

Immigrant Protective Policies in Criminal Justice

Ingrid V. Eagly*

The increasing focus of federal immigration enforcement on persons accused of crimes has hastened the creation of local criminal justice policies that govern the treatment of immigrants. In this Article, I report my findings from public records requests sent to prosecutor offices, city police departments, and county sheriffs in four large counties in California: Alameda, Los Angeles, Santa Clara, and Ventura. I analyze the text of three types of written criminal justice policies that emerged in every county: (1) police policies that prohibit inquiry into immigration violations during routine policing; (2) prosecutor policies that consider deportation penalties in negotiating pleas for low-level offenders; and (3) sheriff policies that reject certain federal requests to detain immigrants in their jails for deportation purposes. All of these policies function to protect at least some immigrants who come into contact with the criminal justice system from possible deportation. Yet, close analysis of these policies—which I refer to as “immigrant protective policies”—also reveals key differences in how these protections are structured and, hence, in which immigrants are covered by these policies. In short, some policies are more protective than others.

This Article argues that the protective gaps in these local policies have evolved against a backdrop of an incomplete set of organizing principles for advancing such policies. The justifications most often put forth by advocates, scholars, and policymakers in favor of protective criminal justice policies are community policing, immigrant integration, and budgetary constraints. Each of these justifications, while important, has supplied only a partial framework for formulating criminal justice policy that decouples local policing and prosecuting from federal immigration enforcement priorities. To help guide the development of next-generation protective policies, which will be particularly crucial to pro-immigrant states and localities during the administration of President-elect Donald Trump, this Article explores an alternative justification for immigrant protective policies—immigrant equality. Immigrant equality seeks to insulate noncitizens from harsher forms of punishment, racial and ethnic profiling, and

* © Professor of Law, UCLA School of Law. Thank you to Joseph Berra, Jennifer Chacón, Jack Chin, Beth Colgan, César Cuauhtémoc García Hernández, Scott Cummings, Sharon Dolovich, Alice Eagly, Pratheepan Gulasekaram, Eisha Jain, Kevin Johnson, Raha Jorjani, Angie Junck, Andrés Dae Keun Kwon, Jerry López, Hiroshi Motomura, Jennie Pasquarella, Emily Ryo, David Rubenstein, Elissa Steglich, and Roger Waldinger for commenting on early drafts of this Article. This project also benefitted from the feedback of participants in workshops hosted by the UCLA Center for the Study of International Migration, the Southern California Criminal Justice Roundtable, the University of Texas School of Law, the UCLA School of Law, and the UC Davis School of Law. I am grateful for the excellent research assistance of Cheryl Kelly Fischer, Maria Manman Lu, Sarah McAlister, and the UCLA Hugh & Hazel Darling Law Library.

other substantive and procedural distortions that immigration enforcement imposes on criminal cases involving noncitizens. To illustrate how adherence to a norm of immigrant equality would further refine and shape next-generation protective policies, this Article applies the approach to current criminal justice issues facing localities around the country.

INTRODUCTION.....	246
I. IMMIGRANT PROTECTIVE POLICIES IN FOUR CALIFORNIA COUNTIES	253
A. Police Policies Barring Investigation of Immigration Violations.....	254
1. <i>Don't Police Civil Immigration Law</i>	258
2. <i>Don't Police Criminal Immigration Law</i>	261
B. Prosecutorial Policies to Weigh Deportation Penalties in Plea Bargaining.....	264
1. <i>Fair Punishment Approach</i> :.....	267
2. <i>Exacting a Premium Approach</i>	270
C. Jail Policies Limiting Cooperation with Federal Detainer Requests	271
1. <i>Fiscal Restriction</i>	274
2. <i>Fourth Amendment Restriction</i>	275
3. <i>Conviction Severity Restriction</i>	278
II. CONVENTIONAL JUSTIFICATIONS FOR IMMIGRANT PROTECTION	280
A. Community Policing	281
B. Immigrant Integration	288
C. Fiscal Constraints.....	291
III. TOWARD IMMIGRANT EQUALITY	294
A. Not Policing Civil Immigration Law Against Criminal Suspects	299
B. Promoting Fair Punishment	304
C. Keeping ICE Out of Local Jails	309
CONCLUSION.....	312
APPENDIX A: POLICE POLICIES.....	314
APPENDIX B: DISTRICT ATTORNEY POLICIES.....	320
APPENDIX C: SHERIFF POLICIES	322

Introduction

Every stage of the American criminal process is now deeply intertwined with immigration enforcement. Immigration officials formally prioritize the deportation of noncitizens who are convicted of crimes.¹ The federal

1. See, e.g., Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski et al. 3–4 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<https://perma.cc/MM4S-GYM2>] [hereinafter Johnson Removal Memo] (prioritizing immigrants with criminal convictions for deportation). Throughout this Article, I use the terms “immigrants” and “noncitizens” interchangeably to refer to individuals who are not United States citizens. It is important to clarify

government has proliferated programs to transfer immigrants directly from criminal custody into immigration detention.² This tight immigration–criminal nexus has created a system in which local criminal justice actors—police, prosecutors, and jail officials—have the power to operate as de facto immigration adjudicators.³ These dynamics will only intensify further under the leadership of President-elect Donald Trump, who has vowed to rely on local jails to execute a program of mass deportation.⁴

Localities have reacted in quite different ways to their role as crucial partners in immigration enforcement.⁵ Some have embraced their close connection to deportation and even relied on it to allow harsher treatment of noncitizens through methods such as denying immigrants bail in their criminal case or using undocumented status as a sentencing enhancement.⁶ In contrast, other localities have sought to decouple criminal justice from the harshest aspects of immigration enforcement and to promote criminal justice outcomes that guard against discrimination based on citizenship status.⁷

Although immigration scholarship has documented variation in local approaches to the treatment of immigrants in all aspects of civic life,⁸ this

that noncitizens include both persons who are lawfully present in the United States, such as lawful permanent residents and refugees, as well as individuals who are undocumented.

2. See, e.g., Juliet P. Stumpf, *D(E)volving Discretion: Lessons From the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259 (2015) (detailing the federal government’s Secure Communities and Priority Enforcement Program that screen arrestees in local jails).

3. Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1350 (2010) (discussing ways in which “criminal law can function as immigration law”).

4. See *Transcript of Donald Trump’s Immigration Speech*, N.Y. TIMES (Sept. 1, 2016), http://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html?_r=0 [<https://perma.cc/8SB3-RK79>] (noting in a presidential campaign speech that Donald Trump’s “plan” for immigration includes “cooperating with local jurisdictions to remove criminal aliens immediately” and claiming that there are “hundreds of thousands of deportable aliens in local jails that we don’t even know about”).

5. See Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1156–90 (2013) (analyzing different criminal justice responses to immigration enforcement in three of the largest jurisdictions in the United States).

6. See *id.* at 1170 (describing the “illegal-alien-punishment model” of criminal adjudication in Harris County, Texas, which disadvantages undocumented immigrants with respect to bail eligibility, plea bargaining, and sentencing).

7. See *id.* at 1157 (describing the “alienage-neutral model” of criminal adjudication in Los Angeles County, California, which endeavors to make criminal justice decisions that are “neutral” or “blind” to immigration status).

8. See, e.g., Huyen Pham & Pham Hoang Van, *Measuring the Climate for Immigrants: A State-by-State Analysis*, in STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY 21, 24–31, 32 tbl.1.2 (Carissa Byrne Hessick & Gabriel J. Chin eds., 2014) (reporting the “immigration climate index” scores of each state based upon the friendliness or hostility of state and local immigration laws); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 581–605 (2008) (describing how various states work to integrate both lawful and undocumented immigrants); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1608 (2008) (discussing state attempts to regulate immigration through criminal law); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1633 (2008) (arguing that localities employ direct and indirect local immigration regulations as a way to further local interests).

research has only begun to explore the policies that localities have adopted to guide their criminal justice officials. Such research has tended to focus on restrictive local criminal justice policies that punish and deport noncitizens,⁹ without giving sustained attention to protective immigrant policies on the opposite end of the spectrum. To the extent that prior scholarship has explored criminal justice policies that protect immigrants from deportation, it has examined these policies individually,¹⁰ rather than as part of a set of policies that advance certain normative commitments regarding the treatment of immigrants within the criminal justice system.¹¹

In this Article, I present my findings from public records requests seeking local policies relating to immigrants that I submitted to the major city police departments, county prosecutors, and county sheriffs in four of the

9. See, e.g., Angela M. Banks, *The Curious Relationship Between “Self-Deportation” Policies and Naturalization Rates*, 16 LEWIS & CLARK L. REV. 1149, 1172 (2012) (arguing that local law enforcement agencies use arrests for minor traffic offenses as pretexts to determine immigration status); Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 257–58 (2011) (explaining how states rely on the “mirror-image” theory to prosecute aliens at the state level for violating federal immigration law); Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 182 (2005) (contending that arresting aliens for violating federal immigration law is “within the inherent authority of the states”); Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. U. L. REV. 879, 881 (2015) (observing that many states effectively “attach[] criminal sanctions to conduct immigrants must engage in” such as driving); Karla Mari McKanders, *Unforgiving of Those Who Trespass Against U.S.: State Laws Criminalizing Immigration Status*, 12 LOY. J. PUB. INT. L. 331, 331 (2011) (describing how states have used criminal trespass laws to prosecute undocumented immigrants); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 33 (2007) (explaining how local prosecutors have repurposed dormant statutes, such as smuggling and criminal trespass laws, to prosecute undocumented immigrants); Huyen Pham & Pham Hoang Van, *The Economic Impact of Local Immigration Regulation: An Empirical Analysis*, 32 CARDOZO L. REV. 485, 500–02 (2010) (discussing 287(g) agreements, which deputize state and local police departments to act as immigration authorities).

10. See, e.g., Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 25–28 (2012) (examining prosecution policies); Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13, 13 (2016) (examining immigration detainer policies); Alia Al-Khatib, Comment, *Putting a Hold on ICE: Why Law Enforcement Should Refuse to Honor Immigration Detainers*, 64 AM. U. L. REV. 109, 115 (2014) (same); Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 248–49 (2012) (examining police policies); Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1455 (2006) (same); Paul G. Lewis & S. Karthick Ramakrishnan, *Police Practices in Immigrant-Destination Cities: Political Control or Bureaucratic Professionalism?*, 42 URB. AFF. REV. 874, 877 (2007) (same); Rick Su, *Police Discretion and Local Immigration Policymaking*, 79 UMKC L. REV. 901, 910 (2011) (same).

11. But see Katherine Beckett & Heather Evans, *Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation*, 49 LAW & SOC’Y REV. 241, 245, 252–53 (2015) (presenting a case study of the treatment of immigrants in the criminal justice system in King County, Washington); Trevor George Gardner, *The Promise and Peril of the Anti-Commandeering Rule in the Homeland Security Era: Immigrant Sanctuary as an Illustrative Case*, 34 ST. LOUIS U. PUB. L.J. 313, 323 (2015) (analyzing immigrant sanctuary laws and policies).

most populous counties in California: Alameda, Los Angeles, Santa Clara, and Ventura.¹² Each of these urban counties¹³ has a large immigrant population,¹⁴ is perceived as having at least some criminal justice policies that protect immigrants,¹⁵ and is located within a state that is ranked among the most immigrant-friendly in the United States.¹⁶ As one point of reference, Immigration and Customs Enforcement (ICE) recently reported that these four counties lead the nation in the number of refusals to cooperate with federal-immigration detainers to hold immigrants in local jails for deportation purposes.¹⁷ Yet, the terms and implications of the slate of immigrant-focused policies that operate in these four counties have yet to be the subject of academic analysis.

12. According to the United States Census, the population of the counties is: 1,510,271 in Alameda County, 9,818,605 in Los Angeles County, 1,781,642 in Santa Clara County, and 823,381 in Ventura County. *Community Facts*, U.S. CENSUS BUREAU, http://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml [https://perma.cc/A8LH-6LMQ] (enter “California” in the search field; then follow “Compare Counties for Population, Housing, Area, and Density” hyperlink) (based on 2010 data).

13. All four counties rank among the top fourteen counties in California based on population density. See *California Population Per Square Mile, 2010 by County*, INDEXMUNDI, <http://www.indexmundi.com/facts/united-states/quick-facts/california/population-density#chart> [https://perma.cc/EF95-278Y] (based on 2010 data).

14. These four counties rank among the top nine counties with the largest undocumented immigrant populations in the state of California. Laura Hill & Joseph Hanes, *Just the Facts: Undocumented Immigrants*, PUB. POL’Y INST. OF CAL. (June 2015), http://www.ppic.org/main/publication_show.asp?i=818 [https://perma.cc/5ZKW-LB93] (reporting undocumented immigrant population estimates based on data from 2013). In addition, each county has a sizable foreign-born population: Alameda County (30% foreign born), Los Angeles County (35% foreign born), Santa Clara County (36% foreign born), and Ventura County (22% foreign born). *Immigrants in the United States: County-Level Data on the Foreign-Born*, GRANTMAKERS CONCERNED WITH IMMIGRANTS & REFUGEES, <http://maps.gcir.org/> [https://perma.cc/6YKE-V9M6] (reporting estimates of foreign-born populations by county based on data from the 2005–2009 American Community Survey).

15. For example, all four counties are included on a list of “sanctuary cities” compiled by advocacy groups. *States and Localities that Limit Compliance with ICE Detainer Requests*, CATH. LEGAL IMMIGR. NETWORK (Nov. 2014), https://cliniclegal.org/sites/default/files/anti-detainer_policies_11_21_14.pdf [https://perma.cc/2HZQ-WEB8].

16. See S. Karthick Ramakrishnan & Allan Colbern, *The California Package: Immigrant Integration and the Evolving Nature of State Citizenship*, 6 POL’Y MATTERS 1, 1 (2015) (referring to the more than a dozen laws passed in California since 2001 as producing “a de facto regime of state citizenship” that the authors call “the ‘California Package’”); Pham & Van, *supra* note 8, at 31 (analyzing five years of data and finding that California and Illinois have the most positive climates for immigrants in the country).

17. See Morgan Smith & Jay Root, *Jails Refused to Hold Thousands of Immigrants for Feds*, TEX. TRIB. (Jan. 15, 2016), <https://www.texastribune.org/2016/01/15/34-texas-counties-declined-hold-deportable-immigra/> [https://perma.cc/4QG4-RAWR]. According to ICE data obtained by the *Texas Tribune* with a Freedom of Information Act (FOIA) request, Santa Clara, Los Angeles, Ventura, and Alameda were the four California counties with the most declined immigration detainers between January 2014 and September 2015. *Id.* Overall, 11,171 of the 18,646 detainers declined in the United States between January 2014 and September 2015 were in the state of California. *Id.* It is important to acknowledge that the studied counties may have more declined detainers in part because they are large urban counties that receive large numbers of detainer requests.

Part I introduces the three central types of policies that I find were adopted in all four counties: (1) police policies that prohibit inquiry into immigration violations during routine policing; (2) prosecutor policies that consider deportation penalties in negotiating pleas for low-level offenders; and (3) sheriff policies that reject certain federal requests to detain immigrants in their jails for deportation purposes.¹⁸ My analysis is confined to the text of these written policies, which are found in policy manuals, training bulletins, and internal memoranda and directives.¹⁹ An integral component of this project is the creation of an accompanying online library collection of these written policies from the four counties.²⁰

Through textual analysis of these collected policies, this Article undertakes a conceptual mapping of the ways in which they guide, ban, or encourage officers, prosecutors, and sheriffs to take immigration status into account in going about their work. Each of these policies, as I explain, works at a different stage of the criminal justice process to protect at least some immigrants from deportation. Collectively, I refer to the policies that emerge from the four counties as “immigrant protective policies.”

Although these policies contain many of the same terms, there is variation across the policies and some are more protective of immigrants than others. Overall, the terms of these local policies are more protective for immigrant victims and witnesses who voluntarily participate in the criminal justice system than for those immigrants who are subjected to it through arrest and prosecution. These and other findings presented in Part I and in the accompanying online library guide can help cultivate a richer dialogue regarding the promise and limitations of current pro-immigrant criminal justice policies.

Parts II and III move beyond the descriptive categorization of the local policies to a more conceptual advancement of what we can learn from studying them. First, Part II discusses three central justifications conventionally advanced by scholars, advocacy groups, and policymakers in support of immigrant protection in criminal justice policy: (1) fostering community trust in law enforcement; (2) integrating undocumented immigrants into society; and (3) saving scarce law enforcement resources for

18. By choosing to focus on these three policies, I do not mean to suggest that these are the only policies that regulate the treatment of noncitizens in the criminal systems of these counties.

19. Of course, there are no doubt differences between what the policies say and day-to-day practices, but that kind of additional inquiry into the implementation of these written policies is beyond the scope of this project’s textual analysis. There is, however, evidence from other research that law enforcement agencies have an organizational structure in which subordinates are likely to be informed of office policy. *See generally* GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS* 180 (1996) (discussing the role of law enforcement guidelines in shaping discretionary decisions).

20. This library collection is designed to assist other researchers and policymakers interested in local immigration responses to immigration enforcement. Ingrid V. Eagly, *Library Guide, Immigration Enforcement and Criminal Adjudication*, UCLA SCH. L., <http://libguides.law.ucla.edu/immigrationandcriminaladjudication>.

local, as opposed to federal, initiatives.²¹ As Part II develops, each of these commitments, although relevant to the establishment of protective policies, has thus far supplied an incomplete framework for thinking about how noncitizens within the criminal justice system (e.g., arrested, charged with crimes, seeking release on bond, serving criminal sentences) ought to be treated by criminal justice actors (e.g., police, prosecutors, probation officers, sentencing judges). At the same time, the adoption of a new jail-based screening program (known as the Priority Enforcement Program or PEP)—as well as the likely proliferation of other similar cooperative programs by the Trump administration—has increased pressure on localities to acquiesce to federal efforts to link enforcement to local criminal justice systems.²² Immigrant rights advocates seeking to undo this entanglement have been pushed to address the fundamental normative question lurking behind the “cimmigration” convergence: are immigrants members of our society that deserve the same level of due process and protection when subjected to the criminal justice system?²³ If so, how can localities achieve immigrant equality in this era of aggressive, crime-based immigration enforcement?

To explore this problem, Part III identifies a nascent and important movement to incorporate a norm of immigrant equality into advocacy efforts seeking criminal justice reform. Immigrant equality recognizes how immigration enforcement can incentivize and mask racial and ethnic profiling and discrimination in policing and prosecution. In addition, the principle of immigrant equality calls attention to the ways in which noncitizens are often subjected to harsher and more punitive criminal justice punishment than citizens.

Part III reveals how immigrant equality—especially when combined with the more conventional principles of community policing, immigrant integration, and fiscal savings—can offer greater conceptual clarity about how immigrant-friendly localities should structure their criminal justice systems around immigration enforcement and citizenship status. To illustrate this point, I conclude by showing how the immigrant equality framing has begun to shape next-generation policy solutions to immigrant issues currently confronting local criminal justice systems in California. This discussion features the work of progressive social justice organizations—such as the National Day Laborer Organizing Network, the Immigrant Justice Network, and ICE Out of California—that have begun to move beyond the

21. I do not contend that this is an exhaustive list of all policy arguments that have contributed to developing protective policies, but rather that they are ones that recur frequently and are reflected in the development of the policies of the four California counties studied here.

22. See *infra* note 357 and accompanying text.

23. As Juliet Stumpf argues, both the criminal and immigration systems “act as gatekeepers of membership in our society,” and these membership rules matter because “[e]xpansive notions of membership may broaden the scope of constitutional rights” and other protections. Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 396–97 (2006).

familiar discourse about immigrant protection to advocate for immigrant equality.²⁴

Before proceeding, it is necessary to acknowledge that local criminal justice policy affecting immigrants is evolving in the shadow of immigration federalism. In the wake of the United States Supreme Court's 2012 decision in *United States v. Arizona*,²⁵ which struck down much of Arizona's restrictionist immigration law known as S.B. 1070,²⁶ scholars have become increasingly interested in the question of whether state and local initiatives that incorporate a norm of "immigrant equality" can be insulated from federal preemption.²⁷ My inquiry complements this line of work but does not focus on the legal question of how local protective policies will survive future preemption challenges.²⁸ My project instead concentrates on the less studied topic of how localities actually treat immigrants within their criminal justice system and, relatedly, how immigrant advocates and policymakers articulate and justify their support of immigrant protection.²⁹ These insights, which build on a close study of existing policies in four California counties, are particularly relevant today given the significant leeway that localities in the United States are given to shape criminal justice outcomes.³⁰

24. See *infra* notes 361–64 and accompanying text (providing background on ICE Out of California and other social justice campaigns).

25. 132 S. Ct. 2492 (2012).

26. *Id.* at 2505, 2510.

27. As Lucas Guttentag explains, "immigrant equality" is a "largely overlooked or forgotten" component of federal immigration preemption analysis, rooted in the Civil Rights Act of 1870, that prohibits states from discriminating between citizens and noncitizens "across a wide spectrum of civic life." Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL'Y 1, 3 (2013); see also Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1736, 1743 (2010) (arguing that although preemption "has become the challenge of choice" because of legal "obstacles to equal protection claims by unauthorized migrants," a preemption challenge can nonetheless be used to "persuade some judges based on [a] reasonable possibility of discriminatory intent"); Carrie L. Rosenbaum, *The Role of Equality Principles in Preemption Analysis of Sub-Federal Immigration Laws: The California TRUST Act*, 18 CHAP. L. REV. 481, 513 (2015) (contending that the "equality principle," or the idea that "everyone in the United States should be treated equally" regardless of immigration status, should be "considered in the preemption analysis").

28. See generally Linda S. Bosniak, Comment, *Immigrants, Preemption and Equality*, 35 VA. J. INT'L L. 179, 183 (1994) (noting that an "exclusive focus on the issue of state capacity to regulate immigration" can cause scholars to ignore "questions about the legitimacy of such [state] measures as they affect the immigrants themselves" (emphasis omitted)); Jenny-Brooke Condon, *The Preempting of Equal Protection for Immigrants?*, 73 WASH. & LEE L. REV. 77, 80 (2016) (observing that the sustained focus on immigration federalism "has overshadowed an essential dialogue regarding immigrants' rights").

29. As such, this research is related to Linda Bosniak's deep exploration of the justifications used by immigrant rights advocates to advance pro-immigrant policy. See Linda Bosniak, *Amnesty in Immigration: Forgetting, Forgiving, Freedom*, 16 CRITICAL REV. INT'L SOC. & POL. PHIL. 344, 345 (2013) (probing the arguments advanced by immigrant rights groups in support of amnesty).

30. See generally Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 582 (2012) (arguing that, notwithstanding the United States Supreme Court's decision in *Arizona*, "state and local law enforcement will substantially shape immigration

I. Immigrant Protective Policies in Four California Counties

Immigration enforcement is now intimately tied to the criminal justice system.³¹ Changes in immigration law passed in the 1990s have resulted in expanded criminal grounds for deportation, while eliminating many forms of relief and expanding mandatory detention laws.³² More immigrants than ever before are detained in prisons, jails, and federal facilities, often for long periods of time under adverse conditions.³³ Under priorities set by the United States Department of Homeland Security, noncitizens with criminal convictions now have the highest priority for deportation,³⁴ and a record proportion of federal removals are of convicted criminals.³⁵ Criminal prosecutions for illegally entering and reentering the United States constitute the largest category of federal prosecutions.³⁶

The close connection between immigration and criminal enforcement has created the potential for distortions in the criminal process along alienage

enforcement and the immigrant experience in the United States”); Gerald P. López, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711, 1729 (2012) (explaining that “state and local governments . . . have significantly influenced documented and undocumented immigration”); Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 169 (2013) (noting that “[c]ounties are widely acknowledged to be key American criminal justice players” and arguing that scholars should pay “closer attention” to understanding “their dynamics and impact”).

31. See generally Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 615 (2012) (expounding “the use of the criminal law as a means to effect immigration control”); Stumpf, *supra* note 23, at 377 (discussing the “confluence of criminal and immigration law”).

32. Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1891 (2000).

33. See generally César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1451 (2015) (discussing how “immigration detainees are confined in secure structures designed to include many of the hallmarks of prisons”); Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 LAW & SOC'Y REV. 117, 118 (2016) (chronicling increased immigration detention and lamenting the “enduring physical, psychological, and financial hardships” of detention).

34. See Johnson Removal Memo, *supra* note 1 (setting forth three categories of civil immigration enforcement priorities). For an excellent discussion of the current discretionary system for prioritizing criminal removals, see SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* 94–104 (2015) (considering the prioritization system and discussing various reactions to it) and Marjorie S. Zatz & Nancy Rodriguez, *The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement*, 39 LAW & SOC. INQUIRY 666 (2014) (drawing on interviews and archival data to understand how prosecutorial discretion is exercised in the immigration system).

35. See U.S. IMMIGRATION & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., FY 2015 ICE IMMIGR. REMOVALS (2015), <https://www.ice.gov/removal-statistics> [<https://perma.cc/8BR4-PNZL>] (illustrating the proportion of convicted criminals to non-criminals removed from 2008–2015).

36. See Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282, 2287 (2013) (acknowledging that “immigration crime is the largest single category of crime prosecuted by the federal government”); see also Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257, 1259 (2015) (noting that over the past decade the prosecution of “crimes of migration” has continued on an upward trajectory).

lines. Police officers engaged in routine enforcement of criminal law can enforce immigration to varying degrees while patrolling neighborhoods by prioritizing crimes such as driving without a license or by directly inquiring into immigration status.³⁷ Deputies at local jails can play a pivotal role in immigration screening by participating in federal programs that identify whether suspects are potentially subject to deportation and later hold those individuals for transfer into immigration custody.³⁸ Criminal prosecutors can exercise their charging authority in strategic ways that trigger unwanted immigration consequences.³⁹

In the sections that follow, I introduce the findings of my public records requests to the four California counties—Alameda, Los Angeles, Santa Clara, and Ventura. Tracking the stages of the criminal process, I first analyze police policies on the treatment of immigration status in routine patrols of city streets. Second, I discuss the district attorney policies for negotiating plea agreements with noncitizen defendants who might be subject to deportation following a conviction. Finally, I turn to policies that guide sheriff's deputies in responding to federal requests to transfer noncitizens detained in local jails into immigration custody.⁴⁰ As I describe, although there is variation in certain terms, the policies adopted in each of the four counties share an overall approach.

A. *Police Policies Barring Investigation of Immigration Violations*

The expansion of the criminal law to cover more conduct gives police broad discretion to arrest.⁴¹ With the simultaneous increase in immigration enforcement flowing from criminal arrests, police contact is now a critical first step in the deportation process.⁴² How police departments treat

37. See Lai, *supra* note 9, at 888 (arguing that the criminalization of driving without a license provides an opportunity for law enforcement officials to criminalize undocumented status by “proxy”); Paul G. Lewis et al., *Why Do (Some) City Police Departments Enforce Federal Immigration Law? Political, Demographic, and Organizational Influences on Local Choices*, 23 J. PUB. ADMIN. RES. & THEORY 1, 5, 11–12 (2013) (analyzing the “immigration enforcement practices of city police departments, as reported by police chiefs” and finding a range of practices, including both non-enforcement and pro-enforcement).

38. See generally Amada Armenta, *From Sheriff's Deputies to Immigration Officers: Screening Immigrant Status in a Tennessee Jail*, 34 LAW & POL'Y 191, 207 (studying how sheriff deputies conceptualize their role as immigration screeners in the local jail).

39. See Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 555 (2013) (“The vast majority of convictions are achieved by plea bargain, which means prosecutors can set the terms of the negotiation through their broad charging discretion.”).

40. This stage of transfer into immigration custody is discussed last because it frequently will occur after the criminal case is completed. However, it could also happen earlier in the criminal process—such as when the immigrant is released from criminal custody on bond.

41. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 511 (2001) (suggesting that contemporary criminal codes “cover more conduct than anyone really wishes to punish”).

42. See, e.g., Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1822

immigration status is therefore important to understanding how immigration enforcement functions in practice.⁴³

Immigration scholar Rick Su has argued that “departmental directives to guide the conduct of line-level officers” are preferable to having no such guidance, especially given the fact that immigration enforcement issues come up every day in the field and therefore officers regularly make ad hoc decisions about how to police immigration status.⁴⁴ However, a 2009 survey found that 61% of police departments had no “written departmental policy to guide officers in dealing with persons they encounter who they believe to be undocumented.”⁴⁵ This lack of guidance in the field on how to think about immigration status and whether to engage in immigration enforcement may be consistent with a similar absence of police policies for other policing topics. For example, a recent study by Brandon Garrett and Seth Stoughton found that many of the fifty largest police departments in the United States had no guidance whatsoever for their officers on issues as fundamental as whether to provide verbal warnings before using force.⁴⁶

To investigate how police departments in California counties handle the investigation of citizenship status, I submitted public records requests to the four largest cities with independent police departments in the counties studied.⁴⁷ I asked these sixteen city police departments for all policies

(2011) (noting that criminal arrests partially function as a gatekeeping tool for federal immigration enforcement).

43. For literature questioning the wisdom of allowing local law enforcement to police immigration in the context of criminal law, see 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, 987–1003 (2004), and Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1090–95 (2004).

44. See Su, *supra* note 9, at 901, 904–09 (documenting the increasing pressure on local police departments to establish an immigration enforcement policy); *Developments in the Law—Policing Immigrant Communities*, 128 HARV. L. REV. 1771, 1772 (2015) (arguing that immigration enforcement is now “indistinguishable from policing”).

45. Scott H. Decker et al., *On the Frontier of Local Law Enforcement: Local Police and Federal Immigration Law*, in 13 SOCIOLOGY OF CRIME, LAW AND DEVIANCE: IMMIGRATION, CRIME AND JUSTICE 261, 269 (William F. McDonald ed., 2009).

46. Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 102 VA. L. REV. (forthcoming 2017) (manuscript at 5, 32).

47. Data from the United States Census were used to determine the cities with the largest populations within each county. Next, only the cities with independent police departments (rather than contracts with the county sheriff) were selected. Using this methodology, the following police departments received requests for immigration-related policies: (1) Alameda County: Oakland Police Department, Fremont Police Department, Hayward Police Department, and Berkeley Police Department; (2) Los Angeles County: Los Angeles Police Department, Long Beach Police Department, Glendale Police Department, and Pomona Police Department; (3) Santa Clara County: San Jose Police Department, Sunnyvale Department of Public Safety—Police and Technical Services, Santa Clara Police Department, and Mountain View Police Department; and (4) Ventura County: Oxnard Police Department, Simi Valley Police Department, Ventura Police Department, and Santa Paula Police Department. See generally Lewis & Ramakrishnan, *supra* note 10, at 882 (finding in a statewide survey that 82 out of 474 California municipalities contracted out for police services, generally with the county sheriff).

guiding the extent to which law enforcement officers could or should investigate immigration status while going about their duties.

All sixteen departments responded to my request.⁴⁸ Three-fourths of the departments (twelve total) responded that they did have a written policy governing immigration enforcement.⁴⁹ One of these departments refused to produce its written policy.⁵⁰ The remaining eleven departments produced their policies for inclusion in this study—all of which contained some form of limitation on police engagement in enforcing immigration law. All but three of these police policies were adopted as part of a subscription to Lexipol, a private service that writes and updates policies and procedures for public safety organizations, including police departments.⁵¹ The inclusion of protective immigrant language as standard fare within the popular Lexipol service may signal that the policies highlighted in this Article have been adopted more broadly in California and other states.⁵²

Analysis of the California police policies is enhanced by taking into account Orde Kittrie's influential work describing three classic types of local police policies governing immigration investigation.⁵³ First, "don't ask" policies limit the police department's inquiries about a person's immigration

48. A table summarizing the responses from the sixteen departments I surveyed is contained in Appendix A. The Appendix is organized by county, with the independent city police departments surveyed listed based on city population size (from largest to smallest).

49. Only four of the sixteen police departments surveyed had no written policy on immigration enforcement: Berkeley Police Department, Long Beach Police Department, Santa Clara Police Department, and Sunnyvale Department of Public Safety. Nationally, far fewer police departments have written policies guiding their officers in the enforcement of immigration law. Linda M. Williams, *Beyond Enforcement: Welcomeness, Local Law Enforcement, and Immigrants*, 75 PUB. ADMIN. REV. 433, 437 (2015) (finding that 70% of departments in a national survey had no written immigration policy).

50. The Ventura Police Department refused to participate.

51. Eight of the eleven produced policies are marked with identifying language of the copyright stamp from "Lexipol, LLC." See *FAQs for Lexipol Law Enforcement*, LEXIPOL, <http://www.lexipol.com/law-enforcement/law-enforcement-faqs/> [https://perma.cc/2MVC-UWCM]. According to Lexipol promotional materials, its law enforcement policy manual service provides "state-specific policy management resources" that give police departments "customizable, reliable and regularly updated online policy manual service" as well as training and implementation services. *Id.* (select "What services does Lexipol offer?" hyperlink). These off-the-shelf policy manuals are designed to promote "uniformity for critical policies throughout each state." *Id.* (select "Is this a boilerplate or generic policy manual?" hyperlink).

52. Prior research has found that police departments without policies on immigration enforcement tend to be in smaller cities, suggesting that the lack of a policy may in part be due to the fact that their police forces have insufficient resources to prioritize the development of written policies. Decker et al., *supra* note 45, at 271–72. A service like Lexipol may address this issue by providing economy of scale that enables smaller cities to access standardized protocols. Lexipol promotes its service as allowing police departments to have "up-to-date policies" at "only a fraction" of the time that it takes to customize and maintain policies through an outside policy consultant. *Why Partner with Lexipol?*, LEXIPOL, <http://www.lexipol.com/law-enforcement/law-enforcement-why-lexipol> [https://perma.cc/D5XE-UUWL]. The standardized policies are also advertised as resulting in "fewer litigated claims, when compared to pre-Lexipol implementation." *Id.*

53. Kittrie, *supra* note 10, at 1455.

status.⁵⁴ Second, “don’t enforce” policies limit the ability of police departments to arrest and detain for immigration enforcement purposes.⁵⁵ Third, “don’t tell” policies bar local officers from sharing immigration status information with federal authorities.⁵⁶ These three typologies usually guide scholars’ descriptions of local police policies.⁵⁷

My research from the four California policies suggests that these three classic categories may be less relevant today. First, none of the police departments studied have a “don’t tell” policy that prohibits local officers from reporting individuals to immigration authorities. To the extent that such policies may have played a role in the past, they may now be outdated as a practical matter due to the creation of federal jail-based programs to affirmatively screen for immigration status by automatic crosschecking of fingerprints with federal immigration databases.⁵⁸ In addition, this omission likely reflects the fact that, since 1996, federal law has prevented states from interfering with the voluntary reporting of immigration violations by state and local employees to federal officials.⁵⁹ Although, as I discuss in this subpart, some of the policies guide officers about the appropriateness of a referral to immigration authorities, this kind of guidance cannot be properly characterized as a “don’t tell” ban.⁶⁰

54. *Id.*

55. *Id.*

56. *Id.*

57. For example, Peter Nyers refers to local municipalities adopting what he calls “Don’t Ask, Don’t Tell” or “DADT” policies that prohibit both asking about immigration status and sharing the information with government officials. Peter Nyers, *No One Is Illegal Between City and Nation*, 4 STUD. SOC. JUST. 127, 137 (2010). Nyers reports that “over fifty municipalities have adopted some kind of DADT policy.” *Id.*

58. Some of the police policies make this point explicitly. For example, Simi Valley’s policy states: “Except as described below, it is not necessary to notify ICE when booking arrestees at the county jail. Immigration officials routinely interview suspected undocumented aliens who are booked into the county jail. Notification should be handled according to jail operation procedures.” SIMI VALLEY POLICE DEP’T, POLICY MANUAL § 414.5 (2015).

59. 8 U.S.C. § 1373(a) (2012) (making it unlawful for any “Federal, State, or local government entity or official [to] prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual”); 8 U.S.C. § 1644 (2012) (barring enactment of local laws that prohibit voluntary communication with federal officials). See generally *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. 104-208, § 642, 110 Stat. 3009-546; *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999) (finding that the Tenth Amendment was not violated by federal statutes that preempted a city ordinance preventing city officials from voluntarily providing federal authorities with information about immigration status information unless certain conditions were met).

60. Los Angeles’s Special Order 40, discussed *infra* section I(A)(1), has survived a federal preemption challenge arguing that it impermissibly conflicted with 8 U.S.C. § 1373. *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 731–33 (Cal. Ct. App. 2009). In so ruling, the California Court of Appeal found that Special Order 40 only addressed the initiation of police action through questioning or arrest and had “no effect on the voluntary flow of immigration information between LAPD officers and ICE.” *Id.* at 733 (emphasis omitted).

Also, I find that the police policies cannot be neatly categorized as either “don’t ask” or “don’t enforce” policies. All of the collected police department policies advise officers to refrain from investigating *and* enforcing certain immigration laws. I refer to this set of prohibitions on investigation and overall enforcement as a “don’t police” type of rule.

My survey of the California police departments reveals that a more relevant categorization for these “don’t police” limitations on immigration enforcement distinguishes between those that instruct “don’t police civil immigration law” and those that go further and also instruct “don’t police criminal immigration law.” Merely being present in the United States without authorization is a civil violation of the immigration law, not an immigration crime.⁶¹ However, the act of illegal entry is a federal crime,⁶² as is reentering without permission after a prior deportation.⁶³ As the discussion that follows clarifies, this civil–criminal distinction in immigration law guides the California police policies governing encounters with noncitizens.

1. Don’t Police Civil Immigration Law.—All eleven police policies contain terms that limit the policing of civil violations of the immigration law. That is, under each of the collected policies, civil violations of immigration law standing alone are generally not sufficient for police action.

Los Angeles was the first of the departments studied to adopt a policy barring civil enforcement of the immigration law. In 1979, then Chief of Police Daryl Gates signed off on the policy, known as Special Order 40, which declares as follows:

[I]t is the policy of the Los Angeles Police Department that undocumented alien status in itself is not a matter for police action. It is, therefore, incumbent upon all employees of this Department to make a personal commitment to equal enforcement of the law and service to the public, regardless of alien status. . . . Officers shall not

61. *Gonzales v. City of Peoria*, 722 F.2d 468, 476 (9th Cir. 1983), *overruled on other grounds*, *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999) (noting that illegal presence in the United States is only a civil violation under the Immigration and Nationality Act).

62. Illegal entry is punishable by incarceration for up to six months. 8 U.S.C. § 1325(a) (2012). For an argument that the standard for proving illegal entry crimes ought to be higher in order to conserve enforcement resources for more serious crimes, see Victor C. Romero, *Decriminalizing Border Crossings*, 38 *FORDHAM URB. L.J.* 273 (2010); *see also* Ana Aliverti, *Exploring the Function of Criminal Law in the Policing of Foreigners: The Decision to Prosecute Immigration-Related Offences*, 21 *SOC. & LEGAL STUD.* 511, 512 (2012) (contending that immigration crime prosecution distorts the principle that the criminal law “should be reserved to censure serious wrongs”); Mary Fan, *The Case for Crimmigration Reform*, 92 *N.C. L. REV.* 75, 136 (2013) (arguing that the “expensive heavy artillery of criminal law” ought not be activated for simple illegal entry).

63. Sentences for illegal reentry after deportation can reach as high as twenty years for those with prior criminal convictions. 8 U.S.C. § 1326(b) (2012).

initiate police action with the objective of discovering the alien status of a person.⁶⁴

The language of the original order is now incorporated into the current Los Angeles police department manual: “Undocumented alien status in itself is not a matter for police action.”⁶⁵ In 2007, the Los Angeles City Council passed a resolution reaffirming its commitment to Special Order 40 as a policy that draws “important distinctions between local police and federal immigration.”⁶⁶

Following Special Order 40’s lead, language prohibiting reliance on immigration status as the basis for contact has been adopted by other police departments in the California counties. Oakland’s policy follows almost exactly: “The immigration status of individuals alone is not a matter for police action.”⁶⁷ Similarly, San Jose cautions that its department “will not initiate police action where the primary objective is to discover that the person is an undocumented immigrant or to discover the status of the person under civil immigration laws.”⁶⁸

Several of the policies also make clear that law enforcement may not engage in warrantless arrests based solely on suspected deportability. For example, policies adopted by Glendale, Hayward, and Pomona Police Departments all contain the following identical language: “the fact that an individual is suspected of being an undocumented alien shall not be the sole basis for contact, detention, or arrest.”⁶⁹ The Santa Paula and Simi Valley department policies explain that officers may not “detain any individual, for any length of time, for a civil violation of federal immigration laws or a related civil warrant.”⁷⁰ The Oakland Police have a similar policy, instructing that members of the Department:

SHALL NOT arrest any person solely on the basis of the person’s citizenship or status under any civil immigration laws;

64. L.A. POLICE DEP’T, OFFICE OF THE CHIEF OF POLICE, SPECIAL ORDER NO. 40, at 1 (1979) [hereinafter SPECIAL ORDER No. 40]. Special Order 40 repealed a prior Los Angeles Police order that had a pro-enforcement stance and required officers to “contact by phone an INS agent who would then interview the detainee” for suspected deportability regardless of whether the individual was booked on criminal charges. *Gates v. L.A. Superior Court*, 238 Cal. Rptr. 592, 595 (Cal. Ct. App. 1987). This provision was found by the California Court of Appeal to be unconstitutional because it “impermissibly intruded upon the federal preserve.” *Id.* at 600. For additional background on the history and implementation of Special Order 40, see Theodore W. Maya, Comment, *To Serve and Protect or to Betray and Neglect?: The LAPD and Undocumented Immigrants*, 49 UCLA L. REV. 1611 (2002).

65. L.A. POLICE DEP’T, 1 MANUAL OF THE LOS ANGELES POLICE DEPARTMENT § 390 (2005).

66. L.A. City Council Res. 07-0002-S133 (Cal. 2007).

67. OAKLAND POLICE DEP’T, ENFORCEMENT OF CIVIL IMMIGRATION LAWS 1 (2008).

68. SAN JOSE POLICE DEP’T, DUTY MANUAL, at L 7911 (May 15, 2015).

69. GLENDALE POLICE DEP’T, POLICY MANUAL § 415.3.1 (2015); HAYWARD POLICE DEP’T, POLICY MANUAL § 415.3.1 (2015); POMONA POLICE DEP’T, POLICY MANUAL § 428.3.1 (2014).

70. SANTA PAULA POLICE DEP’T, POLICY MANUAL § 415.4 (2016); SIMI VALLEY POLICE DEP’T, *supra* note 58, § 414.4.

SHALL NOT arrest any person based solely on a “civil immigration detainer” or “administrative warrant of removal” appearing in an NCIC warrant abstract “hit.” DO NOT CALL ICE to confirm the “warrant.”⁷¹

Such local practices follow the United States Supreme Court’s decision in *Arizona v. United States*, which warned that local police may not engage in warrantless arrests of migrants based solely on a belief of “possible removability.”⁷²

In compliance with federal law, none of the studied policy manuals actually prevents officers from voluntarily reporting civil immigration violations to immigration officials. Several of the policies make this point explicitly. For instance, Glendale, Hayward, and San Jose all provide that nothing “in this policy is intended to restrict officers from exchanging legitimate law enforcement information with any other federal, state or local government entity.”⁷³ Oakland’s policy similarly proclaims: “Nothing in this order shall be construed to prohibit or in any way restrict persons authorized by the Office of the Chief of Police from sending to or receiving from the U.S. ICE information regarding citizenship or immigration status”⁷⁴

Importantly, however, many of the police department policies from the four counties also contain affirmative requirements that officers make referrals to ICE,⁷⁵ at least in the context of enforcing more serious criminal law violations.⁷⁶ The Los Angeles Police Department clarifies that if an

71. OAKLAND POLICE DEP’T, *supra* note 67, at 3 (emphasis in original). The importance of policies explaining to officers to not call ICE about an administrative warrant of removal recently received national attention when an undocumented San Francisco resident, Pedro Figueroa, ended up in deportation proceedings after reporting to police that his car was stolen. Richard Gonzales, *Man Reports Car Stolen, Ends Up in Deportation Limbo*, NPR (Feb. 16, 2016), <http://www.npr.org/2016/02/16/465278302/the-curious-case-of-the-man-in-the-u-s-illegally-and-his-stolen-car> [<https://perma.cc/F73E-7BYT>].

72. *Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012). In *Arizona*, the Supreme Court invalidated a provision of the State of Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act (referred to as S.B. 1070), which provided that state and local law enforcement officers “without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States.” *Id.* at 2498, 2505 (quoting ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (2011)) (alterations in original). The Court explained that this arrest policy would improperly “allow the State to achieve its own immigration policy” and to engage in “unnecessary harassment of some aliens . . . whom federal officials determine should not be removed.” *Id.* at 2506.

73. GLENDALE POLICE DEP’T, *supra* note 69, § 415.4; HAYWARD POLICE DEP’T, *supra* note 69, § 415.4; SAN JOSE POLICE DEP’T, *supra* note 69, at L 7911.

74. OAKLAND POLICE DEP’T, *supra* note 67, at 2.

75. In *Arizona v. United States*, the Supreme Court ruled that Section 2(B) of Arizona’s S.B. 1070 law, which required state police to check immigration status during lawful criminal stops, was not preempted by federal law. *Arizona*, 132 S. Ct. at 2510. For a critical analysis of the Court’s preemption decision and important historical background, see Chacón, *supra* note 30, at 578 & n.7, 609–17, and López, *supra* note 29, at 1797–1810.

76. These policies are also consistent with findings from a national survey of law enforcement executives that found that police departments were more likely to check immigration status and contact ICE when dealing with individuals arrested for a violent crime (almost 90% would contact

“undocumented alien is booked for multiple misdemeanor offenses, a high grade misdemeanor or a felony offense,” the officer shall telephonically notify Detective Headquarters and mark the arrest-face sheet “Undocumented Alien.”⁷⁷ Fremont’s policy explains that certain crimes, including “violent felonies” and “significant misdemeanors,” may constitute “a basis for a notification” to ICE.⁷⁸ Police departments in Glendale, Mountain View, Oxnard, Pomona, Santa Paula, and Simi Valley all require referral of persons arrested for felonies to immigration authorities.⁷⁹ However, any such immigration referral remains discretionary for less serious crimes not requiring booking into the county jail.⁸⁰ Moreover, before referring low-level arrestees to immigration authorities, officers are cautioned to consult with a supervisor and weigh the totality of the circumstances, including the seriousness of the offense, community safety, the burden on immigration officials, and the impact on the immigrant community.⁸¹

2. *Don’t Police Criminal Immigration Law.*—Although the studied police policies are all consistent in rejecting investigation of *civil* immigration violations not associated with criminal conduct, they vary in their protocol for enforcing *criminal* violations of federal immigration law.⁸² Of the eleven responsive policies, nine contain detailed terms governing how

as opposed to a mere traffic violation (just over 20% would contact). Scott H. Decker et al., Appendix G: Immigration and Local Policing: Results from a National Survey of Law Enforcement Executives, *Appendix* to ANITA KHASHU, THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES 169, 177 fig.7 (2009), <https://www.policefoundation.org/wp-content/uploads/2015/07/Khashu-2009-The-Role-of-Local-Police.pdf> [<https://perma.cc/ZK3V-HKTV>].

77. SPECIAL ORDER No. 40, *supra* note 64.

78. FREMONT POLICE DEP’T, POLICY MANUAL § 428.8 (2016).

79. GLENDALE POLICE DEP’T, *supra* note 69, § 428.3.7; MOUNTAIN VIEW POLICE DEP’T, POLICY MANUAL § 4.27.3.7 (2016); OXNARD POLICE DEP’T, POLICY MANUAL § 428.3.7 (2013); POMONA POLICE DEP’T, *supra* note 69, § 428.3.7; SANTA PAULA POLICE DEP’T, *supra* note 70, § 415.5; SIMI VALLEY POLICE DEP’T, *supra* note 58, § 414.5.

80. GLENDALE POLICE DEP’T, *supra* note 69, § 428.3.7; MOUNTAIN VIEW POLICE DEP’T, *supra* note 79, § 427.3.7; OXNARD POLICE DEP’T, *supra* note 79, § 428.3.7; POMONA POLICE DEP’T, *supra* note 69, § 428.3.7; SANTA PAULA POLICE DEP’T, *supra* note 70, § 415.5; SIMI VALLEY POLICE DEP’T, *supra* note 58, § 414.5.

81. GLENDALE POLICE DEP’T, *supra* note 69, § 428.3.7; MOUNTAIN VIEW POLICE DEP’T, *supra* note 79, § 427.3.7; OXNARD POLICE DEP’T, *supra* note 79, § 428.3.7; POMONA POLICE DEP’T, *supra* note 69, § 428.3.7; SANTA PAULA POLICE DEP’T, *supra* note 70, § 415.5; SIMI VALLEY POLICE DEP’T, *supra* note 58, § 414.5.

82. Immigration scholar Hiroshi Motomura has questioned the wisdom of allowing the federal government to abdicate its responsibility to determine which potentially removable noncitizens to bring in contact with federal prosecutors for immigration crime prosecution. Motomura, *supra* note 40, at 1826. As he explains, the fact that almost certain deportation follows from an arrest for an immigration crime makes the point of arrest the “discretion that matters” in shaping civil enforcement patterns. *Id.* Therefore, when local officers make discretionary arrest decisions, they not only engage in policing of the criminal immigration violation but also trigger the deportation consequences that follow. *Id.* at 1833.

police should respond to criminal immigration violations.⁸³ Six of these departments contain protective terms that advise against using law enforcement resources to enforce criminal immigration violations. The remaining three policies do not expressly ban such enforcement, but instead guide officers on specific, articulable factors that are necessary to identify criminal violations of the immigration law in the field.

Los Angeles Police Department's policy limits enforcement of the criminal-immigration law. In the relevant passage, the policy prohibits officers from arresting individuals suspected of illegal entry:

Officers shall not initiate police action where the objective is to discover the alien status of a person. Officers shall neither arrest nor book persons for violation of Title 8, Section 1325 of the United States Immigration Code (Illegal Entry).⁸⁴

This portion of the Los Angeles Police Department policy repealed a prior provision found in Special Order 68 that allowed arrests for illegal entry.⁸⁵ The California Court of Appeal found that the prior policy impermissibly “violated state law because it purported to authorize arrests for misdemeanors which had not occurred in an officer’s presence.”⁸⁶

Police departments in Glendale, Hayward, Mountain View, Oxnard, and Pomona have adopted a similar protective policy that limits the enforcement of criminal immigration law. Each policy contains the following identical language:

The U.S. Immigration and Customs Enforcement (ICE) has primary jurisdiction for enforcement of the provisions of Title 8, United States Code dealing with illegal entry. When assisting ICE at its specific request, or when suspected criminal violations are discovered as a result of inquiry or investigation based on probable cause originating from activities other than the isolated violations of 8 USC § 1304; 8 USC § 1324; 8 USC § 1325 and 8 USC § 1326, this department may assist in the enforcement of federal immigration laws.⁸⁷

83. San Jose’s policy does not address criminal immigration violations. SAN JOSE POLICE DEP’T, *supra* note 68, at L 7911. Oakland’s policy simply advises officers to enforce criminal warrants for immigration violations in the same way that they would other criminal warrants. OAKLAND POLICE DEP’T, *supra* note 67, at 4.

84. LOS ANGELES POLICE DEP’T, 4 MANUAL OF THE LOS ANGELES POLICE DEPARTMENT § 264.50 (2015).

85. *Gates v. Superior Court*, 193 Cal. App. 3d 205, 218 (Cal. Ct. App. 1987).

86. *Id.* at 215, 218 (citing CAL. PENAL CODE § 836 (West 2016), which provides that peace officers in California may only arrest for a misdemeanor “when a public offense is committed in the officer’s presence”).

87. GLENDALE POLICE DEP’T, *supra* note 69, § 428.2 (styling the statutes in a slightly different way: “Title 8, U.S.C. §§ 1304, 1324, 1325, and 1326. . .”); HAYWARD POLICE DEP’T, *supra* note 69, § 415.2 (styling the policy in a slightly different way: “[T]his department may assist in the enforcement of federal immigration laws as described in [§§] 415.3.2 and 415.3.3”); MOUNTAIN VIEW POLICE DEP’T, *supra* note 79, § 428.2; OXNARD POLICE DEP’T, *supra* note 79, § 428.2; POMONA POLICE DEP’T, *supra* note 69, § 428.2.

Although the quoted policy language does not actually prohibit arrests or bookings for illegal entry prosecutions, it does make clear that federal authorities have “primary jurisdiction for enforcement” of immigration offenses contained in Title 8.⁸⁸ In addition, the policy contains a crucial limitation that local officers cannot investigate federal immigration crimes on their own—but rather may only do so if they discover such activity “as a result of inquiry or investigation based on probable cause originating from activities other than” the immigration crime violation.⁸⁹

Three police departments (Freemont, Santa Paula, and Simi Valley) have policies that clarify that officers may detain and arrest persons suspected of violating the federal criminal immigration laws.⁹⁰ For example, Simi Valley’s police department policy provides: “An officer may detain an individual when there are facts supporting a reasonable suspicion that the individual entered into the United States in violation of a federal criminal law.”⁹¹ In allowing for criminal immigration enforcement, however, all three cities provide their officers with some guidance about the kind of suspicion necessary to identify a violation of the criminal immigration law. Specifically, the policies advise that officers should “weigh the totality of the circumstances” in considering whether there is reasonable suspicion that a criminal immigration violation has occurred, including the following factors:

- (a) An admission that the person entered the United States illegally.
- (b) Reason to suspect that the person possesses immigration documentation that is forged, altered or otherwise indicative that the person is not legally present in the United States.
- (c) Other factors based upon training and experience.⁹²

Additionally, all three policies caution that reasonable suspicion of any immigration crime “shall not be based on race, color, national origin or any other generalization that would cast suspicion on or stigmatize any person, except to the extent permitted by the United States or California Constitutions.”⁹³

88. *E.g.*, MOUNTAIN VIEW POLICE DEP’T, *supra* note 79, § 428.2; OXNARD POLICE DEP’T, *supra* note 79, § 428.2.

89. GLENDALE POLICE DEP’T, *supra* note 69, § 428.2; HAYWARD POLICE DEP’T, *supra* note 69, § 415.2; MOUNTAIN VIEW POLICE DEP’T, *supra* note 79, § 428.2; OXNARD POLICE DEP’T, *supra* note 79, § 428.2; POMONA POLICE DEP’T, *supra* note 69, § 428.2.

90. FREMONT POLICE DEP’T, *supra* note 78, § 428.4; SANTA PAULA POLICE DEP’T, *supra* note 70, § 415.4; SIMI VALLEY POLICE DEP’T, *supra* note 58, § 414.4.

91. SIMI VALLEY POLICE DEP’T, *supra* note 58, § 414.4.

92. FREMONT POLICE DEP’T, *supra* note 78, § 428.4.1; SANTA PAULA POLICE DEP’T, *supra* note 70, § 415.4.1 (adding an extra factor before factor (c) above: “(c) While a lack of English proficiency may be considered, it should not be the sole factor in establishing reasonable suspicion. When practicable, reasonable effort should be made to accommodate persons with limited English proficiency.”); SIMI VALLEY POLICE DEP’T, *supra* note 58, § 414.4.1 (same).

93. FREMONT POLICE DEP’T, *supra* note 78, § 428.4.1; SANTA PAULA POLICE DEP’T, *supra* note 70, § 415.4.1; SIMI VALLEY POLICE DEP’T, *supra* note 58, § 414.4.1.

In conclusion, this subpart has shown, first, that police departments in all four counties have adopted “don’t police civil immigration law” policies that bar their officers from investigating immigration status in an effort to enforce the civil immigration law. These civil enforcement bans are, however, tempered in many cases by guidance that advises police to refer persons arrested for crimes to immigration enforcement authorities. Second, there is more variability with respect to “don’t police criminal immigration law” policies: some departments have adopted criminal immigration bans, while others have incorporated explicit rules advising officers on how to go about enforcing criminal immigration law.

B. Prosecutorial Policies to Weigh Deportation Penalties in Plea Bargaining

Legal consequences of a guilty plea are often described as either “direct” or “collateral.”⁹⁴ Direct consequences include the fact of conviction and the criminal justice sentence that follows, which may include incarceration, fines, and community supervision.⁹⁵ Collateral consequences include an array of enmeshed penalties, such as eligibility for public benefits, professional licenses, the right to own a firearm, and even deportation from the United States.⁹⁶

In *Padilla v. Kentucky*,⁹⁷ the United States Supreme Court recognized the harshness of deportation as a punishment for noncitizens convicted of crimes. The Court characterized deportation as a “drastic measure” that is an “integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”⁹⁸ Moreover, the Court explained that deportation’s “close connection to the criminal process” makes it “uniquely difficult to classify as either a direct or collateral consequence.”⁹⁹ As a result, the Court concluded that the Sixth Amendment imposes an obligation on criminal defense counsel

94. “Collateral consequences,” including the immigration consequence of deportation, can be distinguished from “direct consequences” of a criminal conviction or guilty plea, such as a period of incarceration, supervision, or a fine. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700–04 (2002); see also MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW POLICY AND PRACTICE § 1:2 (2016 ed.) (providing an introduction to the concept of collateral consequences).

95. LOVE, *supra* note 94, § 2:66.

96. *Id.* §§ 1:2, 2:47.

97. 559 U.S. 356 (2010).

98. *Id.* at 360–64 (holding that a defense attorney’s failure to advise her client of the immigration consequence of a guilty plea falls below the minimum standard for effective counsel).

99. *Id.* at 366. For a discussion of how the criminal justice system has become “not only larger, but also more legally hybrid” and reliant on “civil ‘alternatives’ to invalidated criminal statutes,” such as deportation and immigration detention, see Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 THEORETICAL CRIMINOLOGY 221, 221–22 (2012).

to advise noncitizens of the potential immigration consequences of a guilty plea.¹⁰⁰

The Court's analysis in *Padilla* underscores the modern reality that criminal prosecutors are what Stephen Lee calls "gatekeepers" in the immigration removal system.¹⁰¹ The continuous focus on "criminal aliens" in a criminal justice system where the vast majority of criminal cases are resolved by plea places the prosecutor's discretionary decisions on charge and plea offers front and center in the deportation equation.¹⁰² Yet, despite their de facto power to control immigration outcomes, prosecutors have traditionally been hesitant to take immigration penalties into account in resolving criminal cases.¹⁰³ This hesitancy marks the traditional assumption that criminal prosecutors ought to only focus on the statutory penalty found in the criminal law.¹⁰⁴ It may also reflect personal beliefs of prosecutors that it would be unfair to give a deal to a noncitizen that is not also offered to citizens.¹⁰⁵ Some prosecutors may also still be unfamiliar with their

100. *Padilla*, 559 U.S. at 366. For analysis of how *Padilla* impacted the role of defense counsel, see César Cuauhtémoc García Hernández, *Criminal Defense After Padilla v. Kentucky*, 26 GEO. IMMIGR. L.J. 475, 485 (2012) (delineating the practical mandate of *Padilla* for defense counsel); Andrés Dae Keun Kwon, Comment, *Defending Criminal(ized) "Aliens" After Padilla: Toward a More Holistic Public Immigration Defense in the Era of Crimmigration*, 63 UCLA L. REV. 1034, 1040 (2016) (arguing that the holistic model of criminal defense can help to improve the quality of defender services for immigrants); Rebecca Sharpless, *Clear and Simple Deportation Rules for Crimes: Why We Need Them and Why It's Hard to Get Them*, 92 DENV. U. L. REV. 933, 933 (2013) (arguing that *Padilla* requires criminal defense attorneys to advise their clients of "predictable" outcomes, "even if they are difficult to ascertain" due to the complexity of immigration law); Katherine Brady & Angie Junck, *Steps to Advising a Noncitizen Defendant Under Padilla v. Kentucky*, IMMIGRANT LEGAL RESOURCE CTR. (Apr. 15, 2010), <https://www.probono.net/library/attachment.171727> [<https://perma.cc/8P9X-3A5Q>] (setting forth the requirements for competent representation under *Padilla*).

101. Lee, *supra* note 39, at 608 (demonstrating that *Padilla* "increased the ability of prosecutors to act as gatekeepers within the larger [immigration] removal system"). See also David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 117 J. CRIM. L. & CRIMINOLOGY (forthcoming 2016) (manuscript at 9–10) (contending that it is the "mediating" role of prosecutors that has allowed them to achieve immense power in the criminal justice system).

102. As the United States Supreme Court has noted, guilty pleas constitute 97% of federal criminal convictions and 94% of state criminal convictions. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

103. In 2011 I surveyed fifty of the largest county-level prosecutor offices and found that the majority had no written policy guiding prosecutors on how to weigh deportation penalties in plea bargaining. Eagly, *supra* note 5, at 1152–53, 1153 tbl.1. For a classic treatment of the role of internal office policies to guide the prosecutor's exercise of discretion, see Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971).

104. As Robert Johnson explained when he was President of the National District Attorneys Association, the lack of prosecutorial policies on immigration consequences is in part due to the outdated belief that prosecutors do not "control the whole range of restrictions and punishment imposed on an offender." Robert M. A. Johnson, *Message from the President: Collateral Consequences*, THE PROSECUTOR, May–June 2001, at 5, 5.

105. Heidi Altman surveyed prosecutors in Kings County, New York immediately after *Padilla* and found that some prosecutors believed "it was unfair to offer a noncitizen a plea deal that differed in any way from what they would offer a similarly situated citizen; many of the respondents suggested this would be favoring noncitizens over citizens." Altman, *supra* note 10, at 34.

obligations under *Padilla* and related state law.¹⁰⁶ Since the *Padilla* decision was handed down, however, immigrant rights groups have begun to work with prosecutors' offices to adopt *Padilla* policies, including by drafting model policy language.¹⁰⁷

The Supreme Court, for its part, stressed in *Padilla* that taking deportation consequences into account in the bargaining process could result in plea agreements that "better satisfy the interests of both parties."¹⁰⁸ Defense counsel may be able to "craft a conviction and sentence that reduce the likelihood of deportation, [such] as by avoiding a conviction for an offense that automatically triggers the removal consequence."¹⁰⁹ Prosecutors can also benefit because "the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does."¹¹⁰

To investigate how the four California counties handle immigration consequences in plea bargaining, I sent public records requests to the district attorney's office in each county. I found that all four counties have adopted written policies that explicitly allow prosecutors to consider the adverse immigration consequences of deportation in arriving at an appropriate case disposition.¹¹¹ Analysis of the written terms of these detailed policies uncovers two distinct approaches to considering deportation penalties when resolving criminal cases—which I call *fair punishment* and *exacting a premium*.

With the fair punishment approach, prosecutors consider deportation consequences to be part of the overall punishment for the offense to be weighed in plea negotiations. As part of their duty to pursue justice, prosecutors identify cases in which imposing the severe sanction of deportation would be disproportionate, unfair, or unjust and work with defense counsel in the plea-bargaining process to mitigate these unjust outcomes, including by offering an alternative charge, agreeing to a

106. This may be less true in states that established a similar standard of competency on immigration consequences. Well before the Supreme Court's 2010 decision in *Padilla*, many states had already established a similar standard of competency on immigration consequences. *See, e.g.*, *People v. Bautista*, 8 Cal. Rptr. 3d 862, 872 (Cal. Ct. App. 2004) (holding that counsel's failure to advise defendant of immigration consequences of his guilty plea may have constituted ineffective assistance); *People v. Soriano*, 240 Cal. Rptr. 328, 336 (Cal. Ct. App. 1987) (holding that defendant was prejudiced by the institution of deportation proceedings against him because he was not adequately advised of the immigration consequences of his plea, and defendant was entitled to withdraw his guilty plea).

107. For example, the Immigrant Legal Resource Center (ILRC) published a model prosecution policy on *Padilla*. *Immigration Consequences, Charging Decisions, Dispositions and Sentencing in Light of Padilla v. Kentucky*, IMMIGRANT LEGAL RESOURCE CTR., https://www.ilrc.org/sites/default/files/resources/unit_7b_3_sample_da_padilla_policy_final.pdf [<https://perma.cc/XT5H-STZ4>].

108. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010).

109. *Id.*

110. *Id.*

111. A table summarizing the collected policies is contained in Appendix B.

substitute sanction, or dismissing the charge altogether.¹¹² The fair-punishment ideal reflects the idea, inherent in prosecutorial discretion, that sometimes applying harsh criminal laws “to a particular defendant or in a particular context would be unwise or unfair.”¹¹³ Prosecutors implementing this approach engage in case-specific fairness review by considering the package of sanctions as a whole.¹¹⁴

In contrast, under the approach that exacts a premium, prosecutors treat the potential avoidance of deportation as a benefit to be negotiated in exchange for a premium. If an immigrant asks for an alternative plea that avoids an unfavorable immigration consequence, he or she should be willing to accept additional punishment in exchange for this benefit. For example, in return for an immigration-safe plea, a noncitizen might agree to more custody time, a longer period of probation, or additional community service. This additional amount of punishment that endured above and beyond the standard plea arrangement is what I refer to as the premium.

1. Fair Punishment Approach.—All four county prosecutor policies under review contain aspects of a fair punishment approach. In 2003, Los Angeles became the first of the four counties to adopt a collateral consequences policy.¹¹⁵ An inter-office directive from then-District Attorney Steve Colley instructed deputy district attorneys as follows:

In order to arrive at the appropriate punishment for a criminal defendant, prosecutors routinely review and consider all relevant factors relating to the crime itself as well as all relevant factors relating to the defendant. In some cases the factors relating to the defendant include adverse collateral consequences that the defendant will suffer in addition to the direct consequences of the conviction. In many of

112. This view of deportation consequences is consistent with that articulated by the past President of the National District Attorneys Association, who urged prosecutors to consider collateral consequences in order to fulfill their duty to “seek justice.” Johnson, *supra* note 104, at 5. “As a prosecutor,” he explained, “you must comprehend [the] full range of consequences that flow from a crucial conviction.” *Id.*

113. Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1252 (2011); see also Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1421 (2011) (explaining that prosecutors who recognize “the significance of deporting those with meaningful ties to the United States” may decide to alter their plea offers so as “to avoid deportation altogether or to receive a reduced sentence in recognition of the grievous loss of deportation”).

114. A similar approach for case-specific fairness review has been proposed for sentencing courts by the American Law Institute (ALI), which urges judges to consider collateral consequences as part of a “package of sanctions” to weigh and “dispense with” if they would frustrate other purposes of sentencing. Margaret Colgate Love, *Managing Collateral Consequences in the Sentencing Process: The Revised Sentencing Articles of the Model Penal Code*, 2015 WIS. L. REV. 247, 263; see also Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1830 (2012) (arguing that the goals of sentencing “cannot be achieved without evaluating the total package of sentencing facing an individual”).

115. Special Directive 03-04 from Steve Cooley, L.A. Cty. Dist. Attorney, to all Deputy District Attorneys 1 (Sept. 25, 2003) [hereinafter Special Directive 03-04 from Steve Cooley].

these cases the adverse collateral consequences are appropriate and just. In other cases, collateral consequences can have so great an adverse impact on a defendant that the resulting punishment may not fit the crime.¹¹⁶

Under this written policy, deviation from standard settlement rules is “in the interest of justice” when “indirect or collateral consequences to the defendant in addition to the direct consequences of the conviction” constitute “unusual or extraordinary circumstances.”¹¹⁷ The policy recognizes that sometimes collateral consequences can “have a greater adverse impact on a defendant than the conviction alone.”¹¹⁸ When this situation occurs, “the resulting ‘punishment’ will be disproportionate to the punishment other defendants would receive for the same crime.”¹¹⁹

The other three counties adopted collateral consequences policies in the years following the *Padilla* decision. Alameda County’s policy similarly reflects the basic concept that immigration consequences can be so severe that they result in unfair punishment for the crime. In such cases where “it would be just to do so,” the policy explains that “it is appropriate” for prosecutors to engage in a “fact specific” inquiry in order “to arrive at a just resolution of a criminal case.”¹²⁰ This type of inquiry calls on prosecutors to consider deportation consequences that would be disproportionate to the charged conduct in structuring a plea. As the policy states: “It is generally considered appropriate to offer an accommodation if the collateral consequences are disproportionate to the crime and sentence being discussed.”¹²¹

Ventura County’s collateral consequences policy also calls on prosecutors to deviate from normal case disposition policy to avoid “unjust” outcomes for noncitizens.¹²² As the District Attorney’s Legal Policies Manual provides

Collateral consequences are generally a normal and just consequence of a criminal conviction. However, in unusual cases, the collateral consequences may be so disproportionate to the severity of the crime and to the criminal punishment imposed as to be unjust.¹²³

116. *Id.*

117. *Id.* at 1–2.

118. *Id.* at 2.

119. *Id.*

120. OFFICE OF THE DIST. ATTORNEY, ALAMEDA CTY., GUIDELINES REGARDING THE CONSIDERATION OF COLLATERAL IMMIGRATION CONSEQUENCES DURING PLEA NEGOTIATIONS 2 (Oct. 8, 2012).

121. *Id.*

122. OFFICE OF THE DIST. ATTORNEY, CTY. OF VENTURA, LEGAL POLICIES MANUAL § 4.01(A)(1) (Dec. 31, 2014); *see also id.* § 3.01(C) (extending felony policy on collateral consequences to misdemeanor cases).

123. *Id.* § 4.01(A)(1).

Thus, when immigration consequences would be “disproportionate” and result in an “unjust” outcome, a supervisor may approve a “deviation” from the regular “disposition policy” that will allow the defendant to “avoid such consequences.”¹²⁴

Santa Clara also embraces the fair punishment approach. As Santa Clara District Attorney Jeff Rosen wrote in a memorandum to his fellow prosecutors, it is necessary to explore collateral consequences alongside direct consequences “in order to discharge our highest duty to pursue justice.”¹²⁵ The office’s written policy acknowledges that when collateral impacts are “significantly greater” than the criminal punishment, special consideration is warranted to “mitigate those collateral consequences.”¹²⁶ Therefore, in reaching a case disposition, the assistant district attorney must carefully evaluate the facts of each case “to ensure equality and justice” and “make sure the punishment fits the crime.”¹²⁷

Finally, all four policies acknowledge that collateral consequences generally will not alter the resolution of the most serious criminal cases.¹²⁸ As both the Ventura and the Santa Clara policies explicitly provide: “In general, the less serious the crime, the more likely a collateral consequence will unjustly impact a settlement.”¹²⁹ Santa Clara’s policy similarly clarifies that it is “presumptively inappropriate” to consider collateral consequences in serious felony cases.¹³⁰ Los Angeles’s policy is less specific about case severity, but does acknowledge that in “many” cases “the adverse collateral consequences are appropriate and just” and that departures from normal felony or misdemeanor case settlement policy may be made only in “unusual or extraordinary circumstances.”¹³¹

124. *Id.*

125. Memorandum from Jeff Rosen, Santa Clara Cty. Dist. Attorney, to Fellow Prosecutors 2 (Sept. 14, 2011).

126. *Id.*

127. *Id.*

128. As research by Thea Johnson underscores, plea bargaining “creatively” may be harder with felonies, which generally carry “heavier sentences.” Thea Johnson, *Measuring Plea Bargaining*, 92 IND. L.J. (forthcoming 2017) (manuscript at 31). In interviews with public defenders she discovered that “many attorneys noted that it is easier to plead away the collateral consequences on a misdemeanor than on a felony.” *Id.* Yet, as Irene Joe warns, public defenders tend to focus their resources on felony cases and neglect misdemeanors. Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. (forthcoming 2017) (manuscript at 6).

129. OFFICE OF THE DIST. ATTORNEY, CTY. OF VENTURA, *supra* note 122, § 4.01(A)(1)(b) (styling the policy slightly differently as: “In general, the less serious the crime, the more likely a collateral consequence will unjustly impact the resolution of a case.”); Memorandum from Jeff Rosen, Santa Clara Cty. Dist. Attorney, to Fellow Prosecutors, *supra* note 125, at 4.

130. Memorandum from Jeff Rosen, Santa Clara Cty. Dist. Attorney, to Fellow Prosecutors, *supra* note 125, at 2 (referring to CAL. PENAL CODE § 667.5(c) (West 2016), which defines “violent felony”). California law also sanctions such an approach by formally prohibiting plea bargaining on serious felonies. CAL. PENAL CODE § 1192.7 (West 2016).

131. Special Directive 03-04 from Steve Cooley, *supra* note 115.

2. *Exacting a Premium Approach.*—Although all four county policies contain language consistent with a fair punishment approach, three of the written policies also endorse exacting a premium in exchange for an immigration-safe plea. Under this approach, the mitigation of an immigration penalty is seen as a benefit rather than a requirement of ensuring a just outcome. In exchange for this benefit, defendants are compelled to make a premium payment in the form of punishment above and beyond the normal plea arrangement for the crime at issue.

The policy of the Alameda County District Attorney illustrates the premium-exacting approach. The written policy provides that if immigrant defendants are given some form of modification, it is appropriate to expect a concession in return:

If the consideration of collateral consequences is deemed appropriate and some mitigating modification of an offered plea agreement is suggested, it is also appropriate to require some form of concession by the defendant (to make the resolution roughly equivalent to an offer made to a U.S. citizen). Examples would include more custody time or a longer period of probation.¹³²

Alameda's policy further clarifies that this bartering process "will necessarily be fact specific and require consideration of a variety of relevant factors. There is no specific formula that can be applied in every case."¹³³

Ventura County prosecutors are also advised that exacting "concession[s]" in exchange for an immigration-safe plea, including by "insist[ing] upon more custody time or a longer period of probation," is sometimes appropriate.¹³⁴ According to the terms of the policy, this tactic of demanding compensation in exchange for a plea modification offers the additional benefit to prosecutors of serving as a check that the defendant indeed faces a collateral consequence. As Ventura's written policy stresses, it is "unlikely that anyone would accept" a plea offer with more punishment "unless they were actually facing the claimed collateral consequence."¹³⁵

Finally, similar premium-exacting language is found in the collateral consequences policy adopted by the Santa Clara County District Attorney's Office. There, prosecutors are advised that if they decide "it is appropriate to alter a charge to arrive at an immigration neutral result," then in exchange

132. OFFICE OF THE DIST. ATTORNEY, ALAMEDA CTY., *supra* note 120, at 2.

133. *Id.*

134. OFFICE OF THE DIST. ATTORNEY, CTY. OF VENTURA, *supra* note 122, § 4.01(A)(1)(e).

135. *Id.* § 4.01(A)(1)(g). Eisha Jain refers to the prosecutorial practice of demanding verification that the consequence is in fact true as "authenticating collateral penalties." Rather than collecting information to literally verify immigration status, prosecutors rely on the acceptance of additional custody time as a proxy to test that the consequence is in fact authentic. Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1226 (2016).

they “might well decide to insist upon more custody time or a longer period of probation.”¹³⁶

In summary, my research reveals that all four California counties have adopted a fair punishment approach to mitigating collateral consequences for immigrants accused of crimes. That is, prosecutors can weigh whether deportation may be disproportionate to the criminal conduct at issue and, if so, may consider an alternative charge or plea arrangement that will arrive at an immigration-neutral result. The three county policies most recently adopted (Alameda, Santa Clara, and Ventura) also endorse an alternative approach, which I call exacting a premium. Here, the policies embrace the idea that removal of the collateral consequence functions as a benefit to the noncitizen that must be offset by a harsher punishment, such as more jail time or a larger fine.¹³⁷

C. Jail Policies Limiting Cooperation with Federal Detainer Requests

Since 2008, the Secure Communities program has reviewed fingerprint data collected when arrestees are booked into local jails.¹³⁸ These biometric data are relied on by immigration authorities to determine whether the arrestee is subject to possible deportation.¹³⁹ As previously explained, the federal government gives top deportation priority to individuals with criminal convictions.¹⁴⁰

136. Memorandum from Jeff Rosen, Santa Clara Cty. Dist. Attorney, to Fellow Prosecutors, *supra* note 125, at 4–5.

137. Eisha Jain argues that there are three possible frameworks for understanding how prosecutors are influenced by collateral consequences in the plea bargaining process. Under what she calls a “collateral enforcement model,” prosecutors see collateral consequences as a desirable aspect of a plea. Jain, *supra* note 135, at 1221. This approach is not observed in written policies of the California counties studied in this Article. Alternatively, Jain explains that prosecutors may adopt a “collateral mitigation model” that tries to reduce adverse collateral consequences; or a “middle ground,” which involves “substitut[ing] criminal and civil sanctions” for each other, a model that she calls “counterbalance.” *Id.* at 1202, 1215, 1226. My empirical analysis of the policies in the four counties complements Jain’s insightful work by identifying elements of both mitigation and counterbalance.

138. See generally Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87 (2013) (describing the rollout of Secure Communities).

139. See Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 5–6, 58 (2014) (analyzing the ways in which “new surveillance and dataveillance technologies” represent an important shift in how immigration is enforced and present underappreciated risks).

140. The tiered priorities in place under Secure Communities were set forth in a memo on prosecutorial discretion. See Memorandum from John Morton, Dir. of U.S. Immigration & Customs Enforcement, to all Immigration & Customs Enforcement Employees (Mar. 2, 2011), http://www.ice.gov/doclib/foia/prosecutorial-discretion/civil-imm-enforcement-priorities_app-detr-reml-aliens.pdf [<https://perma.cc/VMH6-YVR9>] (giving immigrants with criminal convictions priority status for deportation). A similar set of priorities are in force under the new PEP program. See Johnson Removal Memo, *supra* note 1, at 1–4 (setting forth three categories of civil immigration enforcement priorities with immigrants convicted of offenses classified as felonies or “aggravated felonies” receiving top priority). For a helpful review of the development of formalized standards for exercising prosecutorial discretion in immigration law, see Jill E. Family, *The Executive Power of Process in Immigration Law*, 91 CHI.-KENT L. REV. 59, 64–69 (2016).

The central tool that federal authorities rely on to link fingerprint screening in local jails with deportation is a “detainer request.”¹⁴¹ A detainer is a written request to hold the immigrant for up to forty-eight hours beyond the regular scheduled release from criminal custody (e.g., after posting bond, having a criminal case dismissed, or completing a sentence) so that immigration officials have time to transfer the person into immigration detention.¹⁴²

Although Secure Communities was promoted as a way to make communities more “secure” by deporting serious criminals, in practice many immigrants transferred into immigration custody using detainer requests were convicted of only minor misdemeanors or no crime at all.¹⁴³ Critics also found that the program failed to reduce crime rates.¹⁴⁴ In late 2014, Homeland Security Secretary Jeh Johnson announced the end of Secure Communities, disclosing that so many localities have “refused to cooperate” in honoring detainers that even the name “Secure Communities” has become “a symbol for general hostility toward the enforcement of our immigration laws.”¹⁴⁵

141. See 8 C.F.R. § 287.7(a) (2016) (defining the term “detainer” as a voluntary request that the law enforcement agency advise immigration officials “prior to release of the alien” so that the immigration officials can “arrange to assume custody”).

142. For the most recent version of the federal detainer form, see DEP’T HOMELAND SEC., FORM I-247D: IMMIGRATION DETAINER—REQUEST FOR VOLUNTARY ACTION (May 2015), <https://www.ice.gov/sites/default/files/documents/Document/2016/I-247D.PDF> [<https://perma.cc/9YBH-C9MD>] [hereinafter FORM I-247D].

143. Chris Strunk & Helga Leitner, *Redefining Secure Communities*, THE NATION (Dec. 21, 2011), <http://www.thenation.com/article/redefining-secure-communities/> [<https://perma.cc/RH7W-RBKU>] (reporting that as of November 30, 2011, “54 percent of immigrants processed through the [Secure Communities] program were guilty of committing a misdemeanor offense or were never charged with a crime”). A study by the Migration Policy Institute of another cooperative immigration enforcement program known as 287(g) similarly found that the initiative did not target serious offenders. RANDY CAPPES ET AL., MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 2 (2011).

144. See Thomas J. Miles & Adam Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & ECON. 937, 969 (2014) (finding that Secure Communities did not cause a reduction in the overall index crime rate nor in the rate of individual violent offenses); see also Charis E. Kubrin, *Secure or Insecure Communities?: Seven Reasons to Abandon the Secure Communities Program*, 13 CRIMINOLOGY & PUB. POL’Y 323, 324 (2014) (discussing empirical studies that found no statistically discernible effects of the program on any type of crime).

145. Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski et al. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [<https://perma.cc/B6AL-WC4M>] [hereinafter Johnson Secure Communities Memo]; see also Jerry Markon, *DHS Deportation Program Meets with Resistance*, WASH. POST (Aug. 3, 2015), https://www.washingtonpost.com/politics/dhs-finds-resistance-to-new-program-to-deport-illegal-immigrants/2015/08/03/4af5985c-36d0-11e5-9739-170df8af8eb9_story.html [<https://perma.cc/PJW4-J5ST>] (explaining that “[m]ore than 350 communities had ended or dialed back their participation” in Secure Communities).

Federal officials instead began a new program known as the Priority Enforcement Program (PEP).¹⁴⁶ Like Secure Communities, PEP relies on the willingness of local jail authorities to voluntarily cooperate with federal enforcement requests.¹⁴⁷ In addition, the process of receiving and reviewing biometric information that was begun under Secure Communities remains unchanged.¹⁴⁸

PEP did make several notable changes to Secure Communities.¹⁴⁹ Significantly, PEP now uses “requests for notification” in addition to detainer requests.¹⁵⁰ Unlike a detainer that requests that the immigrant be held past the normal time of release, a notification request simply asks for advanced notice of the upcoming release so that ICE can pick up the immigrant from the local jail.¹⁵¹ The significance of notification requests for local resistance to immigration enforcement is discussed in subpart III.C of this Article. This subpart, however, focuses on county policies for responding to detainer requests, which are still part of PEP and may expand further under the Trump administration.¹⁵² Given that compliance with these detainer requests is

146. U.S. IMMIGRATION & CUSTOMS ENF’T, PRIORITY ENFORCEMENT PROGRAM, <https://www.ice.gov/pep> [<https://perma.cc/6P7C-UH7S>] [hereinafter PRIORITY ENFORCEMENT PROGRAM]. Cristina Rodríguez has described the new PEP program as an effort to respond to “local pressures” to achieve a “fair and legitimate system of enforcement.” Cristina M. Rodríguez, *Toward Détente in Immigration Federalism*, 30 J.L. & POL. 505, 507 (2015). However, immigrant rights groups have continued to urge localities to not participate in PEP. See Markon, *supra* note 145.

147. PRIORITY ENFORCEMENT PROGRAM, *supra* note 146.

148. *Id.* (found under the “How is PEP different from Secure Communities” tab).

149. For an excellent discussion of how PEP addresses concerns raised about the Secure Communities Program, see David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 411, 453–54 (2015). For a helpful comparison of PEP and Secure Communities, see NAT’L IMMIGRATION LAW CTR., PRIORITY ENFORCEMENT PROGRAM: WHY ‘PEP’ DOESN’T FIX S-COMM’S FAILINGS 1–4 (June 2015), <http://www.nilc.org/PEPnotafix.html> [<https://perma.cc/JH9H-F5YE>].

150. See Johnson Secure Communities Memo, *supra* note 145, at 2 (“I am directing ICE to replace requests for detention (*i.e.*, requests that an agency hold an individual beyond the point at which they would otherwise be released) with requests for notification (*i.e.*, requests that state or local law enforcement notify ICE of a pending release during the time that person is otherwise in custody under state or local authority).” (emphasis in the original).)

151. *Id.*; see also DEP’T HOMELAND SEC., FORM I-247N: REQUEST FOR VOLUNTARY NOTIFICATION OF RELEASE OF A SUSPECTED PRIORITY ALIEN (2015), <https://www.ice.gov/sites/default/files/documents/Document/2016/I-247N.PDF> [<https://perma.cc/B3VE-T48Y>] [hereinafter FORM I-247N] (requesting that authorities “[p]rovide notice as early as practicable (at least 48 hours, if possible) before the subject is released from your custody to allow DHS an opportunity to determine whether there is probable cause to conclude that he or she is a removable alien”).

152. See Johnson Secure Communities Memo, *supra* note 145, at 2 (acknowledging that ICE may still use detainer requests in “special circumstances”); DEP’T HOMELAND SEC., FORM I-247D: IMMIGRATION DETAINER—REQUEST FOR VOLUNTARY ACTION (2015), <https://www.ice.gov/sites/default/files/documents/Document/2016/I-247D.PDF> [<https://perma.cc/4MFA-W5TF>]. In addition to I-247D detainer forms, ICE has begun to use a new form known as a “request for voluntary transfer,” or Form I-247-X. According to ICE, this form requests that immigrants are held by the law enforcement agency for up to forty-eight hours beyond the scheduled release time, and also applies to immigrants who do not fall under PEP’s enforcement priorities. PRIORITY ENFORCEMENT PROGRAM, *supra* note 146. See also *Transcript of Donald Trump’s Immigration*

voluntary,¹⁵³ localities must craft their own internal policies on whether to hold immigrants beyond the normal point of release.¹⁵⁴

To investigate how the four California counties currently respond to detainer requests from federal authorities, I issued public records requests to the sheriffs who run the county jails.¹⁵⁵ All four departments provided a written policy on the topic.¹⁵⁶ As this subpart explains, the county policies contain three distinct types of detainer restrictions. First, a *fiscal restriction* limits cooperation with detainer requests unless the federal government reimburses the county for the expenses associated with facilitating federal-immigration enforcement. Second, a *Fourth Amendment restriction* prevents officers from complying with detainer requests absent a probable cause finding by the immigration agency that the immigrant is in fact subject to removal. Third, a *conviction severity restriction* refuses to respond to detainers requesting individuals who have not been convicted of a crime or only convicted of a minor misdemeanor.

1. Fiscal Restriction.—The first type of restriction on detainer enforcement—a fiscal restriction—has only been expressly incorporated into Santa Clara County’s policy. The Santa Clara policy governing the county sheriff was adopted by the County’s Board of Supervisors in 2011.¹⁵⁷ The rationale for banning the use of county resources on detainer compliance

Speech, *supra* note 4 (promising to “restore” the Secure Communities program and “expand and vitalize” the 287(g) partnerships, both of which rely on immigration detainers).

153. DEP’T HOMELAND SEC., FORM I-247D: IMMIGRATION DETAINER—REQUEST FOR VOLUNTARY ACTION; *see supra* note 152 and accompanying text.

154. PEP now makes explicit that participation by localities is voluntary. PRIORITY ENFORCEMENT PROGRAM, *supra* note 146 (noting that PEP enables federal officials to work with “cooperating states or localities”). For a discussion of pro-enforcement detainer policies in locations such as Arizona and Texas, *see Chen*, *supra* note 10, at 40–42.

155. Some cities within the four counties studied have their own jail facilities. These city detention facilities are generally Type I or Temporary Holding facilities that may only be used to detain individuals for short periods of time after booking, rather than for detention pending arraignment or during trial. *See generally* CAL. CODE REGS. tit. 15, § 1006 (2016) (defining California facility types); *Jail*, LONG BEACH POLICE, <http://www.longbeach.gov/police/about-the-lbpd/bureaus/support-bureau/jail-division/> [<https://perma.cc/WCA4-JPWX>] (providing that the Long Beach City Jail is a “Type I” facility that can only house arrestees “for no more than 96 hours excluding holidays”). Immigration policies that apply to these city jails are not studied in this Article. However, it is relevant to note that the largest of these jails is the Los Angeles City Jail, which has adopted a policy to cease honoring all immigration detainers unless there is a judicial determination of probable cause or a warrant from a judicial officer. *See* Memorandum from Assistant to the Dir., Office of Special Operations, to All Jail Division Personnel, L.A. Police Dep’t (July 3, 2014) (on file with author).

156. A table summarizing the collected policies is contained in Appendix C.

157. *See* SANTA CLARA CTY. BD. OF SUPERVISORS, POLICY MANUAL, § 3.54 (Oct. 18, 2011) (establishing the detainer request policy for Santa Clara County law enforcement); E-mail from Johanna Luerra, Law Enf’t Records Technician, Office of the Sheriff, Santa Clara Cty., to Ingrid Eagly (July 31, 2015, 1:23 PM PST) (on file with author) (confirming that the Santa Clara Sheriff’s Office does not have an internal policy governing detainers, but rather follows the detainer policy adopted by the Santa Clara County Board of Supervisors).

appears in the legislative history to the enactment:

The costs associated with honoring detainees is neither the County's priority or in the County's best interest. A decade of significant budget cuts to public safety and safety net services, along with the new shift of responsibility from the State to the County for a large population of parolees and new sentencing requirements make ICE detainees a resource-intensive burden.¹⁵⁸

In accordance with this policy, Santa Clara's Sheriff will hold a limited category of "adult inmates for an additional 24-hour period after they would otherwise be released" on a civil detainer request only "so long as there is a prior written agreement with the federal government by which all costs incurred by the County in complying with the ICE detainer shall be reimbursed."¹⁵⁹ Since there is no agreement from federal authorities for reimbursement,¹⁶⁰ the county policy operates as an absolute ban on enforcement of all detainees.

2. *Fourth Amendment Restriction.*—Resistance to honoring federal immigration detainees is also rooted in constitutional concerns. Prolonging an immigrant's detention after the time that he or she would otherwise be released from criminal custody amounts to an arrest.¹⁶¹ In order to comply with the Fourth Amendment, detaining someone following an arrest requires a judicial determination of probable cause.¹⁶² As the United States Supreme Court stressed in striking down many of Arizona's anti-immigrant laws in 2012, "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns."¹⁶³

When localities agree to participate in the detainer process by holding people beyond their release dates,¹⁶⁴ they rely on the federal immigration

158. Memorandum from George Shirakawa, Dist. 2 Supervisor, Santa Clara Cty. Bd. of Supervisors, to the Pub. Safety and Justice Comm. on the Proposed Alternative Civil Detainer Policy (Oct. 5, 2011).

159. SANTA CLARA CTY. BD. OF SUPERVISORS, *supra* note 157, § 3.54.

160. See Letter from David Venturella, Assistant Dir., U.S. Immigration and Customs Enf't., to Miguel Márquez, Cty. Counsel, Cty. of Santa Clara, 3 (undated), <https://immigrantjustice.org/sites/immigrantjustice.org/files/Detainers%20%20ICE%20response%20to%20Santa%20Clara.pdf> [<https://perma.cc/J8GR-ER7M>] ("ICE does not reimburse localities for detaining any individual until ICE has assumed actual custody of the individual.")

161. *E.g.*, *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *10 (D. Or. Apr. 11, 2014).

162. See *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) ("[T]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.")

163. *Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012). For a discussion of the Fourth Amendment as it applies to interior immigration enforcement and an argument that its constraints are weak in that context, see Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1139–48 (2008).

164. Federal courts have held that detainees are merely requests, and compliance is not mandatory. See, *e.g.*, *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014) (holding that the Code

agency to supply the requisite finding of probable cause. Yet, a detainer form is not a warrant and has not been reviewed by a judge.¹⁶⁵ Jails that honor these detainers to supply probable cause for continued detention have been exposed to lawsuits for unlawfully holding immigrants beyond their release dates without proper cause.¹⁶⁶ In one case that has received significant attention, a federal district judge in Oregon found that a local jail violated the Fourth Amendment by holding someone on such a request without probable cause or a judicially issued warrant.¹⁶⁷

of Federal Regulations does not compel compliance with detainer requests); *see also* Memorandum from Kamala D. Harris, Attorney Gen., Cal. Dep't of Justice, to Execs. of State and Local Law Enf't Agencies, Responsibilities of Local Law Enforcement Agencies Under Secure Communities 2 (Dec. 4, 2012), https://www.aclunc.org/docs/immigration/ag_info_bulletin.pdf [<https://perma.cc/QK2Z-2K84>] (advising local law enforcement agencies in California that they “can make their own decisions about whether to fulfill an individual ICE immigration detainer”).

165. *See* 8 C.F.R. § 287.7(a) (2016) (defining the term “detainer” as a request that federal officials are advised prior to the release of an immigrant from custody). Until recently, the detainer form itself expressly disavowed that the agency had probable cause by stating that the detainer was placed only because ICE had “initiated an investigation,” not that a finding of probable cause had been made. *Revised 2012 ICE Detainer Guidance: Who It Covers, Who It Does Not, and the Problems That Remain*, IMMIGR. LEGAL RES. CTR. 19 add. c (2012), https://www.ilrc.org/sites/default/files/resources/detainer_guidance_plus_addendums.pdf [<https://perma.cc/69CV-LX7B>]. In December 2012, the detainer form was revised to supply boilerplate language asserting that ICE has “[d]etermined that there is reason to believe the individual is an alien subject to removal from the United States.” DEP’T OF HOMELAND SEC., FORM I-247: IMMIGRATION DETAINDER—NOTICE OF ACTION (2012), <https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf> [<https://perma.cc/EDX5-7LFA>]. Whether boilerplate language on a detainer form can be constitutionally sufficient is part of what Michael Kagan calls immigration law’s “looming Fourth Amendment problem.” Michael Kagan, *Immigration Law’s Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 166–70 (2015) (explaining that, although the latest federal detainer form now uses probable cause language, it still has “no place on the form in which DHS would set out the individualized details supporting its assertion”). For an overview of some of the Fourth Amendment issues inherent in detention based on an immigration detainer, see Christopher N. Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOY. L.A. L. REV. 629 (2013).

166. *See, e.g.,* *Mendoza v. Osterberg*, No. 8:13CV65, 2014 WL 3784141, at *6–8 (D. Neb. July 31, 2014) (denying defendant’s motion to dismiss and finding that the plaintiff, a United States citizen, adequately asserted a Fourth Amendment claim by alleging that the defendant lacked probable cause to seek an ICE detainer on plaintiff); *Gonzales v. Immigration and Customs Enforcement*, CV 12-04416 BRO (FFMx), at *12–13 (C.D. Cal. July 28, 2014), https://www.aclu.org/sites/default/files/assets/gonzalez_v_ice_order.pdf [<https://perma.cc/9P83-6CGU>] (granting ICE’s motion to dismiss with leave to file an amended complaint; noting that plaintiffs “have sufficiently pleaded that Defendants exceeded their authorized power” by issuing “immigration detainers without probable cause resulting in unlawful detention”); *Villars v. Kubiатовski*, 45 F. Supp. 3d 791, 807–08 (N.D. Ill. May 5, 2014) (holding that plaintiff stated a Fourth Amendment claim where defendants “lacked probable cause [to believe] that Villars violated federal criminal law”); *Buquer v. City of Indianapolis*, No. 1:11-cv-00708-SEB-MJD, 2013 WL 1332158, at *8, *10 (S.D. Ind. Mar. 28, 2013) (concluding that an ICE detainer, “without more, does not provide the usual predicate for an arrest,” and that “authoriz[ing] state and local law enforcement officers to effect warrantless arrests for matters that are not crimes . . . runs afoul of the Fourth Amendment”).

167. *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *11 (D. Or. 2014) (granting summary judgment on liability for Fourth Amendment violations on the grounds that “[t]here is no genuine dispute of material fact that the County maintains a custom or practice in violation of the Fourth Amendment to detain individuals over whom the County no

Three of the four California counties have incorporated a Fourth Amendment restriction into their detainer policies. First, Alameda's policy instructs deputies to not honor ICE detainers in their jails unless supported by a judge's order that complies with the Fourth Amendment. The written policy begins by emphatically ordering deputies that: "**The Alameda County Sheriff's Office does not honor these detainers.**"¹⁶⁸ However, the policy goes on to clarify that detainers will only be honored if accompanied by an arrest warrant signed by a judge:

A detainer will be acted upon ONLY for inmates with pending criminal cases that would normally be held for further criminal proceedings and if the ICE immigration detainer is accompanied with an arrest warrant signed by a judge. **An ICE detainer alone shall not be honored.**¹⁶⁹

Ventura County's policy similarly clarifies that as of October 30, 2014, the Sheriff's Office "no longer book[s] any ICE Detainers."¹⁷⁰ The accompanying memorandum explains that this new policy responds to recent case law finding that localities can incur liability for holding immigrants without a probable-cause finding that satisfies the Fourth Amendment:

Effective May 27, 2014[,] we were notified pursuant to: U.S. District Court, *Miranda-Olivares v. Clackamas County*, Case No. 3:12-cv-02317-ST, issued April 11, 2014[,] that any and all current inmates in our custody with ICE Detainers needed to be dropped/cleared. . . . [B]ased upon this notification we would no longer book any ICE Detainers.¹⁷¹

Finally, underscoring Fourth Amendment concerns, the Los Angeles County Sheriff's Custody Service Division orders deputies not to extend any detention beyond the "standard time of release" based on a detainer request.¹⁷² As the written policy advises:

longer has legal authority based only on an ICE detainer which provides no probable cause for detention"). Work by Christopher Lasch has been influential in developing litigation strategy to challenge detainer authority. See, e.g., Christopher N. Lasch, *Litigating Immigration Detainer Issues*, in 2 IMMIGRATION LAW FOR THE COLORADO PRACTITIONER § 34.1 (Nancy B. Elkind et al. eds., 2013).

168. ALAMEDA CTY. SHERIFF'S OFFICE, GENERAL ORDER 1.24 (revised July 6, 2015) (emphasis in the original).

169. *Id.* at 3 (emphasis in the original).

170. Memorandum from Laura Flowers, Cent. Inmate Records Manager, Ventura Cty. Sheriff's Dep't, to Tracy Martinez-Aguilar, Legal Unit, Ventura Cty. Sheriff's Dep't (Oct. 30, 2014).

171. *Id.*; see also E-mail from Ronald Nelson, Commander, Ventura Cty. Sheriff's Office, to Ingrid Eagly (Feb. 11, 2016, 2:51 PM PST) (on file with author) ("To further explain, we do not honor ICE Detainer Requests as the court ruling indicated a lack of judicial review.").

172. LOS ANGELES CTY. SHERIFF'S DEP'T, CUSTODY SERV. DIV.: GEN. POPULATION, UNIT ORDER 5-22/001.10, ICE DETAINER PROCESSING & RELEASE PROCEDURES 1 (Oct. 19, 2015) [hereinafter L.A. SHERIFF'S ICE DETAINER PROCEDURES]. As of the time of publication of this Article, this written draft policy was still undergoing review and had not yet been signed by Captain Elier Morejon.

Qualified inmates upon completion of custody time, or upon the posting of bail or bond, or when all court proceedings are terminated can be immediately made available to ICE. ICE agents will be required to take custody and transport the inmate within the standard time of release, **without additional delay**, according to the procedures outlined in this order.¹⁷³

The Los Angeles Sheriff also reiterated his commitment not to hold individuals “beyond their date of release solely based on an ICE [detainer] request” in a letter to the county’s Board of Supervisors.¹⁷⁴ Accordingly, Los Angeles will allow for an “in-custody transfer” of an inmate only if some level of suspicion is satisfied.¹⁷⁵ The written policy specifies that the jail’s Inmate Reception Center must confirm that there is an “[e]lectronic database screening by ICE agents indicating there is a ‘high likelihood of the inmate being in the United States illegally.’”¹⁷⁶

3. *Conviction Severity Restriction.*—A third objection to federal reliance on local jail-based screening programs is that it results in the deportation of persons who are never convicted of a crime, or who have only committed low-level crimes, such as driving without a license.¹⁷⁷ Deportations resulting from such programs have received sizable academic scrutiny and media attention, especially given the fact that federal authorities have promoted their Secure Communities and PEP programs as seeking to identify and remove violent criminals.¹⁷⁸

173. *Id.*

174. Letter from Jim McDonnell, Sheriff, L.A. Cty., to the L.A. Cty. Bd. of Supervisors 2 (Sept. 22, 2015) [hereinafter Letter from Jim McDonnell, Sheriff, L.A. Cty.]; *see also id.* (“No inmate will be held beyond the release date based solely on an ICE request.”).

175. L.A. SHERIFF’S ICE DETAINER PROCEDURES, *supra* note 172, at 3.

176. *Id.* at 1.

177. For data on Secure Communities obtained from a FOIA request submitted by the National Day Laborer Organizers Network, the Kathryn O. Greenberg Immigration Justice Clinic of the Benjamin N. Cardozo School of Law, and the Center for Constitutional Rights, see CENTER FOR CONSTITUTIONAL RIGHTS, ICE FOIA 10-2674.000087, <http://www.ccrjustice.org/files/2a.%20April%202010%20Cumulative%20Data%20by%20County.pdf> [<https://perma.cc/6WTX-T658>]; *see also National Day Laborer Organizing Network (NDLON) v. US Immigration and Customs Enforcement Agency*, CTR. CONST. RTS., <https://ccrjustice.org/home/what-we-do/our-cases/national-day-laborer-organizing-network-ndlon-v-us-immigration-and-customs> [<https://perma.cc/LFV7-V2DC>].

178. *See, e.g.,* AARTI KOHLI, PETER L. MARKOWITZ & LISA CHAVEZ, CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, UNIV. CAL. BERKELEY LAW SCH., SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 2, 13 (Oct. 2011), https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf [<https://perma.cc/LJ56-Y7C9>] (presenting statistical findings regarding the effects of the Secure Communities program and expressing concern about the “level of screening and potential targeting of certain social groups”); *Challenge Unjust Immigration Detainers*, NAT’L IMMIGRANT CTR., <http://www.immigrantjustice.org/detainers#.VjI9ZlWrRjU> [<https://perma.cc/U46S-LQAH>] (characterizing ICE detainers and the Secure Communities program as trust destroying, costly, and constitutionally dubious).

These concerns culminated in a groundbreaking new California law known as the TRUST Act.¹⁷⁹ Since January 1, 2014 the TRUST Act has required that California jails refuse ICE detainers when issued against individuals who have not been convicted of certain serious crimes, such as state felonies, obstruction of justice, or unlawful possession of a weapon.¹⁸⁰ Immigrants who are released without a conviction, or merely convicted of a low-level charge, cannot be held on an immigration detainer in the state of California.¹⁸¹

Two of the counties—Los Angeles and Santa Clara—include a conviction-severity restriction in their detainer policies.¹⁸² Los Angeles County has also chosen to apply the conviction-severity terms of the TRUST Act to any transfers to ICE custody that occur prior to the date of release from criminal custody.¹⁸³ As the Los Angeles County Sheriff spelled out in a letter to the Los Angeles County Board of Supervisors: “[W]e have determined that the appropriate guiding principles for offenses that will subject individuals to ICE transfer should be the provisions of the TRUST Act rather than any other local determination that we might seek to overlay on top of that state enactment.”¹⁸⁴ Pursuant to the Los Angeles County Sheriff’s policy, only inmates with “current or past criminal history” that “meet[] the qualifying criteria” of the TRUST Act’s conviction-severity provisions may be transferred to immigration custody on an I-247D ICE detainer form.¹⁸⁵ As an additional layer of review, Los Angeles County’s conviction requirement also applies to ICE requests for interviews inside the jail.¹⁸⁶

Santa Clara’s policy, which is based on a fiscal restriction, imposes a complete ban on detainer compliance because the federal government has not satisfied the condition of reimbursement.¹⁸⁷ However, if reimbursement were provided at some point, then the policy would impose a conviction-

179. 2013 Cal. Stat. 4650 (codified at CAL. GOV’T CODE §§ 7282–7282.5 (West 2016)).

180. CAL. GOV’T CODE § 7282.5. For a timely scholarly analysis of the TRUST Act, see Rosenbaum, *supra* note 27.

181. Under the TRUST Act, immigrants must be released from custody as soon as they are eligible, such as after completing a term of imprisonment, after having a criminal case dismissed, or after posting a criminal bond. CAL. GOV’T CODE § 7282.5. Following California’s lead, a similar bill mandating noncompliance with detainers issued against low-level offenders was passed in Connecticut. 2013 Conn. Acts 652 (Reg. Sess.).

182. L.A. SHERIFF’S ICE DETAINER PROCEDURES, *supra* note 172, at 1; SANTA CLARA CTY. BD. OF SUPERVISORS, *supra* note 157, § 3.54.

183. As discussed earlier, Los Angeles will not hold individuals on an ICE detainer past the normal time of release. See *supra* notes 172–76 and accompanying text.

184. Letter from Jim McDonnell, Sheriff, L.A. Cty., *supra* note 174, at 2–3.

185. L.A. SHERIFF’S ICE DETAINER PROCEDURES, *supra* note 172, at 1.

186. *Id.* at 2–3 (“Prior to any interviews being conducted by the ICE agents, the AB4 desk personnel shall reconfirm that the inmate’s current or past criminal history meets the qualifying criteria of ‘The Trust Act,’ . . .”).

187. See *supra* notes 157–59 and accompanying text.

severity requirement.¹⁸⁸ According to these terms, Santa Clara would exercise its discretion to honor federal detainer requests only if the individual was “convicted of a serious or violent felony” within the past ten years or convicted at any time of a homicide crime.¹⁸⁹

In conclusion, this subpart has identified three types of restrictions in the detainer procedures of the sheriffs in the four counties. Alameda and Ventura do not enforce any detainers pursuant to a Fourth Amendment requirement. Los Angeles allows for in-custody transfer pursuant to an ICE detainer, but only if ICE confirms that “[the inmates] have a high likelihood of being in the United States illegally,” the immigrant satisfies the conviction-severity requirement of the TRUST Act, and the immigrant is not held beyond the standard point of release.¹⁹⁰ Finally, Santa Clara has a reimbursement requirement which has not been satisfied and therefore operates as a complete ban on cooperation.

II. Conventional Justifications for Immigrant Protection

Part I has presented a detailed descriptive analysis of local criminal justice policies addressing immigration enforcement in four California counties. These policies have provisions that protect some immigrants from possible deportation, but they fall short of offering full protection for all noncitizens within the criminal justice system.¹⁹¹ Additionally, there is variation in the terms of these policies. For example, some police departments restrict enforcement of certain immigration crimes, but others do not.

Building on these findings, Part II analyzes the three justifications most often advanced by policymakers, scholars, and advocates in support of immigrant protective criminal justice policies: enhancing community trust in policing and prosecution, fostering immigrant integration, and conserving local criminal justice budgets. Each of these justifications has played an important role in shaping the protective policies found in the four counties, as well as similar criminal justice policies in other states. Yet, as Part II uncovers, these conventional justifications provide only a partial rationale for immigrant protection in the criminal justice context.

188. SANTA CLARA CTY. BD. OF SUPERVISORS, *supra* note 157, § 3.54(A)(2). This language was adopted by the county’s Board of Supervisors on October 18, 2011, prior to passage of the TRUST Act.

189. *Id.*

190. Letter from Jim McDonnell, Sheriff, L.A. Cty., *supra* note 174, at 2, 4.

191. Amada Armenta’s interesting research on immigration enforcement in Tennessee has similarly found that “inclusively and exclusionary police policies and practice” can coexist within a single jurisdiction, thus complicating the picture that police either effectuate “incorporation” or “social control.” Amada Armenta, *Between Public Service and Social Control: Policing Dilemmas in the Era of Immigration Enforcement*, 63 SOC. PROBS. 111, 113 (2016).

A. *Community Policing*

One of the foremost justifications for immigrant protection in criminal justice is community policing.¹⁹² Today the majority of police chiefs in the United States embrace some version of community policing.¹⁹³ As Jocelyn Simonson has noted, “[i]t is difficult to overstate the influence of the concept of community policing” in shaping how police departments go about their work.¹⁹⁴

The term community policing can refer to a variety of different policing practices.¹⁹⁵ However, experts agree that one key component of this policing approach is promoting a collaborative relationship between community members and the police.¹⁹⁶ According to standard community policing theory, if police improve their informal ties with community members, they

192. See JEROME H. SKOLNICK & DAVID H. BAYLEY, *THE NEW BLUE LINE: POLICE INNOVATION IN SIX AMERICAN CITIES* 21–25 (1986) (characterizing the police approach that values community trust and cooperation as “community-oriented policing”). For a discussion of the role of community policing in the context of immigration enforcement, see David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 1, 7, 60 (2006) (arguing that the “success of community policing” is one of the reasons why “local law enforcement has for the most part vehemently refused to accept” immigration enforcement as part of its work); Lewis & Ramakrishnan, *supra* note 10, at 888–95 (conducting case studies of immigrant-destination cities in California and concluding that “gaining trust and serving the community’s unique needs were the spur for” police policies that were “supportive of immigrants”); Adam B. Cox & Thomas J. Miles, *Legitimacy and Cooperation: Will Immigrants Cooperate with Local Police Who Enforce Federal Immigration Law?* 2 (N.Y.U. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 15-43, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2658265 [<https://perma.cc/J6B7-MLVC>] (arguing that the “leading theory” for policies that “disassociate” local law enforcement from the “federal immigration enforcement bureaucracy” is “to secure the trust and cooperation of immigrants who otherwise would see local police as illegitimate”); “*Sanctuary Cities*,” *Trust Acts, and Community Policing Explained*, AM. IMMIGR. COUNCIL (Oct. 10, 2015), <https://www.americanimmigrationcouncil.org/research/%E2%80%99sanctuarycities%E2%80%99D-trust-acts-and-community-policing-explained> [<https://perma.cc/3PJJ-DDFN>] (describing local “sanctuary” policies and state TRUST Acts as “community policing policies”).

193. Stephen D. Mastrofski et al., *The Challenges of Implementing Community Policing in the United States*, 1 POLICING 223, 225 (2007).

194. Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 401 (2016); see also Tracey L. Meares, *Praying for Community Policing*, 90 CALIF. L. REV. 1593, 1593 (2002) (“Community policing is central to any conversation about the role of community in law and criminal justice.”).

195. DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* 82 (2008) (describing the term “community policing” as “notorious for meaning different things to different people”).

196. FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 89 (Wesley Skogan & Kathleen Frydl eds., 2004) [hereinafter FAIRNESS AND EFFECTIVENESS IN POLICING] (explaining that one “key feature of community policing is community engagement”). For additional research relating to community policing, see WESLEY G. SKOGAN, *POLICE AND COMMUNITY IN CHICAGO: A TALE OF THREE CITIES* (2006) (examining how effectively community policing is carried out in Chicago); SKOLNICK & BAYLEY, *supra* note 192, at 213 (summarizing the characteristics of policing in six American cities and concluding, among other things, that “crime prevention” should focus on the “needs of particular communities”); Will Oliver, *The Changing Role of the Police Chief in Community Policing*, 41 LAW & ORD., Mar. 1993, at 85 (characterizing that “neighborhood-oriented policing,” that seeks “an increase in the communication between beat officers and the community they police,” is an “integral” part of community policing).

are more likely to learn about criminal activity before it happens, to implement effective prevention measures, and to receive cooperation when investigating crimes.¹⁹⁷ Simply stated, community policing is presumed to facilitate effective crime control and enhance the legitimacy of the police.

Community engagement can be undermined, however, if immigrants are afraid to cooperate with the police. Los Angeles's own Mayor Eric Garcetti has described his city's immigration policing policy in community policing terms—as an effort “to assure immigrant communities within the city of Los Angeles that there is no need to fear contact with the LAPD when they have been the victim or a witness to a crime.”¹⁹⁸ Consistent with this approach, research has revealed that immigrants are “less likely to volunteer information about crimes because they fear getting caught in the web of immigration enforcement themselves or bringing unwanted attention to their family or friends.”¹⁹⁹ One study of immigrants in Chicago found that “the most elemental concern of many new immigrants is fear that contact with the police will somehow threaten their status in the United States.”²⁰⁰ More recently, a Task Force found that the Secure Communities program could damage community policing efforts, resulting in “greater levels of crime” because immigration enforcement makes community members “less willing to step forward as witnesses to or victims of crime.”²⁰¹

The community policing rationale for immigrant protection has been adopted by several influential policing organizations. The Major Cities

197. FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 196, at 89 (“Civic engagement usually extends to involving the public in some way in efforts to enhance community safety. Residents are asked to assist the police by reporting crimes promptly when they occur and cooperating as witnesses.”).

198. Alexander Nguyen, *Sanctuary City Status Could Cost L.A. Federal Funds*, MYNEWSLA.COM (July 23, 2015), <http://mynews1a.com/government/2015/07/23/garcetti-warns-of-loss-of-federal-funds/> [<https://perma.cc/QK6Z-UK66>]; *see also* William J. Bratton, *The LAPD Fights Crime, Not Illegal Immigration*, L.A. TIMES (Oct. 27, 2009), <http://articles.latimes.com/2009/oct/27/opinion/oe-bratton27> [<https://perma.cc/K3LZ-EHV7>] (arguing that immigrants' fear of local police is not unfounded). As immigration expert Michele Waslin warns, only by refusing to participate in cooperative programs such as Secure Communities can localities continue to make assurances to immigrant communities that “there will be no immigration consequences to providing information or cooperating with police.” Michele Waslin, *Secure Communities and 287g: A Tale of Two Counties*, AM. IMMIGR. COUNCIL (Mar. 12, 2009), <http://immigrationimpact.com/2009/03/12/secure-communities-287g-prince-william-fairfax-county/> [<https://perma.cc/7PAZ-NNG7>].

199. NIK THEODORE, INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT, at i, 17 (May 2013), http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF [<https://perma.cc/L6BK-U6LT>] (reporting that 44% of respondents agreed they would be less likely to assist law enforcement due to fear).

200. SKOGAN, *supra* note 196, at 17.

201. A Department of Homeland Security Task Force acknowledged in 2011 that programs like Secure Communities could damage community policing efforts. *Task Force on Secure Communities Findings and Recommendations*, TASK FORCE ON SECURE COMMUNITIES, U.S. DEP'T OF HOMELAND SECURITY 24 (Sept. 2011), <https://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities.pdf> [<https://perma.cc/2CG9-3C56>].

Chiefs Association, an organization representing seventy-eight of the largest police departments in the United States and Canada, concluded in 2006 that enforcing “purely civil immigration enforcement action” at a local level would “undermine the . . . trust and cooperation” that is necessary for quality policing.²⁰² Without reassurance that police will not inquire into immigration status when investigating crime, localities risk “creat[ing] a class of silent victims and eliminat[ing] the potential for assistance from immigrants in solving crimes or preventing future terroristic acts.”²⁰³ In 2009, the Police Foundation released a detailed report in which it concluded that police should not engage in civil immigration enforcement outside of the context of criminal law enforcement.²⁰⁴ This recommendation was based in part on the finding that 74% of respondents to the organization’s membership survey agreed that “aggressive enforcement of immigration law would have a negative impact on community relationships” by, among other ills, decreasing trust in the police.²⁰⁵ Further affirming the tie between community policing and immigrant protection is a recent national study of police department policies on immigration which found that those with more “welcoming” policies toward immigrants also share a commitment to community policing.²⁰⁶

Despite these strengths, community policing has some shortcomings as a guiding principle for the treatment of immigrants by police. One issue is that community policing strategies have been associated with “broken-windows” policing, which focuses on low-level, quality-of-life offenses, rather than more serious offenses.²⁰⁷ This focus on petty offenses is thought to encourage residents to become involved with law enforcement because it orients policing efforts around precisely those crimes that occur on a day-to-

202. IMMIGRATION COMM., MAJOR CITIES CHIEFS, M.C.C. IMMIGRATION COMMITTEE RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES 6 (June 2006), http://www.houstontx.gov/police/pdfs/mcc_position.pdf [<https://perma.cc/TDH6-W6FJ>]; see also *Welcome*, MAJOR CITIES CHIEFS, <https://www.majorcitieschiefs.com/> [<https://perma.cc/MBG4-XM39>].

203. IMMIGRATION COMM., MAJOR CITIES CHIEFS, *supra* note 202, at 6; see also INT’L ASS’N OF CHIEFS OF POLICE, ENFORCING IMMIGRATION LAW: THE ROLE OF THE STATE, TRIBAL AND LOCAL LAW ENFORCEMENT 1, 5, <http://www.theiACP.org/Portals/0/pdfs/Publications/ImmigrationEnforcementconf.pdf> [<https://perma.cc/JN9Z-8L4Z>] (“Without assurances that they will not be subject to an immigration investigation and possible deportation, many immigrants with critical information would not come forward, even when heinous crimes are committed against them or their families.”).

204. ANITA KHASHU, POLICE FOUND., THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES 31 (2009), <https://www.policefoundation.org/wp-content/uploads/2015/06/The-Role-of-Local-Police-Narrative.pdf> [<https://perma.cc/66T3-W4AL>].

205. *Id.* at 24.

206. Williams, *supra* note 49, at 434.

207. Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 469 (2000).

day basis.²⁰⁸ However, experience has shown that a turn toward aggressive low-level policing raises serious concerns for noncitizens, who can be exposed to possible deportation even for relatively minor offenses.²⁰⁹ Moreover, as Bernard Harcourt has demonstrated, once order-maintenance policing is in place, “the category of the disorderly” becomes institutionalized and used to justify “aggressive arrests for minor disorderly conduct.”²¹⁰

An emphasis on community policing has not yielded protective policies that allay these concerns about the potential adverse impact on immigrant communities of proactive policing of low-end crimes. Policing policies like those in the four counties primarily support the protection of victims and witnesses rather than those arrested by police. Immigrants charged with crimes are not immune and can be referred to ICE and removed. Other research suggests that these observations from the four counties may be representative of local policies nationally. One national survey of police practices found that only 15% of departments reported they would check immigration status (or report to ICE) a crime victim or witness, yet 87% of

208. See Bruce A. Green & Alafair S. Burke, *The Community Prosecutor: Questions of Professional Discretion*, 47 WAKE FOREST L. REV. 285, 288 (2012) (describing how community policing tactics encourage residents to participate in law enforcement); see also James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29, 31–33 (suggesting that policing quality-of-life crimes should be addressed by community policing).

209. As immigration scholar Kari Hong points out, “the seriousness of an offense” found in today’s immigration law “is based on crude categories rather than how criminal courts view the crime.” Kari Hong, *Deporting Illegal Immigrants Who Commit Crimes Isn’t Always the Answer*, BOSTON GLOBE (Aug. 17, 2015), <https://www.bostonglobe.com/opinion/2015/08/16/deporting-criminals-isn-always-answer/pVknNnYrZnrDyDjT7zmfkwI/story.html> [https://perma.cc/QLG2-PJ8A]. Something that the criminal law regards as nonserious can nonetheless give way to immigration policing and deportation. *Id.* For additional discussion of how low-level convictions affect immigrants charged with crimes, see Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1753–54 (2013) (illustrating how the misdemeanor-prosecution system facilitates the deportation of immigrants who are low-level criminals); Jordan Cummings, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLA L. REV. 510, 531–32 (2015) (describing how low-level marijuana convictions often make noncitizens deportable); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 282 (2011) (asserting that the high-volume misdemeanor system pressures defendants to accept guilty pleas).

210. Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 298–99 (1998). For additional critical commentary on community policing, see Carl B. Klockars, *The Rhetoric of Community Policing*, in COMMUNITY POLICING: RHETORIC OR REALITY 239, 240 (Jack R. Greene & Stephen D. Mastroski eds., 1988) (arguing that police are inherently coercive and thereby fundamentally offensive to peaceful society), and Samuel Walker & George F. Cole, *Putting Justice Back into Criminal Justice: Notes for a Liberal Criminal Justice Policy*, in CRIMINAL JUSTICE: LAW & POLITICS 604, 615 (George F. Cole & Marc G. Gertz eds., 2012) (noting that community policing has “quickly become a fad, in some cases nothing more than a rhetorical phrase with no content”).

departments would do so if an immigrant was arrested for a violent crime.²¹¹ Half of police departments reported engaging in civil immigration policing even when someone with no record was arrested for a nonviolent crime.²¹²

Another source of concern is that the rhetoric of deliberation and consensus that drives community policing practices could potentially be used to support restrictive local policies. Although pro-immigrant reform has received widespread community support in California, states like Arizona have moved in the opposite direction.²¹³ Natasha Tidwell has argued that when police opt out of enforcing the immigration law they risk alienating other sectors of the community by favoring only “one segment” of the population.²¹⁴ She further warns that allowing police discretion on immigration issues to be “shaped by community preferences” will only endure “as long as the next election cycle” when the tides of community preferences may change.²¹⁵ This misgiving is especially heightened in the current political moment in which the President-elect, Donald Trump, has proposed deporting eleven million undocumented immigrants and building a wall between the United States and Mexico.²¹⁶

Further deepening worries about linking immigration policing policy to community policing values is a new study by Adam Cox and Thomas Miles that analyzes data from the federal government’s rollout of its Secure Communities program.²¹⁷ These researchers conclude that jail-based immigration screening programs do not undermine crime-fighting strategies.²¹⁸ Specifically, they find that the speed at which police solved FBI index crimes did not decrease after the start of Secure Communities.²¹⁹ Cox and Miles argue that this finding refutes the traditional position of immigrant

211. Lewis et al., *supra* note 37, at 12 tbl.1.

212. *Id.*

213. See generally *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012) (describing an immigrant policing law adopted in Arizona).

214. Natasha Tidwell, *Fragmenting the Community: Immigration Enforcement and the Unintended Consequences of Local Police Non-Cooperation Policies*, 88 ST. JOHN’S L. REV. 105, 109 (2014).

215. *Id.* at 142.

216. See, e.g., Michael Finnegan, *Trump Sticks to Hard Line on Deporting 11 Million Immigrants*, L.A. TIMES (Aug. 22, 2016), <http://www.latimes.com/politics/la-na-pol-trump-immigration-deportation-20160822-snap-story.html> [<https://perma.cc/59L8-X2WP>] (quoting then-Republican presidential candidate Donald Trump as saying “[t]hey’re going to be out of here so fast, your head will spin”).

217. Cox & Miles, *supra* note 192, at 2–4.

218. *Id.* at 52.

219. *Id.* at 40. The FBI’s crime index measures the incidence of eight crimes: murder and non-negligent manslaughter, rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2014 (2015), <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/offenses-known-to-law-enforcement/offenses-known-to-law-enforcement.pdf> [<https://perma.cc/EJR5-QTTP>]. Cox and Miles also find that counties adopting immigrant protective detainer policies were not any more likely than counties without such policies to suffer a decrease in the rate at which FBI index crimes were solved. Cox & Miles, *supra* note 192, at 40, 42 tbl.4.

rights groups that jail-based immigration screening disrupts community policing efforts by making it harder for police to solve crimes.²²⁰

This research by Cox and Miles brings to light a potential weakness of community policing as a justification for developing more robust immigrant protection. Community policing is ultimately a model for achieving police-defined goals, such as speedy convictions. Under community policing theory, immigrant protection matters—but only if it interferes with achievement of these police-defined goals. Yet concern about community trust in law enforcement advanced by immigrant rights groups could probe beyond the achievement of policing goals as defined by police. As Part III discusses, the criminal justice system could also seek to achieve goals as defined by immigrant communities. These goals include ensuring that immigrants subject to the criminal justice system are treated in the same way as citizens and guarding constitutional standards in the context of collaboration with immigration enforcement. It is possible that community policing may itself change to address these concerns,²²¹ but for the moment it remains a consensus-driven policy that has not yet fully addressed the policing challenges posed by immigration enforcement.

Finally, community policing is not clearly transferrable as a guiding principle for prosecutors in resolving the cases of noncitizen defendants. To be sure, there is a similar concept known as “community prosecution” that emphasizes building community bonds to facilitate the trust necessary to secure convictions.²²² Under this approach, prosecutors are not merely arms

220. Cox & Miles, *supra* note 192, at 48–49. Experts could debate whether this finding does indeed entirely sever the tie between community policing and immigrant protection that pro-immigrant advocates advance. As Cox and Miles themselves point out, their study rests on the assumption that the Secure Communities program was “carefully designed” so that local police would “continue to make the same arrests they had always made[.]” *Id.* at 21. To support this assumption, they rely on their analysis of the same data in a separate research project that reveals that Secure Communities did not affect the rate at which FBI index crimes (like arson and murder) were committed. *Id.* at 4 & n.8; *see also* Miles & Cox, *supra* note 144, at 960 (finding that Secure Communities has not reduced the total FBI index crime rate). Yet, the types of pretextual arrests that immigrant rights groups are most concerned about are lower level crimes (such as traffic offenses) that are used to funnel immigrants into the deportation system and are not included in the FBI index. *See, e.g.*, Maureen A. Sweeney, *Shadow Immigration Enforcement and its Constitutional Dangers*, 104 J. CRIM. L. & CRIMINOLOGY 227, 240 (2014). Future research should investigate the relationship between the implementation of programs like Secure Communities and low-level arrests.

221. One sign of change is found in the recommendations of the Task Force on 21st Century Policing to no longer police immigration in the context of low-level offenses. *See infra* note 307 and accompanying text. Scholars have also called to reform the community policing model. Eric Miller, for example, has criticized the inability of current community policing strategies to incorporate community members into the process of creating law enforcement policies on the front end. Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 552 (2015). Jocelyn Simonson argues that community policing should evolve to consider and prioritize “reform processes that are generated by nonelites.” Simonson, *supra* note 194, at 443.

222. *See* NAT’L CTR. FOR CMTY. PROSECUTION & NAT’L DIST. ATTORNEYS ASS’N, KEY PRINCIPLES OF COMMUNITY PROSECUTION 3–4 (2009), http://www.ndaajustice.org/pdf/final_key_principles_updated_jan_2009.pdf [<https://perma.cc/RA5R-WGUG>] (reviewing key

of the court who send people to prison, but they are also “members of the community, who through leadership and legal expertise, help prevent crime from occurring.”²²³ It could be argued that prosecution policies such as those discussed in this Article help to advance community-oriented rationales by explaining how prosecutors will consider immigration status in plea negotiations, thereby making the plea-bargaining process more transparent.²²⁴ In addition, prosecutors who are attuned to the needs of immigrant communities may be more likely to consider the impact of deportation on families and communities.²²⁵

At the same time, however, community prosecution presents many of the same complications for immigrant protection as community policing. Like community policing, some of the baseline goals and methods of community prosecution—such as prioritization of petty crimes—may disproportionately affect immigrant communities.²²⁶ And the community prosecution model has little to say about how prosecutors should go about the task of reaching fair resolutions for defendants exposed to possible deportation. Should the default be to mitigate disproportionate deportation penalties or instead trade deportation relief for a heftier sentence? Prosecutors concerned about doing justice in cases involving noncitizens would benefit from a conceptual framework that helps to sort out these issues.

principles driving community prosecution). *But see* Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 323 (2002) (explaining that “[i]t is not at all obvious . . . what the term ‘community prosecution’ actually means”); *see also* Catherine M. Coles & George L. Kelling, *Prevention Through Community Prosecution*, 136 PUB. INT. 69 (1999) (introducing the concept of community prosecution).

223. ROBERT V. WOLF & JOHN L. WORRALL, LESSONS FROM THE FIELD: TEN COMMUNITY PROSECUTION LEADERSHIP PROFILES, at xi (Nov. 2004), http://www.courtinnovation.org/sites/default/files/cp_lessons_from_the_field.pdf [<https://perma.cc/P9FV-KEWS>]; *see also* ROBERT V. WOLF, COMMUNITY PROSECUTION AND SERIOUS CRIME: A GUIDE FOR PROSECUTORS 5 (2010), http://www.courtinnovation.org/sites/default/files/documents/CP_SC.pdf [<https://perma.cc/ZL5R-E3XX>] (stating that “[c]ommunity prosecutors are problem-solvers, seeking not only to build better cases but also prevent crime”).

224. *See* Jain, *supra* note 135, at 1233–34 (pointing out that “communities need to understand how law enforcement agencies define and implement their goals”); Lee, *supra* note 39, at 584–85 (emphasizing the importance of transparency in exercising prosecutorial discretion in matters involving noncitizens).

225. *See* Jain, *supra* note 135, at 1220 (asserting that prosecutors who follow the “community prosecution” approach “consider whether a collateral penalty that puts a defendant out of work or triggers deportation harms the relationship between law enforcement and the community”).

226. Like community policing, community prosecution is associated with the pursuit of quality-of-life offenses “such as graffiti, vandalism, trespassing, disorderly conduct, drug solicitation, prostitution, [and] aggressive panhandling.” M. ELAINE NUGENT ET AL., AM. PROSECUTORS RESEARCH INST., THE CHANGING NATURE OF PROSECUTION: COMMUNITY PROSECUTION VS. TRADITIONAL PROSECUTION APPROACHES 3 (2004).

B. *Immigrant Integration*

A second leading justification for pro-immigrant local policies is immigrant integration.²²⁷ In his influential early work on Mexican migration, anthropologist Leo Chavez defined “incorporation” as what is needed to allow immigrants to “become settlers and feel part of the new society.”²²⁸ However, he found that often this path to “full incorporation” is often “blocked” for those with “undocumented status.”²²⁹ To combat this situation, Chavez identified several modes of incorporation that must occur: “[E]conomic, social, linguistic, cultural, and personal.”²³⁰ A decade later, Nicholas De Genova’s foundational article on “deportability in everyday life” urged greater conceptual rigor of migrant “illegality” as composing not only undocumented immigration status, but also the various sociopolitical processes that produce “illegality.”²³¹ For example, undocumented migrants’ lack of driver’s licenses or work permits “exacerbate[s] their sense of ever-present vulnerability.”²³²

Following Chavez and De Genova, immigration scholarship and policy advocacy have continued to address the ways in which undocumented immigrants live in a constant state of vulnerability. Over time, the concept of “incorporation” has evolved to refer to those programs and policies that foster immigrant inclusion. Linda Bosniak, who was among the first to introduce the “integration” term into the legal scholarship, explained that states and localities play a major role in shaping “how immigrants are integrated into the U.S. economy and society.”²³³ According to Bosniak, these integrative policies include “laws and regulations that determine non-citizens’ eligibility for public benefits as well as spending on programs that are targeted to immigrants.”²³⁴ This idea of “integration” is now broadly used to express the desirability of encouraging “the fuller inclusion of undocumented immigrants into American society.”²³⁵

227. For an in-depth discussion of the importance of immigrant “integration” in “building communities” and treating unauthorized migrants “as Americans in waiting,” see Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2071, 2073–75 (2008).

228. LEO R. CHAVEZ, SHADOWED LIVES: UNDOCUMENTED IMMIGRANTS IN AMERICAN SOCIETY 4–6 (George Spindler & Louise Spindler eds., 1992). For a comprehensive analysis of the history and politics of Mexican migration to the United States, see Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981).

229. CHAVEZ, *supra* note 228, at 5.

230. *Id.* at 173.

231. Nicholas P. De Genova, *Migrant “Illegality” and Deportability in Everyday Life*, 31 ANN. REV. OF ANTHROPOLOGY 419, 420–22 (2002).

232. *Id.* at 438.

233. Linda S. Bosniak, Comment, *Immigrants, Preemption and Equality*, 35 VA. J. INT’L L. 179, 186 n.25 (1994) (quoting MICHAEL FIX & JEFFREY S. PASSEL, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 9 (1994)).

234. *Id.*

235. See Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 872–73 (2015) (setting forth the author’s definition of “integrationist”); see also THE INTEGRATION OF MIGRANTS IN THE UNITED STATES AND GERMANY, at xix–xx (Peter H.

Policies that allow immigrants access to beneficial social-welfare programs, such as allowing them to qualify for welfare support, public housing, or legal services²³⁶ are key components of integrationist policymaking.²³⁷ Other initiatives designed to support and integrate undocumented immigrants into the broader community include providing driver's licenses or public library cards, granting in-state tuition at public universities, allowing immigrants to earn professional licenses, or even including immigrants as voters in certain elections.²³⁸ Such initiatives affirmatively treat immigrants as valuable and participating members of the polity by giving them greater opportunities for social and economic mobility.²³⁹ As Cristina Rodríguez has forcefully argued, the "integration of immigrants into public life" is the "primary function of state and local governments," especially in the absence of a cohesive national policy for immigrant integration.²⁴⁰

Although the integrative framework is enormously helpful for understanding state and local policy in the context of immigration federalism debates,²⁴¹ it has thus far supplied an insufficient framework for thinking

Schuck & Rainer Münz, eds., 1998) (collecting essays analyzing the role of government in fostering immigrant "assimilation" and "integration into mainstream society").

236. See, e.g., Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619, 626–27 (2011) (arguing that legal assistance, as a key ingredient in "basic justice," should "belong to everybody," including immigrants).

237. Scholars have used a range of variants on this term. See, e.g., Ming H. Chen, *Immigration and Cooperative Federalism: Toward a Doctrinal Framework*, 85 U. COLO. L. REV. 1087, 1087 (2014) ("inclusionary"); Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 705–06 (2013) ("immigrant-inclusionary"); Rodríguez, *supra* note 8, at 607 ("integrative"); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. (forthcoming 2017) (manuscript at 15) ("integrationist").

238. See Ramakrishnan & Colbern, *supra* note 16, at 2 (surveying California's efforts to integrate undocumented immigrants, with specific attention to its provision of professional and driver's licenses); Rodríguez, *supra* note 8, at 579 & n.40, 605 (noting various immigration integration initiatives, including for providing identification cards that allow access to libraries and banks, for granting immigrants voting rights in certain elections, and providing in-state tuition at public universities for undocumented students). See generally BRIAN K. RAY, MIGRATION POLICY INST., BUILDING THE NEW AMERICAN COMMUNITY INITIATIVE: NEWCOMER INTEGRATION AND INCLUSION EXPERIENCE IN NON-TRADITIONAL GATEWAY CITIES, at ii (2004), http://www.migrationpolicy.org/sites/default/files/publications/BNAC_REPT_SUM_0.pdf [<https://perma.cc/JLX8-HKM7>] (studying three local communities that adopted "integration" policies for immigrants, but not featuring any criminal justice policies).

239. Rodríguez, *supra* note 8, at 581–82 (describing "programs adopted by various states and localities to integrate immigrants affirmatively into local institutions and networks").

240. *Id.* at 581.

241. Cristina Rodríguez clarifies that the "integration function coincides with, but does not completely overlap, the primary federal function of immigration control, or the setting of standards for admissions and removal." *Id.* For a sampling of scholarship that relies on the idea of integration to defend state and local pro-immigrant policymaking against preemption objections, see Chacón, *supra* note 30, at 582 (predicting that "state and local law enforcement will substantially shape immigration enforcement and the immigrant experience in the United States"); Elias, *supra* note 237, at 705 (characterizing the current moment as a "new" era of immigration federalism, one in which states and localities increasingly have opportunities to promote "immigrant-inclusionary"

more deeply about criminal justice policy. As Sharon Dolovich teaches us, punishment “American-Style” is anything but integrative: “orange jumpsuits, cell blocks, bars, barbed wire” are all designed to ensure segregation and separation between “us” and “them.”²⁴² The growing reliance on criminal justice to manage migration has imported the “alien” definition of “other” into our system of punishment to further legitimize and normalize what Dolovich calls a system of “maintaining custodial control over imprisoned populations.”²⁴³

Although integration supporters have done a good job of thinking through when immigrant victims and witnesses should be subjected to immigration enforcement, they have generally avoided addressing how immigrants suspected of criminal activity should be treated. Instead, integration-framed criminal justice policy debates have focused on whether the federal government is in fact deporting criminals, or whether the crimes committed by deportees are in fact serious. Even worse, the dominant conversation on integrating worthy immigrants has given way to allowing “criminal aliens” to be used as what Rebecca Sharpless calls a “foil” to advocate on behalf of immigrant-friendly policies only for law-abiding immigrants that everyone agrees should be integrated.²⁴⁴ President-elect Donald Trump has already signaled a willingness to play into this dynamic, clarifying in a post-election news interview that he intends to focus on deporting “people that are criminal,” rather than the rest of undocumented immigrants, who he said are “terrific people.”²⁴⁵

Such discussions fail to resolve the basic question of whether the criminal justice system should in fact be ingrained with a dual system of punishment, with the harsher and more punitive system reserved for

measures); Markowitz, *supra* note 235, at 875 (arguing that states have the power “to advance inclusive constructions of state citizenship” in ways that the federal government cannot). *But see* Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339, 1404 (2013) (arguing that instead of “clashing over state efforts to regulate immigration . . . we might be better off focusing on enacting comprehensive immigration reforms at the federal level”).

242. Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237, 237–38 (2009).

243. *Id.* at 237.

244. Rebecca Sharpless, “Immigrants Are Not Criminals”: *Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 692 (2016). For other interesting discussions of how rhetoric about “worthy” and “unworthy” immigrants has harmed the development of immigrant rights, see Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207 (2012); Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101 (2013); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157 (2007).

245. *President-Elect Trump Talks to a Divided Country on 60 Minutes*, 60 MINUTES (Nov 13, 2016), <http://www.cbsnews.com/news/60-minutes-donald-trump-family-melania-ivanka-lesley-stahl/> [https://perma.cc/5ACW-F6NJ].

immigrants.²⁴⁶ Beyond innocent victims and witnesses, how should police departments treat noncitizens who are actually charged with crimes? How should sheriffs think about allowing ICE to access local jails to pick up immigrants who have been convicted of crimes at the point of release? How ought prosecutors plea bargain with noncitizens charged with crimes to achieve fair case outcomes? Moving beyond integration and providing a framework for making these decisions about vulnerable noncitizens will supply a crucial missing piece of the institutional design for today's criminal justice system.

C. Fiscal Constraints

A desire to avoid costs associated with taking on immigration enforcement is a third justification often advanced by supporters of protective policies. Local officials throughout the country have realized that immigration enforcement requires investment of personnel hours, facility costs, transportation resources, and other related expenses.²⁴⁷ When a city or county continues to hold an individual beyond the period that is necessary for purposes of the criminal case, it bears the significant cost associated with incarceration.²⁴⁸ A 2012 study found that Los Angeles County paid over twenty-six million dollars a year complying with ICE detainees.²⁴⁹ Controversy over who will pay for immigration enforcement has only grown

246. For important examples of scholars joining in this point, see Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of "Illegality,"* 52 HARV. J. ON LEGIS. 355, 358–59 (2015) (criticizing immigrant rights groups for deploying strategies in favor of legalization on behalf of "ideal respectable candidates" as creating an "immigration caste system" that harms more marginalized groups of immigrants, such as those with criminal convictions or prior deportation orders); Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals,* 66 CASE W. RES. L. REV. 993, 996 (2016) ("Relatively few contemporary immigrant rights advocates expend much political capital seeking to defend immigrants convicted of crimes in immigration law and policy debates."); Sharpless, *supra* note 244, at 701–06 (noting that much of the mainstream pro-immigrant advocacy work distinguishes persons convicted of crimes from "deserving immigrants"). Yolanda Vázquez offers a parallel critique of the criminal justice reform movement's overlooking of the need to address how the criminal justice system treats immigrants. Yolanda Vázquez, *Crimmigration: The Missing Piece of Criminal Justice Reform,* 51 U. RICH. L. REV. (forthcoming 2016).

247. See AMALIA GREENBERG DELGADO & JULIA HARUMI MASS, COSTS AND CONSEQUENCES: THE HIGH PRICE OF POLICING IMMIGRANT COMMUNITIES 27 (2011), <http://www.kbbffm.org/records/Cost%20and%20Consequences%20FINAL%20Feb%2010%202011.pdf> [<https://perma.cc/E4DS-N3UZ>] (arguing that many localities "have recognized the social and fiscal costs borne by community members" when the police engage in immigration enforcement).

248. See *Immigrants Behind Bars: How, Why and How Much?*, NAT'L IMMIGR. F. (2011), <https://immigrationforum.org/blog/immigrants-behind-bars-how-why-and-how-much/> [<https://perma.cc/9LN2-U625>] (noting the "additional jail time waiting for ICE" in certain localities amounts to "millions of dollars annually in county correctional budgets").

249. See Judith A. Greene, *The Cost of Responding to Immigration Detainers in California,* JUST. STRATEGIES (Aug. 22, 2012), <http://big.assets.huffingtonpost.com/Justicestrategies.pdf> [<https://perma.cc/77M3-YG56>] (based on a calculation that Los Angeles county inmates subject to immigration detention spend an average of 20.6 extra days in county custody).

more tense as state and local budgets have shrunk,²⁵⁰ while the federal government's immigration budget has ballooned.²⁵¹

A central aspect of these budget concerns is that localities may expose themselves to additional legal fees and liability when they participate in immigration enforcement.²⁵² Immigration law is notoriously complex and any enforcement must comply with constitutional standards.²⁵³ Some localities have been required to pay substantial damages stemming from lawsuits for unlawfully holding individuals for long periods of time on ICE detainers. For example, Spokane County, Washington paid a settlement of \$35,000 to a man who was held for twenty days on an ICE detainer after being arrested for not having a driver's license.²⁵⁴ A Los Angeles family won a favorable settlement against the Los Angeles County Sheriff's Office when their cognitively impaired United States citizen son, Pedro Guzman, was wrongfully deported to Mexico after being erroneously identified as a noncitizen in the county jail.²⁵⁵ Other similar suits have been brought around the country.²⁵⁶

250. See Associated Press, *Criminal Justice System Faces Crisis Due to State Budget Cuts*, SYRACUSE.COM (Oct. 26, 2011), http://www.syracuse.com/news/index.ssf/2011/10/criminal_justice_system_faces.html [<https://perma.cc/Y798-QFV5>] (discussing the effects of budget cuts on the criminal justice system).

251. See Matt Graham, *Immigration in the President's 2016 Budget*, BIPARTISAN POL'Y CTR. (Feb. 9, 2015), <http://bipartisanpolicy.org/blog/immigration-in-the-presidents-2016-budget/> [<https://perma.cc/YEV4-6L3F>] (summarizing proposed budget increases for federal immigration agencies in the President's proposed 2016 budget).

252. In an important national study of lawsuits against police, Joanna Schwartz found that legal judgments won against local police are not necessarily paid for by the police department. Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1153, 1156, 1165 (2016). However, even jurisdictions that do not pay for lawsuits from their own budgets may be sanctioned in other ways, particularly if insurance costs increase in response to significant damage awards. *Id.* at 1184–85.

253. See Nancy Morawetz & Alina Das, *Appendix B: Legal Issues in Local Police Enforcement of Federal Immigration Law*, *Appendix to ANITA KHASHU*, POLICE FOUNDATION, THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES 69 app. b (2009), https://www.policefoundation.org/wp-content/uploads/2015/06/Appendix-B_0.pdf [<https://perma.cc/MTS2-V36X>] (“[I]mmigration enforcement is a complex business . . . [and implicates potential] violation[s] of the myriad rights of both immigrants of any status as well as citizens.”).

254. Press Release, Nw. Immigrant Rights Project, Northwest Immigrant Rights Project & Center for Justice Achieve Settlement in Case of Immigrant Detained Unlawfully (Sept. 17, 2010), <https://www.nwirp.org/northwest-immigrant-rights-project-center-for-justice-achieve-settlement-in-case-of-immigrant-detained-unlawfully> [<https://perma.cc/ZG99-496R>].

255. Randal C. Archibold, *Deported in Error, Missing and Months Later Home*, N.Y. TIMES (Aug. 8, 2007), <http://www.nytimes.com/2007/08/08/us/08border.html> [<https://perma.cc/K5FA-P3TJ>]; DELGADO & MASS, *supra* note 247, at 7. For further discussion of the troubling deportation of United States citizens, see Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1971 (2013), and Kari E. Hong, *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship*, 28 GEO. IMMIGR. L.J. 277, 281–82 (2014).

256. DELGADO & MASS, *supra* note 247, at 10.

Some local protective policies reflect these budgetary concerns. Recall Santa Clara County's detainer policy.²⁵⁷ It provides that if the federal government reimburses the cost of cooperation, the sheriff will participate in enforcing certain immigration detainers.²⁵⁸ Similar types of reimbursement terms have been adopted in other localities around the country, including Cook County, Illinois and the District of Columbia.²⁵⁹ Although the police department policies studied do not contain explicit fiscal restrictions in their text, some of these police manuals are from cities that have adopted a fiscal restriction that applies to police. For example, in 2007, the cities of Oakland and Berkeley both passed resolutions providing that city employees, including police, may not use city funds to enforce civil immigration violations.²⁶⁰

Prior to adopting its new policy requiring federal reimbursement in exchange for enforcement, the Santa Clara County Counsel inquired whether ICE would bear the burden of the costs associated with a detainer request.²⁶¹ ICE officials responded that they are "not responsible for incarceration costs of any individual against whom a detainer is lodged until 'actual assumption of custody.'"²⁶² In other words, the locality must pay for all costs associated with waiting for ICE to come and pick up the immigrant. Furthermore, ICE officials also clarified that "ICE will not indemnify localities for any liability" incurred by complying with ICE detainers.²⁶³

Although certainly protective of some immigrants in the current enforcement environment, budget-based justifications for immigrant

257. See *supra* notes 158–61 and accompanying text.

258. SANTA CLARA CTY. BD. OF SUPERVISORS, *supra* note 157, § 3.54. In adopting its detainer policy in 2011, county officials cited to "concerns about civil rights violations and fear of litigation." Jennifer Wadsworth, *Santa Clara County Reconsiders 'Sanctuary City' Policy*, SAN JOSE INSIDE (Nov. 13, 2015), <http://www.sanjoseinside.com/2015/11/13/santa-clara-county-reconsiders-sanctuary-city-policy> [https://perma.cc/Z5GM-AL3E].

259. D.C. CODE § 24-211.07 (2016) (providing that the District may choose to comply with detainers only if there "exists a prior written agreement with the federal government by which all costs incurred by the District in complying with the ICE detainer shall be reimbursed"); COOK CTY., ILL., CODE OF ORDINANCES § 46-37 (2016) ("The Sheriff of Cook County shall decline ICE detainer requests unless there is a written agreement with the federal government by which all costs incurred by Cook County in complying with the ICE detainer shall be reimbursed.").

260. BERKELEY, CAL., RESOLUTION 63,711-N.S. (2007) ("No department, agency, commission, officer or employee of the City of Berkeley shall use any City funds or resources to assist in the enforcement of Federal immigration law or to gather or disseminate information [about the immigration] status of individuals in the city of Berkeley unless such assistance is required by federal or state statute, regulation or court decision"); CITY OF OAKLAND, CAL., RESOLUTION 80584 (2007) ("City employees including members of the Oakland Police Department shall not enforce federal civil immigration laws and shall not use city monies, resources, or personnel to investigate, question, detect or apprehend persons whose only violation is or may be a civil violation of immigration law.").

261. See Letter from David Venturella to Miguel Márquez, *supra* note 160 (responding to questions posed by the Santa Clara County Counsel regarding ICE policies on reimbursement and indemnification).

262. *Id.* at 3 (citing 8 C.F.R. § 287.7(e)).

263. *Id.*

protection suffer from other limitations. Most importantly, fiscal restrictions do not take an affirmative normative stance about whether and how localities ought to participate in immigration enforcement if money were not an issue. Consider what would happen if the federal government had agreed to reimburse Santa Clara County's costs associated with immigration enforcement. The failed Stop Sanctuary Policies and Protect Americans Act proposed in the Senate in late 2015 promised to do just that—to defray local costs associated with cooperating with immigration enforcement.²⁶⁴ Or consider the proposal of Republican President-elect Donald Trump to “[b]lock funding for sanctuary cities” by making uncooperative cities ineligible for taxpayer dollars.²⁶⁵ Policymaking based solely on financial concerns leaves a locality without a framework for thinking about immigrant protection in the event the federal government someday alters the financial obligations associated with not participating in enforcement efforts.

Putting fiscal concerns front and center also could stifle the creation of innovative local policies to protect noncitizens in the criminal justice system. Plea bargaining with noncitizens, for example, may take more time than for citizens if a prosecutor must carefully consider the equities of each case and research the complexities of how to avoid immigration consequences in a plea agreement.²⁶⁶ Jurisdictions that focus heavily on budgetary concerns thus run the risk of categorically ruling out useful innovations that might consume local resources.

III. Toward Immigrant Equality

Part I documented that the criminal justice policies from four California counties do allow for varying degrees of immigration enforcement, including by (1) inquiring into the immigration status of arrestees; (2) punishing noncitizens more harshly in plea bargaining; and (3) cooperating with immigration officials in local jails. As Part II advanced, the standard justifications for advancing protective criminal justice policies do not articulate a single, coherent framework for more expansive immigrant

264. See *Summary of S. 2146, “Sanctuary Policies and Protect Americans Act”* (Senator Vitter), AM. IMMIGR. LAW. ASS’N (Oct. 16, 2015), <http://www.aila.org/infonet/section-by-section-summary-senator-vitters-s-2146> [<https://perma.cc/C7QF-57G3>] (summarizing the bill’s removal of liability from state or local political subdivisions and its naming of the federal government as the principal for the acts of local agents). The same proposed Republican bill would have cut federal funding to cities that adopt “sanctuary policies.” Stop Sanctuary Policies and Protect Americans Act, S. 2146, 114th Cong. § 3 (2015). For discussion of the House counterpart, see Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 NEW ENGLAND J. ON CRIM. & CIV. CONFINEMENT 159, 169–71 (2016) (discussing another proposed bill, Enforce the Law for Sanctuary Cities, H.R. 3009, 114th Cong. (2015), which would prevent sanctuary jurisdictions from receiving certain federal funds).

265. Tami Luhby, *Trump Condemns Sanctuary Cities, but What Are They?*, CNN (Sept. 1, 2016), <http://www.cnn.com/2016/09/01/politics/sanctuary-cities-donald-trump/> [<https://perma.cc/EA8U-NKC4>].

266. Immigration law is notoriously complex. See Sharpless, *supra* note 100, at 941–45.

protection within the criminal justice system. Part III addresses this issue by presenting an alternative framework that has begun to emerge in immigrant rights advocacy seeking further criminal justice reform—immigrant equality.

There are two intersecting aspects to the principle of immigrant equality in the criminal justice system.²⁶⁷ The first is equality based on citizenship status. The existing ties between criminal justice and immigration enforcement have built a criminal justice system that treats noncitizens in ways that are harsher and more punitive. Even seemingly neutral rules (e.g., offering the same plea in every similar type of case) can have a disparate impact on immigrants (e.g., if the terms of the standard plea make the immigrant deportable).²⁶⁸ Immigrant equality requires an examination of current policy to ensure that each person subjected to the criminal justice system is treated in a way that is equitable, regardless of his or her immigration status.²⁶⁹ Put differently, immigrant equality builds on the basic idea that guides a legitimate system of criminal punishment—that of treating each person with dignity and respect.²⁷⁰

A second and intersecting component of immigrant equality is equal treatment along racial and ethnic lines.²⁷¹ To be sure, bias and profiling are well documented within the criminal justice system writ large.²⁷² However,

267. As Kimberle Crenshaw teaches, in studying groups that experience intersecting forms of oppression, it is important to examine how those forms of oppression work together, rather than only examining them separately. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244–45 (1991).

268. For important examples of how citizenship inequality can result despite seemingly equal rules, see Beckett & Evans, *supra* note 11, at 253–68 (concluding that despite a commitment to “formal equality” along alienage lines in Kings County, Washington, “de facto ineligibility” for certain programming caused by detainers “dramatically alters” the criminal process for noncitizens, including by subjecting them to longer jail stays for the same types of criminal charges).

269. As Jerry López argues, “would-be citizens,” regardless of immigration status, must be treated with “equal respect, not just as humans but as working and responsible members of the very national community we seek to create and sustain.” López, *supra* note 30, at 1733; *see also* Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4–8 (1977) (arguing that “the principle of equal citizenship” requires that “organized society treat each individual as a person, one who is worthy of respect, one who ‘belongs’”).

270. *See generally* BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2015) (emphasizing that achieving justice requires mercy, or the treatment of all persons charged with crimes with dignity and with appreciation for their individual personal circumstances); Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 314 (2004) (arguing that for punishment to be legitimate in a liberal democracy, it must be framed around “baseline” values, including “the entitlement of all citizens to equal consideration and respect”); Michael Tonry, *Equality and Human Dignity: The Missing Ingredients in American Sentencing*, 45 CRIME & JUST. 459, 459–60 (2016) (asserting that sentencing is “severe and arbitrary” in the United States largely “because two fundamental animating values”—equality and human dignity—are absent).

271. As Lucas Guttentag has argued, “immigration law and policy cannot be divorced from issues of race, national origin, ethnicity, and color.” Lucas Guttentag, Introduction, *Immigration Reform: A Civil Rights Issue*, 3 STAN. J. C.R. & C.L. 157, 158 (2007).

272. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2 (2010) (arguing that America’s “racial caste” system has not ended, but has merely been redesigned as the criminal justice system); Gerald P. López, *How Mainstream*

as Kevin Johnson points out, scholars have systematically “failed to sufficiently scrutinize the glaringly disparate impacts of tying [immigration] removals to alleged criminal activity on immigrants of color.”²⁷³ The call for immigrant equality entails greater attention to the ways in which immigration policing can shift the priorities and practices of the criminal law in ways that promote and disguise profiling of Latinos,²⁷⁴ Asians, and other people of color.²⁷⁵ It also requires deeper investigation of racially and ethnically disparate treatment in prosecution and punishment practices that can be promoted by seemingly race neutral immigration enforcement practices.²⁷⁶

To be sure, advocacy based on the rationales of community policing, immigrant integration, and fiscal prioritization can at times encompass indirect claims about due process and equality for all. For instance, when people talk about effective community policing, they may mean to convey much more than just having immigrants serve as willing witnesses in criminal investigations: they may also recognize that immigrants are de facto

Reformers Design Ambitious Reentry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control, 11 HASTINGS RACE & POVERTY L.J. 1, 7 (2014) (revealing how “mass incarceration and social control” have imposed “terrible damage . . . upon families and kinship networks and neighborhoods and communities”).

273. Johnson, *supra* note 246, at 1000. For examples of other scholarship that has begun to shed light on the important issue of racial and ethnic discrimination in immigration enforcement, see Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1185–96 (2002) (describing the wide range of enforcement activities taken by the United States against immigrants following the terrorist attacks on September 11, 2001); Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 UCLA L. REV. 594 (2016) (arguing against the current United States practice of using the deportation of “criminal aliens” as a means of immigration enforcement); Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307, 309 (2009) (critiquing the Bush-era ICE raids as wrongfully criminalizing immigrants of color); Mary Romero, *Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community*, 32 CRITICAL SOC. 447, 447 (2006) (arguing that immigration raids are a policing practice that maintains and reinforces the subordinated status of Latinos); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599, 601–03 (2015) (documenting disparities between Latinos and other groups in rates of incarceration, poverty, unemployment, and deportation).

274. As Douglas Massey and Karen Pren have shown, Latinos in the United States now have the highest concentration of undocumented immigrants of any group in the United States, making Latinos “now the most vulnerable of all of America’s disadvantaged populations.” Douglas S. Massey & Karen A. Pren, *Origins of the New Latino Underclass*, 4 RACE SOC. PROB. 5, 6 (2012).

275. Racialized immigration enforcement can impact not only immigrants, but also citizens who are “racialized,” including citizens who “are bilingual speakers, have friends or family members who are immigrants, or who engage in certain cultural practices.” Romero, *supra* note 273, at 451.

276. For an argument that “immigrant enforcement policies are colorblind racial projects of the state,” see Elizabeth Aranda & Elizabeth Vaquera, *Racism, the Immigrant Enforcement Regime, and the Implications for Racial Inequality in the Lives of Undocumented Young Adults*, 1 SOC. RACE & ETHNICITY 88, 94 (2015). According to Naomi Murakawa and Katherine Beckett, this myth of “racial innocence” has become deeply engrained in part due to a failure “to recognize the many complex ways racial power operates in and through the ever-expanding criminal justice system.” Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOC’Y REV. 695, 695–98 (2010).

equal members of the locality where that law enforcement agency operates. As Mary Fan has pointed out, letting other justifications serve as “proxies” for antidiscrimination values may also offer the advantage of being more acceptable for the general public than an immigrant equality argument.²⁷⁷ On the other hand, by failing to put the norm of equality front and center, the standard menu of advocacy arguments has tended to overlook the growing inequality concerns facing immigrants who find themselves within the criminal system.

By contrast, recently the advocacy movement has more openly called for the equal treatment of immigrants within the criminal justice system. This trend in criminal justice reform advocacy has been particularly notable in the state of California. Since 2000, California has gone further than any other state in adopting pro-immigrant laws that seek to treat immigrants as valued members of the state citizenship.²⁷⁸ These laws include allowing immigrants to qualify for in-state tuition, driver’s licenses, and health benefits.²⁷⁹ More recently, however, reformers in California have started to focus on the ways in which aggressive federal immigration enforcement has interfered with the state system for criminal law adjudication.²⁸⁰ Advocates have begun to realize that this interference is a neglected aspect of reform—and one which has grown increasingly urgent.²⁸¹ Policies crafted by the Obama administration have resulted in the deportation of approximately 2.5 million people.²⁸² Many of these removals are of persons who came into contact with the criminal justice system—an experience so common that now over sixty million people in the United States possess a criminal record.²⁸³ Deportations have become so widespread that nearly half of all Hispanics, including both

277. Mary D. Fan, *Post-Racial Proxies: Resurgent Subfederal Anti-“Alien” Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905, 906, 932–43 (2011). For a related argument, see Motomura, *supra* note 27, at 1728 (explaining that “even when it is extremely difficult to attack” a local law based on equal protection grounds, “the possibility of race or ethnic discrimination may help convince a court” that the law should be invalidated).

278. Ramakrishnan & Colbern, *supra* note 16, at 2.

279. *Id.*

280. For further analysis of these state-level criminal justice reforms from California, see Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12 (forthcoming 2017).

281. *See id.* (noting that treatment of immigrants is a largely overlooked aspect of criminal justice reform, resulting in a second-class system of punitive treatment reserved for immigrants).

282. Peter L. Markowitz, Opinion, *Can Obama Pardon Millions of Immigrants?*, N.Y. TIMES (July 6, 2016), <http://www.nytimes.com/2016/07/06/opinion/can-obama-pardon-millions-of-immigrants.html> [<https://perma.cc/8W7K-YL2A>].

283. *See* JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 1 (2015) (noting that “federal and state criminal record repositories contain criminal records for approximately twenty-five percent of the U.S. adult population”); MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, NAT’L EMP’T PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3 & n.2 (2011), http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf [<https://perma.cc/78UU-VDKM>] (estimating that 65 million adult Americans have a criminal record).

citizens and noncitizens, now say that they worry that they themselves, a family member, or a close friend could be deported.²⁸⁴

In pursuing justice for immigrants at the state and local level, advocates have begun to call for reforms that equalize the playing field for immigrants caught up in the system.²⁸⁵ These equality-focused reforms endeavor to insulate immigrants from aggressive immigration enforcement triggered by interactions with the police, prosecutors, and jailers.²⁸⁶ These next-generation reforms also seek to revise and rethink existing criminal justice policies that inadvertently have an adverse impact on noncitizens.²⁸⁷

The principle of immigrant equality has already begun to appear in national and local campaigns for change. A national campaign announced in 2016 by the Immigrant Justice Network includes an explicit call for the end of citizenship inequality in criminal punishment.²⁸⁸ The campaign's vision statement advocates ensuring that "immigrants have equal access to justice in the criminal system" by addressing policing policies that target immigration status and "curbing the power of prosecutors and judges to impose more punitive measures on immigrants including harsher plea deals and sentences."²⁸⁹ Invocations of immigrant equality are also found in the work of the Santa Clara County Forum for Immigrant Rights and Education (FIRE) Coalition, a multi-ethnic, multi-racial coalition of grassroots and nonprofit organizations.²⁹⁰ The group recently surveyed both immigrant and citizen residents about their views on immigrant equality and found that 94% of respondents agreed that immigrants should not be treated differently than

284. See Mark Hugo Lopez et al., *On Immigration Policy, Deportation Relief Seen As More Important Than Citizenship*, PEW RES. CTR. (Dec. 19, 2013), <http://www.pewhispanic.org/2013/12/19/on-immigration-policy-deportation-relief-seen-as-more-important-than-citizenship/> [<https://perma.cc/8CLT-39AT>] (reporting that 59% of Hispanic immigrants and 46% of all Hispanics say they worry "a lot" or worry "some" that "they themselves, a family member, or a close friend could be deported").

285. Eagly, *supra* note 280 (noting that immigrant rights groups in California are advocating for state legislative reforms designed to address the criminal justice disadvantage of immigrants charged with crimes).

286. *Id.*

287. Although not the focus of this Article, an immigrant equality approach also has implications for the national conversation on immigration federalism. As Lucas Guttentag and other scholars argue, an equality lens may help to craft policies that are "conceptually distinct from laws that target immigrants for enforcement" and therefore not threatened by rulings finding that local pro-enforcement initiatives are preempted by federal law. Guttentag, *supra* note 27, at 49; see *supra* note 27 and accompanying text. For a contrary view, see David S. Rubenstein, *Black-Box Immigration Federalism*, 114 MICH. L. REV. 983, 1007 (2016) (arguing that "importing an equality norm into preemption analysis" is "at best an underinclusive solution to the problem of preemption symmetry").

288. Immigrant Justice Network, *Ending Mass Criminalization: A Vision*, IMMIGR. JUST. NETWORK (Apr. 2016), <http://immigrantjusticenetwork.org/wp-content/uploads/2016/04/Ending-Mass-Criminalization-A-Vision.png> [<https://perma.cc/VL48-TMPF>].

289. See *id.* (listing steps that can help end mass criminalization of immigrants).

290. *About*, F. FOR IMMIGRANT RTS. & EMPOWERMENT, SANTA CLARA COUNTY, <https://sccfire.wordpress.com/about/> [<https://perma.cc/8JRC-VHGG>].

citizens in the criminal justice system.²⁹¹ This show of public support for immigrant equality has infused the group's advocacy efforts around criminal justice reform in Santa Clara.²⁹²

To understand what acceptance of this equality principle could mean for local criminal justice policy, this Part features new state and local criminal justice policies that are emerging in California. Following the structure of Part I, police policies are discussed first, followed by prosecutorial policies and sheriffs' jail policies.

A. *Not Policing Civil Immigration Law Against Criminal Suspects*

Engaging in immigration policing with criminal suspects raises immigrant equality concerns. As Eisha Jain has shown, allowing immigration enforcement to be tied to criminal investigation can incentivize police to arrest immigrants with the specific intent of imposing the sanction of deportation.²⁹³ These incentives may also motivate police to “engage in unlawful searches and seizures” to obtain information, such as identity documents, that could ensure swift deportation, even if not relevant to a criminal prosecution.²⁹⁴

Immigration-infused policing can also lead to widespread racial profiling.²⁹⁵ For example, the Department of Justice discovered that sheriff's deputies cooperating with federal immigration enforcement in Alamance County, North Carolina were between four and ten times more likely to stop Latino drivers than non-Latino drivers.²⁹⁶ In Irving, Texas, a jail-based immigration screening program was associated with a sharp rise in the arrest

291. *The Trust Index: Survey Results on Community Responses to Immigrant Detainer Policy*, SILICON VALLEY DE-BUG (Sept. 21, 2013), <http://www.siliconvalleydebug.org/articles/2013/09/21/trustindex> [<https://perma.cc/957Q-VRMF>].

292. For example, the FIRE Coalition advocates that detainers should not be allowed to undermine local decisionmaking on bail or sentencing. See Letter from Santa Clara Cty. Forum for Immigrant Rights & Empowerment Coal., to Santa Clara Cty. Bd. of Supervisors (Oct. 5, 2015), <https://static1.squarespace.com/static/56134e6ee4b0b59b83530957/t/56160906e4b02dbaff0f5b4/1444284678967/FIRECoalitionPosition-1052015.pdf> [<https://perma.cc/KH72-Q2R8>] (notifying the County Board of Supervisors of their comments on proposed changes to Santa Clara County's detainer policy).

293. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 854–55 (2015).

294. *Id.* at 855; see also Elina Treyger, *Collateral Incentives to Arrest*, 63 U. KAN. L. REV. 557, 559 (2015) (“The incentives set up by these screening regimes are ‘collateral’ because (i) they hold out benefits that are largely uncorrelated with the suspect’s probability of guilt for the crime of arrest, and (ii) the probability of reaping these benefits is largely independent of the suspect’s guilt of, or prosecution for, the crime of arrest.”).

295. Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1400–01 (2006) (“[I]f local authorities start enforcing immigration laws without proper training, they are prone to engage in racial profiling or other abuses of authority.”); Wishnie, *supra* note 43, at 1102–15 (noting that increased state and local enforcement of immigration law could cause racial profiling).

296. Letter from Thomas E. Perez, Assistant Attorney Gen., to Clyde B. Albright, Alamance Cty. Attorney, and Chuck Kitchen (Sept. 18, 2012), <http://www.justice.gov/iso/opa/resources/171201291812462488198.pdf> [<https://perma.cc/UES5-RR34>].

of Hispanics for low-level misdemeanors, such as traffic violations.²⁹⁷ In Phoenix, Arizona, Sheriff Joe Arpaio's immigration sweeps were found to violate the Equal Protection Clause when officers relied explicitly on race in conducting stops.²⁹⁸

These examples make clear that tying immigration enforcement to criminal policing can produce practices that violate equality. According to Devon Carbado and Cheryl Harris, race and ethnicity can serve as a "proxy" for citizenship status, making Latinos especially likely to be searched and seized.²⁹⁹ This dynamic is heightened by the weak constraints of constitutional law in this area; the United States Supreme Court has found that "Mexican appearance" may be relied upon in forming reasonable suspicion for a stop.³⁰⁰

The policing policies from the four counties fall short of protecting against these dynamics. The "don't police civil immigration law" policies common to police departments in all four counties consistently protect noncitizens who are victims and witnesses. For those charged with crimes, however, the police department policies do not provide protection against police directed civil immigration enforcement efforts. Some departments encourage only making referrals to immigration officials for those arrested for more serious types of offenses,³⁰¹ but all allow some form of civil immigration enforcement against arrestees and convicted criminals.

These policies allowing for civil immigration enforcement while conducting criminal law enforcement duties are consistent with the so-called sanctuary city policies first adopted in the 1980s to offer refuge for Central Americans denied asylum by the United States government.³⁰² These city

297. TREVOR GARDNER II & AARTI KOHLI, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, UNIV. CAL. BERKELEY LAW SCH., THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM I (2009), https://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf [<https://perma.cc/GN9P-P7U5>].

298. *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 827 (D. Ariz. 2013).

299. See Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1545–47 (2011) (arguing that the apparatus of immigration-enforcement and criminal procedure laws have only further enabled and legitimized race-based immigration enforcement); see also Fan, *supra* note 277, at 908, 932–43 (demonstrating that anti-immigrant laws are a "proxy way" to engage in racialized policing).

300. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–87 (1975) (holding that Mexican appearance can be a relevant factor in the reasonable suspicion determination); see also Carbado & Harris, *supra* note 299, at 1568–78 (discussing and comparing the Supreme Court's holding in *Brignoni-Ponce* with its holding in *Terry*). More recently, the Ninth Circuit Court of Appeals has found that Mexican appearance is not sufficient to satisfy the reasonable suspicion standard in the border region where a significant portion of citizens and lawfully present noncitizens are Hispanic. *United States v. Montero-Camargo*, 208 F.3d 1122, 1131–33 (9th Cir. 2000) (en banc).

301. *E.g.*, SPECIAL ORDER No. 40, *supra* note 64.

302. Rose Cuison Villazor, "*Sanctuary Cities*" and *Local Citizenship*, 37 FORDHAM URB. L.J. 573, 583. For instance, in 1989 San Francisco adopted a "sanctuary ordinance" prohibiting city employees from assisting immigration officials with immigration investigations. *Sanctuary Ordinance*, CITY & COUNTY OF S.F., <http://sfgov.org/ccsfgsa/sanctuary-ordinance> [<https://perma.cc/N9BG-D4C7>].

initiatives limited the reach of government employees, including police, to investigate the immigration status of city residents and seek to have them deported.³⁰³ Yet, despite the choice of the term “sanctuary,” these early municipal laws assisting migrants in finding refuge were never designed to provide a sanctuary for those immigrants charged with criminal conduct. To the contrary, sanctuary policies included explicit exceptions for those with criminal records.³⁰⁴ Even San Francisco’s 1989 Sanctuary Ordinance, which is often held out as the gold standard in immigrant protection,³⁰⁵ included an exception allowing for the questioning and reporting of individuals to immigration authorities following arrest for the “alleged commission of a felony.”³⁰⁶ In this respect, the sanctuary movement has followed the path of much of mainstream pro-immigrant advocacy that has not objected to linking immigration enforcement to criminal activity.

New equality-based advocacy efforts have begun to challenge these criminal exceptions and instead call for policies that further decouple criminal policing from immigration enforcement. The President’s Task Force on 21st Century Policing recently took a significant step in the direction of immigrant equality by recommending that federal immigration enforcement be “decouple[d]” from “routine local policing for civil enforcement and nonserious crime.”³⁰⁷ Adopting this recommendation would require police departments in the four counties to revise their policing

303. Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The President and Immigration Federalism*, 68 FLA. L. REV. 101, 131–32 (2016). For additional discussion of sanctuary policies, see Kristina M. Campbell, *Humanitarian Aid Is Never a Crime? The Politics of Immigration Enforcement and the Provision of Sanctuary*, 63 SYRACUSE L. REV. 71, 75 (2012) (arguing that sustained focus on immigration enforcement has “given rise to a renewed need for the provision of sanctuary for undocumented immigrants”); Trevor George Gardner, *The Promise and Peril of the Anti-Commandeering Rule in the Homeland Security Era: Immigrant Sanctuary as an Illustrative Case*, 34 ST. LOUIS U. PUB. L. REV. 313, 315 (2015) (discussing a “second wave of ‘immigrant sanctuary,’” which the author defines as “the state and local government practice of restricting police departments from participation in immigration enforcement”); Su, *supra* note 10, at 910 (using the term “sanctuary” to refer to police policies that limit enforcement of immigration in some way); Villazor, *supra* note 302, at 576 (explaining that the term “sanctuary city” describes those “municipalities that have adopted sanctuary, non-cooperation, or confidentiality policies for undocumented residents, which may be viewed as inclusionary types of laws”).

304. See, e.g., Gardner, *supra* note 303, at 328–29, 329 tbl.1.2 (finding that approximately 70% of “sanctuary policies” analyzed had an exception for “police participation in immigration enforcement”). As Los Angeles’s Mayor Eric Garcetti told the press, the term “sanctuary city” does not accurately reflect Los Angeles’s policy, which “does not prevent officers from turning over those arrested for ‘multiple misdemeanors, a high grade misdemeanor, or felony offense’ to immigration authorities.” Nguyen, *supra* note 198.

305. See, e.g., ELS DE GRAAUW, MAKING IMMIGRANT RIGHTS REAL: NONPROFITS AND THE POLITICS OF INTEGRATION IN SAN FRANCISCO 158 (2016) (describing San Francisco as being a “model of immigrant integration” under this policy).

306. Ordinance No. 375-89 (Oct. 24, 1989) (codified at S.F., CAL., ADMIN. CODE, § 12H.2-1).

307. PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 18 (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [<https://perma.cc/Z57C-2HX2>].

policies to bar inquiry into immigration status for those arrested for nonserious crimes.

Future policy revision could also address whether the distinction between serious and nonserious crimes advances immigrant equality. Back-end deportation screening after the point of conviction can still incentivize front-end criminal justice decisionmaking at critical points along the way, such as arrest and charging.³⁰⁸ Moving toward a consistent immigrant equality principle, advocacy groups have begun to focus attention on personal stories illustrating how reliance on criminal status alone does not ensure just outcomes in the immigration system.³⁰⁹ One case that has sparked widespread community support is that of Daniel Maher, an immigrant who was brought to the United States from China when he was two years old.³¹⁰ A conviction he sustained at the age of twenty caused him to land in immigration detention despite his strong community ties and his respected work as Recycling Director of Berkeley's Ecology Center.³¹¹ Another case pertains to Eddy Zheng, who was sentenced at the age of sixteen to over twenty years in prison for kidnapping and robbery.³¹² While serving his sentence, he pursued his education and became an inspirational activist for prison reform.³¹³ His threatened deportation based on his felony conviction was eventually ended when California Governor Jerry Brown pardoned him.³¹⁴ By publicizing these personal narratives, immigrant rights advocates

308. See Eagly, *supra* note 5, at 1149–51, 1154–56 (discussing barriers facing noncitizens seeking equal treatment in bail and sentencing decisions); see also Chin, *supra* note 113, at 1420 (“Immigration status affects the proceedings from bail through execution of a sentence.”); Patrick Kirby Madden, *Illegal Reentry and Denial of Bail to Undocumented Defendants: Unjust Tools for Social Control of Undocumented Latino Immigrants*, 11 HASTINGS RACE & POVERTY L.J. 339, 366–67 (2014) (revealing the prosecutorial practice of seeking detention of immigrants in criminal cases based on their possible deportation and arguing that this practice fosters a system of social control over undocumented Latino immigrants).

309. A recent and compelling example of sharing stories of over-criminalization of immigrants is found in an amicus brief filed with the United States Supreme Court in the case of *Jennings v. Rodriguez* by Alina Das of the NYU Immigrant Rights Clinic. *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016). See generally Brief of Amici Curiae for Americans for Immigrant Justice, et al. in Support of Respondents, *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (No-15-1204), 2016 WL 6276886. The brief and accompanying website highlights the sympathetic stories of immigrants with criminal records being torn from their families and detained for long periods without a due process hearing. See Brief, PROLONGED DETENTION STORIES, <https://www.prolongeddetentionstories.org/#argument> [<https://perma.cc/5B8N-3BSZ>].

310. Tamara Palmer, *Berkeley Man Released from Immigration Detention*, NBC BAY AREA (Aug. 19, 2015), <http://www.nbcbayarea.com/news/local/Daniel-Maher-Immigration-China-322346022.html> [<https://perma.cc/3BJZ-2T8L>].

311. *Id.*

312. Eddy Zheng's story has been featured in an award-winning documentary film. *About, BREATHTHIN': THE EDDY ZHENG STORY*, <http://eddyzhengstory.com/about/> [<https://perma.cc/HJ35-BSWQ>].

313. *Id.*

314. Bob Egelko, *Ex-Convict Turned Chinatown Activist Won't Be Deported*, SF GATE (Mar. 11, 2016), <http://www.sfgate.com/bayarea/article/Ex-convict-turned-Chinatown-activist-won-t-be-6885013.php> [<https://perma.cc/9BVD-QCQ2>]. For a discussion of the impact of pardons

are signaling a willingness to overcome their traditional hesitancy to defend immigrants with criminal records.³¹⁵

To further advance immigrant equality, advocacy groups have also called attention to the racial injustice that can result from common policing practices. The National Day Labor Organizing Network (NDLON) and other immigrant rights groups in Los Angeles have offered the story of Xochitl Hernandez, a Latina grandmother picked up in an anti-gang operation coordinated by the Los Angeles Police Department and ICE, as an important window into what happens when policing and immigration enforcement are blurred.³¹⁶ Although Ms. Hernandez was not the target of the search warrant and was not charged with a crime or found in any gang database, she was arrested, taken into police custody, and eventually transferred into immigration detention and placed in deportation proceedings.³¹⁷ Invoking a norm of immigrant equality, NDLON attorney Emi MacLean told the press that police action swept Ms. Hernandez into the deportation system “based entirely on false, attenuated, and racially-biased claims of gang association.”³¹⁸ A campaign to “#FreeAbuelaXochitl” drew widespread community support, eventually leading to her release from immigration detention.³¹⁹ To help guard against this kind of result in future cases, the Los Angeles Police Department released a new policy directing “that the Department’s role in joint operations with federal immigration authorities must be limited to the investigation of criminal activity, not immigration violations.”³²⁰

Police departments committed to incorporating a norm of immigrant equality could also do so by developing more robust protections against racial and ethnic profiling. Some of the policies in the four counties do begin to

on immigration proceedings, see Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 373–80 (2012).

315. Rebecca Sharpless has forcefully made this argument, explaining that the pro-immigrant movement has traditionally not defended “people regarded as legitimately positioned at the crossroads of our criminal and immigration enforcement systems.” Sharpless, *supra* note 244, at 694.

316. #FreeAbuelaXochitl, NAT’L DAY LABORER ORG. NETWORK, http://action.ndlon.org/p/dia/action3/common/public/?action_KEY=23453 [https://perma.cc/9QFT-JDXW]. Ms. Hernandez’s story made national news in an editorial published by the *New York Times*. N.Y. Times Editorial Bd., Editorial, *Prisons Aren’t the Answer on Immigration*, N.Y. TIMES (Sept. 5, 2016), http://www.nytimes.com/2016/09/05/opinion/prisons-arent-the-answer-on-immigration.html?_r=0 [https://perma.cc/XMM7-FLN4].

317. #FreeAbuelaXochitl, *supra* note 316.

318. *Court Lowers Bond Amount of Immigrant Grandmother Victim of ICE & LAPD Gang & Racial Profiling*, NAT’L DAY LABORER ORG. NETWORK (Sept. 2, 2016), <http://www.ndlon.org/en/pressroom/press-releases/item/1222-court-lowers-bond-of-immigrant-grandmother-victim-of-ice-lapd-gang-racial-profiling> [https://perma.cc/5TLR-L497].

319. *Id.*

320. Memorandum from Michel Moore, Assistant Chief Dir., L.A. Police Dep’t Office of Operations, to Geographic Bureau Commanding Officers, L.A. Police Dep’t (June 24, 2016). The directive also makes clear that in the future “approval shall be obtained *prior to the operation*” for any “joint operations with federal immigration authorities.” *Id.* (emphasis in the original).

address this issue. For example, the Simi Valley Police Department warns officers that “[r]easonable suspicion that a criminal immigration violation has occurred shall not be based on race, color, national origin or any other generalization that would cast suspicion on or stigmatize any person, except to the extent permitted by the United States or California Constitutions.”³²¹ Yet, this kind of brief and general statement does not go beyond the baseline of constitutional compliance and offers no concrete guidance for officers in the field. Next-generation policies could promote language that more effectively guards against racial profiling and other forms of discrimination associated with policing of immigrant communities.

B. *Promoting Fair Punishment*

Recent research has documented a growing punishment divide along citizenship lines, with noncitizens receiving worse treatment for criminal infractions than citizens. For example, a study by sociologist Michael Light reveals that noncitizens receive longer criminal sentences on average than citizens in federal courts, even when conviction type and characteristics of the defendant are taken into account.³²² Research by Alina Das shows that immigrants are often subject to deportation even for accessing seemingly beneficial programs such as a drug-treatment program offered by “problem-solving courts.”³²³ Nora Demleitner highlights how noncitizens are rendered ineligible for a range of rehabilitative prison programs, such as drug-treatment programs, that also can shorten the prison sentences of successful participants.³²⁴ Emma Kaufman’s work uncovers an entirely separate system of federal prisons—known as Criminal Alien Requirement (CAR) prisons—

321. SIMI VALLEY POLICE DEP’T, *supra* note 58, at § 414.4.1; *see also* OAKLAND POLICE DEP’T, *supra* note 67, at 2 (“The Department shall enforce all suspected law violations with equal consideration and not just those affecting a particular race, ethnicity, age, gender, socioeconomic status or other group.”).

322. *See* Michael T. Light et al., *Citizenship and Punishment: The Salience of National Membership in U.S. Criminal Courts*, 79 AM. SOC. REV. 825, 841–42 (2014) (finding that “citizenship status is a salient predictor of sentencing outcomes[,] more powerful than race or ethnicity” and this citizenship effect has grown over time); Michael T. Light, *The New Face of Legal Inequality: Noncitizens and the Long-Term Trends in Sentencing Disparities Across U.S. District Courts, 1992–2009*, 48 LAW & SOC’Y REV. 447, 468 (2014) (describing data that shows a non-citizenship “penalty” at sentencing).

323. Alina Das, *Immigrants and Problem-Solving Courts*, 33 CRIM. JUST. REV. 308, 318–19 (2008). Most of these programs require some kind of admission of guilt or plea in exchange for receiving the favorable benefits of participation, such as drug treatment or other social programs. *Id.* at 313. Yet, as Das explains, such a plea can still trigger deportation of a noncitizen. *Id.* at 310–11. This reality has drastic consequences. For example, in California, a decarceration initiative for drug crimes known as Proposition 36 allowed first-time offenders to access drug treatment in lieu of jail, but participating in the program made noncitizens deportable. Deji Olukotun, *Harm Reduction Statutes and Immigrants in California: Removal of the Shadow-Class*, 19 GEO. IMMIGR. L.J. 429, 430, 435–36 (2005).

324. Nora V. Demleitner, *Terms of Imprisonment: Treating the Noncitizen Offender Equally*, 21 FED. SENT’G REP. 174, 174 (2009).

that provide inferior conditions and are reserved exclusively to segregate noncitizen inmates from citizens.³²⁵ An immigrant equality approach would require reevaluating these kinds of policies and practices that treat noncitizens as deserving of enhanced punishment over citizens.

There is also a growing awareness that both implicit and explicit bias can thrive within the criminal justice system.³²⁶ On a daily basis, prosecutors engage in what Song Richardson calls “systemic triage,” disposing of large numbers of cases quickly and with little time to analyze the facts of individual cases.³²⁷ Angela Davis’s influential work on American prosecutors has revealed that routine charging and plea-bargaining practices can perpetuate racial disparity in the criminal justice system.³²⁸ Davis argues that one possible model for reform is to work with prosecutors to “analyze the racial impact of their decisions at various points of the process” and to draft new charging practices that remedy any identified racial disparities.³²⁹ An immigrant equality approach similarly calls for closer analysis of the ways in which seemingly race-neutral prosecutorial decisionmaking may adversely impact immigrant communities of color.

The plea-bargaining policies analyzed in this Article have the potential to promote immigrant equality by guarding against unjust sentences received by immigrants. Indeed, all four of the collateral consequences policies adopted in the counties recognize the duty of prosecutors to consider deportation as part of the punishment that can attach to a conviction and to ensure that the overall punishment is fair and not out of proportion to the conduct at issue.³³⁰ For instance, the Ventura County District Attorney’s

325. See generally Emma Kaufman, *The Rise of the All-Foreign Prison* (unpublished manuscript) (on file with author).

326. See generally Sunita Sah et al., *Blinding Prosecutors to Defendants’ Race: A Policy Proposal to Reduce Unconscious Bias in the Criminal Justice System*, BEHAV. SCI. & POL., Dec. 2015, at 69, 70 (arguing that unconscious bias plays a role in the selection of charges by prosecutors and advocating that racial identifiers should be removed from the information presented to prosecutors when making a charging decision).

327. L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. (forthcoming 2017).

328. Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 821, 824 (2013).

329. *Id.* at 823–24. Davis features the work of the Prosecution and Racial Justice Program of the Vera Institute of Justice with the Milwaukee District Attorney’s Office. After it was discovered that 41% of whites arrested for possession of drug paraphernalia were not criminally charged, compared to only 27% of persons of color arrested for the same offense, the District Attorney instituted a policy requiring attorneys in his office to either refer individuals arrested for paraphernalia possession to drug treatment or to justify any charging decisions to a supervisor. *Id.* at 836–37, 839–40. This new approach erased the observed racial disparity. *Id.* at 840.

330. See *supra* notes 111–36 and accompanying text. Michael Wishnie has argued that the idea of proportionality should similarly guide the “severity of the sanction” in removal cases. Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 435 (2012). In some instances, he argues, judges should instead order an intermediate sanction, such as a warning or a shorter term deportation. See *id.* at 435–37 (noting possible intermediate sanctions such as fines and suspended sentences); see also Angela M. Banks, *The Normative and Historical*

policy acknowledges that in some cases “collateral consequences may be so disproportionate to the severity of the crime and to the criminal punishment imposed as to be unjust.”³³¹ In reaching a resolution that avoids an unjust deportation penalty, prosecutors may choose to dismiss low-level charges entirely³³² or pursue a “lateral move” that allows for a plea to an alternative charge with similar criminal punishment that avoids a deportation penalty.³³³

The idea of achieving fair punishment is in tension with a competing approach that emerged in three of the counties. When prosecutors exact a premium in exchange for an immigration-neutral plea, they ratchet up the criminal punishment for noncitizens who wish to avoid the deportation result.³³⁴ Here, the focus turns away from whether the deportation penalty would be just and fair for the individual defendant. Instead, reducing the deportation threat is conceived as a benefit that demands additional compensation. This additional punishment, as Eisha Jain points out, may even result in a total punishment that is more than “the prosecutor believes is necessary” given the conduct at issue.³³⁵ Exacting a premium undermines the ideal of immigrant equality by endorsing the distribution of harsher punishment to noncitizen defendants. In doing so, it may also erode public perceptions of the fairness of the criminal justice system.³³⁶

A California law that went into effect on January 1, 2016, has adopted a fair-punishment approach for immigrants as the public policy of the state.³³⁷ Under this law, all prosecutors in the state are now required to “consider the

Cases for Proportional Deportation, 62 EMORY L.J. 1243, 1247 (2013) (arguing that “deportation for minor criminal activity is an illegitimate deprivation of the liberty interest to remain in the United States because it is disproportionate”).

331. OFFICE OF THE DIST. ATTORNEY, CTY. OF VENTURA, *supra* note 129, at 174.

332. *See* Fairfax, *supra* note 113, at 1252 (noting that prosecutors may in some cases decline to seek a conviction because application of the law in a particular case would be unjust; a practice the author calls “prosecutorial nullification”); McGregor Smyth, *Holistic is Not a Bad Word: A Criminal Defense Attorney’s Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 494–95 (2005) (explaining that when prosecutors think that deportation “offend[s] their basic sense of fairness,” they may be willing to dismiss the case entirely).

333. Eagly, *supra* note 5, at 1188.

334. *See supra* section I(B)(2). *See also* Jain, *supra* note 135, at 1226 (“Prosecutors seek a higher criminal penalty in exchange for avoiding a collateral consequence. The price of an immigration-safe deal might be ‘pleading up’ to a more serious crime or serving a longer criminal sentence that does not trigger deportation.”).

335. *See* Jain, *supra* note 135, at 1226.

336. Importantly, research has shown that people are more likely to obey the law if they perceive it to be fair. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 31, 64–68 (1990) (“These studies suggest that those who view authority as legitimate are more likely to comply with legal authority”); Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 667 (2015) (“A growing body of research finds that (1) the perceived fairness of procedures is significantly related to perceptions of legitimacy of authority, and (2) perceptions of legitimacy are in turn associated with greater voluntary legal compliance.”).

337. An Act to add Sections 1016.2 and 1016.3 to the Penal Code, relating to criminal procedure, § 2, 2015 Cal. Stat. 5365, 5367 (codified at CAL. PENAL CODE §1016.3(b) (West 2016)). Court rules in California have long required sentencing judges to consider the impact of collateral consequences before imposing a sentence. CAL. R. CT. 4.414(b)(6).

avoidance of adverse immigration consequences” in reaching a “just resolution” in every case.³³⁸ By characterizing the consequence of deportation as an “adverse” factor to be considered and avoided in “the interests of justice,” California’s statewide policy demands more robust engagement by prosecutors’ offices throughout the state with what it means to obtain a “just” case resolution for noncitizens.³³⁹

Implementing this new California law could lead prosecutors to review their standard plea offers in common types of cases. A seemingly neutral set of terms could in practice have a disproportionately harsh impact on immigrants. Realizing this, a prosecutor’s office could consider restructuring that standard deal to one that does not carry the same negative consequence. That offer could then be made available to all defendants—citizens and noncitizens alike.³⁴⁰

Analyzing prosecutorial patterns in handling noncitizen cases could help to identify additional policies and procedures to advance immigrant equality. After such an analysis, prosecutors may find that they bring large numbers of driving-without-a-license cases without appreciating that those who are arrested for these cases are disproportionately Latino. Even more troubling, analysis of prosecutorial decisionmaking on these cases could show that prosecutors are more likely to pursue license violation charges against Latinos and to dismiss the cases of other groups. Prosecutor offices working to advance immigrant equality could institute internal review practices that remedy these kinds of disparate charging practices. This kind of approach would be consistent with that advocated by groups such as Black Lives Matter, which has raised public awareness of the disparities in the policing of people of color at every stage of the criminal justice process—from arrest to conviction to sentencing.³⁴¹ As one solution, advocates have

338. CAL. PENAL CODE § 1016.3 (West 2016) (“The prosecution, in the interests of justice, and in furtherance of the findings and declarations of Section 1016.2, shall consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution.”).

339. Although the four large urban counties featured in this Article have adopted collateral consequences policies, most other offices have yet to do so. *But see* Monterey Cty. Dist. Attorney, Negotiating Dispositions of Criminal Cases—Extrinsic Consequences, Policy Number 4.05(IX) (revised Oct. 2, 2012) (on file with author) (“In some cases, the extrinsic consequences may be so disproportionate to the severity of the crime and to the criminal punishment imposed as to be unjust. Considering a proffered extrinsic consequence in such a case may be appropriate in seeking a just resolution.”).

340. Making an alternative plea deal available to citizens and noncitizens alike may help address the concern that showing noncitizens mercy in sentencing could be perceived as creating an “unfair disparity.” Chin, *supra* note 113, at 1456. Jack Chin has argued that to combat this perception prosecutors should take steps to “ensure that the bargain is equivalent to what a similarly situated citizen would receive.” *Id.*

341. NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUALITY IN THE CRIMINAL JUSTICE SYSTEM 10–12 (Feb. 2015), <http://www.sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf> [<https://perma.cc/4YWL-KM7G>].

supported the revision of police and prosecutor policies that have a disparate impact on people of color.³⁴² One success story is the Brooklyn District Attorney's initiative to not prosecute cases of minor marijuana possession so that people of color "do not become unfairly burdened and stigmatized."³⁴³

Another area of possible reform involves improving immigrant access to rehabilitative programs that offer alternative sanctions such as probation or drug treatment. In some locations, prosecutorial practice is to exclude immigrants from these programs.³⁴⁴ Other times, immigrants are included,³⁴⁵ but may choose not to participate if the program is structured in a way that could adversely impact the participant's immigration status. For example, deferred-entry-of-judgment programs that require entry of a guilty plea could impose a deportation penalty despite the fact that they do not count as "conviction" under state law.³⁴⁶ Applying an equality approach, prosecutors could begin to structure participation in these programs in different ways. As an example of this type of a reform, in 2015 the California legislature passed a new law allowing defendants to withdraw their guilty pleas after successfully completing a deferred-entry-of-judgment drug-rehabilitation program.³⁴⁷ This simple fix will protect immigrants from the unfair result of deportation for something that the state does not consider to be a conviction.³⁴⁸

342. *Id.* at 19–25.

343. *Id.* at 20.

344. Eagly, *supra* note 5, at 1155.

345. *Id.*

346. California state law allows for certain defendants charged with a first, minor drug offense to participate in a "deferred entry of judgment" program. *See* CAL. PENAL CODE § 1000(a) (West 2016) (outlining special proceedings in such cases). Under the applicable procedure, defendants enter a guilty plea, but the charges are later dismissed if the defendant completes the drug-rehabilitation program. *Id.* at §§ 1000.1–1000.4. Nonetheless, the initial entry of the plea can be counted as a conviction for immigration purposes. *See* 8 U.S.C. § 1101(a)(48)(A) (2012) (defining a "conviction" under the immigration law to include a guilty plea, combined with some form of punishment). This has resulted in the deportation of thousands of immigrants. *See* KATHY BRADY & MICHAEL K. MEHR, IMMIGRANT LEGAL RES. CTR., PRACTICE ADVISORY: NEW CALIFORNIA DRUG PROVISION HELPS IMMIGRANTS 2 (2015), https://www.ilrc.org/files/documents/new_california_drug_laws_1203.pdf [<https://perma.cc/6Z9N-4RZA>] [hereinafter ILRC PRACTICE ADVISORY]. *See generally* Jason A. Cade, *Enforcing Immigration Equity*, 84 *FORDHAM L. REV.* 661, 675 (2015) (discussing how traditional deferred-adjudication programs can still result in deportation and warning that this issue is of "rising importance" as criminal courts "increasingly rely on diversion programs as opposed to incarceration for a wide range of offenses, including low-level drug, domestic violence, and traffic crimes").

347. *See* An Act to add Section 1203.43 to the Penal Code, relating to the entry of judgement, § 1, 2015 Cal. Stat. 5078, 5078 (codified at CAL. PENAL CODE § 1203.43 (West 2016)).

348. The new law also protects citizens from potential adverse collateral consequences, such as qualifying for public benefits and licenses. It is important to note, however, that defendants are nonetheless exposed to the potential collateral consequence until the point that the plea is withdrawn under the new procedure. *See* ILRC PRACTICE ADVISORY, *supra* note 346, at 3. Immigration attorneys are therefore advised to withdraw their client's plea before proceeding in immigration court. *Id.* at 4.

C. *Keeping ICE Out of Local Jails*

Allowing ICE direct access to the county jail has become a crucial issue under PEP.³⁴⁹ As mentioned earlier, PEP was introduced in late 2014 as a response to widespread protest over its predecessor program, Secure Communities.³⁵⁰ PEP continues to link removal to immigration enforcement, making access to the local jail a key immigrant equality issue for advocates.

To clarify the current policy debate surrounding PEP, it is important to understand three key differences between PEP and Secure Communities. Federal authorities have made these changes in an effort to address the conventional objections to immigration policing discussed in Part II.³⁵¹ First, PEP promises to use detainers only to transfer individuals after conviction, rather than merely at the point of arrest or the filing of a criminal charge.³⁵² This new conviction-focused approach addresses the community policing and integrationist concerns that innocent, noncriminal immigrants could be unfairly swept up in deportations.³⁵³ Second, the new “notification request” system also helps to relieve budget-based objections to compliance with PEP.³⁵⁴ If counties are not asked to hold immigrants past their scheduled release, they do not incur additional costs associated with housing them beyond the criminal case. Third, Department of Homeland Security (DHS) officials have assured counties that their concerns about incurring legal liability for lack of Fourth Amendment compliance are addressed by the new notification-request procedure that does not ask for additional detention.³⁵⁵ As Professor David Martin explains, in making these policy changes, PEP has successfully “struck a middle ground between [the] competing interests” of federal and local officials.³⁵⁶

349. See generally Gulasekaram & Ramakrishnan, *supra* note 303, at 144–45 (emphasizing that the Executive’s creation of Secure Communities and PEP is an attempt at “leveraging local resources” and integrating them “into the federal immigration enforcement scheme” in a way that is “acceptable to the Executive’s enforcement apparatus and priorities”).

350. See *supra* notes 147–50 and accompanying text.

351. See *supra* notes 143–48 and accompanying text.

352. OFFICE OF ENF’T & REMOVAL OPERATIONS, U.S. IMMIGRATION & CUSTOMS ENF’T, PRIORITY ENFORCEMENT PROGRAM (2015), https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2015/pep_brochure.pdf [<https://perma.cc/ML6U-ABG5>].

353. It is important to acknowledge that the recent creation of a new procedure—known as the “Request for Voluntary Transfer” or “Form I-247X”—that facilitates the transfer of immigrants from local jails into immigration detention even when they do not have criminal convictions as required under PEP. See DEP’T OF HOMELAND SEC., FORM I-247X: REQUEST FOR VOLUNTARY TRANSFER (2015), <https://www.ice.gov/sites/default/files/documents/Document/2016/I-247X.PDF> [<https://perma.cc/DL9Y-D4UK>].

354. See FORM I-247N, *supra* note 151 (requesting that law enforcement personnel notify federal immigration officials before releasing immigrants with specified criminal convictions).

355. Johnson Secure Communities Memo, *supra* note 145, at 2 (noting that the creation of a federal “request for notification” procedure is intended “to address the increasing number of federal court decisions that hold that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment”).

356. Kate Linthicum, *Immigration Agents Allowed Back in L.A. County Jails, with Limits*, L.A. TIMES (Sept. 23, 2015), <http://www.latimes.com/local/lanow/la-me-ln-ice-los-angeles-jails->

Although President-elect Donald Trump has suggested he may reinstate the beleaguered Secure Communities program,³⁵⁷ the Obama administration's effort to resolve many of the standard objections to local cooperation with immigration enforcement with PEP has required pro-immigrant advocates to articulate more precisely why local cooperation with ICE in their jails is problematic. As Part I discussed, all four county sheriffs have adopted protective policies that limit their cooperation with federal detainees, yet Santa Clara County is the only county to entirely ban ICE from accessing its jail facility.³⁵⁸ The other three counties have thus far continued to authorize federal agents to operate inside their county jails to look for deportable immigrants.³⁵⁹ Los Angeles's current draft policy explicitly indicates that it will cooperate with PEP.³⁶⁰

In opposing the threat that PEP poses to the treatment of noncitizens within local criminal justice systems, immigrant rights groups have begun to call for complete disentanglement of local law enforcement from ICE. For example, a statewide advocacy campaign known as ICE Out of California now urges localities to ban ICE from entering county jails.³⁶¹ Local versions of this campaign—including ICE Out of LA and ICE Out of Santa Clara—are also gaining momentum.³⁶² These advocacy campaigns call for “disentangling local law enforcement from immigration enforcement” so that ICE will be “push[ed] out of California.”³⁶³ Drawing on an equality principle, ICE Out of California brings attention to how immigration detainees have made the criminal justice system unequal by allowing

20150922-story.html [https://perma.cc/QYF5-43GC]. For a fuller discussion on the topic by David Martin, see Martin, *supra* note 150.

357. See *Transcript of Donald Trump's Immigration Speech*, *supra* note 4 (characterizing Secure Communities as a “good program” that was “highly successful”).

358. See *supra* notes 158–61 and accompanying text (discussing Santa Clara's fiscal restrictions on cooperation).

359. See Linthicum, *supra* note 356 (reporting Los Angeles County Sheriff Jim McDonnell's decision to allow immigration agents to look for deportable immigrants in the county's jails); see also Jim Johnson, *Sheriff to Make New ICE Cooperation Program in Jail Permanent*, MONTERREY HERALD (Oct. 19, 2015), <http://www.montereyherald.com/article/NF/20151019/NEWS/151019775> [https://perma.cc/R8LU-32AT] (noting that “85 inmates had been released to ICE” in two months).

360. L.A. SHERIFF'S ICE DETAINER PROCEDURES, *supra* note 172 (setting forth policies for processing immigration detainees under PEP).

361. ICE out of California, *About*, ICE OUT OF CAL., <http://www.iceoutofca.org/about.html> [https://perma.cc/F5ET-M2M6].

362. See, e.g., *ICE Out of LA*, CARECEN, http://www.carecen-la.org/ice_out_of_la [https://perma.cc/4RUT-F4WB]; Silicon Valley De-Bug, *No ICE, ICE, Baby! Keeping PEP COMM Out of Santa Clara County*, YOUTUBE (Aug. 25, 2015), <https://www.youtube.com/watch?v=pAyr1DygvK8> [https://perma.cc/LZ8D-Q72Q] (opposing local law enforcement collaboration with ICE). For more background on the ICE Out of LA Coalition and how its efforts are leading the national movement against local collaboration with ICE, see Victor Narro, *Should LA County's Sheriff Stop Helping Deport Undocumented Angelenos?*, LA PROGRESSIVE (Sept. 11, 2015), <https://www.laprogressive.com/ice-out-of-la/> [https://perma.cc/Y5MU-X2KH].

363. ICE OUT OF CAL., <http://www.iceoutofca.org/> [https://perma.cc/L2A2-XKGB].

noncitizens to be picked up by federal agents despite the “lack [of] a criminal warrant signed by a judge” and unfairly subjected to a “denial or increase of bail” based solely on the filing of a detainer.³⁶⁴

These equality-infused organizing efforts also focus on how jail-based screening can incentivize racial profiling and discriminatory treatment in the criminal justice system. Jail-based screening programs like PEP and Secure Communities are promoted by the federal government as reducing racial profiling by taking immigration enforcement decisions out of the hands of local authorities.³⁶⁵ Yet, despite their presumptive racial blindness, such programs are associated with racialized policing patterns. A study of the federal government’s initial rollout of Secure Communities, a program widely touted as promoting fairness and racial neutrality in enforcement, concluded that the program was in fact intentionally wielded to focus on Hispanic communities.³⁶⁶ An analysis of case-level policing data after a similar screening program (known as the Criminal Alien Program) was implemented in a county in Texas found that arrest patterns shifted to Hispanic residents for low-level misdemeanors so that their immigration status could be discovered.³⁶⁷ Adopting an immigrant equality strategy, the Immigrant Justice Network recently called for ending mass criminalization, including all “mass deportation programs like [the] Priority Enforcement Program” that encourage racial profiling and compound “the racial and economic injustices of the criminal justice system.”³⁶⁸

According to the ICE Out of California campaign, a sheriff’s policy consistent with immigrant equality would deny ICE access to local jails without a criminal warrant signed by a judge.³⁶⁹ It would also prevent ICE from questioning inmates about their immigration status, denying immigrants release on bond in their criminal case, or transporting individuals from the jail to ICE custody.³⁷⁰ In late 2016, pro-immigrant supporters in California won a major victory in securing due process for immigrants with passage of the TRUTH Act, which among other new protections made California the first state in the country to require federal authorities to advise immigrants of their right to speak with an attorney before being interviewed

364. *Id.*

365. *See supra* note 298–301 and accompanying text (describing how local immigration enforcement can lead to racial profiling).

366. Cox & Miles, *supra* note 138, at 134 (finding that racially discriminatory patterns remain statistically significant even when controlling for border proximity and other factors).

367. ANDREA GUTTIN, AMERICAN IMMIGRATION COUNCIL, THE CRIMINAL ALIEN PROGRAM: IMMIGRATION ENFORCEMENT IN TRAVIS COUNTY, TEXAS 8–9 (2010), https://www.americanimmigrationcouncil.org/sites/default/files/research/Criminal_Alien_Program_021710.pdf [<https://perma.cc/G7AR-UGMB>].

368. Immigrant Justice Network, *supra* note 288.

369. ICE Out of California, *supra* note 361.

370. *Id.*

about their immigration status.³⁷¹ Such next-generation immigrant protective policies demand that immigration enforcement activities not be allowed to erode constitutional protections for all.

Conclusion

This study of four California counties identifies three core criminal justice policies governing interactions with noncitizens. These policies, which recur in each county, are police policies that limit policing of civil and criminal immigration violations, prosecutorial policies that weigh the consequence of deportation in plea bargaining, and jail policies that decline cooperation with immigration detainees. By closely studying the terms of these policies, this Article identifies the structural similarities, and modest differences, in the treatment of immigrants within these large, urban criminal justice systems.

This Article adopts the term “immigrant protective policies” to refer to local law enforcement policies that seek to counter the interruptions and distortions in criminal justice adjudication caused by immigration enforcement. As this Article has shown, the local policies from California do also protect at least some noncitizens from immigration enforcement. Yet, the policies do not offer complete protection, and some policies are more protective than others.

Community policing, immigrant integration, and budgetary concerns have all figured prominently in the advocacy efforts that helped to craft the set of first-generation immigrant protective policies featured in this Article. Still incomplete in the debate over state and local criminal justice policy, however, is the perspective that immigrant equality can offer. Immigrant equality, as the concept is advanced on the ground, recognizes what is increasingly becoming self-evident: immigrants are subject to a second-class criminal justice system that exposes them to disproportionate punishments, procedural irregularities, and racially disparate treatment. Guided by notions of fundamental fairness, advocacy for next-generation immigrant protective policies seeks to identify and correct these inequalities.

371. Transparent Review of Unjust Transfers and Holds (TRUTH) Act, ch. 768, § 3, 2016 Cal. Legis. Serv. (West) (to be codified at CAL. GOV'T CODE § 7283.1(a)); *see also* Adolfo Flores, *Undocumented Immigrants Get First Due Process Law in the US*, BUZZFEED (Sept. 28, 2016), https://www.buzzfeed.com/adolfoflores/undocumented-immigrants-get-first-due-process-law-in-the-us?utm_term=.or2ggEvwN#.wbALLW3Qq [<https://perma.cc/52XF-CYSN>].

Appendices A, B, and C summarize the results of a survey of immigration policies in four California county criminal justice systems: Alameda, Los Angeles, Santa Clara, and Ventura. Initial public record requests were sent to city police departments, county prosecutors, and county sheriffs in June 2015 and follow-up was conducted through October 2016. Each Appendix is organized by county. Readers interested in the original text of the policies may review them in the accompanying online database. *See* Ingrid V. Eagly, Library Guide, Immigration Enforcement and Criminal Adjudication, UCLA School of Law, <http://libguides.law.ucla.edu/immigrationandcriminaladjudication>.

APPENDIX A: POLICE POLICIES

County	City	Written Policy	Date Adopted	Publication Type	Don't Police Civil Immigration Law	Don't Police Criminal Immigration Law
Alameda	Oakland	Yes	June 25, 2008	Department Training Bulletin	<p>"[M]embers of the Department will not initiate police action where the primary objective is to discover that the person is an alien (non-United States citizen) or to discover the status of the person under <i>civil</i> immigration laws."</p>	Not mentioned
Alameda	Freemont	Yes	June 27, 2016	Policy Manual (Lexipol)	<p>"To encourage crime reporting and cooperation in the investigation of criminal activity, all individuals, regardless of their immigration status, must feel secure that contacting or being addressed by members of law enforcement will not automatically lead to immigration inquiry and/or deportation."</p>	<p>No ban, but guidance provided: "Reasonable suspicion that a criminal immigration violation has occurred shall not be based on race, color, national origin or any other generalization that would cast suspicion on or stigmatize any person, except to the extent permitted by the United States or California Constitutions. Instead, the totality of circumstances shall be used to determine reasonable suspicion, and shall include factors weighing for and against reasonable suspicion."</p>
Alameda	Hayward	Yes	April 16, 2015	Policy Manual (Lexipol)	<p>"The immigration status of individuals alone is generally not a matter for police action."</p>	<p>"The U.S. Immigration and Customs Enforcement (ICE) has primary jurisdiction for enforcement of the provisions of Title 8, United States Code</p>

County	City	Written Policy	Date Adopted	Publication Type	Don't Police Civil Immigration Law	Don't Police Criminal Immigration Law
Alameda	Berkeley	No	N/A	N/A	N/A	N/A
Los Angeles	Los Angeles	Yes	November 27, 1979	Special Order from Chief of Police; Policy Manual	"Undocumented alien status in itself is not a matter for police action."	"Officers shall neither arrest nor book persons for violation of Title 8, Section 1325 of the United States Immigration Code (Illegal Entry)."
Los Angeles	Long Beach	No	N/A	N/A	N/A	N/A
Los Angeles	Glendale	Yes	June 11, 2015	Policy Manual (Lexipol)	"The immigration status of individuals alone is generally not a matter for police action."	"The U.S. Immigration and Customs Enforcement (ICE) has primary jurisdiction for enforcement of the provisions of Title 8, United States Code dealing with illegal entry. When assisting ICE at its specific request, or when suspected criminal violations are discovered as a result of inquiry or

County	City	Written Policy	Date Adopted	Publication Type	Don't Police Civil Immigration Law	Don't Police Criminal Immigration Law
Los Angeles	Pomona	Yes	March 12, 2014	Policy Manual (Lexipol)	“The immigration status of individuals alone is generally not a matter for police action.”	investigation based on probable cause originating from activities other than the isolated violations of 8 USC § 1304; 8 USC § 1324; 8 USC § 1325 and 8 USC § 1326, this department may assist in the enforcement of federal immigration laws. . . .” “The U.S. Immigration and Customs Enforcement (ICE) has primary jurisdiction for enforcement of the provisions of Title 8, United States Code dealing with illegal entry. When assisting ICE at its specific request, or when suspected criminal violations are discovered as a result of inquiry or investigation based on probable cause originating from activities other than the isolated violations of 8 USC § 1304; 8 USC § 1324; 8 USC § 1325 and 8 USC § 1326, this department may assist in the enforcement of federal immigration laws. . . .”
Santa Clara	San Jose	Yes	May 15, 2015	Memo from Chief of Police to all Sworn Personnel;	“[M]embers of the Police Department will not initiate police action where the primary objective is to discover that the person is an	Not mentioned

County	City	Written Policy	Date Adopted	Publication Type	Don't Police Civil Immigration Law <i>undocumented immigrant . . . or to discover the status of the person under civil immigration laws.</i>	Don't Police Criminal Immigration Law
Santa Clara	Sunnyvale	No	N/A	N/A	N/A	N/A
Santa Clara	Santa Clara	No	N/A	N/A	N/A	N/A
Santa Clara	Mountain View	Yes	September 25, 2014	Policy Manual (Lexipol)	"The immigration status of individuals alone is generally not a matter for police action."	"The U.S. Immigration and Customs Enforcement (ICE) has primary jurisdiction for enforcement of the provisions of Title 8, United States Code dealing with illegal entry. When assisting ICE at its specific request, or when suspected criminal violations are discovered as a result of inquiry or investigation based on probable cause originating from activities other than the isolated violations of 8 USC § 1304; 8 USC § 1324; 8 USC § 1325 and 8 USC § 1326, this department may assist in the enforcement of federal immigration laws"
Ventura	Oxnard	Yes	January 25, 2013	Policy Manual (Lexipol)	"The immigration status of individuals alone is generally not a matter for police action."	"The U.S. Immigration and Customs Enforcement (ICE) has primary jurisdiction for enforcement of the

County	City	Written Policy	Date Adopted	Publication Type	Don't Police Civil Immigration Law	Don't Police Criminal Immigration Law
Ventura	Simi Valley	Yes	October 28, 2015	Policy Manual (Lexipol)	<p>“To encourage crime reporting and cooperation in the investigation of criminal activity, all individuals, regardless of their immigration status, must feel secure that contacting or being addressed by members of law enforcement will not automatically lead to immigration inquiry and/or deportation.”</p>	<p>provisions of Title 8, United States Code dealing with illegal entry. When assisting ICE at its specific request, or when suspected criminal violations are discovered as a result of inquiry or investigation based on probable cause originating from activities other than the isolated violations of 8 USC § 1304; 8 USC § 1324; 8 USC § 1325 and 8 USC § 1326, this department may assist in the enforcement of federal immigration laws”</p> <p>No ban, but guidance provided: “Reasonable suspicion that a criminal immigration violation has occurred shall not be based on race, color, national origin or any other generalization that would cast suspicion on or stigmatize any person, except to the extent permitted by the United States or California Constitutions. Instead, the totality of circumstances shall be used to determine reasonable suspicion, and shall include factors weighing for and against reasonable suspicion.”</p>

County	City	Written Policy	Date Adopted	Publication Type	Don't Police Civil Immigration Law	Don't Police Criminal Immigration Law
Ventura	Ventura	Yes	Refused to Produce Written Policy	Policy Manual (Lexipol)	Unknown	Unknown
Ventura	Santa Paula	Yes	August 9, 2016	Policy Manual (Lexipol)	<p>"To encourage crime reporting and cooperation in the investigation of criminal activity, all individuals, regardless of their immigration status, must feel secure that contacting or being addressed by members of law enforcement will not automatically lead to immigration inquiry and/or deportation."</p>	<p>No ban, but guidance provided: "Reasonable suspicion that a criminal immigration violation has occurred shall not be based on race, color, national origin or any other generalization that would cast suspicion on or stigmatize any person, except to the extent permitted by the United States or California Constitutions. Instead, the totality of circumstances shall be used to determine reasonable suspicion, and shall include factors weighing for and against reasonable suspicion."</p>

APPENDIX B: DISTRICT ATTORNEY POLICIES

County	Written Policy	Date Adopted	Publication Type	Fair Punishment Approach	Exacting a Penalty Approach
Alameda	Yes	October 8, 2012	Guidelines Regarding the Consideration of Collateral Immigration During Plea Negotiations	<p>“When it would be just to do so, it is appropriate to consider the collateral consequences (including potential immigration consequences) of a criminal conviction during the plea negotiation process. This sort of analysis will necessarily be fact specific and require consideration of a variety of relevant factors. . . . It is generally considered appropriate to offer an accommodation if the collateral consequences are disproportionate to the crime and sentence being discussed.”</p>	<p>Exacting a Penalty Approach</p> <p>“If the consideration of collateral consequences is deemed appropriate and some mitigating modification of an offered plea agreement is suggested, it is also appropriate to require some form of concession by the defendant (to make the resolution roughly equivalent to an offer made to a U.S. citizen). Examples would include more custody time or a longer period of probation.”</p>
Los Angeles	Yes	September 25, 2003	Special Directive 03-04 from District Attorney Steve Cooley to All Deputy District Attorneys	<p>“In order to arrive at the appropriate punishment for a criminal defendant, prosecutors routinely review and consider all relevant factors . . . [In some cases] collateral consequences can have so great an adverse impact on a defendant that the resulting punishment may not fit the crime.”</p>	Not mentioned
Santa Clara	Yes	September 14, 2011	Memorandum from Santa Clara County District Attorney Jeff Rosen to Fellow Prosecutors	<p>“It is not generally the duty of a prosecutor to mitigate the collateral consequences to a defendant of his or her crime. However, in those cases where the collateral consequences are significantly greater than</p>	<p>“[A] prosecutor should determine an appropriate sentence based upon all traditional and appropriate factors, and then if a significant downward departure is appropriate due to a disproportionate</p>

County	Written Policy	Date Adopted	Publication Type	Fair Punishment Approach	Exacting a Penalty Approach
Ventura	Yes	August 7, 2012	Ventura County District Attorney, Additions to Legal Policies Manual	<p>the punishment for the crime itself, it is incumbent upon the prosecutor to consider and, if appropriate, take reasonable steps to mitigate those collateral consequences.”</p>	<p>collateral consequence, then the prosecutor should insist upon a concession to maintain a concordance between the modified and the original sentence. For example, if the prosecutor decides it is appropriate to alter a charge to arrive at an immigration neutral result, and such an alteration results in the loss of priority, then the prosecutor might well decide to insist upon more custody time or a longer period of probation.”</p>
				<p>“Collateral consequences are generally a normal and just consequence of a criminal conviction. However, in unusual cases, the collateral consequences may be so disproportionate to the severity of the crime and to the criminal punishment imposed so as to be unjust. In such cases, the deputy district attorney’s supervisor may approve deviation from our case disposition policy to avoid such consequences.”</p>	<p>“In immigration matters, an individual will often allege severe immigration consequences. However, these determinations are sufficiently complicated that they are often difficult to predict or verify. The remedy is to structure the disposition so that it is comparable to the original offer. For example, if the new offer includes additional custody time to compensate for a change in charge, it is unlikely that anyone would accept the offer unless they were actually facing the claimed collateral consequence.”</p>

APPENDIX C: SHERIFF POLICIES

County	Written Policy	Date Adopted	Publication Type	Fiscal Restriction	Probable Cause Restriction	Conviction Severity Restriction
Alameda	Yes	January 1, 2014; (revised July 6, 2015)	Sheriff's Office General Order	Not mentioned	"A detainer will be acted upon ONLY for inmates with pending criminal cases that would normally be held for further criminal proceedings and if the ICE immigration detainer is accompanied with an arrest warrant signed by a judge."	Not mentioned
Los Angeles	Yes	October 19, 2015	Custody Service Division: General Population, Unit Order 5-22/001.10	Not mentioned	"ICE agents will be required to take custody and transport the inmate within the standard time of release, without additional delay , according to the procedures outlined in this order."	If the immigrant is not held beyond the standard time of release, the Sheriff will allow for the transfer of individuals who satisfy the "list of qualifying AB4 charges."
Santa Clara	Yes	October 18, 2011	Santa Clara County Board of	Allows limited compliance "so long as there is a prior written	Not mentioned	If the fiscal restriction is satisfied, Santa Clara will exercise its discretion to

County	Written Policy	Date Adopted	Publication Type	Fiscal Restriction	Probable Cause Restriction	Conviction Severity Restriction
Ventura	Yes	October 30, 2014	Supervisors Policy Manual Memorandum from Central Inmate Records	agreement with the federal government by which all costs incurred by the County in complying with the ICE detainer shall be reimbursed." Not mentioned	“Effective May 27, 2014 we were notified pursuant to: U.S. District Court, Miranda-Olivares v. Clackamas County, Case No. 3:12-cv-02317-ST, issued April 11, 2014 that any and all current inmates in our custody with ICE Detainers needed to be dropped/cleared. . . . [B]ased upon this notification we would no longer book any ICE Detainers.”	honor federal detainer requests if the individual was “convicted of a serious or violent felony” within the past ten years, or convicted at any time of a homicide crime. Not mentioned