

39. Anglen, *supra* note 35.

40. Anglen & Wingett, *supra* note 37; Mussman Interview, *supra* note 27.

41. Anglen & Wingett, *supra* note 37.

42. *Id.*

probable cause: The crime must have actually been committed.⁴³ If the arresting citizen guesses wrong, he can be prosecuted for a crime committed in connection with the illegal arrest.⁴⁴ For example, pointing a gun at someone is a felony in Arizona.⁴⁵

The legality of Haab's actions therefore depended on whether the men he arrested had committed a crime that fell within the purview of Arizona's citizen's arrest statute. The men held at gunpoint were determined to have been undocumented. However, undocumented status alone is not a crime, either under federal law or under the law of Arizona.⁴⁶ Even if it could be argued that the men were guilty of illegally entering the country,⁴⁷ Arizona law does not empower citizens to arrest for this federal misdemeanor.⁴⁸

According to Sheriff Arpaio, Haab was guilty of a felony and the detained men were innocent.⁴⁹ Although local law enforcement has the "authority to lock up smugglers," it cannot arrest "illegals hanging around street corners."⁵⁰ "You can't go to jail for being an illegal alien," Arpaio explained, "you can only be deported."⁵¹ Moreover, having local sheriffs enforce immigration law would be a "waste" of resources: It simply makes no sense to go "after a guy in a truck when he picks up five illegals to go trim palm trees."⁵²

With all the media attention focused on Haab, federal prosecutors were pulled into the fray. After reviewing the case, the U.S. Attorney for the District of Arizona filed federal smuggling charges against the driver of the vehicle,⁵³ but not against any of the passengers.⁵⁴ Defending the decision, the U.S. Attorney's Office publicly clarified that the passengers had not violated any federal law.⁵⁵

43. ARIZ. REV. STAT. ANN. § 13-3884 (2010) (providing that a "private person may make an arrest" if (1) a misdemeanor amounting to breach of the peace is committed in his presence or (2) a felony "has been in fact committed and he has reasonable ground to believe that the person to be arrested has committed it" (emphasis added)).

44. See generally *State v. Skaists*, No. 1 CA-CR 08-0329, 2008 WL 5384288 (Ariz. Ct. App. Dec. 26, 2008) (clarifying that the lawfulness of a citizen's arrest requires an evaluation of whether the individual arrested in fact committed a crime covered by the statute).

45. ARIZ. REV. STAT. ANN. § 13-1204.

46. See Eagly, *supra* note 7, at 1298, 1344; see also *infra* notes 169–172 and accompanying text.

47. 8 U.S.C. § 1325 (2006) (illegal entry).

48. ARIZ. REV. STAT. ANN. § 13-3884.

49. Anglen & Wingett, *supra* note 37.

50. Michael Kiefer, *Law Agencies Cool to New "Coyote" Law*, ARIZ. REPUBLIC, Aug. 21, 2005, at B1.

51. Anglen & Carroll, *supra* note 34.

52. Kiefer, *supra* note 50.

53. 8 U.S.C. § 1324(a)(1)(A)(ii) (2006) (federal smuggling).

54. Anglen & Wingett, *supra* note 37.

55. Robert Anglen, *Feds Look at Arrest by Haab*, ARIZ. REPUBLIC, Apr. 28, 2005, at B1.

At this point, County Attorney Thomas announced that the men held at gunpoint had in fact committed a felony.⁵⁶ Just one month before, Arizona Governor Janet Napolitano had signed a new bill criminalizing for-profit smuggling of migrants into Arizona.⁵⁷ The Maricopa County Attorney's Office provided key support for the legislation,⁵⁸ which made alien smuggling a class four felony.⁵⁹ Although the bill was not yet in effect, Thomas had already developed a novel legal theory rooted in the new law: The passengers arrested by Haab were guilty of "conspiring" with the smuggler to "smuggle themselves."⁶⁰ One of the trial attorneys for the County Attorney's Office explained the strategy in more detail: "When individuals by action agreed to be transported, or when they got into the vehicle to be transported, a crime of conspiracy was committed."⁶¹

By combining Arizona's conspiracy statute⁶² with the new Arizona felony of "human smuggling,"⁶³ Thomas was able to reach beyond prosecution of the smugglers (known as *coyotes* or *polleros*⁶⁴) and prosecute the migrants being transported (known as *pollos*⁶⁵). The problem was solved: Haab had the legal

56. Robert Anglen, *Migrant-Holding Reservist Walks*, ARIZ. REPUBLIC, Apr. 22, 2005, at A1.

57. See *supra* note 12. Specifically, the law makes it "unlawful for a person to intentionally engage in the smuggling of human beings for profit or commercial purpose." ARIZ. REV. STAT. ANN. § 13-2319(A) (2010). "Smuggling of human beings" is defined as:

[T]he transportation, procurement of transportation or use of property or real property by a person or an entity that knows or has reason to know 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.

Id. § 13-2319(F)(3).

58. MARICOPA CNTY. ATT'Y'S OFFICE, ILLEGAL IMMIGRATION 4 (Sept. 2008) [hereinafter MCAO ILLEGAL IMMIGRATION 2008].

59. ARIZ. REV. STAT. ANN. § 13-2319(B).

60. Anglen & Wingett, *supra* note 37.

61. *Id.*

62. ARIZ. REV. STAT. ANN. § 13-1003(A) ("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 . . ."). For general background on the criminal law of conspiracy, see WAYNE R. LAFAYE, PRINCIPLES OF CRIMINAL LAW 486-92 (2d ed. 2010) (discussing the many "unique advantages" that conspiracy offers prosecutors, including vague doctrine, flexible venue, favorable evidentiary rules, and joint trials); PAUL MARCUS, PROSECUTION AND DEFENSE OF CRIMINAL CONSPIRACY CASES (2010) (discussing the evidentiary and practical considerations raised by conspiracy prosecutions).

63. ARIZ. REV. STAT. ANN. § 13-2319.

64. *Coyote* is Spanish for "wolf." *Pollero* is Spanish for "chicken farmer."

65. *Pollo* is Spanish for "chicken." For a discussion of these and other slang terms associated with alien smuggling, see ROBERT JAMES MCWHIRTER, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS (2d ed. 2006); DAVID SPENCER, CLANDESTINE CROSSINGS: MIGRANTS AND COYOTES ON THE TEXAS-MEXICO BORDER, at xxii-xxiii, 94-95 (2009).

right under Arizona law to hold the men at gunpoint. On April 28, 2005, all criminal charges against Patrick Haab were dismissed.⁶⁶

B. The Arizona Immigration Prosecution Regime

Although County Attorney Thomas did not actually prosecute the men Haab held at gunpoint,⁶⁷ real prosecutions would soon follow.⁶⁸ On September 29, 2005, Thomas issued a formal legal opinion to Sheriff Arpaio, authorizing law enforcement to arrest both *coyotes* and the migrants they smuggle if there is “probable cause to believe that illegal immigrants have intentionally allowed themselves to be smuggled by a paid human smuggler, or ‘coyote,’ and were transported in Maricopa County as part of that smuggling.”⁶⁹ With this new guidance in hand, Sheriff Arpaio was assured that he could arrest illegal immigrants who conspire to smuggle themselves.⁷⁰

Cupertino Salazar Hernández was one of forty-nine defendants to be charged in the first Maricopa County smuggling prosecution.⁷¹ On March 2, 2006, Salazar Hernández was traveling with other men in a rural area of Maricopa County when a sheriff’s deputy stopped his van, along with another traveling behind it, in a routine traffic stop.⁷² When Border Patrol agents and additional deputies arrived, the men were asked questions regarding their immigration status.⁷³ They were all arrested and criminally charged: one with alien smuggling, and the forty-eight other passengers with felony conspiracy to commit alien smuggling.⁷⁴

66. Haab v. Cnty. of Maricopa, 191 P.3d 1025, 1026 ¶ 3 (Ariz. Ct. App. 2008).

67. Technically, he could not prosecute the men because the smuggling law—although signed by the governor—did not go into effect until August 2005. GENERAL EFFECTIVE DATES, ARIZ. STATE LEGIS., <http://www.azleg.gov/GeneralEffectiveDates.asp> (last visited June 14, 2011).

68. See Telephone Interview With Tim Agan, Att’y, Office of the Legal Advocate, Maricopa Cnty., Ariz. (Aug. 13, 2010) [hereinafter Agan Interview].

69. Letter From Andrew P. Thomas to Joseph Arpaio, Maricopa Cnty. Att’y, Op. No. 2005-002 (Sept. 29, 2005) (obtained by author from the MCAO with a public records act request on Dec. 7, 2010) [hereinafter MCAO Smuggling Policy].

70. See generally Michael Kiefer, *Maricopa Court Upholds Migrant Smuggling Law*, ARIZ. REPUBLIC, June 10, 2006, at B1.

71. Agan Interview, *supra* note 68 (discussing the first set of conspiracy prosecutions in which he represented Cupertino Salazar Hernández); Fontes Interview, *supra* note 30 (same); Telephone Interview With Alex Navidad, Criminal Def. Att’y, Phx., Ariz. (Aug. 12, 2010) [hereinafter Navidad Interview] (same); Salazar Interview, *supra* note 30 (same).

72. Ruiz-Lopez Presentence Investigation Report at 1, *State v. Ruiz-Lopez*, CR 2006-005932-049-DT (Ariz. Super. Ct. Aug. 1, 2006); Carreto’s Motion to Sever at 2, *Arizona v. Carreto*, No. CR 2006-005932-048-DT (Ariz. Super. Ct. June 9, 2006).

73. Ruiz-Lopez Presentence Investigation Report, *supra* note 72, at 4; Carreto’s Motion to Sever, *supra* note 72, at 2.

74. Carreto’s Motion to Sever, *supra* note 72, at 2–3; Agan Interview, *supra* note 68.

Salazar Hernández and the other self-smuggling defendants moved to dismiss their charges, in part based on the argument that federal law preempted the state smuggling statute.⁷⁵ Under U.S. Supreme Court doctrine, a state or local immigration statute may be invalidated under any one of three different preemption tests. In particular, a court will invalidate the law if it directly regulates immigration, exists in a field that Congress has intended to occupy, or otherwise “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁷⁶

Counsel for Salazar Hernández argued that local criminal prosecution of individuals “not lawfully in the state” conflicts with the federal immigration system.⁷⁷ For example, migrants may qualify for legal permanent residence by virtue of their long-term residence in the United States or by their status as a battered spouse or child, a refugee, an asylee, or a victim of trafficking.⁷⁸ However, by prosecuting them in criminal court with a felony that would make them ineligible for such relief, the federal system for civil immigration relief is effectively bypassed.⁷⁹ As County Attorney Thomas would later explain, the fact that a felony record would bar migrants from “amnesty down the road for citizenship purposes” was one of the explicit goals of his self-smuggling prosecutions.⁸⁰

Three months after Salazar Hernández was apprehended, Maricopa County Superior Court Judge Thomas O’Toole rejected his preemption challenge.⁸¹ Rather than “impair[ing] federal enforcement objectives,” Judge

75. Defendant’s Motion to Dismiss (Federal Preemption), *Arizona v. Salazar Hernández*, No. CR2006-005932-003-DT (Ariz. Super. Ct. June 9, 2006). In addition to the federal preemption argument, the defendants also presented other arguments to dismiss the charges, including the legislative intent of the statute, Wharton’s rule, and lack of jurisdiction. Agan Interview, *supra* note 68.

76. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). For further discussion of the three tests for immigration preemption, see *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011), and *De Canas v. Bica*, 424 U.S. 351 (1976). Of course, the preemption doctrine is not without its critics. See, e.g., Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).

77. Defendant’s Motion to Dismiss (Federal Preemption), *supra* note 75, at 8–9; Agan Interview, *supra* note 68.

78. See 8 U.S.C. §§ 1229b(b)(2), 1255(l), 1159(b), 1229b(b)(1)(A)-(D) (2006).

79. Under federal law, alien smuggling is an aggravated felony, which bars most forms of immigration relief. See *id.* § 1101(a)(43)(N) (classifying alien smuggling as an aggravated felony, except for a first offense in which the alien has affirmatively shown that the offense was committed to assist only a spouse, child, or parent); *id.* § 1227(a)(2)(A)(iii) (“Any alien who is convicted of an aggravated felony at any time after admission is deportable.”). For a discussion of the immigration consequences of aggravated felonies, see NORTON TOOBY, *TOOBY’S GUIDE TO CRIMINAL IMMIGRATION LAW* (2008).

80. 2007 MARICOPA CNTY. ATT’Y’S OFFICE ANN. REP. 4, http://www.maricopacountyattorney.org/Annual_Reports_Protocols/2007.pdf [hereinafter 2007 MCAO ANN. REP.] (describing Thomas’s “no amnesty” policy for prosecuting alien smuggling).

81. Ruling Denying Motions to Dismiss, *Arizona v. Salazar Hernández*, No. CR2006-005932-DT-003 (Ariz. Super. Ct. June 9, 2006).

O'Toole explained, "concurrent [state] enforcement enhances" federal enforcement's "compatible purposes."⁸² Outside the courtroom, County Attorney Thomas declared that he had "won the fight against illegal immigration in a court of law."⁸³

With the preemption question now clarified by the trial court, a more robust prosecutorial structure for ensuring convictions in smuggling cases began to emerge.⁸⁴ County Attorney Thomas established a specialized unit of attorneys and investigators dedicated to pursuing alien smuggling.⁸⁵ Sheriff Arpaio followed suit, setting up a "Human Smuggling Squad."⁸⁶ Over the next few months, hundreds of migrants were arrested in Maricopa County for smuggling themselves.⁸⁷

In order to enhance the success of the growing immigration docket, County Attorney Thomas began working behind the scenes to promote key pieces of legislation.⁸⁸ With the support of the County Attorney's Office,⁸⁹ the Arizona legislature passed laws requiring all detention facilities to determine the citizenship of arrestees.⁹⁰ The same legislation required judges to take immigration status into consideration when making bail decisions.⁹¹

Later that year, again with the backing of the County Attorney's Office,⁹² Arizona voters passed Proposition 100, which amended the state constitution to forbid courts from setting bail in certain cases involving undocumented

82. *Id.* at 9.

83. Kiefer, *supra* note 70.

84. Attorneys for Cupertino Salazar Hernández brought a special action in the Arizona Court of Appeals challenging the preemption decision, but the court declined to hear the appeal. See Minute Order, *supra* note 13; see also Agan Interview, *supra* note 68 (clarifying that a "special action" is the Arizona equivalent of a common law writ or interlocutory appeal); Email From Tim Agan to author (Sept. 26, 2010) (on file with author) (confirming that the trial court's decision in *Salazar Hernández* was never reviewed by the Arizona Court of Appeals).

85. MCAO ILLEGAL IMMIGRATION 2008, *supra* note 58, at 8.

86. Kiefer, *supra* note 50; see generally JOE ARPAIO & LEN SHERMAN, JOE'S LAW 24 (2008) (discussing the work of Arpaio's smuggling unit).

87. MARICOPA CNTY. ATT'Y'S OFFICE, DATAFILE NO. 2010-0825-1 (obtained by author with a public records act request on Sept. 1, 2010).

88. Mussman Interview, *supra* note 27.

89. Audio Recording: Debate on H.R. 2580, Ariz. H.R. Comm. on the Judiciary, 47th Leg., 2d Reg. Sess. 16:00–17:30 (Feb. 2, 2006) (obtained by author, courtesy of Ariz. H.R.) (including testimony from a representative of the MCAO).

90. H.R. 2580, 47th Leg., 2d Reg. Sess. (Ariz. 2006) (codified at ARIZ. REV. STAT. ANN. § 13-3906 (2010)) ("After a person is brought to a law enforcement agency for incarceration, the law enforcement agency shall determine that person's country of citizenship.").

91. H.R. 2580, 47th Leg., 2d Reg. Sess. (Ariz. 2006) (codified at ARIZ. REV. STAT. ANN. § 13-3967(B)(11)) (requiring judicial officers to take into account "whether the accused has entered or remained in the United States illegally" when making bail decisions).

92. MCAO ILLEGAL IMMIGRATION 2008, *supra* note 58, at 10.

defendants.⁹³ As Thomas explained, the new no-bond rule was an important “component” of his office’s approach to “combating illegal immigration.”⁹⁴ Under the law, persons charged with “serious felony offenses as prescribed by the legislature” were to be categorically denied bond if they had “entered or remained in the United States illegally.”⁹⁵ Shortly after Proposition 100 was passed, the Arizona legislature defined a “serious felony offense” to include a wide swath of crimes: any class one, two, three, or four felony.⁹⁶ Undocumented immigrants charged with smuggling themselves could now be detained without any possibility of bond.

Pretrial Services, the county agency charged with interviewing defendants to prepare the court for bond determinations, soon announced that its officers would no longer ask questions regarding citizenship.⁹⁷ Such inquiries raised Fifth Amendment concerns, particularly when defendants were charged with crimes (like smuggling) that contained alienage as an element.⁹⁸ As lower courts scrambled to implement the new bond procedure, the Arizona Supreme Court issued administrative guidance to clarify the applicable standards.⁹⁹ First, the state was required to prove the defendant’s undocumented status by “proof evident, presumption great.”¹⁰⁰ Second, the defendant had the right to a full

93. H.R. Con. Res. 2028, 47th Leg., 1st Reg. Sess. (Ariz. 2005) (amending ARIZ. CONST. art. II, § 22) [hereinafter Ariz. Proposition 100].

94. 2007 MCAO ANN. REP., *supra* note 80.

95. Ariz. Proposition 100, *supra* note 93. The constitutionality of Proposition 100 was upheld by the Arizona Court of Appeals. *Hernández v. Lynch*, 167 P.3d 1264 (Ariz. Ct. App. 2007). A federal class action lawsuit brought by the American Civil Liberties Union and the Mexican American Legal Defense and Educational Fund is ongoing. See Complaint, *Lopez-Valenzuela v. Maricopa Cnty.*, No. CV-08-660-PHX-SRB (D. Ariz. Mar. 29, 2008), http://www.maldef.org/assets/pdf/MaricopaCnty._Complaint_04042008.pdf. The federal district court dismissed the plaintiffs’ preemption claim and granted summary judgment for the defendants on the bulk of the other claims. The plaintiffs’ appeal is now pending at the U.S. Court of Appeals for the Ninth Circuit. *Lopez-Valenzuela v. Maricopa Cnty.*, No. 11-16487 (9th Cir. filed June 14, 2011).

96. H.R. 2580, 47th Leg., 2d Reg. Sess. (codified as amended at ARIZ. REV. STAT. ANN. § 13-3961(A)(5)(b)).

97. Telephone Interview With Penny Stinson, Div. Dir., Pretrial Servs. & Custody Mgmt., Maricopa Cnty. Superior Court (Aug. 24, 2010) [hereinafter Stinson Interview] (discussing the difficult position that Pretrial Services encountered when alienage became an element of both pretrial release and state-level criminal charges).

98. *Id.*

99. Administrative Order, *In re* Implementation of Amendments to Ariz. Const. Art. II, § 22 and A.R.S. § 13-3961.A, No. 2007-30 (2007), <http://www.azcourts.gov/portals/22/admorder/orders07/2007-30.pdf>; see also Letter From Ruth V. McGregor, Chief Justice, Supreme Court of Ariz. to President Timothy S. Bee and Representative Jim Weiers (Apr. 3, 2007) (on file with author) (discussing the Arizona Supreme Court’s inquiry into judicial problems raised by the implementation of Proposition 100).

100. Administrative Order, *supra* note 99.

due process hearing, with the presence of appointed counsel, within twenty-four hours of the initial appearance.¹⁰¹

When public defenders began to vigorously represent defendants detained under the new law,¹⁰² the County Attorney's Office sent its prosecutors en masse to staff initial appearances.¹⁰³ The number of Proposition 100 hearings became so great that three to four courtrooms were needed on a full-time basis to handle the volume.¹⁰⁴

Immigration status, as prosecutors soon learned, was hard to prove in a court of law—particularly under time pressure.¹⁰⁵ During the first month and a half that the law was in force, less than 6 percent of those who requested a due process hearing were found nonbondable under Proposition 100.¹⁰⁶ At a press conference decrying the situation, Thomas waved a list of defendants released to the streets after Proposition 100 hearings. “[T]he judiciary of Maricopa County is openly defying the will of the people and creating a crisis of public safety,” he exclaimed.¹⁰⁷

As controversy mounted and considerable court resources were expended,¹⁰⁸ the Arizona legislature acted to lower the state's legal burden of

101. *Id.*; see generally *Segura v. Cunanan*, 196 P.3d 831 (Ariz. Ct. App. 2008) (finding that no-bail determinations under Proposition 100 must comply with due process).

102. Letter From Peter Ozanne, Assistant Cnty. Manager, Maricopa Cnty. Office of Criminal Justice, to Andrew P. Thomas, Maricopa Cnty. Att'y, 1 (May 3, 2007) (on file with author) (explaining that when Proposition 100 was first passed, defense counsel was provided at all Maricopa County initial court appearances where Proposition 100 detention was sought by prosecutors).

103. *Id.* (referencing the MCAO's decision to appear at all initial court appearances).

104. Telephone Interview With Carlos Daniel Carrion, Att'y Manager, Early Representation Unit, Maricopa Cnty. Pub. Defender (Aug. 18, 2010) [hereinafter Carrion Interview] (describing hearings being held “24/7,” including on weekends); Telephone Interview With Elmer Parker, Att'y, Reg'l Ct. Ctr., Maricopa Cnty. Pub. Defender (Jan. 3, 2011) [hereinafter Parker Interview] (discussing the high volume of so-called *Simpson* hearings that the public defender's office handled after the passage of Proposition 100).

105. Carrion Interview, *supra* note 104 (noting the initial success of the defense bar in Proposition 100 hearings); Telephone Interview With Robert McWhirter, Former Deputy Pub. Defender, Maricopa Cnty. Pub. Defender (Sept. 15, 2010) [hereinafter McWhirter Interview] (describing the inadequacies of the state's proof of alienage); Telephone Interview With Mikel Steinfeld, Deputy Pub. Defender, Maricopa Cnty. Pub. Defender (Jan. 12, 2011) (explaining that, with only two days to prepare, the MCAO was losing these hearings); Parker Interview, *supra* note 104 (explaining that the county attorneys were not prepared for the hearings).

106. Unable to prevail in the due process Proposition 100 hearings, the MCAO filed a petition for “special action” in the Arizona Supreme Court. See Petition for Special Action at 5 & app. 1, *Arizona ex rel. Thomas v. Spencer*, No. CR 2007-006520-001 DT (Ariz. June 15, 2007) (providing that of 699 defendants found nonbondable under Proposition 100 at the initial appearance, only forty were held nonbondable after a due process hearing).

107. Michael Kiefer, *Supreme Court Ruling Sought on Migrant Bail*, ARIZ. REPUBLIC, June 16, 2007, at B7.

108. See Petition to Amend Rules 4.2, 7.2, 7.4, 27.7, and 31.6, Arizona Rules of Criminal Procedure (Ariz. May 25, 2007), http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/18415962671.pdf (noting

proof and significantly extend the time that the state had to prepare for a hearing.¹⁰⁹ In addition, Maricopa County made a policy decision that indigent counsel could not be appointed until arraignment.¹¹⁰ As a result, defendants could remain detained for up to two weeks before obtaining a full Proposition 100 hearing with counsel present.¹¹¹ Pretrial Services was ordered to ask detailed questions regarding immigration status prior to the appointment of counsel.¹¹² Law enforcement officers were mandated to prepare (without Mirandizing defendants) a detailed statement as to whether defendants “entered or remained in the United States illegally.”¹¹³ As a result of these various changes, defendants charged with alien smuggling are now rarely, if ever, released on bond.¹¹⁴

that “some courts, especially the Superior Court in Maricopa County, are experiencing severe problems involving a large number of cases and considerable expenditure of resources”).

109. Specifically, the state’s burden of proof at the no-bail hearing was lowered from “proof evident, presumption great” to probable cause, and courts were permitted to delay the no-bail hearing for up to seven days after the defendant’s formal request. S. 1265, 48th Leg., 1st Reg. Sess. (Ariz. 2007) (codified as amended at ARIZ. REV. STAT. ANN. §§ 13-3906, 13-3961 (2010)); see also ARIZ. R. CRIM. P. 7.4(b) (“Seven days appears necessary to allow for preparation by the parties, notice to the victim and transportation of the defendant, if required.”); *Tovar v. Cunanan*, 196 P.3d 831 (Ariz. Ct. App. 2007) (finding that a “no bond” determination made at the initial appearance without counsel present is sufficient to hold a defendant until a full hearing can be held pursuant to Rule 7.4(b)).

110. Mussman Interview, *supra* note 27; Stinson Interview, *supra* note 97; see also Memorandum From Peter Ozanne, Assistant Cnty. Manager for Criminal Justice, to Timothy Casey, Smitt, Schneck, Smyth & Herrod, PC (June 29, 2007) (on file with author) (discussing the county’s decision to cease funding public representation for indigent defendants at initial appearances).

111. Carrion Interview, *supra* note 104 (describing the practice); Parker Interview, *supra* note 104 (same).

112. Administrative Order, *supra* note 99; see also Stinson Interview, *supra* note 97 (explaining that, after the Arizona Supreme Court’s Order, Pretrial Services was required to ask questions to determine immigration status of pretrial detainees); Memorandum From Barbara Rodriguez Mundell, Presiding Judge, to Barbara Broderick, Chief, Adult Probation Dep’t (Apr. 4, 2007) (on file with author) (detailing the effect of the Arizona Supreme Court’s Order). More recently, the policy has been revised to only ask defendants if they are citizens of the United States, without any detailed questions about immigration status. See Stipulation re Settlement of Claims Against Defendant Mundell, *Lopez-Valenzuela v. Maricopa Cnty.*, No. CV 08-660-PHX-SRB (ECV), at ¶¶ 4–5 (D. Ariz. Aug. 11, 2009) (stipulating that immigration status questions will not be asked of pretrial detainees); Memorandum From Marcus Reinkensmeyer, Court Adm’r, Maricopa Cnty. Superior Court, to all Criminal Judges, Comm’rs, and Adult Probation Admin. (Dec. 23, 2008) (on file with author) (directing that Pretrial Services only ask “Are you a U.S. citizen?” and omit all additional questions).

113. This report is known as Form IV. See Telephone Interview With Tracy Friddle, Deputy Pub. Defender, Maricopa Cnty. Pub. Defender (Aug. 18, 2010) [hereinafter Friddle Interview]; McWhirter Interview, *supra* note 105.

114. Carrion Interview, *supra* note 104; Parker Interview, *supra* note 104; see also *Lopez-Valenzuela*, No. CV 08-660-PHX-SRB (ECV), slip op. at 3–4 (citing a 100 percent detention rate under the amended Proposition 100).

In 2007, the Arizona legislature passed a material witness statute that further expanded criminal detention rules.¹¹⁵ Modeled after the broad federal material witness detention statute,¹¹⁶ the law allowed for detention if a witness's testimony is "material" to an alien smuggling prosecution and "it may become impracticable to secure the presence of the person by subpoena because of the immigration status of the person."¹¹⁷ With this new power, prosecutors solved one "big problem" in securing immigration convictions—that their noncitizen witnesses could be removed from the country before trial.¹¹⁸

Changes in sentencing laws followed. For example, the County Attorney's Office supported a 2008 law that made violation of the federal criminal immigration law a state sentencing aggravator.¹¹⁹ At the same time, Thomas instituted a mandatory policy requiring that his deputies bring immigration status to the attention of sentencing judges.¹²⁰ By 2009, Thomas would conclude that "[t]he 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."¹²¹

Fast forward to 2010. Arizona's legislature introduces SB 1070, which quickly captures the nation's attention.¹²² It is well known that SB 1070, if ever fully implemented, will add more immigration crimes to the Arizona criminal code and expand local power to enforce immigration law.¹²³ The

115. H.R. 2016, 48th Leg., 1st Reg. Sess. (Ariz. 2007) (codified at ARIZ. REV. STAT. ANN. § 13-4085 (2010)). The new law supplemented the existing Arizona material witness statute, which only allowed for a three-day detention of certain witnesses. See ARIZ. REV. STAT. ANN. § 13-4083.

116. 18 U.S.C. § 3144 (2006); Video: Hearing on H.R. 2016, Ariz. S. Comm. on the Judiciary, 48th Leg., 1st Reg. Sess. (Mar. 26, 2007), http://azleg.granicus.com/MediaPlayer.php?view_id=3&clip_id=875 [hereinafter H.R. 2016 Senate Hearing] (containing testimony of the bill's sponsor, Representative Jonathan Paton, explaining that the federal government "already has" material witness detention power, but the state does not).

117. ARIZ. REV. STAT. ANN. § 13-4085.

118. H.R. 2016 Senate Hearing, *supra* note 116 (testimony of Rep. Jonathan Paton).

119. 2008 Ariz. Legis. Serv. Ch. 301 (West) (codified at ARIZ. REV. STAT. ANN. § 13-701(D)(21)) (making violations of 8 U.S.C. §§ 1323, 1324, 1325, 1326, or 1328 sentencing aggravators).

120. Maricopa Cnty. Att'y's Office, Prosecution Policies and Procedures, Immigration Status in Sentencing Proceedings, File No. 2010-0825-1 (effective May 12, 2008) (obtained by author from the MCAO with a public records act request on Sept. 1, 2010) (providing that if "there is documented information that the defendant may not be a United States citizen," the prosecutor must (1) inform the sentencing judge and the sheriff and (2) oppose employment during probation).

121. 2009 MCAO ANN. REP., *supra* note 28, at 2.

122. See *supra* note 1. For a comprehensive compilation of resources regarding SB 1070, see *Arizona and National Immigration Crisis*, HUGH & HAZEL DARLING L. LIBR., <http://libguides.law.ucla.edu/arizonaimmigration> (last updated Mar. 21, 2011) (compiled by UCLA law librarian June Kim, research assistant Tara Kearns, and Professor Gerald P. López).

123. For a discussion of the provisions of SB 1070 and ongoing litigation to challenge its constitutionality, see Panel Discussion, *From Emma Lazarus to Arizona's SB 1070: Can Progressives Meet New Challenges to Immigrants' Rights?*, 31 CHICANA/O-LATINA/O L. REV. (forthcoming 2011).

explicit purpose of the law is to “make attrition through enforcement the public policy of all state and local government agencies in Arizona” and to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”¹²⁴ Although a number of provisions of the law have been preliminarily enjoined in federal court on preemption grounds,¹²⁵ others are currently in effect—including the new crimes of transporting or moving an alien in furtherance of the alien’s unlawful presence,¹²⁶ and blocking traffic to hire or seek work on the street.¹²⁷ In Maricopa County, Sheriff Arpaio has opened a new wing in his outdoor jail—“Section 1070”—to house SB 1070 defendants.¹²⁸

* * *

The evolving framework for criminal immigration prosecution in Arizona demonstrates that SB 1070 is only one piece of the puzzle. The institutional structure for prosecuting immigration at the local level is much broader—and has been in place for some time. Substantive laws are of course critical to getting local prosecutors into court with their own immigration caseload. But Arizona’s smuggling law has also been carefully buttressed by broader structural changes—such as denial of bond for migrants, detention of undocumented witnesses, and sentencing enhancements for immigration violators—designed to enhance and institutionalize Arizona’s criminal immigration regime.

II. THE RELATIONSHIP BETWEEN LOCAL IMMIGRATION PROSECUTION AND FEDERAL IMMIGRATION LAW

Part II studies the Maricopa County smuggling cases in greater detail, focusing first on the differences between federal and state alien smuggling and then on the interaction between the federal and state criminal systems. Through this analysis, this Part identifies four key aspects of federal criminal immigration enforcement impacted by the Arizona model: the definition of immigration

124. Support Our Law Enforcement and Safe Neighborhoods Act, S. 1070, § 1, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

125. *United States v. Arizona*, 703 F. Supp. 2d 980, 1007–08 (D. Ariz. 2010).

126. *Id.* at 1003 (declining to enjoin ARIZ. REV. STAT. ANN. § 13-2929 (2010)).

127. *Id.* at 1000 n.16 (declining to enjoin ARIZ. REV. STAT. ANN. § 13-2928(A), (B)). The United States did not appeal the denial of injunctive relief on these particular crimes. See *United States v. Arizona*, 641 F.3d 339, 344 (9th Cir. 2011).

128. Evan Wylöge, “Section 1070” Tent City Expansion to Unveil July 21, ARIZ. CAPITOL TIMES, July 20, 2010, <http://azcapitoltimes.com/strike-everything/2010/07/20/section-1070-tent-city-expansion-to-unveil-july-21>.

crime, the authority of localities to arrest for immigration violations, the allocation of state and federal criminal resources, and the strength of executive control over immigration.

A. Criminal Law and Prosecutorial Discretion

Understanding the operation of alien smuggling prosecution begins with analyzing the substance of the law. As an initial matter, differences can be identified between the proof required to support a smuggling conviction in state and federal court. More significantly, by examining how state and federal smuggling laws have been implemented in practice, broader differences emerge.

1. Formal Definition

Both Arizona and federal smuggling crimes prohibit the transportation and movement of undocumented migrants within the United States.¹²⁹ There are, however, important differences between the two crimes.¹³⁰ For example, whereas federal law requires that violators act “knowingly or in reckless disregard” of the alien’s immigration status,¹³¹ Arizona law only requires that the defendant “knows or has reason to know” of the defendant’s unlawful status.¹³² In addition, whereas federal law requires proof that the act of transportation of the noncitizen was “in furtherance” of the smuggling offense, Arizona law includes no such requirement.¹³³ Finally, although both

129. Compare ARIZ. REV. STAT. ANN. § 13-2319(A), with 8 U.S.C. § 1324(a)(1)(A)(ii) (2006). Section 1324 includes several crimes that Arizona’s 2005 smuggling law does not, including bringing into the United States, concealing, harboring, shielding, or otherwise encouraging the illegal entry of an alien. *Id.* § 1324(a)(1)(A)(i), (iii), (iv). For additional background on federal prosecutions under Section 1324, see Susan Bibler Coutin, *Smugglers or Samaritans in Tucson, Arizona: Producing and Contesting Legal Truth*, 22 AM. ETHNOLOGIST 549 (1995); Eisha Jain, *Immigration Enforcement and Harboring Doctrine*, 24 GEO. IMMIGR. L.J. 147 (2010).

130. See generally Chin & Miller, *supra* note 4 (manuscript at 20) (analyzing the elements of various state-level immigration crimes, and concluding that none is “identical to the federal provision”).

131. *Id.*

132. ARIZ. REV. STAT. ANN. § 13-2319(F)(3). Compare *Marmolejo-Campos v. Holder*, 558 F.3d 903, 912 (9th Cir. 2009) (en banc), cert. denied, 130 S. Ct. 1011 (2009) (noting that the standard “should have known” under Arizona law is equivalent to criminal negligence), with *State v. Cifelli*, 155 P.3d 363, 368 (Ariz. Ct. App. 2007) (noting that “neglect, standing alone, would not satisfy the . . . requirement that a defendant have reason to know” and instead requires more—such as “deliberate ignorance” or “willful blindness”).

133. Compare 8 U.S.C. § 1324(a)(1)(A)(ii), with ARIZ. REV. STAT. ANN. § 13-2319. In the federal system, the “in furtherance” requirement has proved significant. See, e.g., *United States v. Moreno*, 561 F.2d 1321 (9th Cir. 1977) (finding a ranch foreman not guilty of transporting illegal aliens when he transported workers in the course of his employment because “there must be a direct or substantial relationship between that transportation and its furtherance of the alien’s presence in the United States”).

state and federal law classify smuggling as a felony, their sentencing structures are different.¹³⁴

Federal sentencing is one (perhaps unexpected) context in which these formal variations in crime definition matter.¹³⁵ As those convicted of self-smuggling in Maricopa County attempt to reenter the United States, some are arrested and prosecuted by federal authorities for the crime of illegal reentry.¹³⁶ Under federal law, those charged with reentering after a prior deportation can receive significant sentencing enhancements if their return follows certain types of convictions.¹³⁷ One prior crime that qualifies for the greatest enhancement under federal sentencing guidelines is alien smuggling.¹³⁸ Thus, whether Arizona “alien smuggling” is in fact categorically aligned with federal “alien smuggling” is a contested question of substantial consequence.¹³⁹

The Federal Public Defender’s Office for the District of Arizona has argued that Arizona smuggling and federal smuggling are not the same—citing, for example, Arizona’s reduction of the mens rea requirement and elimination of the “in furtherance of the offense” requirement.¹⁴⁰ The Phoenix U.S. Attorney’s Office (notwithstanding the Department of Justice’s challenge to SB 1070) has argued that state smuggling is in fact sufficient for the federal sentencing enhancement.¹⁴¹ Perplexed by the complexity of the issue, the now-Chief Judge of the District of Arizona Roslyn Silver commented at a recent sentencing hearing: “[W]hat in the world does human smuggling mean in Arizona? It has always been problematic since [the County Attorney’s Office]

134. See discussion *infra* Part II.D.2.

135. Telephone Interview With Juan Rocha, Assistant Fed. Pub. Defender, Dist. of Ariz. (Dec. 16, 2010) [hereinafter Rocha Interview].

136. 8 U.S.C. § 1326.

137. *Id.* § 1326(b)(2) (increasing the statutory maximum jail time for illegal reentry from two to twenty years if the defendant was convicted of an aggravated felony prior to removal); *id.* § 1101(a)(43)(N) (classifying “alien smuggling” as an aggravated felony, except for a first offense in which the alien has affirmatively shown that the offense was committed to assist only a spouse, child, or parent).

138. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A)(vii) (2010) (enhancing a federal sentence for illegal reentry by sixteen levels if the defendant was deported after “an alien smuggling offense”); *id.* § 2L1.2 cmt. 1(B)(i) (“‘Alien smuggling offense’ has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act.”).

139. See generally *Taylor v. United States*, 495 U.S. 575, 602 (1990) (setting forth the “categorical approach” for determining substantial similarity, which requires comparing the elements of the state crime with the “generic” federal offense). See also *United States v. Guzman-Mata*, 579 F.3d 1065, 1069 (9th Cir. 2009) (applying *Taylor* to analyze whether a prior conviction qualifies as an “alien smuggling offense” under federal sentencing guideline section 2L1.2(b)(1)(A)).

140. Rocha Interview, *supra* note 135.

141. See, e.g., Opening Brief of Appellant at 30–31, *United States v. Aguilar-Reyes*, No. 10-10216 (9th Cir. Oct. 20, 2010) (arguing that Arizona smuggling qualifies as “smuggling” under the federal sentencing guidelines).

started prosecuting them in the manner and means that they have been.”¹⁴² Of course, the chief judge was not simply alluding to the law as written, but also the law in action.

2. Implementation

Arizona’s alien smuggling statute does not, on its face, criminalize smuggling one’s self.¹⁴³ In fact, the Arizona legislature that approved the statute made clear during deliberations that the problem being addressed was that of *coyotes* and dangerous for-profit trafficking rings—not that of *pollos* being smuggled.¹⁴⁴ Yet County Attorney Thomas interpreted the law to criminalize all of those apprehended rather than just the smugglers.¹⁴⁵

a. Self-Smuggling and Federal Law

If federal authorities were to accept “self-smuggling” as a federal crime, it would mark a substantial change in existing federal immigration prosecution. As the U.S. Attorney’s Office in Arizona clarified in the wake of the Haab controversy, “[i]ndividuals can’t be charged with aiding and abetting their own smuggling.”¹⁴⁶ Although careful to stress that the chief federal prosecutor was not “second guessing” County Attorney Thomas’s decisionmaking, the U.S. Attorney’s Office explained that “[i]f the people being smuggled are only being transported, then there is no conspiracy.”¹⁴⁷ Jon Sands, the Federal Public Defender for the District of Arizona, agreed: “That’s just not how these cases are resolved.”¹⁴⁸

142. Transcript of Sentencing Hearing at 12, *United States v. Aguilar-Reyes*, No. CR-09-01119-PHX-ROS (D. Ariz. Mar. 29, 2010).

143. ARIZ. REV. STAT. ANN. § 13-2319 (2010).

144. Ariz. H.R. Comm. Min., H.R. 2539, Comm. on the Judiciary, 47th Leg., 1st Reg. Sess. (Feb. 10, 2005), http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/47leg/1R/comm_min/House/0210JUD.DOC.htm&Session_ID=8 (quoting Arizona Representative Jonathan Paton complaining that “[p]eople who are involved in trafficking, referred to as coyotes, are operating with impunity in this area and there is a culture of lawlessness growing up around that”); *id.* (quoting Arizona Senator Marilyn Jarrett explaining that “[t]he intent of this legislation is to prosecute anyone involved in selling another person”).

145. MCAO Smuggling Policy, *supra* note 69.

146. Anglen & Wingett, *supra* note 37.

147. *Id.*; see also Complaint, *supra* note 2, at 10 ¶ 27 (explaining that federal smuggling “sanctions are directed at the smuggler and are not meant to serve as a criminal sanction for the unlawfully present alien or for incidental transportation”); Charlton Interview, *supra* note 30 (clarifying that prosecution of persons for smuggling themselves is not consistent with federal law).

148. Anglen & Wingett, *supra* note 37; see also Sands Interview, *supra* note 30 (emphasizing that he has never seen the federal government prosecute smuggling victims as co-conspirators).

Fidelity to statutory intent underlies this federal practice.¹⁴⁹ In fact, the U.S. Attorney's Office relied in part on the intent of the federal smuggling statute when it publicly declared that federal law does not allow for prosecution of smuggled persons.¹⁵⁰ The language of the federal smuggling law, like the Arizona law, does not criminalize the act of being smuggled.¹⁵¹ And, despite a long history of federal prosecutors not using the conspiracy law to prosecute the smuggler's human cargo,¹⁵² Congress has never amended the law to include smuggled persons.

In fact, when federal prosecutors have tried to charge crime victims with conspiracy to commit crimes that by definition require victim participation, federal courts have declined to read liability of the accomplice or co-conspirator into the statute. The federal Mann Act, which criminalizes the transportation of persons to engage in illicit sexual acts, provides the classic illustration.¹⁵³ In 1929, the U.S. Attorney in Chicago prosecuted Louise Rolfe Gebardi for conspiracy to violate the Mann Act when a man transported her across state lines for purposes of engaging in an adulterous affair.¹⁵⁴ Although Gebardi had consented to the affair (and was married to her lover by the time of trial), the U.S. Supreme Court reversed her conviction on the ground that she could not be found guilty of conspiring to violate the Mann Act.¹⁵⁵ Congress, the

149. See generally JOSHUA DRESSLER, UNDERSTANDING THE CRIMINAL LAW 494-95 (5th ed. 2009) (summarizing the so-called "legislative-exemption rule," which provides that "[a] person may not be convicted of conspiracy to violate an offense if her conviction would frustrate a legislative purpose to exempt her from prosecution for the substantive crime"). For a classic treatment of this rule under the Model Penal Code, see Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 1019 (1961).

150. Charlton Interview, *supra* note 30.

151. 8 U.S.C. § 1324 (2006).

152. Agan Interview, *supra* note 68; Charlton Interview, *supra* note 30; see also Petition for Special Action at 17, *Salazar Hernández v. Hon. Thomas O'Toole*, No. CR2006-005932-DT-003 (Ariz. Ct. App. July 13, 2006) ("Despite the [smuggling] law's long existence, there is not a single reported case in which the federal government has prosecuted an alien for conspiring to smuggle him or herself into the United States.").

153. 18 U.S.C. § 2421 (2006).

154. Brief of Respondent, *Gebardi v. United States*, 287 U.S. 112 (1932) (No. 97), 1932 WL 33638.

155. *Gebardi*, 287 U.S. at 123. This is not to say that it is impossible to convict a woman of conspiring to violate the Mann Act. In an earlier case, the Court explained that it would be consistent with congressional intent if a "professional prostitute" were to "suggest and carry out a journey within the act of 1910 in the hope of black-mailing the man, and should buy the railroad tickets, or should pay the fare from Jersey City to New York, she would be within the letter of the act of 1910, and we see no reason why the act should not be held to apply." *United States v. Holte*, 236 U.S. 140, 145 (1915). For a discussion of federal enforcement of the Mann Act, see Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3012-17 (2006).

Court explained, had drafted the law to criminalize the transportation without regard to the woman's consent.¹⁵⁶ In doing so, Congress evidenced an "affirmative legislative policy to leave [the woman's] acquiescence unpunished."¹⁵⁷ To allow a prosecutor to combine the conspiracy law with the Mann Act would contravene the law's implicit policy to "not punish the woman for transporting herself."¹⁵⁸

Like counsel for Louise Gebardi, defense attorneys in Arizona have argued that persons who are smuggled are not the intended targets of the Arizona legislation.¹⁵⁹ Juan Barragan-Sierra, the first person to be convicted by a Maricopa County jury for smuggling himself, illustrates the typical smuggling scenario.¹⁶⁰ He met his smuggler in a hotel room in San Luis Río Colorado—a Mexican city just south of Yuma, Arizona.¹⁶¹ There, he was told that for \$2000 he would be transported to a small town in Washington State, where he would seek work milking cows on a dairy farm.¹⁶² After crossing the border on foot,¹⁶³ he was arrested by Maricopa County sheriff's deputies who found him traveling in a van with nine other smuggled migrants.¹⁶⁴ Had he reached his destination, the smugglers would have held him in a safe house and threatened to beat him if his family did not come forward to pay the \$2000 fee.¹⁶⁵

Thus far, however, Arizona courts have refused to find that their legislature meant to exempt self-smuggling from the law's reach.¹⁶⁶ Some lawmakers

156. *Gebardi*, 287 U.S. at 118.

157. *Id.* at 123.

158. *Id.* at 118.

159. Agan Interview, *supra* note 68; Telephone Interview With Carlos Holguín, Gen. Counsel, Ctr. for Human Rights & Constitutional Law (Jan. 6, 2011) [hereinafter Holguín Interview].

160. Telephone Interview With Carissa A. Jakobe, Trial Att'y, Maricopa Cnty. Office of the Legal Defender (Mar. 28, 2011) [hereinafter Jakobe Interview] (recalling her representation of Juan Barragan-Sierra at trial).

161. *State v. Barragan-Sierra*, 196 P.3d 879, 883 (Ariz. Ct. App. 2008).

162. *Id.*; Barragan-Sierra Presentence Investigation Report, *Barragan-Sierra*, 196 P.3d 879 (No. CR 2006-136686-004 DT).

163. *Barragan-Sierra*, 196 P.3d at 883.

164. Barragan-Sierra Presentence Investigation Report, *supra* note 162, at 1.

165. *Id.* Like Juan Barragan-Sierra, Mexican migrants are now more likely to cross the border with the help of a coyote than on their own. See Gustavo López Castro, *Factors That Influence Migration: Coyotes and Alien Smuggling*, in 3 MIGRATION BETWEEN MEXICO AND THE UNITED STATES 965 (1998). Also, like Barragan-Sierra, migrants smuggled from Mexico are typically brought to a "stash house" in the United States where a relative must pay a fee before the migrant is taken to the final destination. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-305, COMBATING ALIEN SMUGGLING: OPPORTUNITIES EXIST TO IMPROVE THE FEDERAL RESPONSE 31 (2005), <http://www.gao.gov/new.items/d05305.pdf> [hereinafter 2005 GAO 05-305 SMUGGLING].

166. Scouring the legislative record, the Arizona Court of Appeals concluded that legislators have not "signal[ed] an intent to exempt this category of [smuggling] offense from application of the conspiracy statute." *Barragan-Sierra*, 196 P.3d at 886. A related argument that has been raised in the context of Maricopa County's smuggling prosecutions is based on what is known as Wharton's rule.

have come forward and explained that “we never had expected the statute to be interpreted by the county attorney the way [Andrew Thomas] interpreted it.”¹⁶⁷ However, a proposal to rewrite the law to bar self-smuggling prosecution failed to emerge from committee.¹⁶⁸

The expansive use of Arizona’s smuggling law to prosecute undocumented migrants in Maricopa County has worked a substantive change in the meaning of the criminal immigration law on the ground. In effect, the county’s use of the smuggling law criminalizes unlawful presence. This consequence is significant because illegal presence, although it is a civil violation of the immigration law that can lead to deportation,¹⁶⁹ has never been made a federal crime.¹⁷⁰ Illegal entry—a federal petty misdemeanor¹⁷¹—is distinctly a crime of border crossing, prosecuted at the time of apprehension by the Border Patrol.¹⁷² In contrast, Arizona alien smuggling is a state felony that affects the migrant inside the nation’s borders, without requiring proof of an illegal border crossing.

b. Plea Bargaining and Preemption

As the proceeding discussion highlights, Maricopa County smuggling differs from its federal counterpart in both formal definition and implementation. However, local smuggling prosecution has been quite difficult to

Agan Interview, *supra* note 68; Holguín Interview, *supra* note 159. Under this classic criminal law doctrine, one cannot be charged with conspiracy to commit an offense that necessarily requires participation of another person. Crimes such as dueling, bigamy, and incest are typically cited as examples of crimes that inevitably require concert and therefore cannot maintain a conspiracy charge. WHARTON’S CRIMINAL LAW § 684 (2010). So far, however, Arizona courts have declined to bar prosecutions of defendants like Juan Barragan-Sierra based on Wharton’s rule. See, e.g., *Barragan-Sierra*, 196 P.3d at 887–89; Ruling Denying Motions to Dismiss at 3–6, *Arizona v. Salazar Hernández*, No. CR2006-005932-DT-003 (Ariz. Super. Ct. June 9, 2006).

167. H.R. 2016 Senate Hearing, *supra* note 116, at 25:00–29:00 (quoting Rep. Ben Miranda). Representative Jonathan Paton, one of the authors of the smuggling law, agreed that he “never intended that immigrants would be arrested.” *Arizona Sheriff Uses Anti-Smuggling Law to Target Illegal Immigrants*, FOXNEWS.COM, May 11, 2006, <http://www.foxnews.com/story/0,2933,195083,00.html>.

168. See H.R. 2270, 48th Leg., 1st Reg. Sess. (Ariz. 2007); H.R. 2271, 48th Leg., 1st Reg. Sess. (Ariz. 2007). The legislature did, however, amend the law to disallow conspiracy prosecutions of persons who are under the age of eighteen. See *Barragan-Sierra*, 196 P.3d at 887.

169. 8 U.S.C. § 1227(a)(1)(B) (2006).

170. See Eagly, *supra* note 7, at 1344 & n.365 (discussing Congress’s consistent refusal to criminalize illegal presence).

171. 8 U.S.C. § 1325 (illegal entry).

172. Illegal entry is subject to a five-year statute of limitations that commences at the time of the entry. 18 U.S.C. § 3282 (2006); *United States v. Rincon-Jimenez*, 595 F.2d 1192 (9th Cir. 1979). See generally Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post–September 11th “Pale of Law,”* 29 N.C. J. INT’L L. & COM. REG. 639, 662–63 (2004) (discussing the limits of the federal crime of illegal entry); Jon M. Sands & Robert J. McWhirter, *A Primer for Defending a Criminal Immigration Case*, 8 GEO. IMMIGR. L.J. 23, 38 (1994) (outlining the statute of limitations defense to illegal entry).

challenge in a court of law. In this respect, Maricopa County provides a concrete example of what Dan Kahan has described as prosecutorial “power of initiative,” which allows prosecutors to select cases “as vehicles for novel statutory readings.”¹⁷³ In practice, judges are hesitant to rein in such discretionary power in their courtrooms.¹⁷⁴ Moreover, as Dan Richman has observed, a defendant must go to trial to preserve his challenge to a prosecutor’s discretionary reading of a statute.¹⁷⁵ In practice, however, most defendants opt to plead guilty rather than risk greater sentencing exposure at trial.¹⁷⁶ In the process, prosecutorial discretion becomes largely unreviewable.¹⁷⁷

These predictions have certainly played out in Maricopa County. Although there were early attempts to block the law, over time very few defendants charged with smuggling themselves have fought their prosecution.¹⁷⁸ Local attorneys explain that this pattern follows from the dynamics of plea bargaining that have evolved. When accusing aliens of smuggling themselves, Maricopa prosecutors typically offer a plea bargain at the time of the pretrial conference.¹⁷⁹ Under the standard deal, the prosecutor agrees to no further jail time in exchange for the defendant’s immediate guilty plea and sentencing.¹⁸⁰ Often such agreements are further sweetened by allowing the defendant to plead to a lesser felony offense, such as solicitation to commit smuggling.¹⁸¹

173. Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 470 (1996) (arguing that “federal criminal law, as a whole, is best conceptualized as a regime of delegated common law-making” rather than a “self-executing rule of law”); see also Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 2 (1971) (“Prosecutors in Anglo-American legal systems, both as a matter of theory and practice, have considerable discretion in making their decisions.”).

174. Kahan, *supra* note 173, at 480.

175. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 762 (1999).

176. See generally GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003).

177. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (allowing prosecutors to threaten additional prosecution in the process of plea bargaining); see also ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007) (criticizing the unchecked discretionary power given to prosecutors); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1025 (2006) (“Despite the significance of prosecutorial power, prosecutors operate with little oversight or regulation.”).

178. See, e.g., Agan Interview, *supra* note 68 (discussing initial preemption challenges and the overall infrequency with which defendants challenge the law); Navidad Interview, *supra* note 71 (same); Parker Interview, *supra* note 104 (same).

179. See Telephone Interview With Amy Kalman, Deputy Pub. Defender, Maricopa Cnty. Pub. Defender (Jan. 18, 2011) [hereinafter Kalman Interview].

180. *Id.*; see also Carrion Interview, *supra* note 104. Although the majority of those prosecuted for Arizona smuggling are persons being smuggled, when smugglers themselves are prosecuted, plea offers generally require some additional jail time. Friddle Interview, *supra* note 113.

181. Fontes Interview, *supra* note 30 (describing this practice); Kalman Interview, *supra* note 179 (same); Telephone Interview With Former Maricopa Cnty. Superior Court Judge Thomas O’Toole

Defense attorneys handling Arizona smuggling cases report that most defendants presented with plea offers choose to plead guilty rather than proceed to trial.¹⁸² Moreover, defendants in self-smuggling cases plead guilty despite the decision by county judges to sentence several self-smuggling defendants convicted *at trial* to only probation (rather than incarceration).¹⁸³ The real “carrot that prosecutors dangle” is the fact that going to trial requires defendants to wait three to four months in the county jail, which has the effect of a longer sentence.¹⁸⁴ Getting out of detention is a central client concern, especially given the adverse conditions in Sheriff Arpaio’s jail.¹⁸⁵ Proposition 100, by making undocumented defendants categorically ineligible for bail, further enhances the pressure on smuggling defendants to plead guilty.¹⁸⁶ To date, only nineteen out of the nearly 2000 defendants charged under the alien smuggling statute in Maricopa County have empanelled a jury.¹⁸⁷

As immigration enforcement becomes entrenched in the hands of local criminal prosecutors, it also moves further away from the scrutiny of legislators.

(Mar. 2, 2011) [hereinafter O’Toole Interview] (same); *see also* State v. Flores, 188 P.3d 706, 709 (Ariz. Ct. App. 2008) (reflecting that the defendant, although initially charged with conspiracy to smuggle himself, entered into a plea to solicitation to commit smuggling). This sweetening of plea offers to drive fast, high volume pleas is similar to what I have previously described in the federal immigration crime system. The successful prosecution of hundreds of migrants in Postville, Iowa—driven by the threat of more serious penalties and detention pending trial—serves as a classic example. *See* Eagly, *supra* note 7, at 1300–04.

182. Carrion Interview, *supra* note 104 (emphasizing that people were “just pleading”); Fontes Interview, *supra* note 30 (explaining that the way the MCAO “manipulated the plea bargaining process” caused many defense attorneys to advise their clients to sign the plea agreements if they did not want to do extra time in the county jail); Friddle Interview, *supra* note 113 (describing favorable plea agreements for smuggling defendants); Kalman Interview, *supra* note 179 (indicating that defendants would take the plea offers); Navidad Interview, *supra* note 71 (explaining that the prosecution gave “sweetheart” plea deals in smuggling cases—typically to time served or one month); O’Toole Interview, *supra* note 181 (noting that “99 percent” of smuggling defendants “took the get out of jail card”); Telephone Interview With Richard M. Romley, Former Maricopa Cnty. Att’y (May 18, 2011) [hereinafter Romley Interview] (noting that, with the denial of bond, “individuals would basically plead to anything” and very few cases went to trial); Salazar Interview, *supra* note 30 (noting that most smuggling defendants he represented wanted to get out of jail as soon as possible).

183. Jakobe Interview, *supra* note 160. For a classic argument that trial court sentencing outcomes often establish a “going rate” for subsequent plea bargains, *see* Malcolm M. Feeley, *Pleading Guilty in Lower Courts*, 13 L. & SOC’Y REV. 461 (1979).

184. O’Toole Interview, *supra* note 181.

185. Fontes Interview, *supra* note 30; Navidad Interview, *supra* note 71.

186. For a discussion of Proposition 100, *see supra* notes 93–114 and accompanying text.

187. MARICOPA CNTY. ATT’Y’S OFFICE, DATAFILE NO. 2011-0119-2 (obtained by author from the MCAO with a public records act request on Mar. 7, 2011) (containing trial versus plea outcomes by individual case); O’Toole Interview, *supra* note 181 (explaining that there “weren’t that many trials” under the smuggling law). The high guilty plea rates and low trial rates uncovered in this case study are consistent with what scholars have observed in the federal criminal system. *See, e.g.,* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005).

Some members of Arizona's House of Representatives acknowledged this reality during floor debates on the smuggling legislation.¹⁸⁸ The more broadly they drafted the law, the more discretion they transferred to county attorneys to define the crime of smuggling.¹⁸⁹ What if prosecutors were to use the law to convict persons for transporting their own family members?¹⁹⁰ Or, what if they used the law to go after the "little guy" who simply drives undocumented individuals from one worksite to another?¹⁹¹ Once the law is in force, however, challenging applications that diverge from legislative intent becomes the exception rather than the rule.¹⁹² Even when prosecutors make their interpretation of the law explicit by issuing formal prosecutorial guidelines (as Thomas did), the lack of any formal administrative process shields such policies from routine review.¹⁹³

In sum, changes in state substantive law have merged with localized exercise of prosecutorial discretion to create significant variation between state

188. See Audio Recording: Debate on H.R. 2539, Ariz. H.R. Comm. on the Judiciary, 47th Leg., 1st Reg. Sess. (Feb. 10, 2005) (obtained by author, courtesy of the Ariz. H.R.) [hereafter H.R. 2539 Audio Recording].

189. *Id.* at 27:30–45 (Arizona Representative Ben Miranda expressing concern that "the wording on this is such that it casts a wide net and it captures a lot of people that perhaps is not really the intent of our targets—and them being the little guy"); *id.* at 87:58–89:03 (Arizona Representative Ted Downing explaining that "it is our job to write these laws as narrowly as possible" rather than allow prosecutors to decide the boundaries).

190. *Id.* at 36:45–37:45 (Representative Ben Miranda asking whether the bill would extend to, for example, an uncle, and expressing concern that applying the law to family members would "be dipping down into the social structure of the border and getting individual's family-level people with class four felonies"). This concept of forgiveness for transporting family members into the United States is incorporated into federal immigration law. See, e.g., 8 U.S.C. § 1101(a)(43)(N) (2006) (excluding from the definition of aggravated felony "the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent"); *id.* § 1227(a)(1)(E)(iii) (providing discretionary relief from removal for those deportable for smuggling but who only encouraged the entry of an immediate family member).

191. H.R. 2539 Audio Recording, *supra* note 188, at 27:55–29:00 (Representative Ben Miranda: "By passing this type of legislation, are we going to create a process here for prosecutors to start prosecuting individuals driving undocumented individuals from one worksite to another? And then at the end of the road we are going to produce these fabulous statistics—'we've arrested 5000 people for human trafficking'—when in actuality it is so disproportionate to the problem we've set out to resolve.").

192. Challenges based on legislative intent have been brought against Maricopa County's alien smuggling prosecutions but thus far have not been successful. See *supra* notes 159–166 and accompanying text.

193. See generally Richman, *supra* note 175, at 768 (noting that the federal system has "no formal rule-making process" for prosecutorial guidelines). Work by Marc Miller and Ronald Wright has highlighted how prosecutors can nonetheless incorporate legal values into their decisionmaking by adopting prosecutorial guidelines. Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 141 (2008) (relying on New Orleans data to conclude that many decisions by prosecutors to decline prosecution "are shaped by legal norms that control criminal investigations," such as the exclusionary rule).

and federal alien smuggling. The two crimes have different statutory elements, different penalties, and are used in practice to target different types of activity.

B. Law Enforcement Authority and Policing Migration

The addition of immigration crime to state codes has had another important result: It effectively broadens state and local enforcement authority over immigration.

1. Police

Without any state immigration crime, it is generally agreed that Arizona law enforcement would still have the authority to arrest for federal criminal immigration violations.¹⁹⁴ In fact, for the federal crime of smuggling, Congress has specifically delegated arrest authority to “all other officers whose duty it is to enforce criminal laws.”¹⁹⁵ Local officers can therefore arrest individuals for federal smuggling and refer the arrestees to federal authorities for criminal prosecution. The federal government then retains the authority to decide whether to bring criminal charges.

When states create their own immigration crimes—especially those that vary in substance from federal law—the scope of state arrest power expands beyond that formally granted by the federal government. Arizona’s new state smuggling crime and its application to criminalize self-smuggling effectively enlarged the legitimate domain of criminal suspicion.¹⁹⁶ In turn, more criminal suspicion opens the door for more stops, interrogations, and searches, regardless of whether criminal charges are ever filed. And, by making alienage an element of the smuggling crime, more questioning regarding citizenship status

194. See *Gonzales v. City of Peoria*, 722 F.2d 468, 477 (9th Cir. 1983), *overruled in part on other grounds by* *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999). For challenges to this view, 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); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004).

195. 8 U.S.C. § 1324(c). Federal law also allows for state and local arrests of aliens illegally present in the United States who “have previously been convicted of a felony in the United States and deported or left the United States after such conviction.” *Id.* § 1252c. However, such arrests require that federal officials confirm the individual’s status and not hold the individual longer than required for transfer into federal custody. *Id.*

196. See MCAO Smuggling Policy, *supra* note 69.

and more arrests of noncitizens are folded into the daily work of local police.¹⁹⁷ One practical effect of all this is the potential for enhanced racial profiling.¹⁹⁸

Empirical evidence from Maricopa County supports these concerns. As seen in Figure 1, the number of inmates in the Maricopa County Jail subject to a federal immigration detainer has increased from 894 in 2005 to 1430 in 2009.¹⁹⁹ An immigration detainer—more commonly known as an Immigration and Customs Enforcement (ICE) hold—signifies that federal authorities are researching the individual's immigration status and may initiate removal proceedings.²⁰⁰ As Figure 1 highlights, during this time of increasing ICE-hold population, the total number of inmates in the county jail has declined year-over-year.²⁰¹ Thus, the overall concentration of ICE-hold inmates in the county jail has increased dramatically—from 10 percent in 2005 to 20 percent in 2009.²⁰² In part, this increase reflects the increased likelihood that a detainer will be filed as a result of cooperative programs that have enhanced the presence of immigration enforcement in local jails. It may also be due in part to the longer periods of time that deportable defendants spend in detention as a result of Proposition 100.²⁰³

197. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 539 (2001) (describing how “police benefit from laws that criminalize street behavior that no one wishes to actually punish, solely as a means of empowering them to seize suspects”).

198. For an insightful discussion of the role that immigration enforcement plays in legitimizing racial profiling, see Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011); see also Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002); Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129 (2010); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1036 (2010); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 98–104 (2005); Juan Rocha, *Found in the USA*, FED. LAWYER, Nov.–Dec. 2010.

199. This doubling of arrests of persons potentially subject to removal is also reflected in the total annual number of jail bookings in Maricopa County. See Letter and Accompanying CD From Jalena Borders, Legal Liaison, Maricopa Cnty. Sheriff's Office (MCSO), to author (Dec. 27, 2010) [hereinafter MCSO ICE-Hold Data] (showing that the total number of bookings with U.S. Immigration and Customs Enforcement (ICE) holds increased from 4.7 percent in 2005 to 11.3 percent in 2009).

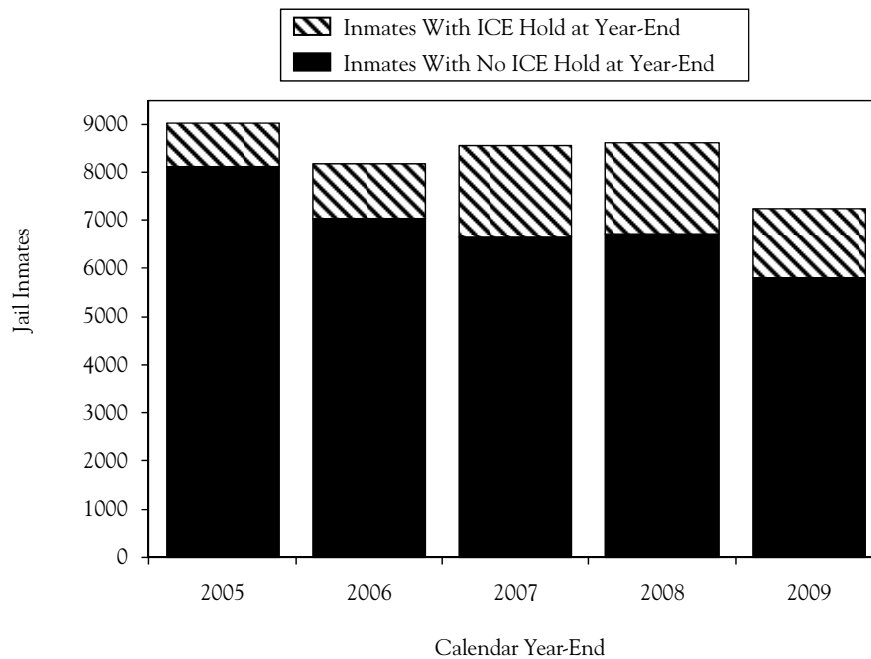
200. See 8 C.F.R. § 287.7(a) (2010) (“A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien.”).

201. Maricopa County's decline in overall jail population is consistent with other major jails across the United States, which have also experienced steady population reductions in recent years. See Todd D. Minton, *Jail Inmates at Midyear 2010—Statistical Tables 2*, 10 (NCJ 233431) (Apr. 2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim10st.pdf>.

202. See *infra* Figure 1.

203. See *supra* notes 93–114 (discussing Proposition 100).

FIGURE 1. Total Number of Inmates at Year-End in Maricopa County Jails, by ICE-Hold Status (2005–2009)²⁰⁴



Without state criminal immigration law, Maricopa County would be far more restricted in its ability to investigate and arrest for immigration violations. The Ninth Circuit has concluded that police departments have the inherent authority to enforce the federal *criminal* immigration law,²⁰⁵ but not the *civil* immigration law.²⁰⁶ Because mere illegal presence in the United

204. Data for Figure 1 were obtained by the author from the Maricopa County Sheriff's Office with a public records act request. See MCSO ICE-Hold Data, *supra* note 199. These data measure the number and ICE hold status of MCSO jail inmates as of December 31 of each year. *Id.* ICE holds are counted by MCSO regardless of the time of placement or eventual disposition. *Id.*

205. *Gonzales v. City of Peoria*, 722 F.2d 468, 474–75 (9th Cir. 1983). For an analysis of the implications of the *Gonzales* decision, see Motomura, *supra* note 194.

206. *United States v. Arizona*, 641 F.3d 339, 363–65 (9th Cir. 2011) (acknowledging a circuit split on this issue). For a long time, the U.S. Department of Justice (DOJ) maintained that local police may arrest for *criminal* immigration violations, but not *civil* immigration violations. See Memorandum Op. for the U.S. Att'y, S. Dist. of Cal., From Teresa Wynn Roseborough, Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice (Feb. 5, 1996), <http://www.usdoj.gov/olc/immstopo1a.htm>. In 2002, the DOJ flipped its view, concluding that state officers have “inherent authority” to arrest for both civil and criminal immigration violations. Memorandum From Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, on Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations 1–4, 13 (Apr. 3, 2002),

States is not a crime, this legal restriction seriously curtails the immigration authority of local police.

Of course, states may act as civil immigration enforcers if Congress delegates such power to them.²⁰⁷ However, federal authorities hold the reins when it comes to cooperative programs.²⁰⁸ Some local police departments, including the Maricopa County Sheriff's Office, have been deputized to enforce civil immigration law during routine policing under so-called 287(g) agreements.²⁰⁹ Police acting under such agreements are required to work under the close supervision and training of the Department of Homeland Security. For example, 287(g) program participants are instructed that they may arrest for civil immigration violations only if they have independent suspicion of criminal activity and approval from federal authorities that the arrest is consistent with federal priorities.²¹⁰ When federal authorities are dissatisfied with a state or local partner under the program, they may unilaterally rescind the delegated power. In fact, this is precisely what happened in Maricopa County.²¹¹

State criminal immigration law alters this dynamic. With such laws in place, state investigative power is removed from the purview of federal supervision. Local police can investigate immigration as part of police work, without the need to comply with federal standards, attend federal trainings, or reapply for certification at regular intervals. These effects may be especially consequential for police departments with existing policies against engagement in immigration enforcement. Sanctuary policies typically bar

<http://www.aclu.org/FilesPDFs/ACF27DA.pdf>. This more recent opinion has been criticized by legal experts, and some have called for the DOJ to withdraw it—especially in the wake of the federal lawsuit against Arizona. See generally Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1195 (2004) (arguing that the Attorney General's 2002 decision "makes little sense").

207. *Arizona*, 641 F.3d at 365.

208. See generally Chin & Miller, *supra* note 4 (manuscript at 21) (arguing that federal cooperative programs are "exclusively to assist, not to make policy or independent decisions about enforcement").

209. 8 U.S.C. § 1357(g) (2006). The popular name for such agreements—287(g)—derives from their placement in Section 287(g) of the Immigration and Nationality Act. For an example of a task force model agreement that allows officers to enforce immigration during routine policing, see Memorandum of Understanding, Phoenix Police Dep't (Oct. 15, 2009), http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gphoenixpd101509.pdf.

210. Memorandum of Understanding, *supra* note 209, at 20 (explaining that prior to arresting a suspect for a civil immigration violation, the police officer "first must obtain approval from a U.S. Immigration and Customs Enforcement (ICE) supervisor, who will approve the exercise only to further the priorities of removing serious criminals, gang members, smugglers, and traffickers and when reasonable suspicion exists to believe the alien is or was involved in criminal activity").

211. See JJ Hensley, *Arpaio May Lose Some Immigrant Authority*, ARIZ. REPUBLIC, Oct. 3, 2009, at A1 (discussing the termination of Arpaio's street-level 287(g) authority).

both investigation of immigration status (unless a crime is properly under investigation) and arrest for certain violations of federal criminal immigration law (such as illegal entry).²¹² It is too early to know whether police departments will expand sanctuary policies to bar enforcement of *state* criminal law—a move that may be more problematic than limiting enforcement of federal law. Assuming, however, that sanctuary policies are not rewritten, the practical scope of immigration police power will expand even in those cities that in the past have guarded their officers from engaging in immigration enforcement.²¹³

2. Civilians

This broadening of state-level arrest authority is not, however, limited to deputized law enforcement officers. It has also empowered civilians to enforce the immigration law. Patrick Haab is a case in point. The state smuggling law enabled him to stop and arrest at gunpoint the smuggled men even though federal law gave him no such authority. That is, under the federal criminal law, Haab could not have legally arrested the passengers. In fact, he would have committed a state crime by threatening the men with a gun. The manufacture of a new immigration crime—of migrants smuggling themselves—was thus essential to the reclassification of Haab’s actions from those of a common criminal to those of an immigration law enforcement officer.

212. See, e.g., L.A. Police Dep’t, Special Order No. 40 at 1 (Nov. 27, 1979), http://www.lapd.org/get_informed/pdf_view/44798 (“[I]t is the policy of the Los Angeles Police Department that undocumented alien status in itself is not a matter for police action. . . . Officers shall not initiate police action with the objective of discovering the alien status of a person. Officers shall not arrest nor book persons for violation of Title 8, Section 1325 . . .”).

213. SB 1070 makes the tension between state immigration law and sanctuary policies explicit by *requiring* localities to enforce immigration law. See ARIZ. REV. STAT. ANN. § 11-1051(A) (2010) (prohibiting Arizona officials, agencies, and political subdivisions from limiting enforcement of federal immigration laws); *id.* § 11-1051(C)–(F) (requiring state officials to work with federal officials with regard to unlawfully present aliens); *id.* § 11-1051(G)–(L) (granting legal residents the right to sue state officials and agencies for not enforcing federal immigration laws to the full extent permitted by federal law). None of these provisions was preliminarily enjoined by the federal court. *United States v. Arizona*, 703 F. Supp. 2d 980, 986 (D. Ariz. 2010). However, a related section of the law, see ARIZ. REV. STAT. ANN. § 11-1051(B), which requires officers to attempt to determine immigration status at the time of a stop or arrest, was preliminarily enjoined because of the burden it would place on lawful aliens and federal resources. *Arizona*, 703 F. Supp. 2d at 986.

Federal law makes clear that only law enforcement officers²¹⁴—not civilians²¹⁵—can arrest for violations of the federal criminal immigration law. Yet, the civilian border patrol movement in Arizona is part of a campaign to allow landowners and concerned citizens to enforce immigration law. Although the Haab incident may appear to be an isolated event to those not familiar with the region, civilians have become a recognized component of the border enforcement landscape.²¹⁶ Some radical segments of the patrol movement have employed increasingly violent tactics.²¹⁷ For example, in 2011, a leader of a group known as Minutemen American Defense was sentenced to death by a Pima County jury for her role in invading the private home of a migrant family, identifying herself as a law enforcement officer, and proceeding to kill a father and his nine-year-old daughter.²¹⁸

Maricopa County's Sheriff Arpaio has institutionalized civilian participation in his enforcement of alien smuggling through what is known as "the posse."²¹⁹ This civilian force of nearly 3000 volunteers utilizes privately owned vehicles, boats, and weapons to assist in law enforcement efforts, including

214. See 18 U.S.C. § 3041 (2006) ("For any offense against the United States, the offender may, by any justice or judge of the United States, or by any United States magistrate judge, or by any chancellor, judge of a supreme or superior court, chief or first judge of the common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and at the expense of the United States, be arrested and imprisoned or released . . ."); *United States v. Bowdach*, 561 F.2d 1160, 1168 (5th Cir. 1977) (finding that Section 3041 gives state police officers "the power to arrest citizens for crimes against the United States").

215. 8 U.S.C. § 1324(c) (2006) ("No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service . . . and all other officers whose duty it is to enforce criminal laws."). See generally Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275, 310 (1989) ("With the perceived need to increase centralization of criminal law enforcement, Congress has drastically reduced the role of private citizens in enforcing the criminal laws.").

216. See generally STEPHEN R. VINA ET AL., CONG. RESEARCH SERV., RL 33353, CIVILIAN PATROLS ALONG THE BORDER: LEGAL AND POLICY ISSUES (2006), available at <http://www.fas.org/sgp/crs/homesec/RL33353.pdf> (discussing a variety of civilian militia groups, including Civil Homeland Defense, Ranch Rescue, and American Border Patrol); see also Rocha Interview, *supra* note 135 (explaining that, as an Assistant Federal Public Defender in Arizona, he has handled multiple cases involving arrests by "concerned citizens").

217. A study by the Anti-Defamation League has linked the development of several of the more radical border patrol groups to white supremacist and anti-Semitic associations. ANTI-DEFAMATION LEAGUE, BORDER DISPUTES: ARMED VIGILANTES IN ARIZONA (2003), <http://www.adl.org/extremism/arizona/arizonaborder.pdf>.

218. Jesse McKinley & Malia Wollan, *New Border Fear: Violence by a Rogue Militia*, N.Y. TIMES, June 27, 2009, at A9.

219. JOE ARPAIO & LEN SHERMAN, AMERICA'S TOUGHEST SHERIFF 121-44 (1996) (discussing the Maricopa County posse). See generally ARIZ. REV. STAT. § 11-441(D) (2010) ("The sheriff, in the execution of the duties prescribed in this section, may request the aid of volunteer posse and reserve organizations located in the county.").

immigration sweeps.²²⁰ As Arpaio explained at a meeting of the Minuteman Civil Defense Corps, under Arizona law, he can swear in civilians so that they can “arrest like any other cop.”²²¹ A law passed in 2010 has further fortified this emerging civilian force by allowing concealed weapons to be carried without a permit.²²²

State criminal laws that enable warrantless arrests by citizens thus broaden immigration enforcement by allowing ordinary civilians to act as law enforcers—a sort of civilian border patrol. In the process, they allow arrests to operate within a framework of curtailed constitutional protections. For example, because civilian border patrol members are presumed to be engaged in private rather than state action, they are not subject to the full rigors of rules that apply to police, such as the reading of *Miranda* rights and the application of search and seizure law.²²³ Even when their actions may cross the line into illegal behavior (as was the case with Patrick Haab), prosecutorial discretion can be used in ways that forgive such transgressions.²²⁴

In addition, although technically citizens are able to arrest based only on criminal violations under Arizona law, once they have arrested a suspect, prosecutors may decline criminal charges. If ICE or Border Patrol agents later take the arrested migrant into federal immigration custody, the citizen’s arrest turns into the functional equivalent of a civil immigration arrest.²²⁵ For example, although Haab’s actions found justification under the criminal

220. ARPAIO & SHERMAN, *supra* note 219, at 42; Press Release, Maricopa County 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>; ABOUT US, MARICOPA CNTY. SHERIFF’S OFFICE, <http://www.mcso.org/About/Default.aspx> (last visited June 7, 2011). See generally Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1435, 1462 n.125 (2010) (discussing the expanding role of private actors, including vigilantes, in the realm of homeland security).

221. Minutemenhq, *Minutemen Civil Defense Corps Dec. 2008 Phoenix Chapter Meeting*, YOUTUBE (Dec. 20, 2008), http://www.youtube.com/watch?v=hUEEdvRFUEw&feature=player_embedded. Whether MCSO, as a matter of official policy, allows posse members to conduct arrests is unclear. See Letter From Ashley Osolin, Legal Liaison, Compliance Div., Maricopa Cnty. Sheriff’s Office, to author re Response to Request for Information (obtained by author with a public records request on Apr. 12, 2011) (claiming that “[p]osse members do not have arrest powers, therefore they cannot arrest for either State or Federal charges”).

222. S. 1108, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (codified as amended at ARIZ. REV. STAT. ANN. § 13-3102 (2010)).

223. See VINA ET AL., *supra* note 216, at 12–13, 17–18; Michaels, *supra* note 220, at 1462.

224. See generally Muneer I. Ahmad, *A Rage Shared by Law: Post–September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1324 (2004) (exploring the interaction between “private” violence of vigilantism and “[l]ax enforcement, low profile enforcement, and state policies that implicitly or explicitly approve of bias”).

225. See Motomura, *supra* note 194, at 1829–42, 1858.

law, the sanction the transported men ultimately faced was not criminal prosecution but rather civil removal.

Over time, this move to use state law to allow for civilian law enforcement has become increasingly formalized. Consider Arizona's Proposition 200—a 2004 ballot initiative that gave citizens a private right of action against public officials who fail to report undocumented persons applying for public benefits.²²⁶ SB 1070 has similarly empowered civilians to bring damages actions against police departments or officials that limit or restrict state enforcement of federal immigration law. This provision, which is currently in effect,²²⁷ gives citizens the ability to demand that police resources be allocated to enforce immigration.²²⁸

Thus far, Part II has shown how state and federal immigration crime can vary in both definition and enforcement. Arrest authority of police and civilian involvement in border enforcement are two areas in which state and federal immigration enforcement can differ. Next, this Article transitions from looking at the differences between the two systems to examining their interaction.

C. Resource Allocation and Criminal Dockets

When states begin to enforce immigration crime in earnest, interactions between federal and state authorities increase. States call on federal authorities to research and prove alienage. Federal resistance to these pressures is complicated by existing cooperative relationships.

1. *Corpus Delicti*, Cooperation, and Resistance

Although funding for state prosecutions generally comes from state and local coffers, in practice federal resources are used when states prosecute immigration. Explore what happens at the different phases of alien smuggling prosecutions in Maricopa County. At the very earliest investigative stage, state involvement requires federal authorities to respond to inquiries from police in the field regarding immigration status. This dynamic continues when state authorities actually file criminal charges. For example, a deputy county attorney may seek mandatory detention based on the defendant's

226. ARIZ. REV. STAT. ANN. § 46-140.01 (2010).

227. *Id.* § 11-1051(H) (2010). The United States did not make any specific argument to preliminarily enjoin this section. *United States v. Arizona*, 703 F. Supp. 2d 980, 986 (D. Ariz. 2010).

228. See generally Chin et al., *supra* note 4, at 75–77 (critiquing the citizen suit provision of SB 1070 and arguing that the “legislature would be wise to eliminate” it).

suspected immigration status.²²⁹ To prove alienage at this early stage, local agents trained and supervised by the federal government to enforce immigration (known as 287(g) officers)²³⁰ are frequently called upon to testify at the initial appearance or at a full due process hearing (known as a *Simpson* hearing) regarding the defendant's immigration status.²³¹ As the Arizona Court of Appeals has acknowledged, inserting immigration status into the bail determination has made such hearings "more complicated" precisely because "[w]hether the accused was in the country illegally was often a fact not readily available to the State."²³²

If a case proceeds to trial, state alienage-based crimes require immigration status to be proven beyond a reasonable doubt. In the case of Arizona's smuggling law, for example, the state must demonstrate that the smuggled person is "not [a] United States [citizen], permanent resident [alien,] or . . . otherwise [un]lawfully in the state."²³³ Typically, prosecutors rely on a combination of testimony and documentary evidence to prove alienage. In federal illegal reentry trials, for example, the government generally calls a federal agent to testify that, after conducting a diligent search of federal agency databases, no record was found indicating that the defendant applied for readmission.²³⁴ In Maricopa County, prosecutors rely upon certified records prepared by ICE or U.S. Customs and Border Protection (CBP).²³⁵ Should a case go to trial, the

229. ARIZ. CONST. art. II, § 22(A)(4); ARIZ. REV. STAT. ANN. § 13-3961(A)(5) (2010).

230. Pursuant to agreements with the U.S. Attorney General, local law enforcement officers may "perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States." 8 U.S.C. § 1357(g) (2006).

231. Mussman Interview, *supra* note 27; Parker Interview, *supra* note 104; Stinson Interview, *supra* note 97. See generally *Simpson v. Owens*, 85 P.3d 478 (Ariz. Ct. App. 2004) (setting forth the due process standard for a hearing on ineligibility for bond).

232. *Segura v. Cunanan*, 196 P.3d 831, 839 (Ariz. Ct. App. 2008).

233. ARIZ. REV. STAT. ANN. § 13-2319(F)(3).

234. Declaration of Daniel H. Ragsdale ¶ 52, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. July 1, 2010), <http://www.justice.gov/opa/documents/declaration-of-daniel-ragsdale.pdf> [hereinafter Ragsdale Declaration]. Especially after *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), prosecutors have erred in favor of calling live witnesses in order to avoid Confrontation Clause challenges. See *United States v. Orozco-Acosta*, 607 F.3d 1156, 1161 (9th Cir. 2010) (noting the government's concession that introduction of a certificate of no record without live testimony violated the defendant's confrontation right); *United States v. Martinez-Rios*, 595 F.3d 581, 586 (5th Cir. 2010) (finding that admission of certificate of nonexistence of record violated defendant's Sixth Amendment rights).

235. See Romley Interview, *supra* note 182 (discussing the state's burden of proof and need to obtain immigration status information from federal authorities); see also MCAO ILLEGAL IMMIGRATION 2008, *supra* note 58, at 8 (explaining that local immigration crime prosecutors must work closely with the Department of Homeland Security (DHS) to pursue these "unique prosecution[s]"); Memorandum From Anthony Novitsky, Div. Chief, Major Crimes Div., to Richard M. Romley, Maricopa Cnty. Att'y, re Enforcement Issues With A.R.S. § 13-1509/S.B. 1070 4 (June 10, 2010) (on file with author) [hereinafter Novitsky Memorandum] ("Only the federal government can provide information and records which will provide the necessary evidence to corroborate a person's admissions regarding immigration status.").

state may call a federal agent to testify regarding searches of federal immigration databases or as expert witness on smuggling.²³⁶

The need for evidence from federal officials is especially acute because of the doctrine of *corpus delicti*. In Arizona, proof of the *corpus delicti*—literally “the body of crime”—cannot rest solely on “an uncorroborated confession without independent proof.”²³⁷ In other words, prosecutors must have “evidence of the defendant’s guilt other than simply the defendant’s confession.”²³⁸ Aware of this evidentiary hurdle, County Attorney Thomas instructed Sheriff Arpaio from the outset that “[t]he doctrine of *corpus delicti* may apply disproportionately in these cases.”²³⁹ Thomas’s predictions were underscored when the first two self-smuggling defendants who went to trial protested the admission of their confessions on *corpus delicti* grounds. When the state was forced to proceed without the defendants’ own statements due to a lack of supporting evidence, a superior court judge acquitted them for want of proof at the conclusion of the state’s case.²⁴⁰

236. For an example of this practice, see *State v. Guzman-Garcia*, No. 1 CA-CR 07-0056, 2008 WL 4824031, at *1 (Ariz. Ct. App. Nov. 4, 2008) (noting that, in a smuggling trial, the MCAO called federal agents, including “a border patrol agent who testified to common practices and procedures of human smugglers” and “a record supervisor with Homeland Security who ran Guzman-Garcia’s information through various databases and testified he was not in the country legally”); see also Motion to Preclude ICE/DHS Records, *Arizona v. Alvarado*, No. CR2006-006640-003 DT (Ariz. Super. Ct. June 13, 2006) (highlighting pretrial discovery issues associated with federal alienage evidence in a state smuggling trial).

237. *State v. Jones*, 6 P.3d 323, 325 (Ariz. Ct. App. 2000). In contrast to Arizona and other states that maintain the traditional *corpus delicti* rule, the federal government and a growing number of states have adopted a more lenient “corroboration” rule. KENNETH S. BROUN, MCCORMICK ON EVIDENCE §§ 147–48 (6th ed. 2006). The corroboration rule requires the prosecution to produce evidence tending to establish the trustworthiness of the defendant’s statement, but not independent evidence of every element of the offense. See *Opper v. United States*, 348 U.S. 84, 93 (1954) (discussing the federal corroboration rule). For an argument that the traditional *corpus delicti* rule is an important protection against false confessions, see David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817 (2003).

238. MCAO Smuggling Policy, *supra* note 69, at 4 n.2.

239. *Id.*; see also Novitsky Memorandum, *supra* note 235 (discussing the challenges that the *corpus delicti* rule will present for SB 1070 prosecutions).

240. Minute Order, *State v. Antonio Hernández*, No. CR2006-005932-039 DT (Ariz. Super. Ct. July 11, 2006) (granting directed verdict); Minute Order, *State v. Gustavo Unbalejo Gómez*, No. CR2006-005932-025 DT (Ariz. Super. Ct. July 11, 2006) (same); see also Salazar Interview, *supra* note 30 (recalling his “highly publicized” representation of Unbalejo Gómez at trial). This is not to say that the *corpus delicti* burden is insurmountable. For example, in a related case, the same judge found that the county attorney satisfied the requirement of “substantial independent evidence.” Ruling at 1, *State v. Guzman-Garcia*, CR2006-124913-001 DT (Ariz. Ct. App. Dec. 5, 2006); see also *State v. Barragan-Sierra*, 196 P.3d 879, 884 (Ariz. Ct. App. 2008) (affirming the trial court’s denial of the defendant’s motion to exclude his statement on *corpus delicti* grounds in an alien smuggling case).

These interactions between federal and local prosecutors occur because states cannot prosecute immigration crime on their own. Instead, they remain in a symbiotic relationship with the federal government. Federal agents must aid in investigating alienage—and eventually in proving immigration status beyond a reasonable doubt in court.²⁴¹ From the federal government’s perspective, supporting state prosecutions necessarily diverts attention away from high-priority targets, such as aliens with criminal records or those implicated in terrorism, drug smuggling, or gang activity.²⁴² The end result, as the U.S. Government Accountability Office has found, is a federal agenda that is less “proactive” and more “reactive.”²⁴³

Given the Justice Department’s formal stance opposing state-level criminal immigration enforcement, one may wonder: Why would the federal government allow its agents to be involved in such prosecutions? As an initial matter, it is important to note that Congress has established some programs, such as the 287(g) program discussed earlier, that encourage federal–state cooperation on immigration enforcement.²⁴⁴ Related to such cooperation, Congress requires that federal authorities provide state and local agencies with certain immigration status information.²⁴⁵ In complying with this mandate, the federal government has established Law Enforcement Support

241. As Phoenix Police Commander Kim Humphrey explained, “[e]ven if we decide we’re going to prosecute them under the state law, we’re going to have to call the feds and they’re going to have to get involved in the case.” Kiefer, *supra* note 50.

242. Complaint, *supra* note 2, at 18; Ragsdale Declaration, *supra* note 234, ¶ 42; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-919T, ALIEN SMUGGLING: DHS COULD BETTER ADDRESS ALIEN SMUGGLING ALONG THE SOUTHWEST BORDER BY LEVERAGING INVESTIGATIVE RESOURCES AND MEASURING PROGRAM PERFORMANCE 5 (2010), <http://www.gao.gov/new.items/d10919t.pdf> [hereinafter 2010 GAO 10-919T SMUGGLING] (explaining that, in one office studied, “the equivalent of two full-time investigators each week spent their time responding to non-investigation-related calls during fiscal year 2009”).

243. 2010 GAO 10-919T SMUGGLING, *supra* note 242, at 10.

244. See *supra* notes 208–211 and accompanying text.

245. See 8 U.S.C. § 1373(c) (2006) (“The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.”). See generally *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1976 (2011) (explaining that Section 1373(c) “requires the Federal Government to ‘verify or ascertain’ an individual’s ‘citizenship or immigration status’ in response to a state request”); see also *United States v. Arizona*, 641 F.3d 339, 350 n.10 (9th Cir. 2011) (reflecting disagreement among the three judges as to whether Section 1373(c) allows for states to demand that federal agencies respond to all local inquiries regarding immigration status).

Centers, administered by ICE, to provide 24-hour-a-day information regarding immigration status to state and local agencies.²⁴⁶

Verifying immigration status is quite different, however, from affirmatively partnering with the state in detention hearings, discovery, and trials. A more thorough answer to the question of why such cooperation occurs thus requires an understanding of the deeper politics of law enforcement interaction along the border. Completely opting out of assisting local authorities is strategically problematic for federal agents with their “boots on the ground.”²⁴⁷ Doing so would especially hinder the ability of federal agents to ask for assistance in their priority areas, where they have worked extremely hard to foster local assistance.²⁴⁸ In practice, federal agents simply do not have the street presence necessary to effectively pursue many types of crime. Therefore, they rely on state and local police to act as their eyes and ears.²⁴⁹ This is particularly true in the area of immigration, where the federal government depends upon state and local law enforcement to identify and arrest so-called criminal aliens, a top federal priority.²⁵⁰

246. Declaration of David C. Palmatier, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010), <http://www.justice.gov/opa/documents/declaration-of-david-palmatier.pdf> (discussing Law Enforcement Support Centers).

247. Telephone Interview With Diane J. Humetewa, Former U.S. Att’y for the Dist. of Ariz. (Sept. 2, 2010) [hereinafter Humetewa Interview] (distinguishing between central DOJ policy and the reality for those with their “boots on the ground” who are removed from federal policymaking); Ragsdale Declaration, *supra* note 234, ¶ 52 (“If ICE agents are asked to testify in a significant number of state criminal proceedings, as contemplated under SB 1070, they will be forced either to divert resources from federal priorities, or to refuse to testify in those proceedings, thus damaging their relationships with the state and local officials whose cooperation is often of critical importance in carrying out federal enforcement priorities.”).

248. See Sands Interview, *supra* note 30 (noting that if federal prosecutors turn down assistance to the state, it may cause problems later for cooperation when the feds need it); see also John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 684 (1999) (explaining that, if federal prosecutors want to expand their ability to fight violent crime, they need the cooperation of local law enforcement); Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007) (identifying what he calls “cooperative localism,” whereby federal governments and local governments work together in areas such as homeland security, law enforcement, and immigration).

249. Humetewa Interview, *supra* note 247 (discussing federal participation on task forces with state, local, and tribal governments). See generally MALCOLM RUSSELL-EINHORN ET AL., FEDERAL-LOCAL LAW ENFORCEMENT COLLABORATION IN INVESTIGATING AND PROSECUTING URBAN CRIME, 1982–1999: DRUGS, WEAPONS, AND GANGS (2004), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/201782.pdf> (documenting a rise in federal collaboration with local police and prosecutors); Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 427 (2006) (discussing an expansion in law enforcement collaboration that has accompanied the federalization of criminal law).

250. Schuck, *supra* note 4, at 72 (“Indeed, it is no exaggeration to say that where enforcement against criminal aliens is concerned . . . federal immigration officials are practically impotent without the substantial help of the state and local criminal justice systems.”).

Maricopa County is no exception when it comes to cooperation. Federal programs, such as the Arizona Border Control Initiative and the Alliance to Combat Transnational Threats, foster collaboration with local and tribal governments throughout Arizona.²⁵¹ Since 1990, Maricopa County has been designated a federal High Intensity Drug Trafficking Area, formally joining local and federal agents to target drug trafficking.²⁵² Federal authorities have also solicited assistance from Maricopa and other Arizona counties in immigration screening through a variety of cooperative arrangements.²⁵³

With all of this investment in interagency relationships,²⁵⁴ federal agents are under pressure to lend support to Maricopa County's smuggling project. There are, however, a few signs of federal resistance to the county's aggressive immigration enforcement.²⁵⁵ For example, Roberto Medina, who served in Arizona as Special Agent in Charge of Investigations for ICE during the early Thomas years, refused to pick up aliens arrested by Sheriff Arpaio's deputies.²⁵⁶ Washington has also launched an official critique of the civilian movement, fostered by Arpaio, to enforce the

251. *Fact Sheet: Arizona Border Control Initiative—Phase II*, U.S. DEP'T OF HOMELAND SEC. (Mar. 30, 2005), http://www.dhs.gov/xnews/releases/press_release_0646.shtm; *News Releases, ICE Part of Unprecedented, Multi-Agency Effort Securing Border in Arizona*, U.S. DEP'T OF HOMELAND SEC. (Feb. 8, 2011), <http://www.aiala.org/content/default.aspx?docid=34457>. Federal agencies have also established "fusion centers" in Arizona that rely on federal dollars to bring different levels of law enforcement together to engage in data sharing and counterterrorism efforts. U.S. DEP'T OF HOMELAND SEC., STATE AND MAJOR URBAN AREA FUSION CENTERS, http://www.dhs.gov/files/programs/gc_1156877184684.shtm (last modified Apr. 1, 2011).

252. 2001 OFFICE OF NAT'L DRUG CONTROL POL'Y ANN. REP. 137–42, http://www.azdps.gov/About/Reports/docs/Crime_In_Arizona_Report_2009.pdf.

253. The 287(g) Program, the Criminal Alien Program, and Secure Communities are examples of programs active in Maricopa County. See generally Motomura, *supra* note 194, at 1850–57 (describing such cooperative programs).

254. See generally NORMAN ABRAMS ET AL., FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 79 (5th ed. 2010) (noting an "increasing trend toward collaborative investigations by state and federal law enforcement agents"); Harry Litman & Mark D. Greenberg, *Reporters' Draft for the Working Group on Federal-State Cooperation*, 46 HASTINGS L.J. 1319 (1995) (explaining that the most important factor to ensure cooperation between criminal enforcement authorities is "close personal relationships").

255. See generally Salazar Interview, *supra* note 30 (recalling that during his representation of Antonio Hernández, one of the first "I smuggled myself" defendants to go to trial in Maricopa County, he was "getting [the] impression that the feds didn't want to get involved with this law and they weren't going to help in any way").

256. Daniel González, *Arizona ICE Chief Set to Exit*, ARIZ. REPUBLIC, Feb. 2, 2008, at A1. Amid controversy, Medina was replaced in late 2006 by Alonzo Peña, who worked to restore relationships with local law enforcement. Daniel González, *State-Federal Border Rift Apt to Persist*, ARIZ. REPUBLIC, Aug. 30, 2006, at A1.

border.²⁵⁷ More recently, federal officials announced that federal agents may “not necessarily process all illegal immigrants referred by Arizona Police officers.”²⁵⁸

2. Measuring Concurrent State–Federal Jurisdiction

With all the tension in Arizona over who ought to enforce immigration and how it ought to be done, prosecution data are essential to understanding the state–federal enforcement dynamic. As Figure 2 reflects, Maricopa County’s smuggling prosecutions have steadily increased since Arizona’s smuggling law was adopted in 2005. During the same time period, there has been an overall reduction in Arizona’s federal alien smuggling docket.²⁵⁹ By 2009, there were fewer federal smuggling convictions in the entire federal District of Arizona than in the County of Maricopa.²⁶⁰

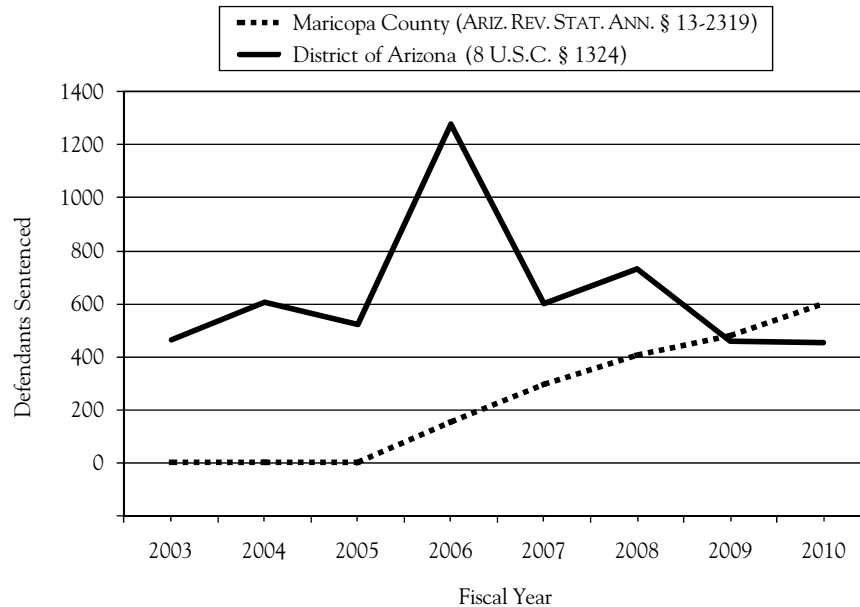
257. Federal immigration officials have stressed that the job of border enforcement should be conducted by professional law enforcement. See, e.g., Susan Carroll, *Minuteman Support Fades as Launch of Patrol Nears*, ARIZ. REPUBLIC, Sept. 22, 2005, at A1. The Bush administration even made formal efforts to report the locations of Minuteman enforcement zones to Mexican officials. Sara A. Carter, *U.S. Tipping Mexico to Minuteman Patrols*, INLAND VALLEY DAILY BULL., May 8, 2006, http://www.dailybulletin.com/news/ci_3799653. Under the radar, however, federal officials may be more supportive than their official stance suggests. See, e.g., *Securing Our Borders: What Have We Learned From Government Initiatives and Citizen Patrols?: Hearing Before the Comm. on Gov’t Reform*, 109th Cong. 45 (2005) (statement of Robert C. Bonner, Comm’r, U.S. Customs & Border Protection) (characterizing the work of the Minuteman Project as a “force multiplier” that can serve as the “eyes and ears of the Border Patrol along the border”); IMMIGRATION REFORM CAUCUS, RESULTS AND IMPLICATIONS OF THE MINUTEMAN PROJECT 14 (2005), http://www.jimgilchristforcongress.com/documents/minuteman_project_findings.pdf (suggesting that line Border Patrol agents believe that Minutemen make valuable contributions to policing the border).

258. *ICE’s Immigration Focus Draws Criticism From Arizona Law Enforcement*, FOX 10 NEWS, May 21, 2010, <http://www.myfoxphoenix.com/dpp/news/immigration/ice-immigration-focus-draws-criticism-5-21-2010> (quoting statement of John Morton, ICE Dir.). See generally Memorandum From John Morton, Dir., U.S. Immigration & Customs Enforcement, U.S. Dep’t of Homeland Sec., to All ICE Employees, U.S. ICE, Civil Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> (setting forth a three-tiered priority system for ICE’s civil immigration enforcement); Memorandum From John Morton, Dir., U.S. Immigration & Customs Enforcement, U.S. Dep’t of Homeland Sec., to All Field Office Dirs., Special Agents in Charge, and Chief Counsel, U.S. Immigration & Customs Enforcement, Exercising Prosecutorial Discretion Consistent With the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> (clarifying the wide range of prosecutorial discretion possessed by ICE officials).

259. For a discussion of some of the possible reasons for the downturn in smuggling prosecution levels, see *infra* notes 274–288 and accompanying text.

260. Data obtained by the author from the Office of the Federal Public Defender also support this trend. The District of Arizona office handled 324 smuggling cases in 2006, but only 95 in 2007, 93 in 2008, 78 in 2009, and 56 in 2010. Email From Gregory Bartolomei, Supervisor, Fed. Pub. Defender, Dist. of Ariz., to author (Mar. 24, 2011) (on file with author).

FIGURE 2. Comparison of Alien-Smuggling Defendants Sentenced in Maricopa County Superior Court and in U.S. District Court of Arizona (2003–2010)²⁶¹



Not only has Maricopa County's caseload now outstripped Arizona's federal caseload, but also the magnitude of the shift toward state smuggling enforcement may be somewhat greater than it appears in Figure 2. For more

261. Figure 2's Maricopa County data were obtained by the author from the MCAO in response to a public records request for all defendants convicted (whether by trial or plea) in Maricopa County under ARIZ. REV. STAT. ANN. § 13-2319, as reported in the Maricopa County Attorney Information System during fiscal years 2003 to 2010 (defined as Oct. 1 to Sept. 30). See MARICOPA CNTY. ATT'Y'S OFFICE, DATAFILE NO. 2011-0520-1 (obtained by author with a public records act request on May 26, 2011) [hereinafter MCAO FISCAL YEAR ALIEN SMUGGLING PLEA AND SENTENCING DATAFILE 2011]. Figure 2's federal data were obtained by the author from the Transactional Records Access Clearinghouse (TRAC) of Syracuse University. See CRIMINAL ENFORCEMENT, TRACFED, <http://trac.fed.syr.edu/index/index.php?layer=cri> (last visited July 5, 2011) (follow "Express" link; follow "Lead Charge" link; follow "Focus" hyperlink; input the following search criteria: Focus on Specific District—Lead Charge; Select District to Focus on: Arizona; Select Lead Charge: 8 U.S.C. § 1324—bringing in or harboring aliens; Select Table Topic: Convictions; Select Data: Annual Series; Select Time Period: 2003–2010). Figure 2's federal data include all federal convictions with a lead charge of 8 U.S.C. § 1324 for bringing in or harboring an alien as recorded by U.S. Attorneys in their Legal Information Office Network System database for fiscal years 2003 to 2010 (defined as Oct. 1 to Sept. 30). See *id.*; U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR U.S. ATT'YS, LEGAL INFORMATION OFFICE NETWORK SYSTEM USER MANUAL, RELEASE 5.3, at 5–11 (2010), http://www.justice.gov/usao/reading_room/data/Info/LIONS_User_Manual_5.3_Nov_2010.pdf (defining "Lead Charge" and requiring that the Lead Charge "be reviewed when charges are filed, and modified as needed").

serious smuggling-related activity, Maricopa County uses Arizona's kidnapping law.²⁶² Unlike smuggling, kidnapping requires proof of some form of force, such as holding the smuggling victim for ransom.²⁶³ Between 2005 and 2009, the number of individuals arrested for kidnapping in Maricopa County increased by more than 50 percent.²⁶⁴ During the same period, the number of persons convicted after being charged with kidnapping nearly doubled.²⁶⁵ However, as kidnapping is also the charge of conviction for nonimmigration matters, it cannot be disaggregated for purposes of tracking smuggling prosecutions.

Moreover, if the rest of Arizona's alien smuggling prosecutions were added to the mix, the federal–state enforcement balance would tip even further toward the state. Public records obtained by the author from Arizona's remaining twelve counties reveal that six counties (in addition to Maricopa County) have used the smuggling law—securing a total of 165 convictions since 2005.²⁶⁶ At the state level, the Arizona attorney general has also handled a number of alien smuggling prosecutions—139 defendants have been charged with smuggling and 51 sentenced since the smuggling law was passed.²⁶⁷ However, the attorney general's role may expand. Recently elected Attorney General Tom Horne is developing a plan to incorporate alien smuggling prosecution into a new border litigation plan.²⁶⁸ The Attorney General's Office already has a track record in

262. See generally MCAO ILLEGAL IMMIGRATION 2008, *supra* note 58, at 7 (reporting on the MCAO's use of kidnapping to prosecute alien smuggling).

263. See ARIZ. REV. STAT. ANN. § 13-1304(A)(1) (2010).

264. While 639 individuals were submitted to prosecutors with kidnapping charges in 2005, that number rose to 768 in 2007 and to 975 in 2009. MARICOPA CNTY. ATTORNEY'S OFFICE, DATAFILE NO. 2011-0103-2 (obtained by author from MCAO with a public records act request on Jan. 7, 2011).

265. *Id.*

266. With all thirteen Arizona counties responding, public records obtained by the author from the following six counties (in addition to Maricopa County) report local convictions under Section 13-2319: Letter From Terry Bannon, Civil Deputy Cnty. Att'y, Cochise Cnty. Att'y's Office (May 18, 2011) (24 defendants); Email From Penny Cramer, Admin. Assistant, Yavapai Cnty. Att'y's Office (June 14, 2011) (50 defendants); Email From Cheryl Harris, Office Manager, Navajo Cnty. Att'y's Office (June 27, 2011) (24 defendants); Email From Kostas Kalaitzidis, Commc'ns Adm'r, Pinal Cnty. Att'y's Office (June 22, 2011) (59 defendants); Letter From William J. Kerekes, Chief Civil Deputy Cnty. Att'y, Yuma Cnty. Att'y's Office (June 1, 2011) (2 defendants); Letter From James J. Zack, Chief Deputy Cnty. Att'y, Mohave Cnty. Att'y's Office (May 18, 2011) (6 defendants). Responses from the thirteen counties to the author's survey also confirm that Maricopa County is the only Arizona county to produce a formal, written policy governing enforcement of state alien smuggling.

267. ARIZ. ATT'Y GEN.'S OFFICE, ALIEN SMUGGLING STATISTICS DATAFILE (obtained by author with a public records request on May 26, 2011). The limited number of cases handled by Arizona's attorney general is consistent with the results of Rachel Barkow's recent empirical study, which found that most criminal cases within states are handled by local district attorneys rather than state attorneys general. Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn From the States*, 109 MICH. L. REV. 519, 550–56 (2011).

268. Email From James Keppel, Chief Counsel, Criminal Div., Office of Ariz. Att'y Gen., to author (June 6, 2011) (on file with author) (indicating that the Arizona Attorney General's Office is

this area: It established a specialized task force to address smuggling and other border crimes²⁶⁹ and aggressively used its warrant power to seize millions of dollars of funds funneled to smuggling organizations through outfits like Western Union.²⁷⁰

The overall downturn in federal smuggling convictions vis-à-vis the state system has been accompanied by other shifts in Arizona's federal immigration crime docket. When it comes to immigration crime, U.S. Attorneys primarily enforce three code provisions: illegal entry, illegal reentry, and alien smuggling.²⁷¹ Figure 3 measures the percentage of the nation's docket for each of these three crimes prosecuted in the District of Arizona. With respect to federal smuggling prosecutions (Section 1324), Figure 3 makes clear that the number of smuggling cases in Arizona have decreased not only absolutely, but also relative to the national smuggling docket. In 2006, the year when local prosecution of smuggling began in Maricopa, Arizona produced over one-fourth of all federal smuggling convictions in the United States. By 2010, Arizona's share of federal smuggling convictions had been almost cut in half.

At the same time, Figure 3 shows that Arizona's share of the national docket of illegal reentry (Section 1326) and illegal entry (Section 1325) cases has increased dramatically. This surge in Arizona immigration prosecutions has been fueled in part by a program known as Operation Streamline, which

currently developing a "Comprehensive Border Plan for the Office" that will "include enforcement of our human smuggling laws").

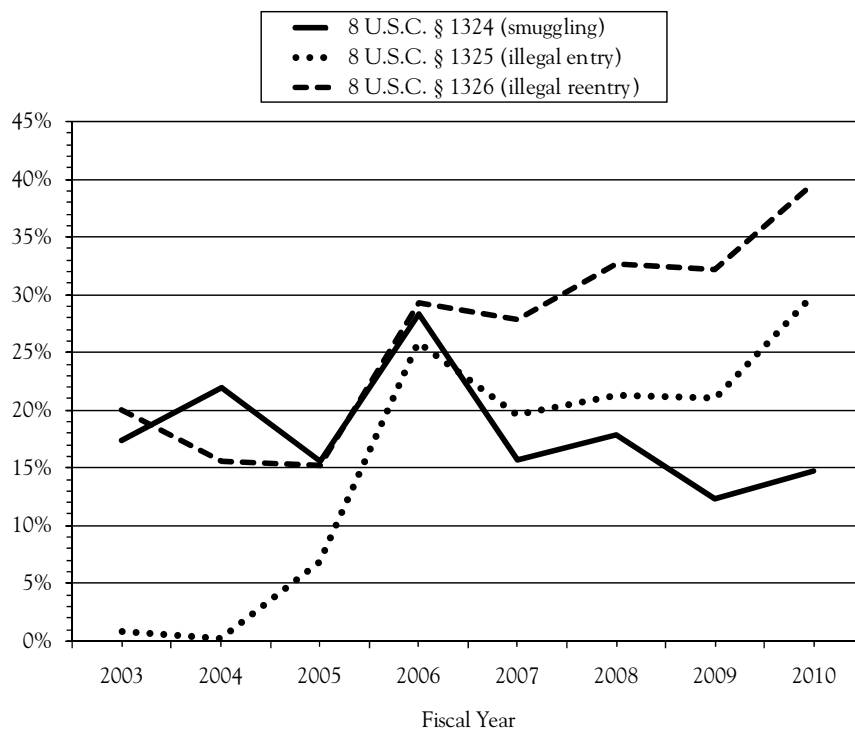
269. Press Release, Ariz. Office of Att'y Gen. Terry Goddard, Terry Goddard Announces New Team to Expand Prosecution of Border Crime (May 26, 2010), http://sandbox.azag.gov/press_releases/may/2010/Press%20Release%20-%20NEW%20Border%20Section%20Announcement%205-26-10.html.

270. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-328, ALIEN SMUGGLING: DHS NEEDS TO BETTER LEVERAGE INVESTIGATIVE RESOURCES AND MEASURE PROGRAM PERFORMANCE ALONG THE SOUTHWEST BORDER 33 (2010), <http://www.gao.gov/new.items/d10328.pdf> [hereinafter 2010 GAO 10-328 SMUGGLING]. The attorney general's use of what are popularly known as "damming warrants" has been particularly controversial. This technique derives its name from its function: These warrants literally dam up transferred funds. Damming warrants are issued solely based on defined criteria, generally an amount over 500 dollars sent through certain private companies (such as Western Union) and between specified states (such as from California to Arizona). If a transfer meets the warrant's set criteria, it is frozen unless and until the recipient makes an affirmative showing of legality. *Id.* at 30-33. A constitutional challenge to the use of such warrants is ongoing. See *Torres v. Home*, No. CV 06-2482-PHX-SMM, 2011 WL 587590, at *1 (D. Ariz. Feb. 10, 2011) (denying defendants' motion for summary judgment of plaintiffs' Section 1983 claims alleging that damming warrants violated their Fourth Amendment rights). The federal government, citing concerns that federal magistrate judges would not authorize such warrants and the potential to compromise the safety of smuggling victims, has not used damming warrants for immigration enforcement. 2010 GAO 10-328 SMUGGLING, *supra*, at 35; Charlton Interview, *supra* note 30.

271. Eagly, *supra* note 7, at 1281, 1323, 1343.

targets illegal entrants for rapid-fire plea bargains, very little jail time, and certain removal from the United States.²⁷²

FIGURE 3. Immigration Crime Convictions in the U.S. District of Arizona, as a Percentage of Total U.S. Convictions, by Immigration Crime Category (2003–2010)²⁷³



Of course, several factors beyond state-level prosecution may have contributed to the decrease in Arizona’s federal smuggling prosecutions. Consider the 2006 firing of the District’s U.S. Attorney, Paul Charlton. After Charlton’s departure, the office experienced an overall loss in prosecutors.²⁷⁴ This downturn

272. See generally *id.* at 1327–30 (describing the federal Operation Streamline program in Arizona and other border districts).

273. Calculations for Figure 3 were made by the author based on data obtained from Syracuse University’s TRAC, <http://tracfed.syr.edu>, using the search criteria referenced in note 261, *supra*, for the following lead charges: 8 U.S.C. §§ 1324, 1325, and 1326.

274. Tim Eigo, *Lawyer for the District*, ARIZ. ATT’Y, Jan. 2010, at 28, 30 (quoting current U.S. Attorney Dennis Burke explaining that Charlton’s departure was “very difficult” for his colleagues and affected the overall office morale); Sands Interview, *supra* note 30 (recalling that Charlton’s departure resulted in a temporary loss of federal prosecutors).

in experienced staffing may have fueled the turn toward prosecution of petty misdemeanors in lieu of higher-worth smuggling cases.²⁷⁵

Another relevant factor may be docket pressure.²⁷⁶ Indeed, immigration already constitutes the number one most prosecuted crime category in the federal system, overtaking other staples, such as narcotics, white collar fraud, and weapons offenses.²⁷⁷ In Arizona, where the lion's share of the nation's criminal immigration cases is prosecuted,²⁷⁸ overflow has become so severe that a judicial state of emergency was recently declared.²⁷⁹ The lack of sufficient judicial resources to meet the explosion in federal caseload may be part of the driving force away from more complex smuggling cases and toward simple illegal entry and reentry prosecutions.²⁸⁰

Finally, the decrease in federal smuggling cases could also reflect the fact that Maricopa County has criminally prosecuted individuals who might otherwise be willing to assist federal authorities with the investigation and prosecution of the higher-ups in smuggling organizations. As the Haab case highlights, it was federal policy to hold the smuggled men as material witnesses—rather than to prosecute them—in order to secure the higher-value conviction.²⁸¹ Federal law acknowledges the importance of

275. See generally James Eisenstein, *The U.S. Attorney Firings of 2006: Main Justice's Centralization Efforts in Historical Context*, 31 SEATTLE U. L. REV. 219, 258–59 (2008) (“To the extent that the firings increased the resignation rate of experienced AUSAs, it reduced the capacity of USAOs to take on major cases that require experienced prosecutors and the support of a strong office head.”).

276. ADMIN. OFFICE OF THE U.S. COURTS, REPORT ON THE IMPACT ON THE JUDICIARY OF LAW ENFORCEMENT ACTIVITIES ALONG THE SOUTHWEST BORDER 6 (2008) (on file with author) (discussing the incredible docket pressure caused by immigration crime prosecution in the Southwest).

277. Eagly, *supra* note 7, at 1281–82; see also EXEC. OFFICE FOR U.S. ATT'YS, DATAFILE (obtained by author with a Freedom of Information Act request on Apr. 28, 2010) (ranking smuggling as the third most frequently prosecuted immigration crime, behind illegal entry and reentry).

278. The District of Arizona is currently the top national producer of federal immigration crime convictions. See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIV., ILLEGAL ENTRY BECOMES TOP CRIMINAL CHARGE (June 10, 2011), <http://trac.syr.edu/immigration/reports/251>.

279. Arizona's declaration of judicial emergency temporarily extends the Speedy Trial Act's requirement that criminal trials commence within 70 days of indictment to 180 days. *Judicial Emergency Declared in Arizona*, U.S. COURTS, Jan. 25, 2011, http://www.uscourts.gov/News/NewsView/11-01-25/Judicial_Emergency_Declared_in_District_of_Arizona.aspx.

280. See *supra* Figure 3.

281. See generally 2005 GAO 05-305 SMUGGLING, *supra* note 165, at 10 (citing DHS officials explaining that alien smuggling cases “can be challenging and time consuming” in part “due to the fact that unlike drug-trafficking cases where the contraband itself is proof of the illegal activity, the successful prosecution of alien-smuggling cases relies on the availability of material witnesses”); Telephone Interview With Francisco Morales, Assistant Fed. Pub. Defender, W.D. Tex. (Dec. 5, 2008) [hereinafter Morales Interview] (describing the use of material witnesses in smuggling prosecutions); Rocha Interview, *supra* note 135 (same). For a general discussion of the heavy reliance on snitches to secure plea bargains and pursue complex criminal cases, see Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965 (2008); Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563 (1999).

cooperation,²⁸² allowing for the designation of material witnesses²⁸³ and even providing for immigration visas for certain undocumented victims who provide assistance in securing a conviction.²⁸⁴ In federal practice, when smugglers are prosecuted, the migrants they transport are held as material witnesses to testify against their smugglers.²⁸⁵ Material witnesses provide written witness declarations, submit to depositions, and, if the case goes to trial, testify in court.²⁸⁶ In this way, federal prosecutors in Arizona have obtained hefty sentences in more severe cases—such as those of dangerous *bajadores* (criminal gangs also known as “rip-off crews”) that hold immigrants and their smugglers for ransom.²⁸⁷ Experience has proven, however, that without cooperation it is difficult to obtain convictions that infiltrate smuggling organizations.²⁸⁸

In sum, immigration crime in Arizona is prosecuted in the context of a complicated, symbiotic relationship between federal, state, and local law enforcement. By looking more closely at how priorities and prosecutions are implicated by the local prosecution of alien smuggling, a more complete picture of criminal immigration prosecution emerges.

282. See generally U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2010) (allowing for downward departures in sentencing in exchange for cooperation).

283. See 18 U.S.C. § 3144 (2006) (allowing for the detention of material witnesses). See generally Laurie L. Levenson, *Detention, Material Witnesses & the War on Terrorism*, 35 LOY. L.A. L. REV. 1217 (2002) (discussing the enhancement of federal material witness law after 9/11).

284. See, e.g., 8 U.S.C. §§ 1101(a)(15)(U), 1184(p) (2006) (granting “U” visas to certain crime victims and close family members); *id.* §§ 1101(a)(15)(T), 1184(o), 1255(l); 22 U.S.C. § 7102 (2006) (granting “T” visas to certain trafficking victims and close family members). See generally Dina Francesca Haynes, *Used, Abused, Arrested, and Deported: Extending Immigration Benefits to Protect Victims of Trafficking and to Secure the Prosecution of Traffickers*, 26 HUM. RTS. Q. 221 (2004) (highlighting how immigration visas and victim cooperation can be used to secure trafficking convictions).

285. Ragsdale Declaration, *supra* note 234, ¶¶ 33–35 (“ICE agents routinely rely on foreign nationals, including aliens unlawfully in the United States, to build criminal cases, . . . [and] this is particularly likely in alien smuggling and illegal employment cases.”); Memorandum From John Morton, Dir., U.S. Immigration & Customs Enforcement, U.S. Dep’t of Homeland Sec., to All Field Office Dirs., Special Agents in Charge, and Chief Counsel, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf> (clarifying that it is “against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime”); Morales Interview, *supra* note 281.

286. Morales Interview, *supra* note 281. See generally Anglen & Wingett, *supra* note 37.

287. See Navidad Interview, *supra* note 71; see also *Federal Strategies to End Border Violence: Hearing Before the Subcomm. on Terrorism and Homeland Sec. of the S. Comm. on the Judiciary*, 109th Cong. (2006), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da10faa07> (statement of Paul K. Charlton).

288. Navidad Interview, *supra* note 71 (observing a decrease in the federal prosecution of *bajadores* after Maricopa County began prosecuting alien smuggling); Rocha Interview, *supra* note 135 (explaining that a lot of the drivers are U.S. citizens and are more likely to invoke *Miranda* rights, thus making the cooperation of transported migrants particularly important).

D. Executive Control and Immigration Policy

The fourth aspect of Arizona's nascent immigration regime studied here is its impact on executive control over migration. In practice, the President exerts considerable control over immigration policy.²⁸⁹ Although Congress makes decisions as to the number and type of migrants allowed to legally enter the United States and establishes rules regarding removal, the President is charged with enforcing these laws, thereby shaping the meaning of immigration law on the ground.²⁹⁰ The President's enforcement powers are not limited to the civil immigration law: He also supervises the prosecution of criminal immigration laws by U.S. Attorneys.

1. Federal Supervision of Immigration Prosecution

As a general matter, the federal criminal system is highly centralized.²⁹¹ The attorney general provides direct oversight for ninety-three local U.S. Attorneys, who are appointed by the President.²⁹² The Department of Justice (DOJ) establishes a uniform set of rules, procedures, and ethical standards for federal prosecutors.²⁹³ In addition, the Executive Office for United States Attorneys (EOUSA), located in the nation's capital, provides local offices with administrative support, uniform case tracking and monitoring, and performance evaluation.²⁹⁴ Particularly after September 11, 2001, as terrorism became a top priority, the President has increased centralization of the DOJ's Criminal Division.²⁹⁵

289. Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 740 (1997) (explaining that the President is responsible for general oversight of immigration enforcement); Marc L. Miller, *Immigration Law: Assessing New Immigration Enforcement Strategies and the Criminalization of Migration*, 51 EMORY L.J. 963, 972 (2002) (noting that "the vast weight of authority over immigration cases rests with the Executive Branch").

290. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009); Cristina M. Rodríguez, *Constraint Through Delegation: The Case of Executive Control Over Immigration Policy*, 59 DUKE L.J. 1787 (2010).

291. See, e.g., Krent, *supra* note 215, at 280–81 ("As a practical matter, the Executive today enjoys near total control over federal criminal law enforcement . . .").

292. Norman Abrams, *Federal Criminal Law Enforcement*, in ENCYCLOPEDIA OF CRIME AND JUSTICE 781 (Sanford H. Kadish ed., 1983); Eisenstein, *supra* note 275, at 220, 261.

293. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL (1997), http://www.justice.gov/usao/eousa/foia_reading_room/usam [hereinafter DOJ ATT'YS' MANUAL].

294. *Mission and Functions*, EXEC. OFFICE FOR U.S. ATT'YS, <http://www.justice.gov/usao/eousa/mission.html> (last visited July 5, 2011).

295. For example, the Attorney General sought uniformity in charge bargaining by requiring all federal prosecutors to "pursue the most serious, readily provable offense or offenses that are supported by the facts of the case." Memorandum From John Ashcroft, U.S. Att'y Gen., to all Fed. Prosecutors (Sept. 22, 2003), http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm. See generally Daniel

At its most extreme, centralization of criminal enforcement includes the President's ability to fire U.S. Attorneys.²⁹⁶ The Bush Administration's decision to exercise that authority was arguably motivated in part by a desire to prod the federal immigration agenda.²⁹⁷ In fact, three of the nine U.S. Attorneys asked to resign in 2006 were from the Southwest border region.²⁹⁸ As the U.S. Attorney for the Southern District of California Carol Lam learned, her failure to aggressively prosecute immigration and firearm cases was the official reason for her termination.²⁹⁹

None of this is meant to say that local U.S. Attorneys do not enjoy discretion in choosing their cases.³⁰⁰ As the DOJ's mission statement acknowledges, "[e]ach United States Attorney exercises wide discretion in the use of his/her resources to further the priorities of the local jurisdictions and needs of their communities."³⁰¹ In crafting the national immigration prosecution agenda, for example, the federal government recognizes that it walks on a tightrope

Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2094–98 (2009) (discussing the nexus between heightened terrorism concerns and centralization).

296. *Parsons v. United States*, 167 U.S. 324 (1897) (holding that the President has the power to remove U.S. Attorneys without statutory authorization); see also Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 411–12 (2009) (identifying the removal of U.S. Attorneys as an available, although rarely used, presidential power).

297. See generally Lydia Tiede & Daniel Rodriguez, *Who Really Is in Control? Explaining the Variance in Federal Immigration Prosecution* (Apr. 3, 2009) (unpublished paper prepared for the Midwest Political Science Association Annual Meeting) (on file with author) (arguing that a correlation existed between the firing of U.S. Attorneys and federal immigration policy).

298. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006, at 1 n.1, 2 (2008), <http://www.justice.gov/oig/special/s0809a/final.pdf>.

299. *Id.* at 271–72, 277–85 (concluding that Lam was fired "because of the Department's concerns about her office's gun and immigration prosecution statistics"); see also Erica Werner & Allison Hoffman, *E-mails Show Frustration With Carol Lam Before Her Ouster*, N. CNTY. TIMES, Mar. 24, 2007, http://www.nctimes.com/news/local/sdcounty/article_ad3825e7-ea5c-5420-8e71-a7c4b2096abf.html (excerpting emails from DOJ officials asking if anyone has "ever called Carol Lam and woodshedded her re immigration enforcement" and indicating that someone should "[h]ave a heart-to-heart with Lam about the urgent need to improve immigration enforcement in [the Southern District]").

300. See generally DOJ ATT'YS' MANUAL, *supra* note 293, § 3-2.140 ("In the exercise of their prosecutorial discretion, United States Attorneys construe and implement the policy of the Department of Justice."). For a sampling of the academic scholarship discussing the extent of control that U.S. Attorneys have over their own offices, see JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 101–25 (1978) (studying the various factors that influence the level of central, as opposed to local, control over U.S. Attorney offices); Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CALIF. L. REV. 1541, 1557–58 (2002) (arguing that U.S. Attorneys have strong ties to state interests that fuel devolution of federal authority); Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1040 (1972) (arguing that U.S. Attorneys "enjoy a considerable degree of freedom from the Justice Department").

301. *United States Attorneys' Mission Statement*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/usao/about/mission.html> (last visited Mar. 15, 2011).

between consistency and the necessity of some district-to-district variation in strategy. Prosecuting immigration along the Southwest border will necessarily look different than it does in, say, Indiana.³⁰²

At bottom, however, federal prosecutors realize that immigration is “like a balloon”—if you push on one side, it will expand on the other.³⁰³ Research on migration flows supports the balloon analogy.³⁰⁴ Although rigorous enforcement may cause the total number of apprehensions in certain zones to decrease (thus suggesting a downturn in illegal immigration), it may not actually change the overall migration rate. Instead, illegal migration may move to less-patrolled points of entry, and reliance on human smugglers may increase.³⁰⁵ Higher enforcement levels can also decrease so-called return migration—causing those who successfully arrive in the United States without detection to stay longer and be less likely to return to the sending country.³⁰⁶

Therefore, despite some local variability in immigration enforcement, the DOJ keeps its front-line prosecutors on a tight leash so that one district’s strategy does not “simply shift the problem to a neighboring district.”³⁰⁷ As one of the DOJ’s self-declared priority areas, oversight of immigration prosecution has been especially tightly wound. For example, the DOJ has supported core infrastructure for federal initiatives that prioritize immigration, such as hiring a

302. See generally Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 230 (2003) (noting that, although geography can play a role in federal case selection, the substantive criminal law is consistent from state to state); Trevor N. McFadden, *Immigration Enforcement and the Department of Justice*, 56 U.S. ATT’YS’ BULL. 7 (Nov. 2008), available at http://www.justice.gov/usao/eousa/foia_reading_room/usab5606.pdf (“Decisions about the most effective way to tackle local problems are best made by the local prosecutors and agents who know the situation.”).

303. Charlton Interview, *supra* note 30.

304. See, e.g., Wayne Cornelius & Idean Salehyan, *Does Border Enforcement Deter Unauthorized Immigration? The Case of Mexican Migration to the United States of America*, 1 REG. & GOVERNANCE 139 (2007) (concluding, based on a detailed survey, that increased border enforcement efforts have had little influence on migration decisions of Mexicans).

305. See, e.g., AARTI KOHLI & DEEPA VARMA, BORDERS, JAILS AND JOBSITES 11 (2011) (discussing the effect of enforcement on migration); CROSSING THE BORDER: RESEARCH FROM THE MEXICAN MIGRATION PROJECT (Jorge Durand & Douglas S. Massey eds., 2004); Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 CRIM. L. BULL. 550, 557 (2004) (discussing the increased reliance on “so-called coyotes to cross more remote border areas”); Christina Gathmann, *Effects of Enforcement on Illegal Markets: Evidence From Migrant Smuggling Along the Southwest Border*, 92 J. PUB. ECON. 1926 (2008) (analyzing the effects of border control on the United States–Mexico smuggling market).

306. See, e.g., BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 184–205 (2004) (describing the migration effects of federal border enforcement); Susan Bibler Coutin, *Being En Route*, 107 AM. ANTHROPOLOGIST 195 (2005) (discussing the effects that immigration laws have on the lives of unauthorized migrants).

307. McFadden, *supra* note 302, at 7.

National Immigration Coordinator for the EOUSA³⁰⁸ and deploying new assistants to prosecute immigration crime along the border.³⁰⁹ For Arizona, Congress has funded forty-two new prosecutor positions since 2006.³¹⁰

2. Jurisdictional Gatekeeping

The Executive's close monitoring of immigration prosecution is absent, however, when states get involved in criminal immigration enforcement. State prosecution of criminal law is largely a fixture of local governments, which choose their lead prosecutors in popular elections. The federal government simply has no formal control over the selection or decisionmaking of local prosecutors.³¹¹ State attorneys general, for their part, rarely intervene in local criminal policy.³¹² The end result is a system of strong independence for local prosecutors that subjects state criminal law enforcement to sharp policy fluctuations across county lines.³¹³ The Maricopa County Attorney's Office, for example, was the only one in Arizona that issued a formal opinion interpreting the smuggling statute to include those who "smuggled themselves."³¹⁴

SB 1070 is certainly not the first occasion that concerns regarding uniformity of immigration policy have motivated the federal government to oppose state efforts to enforce criminal immigration laws of their own. Consider Pennsylvania's 1939 attempt to require aliens to register for a state identification card or face a fine of up to \$100 and/or imprisonment for up to sixty days.³¹⁵ When the question of preemption reached the U.S. Supreme Court, the United States joined the plaintiffs as *amicus curiae* to clarify that

308. *Id.* at 8.

309. John Grasty Crews, II, *The Executive Office for United States Attorneys' Involvement in Immigration Law Enforcement*, 56 U.S. ATT'YS' BULL. 1 (Nov. 2008), available at http://www.justice.gov/usao/eousa/foia_reading_room/usab5606.pdf.

310. See U.S. ATT'Y, DIST. OF ARIZ., BORDER SECURITY FACT SHEET (2010), [http://www.justice.gov/usao/az/press_releases/2010/2010-136\(SWB%20Facts\).pdf](http://www.justice.gov/usao/az/press_releases/2010/2010-136(SWB%20Facts).pdf).

311. As Wayne Logan's work has shown, the federal government can influence state prosecution patterns indirectly, such as by federal spending designed to influence state criminal policy. See generally Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 122 (2008).

312. Barkow, *supra* note 267, at 556–60.

313. Of course, local elections do play some role in holding local prosecutors accountable. For a discussion of some of the advantages and drawbacks of the almost exclusive reliance on popular elections to select America's local prosecutors, see Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2009).

314. See *supra* note 266 (describing the results of the author's comprehensive public record requests to all Arizona county attorneys).

315. Act of June 21, 1939, Pub. L. No. 652, § 5 (codified at 35 PA. CONS. STAT. ANN. § 1805 (West 2003)), declared unconstitutional by *Hines v. Davidowitz*, 312 U.S. 52 (1941).

enforcement of the federal immigration law “will be embarrassed and impeded if the various states are allowed to legislate in the same field, whether the legislation be similar to or in conflict with the federal law.”³¹⁶ By passing a federal Alien Registration Act, Solicitor General Francis Biddle explained, Congress made clear that “alien registration is exclusively the concern of the federal government” and state attempts to regulate the area require “express consent by Congress.”³¹⁷

Thirty years later when California Governor Ronald Reagan signed a law imposing misdemeanor penalties on employers who knowingly hired undocumented workers,³¹⁸ the federal government again expressed disapproval. As Solicitor General Robert Bork informed the Court, the California law impermissibly “intrude[d] upon a field where Congress has comprehensively defined the consequence of hiring illegal aliens as farmworkers.”³¹⁹ Additionally, it conflicted with federal law by extending criminal sanctions to employment—an area where “Congress deliberately refrained from imposing criminal consequences”³²⁰ The issue of whether to criminalize the employment of undocumented aliens was, in the federal government’s view, a “national one requiring a sensitive balancing of interests.”³²¹

The dominance of Arizona’s local prosecutors in the jurisdictional turf war is an important dimension of the impact of state-level immigration crimes on the national immigration system. As a general matter, U.S. Attorneys are required to pursue all readily provable violations of federal law.³²² Federal policy allows for this requirement to give way, however, if a defendant is subject to effective prosecution by the state.³²³ In addition, when a case could be prosecuted in both state and federal courts, federal policy (known as the *Petite* policy) requires prosecutors to meet as soon as possible to assess which forum

316. Brief for the United States as Amicus Curiae, *Hines*, 312 U.S. 52 (No. 22), in MAKING OF MODERN LAW: U.S. SUPREME COURT RECORDS AND BRIEFS 1832–1978, at 49 (2005).

317. *Id.* The U.S. Supreme Court agreed, concluding that the law stood as an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress” and was therefore preempted. *Hines*, 312 U.S. at 67.

318. Act of Nov. 8, 1971, ch. 1442, § 1, 1971 Cal. Stat. 2847 (codified at CAL. LABOR CODE § 2805) (repealed 1988) [hereinafter Arnett Act].

319. Brief for United States as Amicus Curiae Supporting Respondent at 3, *De Canas v. Bica*, 424 U.S. 351 (1976) (No. 74-882) (obtained by author, courtesy of the U.S. Supreme Court).

320. *Id.* at 5.

321. *Id.*

322. The U.S. Attorney’s Manual sets forth principles of federal prosecution that provide a general statement of federal prosecutorial policy. See DOJ ATT’YS’ MANUAL, *supra* note 293, § 9-27.220.

323. *Id.* The prosecution may also be declined if no substantial interest would be served or there is an adequate noncriminal alternative to prosecution. *Id.*

would be most appropriate.³²⁴ If the state goes forward with the prosecution after this meeting, federal authorities may pursue a subsequent prosecution only if the conduct is egregious, federal interests are compelling, and the state result is manifestly inadequate.³²⁵

In practice, federal prosecution has evolved with an eye toward protecting states against encroachment into core areas of state police powers.³²⁶ As Harry Litman and Mark Greenberg have argued, the *Petite* policy allows federal law to expand without undue risk that federal authorities will usurp state control.³²⁷ Such policies were not designed for immigration's reversal of this federalization trend—state expansion into an area of traditional federal criminal control. However, federal prosecutors in Arizona have applied to alien smuggling the lessons of both cooperating and reserving federal prosecution for the most serious cases.³²⁸ Within this framework, once the local prosecutor exercises jurisdiction, federal policy favors deference to the state forum.³²⁹

The significant sentencing exposure for Arizona alien smuggling is one factor described by federal prosecutors as weighing in favor of federal deference to state jurisdiction.³³⁰ Basic Arizona smuggling is a class four felony with a presumptive sentencing range of one to three and three-fourths years

324. The *Petite* policy establishes a presumption against a subsequent federal prosecution of a prior state prosecution based on the same acts unless: (1) the matter involves a substantial federal interest; (2) the prior prosecution failed to vindicate that interest; and (3) the offense can be successfully prosecuted. *Id.* § 9-2.031; see also *Petite v. United States*, 361 U.S. 529 (1960) (discussing policy). See generally Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 L. & SOC. INQUIRY 239, 254 (2005) (explaining that in the large city the authors studied, federal and local prosecutors “routinely met face to face” to “discuss both specific cases and broad principles of prosecution”).

325. DOJ ATT'YS' MANUAL, *supra* note 293, § 9-2.031. In addition to formal policy, as Norman Abrams and his co-authors have shown, working relationships between different levels of government also influence where a case is ultimately filed. ABRAMS ET AL., *supra* note 254, at 80.

326. See generally O'Neill, *supra* note 302, at 238 (noting that, in practice, the federal government will acquiesce in allowing the state to prosecute unless an important national issue is at stake).

327. Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72, 80–81 (1996).

328. See Humetewa Interview, *supra* note 247.

329. *Id.* (“By policy, we have to defer to the state.”). See generally Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 250 (1980) (acknowledging the tendency of federal prosecutors to defer cases to state prosecutors, particularly those that are “low-priority”).

330. See Humetewa Interview, *supra* note 247 (explaining that, under the *Petite* policy, harsh state sentences for smuggling cause the federal government to “lose the argument that there is a federal interest”); see also Barkow, *supra* note 267, at 520 (noting that the federal government often hinges the decision to follow a state prosecution on whether it agrees with local sentencing judgments).

for first-time felony offenders.³³¹ For smuggling cases that are prosecuted as kidnappings,³³² the presumptive sentencing range increases to four to ten years.³³³ By comparison, federal alien smuggling is a felony with a statutory maximum of five years to life, depending on aggravating circumstances.³³⁴ However, the low-end guideline sentence for federal smuggling is much lower than the statutory maximum: ten months for defendants with a limited criminal record.³³⁵ Given the low advisory federal sentence, federal prosecutors engaged in negotiations with their counterparts in Maricopa County could reasonably conclude that the state often had the “biggest hammer.”³³⁶ As former U.S. Attorney for the District of Arizona Diane Humetewa explained, federal officials recognize that federal interests are at stake in immigration cases, but when states have leeway to mete out substantial punishment, federal prosecutors are more likely to agree that state officials take the case.³³⁷

As for actual sentencing trends, however, the smuggling sentences imposed by Maricopa County judges have paled in comparison to those imposed by the federal system. As Figure 4 highlights, the average county sentence for smuggling in Maricopa County was two months or less. In contrast, across the United States, the average federal smuggling sentence has consistently hovered around fifteen months. In the District of Arizona, the average smuggling sentence has climbed since the state smuggling law has been enforced, reaching a high of twenty-two months in 2009.

331. ARIZ. REV. STAT. ANN. § 13-702(A), (D) (2010); *see also* 2010 GAO 10-328 SMUGGLING, *supra* note 270, at 15 (noting that alien smuggling sentences in Arizona involve “a minimum of 1 to 3.75 years in prison, with significantly higher sentencing ranges for dangerous conduct or repeat offenses”).

332. *See supra* notes 262–265 (describing practice).

333. ARIZ. REV. STAT. ANN. § 13-1304(B) (classifying kidnapping as a class two felony); *id.* § 13-702(A), (D) (providing sentencing ranges for class two felonies in Arizona).

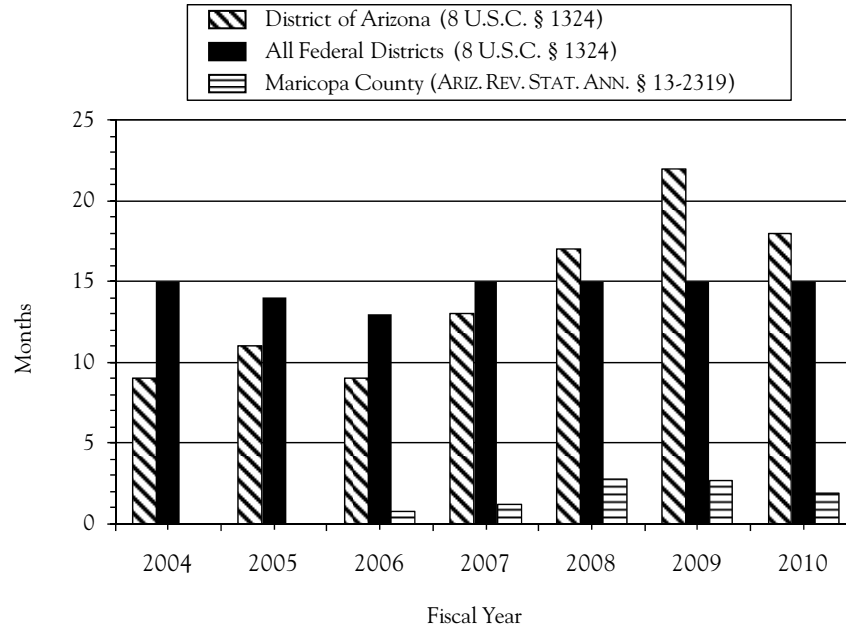
334. 8 U.S.C. § 1324(B) (2006).

335. U.S. SENTENCING GUIDELINES MANUAL § 2L1.1 (2010) (smuggling, transporting, or harboring an unlawful alien).

336. Humetewa Interview, *supra* note 247 (“By and large if you look at length of sentence [for smuggling], they [Maricopa County] had a larger hammer.”). In other contexts, scholars have documented that federal prosecutors tend to pursue cases when they perceive that state law is too lenient. *See, e.g.*, Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 811 (2004) (discussing the phenomena in the context of drug prosecutions).

337. Humetewa Interview, *supra* note 247. Federal authorities may also be more likely to decline prosecution if state officials “built” the case. John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174, 192 (1965).

FIGURE 4. Average Prison Sentence (Months) for Alien Smuggling:
Comparing U.S. District Court of Arizona, All Federal Districts,
and Maricopa County (2004–2010)³³⁸



This divergence between federal and state sentencing may at first glance suggest a misfiring of the *Petite* policy. However, data reveal that Maricopa's low average smuggling sentence results in part from the inclusion of persons being smuggled as the bulk of the county's smuggling docket.³³⁹ Such cases typically result in probation and no jail time, thus bringing down the average jail sentence significantly.³⁴⁰ Moreover, because smuggling one's self is technically

338. Figure 4's Maricopa County fiscal year sentencing averages were calculated based on data obtained by the author from the MCAO with a public records act request. See MCAO FISCAL YEAR ALIEN SMUGGLING PLEA AND SENTENCING DATAFILE 2011, *supra* note 261. Figure 4's federal fiscal year sentencing averages were obtained by the author from Syracuse University's TRAC, <http://tracfed.syr.edu/index/index.php?layer=cri> (follow "Express" link; follow "Lead Charge" link; follow "Focus" hyperlink; input the following search criteria: Select District to Focus on: U.S. (and District Arizona); Select Lead Charge: 8 U.S.C. § 1324, bringing in or harboring aliens; Select Table Topic: Prison Sentence Length; Select Data: Annual Series; Select Time Period: 2003–2009); see also *supra* note 261 (providing additional details on data sets).

339. MCAO FISCAL YEAR ALIEN SMUGGLING PLEA AND SENTENCING DATAFILE 2011, *supra* note 261; McWhirter Interview, *supra* note 105 (discussing the practice); Navidad Interview, *supra* note 71 (same).

340. MCAO FISCAL YEAR ALIEN SMUGGLING PLEA AND SENTENCING DATAFILE 2011, *supra* note 261.

not a crime in the federal system, the *Petite* policy does not apply to these cases in the first instance.³⁴¹ Even when prosecuting smugglers, the state-level cases handled by County Attorney Thomas were not necessarily ones the federal government would have pursued.³⁴² In the interior of the country, federal prosecutors focus on large-scale smuggling operations rather than small players.³⁴³

In conclusion, the federal Executive can take action to dictate immigration enforcement policy and control renegade federal prosecutors—but it enjoys no such authority in Maricopa County. With this sea change occurring in the structure of Arizona immigration crime prosecution, the threshold decision of whether to enforce immigration law has shifted to state court. Within the state court, where the President has no authority to dictate policy, the type of defendant, nature of immigration violation, and severity of punishment reflect Maricopa County's discretionary choices.

III. IMPLICATIONS

Maricopa County's prosecutions have proceeded through a two-step legal process that has produced an interesting result: avoiding preemption while nonetheless significantly influencing the federal immigration system. This process has involved, as the first step, the 2005 enactment of an alien smuggling law, which formally empowered state prosecutors to impose criminal sanctions on those who transport illegal immigrants into the state. Through the second step—local implementation—Arizona has in fact influenced federal immigration law. Maricopa County prosecutors bring criminal immigration cases in their own courts (even against individuals who have committed no crime under federal law) in a concerted effort to implement a localized “no amnesty” policy. Understanding how this two-step process works has important implications for preemption and, more broadly, for “immigration federalism.”

1. Ex Post Analysis and Preemption

So far, Arizona prosecutors have convinced state courts that alien smuggling is integral to the state's police powers—and therefore neither

341. Charlton Interview, *supra* note 30.

342. *Id.*

343. *Id.*

expressly nor impliedly preempted.³⁴⁴ In this respect, Arizona's preemption decisions are not particularly unique.³⁴⁵ For example, in the seminal immigration preemption case of *De Canas v. Bica*, the U.S. Supreme Court concluded that the California law fit into the "mainstream" of state "police powers to regulate the employment relationship."³⁴⁶ Similarly, when California's Proposition 187 was challenged in the 1990s,³⁴⁷ the district court declined to enjoin those sections that made the use of false documents to conceal citizenship status a state crime.³⁴⁸ Instead, the court concluded that such crimes could be enforced at the local level as part of the "legitimate exercise of police power of a state."³⁴⁹

Conflict preemption—whether a state or local law makes enforcement of federal immigration law impossible or otherwise frustrates federal enforcement³⁵⁰—is thus critical to evaluating the constitutionality of state criminal immigration laws.³⁵¹ Consider again the *De Canas* case. In *De Canas*, agricultural employers argued that a newly created state misdemeanor for knowing employment of undocumented workers was preempted by federal

344. For a summary of the preemption standard, see *supra* note 76 and accompanying text. For a collection of Arizona cases upholding the smuggling law, see *supra* notes 13–16. A federal court challenge to Thomas's self-smuggling policy is ongoing, Holguín Interview, *supra* note 159, but the federal court's analysis thus far has not diverged from Arizona's, see *supra* note 21.

345. Jennifer Chacón has made precisely this point: "[B]ecause states and localities—rather than the federal government—have historically served as the locus of criminal regulation," courts have been "surprisingly willing to defer to such local regulation of crime." Chacón, *supra* note 6, at 1647.

346. 424 U.S. 351, 356 (1976).

347. Proposition 187 was a 1994 California ballot initiative that sought to prevent illegal aliens from receiving public services. Prop. 187, 1994 Cal. Legis. Serv. § 1 (West).

348. Specifically, Sections 2 and 3 of Proposition 187 make it a state felony to manufacture, distribute, or sell "false documents to conceal the true citizenship or resident alien status of another person" or to use "false documents to conceal [one's own] true citizenship or resident alien status." CAL. PENAL CODE §§ 113, 114 (West 1999).

349. League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 775 (C.D. Cal. 1995) (declining to enjoin Section 2); see also League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997) (granting summary judgment to defendants as to Section 3). As Juliet Stumpf has observed, the district court's decision in the Proposition 187 litigation "situated the challenged provisions at the core of state police powers over criminal law[.]" Stumpf, *supra* note 6, at 1611.

350. See *supra* note 76 and accompanying text; see also United States v. Arizona, 641 F.3d 339, 345 (9th Cir. 2011) (discussing conflict preemption); Robert A. Schapiro, *From Dualism to Polyphony*, in PREEMPTION CHOICE: THE THEORY, LAW AND REALITY OF FEDERALISM'S CORE QUESTION 33, 50 (William W. Buzbee ed., 2009) (defining the "obstacle" branch of conflict preemption as being used to "strike down state regulations that it finds in tension with a federal statute, without regard to whether the state law actually conflicts with some textual provision of the federal enactment").

351. See CRISTINA RODRÍGUEZ ET AL., MIGRATION POLICY INST., TESTING THE LIMITS: A FRAMEWORK FOR ASSESSING THE LEGALITY OF STATE AND LOCAL IMMIGRATION MEASURES 6 (2007), http://www.migrationpolicy.org/pubs/NCIIP_Assessing%20the%20Legality%20of%20State%20and%20Local%20Immigration%20Measures121307.pdf ("[M]ost immigration preemption cases decided by the Supreme Court ultimately have been conflict preemption cases.").

law.³⁵² Although *De Canas* is almost uniformly described in the immigration scholarship as holding that the California law at issue conclusively survived constitutional review,³⁵³ in actuality the Court never reached preemption's third prong: whether the law conflicted with congressional objectives. Instead, after counsel for the farmworker plaintiffs admitted during oral argument that the California law *did conflict* on its face with federal law,³⁵⁴ the Court remanded the case to the California superior court so that a record regarding implementation of the law could be developed.³⁵⁵ The Court explained, for example, that administrative regulations promulgated by the California Director of Industrial Relations could be examined to determine whether the federal and state regimes conflicted in practice.³⁵⁶

Ultimately, an evolving appreciation of how the California workplace law could be used—*against* immigrant agricultural laborers and people of color more broadly³⁵⁷—led the plaintiffs to cease their enforcement action.³⁵⁸ The constitutionality of the California law was never fully resolved and, eventually, the law was repealed by the California legislature.³⁵⁹ As Antioch School of Law Professor Robert Katz, who represented the farmworkers before the Supreme Court, would later write: The Court's decision left open "significant questions,"

352. Arnett Act, *supra* note 318. The U.S. Supreme Court and the California Court of Appeal both described the Arnett Act as "criminal." *De Canas v. Bica*, 424 U.S. 351, 355 (1976); *De Canas v. Bica*, 115 Cal. Rptr. 444, 445 (Ct. App. 1974).

353. See, e.g., Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2060 (2008); Rodríguez, *supra* note 5, at 620–25; Stumpf, *supra* note 6, at 1590.

354. Oral Argument at 28:00–29:00, *De Canas*, 424 U.S. 351, http://www.oyez.org/cases/1970-1979/1975/1975_74_882 (argument of Robert Katz, counsel for Leonor Alberti de Canas and her husband, Miguel Canas).

355. *De Canas*, 424 U.S. at 363–65.

356. *Id.* at 364.

357. See, e.g., Telephone Interview With William S. Marrs, Counsel of Record for Respondent Anthony G. Bica (Sept. 16, 2010) (describing such concerns) [hereinafter Marrs Interview]; see also Frank Del Olmo, *Chavez Not Impressed by Ruling*, L.A. TIMES, Feb. 26, 1976, at A11 (explaining that César Chávez's United Farm Workers of America, which had originally backed the Arnett Act, now believed that it would be used to discriminate against Latinos).

358. See Marrs Interview, *supra* note 357 (clarifying that the *De Canas* case was never litigated on remand: "After running 99 yards with it, they never filed a subsequent paper."); Memorandum From Darla Rodriguez, Lead Records/Exhibit Clerk, Cnty. of Santa Barbara, Super. Cts. of Cal., to Vicki Steiner, Reference Librarian, UCLA Sch. of Law (Jan. 10, 2011) (confirming that there is no record of any documents filed in the Santa Barbara Superior Court on remand). See generally John Kendall, *Enforcement of Illegal Alien Job Law Urged*, L.A. TIMES, Feb. 23, 1977, at B3 (citing Ralph Abascal, Deputy Dir. of Calif. Rural Legal Assistance, explaining that one of his clients, Mr. Canas, was now "of a confused mind" as to whether he wanted to continue to pursue the case).

359. See generally Kitty Calavita, *California's "Employer Sanctions" Legislation: Now You See It, Now You Don't*, 12 POL. & SOC'Y 205 (1983) (describing the political "disappearance"—and eventual repeal—of the Arnett Act).

including whether the law conflicted with “the existing federal regulations of immigration.”³⁶⁰

Revisiting *De Canas* underscores the practical distinction that can develop between the text of a law and how it is actually implemented. In *De Canas*, the law as written *did conflict* with federal law, but could have been *implemented* through administrative regulations to be consistent with federal law. In contrast, although courts have found (without exploring implementation data) that Arizona alien smuggling is consistent with federal smuggling, in practice it has complicated executive immigration control.

Preemption review, especially in the context of facial challenges,³⁶¹ has hampered a robust conflict analysis. Identifying conflict with federal law on the face of a state law has become increasingly difficult as states have integrated federal immigration standards directly into their laws. For example, just this year when the U.S. Supreme Court upheld the Arizona Legal Workers Act against a preemption challenge, it noted with approval that “Arizona went the extra mile” by writing the law to “closely track[]” the federal Immigration Reform and Control Act “in all material respects.”³⁶²

Within this constrained framework for conflict preemption, Hiroshi Motomura has argued that the extent to which lower courts understand immigration law as “discretionary” (rather than “self-executing”) plays an important role in whether conflicts are discovered in immigration preemption analysis.³⁶³ Cristina Rodríguez, in contrast, has criticized those courts that engage in conflict analysis by hypothesizing as to the probable effect of state and local alienage laws.³⁶⁴ Instead, she proposes that courts engage in a “fact dependent” and “outcome-oriented” analysis that keeps such speculation “in check.”³⁶⁵

This Article goes a step further by presenting a fact-intensive, *ex post* analysis of the implementation of one state criminal immigration law. In recent years, alien smuggling laws have proliferated not only in Arizona, but

360. Robert S. Catz, *Regulating the Employment of Illegal Aliens: De Canas and Section 2805*, 17 SANTA CLARA L. REV. 751, 752 (1977).

361. As the Ninth Circuit has explained, for facial challenges, the challenger must meet the rigorous standard of establishing that “no set of circumstances exist under which the Act would be valid.” *United States v. Arizona*, 641 F.3d 339, 345–46 (9th Cir. 2011) (citing *Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571, 579 (9th Cir. 2008)).

362. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1971 (2011).

363. Motomura, *supra* note 353, at 2060–65.

364. Rodríguez, *supra* note 5, at 626–27 (calling such analysis a “malleable frustration of purpose of approach” to conflict preemption). For a similar critique of conflict preemption, see Nelson, *supra* note 76, at 231 (criticizing “fuzzier notions of ‘obstacle’ preemption, under which state law is preempted whenever its practical effects would stand in the way of accomplishing the full purposes behind a valid federal statute”).

365. Rodríguez, *supra* note 5, at 626–27.

also in other states around the country.³⁶⁶ Appreciating the broad discretionary power that state alien smuggling law gives local law enforcement to act in ways that are in fact incompatible with the federal regulatory structure of immigration is a key—and heretofore missing—component of the conventional legal debate in this expanding area of criminal law.

Even if state immigration crimes were to perfectly “mirror” federal immigration crimes³⁶⁷ (which Arizona alien smuggling does not), local prosecutors would still obtain the discretion to enforce their *own version* of those laws. By empowering state and local law enforcement officials to exercise discretion over *how* and *against whom* they pursue arrests and criminal charges, state immigration crime can give rise to localized prosecution practices, such as the Maricopa County prosecutions against migrants for smuggling themselves. The particularities of state and local enforcement structure—including rules for bail, plea bargaining, and sentencing—further distinguish the practice of federal and state criminal immigration law.³⁶⁸

Although the United States seeks to bar enforcement of SB 1070 *ex ante*, the preemption analysis presented by DOJ is unprecedented in its focus on the outcomes that would flow from state-level criminal enforcement of immigration law.³⁶⁹ The DOJ’s suit draws on the federal government’s expansive law enforcement expertise to demonstrate how, in practice, independent state enforcement efforts interrupt the national project of immigration enforcement.³⁷⁰ Placing an emphasis on conflict preemption, the DOJ has filed

366. See, e.g., COLO. REV. STAT. § 18-13-128 (West 2010) (adopted in 2006); FLA. STAT. ANN. § 787.07 (West Supp. 2011) (adopted in 2009); OKLA. STAT. ANN. tit. 21, § 446(A) (West Supp. 2011) (adopted in 2007); TENN. CODE ANN. § 39-17-114 (2010) (adopted in 2007); UTAH CODE ANN. § 76-10-2901 (LexisNexis 2008) (adopted in 2008).

367. As Kris Kobach, the main proponent of this theory, argues in his influential article, immigration crimes that “mirror the terms of federal law” are within the authority of state government. According to Kobach, “alien smuggling and alien harboring” are the “most suited to duplication at the state level.” Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 475–78 (2008).

368. See *supra* Part I.B (discussing the broader structure of Arizona’s criminal immigration system, as implemented in Maricopa County).

369. Even outside the immigration context, direct suits by the federal government seeking preemption of state law remain rare. Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 45–46 (2011).

370. The DOJ’s suit against Arizona also underscores an important observation made by Margaret Taylor some time ago in the context of immigration detention: that DOJ litigators, contrary to conventional wisdom, play an integral role in the executive branch’s implementation of immigration law and policy. Margaret Taylor, *Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271 (2002).

detailed declarations of local, state, and federal law enforcement officials.³⁷¹ In earlier preemption contests involving state criminal immigration law, the federal government has joined as amicus to express its formal view that state immigration law would conflict with federal enforcement.³⁷² In Arizona, by filing an affirmative suit, the federal government has infused the litigation with practical knowledge regarding how federal immigration enforcement functions in practice.

Ultimately, as a number of immigration scholars have noted, preemption cannot be relied upon as a flawless guide to segregate state and federal spheres in the area of immigration control.³⁷³ One solution to this problem would be to have Congress clarify the divide between federal and state jurisdiction for immigration crime.³⁷⁴ An alternative approach could involve developing an administrative system to curb prosecutorial use of criminal law powers to police migration.³⁷⁵ In the meantime, acknowledging the limitations of judicial preemption as a tool for protecting the exclusive federal realm for immigration crime allows for a deeper understanding of immigration law's structure.³⁷⁶

2. State Immigration Crime and Immigration Federalism

Beyond preemption, close study of Arizona's smuggling enforcement project provides an important window into broader structural changes in the relationships between federal, state, and local entities in enforcing migration. Immigration law is conventionally thought to operate within a single jurisdiction—at the federal level.³⁷⁷ To be sure, in enforcing immigration law,

371. Press Release, Dep't of Justice, Office of Pub. Affairs, Citing Conflict With Federal Law, Dep't of Justice Challenges Arizona Immigration Law (July 6, 2010), <http://www.justice.gov/opa/pr/2010/July/10-opa-776.html> (describing suit and collecting links to declarations and briefs filed in support of the federal challenge).

372. See *supra* notes 315–321.

373. See, e.g., Cox, *supra* note 6, at 369; Huntington, *supra* note 5, at 798; Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 202 (1994); Schuck, *supra* note 4, at 89.

374. In the criminal law context, William Stuntz has argued that clearer lines should be drawn between state and federal criminal jurisdiction, in part because reliance on “judicially mandated federalism obscures accountability and wastes the time of litigants and courts alike.” William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 844–45 (2006).

375. For example, Rachel Barkow has proposed separating investigative decisionmaking from adjudicative decisionmaking within prosecutors' offices. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons From Administrative Law*, 61 STAN. L. REV. 869 (2009).

376. Federal labor law is another area where the imperfect reach of preemption may also be reshaping practices of subfederal actors. See Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1154 (2011).

377. Of course, this has not always been the case. As Gerald Neuman has shown, until the turn of the century, there was no federal immigration law and states filled the void by establishing their own

Congress and the President call upon states and localities to cooperate in reaching federal targets. However, cooperation in the immigration context is understood to entail formal boundaries for states and localities, allowing them to exercise their delegated powers pursuant to federally drawn lines, under close federal supervision.³⁷⁸

In sharp contrast to immigration law, in most areas of criminal law, state and federal sovereigns enjoy independent, concurrent jurisdiction.³⁷⁹ The comparatively small size of the federal judiciary, federal prosecutors' offices, and federal prisons underscore Congress's choice to maintain the federal criminal system as a limited operation. Within this concurrent jurisdictional model, federal authorities prosecute only a fraction of the cases covered by the vast federal criminal law.³⁸⁰ For those street-level crimes that federal authorities do pursue, cooperation with state and local authorities is critical to their success.³⁸¹

What Arizona has done is move criminal immigration law from the exclusively federal jurisdiction of immigration law into the concurrent state–federal

laws to regulate movement across borders. Gerald L. Neuman, *The Lost Century of American Immigration Law*, 93 COLUM. L. REV. 1833 (1993).

378. See, e.g., Schuck, *supra* note 4, at 66–67 (defining “immigration federalism” as state–federal relationships in which “states operate under, and are obliged to respect, federal immigration policies and supervision”).

379. This is not to say that the federal criminal law does not enjoy its own domain, exclusive of state power—it does. See generally Chin & Miller, *supra* note 4 (manuscript at 28) (noting that “there are a number of areas of exclusive federal jurisdiction” in the criminal law). For example, as Carole Goldberg has highlighted, the federal government has since 1886 exercised exclusive federal jurisdiction over certain serious felonies committed by and against Native Americans in Indian country. Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1413 (1997). The federal government can also enjoy exclusive jurisdiction over crimes such as piracy on the high seas and certain crimes committed on military facilities and national parks. U.S. CONST. art. I, § 8. This concept of exclusive federal criminal jurisdiction has also been solidified by Congress, which has ordered that “all offenses against the laws of the United States” have “original jurisdiction, exclusive of the courts of the States,” in the federal district courts. 18 U.S.C. § 3231 (2006).

380. Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 963 (1997) (“Both by design and in practice, federal prosecutions occur in only a tiny fraction of the cases covered by the federal criminal legislation.”).

381. As cooperation has increasingly intertwined different levels of government in criminal enforcement, Sandra Guerra has argued that the “dual sovereignty” doctrine, which allows for successive and dual prosecutions, should be reevaluated. Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159 (1995). Guerra's argument may have some traction in the area of criminal immigration law when states act as a federal “force multiplier.” For development of the argument that allowing states to assert jurisdiction over immigration crime would effectively bar a subsequent federal prosecution, see Gregory S. Schneider & Gabriel J. Chin, *Double Trouble: Double Jeopardy's Dual Sovereignty Exception and State Immigration Statutes* (June 27, 2011) (manuscript at 14–16) (on file with author).

realm that dominates much of criminal law. In this way, the Arizona project invites localities to leave behind their role of merely supporting the federal government in the enforcement of federally defined immigration priorities. Instead, Arizona empowers its officials to direct their own system for handling illegal immigration.³⁸²

Arizona has not gone so far as to claim that it can create its own civil immigration system for granting green cards and deporting migrants.³⁸³ Nor could it. What it does vigorously contend is that it can create its own criminal immigration enforcement system. However, by claiming state power to criminally punish migration violations, local officials correctly point out that they can obtain civil regulatory effects. For example, as County Attorney Thomas explained, the policy requiring that smugglers and self-smugglers plead to a felony was important: “That [felony] conviction will harm their ability to immigrate here legally and become citizens.”³⁸⁴ By making migrants felons, prosecutors made them ineligible for most forms of relief from removal,³⁸⁵ barred them from future legal immigration,³⁸⁶ and subjected them to enhanced federal criminal penalties if they later returned to the United States.³⁸⁷

Sheriff Arpaio has also used the state alien smuggling enforcement system to force immigration outcomes. For example, when two defendants were acquitted of self-smuggling by a superior court judge for failure to prove the *corpus* of the crime,³⁸⁸ ICE officials refused to pick them up from the jail.³⁸⁹ In

382. Arizona’s regime is a possible variant of what Jessica Bulman-Pozen and Heather Gerken have described as “uncooperative federalism,” in which states serve as “rivals and challengers to the federal government” even in areas where “they lack autonomy” as a formal matter. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1257, 1263 (2009).

383. Appellants’ Reply Brief at 22, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645), 2010 WL 5162517 (acknowledging that SB 1070 does “not purport to regulate who may enter the country or the terms upon which a legal entrant may remain”).

384. Michael Kiefer, *ID’s Unequal Across the Board*, *ARIZ. REPUBLIC*, Mar. 16, 2008, at B1.

385. For a thorough treatment of the impact of criminal convictions on the availability of relief from removal, see DAN KESSELBRENNER & LORY D. ROSENBERG, *IMMIGRATION LAW AND CRIMES* (2009).

386. Thomas recently described his “no amnesty policy” as requiring that “they get a felony conviction so that if they were deported they would have a very difficult time becoming a U.S. Citizen or legally immigrating to the United States.” Arpaionews, *Joe Arpaio & Andrew Thomas Press Conference*, *YOUTUBE* (May 18, 2010), <http://www.youtube.com/watch?v=aPp3Oy-8rE4> [hereinafter Arpaio/Thomas 2010 Press Conference].

387. See 8 U.S.C. § 1326 (2006) (increasing criminal penalties for felons who reenter the United States without permission); see also Arpaio/Thomas 2010 Press Conference, *supra* note 386 (statement by Arpaio explaining that “if you ship them back after conviction, they will get serious time” if they return).

388. See Minute Order, *State v. Hernández*, No. CR2006-005932-039 DT (Ariz. Super. Ct. July 11, 2006); Minute Order, *State v. Unbalejo Gómez*, No. CR2006-005932-025 DT (Ariz. Super. Ct. July 11, 2006).

389. Michael Kiefer, *Immigrant Conspiracy Case Tossed*, *ARIZ. REPUBLIC*, July 12, 2006, at B1.

response, Sheriff Arpaio had his deputies physically drive the acquitted men to a Border Patrol station for removal.³⁹⁰ More recently, Arpaio indicated that he will continue his deportation program under SB 1070. First, he will first use the criminal law to arrest migrants and hold them in Tent City.³⁹¹ Then, he will accomplish deportation by “tak[ing] ‘em down to ICE” and, if they are not accepted, “bring[ing] ‘em myself to the border.”³⁹²

Why might local control over the immigration agenda matter from a criminal justice perspective? Federal prosecutors remain concerned that a patchwork of immigration crime policies may not actually reduce illegal immigration, but rather may shift it from one jurisdiction to the next.³⁹³ Even worse, overreliance on criminal enforcement may further entrench illegal migration within violent criminal organizations, driving illegal migration deeper underground. As immigration concerns increase, neighboring communities, fearing displaced migration and crime, may systematically reinforce their own criminal immigration policies, making crime control more expensive, but not necessarily more effective.³⁹⁴ Indeed, empirical research on migration patterns validates these concerns.³⁹⁵

Although there are scholarly counterarguments to theories of jurisdictional competition,³⁹⁶ the premise that immigration can be displaced by criminal policy is undeniably the philosophy that has been applied in Arizona. In Maricopa County, after Sheriff Arpaio started enforcing the smuggling law

390. See Fontes Interview, *supra* note 30 (recalling that Arpaio had taken defendants to the Border Patrol for removal); O’Toole Interview, *supra* note 181 (acknowledging reports that the Sheriff would transport smuggling defendants to Nogales, at the border of Sonora, Mexico, to be walked across the border by the Border Patrol). In a memorable moment, Arpaio was seen on television wagging his finger at Javier Ruiz-Lopez and Gustavo Unbalejo Gómez through the bars of a cage as they were readied for their county-funded journey to the border. Telephone Interview With Michael Kiefer, Reporter, *Ariz. Republic* (Mar. 31, 2011).

391. Andrea Christina Nill, ‘Hispanic-Hunting’ Arizona Sheriff Joe Arpaio Says He Will Deport Immigrants Himself if Feds Refuse, *LA PROGRESSIVE*, Oct. 7, 2009, <http://www.laprogressive.com/immigration-reform/hispanic-hunting-arizona-sheriff-joe-arpaio-says-he-will-deport-immigrants-himself-if-feds-refuse>.

392. *Id.*

393. See discussion *supra* Part II.D.

394. Doron Teichman has made a similar argument in the criminal law context. Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 *MICH. L. REV.* 1831, 1861, 1935 (2005) (“[J]urisdictions ignoring the negative externalities created by the policies they adopt will be driven, over time, to adopt an increasingly harsh criminal justice system despite the fact that they would be better off agreeing collectively on a more lenient system.”).

395. See *supra* notes 304–306.

396. See, e.g., Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 *N.Y.U. L. REV.* 1210 (1992) (arguing that, in the context of environmental legislation, local regulation fosters a healthy equilibrium); see also Spiro, *supra* note 6, at 1640 (concluding that, in the context of immigration law, the “prospect of a race to the bottom is slight”).

in earnest, he explained that his message “to the illegals” was simple: “Stay out of Maricopa County, because I’m the sheriff here.”³⁹⁷ Similarly, with the proclamation to make “attrition through enforcement” the public policy of the state, Arizona legislators have manifested their belief that illegal migration can be pushed out of the state—either over the border or into neighboring states.³⁹⁸ The large number of copycat bills suggests that other states may be expanding their codes and dialing up sentences in part because they are worried that they may unwillingly become the recipient of displaced Arizona migration.³⁹⁹

A related concern stems from the fact that, unlike the federal system, Arizona does not offer prosecutors a balance between civil and criminal sanction. Local authorities simply cannot exercise the full range of discretionary authority inherent in the Executive’s supervisory immigration role.⁴⁰⁰ This criminal-only dynamic may incentivize state and local prosecutors to pursue criminal charges when federal law enforcement would conclude a civil remedy—or no action at all—to be most appropriate. As Darryl Brown has shown, when prosecutors practice within a civil–criminal regulatory structure (such as white collar crime), they tend to weigh a number of factors before administering punishment, including the perceived deterrent effect of the

397. John Pomfret & Sonya Geis, *One Sheriff Sees Immigration Answer as Simple*, WASH. POST, May 20, 2006, at A3. See generally Teresa A. Miller, *A New Look at Neo-Liberal Economic Policies and the Criminalization of Undocumented Migration*, 61 SMU L. REV. 171, 185 (2008) (describing the increasing criminalization of undocumented migrants through municipal ordinances as “equivalent to posting an ‘Illegal aliens NOT welcome’ sign at the town line”).

398. See *supra* note 124 and accompanying text. Such claims were made by supporters of California’s Amett Act, who predicted “an exodus of illegal aliens” from California if Section 2805 were enforced, causing a “domino effect” as other states scramble to enact similar legislation. Robert S. Catz & Howard B. Lenard, *The Demise of the Implied Federal Preemption Doctrine*, 4 HASTINGS CONST. L.Q. 295, 318 (1977). Similarly, in the 1990s, Governor Pete Wilson contended that Proposition 187 would lead undocumented immigrants to “self-deport.” Mitchell Benson, *Wilson Says He Can Run the Country: Still-Unofficial Candidate Stresses Experience, Ideas*, SAN JOSE MERCURY NEWS, Apr. 4, 1995, at B3. The belief that criminal law can force migrants to relocate has also motivated the recent proliferation of antisolicitation ordinances that criminalize day laborer activity. See Scott L. Cummings, *Litigation at Work: Defending Day Labor in Los Angeles*, 58 UCLA L. REV. 1617 (2011).

399. See *infra* note 411 (citing SB 1070–inspired state laws). The effect of local immigration prosecution on migration patterns is an important area for future research: Preliminary reports suggest that localized immigration flows may be decreasing in the wake of SB 1070. See, e.g., *After SB1070: Adios Arizona*, ECONOMIST, Nov. 25, 2010, <http://www.economist.com/node/17581892> (noting that research by BBVA Bancomer estimates that 100,000 Latinos have left Arizona for Mexico or other states as a result of SB 1070).

400. See generally Janet A. Gilboy, *Deciding Who Gets In: Decisionmaking by Immigration Inspectors*, 25 LAW & SOC’Y REV. 571 (1991) (detailing the types of discretion exercised by “front-line [immigration] gatekeepers”); Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 611 (2006) (“The executive enjoys its customary authority not to pursue enforcement, and Congress has authorized the executive to formally exempt deportable aliens from removal for sympathetic or compelling reasons.”); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010) (discussing the extent of prosecutorial discretion in immigration law).

criminal sanction and the social costs and benefits of criminal punishment.⁴⁰¹ In contrast, when a civil regulatory alternative is lacking (think of most street crimes), blameworthiness becomes the primary prosecutorial consideration.⁴⁰² State immigration crime makes immigration violators more like street criminals than individuals who should be considered first for civil remedies.

Finally, Arizona's placement of its immigration efforts squarely within the criminal law erodes formal barriers between state and federal spheres of criminal law enforcement. As this Article has shown, the federal government in Arizona already cooperates with and defers to state and local officials on a daily basis in the context of criminal enforcement. Adding criminal immigration law into this cooperative structure thus complicates federal resistance to state encroachment on national immigration powers.

In sum, Arizona's alien smuggling law has enabled local prosecutors to do far more than assist the federal government in implementing federal immigration policy. Instead, Arizona has created a parallel, criminal-only system for adjudicating its own unique set of immigration sanctions.

CONCLUSION

In April 2010, five years after Patrick Haab held seven migrants at gunpoint on a deserted interstate, Andrew Thomas resigned as Maricopa County Attorney to run for Arizona Attorney General.⁴⁰³ Back at the Maricopa County Attorney's Office, former County Attorney Richard Romley was appointed interim chief.⁴⁰⁴ When thirty-two migrants were arrested by sheriff's deputies, Romley announced that he would not press smuggling charges until Sheriff Arpaio provided additional proof.⁴⁰⁵ Under a new office policy, Romley required that evidence of immigration status be provided by federal officials prior to filing alien smuggling charges.⁴⁰⁶ Accusing the new

401. Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1314–15, 1324–32 (2001).

402. *Id.*

403. Andrew Thomas was defeated in the attorney general's race by Republican competitor Tom Horne. Michael Kiefer & Yvonne Wigett, *Thomas Resigns to Run for State Post*, ARIZ. REPUBLIC, Apr. 2, 2010, at A1. An ongoing investigation by the Arizona State Bar into Thomas's conduct in a criminal case against a superior court judge and members of the Maricopa County Board of Supervisors was said to have influenced voters. Michael Kiefer & Yvonne Wingett, *Thomas Brushes off Inquiries*, ARIZ. REPUBLIC, Apr. 3, 2010, at B1.

404. Mussman Interview, *supra* note 27; Romley Interview, *supra* note 182.

405. *Id.* (discussing the 2010 change in policy to require independent proof of the *corpus* of the crime prior to filing criminal charges).

406. *Id.*

County Attorney of “erecting barriers” to enforcement, Arpaio released the men to federal immigration authorities.⁴⁰⁷

Come election time, Sheriff Arpaio lent his support to a line prosecutor—Bill Montgomery—who ran on a platform to revive the Thomas self-smuggling prosecution policy and enforce SB 1070.⁴⁰⁸ In November, voters overwhelmingly elected Montgomery the next County Attorney.⁴⁰⁹ Presently, 221 defendants await trial in Maricopa County on alien smuggling charges, including charges of self-smuggling.⁴¹⁰

* * *

This Article’s central contribution is to provide a more complex and accurate picture of the dynamic process that occurs when immigration violations become state crimes. A critical insight of this research is the identification of an existing Arizona immigration system—located within state criminal courts and operated by prosecutors and police. The findings regarding how this state system has been implemented in Maricopa County should foster a more nuanced understanding of both preemption and the broader role of states and localities in federal immigration enforcement. First, by examining the practice of state alien smuggling prosecution, this Article highlights the shortcomings of conventional *ex ante* immigration preemption analysis. In particular, without implementation data, courts tend to obscure the ways in which state criminal law—as shaped by local actors—actually conflicts with and frustrates the goals of federal immigration law. Second, this Article’s

407. *Arpaio Says Romley Sank Cases Against Immigrants*, ARIZ. CAPITOL TIMES, May 19, 2010, <http://azcapitoltimes.com/news/2010/05/19/arpaio-says-romley-sank-cases-against-immigrants>.

408. See, e.g., Bill Montgomery, *Illegal Immigration*, <http://www.montgomery2010.com/video/97001518.asp> (last visited May 30, 2011) (promising to “continue to enforce all laws against illegal immigration”); SandAngelMedia, *06-05-2010 Phoenix Rising Pro-SB1070 Rally—Bill Montgomery*, YOUTUBE (June 6, 2010), <http://www.youtube.com/watch?v=nnNodT4sx3M> (pledging to reinstitute alien smuggling prosecutions).

409. Mike Sakai, *Montgomery Cruises to Victory in County Attorney Race*, EAST VALLEY TRIB., Nov. 4, 2010, http://www.eastvalleytribune.com/arizona/politics/article_fc4262c2-e6e2-11df-9f74-001cc4c03286.html (reporting that Montgomery garnered 75 percent of the vote).

410. MARICOPA CNTY. ATT’Y’S OFFICE, PENDING ALIEN SMUGGLING DATAFILE NO. 2011-0422-2 (obtained by author with a public records request on June 2, 2011) (containing 2011 charging data for smuggling cases). Of these defendants, 24 are charged with smuggling others and 66 with self-smuggling. For the remaining 131 defendants, the MCAO’s records do not differentiate between smuggling and self-smuggling. *Id.* In bringing these charges, the MCAO has discontinued Romley’s policy of requiring proof of the *corpus* before bringing smuggling charges. See Letter From Debbie MacKenzie, Custodian of Records, Maricopa Cnty. Att’y’s Office, to author re Public Records Request No. 2011-0422-2 (Apr. 27, 2011) (confirming that MCAO procedures requiring pre-filing proof of alienage from ICE, CBP, or a certified 287(g) officer do not apply in Section 13-2319 prosecutions).

analysis reveals a gap in the dominant understanding of the relationship between state and federal governments in immigration law. Despite preemption, Arizona's alien smuggling law has quietly transferred control over immigration prosecution into the hands of state and local actors—enabling them to work independently to pursue their own immigration agendas without Congress's blessing or the Executive's guidance. Moreover, by allowing devolution of immigration enforcement to occur within an exclusively criminal state practice, the federal civil–criminal immigration system is recalibrated toward criminal enforcement.

The enhanced understanding this Article offers is increasingly relevant as a growing number of states adopt criminal immigration laws of their own.⁴¹¹ Future research should continue to examine lower-level courts to understand how localities beyond Maricopa County have addressed the connection between immigration enforcement and crime control. Such investigations, along with the scholarship presented in this Article, are critical to understanding how the American criminal justice system is shaping the structure of immigration law.

411. See, e.g., H.R. 56, 2011 Leg., Reg. Sess. (Ala. 2011); H.R. 87, 2011–2012 Gen. Assemb., Reg. Sess. (Ga. 2011); Senate Enrolled Act 590, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011); H.R. 497, 2011 Leg., Gen. Sess. (Utah 2011). Civil rights groups have challenged these laws as unconstitutional. See, e.g., Complaint, Hispanic Interest Coal. v. Bentley, No. 5:11-cv-02484-SLB (N.D. Ala. July 8, 2011), <http://www.nilc.org/immlawpolicy/LocalLaw/HICA-v-Bentley-complaint-2011-07-08.pdf>; Complaint, Ga. Latino Alliance for Human Rights v. Deal, No. 1:11-cv-01804-TWT (N.D. Ga. June 2, 2011); Complaint, Buquer v. City of Indianapolis, No. 1:11-cv-708-SEB-MJD (S.D. Ind. May 25, 2011), <http://www.nilc.org/immlawpolicy/LocalLaw/Indiana-complaint-2011-05-25.pdf>; Complaint, Utah Coal. of La Raza v. Herbert, No. 2:11-cv-00401-BCW (D. Utah May 3, 2011), http://www.aclu.org/files/assets/Utah_Coal_of_La_Raza_v_Herbert_FINAL.pdf. Other states have introduced similar bills in their legislatures. See, e.g., S. 1388, 2010 Leg., 95th Sess. (Mich. 2010); H.R. 2479, 2010 Sess., Gen. Assemb. (Pa. 2010); H.R. 8142, 2010 Leg. Sess., Gen. Assemb. (R.I. 2010); S. 1446, 118th Sess., Gen. Assemb. (S.C. 2010). For an updated chart of state immigration laws that parallel SB 1070, see *Threat Assessment for Arizona-Inspired Copycats*, NAT'L IMMIGRATION LAW CTR. (June 24, 2011), <http://www.nilc.org/immlawpolicy/LocalLaw/Threat-Levels-Map.pdf>.