

Workplace Enforcement Workarounds

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Repository Citation

Stephen Lee, *Workplace Enforcement Workarounds*, 21 Wm. & Mary Bill Rts. J. 549 (2012),
<http://scholarship.law.wm.edu/wmborj/vol21/iss2/7>

WORKPLACE ENFORCEMENT WORKAROUNDS

Stephen Lee*

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INTRODUCTION

For more than a quarter-century, immigration law’s interior enforcement agenda has fixated on the workplace and the criminal justice system. Every hiring decision and every traffic stop transpires in the shadow of the immigration code. Within this far-reaching universe, employers and the police have reigned supreme. Each stands as a gatekeeper for their respective institutions—a recruitment pitch often opens one gate, a street encounter the other—and while much has been written about these agents of immigration law, they are typically treated as separate subjects of academic inquiry. This essay shows how these front-line immigration decisionmakers are coming together. Specifically, I argue that the Executive’s workplace enforcement policy is being undermined by its growing use of criminal law actors for immigration purposes.

To start with, the Obama Administration has deprioritized the removal of immigrant workers. It has chosen instead to focus on the employers themselves,¹ with a particular focus on “exploitative employers”—those who knowingly hire and exploit

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¹ See, e.g., Adriana Gardella, *As Immigration Audits Increase, Some Employers Pay a High Price*, N.Y. TIMES, July 14, 2011, at B10.

immigrant labor. A key part of this strategy has been constraining the ability of employers to report unauthorized workers to immigration officials as a way of avoiding liability for workplace violations.² One of the ways President Obama has distinguished himself from past administrations has been by targeting bad actor employers through the creative use of the administrative state. Some of the regulatory innovations force immigration enforcement-related investigations to yield to labor enforcement-related investigations; others enable unauthorized workers to pursue workplace claims before being removed; still others allow unauthorized workers with such claims to avoid removal altogether.³ Moreover, agencies with a workplace-oriented mandate—like the Department of Labor (DOL)—have come to play a more prominent role in the enforcement of immigration laws. All of these workplace enforcement fixes rest on the same rationale: discouraging employers from engaging in the strategic reporting of immigration-related information will advance the goal of deterring employers from hiring and exploiting immigrant workers.

Meanwhile, the Executive has sent a different type of message to sheriffs and police officers, who have emerged as key figures in another major interior enforcement program: the pursuit of noncitizen criminals for removal.⁴ Having announced that the removal of “criminal aliens” is the Administration’s top immigration enforcement priority,⁵ Immigration and Customs Enforcement (ICE) has undertaken an unprecedented effort to encourage and, in many cases, compel local police to share immigration-related information with federal immigration officials. Although there might be some instances where the Executive discourages such contact from local police,⁶ interior enforcement as a whole is evolving in a direction that relies heavily on the engagement of local police. In the vast majority of jurisdictions, local law enforcement officers are effectively required to share immigration-related information

² I have written about this practice in previous work. See Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103 (2009). The immigration code requires all employers to verify the immigration status of their workers, which means they extract sensitive information about their workers. See 8 U.S.C. § 1324(a)(1)(B) (2006).

³ See Memorandum from John Morton, Dir. of U.S. Immigration & Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel on Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011) [hereinafter Morton Memorandum], available at <http://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf> (instructing immigration officials to pay particular attention to individuals “who may be in a non-frivolous dispute with an employer” as potential candidates for favorable exercises of prosecutorial discretion).

⁴ See 8 U.S.C. § 1226 (2006) (requiring federal officials to work with local officials in identifying aliens incarcerated through local government, and to designate and train liaisons to carry out such purpose).

⁵ See Charlie Savage, *2,901 Arrested in Crackdown on Criminal Immigrants*, N.Y. TIMES, Sept. 29, 2011, at A14.

⁶ See *infra* Part III.

with ICE on every person they arrest.⁷ This is a recent development,⁸ and one that has come to define the Obama Administration's approach to immigration enforcement. Rather than utilizing the 287(g) program⁹—an “opt-in” model of local enforcement where each jurisdiction decides whether to assist the federal government in identifying potentially removable immigrants—the Department of Homeland Security (DHS) has openly embraced the Secure Communities Program (S-Comm),¹⁰ which compels *every* jurisdiction to assist in this endeavor. Under S-Comm, every set of fingerprints submitted to a national criminal information database is automatically re-routed to a DHS database for immigration screening purposes. S-Comm requires no opt in, and indeed, its design is indifferent to the immigration enforcement preferences of the local officers submitting the fingerprints.

By themselves, these structural distinctions are unremarkable. Different regulatory challenges often invite different information-sharing policies, and the comparative case of workplace enforcement and “cimmigration”¹¹ policies would seem no different. On the surface, deterring workplace exploitation and identifying noncitizen criminals for removal appear to have little to do with one another. But however distinct these strategies may appear, the growing anecdotal evidence suggests that these strategies are getting tangled up as a matter of practice. Consider this example: Michael Tebb hired Jose Ucelo-Gonzalez to assist him with a parking lot project in Garden Grove, California.¹² At the end of the day, Tebb allegedly refused to pay Ucelo-Gonzalez, and as their exchange escalated, Tebb contacted the Garden Grove police.¹³ The local prosecutor quickly dropped the charges, but no matter: Ucelo-Gonzalez's brief tenure in jail was apparently long enough for ICE to verify his unauthorized

⁷ See Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 182 (2005).

⁸ See *Fact Sheet: Transforming the Immigration Enforcement System*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (2012), <http://www.dhs.gov/news/2012/06/15/fact-sheet-transforming-immigration-enforcement-system>.

⁹ See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 8 U.S.C. § 1357(g) (2006).

¹⁰ *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Dec. 6, 2012).

¹¹ The immigration law and criminal law systems have become so intertwined, scholars have come to refer to it as a single “cimmigration” system. See, e.g., Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157 (2012); Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

¹² See Complaint para. 13, *Ucelo-Gonzalez v. Tebb* (Cal. Sup. Ct. 2012) (No. 30-2012-00588416-CU-ML-CJC).

¹³ See *id.* at para. 17.

immigration status and issue a detainer thus triggering the removal process.¹⁴ The wage theft Tebb allegedly committed (and the manner in which he committed it) makes him precisely the kind of “exploitative employer” the Obama Administration has set out to punish. But because the vast majority of arrests result in automatic immigration screening, employers have the ability to recast their workers—the victims of wage theft and other workplace violations—as “criminal aliens,” thus evading detection. This troubling case illustrates how the Executive’s far-reaching insinuations into the criminal justice system are poised to undermine workplace protections, which have long been understood to shield unauthorized workers against exploitation.

In this essay, I argue that the Executive’s increased reliance on local law enforcement to identify “criminal aliens” undermines competing commitments in the realm of workplace enforcement, which sets out to identify and punish “exploitative employers.” In developing this point, I rely on insights generated by public law scholars in a conversation over what they call “workarounds.” Within the workarounds framework, legal actors achieve some outcome or goal, which is formally prohibited by one set of rules but achievable by a separate, often unrelated set of rules.¹⁵ Here, while workplace enforcement rules formally prohibit (or at least significantly raise the costs of) reporting workers to evade liability for workplace violations, S-Comm’s immigration screening requirement undermines these rules by creating an alternate route for reporting workers.

Examining programs like S-Comm through a workarounds lens generates two primary insights. First, as the Ucelo-Gonzalez example demonstrates, transferring immigration authority to local law enforcement officers creates opportunities for employers to circumvent the very information-sharing restrictions that have come to define workplace enforcement policy. Such workarounds can be particularly deft under S-Comm where all that is required to trigger scrutiny by federal immigration officials is an arrest.¹⁶ As the Ucelo-Gonzalez example illustrates, it does not matter that a prosecutor drops the charges. An arrest is enough to transform a noncitizen into a “criminal alien.” A second insight concerns allocations of power within the Executive. Although the devolution of immigration enforcement authority to local police often invites worries about the federal government ceding power to sub-federal entities,¹⁷ in another respect, programs like S-Comm have an aggrandizing effect: enlisting the help of local police allows ICE to expand its enforcement power at the DOL’s expense.

¹⁴ For more details, see *infra* Part II.B.

¹⁵ See, e.g., Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1503–04 (2009).

¹⁶ See Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011).

¹⁷ See, e.g., Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001).

Part I provides an overview of the immigration law's interior enforcement strategy. In this Part, I summarize recent changes in workplace enforcement policy and in those programs geared towards identifying "criminal aliens." I explain how these enforcement schemes rest on different informational rules: while employers are discouraged from reporting the presence of potentially removable immigrants, local law enforcement officers are often welcomed and increasingly required to do so.

Part II shows how the Obama Administration's pursuit of "criminal aliens" has the strong potential for frustrating its competing goal of punishing "exploitative employers." In other words, I show how one interior enforcement arm is working at cross-purposes with the other. After developing a working definition of workarounds, I provide examples of local police being drawn into workplace disputes. Importantly, as these examples demonstrate, workarounds do not require employers to know that contacting police will lead to the issuance of an immigration detainer, nor do they require police to realize that arresting "troublemaker" migrants facilitates the suppression of labor and employment rights. Nevertheless, "criminal alien" enforcement programs have the effect of destabilizing the enforcement of workplace rights by unauthorized migrants. Moreover, although programs like S-Comm are designed to give away power to local entities, such programs allow ICE to amass power in another, less noticeable respect. By creating more entry points into the removal pipeline, ICE hampers (and thus expands its power at the expense of) the DOL, whose privacy challenge in workplace enforcement is credibly conveying to workers that no immigration consequences will follow from their decision to pursue workplace claims. By way of conclusion, Part II teases out the regressive elements of S-Comm: localities are now positioned to either facilitate or prevent the suppression of labor rights, a position local police have not confronted since the pre-World War II era.

Part III addresses whether and to what extent these workarounds are correctable. Although there are a number of reasons to criticize *that* the Executive is pursuing "criminal aliens," my primary focus here is on the limitations tied up in *how* it is choosing to do so. Thus, my primary focus here is whether the President and high-level policymakers have a meaningful opportunity to oversee the process by which immigrants like Ucelo-Gonzalez are swept into the removal pipeline. As I explain, the policy choice to pursue criminal aliens through S-Comm, which casts a wide and indiscriminate screening net, will hamper the Executive's ability to coordinate its interior enforcement agenda. I then conclude.

I. INTERIOR ENFORCEMENT TARGETS

For many years, immigration scholarship focused on screening challenges at the border,¹⁸ but in recent years, immigration scholars have extended the screening

¹⁸ See, e.g., Janet A. Gilboy, *Deciding Who Gets In: Decisionmaking by Immigration Inspectors*, 25 L. & SOC'Y REV. 571 (1991).

framework into the interior.¹⁹ While there are many social institutions through which migrants move, two have emerged as central to immigration law's interior enforcement agenda: the workplace and the criminal justice system.²⁰ Because much has already been written about immigration law's intersections with both labor and employment law²¹ on the one hand, and criminal law on the other,²² I will provide only a cursory overview of the relevant immigration enforcement programs governing each institution. But these summaries perform important prefatory work in setting up the dynamic with which I am primarily concerned in Part II, namely that strategies designed to target "criminal aliens" can frustrate strategies for deterring the exploitation of immigrant workers. The salient point here is that both employers and local law enforcement entities are charged with the responsibility of gathering immigration-related information but are subject to different constraints as to what they can do with this information once they obtain it. Whereas modern workplace enforcement rules discourage employers from sharing immigration-related information, the police are largely encouraged to share such information regarding their investigatory targets.

A. "Exploitative Employers"

As is well known by now, 1986 was a major turning point in the enforcement of immigration laws in the workplace. That year, Congress passed the Immigration Reform and Control Act (IRCA), which imposed screening duties and the threat of sanctions on our nation's employers.²³ The authorized migration system reflects the notion that employers possess greater expertise and face stronger incentives to identify and screen potential migrant workers than do immigration officials. But employers can hire migrants only to the extent that doing so does not displace U.S. and other authorized workers, and as a result, IRCA operates as a check on the labor

¹⁹ See generally Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809 (2007); Lee, *supra* note 2; Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777 (2008).

²⁰ See *infra* Parts I.A–B.

²¹ See, e.g., Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 L. & SOC'Y REV. 1041 (1990); Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409 (2011); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 201.

²² See *supra* note 11.

²³ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986). IRCA unfurled a three-part plan for reforming the immigration system of which employer sanctions was just one part. It also created a legalization program for unauthorized migrants and committed resources to fortifying the border. This was the last time the country reformed the immigration code. IRCA's workplace enforcement piece has been lambasted by scholars as ineffective, a prime example of symbolic legislation, and for exacerbating an employer's ability to exploit unauthorized labor. See Calavita, *supra* note 21; Wishnie, *supra* note 21, at 194–95, 201.

migration flow. To prevent employers from hiring noncitizen workers outside of the strictly regulated labor pool of authorized foreign workers, IRCA prohibits employers from knowingly hiring unauthorized workers and requires that they “verify” all of their workers to implement this directive.²⁴ IRCA’s verification requirements are broadly conceived and apply to all 7.6 million employers in the United States.²⁵ But because proving knowledge can be difficult, the reality has been that employers enjoy a great deal of flexibility in selectively deploying verification duties to serve their own purposes, which often includes the suppression of labor dissent.²⁶

Historically, immigration officials have under-enforced immigration laws against employers.²⁷ Thus, an employer could usually hire and exploit unauthorized migrants with little fear of reprisal from either the workers themselves or federal officials.²⁸ By contrast, President Obama has prioritized bad actor or “exploitative” employers, especially those engaging in the systematic and intentional exploitation of unauthorized labor.²⁹ Moreover, the President has tried to neutralize the bargaining advantage

²⁴ Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (a)–(b) (2006).

²⁵ See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, tbl. 759 (2012), available at <http://www.census.gov/compendia/statab/2012/tables/12s0759.pdf>.

²⁶ I have written about this elsewhere. See Lee, *supra* note 2, at 1107.

²⁷ *Id.* at 1126.

²⁸ This dynamic spurred Congress to revisit the screening process in 1996, when it established numerous database refinements, most notably the “E-Verify” system. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, 658, 661–62 (1996) (relevant provisions codified in 8 U.S.C. § 1324a (2006)). E-Verify did not change the verification requirements, only how they were carried out. Instead of examining paperwork, E-Verify requires employers to cross-check a potential employee’s identification information with a centralized database developed with information compiled by the Social Security Administration (SSA). Several scholars have pointed out that E-Verify actually harms citizens. Despite the greater oversight that E-Verify enables immigration officials to exercise, critics point out that the SSA-based information provides only spotty reliability. See, e.g., Kati L. Griffith, *Discovering “Immigration” Law: The Constitutionality of Subfederal Regulation at Work*, 29 YALE L. & POL’Y REV. 390, 424–26 (2011) (explaining how E-Verify adversely affects workers with “uncommon spellings or sequencing of last names” and noncitizen work-authorized workers more generally). They also point out that E-Verify still provides employers plenty of leeway to deploy their verification duties selectively. See Juliet P. Stumpf, *Getting to Work: Why Nobody Cares About E-Verify (and Why They Should)*, 2 U.C. IRVINE L. REV. 381, 401–04 (2012) (describing the ways in which E-Verify exacerbates the affirmative misuse of verification duties).

²⁹ ICE prioritizes targeting those employers who: “Utilize unauthorized workers as a business model; Mistreat their workers; Engage in human smuggling or trafficking; Engage in identity and benefit fraud; Launder money; [and] Participate in other criminal conduct.” See *Fact Sheet: Worksite Enforcement*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (May 23, 2012), <http://www.ice.gov/news/library/factsheets/worksite.htm>. To be clear, enforcing immigration laws in the workplace made for splashy news during the Bush Administration as well, but the difference has been that unauthorized workers appearing as witnesses rather than as defendants have become more commonplace under this Administration. See also Julia Preston, *A Crackdown on Employing Illegal Workers*, N.Y. TIMES, May 30, 2011, at A1 (“Obama administration officials are sharpening their crackdown on the hiring of illegal immigrants by

that employers have enjoyed over workers rendered vulnerable by their unauthorized status.³⁰ In particular, his Administration has developed policy designed to deter employers from using immigration law to escape liability for violations of labor and employment law. Perhaps the most notable example is a Memorandum of Understanding (MOU) prohibiting ICE officials from conducting enforcement actions in workplaces where active DOL investigations are already underway.³¹ Although ICE assumes primary enforcement authority over immigration enforcement matters in the interior, other agencies, like the DOL, enjoy overlapping authority in the workplace. And, as I've explained elsewhere, one goal of such interagency agreements is to force ICE to take more seriously the need to protect immigrant workers against exploitation, a goal that DOL is often more suited to handle than ICE.³² For similar reasons, those who have been victims of workplace crimes may initiate the U visa certification process by contacting the DOL instead of another agency with a more traditional immigration enforcement mission.³³ Both of these measures increase the DOL's ability to credibly signal to unauthorized workers that cooperating with labor officials will not lead to immigration consequences like removal.

Other regulatory innovations encourage unauthorized workers to hold bad actor employers accountable through the enforcement of private labor and employment rights. The clearest example is a recent prosecutorial discretion memo released by DHS.³⁴ In evaluating the equitable consequences of removal, this memo instructs immigration officials to consider the presence of a labor or civil rights claim as a factor cutting in favor of declination.³⁵ ICE officials are also instructed not to respond to tips if doing so facilitates retaliation.³⁶ This too is intended to guard the workplace against immigration inspection while disputes are ongoing. Using this regulatory toolkit—which contains a variety of tools ranging from interagency agreements, U visa certification protocols, guidance documents, and a fairly consistent

focusing increasingly tough criminal charges on employers while moving away from criminal arrests of the workers themselves.”).

³⁰ See, e.g., Miriam Jordan, *Fresh Raids Target Illegal Hiring*, WALL ST. J., May 2, 2012, at A2 (explaining that the DHS has cracked down on employers under President Obama's direction).

³¹ See Revised Memorandum of Understanding Between U.S. Dep't of Homeland Sec. and U.S. Dep't of Labor Concerning Enforcement Activities at Worksites (Dec. 7, 2011), available at <http://www.dol.gov/asp/media/reports/dhs-dol-mou.pdf> [hereinafter Revised Memorandum of Understanding].

³² See Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089 (2011).

³³ News Release, U.S. Dep't of Labor, U.S. Department of Labor Announces Protocols for Certifying U Visa Applications (Apr. 28, 2011), available at <http://www.dol.gov/opa/media/press/whd/WHD20110619.htm>.

³⁴ See Morton Memorandum, *supra* note 3.

³⁵ See *id.*

³⁶ See Memorandum from Office of Field Operations & Office of Programs, Revised Operations Instruction 287.3a (Dec. 20, 1996), reprinted in 74 INTERPRETER RELEASES 188 (1997). This was established as policy during the Clinton Administration, but has been implemented with varying degrees of success across administrations.

stream of public statements—the President has allocated resources for the purposes of targeting the employers who hire unauthorized workers rather than plucking the “low-hanging fruit” represented by the workers themselves. The collective effect is not only to raise public enforcement of workplace laws as a viable threat, but to embolden workers to enforce these laws through private means.³⁷

To be clear, the willingness of the Obama Administration to provide greater opportunities for relief to immigrant workers should not be mistaken with the unwillingness to remove immigrant workers. U visas, for example, are subject to statutory caps imposed by Congress. And establishing factors cutting in favor of prosecutorial discretion certainly provides no guarantees of the actual deferral of removal. Once workers get swept into the removal pipeline, the odds suggest that they will be removed,³⁸ a reality that even the President seems to acknowledge.³⁹ Still, the shifts in workplace enforcement policy, while relatively modest, are unmistakable. These shifts prioritize the punishment of exploitative employers; they enable labor enforcement agencies like the DOL to more effectively intervene on behalf of immigrant workers; and they create regulatory space for immigrant workers to pursue valid claims through private enforcement channels.

B. “Criminal Aliens”

For social justice advocates, 1996 stands as a year of infamy. That year, Congress passed a series of laws that nudged prisoners,⁴⁰ the poor,⁴¹ and immigrants⁴² closer

³⁷ See Steven Greenhouse & Steven Yaccino, *Fight Over Immigrant Firings*, N.Y. TIMES, July 28, 2012, at B1.

³⁸ See Motomura, *supra* note 16.

³⁹ In remarks he made last year about comprehensive reform, he explained: “[W]e’re going after employers who knowingly exploit people and break the law. . . . And we are deporting those who are here illegally. And that’s a tough issue. It’s a source of controversy.” See Press Release, Remarks by the President on Comprehensive Immigration in El Paso, Texas (May 10, 2011), <http://www.whitehouse.gov/the-press-office/2011/05/10/remarks-president-comprehensive-immigration-reform-el-paso-texas> [hereinafter President on Comprehensive Immigration]. And of course, the shift in workplace enforcement policy may very well represent a response to the shifting preferences of the public. See Julia Preston, *Republicans Reconsider Positions on Immigration*, N.Y. TIMES, Nov. 10, 2012, at A12. He went on to remark: “That’s not to ignore the real human toll of a broken immigration system. Even as we recognize that enforcing the law is necessary, we don’t relish the pain that it causes in the lives of people who are just trying to get by and get caught up in the system.” President on Comprehensive Immigration, *supra*.

⁴⁰ See Prison Litigation Reform Act of 1995, Pub. L. 104-34, tit. VIII, 110 Stat. 1321-66 (1996) (codified as amended in scattered sections of 11, 18, 28 and 42 U.S.C.).

⁴¹ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105.

⁴² See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214.

to the margins of society. It was also the year that Congress first hatched the scheme that has become fairly commonplace today: the participation of local police in the enforcement of immigration laws. It is in this respect that the Obama Administration has made its most significant changes in immigration enforcement. The Administration has fully embraced local law enforcement schemes as tools for identifying “criminal aliens.”⁴³

Congress and the Executive have erected a variety of enforcement schemes.⁴⁴ For example, under the 287(g) program, Congress authorized the Executive to enter into enforcement partnerships with state and local authorities.⁴⁵ This deputization program authorizes state and local enforcement officers to carry out immigration functions.⁴⁶ Some of these agreements operate within state jails; others operate in the field; and still others operate in both.⁴⁷ These agreements are not compulsory. Local jurisdictions must opt into the program by signing a Memorandum of Agreement (MOA), which memorializes the content and the limits of the delegated authority.⁴⁸ Currently, sixty-eight law enforcement entities in twenty-four states have opted into this program.⁴⁹

The MOA is the key oversight instrument by which ICE ensures that local police remain within the bounds of the delegation.⁵⁰ MOAs are renewable, and ICE has used this renewal power to ensure that participating jurisdictions remain faithful to federal priorities.⁵¹ For example, in *Arizona v. United States*,⁵² the Court struck down most of Arizona’s controversial immigration enforcement statute.⁵³ The lone provision to survive preemption allowed police officers to determine the immigration status of any person they stop, detain, or arrest, provided they have “reasonable

⁴³ See *Secure Communities*, *supra* note 10.

⁴⁴ For a useful overview of the various enforcement programs utilizing local law enforcement entities, see Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1565–66 (2010).

⁴⁵ The program is named after the section of the Immigration and Nationality Act in which it is lodged. See the Immigration and Nationality Act § 287(g), Pub. L. No. 82-414, 66 Stat. 163, amended by Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified at 8 U.S.C. § 1357(g) (2006)).

⁴⁶ See 8 U.S.C. § 1357(g)(1) (2006).

⁴⁷ For a good overview of the 287(g) program, see RANDY CAPPS ET AL., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT (2011), available at <http://www.migrationpolicy.org/pubs/287g-divergence.pdf>.

⁴⁸ Participating officers must undergo a mandatory four-week training program. See *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Dec. 6, 2012).

⁴⁹ *Id.*

⁵⁰ See Chacón, *supra* note 44, at 1583–86.

⁵¹ See *id.* at 1586 (“[T]he government can decline to enter into an [MOA] with that agency, or can even cancel an existing one.”).

⁵² 132 S. Ct. 2492 (2012).

⁵³ See *id.* at 2510 (striking down §§ 3, 5(c), and 6 of the Arizona statute).

suspicion . . . that the person is an alien and is unlawfully present in the United States.”⁵⁴ While the Executive failed to persuade the Court that its authority over immigration enforcement displaced Arizona’s police force as a constitutional matter, it partially achieved its goal of displacement through its indisputable control over the 287(g) program.⁵⁵ The same day the Court issued its decision, the DHS cancelled all of its 287(g) task force agreements with participating jurisdictions within the state of Arizona,⁵⁶ curtailing the ability of Arizona police officers to screen investigative targets for noncitizens, and disciplining the wayward activities of state officials whose enforcement priorities had begun deviating from those of the federal government.

Although the withdrawal of Section 287(g) authority from Arizona provides an interesting postscript to S.B. 1070, it is emblematic of a larger enforcement trend. Generally speaking, DHS appears to be redirecting its resources away from 287(g) agreements and towards S-Comm, an enforcement program which was unfurled near the end of the Bush Administration but ramped up during the Obama Administration. S-Comm is an information-sharing system.⁵⁷ When street-level police arrest individuals, they routinely check that individual’s fingerprints against the FBI criminal database to ascertain whether the arrestee has a criminal record.⁵⁸ S-Comm automatically re-routes and cross-checks those fingerprints against DHS’s database, which houses immigration-related information.⁵⁹ Thus, by linking these two databases, ICE retains the ability to carry out its enforcement goal of identifying and removing noncitizen

⁵⁴ See *id.* at 2507 (citing ARIZ. REV. STAT. ANN. § 11-1051(B) (2012)).

⁵⁵ See *id.* at 2506, 2508, 2510 (explaining that “the State may not pursue policies that undermine federal law”).

⁵⁶ See Morgan Little, *Brewer Accuses Obama Administration of Telling Arizona to ‘Drop Dead,’* L.A. TIMES (June 26, 2012), <http://www.latimes.com/news/politics/la-pn-brewer-accuses-obama-administration-of-telling-arizona-to-drop-dead-20120626,0,6802412.story>. Two additional points are worth mentioning. First, in December 2011, a Justice Department investigation revealed widespread civil rights abuses in Arizona’s Maricopa County Sheriff’s Office, which is headed by Joe Arpaio. See Richard A. Serrano & Ashley Powers, *U.S. Finds Bias by Arizona Sheriff*, L.A. TIMES, Dec. 16, 2011, at A1. Shortly after the Justice Department’s report was released, the DHS revoked Maricopa County’s authority to carry out Section 287(g) duties within its jails. See Press Release, Statement by Sec’y Napolitano on DOJ’s Findings of Discriminatory Policing in Maricopa County (Dec. 15, 2011), *available at* <http://www.dhs.gov/news/2011/12/15/secretary-napolitano-doj-s-findings-discriminatory-policing-maricopa-county>. As the Arpaio example suggests, the Executive can bring to bear a variety of oversight tools to discipline rogue local law enforcement partners engaging in wayward behavior, though some forms of oversight (like a Justice Department investigation) can be costlier than others. A second point is that the DHS’s *en masse* withdrawal of Section 287(g) power from Arizona apparently left intact those 287(g) agreements operating within its jails. Jeremy Duda, *Homeland Security Revokes 287(g) Agreements in Arizona*, ARIZ. CAPITOL TIMES (June 25, 2012), <http://azcapitoltimes.com/news/2012/06/25/homeland-security-revokes-287g-immigration-check-agreements-in-arizona/>.

⁵⁷ See *Secure Communities*, *supra* note 10.

⁵⁸ *Id.*

⁵⁹ See *id.*

criminals without having to worry about whether police are acting within the scope of their formally delegated authority.

The pace at which the Obama Administration has implemented S-Comm has been breathtaking. As others have pointed out, never in our nation's history has a program involving local enforcement of immigration laws reached so far, so fast.⁶⁰ In November 2009, only 95 out of 3,181 local jurisdictions had been S-Comm activated.⁶¹ By June 2012, that number jumped to 3,074, covering 97% of our nation's local jurisdictions.⁶² At this rate, ICE will likely achieve nationwide coverage before its targeted deadline of 2013.⁶³ All of this has led to an immense number of deportations under the Obama Administration.⁶⁴ In 2010, DHS deported more immigrants in a single year than any previous administration.⁶⁵ It broke that record in 2011,⁶⁶ and the DHS is always quick to point out that most of these deportations involved people carrying convictions on their record.⁶⁷ Moreover, the Executive has shown little interest in accounting for local preferences in ramping up the program.⁶⁸ Although a number of cities and states have publicly registered their objections to S-Comm—including former advisors to the President⁶⁹—the Executive has

⁶⁰ See Adam B. Cox & Thomas J. Miles, *Integrating Immigration and Criminal Enforcement*, 80 U. CHI. L. REV. (forthcoming 2013) (explaining that “[S-Comm] is the largest expansion of local involvement in immigration enforcement in the nation’s history”).

⁶¹ See Editorial, *Immigrants, Criminalized*, N.Y. TIMES, Nov. 27, 2009, at A38.

⁶² See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ACTIVATED JURISDICTIONS (2012), available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated1.pdf>.

⁶³ See *Frequently Asked Questions*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/faq.htm (last visited Dec. 6, 2012).

⁶⁴ See Julia Preston, *States Resisting Program Central to Obama’s Immigration Strategy*, N.Y. TIMES, May 6, 2011, at A18 (reporting nearly 800,000 deportations).

⁶⁵ See Brian Bennett, *Obama Administration Reports Record Number of Deportations*, L.A. TIMES (Oct. 18, 2011), <http://articles.latimes.com/2011/oct/18/news/la-pn-deportation-ice-20111018>.

⁶⁶ In 2011, the DHS removed 396,906 immigrants. See *id.* (noting that “[t]he annual total was about 4,000 more deportations than the record set in the previous year”).

⁶⁷ See News Release, U.S. Dep’t of Labor, FY 2011: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities Including Threats to Public Safety and National Security (Oct. 18, 2011), available at <http://www.ice.gov/news/releases/1110/111018washingtondc.htm>. A recent study suggests that S-Comm sweeps much more broadly than those with criminal histories. See AARTI KOHLI ET AL., CHIEF JUSTICE EARL WARREN INST. L. & SOC. POL’Y, BERKELEY L. SCH., *SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS*, at Figure 5 (2011), available at http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf (suggesting that up to 37% of those swept into removal proceedings through S-Comm are noncriminals).

⁶⁸ See Preston, *supra* note 64 (reporting that the Executive continued to make the program mandatory despite opposition).

⁶⁹ The governors of a number of states, including Illinois, Massachusetts, and New York have publicly registered their objections to the S-Comm program. See Julia Preston, *Resistance Widens to Obama Initiative on Criminal Immigrants*, N.Y. TIMES, Aug. 13, 2011, at A11. Chicago’s mayor, Rahm Emanuel, who once served as President Obama’s chief of staff, has

charged ahead insisting that its authority to implement the program does not require local permission.⁷⁰

II. WORKING AROUND WORKPLACE ENFORCEMENT

Employers and the police rarely move through the pages of the same piece of immigration scholarship. At best, each plays a supporting role in the other's story.⁷¹ But as I explain in this Part, growing anecdotal evidence suggests that the separate spheres of the workplace and the criminal justice system are beginning to collide.

Although the ability of employers to report the presence of unauthorized workers to ICE has become constrained,⁷² the police and other local law enforcement entities face no such constraints. Therefore, reporting (or threatening to report) workers to police effectively allows employers to circumvent modern workplace enforcement policy. The police enable employers to achieve the prohibited outcome (suppressing labor dissent) by acting as a workaround—an alternative path by which employers can achieve the otherwise prohibited outcome. This dynamic reveals an interior enforcement policy at war with itself. In this part, I explain what workarounds are, provide some examples of how the Executive's pursuit of "criminal aliens" is frustrating its goal of punishing "exploitative employers," and relate this shift to an earlier period of history where police played an active role in responding to confrontations between management and labor.

A. What Are Workarounds?

Legal scholars have long engaged in a conversation about how regulatory design can affect outcomes.⁷³ Workarounds represent one strand of this conversation. Within the workarounds framework: (1) some legal rule or structure presents an obstacle to the accomplishment of a certain goal; (2) another legal rule presents an alternative, perhaps unusual means for accomplishing that goal; and (3) it is not entirely clear

joined the chorus of S-Comm critics. He announced plans to release a proposed ordinance that would prevent police officers from turning over unauthorized migrants without serious criminal records to immigration officials. See Julia Preston & Steven Yaccino, *Obama Policy on Immigrants Is Challenged by Chicago*, N.Y. TIMES, July 11, 2012, at A14.

⁷⁰ See Preston, *supra* note 64 (noting that the "Department of Homeland Security . . . has said that Secure Communities is mandatory").

⁷¹ *But cf.* Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. (forthcoming 2012).

⁷² See *supra* Part I.A.

⁷³ See, e.g., Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655 (2006); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201.

which rule should be given priority.⁷⁴ Workarounds have been employed across a variety of contexts, ranging from closely scrutinized national events like the passage of the North American Free Trade Agreement (in which President Clinton submitted the agreement as a statute rather than a treaty to exploit the less burdensome passage requirements)⁷⁵ to the more furtive intelligence-gathering endeavors of the Executive in the war on terror (in which the President outsources data-gathering responsibilities to circumvent restrictions imposed by privacy laws).⁷⁶ In all of these instances, the legal actor (be it Congress, the White House, or low-level agency officials) achieves a policy result using means that are neither clearly encompassed nor formally prohibited by existing law.⁷⁷

Jon Michaels explains that the Executive regularly outsources services to private entities “that provide the outsourcing agency with the means of achieving distinct public policy goals more readily than would be possible in the ordinary course of nonprivatized public administration.”⁷⁸ For example, Congress has passed privacy laws designed to constrain the ability of the Executive to collect personal data. But these laws do not cover private entities. Thus, contracting out data-gathering services to these entities allows the Executive to obtain information otherwise beyond its reach⁷⁹—that is, it enables the Executive to work around the privacy rules written by Congress. Workarounds therefore provide the Executive with the means “to gain greater control over government objectives, at the expense of coordinate branches, future administrations, the civil service, and the electorate.”⁸⁰

The descriptive benefit of the workarounds framework is that it reveals a subtle power dynamic tied up in privatization, which can be easy to miss. Although privatization often invites concerns that traditionally governmental services have been entrusted to unaccountable and self-interested private actors⁸¹—thus resulting in the

⁷⁴ This is Mark Tushnet’s formulation. See Tushnet, *supra* note 15, at 1503. Jon Michaels offers a more focused definition to explain workarounds in the context of Executive decision-making and privatization. See Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717, 728 (2010); see also Mark D. Rosen, *From Exclusivity to Concurrence*, 94 MINN. L. REV. 1051, 1129 (2010) (discussing how concurrent powers among the branches allows one branch to work around another); Mark Tushnet, *How Courts Implement Social Policy*, 45 TULSA L. REV. 855, 861 (2011) (discussing how judges employ seemingly unrelated precedent to get around other precedent).

⁷⁵ See Tushnet, *supra* note 15, at 1502.

⁷⁶ See Michaels, *supra* note 74, at 719–20, 738–39.

⁷⁷ For this reason, workarounds can evince what Mark Tushnet calls “a slightly seedy resonance.” Tushnet, *supra* note 15, at 1506.

⁷⁸ See Michaels, *supra* note 74, at 727.

⁷⁹ *Id.* at 738–39.

⁸⁰ *Id.* at 727.

⁸¹ See, e.g., Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005).

subordination of public values and contraction of public authority⁸²—Michaels makes the case that workarounds can have an aggrandizing effect.⁸³ In the data-collection example, transferring governmental power to private actors enabled the Executive to side-step rules designed to shrink Executive power. The counterintuitive effect of this transfer of power is to expand the Executive's control stealthily, without much fanfare and at the expense of coordinate branches.⁸⁴

Applying the workarounds framework to the example of interior enforcement represents something of a departure from existing accounts, which confront workarounds as they are initiated *by* one branch of government at the expense of another branch of government (or of the people). By contrast, the phenomenon I address involves the transfer of power from ICE to local law enforcement agencies. In other words, the workaround occurs primarily *within* a single branch of government, namely the Executive. But the key insight still holds: the transfer of power from ICE to local entities allows ICE to enlarge its power largely at the expense of a competing agency, like the DOL, which is also empowered to target bad actor employers. For example, ICE has agreed to defer to the DOL when an active labor investigation is underway, but nothing in the MOU requires ICE's enforcement partners to provide similar deference.⁸⁵

One final point: the conversation surrounding workarounds has thus far hesitated to focus on the intent of the actor effectuating the workaround. A part of this hesitation arises from the absence of any obvious criteria for evaluating whether a particular workaround is “good” or “bad.”⁸⁶ Some of the hesitation is because our understanding of workarounds is still evolving.⁸⁷ Thus, while workarounds have emerged as an unmistakable part of the regulatory landscape, we are still at the beginning stages of fully comprehending the extent and nature of this phenomenon.

⁸² See Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135 (2005).

⁸³ See Michaels, *supra* note 74, at 719.

⁸⁴ See *id.* at 728 (explaining that workarounds enlarge executive power over policy, often stealthily).

⁸⁵ Under the terms of the agreement, ICE “agrees to be alert to and thwart attempts by other parties to manipulate its worksite enforcement activities for illicit or improper purposes.” Revised Memorandum of Understanding, *supra* note 31.

⁸⁶ Tushnet rejects a “bad motivations” critique of workarounds suggesting that a more “promising path” is to distinguish between workarounds implicating the Constitution’s “deep commitments” (what he calls the “thick Constitution”) and those that merely implement those “deep commitments” (what he calls the “thin Constitution”). Tushnet, *supra* note 15, at 1506–07. Framed this way, Tushnet argues that “[i]t is not the purpose or motive that leads to concern about workarounds but rather their target.” Tushnet, *supra* note 15, at 1506–07. Jon Michaels is even clearer on the point of intent: “[t]hrough workarounds are often purposive, intent is not a necessary condition. Workarounds may occur accidentally, incidentally, or even because the legislature forces the agency’s hand.” Michaels, *supra* note 74, at 728.

⁸⁷ Michaels, *supra* note 74, at 728–29.

Nevertheless, workarounds are useful for identifying the *effects* of redesigns, and it is in this capacity that I borrow the workarounds framework to help explain the consequences of sharing immigration enforcement authority with local law enforcement agencies.

B. Workarounds in Interior Enforcement

Considered in isolation, the Obama Administration's workplace enforcement policy would point to the conclusion that employers have been deprived of a key tool for suppressing workplace rights. But the broader lens offered by the workarounds framework puts that policy in proper context. The parallel rise of S-Comm enables employers to simply redirect their reporting practices towards police through an S-Comm workaround. A couple of examples illustrate this dynamic.

In Manchester, Tennessee, several unauthorized workers repeatedly asked their employer, a cheese manufacturer, about wages that they were owed.⁸⁸ The employer refused their grievances, fired the workers, and contacted the local sheriff's department, who arrested the workers for trespass.⁸⁹ The district attorney dropped all criminal charges against the workers, but a captain in the sheriff's department reported these workers to ICE.⁹⁰ Similarly, several migrant workers in New Orleans were recruited to perform demolition work in Beaumont, Texas.⁹¹ The employer failed to pay these day laborers the promised wage and treated them adversely and differently from their white co-workers.⁹² After complaining about these conditions, the employer evicted the workers and reported them to the neighboring Port Arthur police, who arrived with an ICE agent.⁹³ Here again, the local prosecutor dropped all charges against the workers, but ICE nevertheless issued detainers.⁹⁴

Both of these examples offer a slight twist on what is a familiar story to immigration scholars: employers reporting the presence of unauthorized workers as a way of avoiding the costs associated with workplace disputes. But the twist is that neither of these examples involves an employer directly contacting federal immigration officials. Rather, the employer nudged their workers into the removal pipeline vis-à-vis the police. A recent example from Garden Grove, California further illustrates just how easily "exploitative employers" can recast their workers as "criminal aliens." Jose Ucelo-Gonzalez joined other day laborers at a Home Depot parking lot early

⁸⁸ See Lee, *supra* note 32, at 1132 (citing *Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894 (M.D. Tenn. 2009)).

⁸⁹ *Id.* at 1132–33.

⁹⁰ *Id.* at 1133.

⁹¹ REBECCA SMITH ET AL., ICED OUT: HOW IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS' RIGHTS 18 (2009), available at http://www2.ohchr.org/english/bodies/cmw/docs/DGD/ICED_OUT_DGD2011.pdf.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

one morning.⁹⁵ Michael Tebb offered him work, which Ucelo-Gonzalez accepted.⁹⁶ They drove to a convalescent home where Ucelo-Gonzalez agreed to sweep, collect garbage, and lay asphalt.⁹⁷ At the end of the work day, Tebb allegedly refused to pay Ucelo-Gonzalez, cursing and yelling at him and threatening to have him arrested for stealing.⁹⁸ Tebb drove away and soon thereafter, eight police cars converged on the street to arrest Ucelo-Gonzalez.⁹⁹

He was taken to the Garden Grove police station,¹⁰⁰ and eventually Ucelo-Gonzalez was transferred to Santa Ana county jail where he was questioned by an immigration officer.¹⁰¹ Ucelo-Gonzalez recounted his story, to which the officer allegedly responded by encouraging him to sue Tebb.¹⁰² He remained in custody, and a few days later, Ucelo-Gonzalez was transferred to immigration custody, where removal proceedings were initiated.¹⁰³

The Ucelo-Gonzalez example demonstrates how differentials in information rules allow employers to bypass the constraints imposed by the worker-friendly elements of workplace enforcement policy. Contacting the police allows employers to tap into an enforcement strategy where information-sharing is not only unconstrained, but strongly encouraged. Sharing enforcement authority with local police through S-Comm has the effect of expanding ICE's power at the expense of agencies like DOL, which exercise overlapping authority over the workplace. In order for DOL to effectively police the workplace, ICE must block any immigration-related information flowing from the workplace to its immigration officials. Doing so signals to workers that immigration consequences will not flow from workers pursuing legitimate labor-related claims. Regulatory tools, like the 2011 interagency MOV allow the DOL to coordinate its enforcement actions with ICE. But now that ICE has transferred a significant amount of immigration power to localities, the DOL faces an immensely more difficult task. Because even low-level contact with police can lead to removal,

⁹⁵ See Complaint para. 6, *Ucelo-Gonzalez v. Tebb* (Cal. Sup. Ct. 2012) (No. 30-2012-00588416-CU-ML-CJC).

⁹⁶ See *id.* paras. 7, 9.

⁹⁷ See *id.* para. 13.

⁹⁸ See *id.* para. 10.

⁹⁹ See *id.* paras. 20–22.

¹⁰⁰ See *id.* paras. 19–20.

¹⁰¹ See *id.* para. 24.

¹⁰² Ucelo-Gonzalez Declaration para. 25, *Ucelo-Gonzalez v. Tebb* (Cal. Sup. Ct. 2012) (No. 30-2012-00588416-CU-ML-CJC) (“At the end of the interview, the immigration officer asked me what I was going to do about what my boss had done. The officer told me that I should sue my boss for what he had done to me.”).

¹⁰³ Complaint paras. 27, 30, *Ucelo-Gonzalez v. Tebb* (Cal. Sup. Ct. 2012) (No. 30-2012-00588416-CU-ML-CJC). Both in detention and at the work-site, Ucelo-Gonzalez allegedly met other migrant workers who knew Tebb and who were familiar with his practice of hiring and refusing to pay day laborers under threat of reporting them to the police. Ucelo-Gonzalez Declaration paras. 8, 28, *Ucelo-Gonzalez v. Tebb* (Cal. Sup. Ct. 2012) (No. 30-2012-00588416-CU-ML-CJC).

the DOL must account for the broad cross-section of policies and practices governing the various local law enforcement agencies initiating such contact.

To be fair, different localities value immigrants differently. More specifically, different police departments and prosecutorial offices often administer competing visions of criminal justice for noncitizens.¹⁰⁴ Where law enforcement officials value the role that immigrants can play as informants or witnesses, or where the costs of assisting the federal government are simply too high,¹⁰⁵ police might be reluctant to charge into a workplace without some measure of pause. Indeed, some localities might be inclined to reward police who refuse to assist employers in the exploitation of unauthorized migrants.¹⁰⁶ But as the Ucelo-Gonzalez case demonstrates, the information flow is automatic under S-Comm, which can create a problem of mixed signals. The assigned immigration officer suggested that Ucelo-Gonzalez had a legitimate claim against his boss while simultaneously holding him in detention while a detainer issued. This example illustrates how routine and low-level local policing decisions can nevertheless open a conduit for information. Indeed, the Executive's shift away from 287(g) agreements towards S-Comm only bolsters this conclusion. Moving a nationwide fingerprint collection system to the top of ICE's interior enforcement toolkit demonstrates how immigration officials can get the benefit of local enforcement without having to worry about local buy in.

This distinction is important because many localities would presumably resist the idea of serving as an employer workaround, but S-Comm complicates the process by which police might implement such an "immigrant-friendly" policy. Moreover, the alleged facts surrounding the Ucelo-Gonzalez case suggest that Tebb felt quite comfortable contacting the police. But they do not establish that he contacted them *because* he perceived contacting ICE as too risky—nor should he have had to in order for the workarounds characterization to apply.¹⁰⁷ Moving forward, a thicker, more developed empirical account of how police are responding to S-Comm could help us assess whether the workarounds phenomenon will persist only in those "gung ho" jurisdictions where police fully embrace immigration enforcement duties or whether it will seep into any jurisdiction regardless of its relationship to immigrants.

¹⁰⁴ See Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. (forthcoming 2013).

¹⁰⁵ See *Santa Clara County to Stop Honoring Immigration Detainers for Low-Level Offenders*, L.A. TIMES (Oct. 18, 2011, 3:37 PM), <http://latimesblogs.latimes.com/lanow/2011/10/santa-clara-county-to-stop-honoring-immigration-detainers-for-low-level-offenders-.html>.

¹⁰⁶ For example, in Garden Grove, three day laborers—all unauthorized migrants—approached police for help in recovering wages from their employer. See Jennifer Mena, *2 Policeman Hailed for Effort to Get Wages That Day Laborers Are Owed*, L.A. TIMES, Sept. 20, 2001, <http://articles.latimes.com/2001/sep/20/local/me-47727>. The officers decided to assist the laborers in their cause, and as a result, received recognition from several public officials. *Id.*

¹⁰⁷ For an example of this kind of discretionary decisionmaking during the pre-S-Comm era, see Mena, *supra* note 106; see also Motomura, *supra* note 16.

The story of S-Comm undermining workplace protections for unauthorized workers is still in its formative stages—for the moment, we are forced to rely on a patchwork of sources including newspaper accounts, court opinions, and reports by advocacy organizations. Therefore, any conclusions we draw about the scope of the workarounds phenomenon is necessarily speculative—but that is part of my point. Because immigration scholarship has traditionally treated the workplace and the criminal justice system as separate institutions of regulation, there is much we do not know.¹⁰⁸

C. Historical Analogues

As a screening policy, S-Comm is not only comprehensive, it is compulsory. It shifts the default rule. Rather than giving localities the choice to opt into the immigration enforcement system (as the 287(g) program does), S-Comm simply siphons off information from every arrest involving the extraction of fingerprint data. Such programs further complicate the process by which workplace disputes are resolved. Because the program transforms every arrest into an immigration-related screening opportunity, the police can be called upon (even unwittingly) to resolve such disputes. This represents a step backwards towards an era when the police heavily participated in the regulation of work and workplace disputes. Up until the middle of the twentieth century, labor disputes were regulated by the common law,¹⁰⁹ and the police often played the role of enforcer.¹¹⁰ With the passage of New Deal legislation¹¹¹ and the rise of the administrative state, workplace disputes shifted venues and became subject

¹⁰⁸ In a forthcoming piece, Adam Cox and Thomas Miles offer a useful quantitative analysis of how ICE rolled out S-Comm nationwide. *See Cox & Miles, supra* note 60. Their study tests a variety of hypotheses, but they all relate to federal officials. *See id.* This is, however, an ongoing project, and future projects may provide greater insight on how S-Comm is changing the way police exercise their power. We have a better understanding of how Section 287(g) is changing the practices of the police, *see, e.g.,* Amada Armenta, *From Sheriff's Deputies to Immigration Officers: Screening Immigrant Status in a Tennessee Jail*, 34 L. & POL'Y 191 (2012), but it is hard to extrapolate too many lessons given the difference between Section 287(g)'s "opt-in" structure providing officers with a clear and formal set of parameters in which they can exercise their delegated immigration authority and S-Comm's database-driven structure, in which officers need not realize the immigration consequences of their arresting decisions in order to carry out their screening duties.

¹⁰⁹ *See* Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983). Rights and responsibilities that developed over centuries within the realms of property, contract, and tort provided management and labor with guidance on who was right and who was wrong. *See id.*

¹¹⁰ *See id.* at 1387 (noting that employers using force to prevent unionization would amount to tortious and criminal conduct at common law).

¹¹¹ *See, e.g.,* National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–169 (2006) (regulating relations between employers and employees who participate in labor unions and engage in collective bargaining); *see also* Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219 (2006) (regulating employees' work hours and wages).

to civil administrative rules, which were developed and overseen by a mix of bureaucrats, administrative law judges, and the National Labor Relations Board (NLRB).¹¹² Thus, since the 1940s, labor disputes have often stumbled towards resolution without police interference.¹¹³ But the prospect of S-Comm-initiated workarounds invites police back into the workplace. Put differently, after a long period of desuetude, criminal law and labor law once again confront the possibility of colliding with one another. Only this time, labor law must work against the constraints imposed by the police acting, not as street-level embodiments of criminal law's local authority, but rather as agents of immigration law's federal authority imposed remotely by DHS.

During this period, the line separating criminal law and labor law was not always easy to discern. For example, the right to strike established under the National Labor Relations Act of 1935 (commonly known as the Wagner Act)¹¹⁴ gave workers the opportunity to contest and mitigate the advantage that employers otherwise enjoy within the common law regime of contract.¹¹⁵ This was one of the key labor rights established under the Wagner Act.¹¹⁶ At the same time, striking is an emotional endeavor. It can be confrontational, and it is a gamble. It asks workers to set aside short-term individual gain in the interests of long-term collective gain. When strikes begin arising in the workplace, they inevitably begin impinging upon the employer's right to expel trespassers. Thus, a key conflict defining the early years of implementing the Wagner Act stemmed from the question of whether a worker's labor rights could displace an employer's property rights.¹¹⁷ This question posed some difficulty to the Court because neither management nor labor could authoritatively claim the moral high ground.¹¹⁸

¹¹² Of course, criminal law still plays a significant role in regulating access to work. See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003).

¹¹³ See Epstein, *supra* note 109, at 1403–04 (explaining that the New Deal legislation created an administrative state to deal with labor disputes to which courts were forced to give deference).

¹¹⁴ 29 U.S.C. §§ 157–158, 163 (2006). See also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the constitutionality of the Wagner Act).

¹¹⁵ See generally Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783 (1996) (discussing the effects of common law contract rules on employment contracts and noting imbalances in bargaining between employers and employees).

¹¹⁶ Wagner Act, 29 U.S.C. §§ 63, 157–158 (2006).

¹¹⁷ See, e.g., Holly J. McCammon, *Legal Limits on Labor Militancy: U.S. Labor Law and the Right to Strike Since the New Deal*, 37 SOC. PROBS. 206, 211–12 (1990) (noting that legal interpretations of the Wagner Act attempted to balance the rights of employees to strike with the private property rights of employers).

¹¹⁸ The employers argued that sit-down strikes violated their property rights, while the unions defended them as vital to the right to strike. See Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958*, 24 L. & HIST. REV. 45, 71–73, 85 (2006). Thus, they argued, the right to strike should prevail in the face of an employer's unclean hands. *Id.*

In *NLRB v. Fansteel Metallurgical Corp.*,¹¹⁹ the Court resolved this conflict in favor of employers.¹²⁰ Fansteel manufactured and sold rare metals, and had employed a variety of tactics to undermine a unionization effort.¹²¹ As a response, the union organized sit-down strikes where workers occupied several key buildings in the manufacturing plant.¹²² In concluding that an employer's property rights could displace workers' labor rights, the Court curtailed the reach of the Wagner Act,¹²³ thus marking the beginning of a line of cases that followed suit.¹²⁴ More importantly, *Fansteel* also created room for state and local criminal law to regulate workplace disputes.¹²⁵ A key part of the sit-down strike era of labor law was that it was the local police who arrested and detained labor dissenters, sometimes in violent and oppressive ways.¹²⁶ Even as the presence of private security forces in manufacturing plants began to wane (or at least evolve),¹²⁷ the public police regularly intervened in large-scale workplace disputes.¹²⁸

Fansteel and its progeny, and the story of sit-down strikes more generally, have a particular resonance with the story of immigration enforcement: it was the key line of cases that the Court relied on in concluding that unauthorized migrants had no right to back pay in its 2002 decision, *Hoffman Plastic Compounds, Inc. v. NLRB*.¹²⁹ Although *Hoffman* has been heavily criticized by immigration law scholars for the ways it perpetuates the exploitation of unauthorized workers,¹³⁰ the decision also

¹¹⁹ 306 U.S. 240 (1939).

¹²⁰ *Id.* at 253.

¹²¹ For example, the employer had utilized a "labor spy" to infiltrate the workforce and refused to bargain with the worker's designated collective bargaining representative. *See id.* at 247–48.

¹²² *Id.* at 248.

¹²³ As Jim Pope observes,

The *Fansteel* Court affirmed that both [employer's tactics and workers' tactics] were illegal, but also concluded that the employer could violate the workers' statutory rights without sacrificing its property rights, while the workers could not violate the employer's property rights without sacrificing their statutory rights—a return to the hierarchy of values that predated the Wagner Act.

Pope, *supra* note 118, at 106.

¹²⁴ Just a few years later, the Court extended the *Fansteel* principle to mutinies that arose on a ship. *See S. S. Co. v. NLRB*, 316 U.S. 31 (1942). For a critique of this case, see Ahmed A. White, *Mutiny, Shipboard Strikes, and the Supreme Court's Subversion of New Deal Labor Law*, 25 BERKELEY J. EMP. & LAB. L. 275 (2004).

¹²⁵ *See* Ahmed A. White, *The Depression Era Sit-Down Strikes and the Limits of Liberal Labor Law*, 40 SETON HALL L. REV. 1, 4 (2010).

¹²⁶ *See* Pope, *supra* note 118, at 88–89, 98; White, *supra* note 125, at 27–28.

¹²⁷ *See* David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1214–20 (1999).

¹²⁸ *See id.* at 1220.

¹²⁹ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

¹³⁰ *See, e.g.,* Anne Marie O'Donovan, *Immigrant Workers and Workers' Compensation After Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 30 N.Y.U. REV. L. & SOC. CHANGE 299,

marks a door to a past era when the police policed workplace disputes.¹³¹ Employers using criminal law to work around workplace enforcement policy not only present a new regulatory challenge to immigration officials, but they also create opportunities for the police to resume their role as interlocutors in workplace disputes.

III. UNDERSTANDING WORKAROUNDS IN INTERIOR ENFORCEMENT

As loudly as defenders of immigrant rights have condemned the Obama Administration's rapid insinuations into the criminal justice system,¹³² they have applauded the Administration's delicate hand within the workplace.¹³³ But the rise of S-Comm-initiated workarounds suggests that the reasons for condemnation may soon overtake the reasons for applause. Without seeing the entire interior enforcement field, we might be too quick to write off stories like those arising in Manchester, Beaumont, and Garden Grove as simply the latest examples of employers acting badly with regard to immigrants. But the expansion of local immigration enforcement programs into the workplace enforcement landscape forces us to look beyond the familiar problem—that employers are reporting their workers to escape labor violations, and begin considering the equally important set of questions involving *to whom* they are reporting them.

In this final Part, I briefly address how the Executive might address the workplace enforcement phenomenon. As an initial matter, workarounds in the interior pose a problem only to the extent that they frustrate the particular substantive vision set out by the Executive. President Obama has decided to prioritize “criminal aliens” and “exploitative employers” within its interior enforcement agenda. It is a part of a deliberate, and relatively transparent policy of using its resources in a cost effective manner,¹³⁴ accommodating immigration's member-selection goals,¹³⁵ and coordinating the enforcement agendas of various agencies. Here, ICE has intensified its pursuit

300 (2006) (“Employers have taken the *Hoffman* decision as a green light to contend that undocumented workers are without a range of state and federal workplace rights . . .”).

¹³¹ See White, *supra* note 125, at 68 (noting that, after *Hoffman*, undocumented employees could not receive the protections of labor laws).

¹³² See Preston, *supra* note 69.

¹³³ Preston, *supra* note 29.

¹³⁴ In the same speech where the President recognized the inevitable removal of even immigrant workers, the President also explained that rather than enforcing immigration laws “haphazardly,” the DHS was “focusing [its] limited resources and people on violent offenders and people convicted of crimes—not just families, not just folks who are just looking to scrape together an income. And as a result, we’ve increased the removal of criminals by 70 percent.” President on Comprehensive Immigration, *supra* 39. And of course, the shift in workplace enforcement policy may very well represent a response to the shifting preferences of the public. See Preston, *supra* note 39.

¹³⁵ Because the Executive can remove only a small percentage of all unauthorized migrants, enforcement priorities effectively dictate the rules of de facto membership. See Morton Memorandum, *supra* note 3 (noting that ICE has the resources to remove no more than 400,000 individuals, or less than 4% of the total unauthorized migrant population).

of “criminal aliens” to the point of enabling “exploitative employers” to avoid detection by reporting workers to police, which effectively recasts workers—the victims of exploitation—as “criminal aliens.” The Executive has great discretion over how it chooses to prioritize and reconcile its various enforcement goals, and certainly the Executive can strike the balance that it sees fit between these goals. But the challenge involves giving the President and high-level policymakers the opportunity to respond to the manner in which ICE is striking the balance.¹³⁶

In pursuing criminal aliens, ICE has employed a variety of local enforcement programs, but it is clear that S-Comm is its program of choice. According to DHS, S-Comm offers superior screening capabilities and, for this reason, it has moved programs like the Section 287(g) program to the margins.¹³⁷ But this alleged gain in screening capability comes at a cost. This reorganization removes one major way that the Executive, as a principal, has traditionally exercised oversight over its agents: by setting clear conditions of delegated authority. To appreciate this dynamic, consider how the Executive controls agents through the 287(g) program.¹³⁸ Because that program transfers authority to local law enforcement, the delegation of power can include any number of conditions and qualifications, which could reduce the likelihood that police would willingly facilitate labor suppression. The MOA—the 287(g)’s primary oversight instrument—could impose conditions on police similar to those imposed on low-level ICE officials. They could prohibit police from responding to tips or leads where the surrounding circumstances suggested the presence of an ongoing workplace dispute. Or the police could be prohibited from carrying out their immigration-related duties in workplaces where labor-related investigations were already underway. The Executive could punish wayward jurisdictions for failing to

¹³⁶ Michaels, *supra* note 74, at 769.

¹³⁷ In its 2013 budget brief, the DHS explained:

In light of the nationwide activation of the Secure Communities program, the Budget reduces the 287(g) program by \$17 million. The Secure Communities screening process is more consistent, efficient and cost effective in identifying and removing criminal and other priority aliens. To implement this reduction in 2013, ICE will begin by discontinuing the least productive 287(g) task force agreements in those jurisdictions where Secure Communities is already in place and will also suspend consideration of any requests for new 287(g) task forces.

U.S. DEP’T OF HOMELAND SEC., FY 2013: BUDGET IN BRIEF 16, *available at* <http://www.dhs.gov/xlibrary/assets/mgmt/dhs-budget-in-brief-fy2013.pdf>.

¹³⁸ To tease out the insights generated by workplace enforcement workarounds, I focus on only the 287(g) program and S-Comm. Again, it is worth noting that in reality, a spectrum of possibilities separates the two models. *See generally* Chacón, *supra* note 44 (comparing different methods of state and local police participation in immigration enforcement that give rise to rights violations). But for purposes of drawing out the different challenges involved with coordinating enforcement agendas, it is most useful to focus on these two programs, given the different ways in which each allocates power to the police.

remain within the bounds of these conditions. One can imagine a local law enforcement agency serially ignoring these workplace enforcement-oriented conditions only to have its 287(g) authority revoked just as the Executive did with Arizona in the wake of the Court's ruling on the constitutionality of SB 1070. The point is that the MOA-driven 287(g) program allows the Executive to signal its preferences and desires, and it empowers it to punish wayward localities accordingly. By contrast, S-Comm provides the Executive with no comparable signaling or oversight opportunities. As an enforcement program, it rests on different design principles.¹³⁹ The program is designed to use police as a conduit of information. That is, it facilitates the enforcement of immigration laws while minimizing the formal discretion that police enjoy over immigration decisions.¹⁴⁰

Tinkering with the delegation instrument is not the only way the Executive can harmonize competing enforcement goals. Rather than coordinating the actions of its agents—employers and local police—the Executive can screen out “false positives” at the back-end. Framed this way, Ucelo-Gonzalez is a “screening error,” which can be corrected by immigration officials once he is placed in removal proceedings. The Obama Administration's recent embrace of large-scale exercises of prosecutorial discretion reflect this sentiment. The Administration's string of “Morton memos”¹⁴¹ lists factors supporting the favorable exercise of prosecutorial discretion—high-achieving college students, members of same-sex relationships, and victims of civil rights abuses can apply for such discretionary relief—but in most cases, the applications can be filed only after removal proceedings have been initiated.¹⁴² The specific

¹³⁹ The informational challenges are different and hard to reconcile. ICE agreed with a series of recommendations offered by a Task Force to improve upon the administration of the S-Comm program. *See* U.S. IMMIGR. & CUSTOMS ENFORCEMENT OFFICE OF THE DIRECTOR, ICE RESPONSE TO THE TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS (Apr. 27, 2012) [hereinafter ICE RESPONSE], available at <http://www.ice.gov/doclib/secure-communities/pdf/hsac-sc-taskforce-report.pdf>. Importantly, ICE registered its disagreement over the recommendation that it tailor the information it provides to local police. *Id.* at 16. Under S-Comm, once local police upload an arrestee's fingerprints, the local police may request information about the individual. *Id.* at 11. Some of this information (like ICE's initial status determination) advances immigration enforcement goals, while other information (like biographical information) facilitates traditional law enforcement goals. But the information is delivered in a bundled package, which prevents local law enforcement agencies from credibly representing to surrounding communities that their partnership with immigration officials does not increase the likelihood of federal involvement. *See id.* Thus, disaggregating information delivery would give local police the benefit of participating in S-Comm without absorbing the cost. But ICE rejected this request. *See id.* at 16.

¹⁴⁰ Cox & Posner, *supra* note 19, at 51. *But cf.* Motomura, *supra* note 16.

¹⁴¹ The colloquial term is in reference to ICE director, John Morton. *See* Morton Memorandum, *supra* note 3.

¹⁴² The exception is high-achieving college graduates, who can affirmatively apply for such relief under the “Deferred Action for Childhood Arrivals” program. *See Consideration of Deferred Action for Childhood Arrivals Process*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT,

facts of the Ucelo-Gonzalez case are consistent with this evolving approach to immigration regulatory issues. Indeed, this helps reconcile the seemingly contradictory actions of the designated immigration officer in the Santa Ana jail who, on the one hand, advised Ucelo-Gonzalez to “sue [his] boss for what he had done to [him],”¹⁴³ while on the other hand, holding Ucelo-Gonzalez in custody until an immigration detainer was issued. Arresting Ucelo-Gonzalez may have set in motion the initiation of removal proceedings, but he has the opportunity to avoid removal but pursuing workplace claims against Tebb, which would make him eligible for a favorable exercise of prosecutorial discretion.

This centralized approach to reconciling competing enforcement goals is alluring, but it places a tremendous amount of discretion in the hands of the immigration officials overseeing a particular case. In prior work, I have argued that the ability of the President and senior advisors to implement labor-friendly workplace enforcement policy often gets undermined by low-level agency officials within ICE who tend to resist such policies.¹⁴⁴ An agency’s mission, the presence of multiple and often competing regulatory goals, and work culture all constrain the ability of the White House to implement on-the-ground shifts in enforcement policy. As Tino Cuéllar explains, “[w]ithin bureaucracies, ICE agents and other law enforcement personnel may resist wholesale ramp-downs in enforcement.”¹⁴⁵ Thus, he concludes that “while a mix of judicially acknowledged discretion and resource limitations leave presidential administrations with a measure of control over enforcement, their choices are limited by larger forces they are only partially able to affect.”¹⁴⁶

A string of anecdotal evidence confirms this account. Despite the Obama Administration’s attempt to exercise a modicum of mercy against certain immigrants who are otherwise removable—the class of immigrants to which Ucelo-Gonzalez would apparently belong—several ICE officials have publicly resisted this shift in policy. Since President Obama took office, he has faced some difficulty in getting low-level officials to step in line with his shift in policy.¹⁴⁷ The most recent obstacle involves the Deferred Action for Childhood Arrivals (DACA) program, which gives certain unauthorized immigrant youths a temporary but renewable reprieve against removal.¹⁴⁸ Several ICE officials filed a lawsuit against DHS alleging that they are

<http://www.uscis.gov/> (follow hyperlink for Consideration of Deferred Action for Childhood Arrivals Process under Humanitarian section) (last updated Nov. 30, 2012) (explaining that current undocumented students, so long as they meet other criteria, may affirmatively apply for consideration for deferred action under ICE’s new guidelines).

¹⁴³ Ucelo-Gonzalez Declaration para. 25, *Ucelo-Gonzalez v. Tebb* (Cal. Sup. Ct. 2012) (No. 30-2012-00588416-CU-ML-CJC).

¹⁴⁴ Lee, *supra* note 32, at 1106–10.

¹⁴⁵ See Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 U.C. IRVINE L. REV. 1, 57 (2012).

¹⁴⁶ *Id.*

¹⁴⁷ For some examples, see Lee, *supra* note 32, at 1108–09.

¹⁴⁸ See Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship &

being reprimanded for resisting DACA implementation efforts.¹⁴⁹ One of the plaintiffs in the lawsuit is the president of the union representing the ICE officers.¹⁵⁰ He claims that DACA asks officers “to break the law” and “puts ICE agents and officers in a horrible position.”¹⁵¹ The merits of the officers’ position are arguable,¹⁵² but the salient point is that the heterogeneity of interests pervading the Executive poses an obstacle to the Obama Administration’s approach of reconciling competing interior enforcement goals through prosecutorial review of cases at the back-end.

CONCLUSION

Both law and scholarship suggest that the President enjoys significant leeway in using his enforcement powers to cobble together a set of workable membership rules.¹⁵³ Most recently, this vision of the President found an audience with the Supreme Court as it addressed whether Arizona’s immigration enforcement statute, known as SB 1070, was preempted by federal law.¹⁵⁴ Notably, several of the Justices expressed unease over the degree to which the Executive controlled immigration policy.¹⁵⁵ The federal government’s core argument was that SB 1070 was preempted because to hold otherwise would allow Arizona (or any other state with a similar law)

Immigration Servs., and John Morton, Dir., U.S. Immigration & Customs Enforcement (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

¹⁴⁹ See Lornet Turnbull, *ICE Agents Sue Over Program to Defer Departing*, SEATTLE TIMES, Aug. 24, 2012, at B1.

¹⁵⁰ See Alan Gomez, *ICE Agents Sue Own Agency Over Deferred Deportations*, USA TODAY, Aug. 24, 2012, at 8A.

¹⁵¹ *Id.*

¹⁵² See Letter from Hiroshi Motomura, Susan Westerberg Prager Professor of Law, UCLA Sch. of Law, et al., to the President (May 28, 2012), available at <http://www.nilc.org/document.html?id=754>. *But cf.* John C. Yoo & Robert J. Delahunty, *The Obama Administration, the DREAM Act and the Take Care Clause*, 91 TEX. L. REV. (forthcoming 2013).

¹⁵³ See, e.g., Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 510–18 (2009) (noting that immigration law’s identification of a large class of deportable persons, coupled with the President’s wide prosecutorial discretion, gives the President de facto power to decide which immigrants are deported and which are not); see also, e.g., Immigration and Nationality Act, 8 U.S.C. § 1182 (2006) (making all unlawful entrants automatically deportable and identifying a class of lawful entrants as deportable).

¹⁵⁴ The Court struck down most of the law leaving intact one provision concerning the authority of police officers to verify the immigration status of investigative targets. See *Arizona v. United States*, 132 S. Ct. 2492, 2501–07 (2012).

¹⁵⁵ See *id.* at 2524, 2527 (Alito, J., concurring in part and dissenting in part) (“[T]he Executive’s current enforcement policy is an astounding assertion of federal executive power that the Court rightly rejects.”); *id.* at 2520–21 (Scalia, J., concurring in part and dissenting in part) (noting that the Executive’s ability to exercise discretion over immigration policies limits Arizona’s ability to protect its borders by making it fundamentally dependent on the choices of the Executive).

to dictate how the Executive should allocate its scarce enforcement resources.¹⁵⁶ Five Justices found such an argument consistent with the theory that the political branches more generally enjoy deference within immigration law.¹⁵⁷ Concurring in part and dissenting in part, Justice Alito expressed skepticism over this position.¹⁵⁸ He would disaggregate the President from Congress in analyzing the preemption question.¹⁵⁹ To do otherwise would give preemptive force to current enforcement priorities, which could lead to the very same state laws being “unpre-empted at some time in the future if the agency’s priorities changed.”¹⁶⁰ The most strident position was offered by Justice Scalia, who went so far as to say that the Executive’s position “boggles the mind” when considered in light of the post-argument Executive decision to grant deferred status to over a million high-achieving undocumented youth.¹⁶¹ Members of Congress¹⁶² and the academy¹⁶³ have lodged similar criticisms.

But the Executive is not as monolithic as this picture suggests. Immigration-related authority is disaggregated across the administrative state and while disaggregation has its benefits, a consequence of this regulatory approach is that points of intersection are inevitable even if they are not always obvious. Immigration law has grown well into the interior. Job announcements and traffic stops implicate the immigration code in a way that only passing through ports of entry once did. As some have observed, the border has moved.¹⁶⁴

To its credit, the Obama Administration has refined workplace enforcement policy and reallocated resources for the purposes of preventing bad actor employers

¹⁵⁶ See Brief for Respondent at 21, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182). Margaret Hu refers to these kinds of laws as attempts at “reverse-commandeering” of federal sources and thus unconstitutional. See Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. (forthcoming 2013).

¹⁵⁷ See *Arizona*, 132 S. Ct. at 2498–500.

¹⁵⁸ See *id.* at 2527 (Alito, J., concurring in part and dissenting in part).

¹⁵⁹ See *id.* at 2528 (analyzing the preemption question as a function solely of congressional intent).

¹⁶⁰ See *id.*; see also David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125 (2012).

¹⁶¹ See *Arizona*, 132 S. Ct. at 2522 (Scalia, J., concurring in part, dissenting in part). For a critique of Scalia’s dissenting opinion, see Richard A. Posner, *Supreme Court Year in Review, Entry 11: Justice Scalia Is Upset About Illegal Immigration. But Where Is His Evidence?*, SLATE (June 27, 2012, 10:21 AM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/_supreme_court_year_in_review/supreme_court_year_in_review_justice_scalia_offers_no_evidence_to_back_up_his_claims_about_illegal_immigration_.html.

¹⁶² Congressman Lamar Smith, chairman of the House Judiciary Committee, characterized this as an “amnesty” and “an overreach of executive branch authority.” See Letter from Lamar Smith, Congressman, to John Morton, Dir. of U.S. Immigration & Customs Enforcement (July 3, 2012), available at <http://judiciary.house.gov/news/pdfs/DreamActLetterICE.pdf>.

¹⁶³ See Yoo & Delahunty, *supra* note 152.

¹⁶⁴ See Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115 (2009).

from acting badly with regard to migrant labor.¹⁶⁵ But its increased reliance on police to screen criminal noncitizens threatens to undermine these efforts. Although the workplace and the criminal justice system appear to comprise separate spheres within the interior, database-driven enforcement on the criminal side is bringing these two spheres together by creating opportunities for employers to evade workplace enforcement rules to which they would ordinarily be subject. This insight provides immigrant rights advocates with another reason to be suspicious of S-Comm, presents the Obama Administration with a difficult policy choice to make, and invites other scholars to search for and evaluate other workarounds within the sprawling immigration state.

¹⁶⁵ See Julia Preston, *White House Plan on Immigration Includes Legal Status*, N.Y. TIMES, Nov. 14, 2009, at A10.