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### Police Discretion and Local Immigration Policymaking

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# POLICE DISCRETION AND LOCAL IMMIGRATION POLICYMAKING

Rick Su\*

## I. INTRODUCTION

Imagine a local police department confronted with the issue of immigration. With a growing immigrant population in the community and increasing federal emphasis on local involvement in immigration enforcement, the police chief realizes that it is no longer possible to ignore the immigration consequences of even the most ordinary of police activity. At the same time, concerned about the deleterious effects of immigration enforcement on local policing priorities, and the potential abuse that might arise from giving unbridled discretion to line-level officers under his charge, the police chief feels it is important to promulgate an official policy on how immigration issues will be addressed as a departmental matter. On the one hand, the policy he arrives at *prohibits* any local police officer from inquiring about or otherwise contacting federal authorities in regards to an individual's immigration status if that person is not under arrest on suspicions of having committed a felony offense. On the other hand, for those who are arrested for a felony violation, it *requires* the arresting officer to take steps to determine their immigration status and alert federal authorities if any are identified as being unlawfully present in the United States. This essay begins with the proposition that irrespective of the disagreements that we may have about the particularities of such a policy, broad agreement may nevertheless be reached on the merits of having departmental directives to guide the conduct of line-level officers. Yet, as this essay argues, recent legal developments are calling such local policymaking into serious doubt, both with respect to limitations on immigration enforcement and mandate to participate.

Immigration responsibilities in the United States are formally charged to a broad range of federal agencies, from the overseas screening of the State Department to the border patrols of the Department of Homeland Security. Yet in recent years, no department seems to have received more attention than that of the local police. A robust public debate now rages over the wisdom of involving local law enforcement officials in the enforcement federal immigration laws.<sup>1</sup> At

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<sup>1</sup> See, e.g., 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, 7 (2007); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1381 (2006) [hereinafter Pham, *Right Not to Cooperate*]; Michael Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004).

the same time, legal opinions range from those who feel such participation is constitutionally required to those who believe that it is constitutionally prohibited.<sup>2</sup> Indeed, as momentum gains for the next round of immigration reforms, there is a growing sense that sorting out what role, if any, local law enforcement plays will be one of the central issues.

Immigration is, of course, not a local law enforcement responsibility. Nevertheless, there are many reasons why the immigration focus is starting to shift from federal agents to the local police. The sheer number of local officials in our uniquely decentralized system of law enforcement represents, for some, an enticing “force multiplier” while, for others, an unmanageable liability.<sup>3</sup> In addition, as immigration is becoming increasingly connected to such local issues as crime control, housing, neighborhood transitions, and quality of life, people are increasingly looking to the police as “first-responders” of sorts with respect to emerging immigration-fueled controversies. Given all this, it is no wonder that so many localities and police departments have embarked on the task of considering, adopting, and revising policies that govern how their officials respond to immigration issues in the field.<sup>4</sup> Nor is it surprising that, in response to some of these policies, both the federal government and the states have begun to exercise their regulatory power in an effort to proscribe such local policymaking efforts—and have done so both for and against local participation in immigration enforcement.<sup>5</sup> These efforts to restrict how local law enforcement agencies set policies regarding immigration enforcement for their officers are the focus of this essay. The argument here is that rather than clarifying or standardizing local immigration enforcement practices, they enhance individual police discretion at the expense of departmental supervision.

On the surface, the trend toward increasing regulation of local immigration policymaking appears to be a welcome development. Uniform treatment, centralized administration, and specialized expertise have long been considered hallmarks of immigration regulation generally, and these features have long been thought to be more likely found at the federal and state level than

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<sup>2</sup> Compare, e.g., Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violate the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004) [hereinafter Pham, *Inherent Flaws*] (arguing that local immigration enforcement is constitutionally prohibited), with Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 PEPP. L. REV. 297, 316-20 (1989) (arguing that it is unconstitutional for local law enforcement not to enforce federal immigration laws).

<sup>3</sup> Compare Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005), with Wishnie, *supra* note 1, at 1012-45.

<sup>4</sup> See, e.g., Mike Glenn, *HPD Turns over 3 to Immigration Officials*, HOUS. CHRON., Oct. 20, 2006, at B3; Jesse McKinley, *San Francisco at a Crossroads on Immigration*, S.F. CHRON., June 13, 2009, at A12.

<sup>5</sup> See *infra* Part III.

at the local.<sup>6</sup> But upon closer examination, it is not clear that the haphazard and politicized manner in which the federal government and the states are starting to regulate local policymaking is all that effective in advancing these interests. Moreover, by targeting local policies directly, these restrictions undermine the supervisory relationship between line-level law officers and the departments they work for and the communities that they serve.

Admittedly, given that the legal developments considered here are all relatively new, their impact and significance are largely unsettled. The purpose of this essay, then, is to serve as a preliminary examination of an emerging regulatory framework and its potential consequences on immigration regulation and local policing. To this end, this essay proceeds as follows. Part II reexamines the need for local immigration policymaking in light of the changing nature of federal immigration law and the needs of modern policing. Notwithstanding this need, Part III shows how legal developments in recent years are making such policies increasingly hard to adopt at the local level. Further, rather than foreclosing local involvement in immigration, these developments have actually expanded the role of local law enforcement officials by making their immigration-related activities harder to regulate or control. After explaining why federalism constraints make the emergence of a truly comprehensive federal- or state-mandated set of procedures unlikely, Part IV suggests that local policymaking is the most viable alternative to unfettered police discretion. This is followed by a brief conclusion.

## II. REASSESSING THE NEED FOR LOCAL POLICYMAKING

Immigration policymaking at the local level has long been an area of substantial controversy. This is particularly true when they concern the conduct of local law enforcement officials. Notwithstanding all the attention, however, most of the debates thus far have centered on the relative merits of experimentation versus uniformity,<sup>7</sup> or on the wisdom of particular policy prescriptions.<sup>8</sup> Of course, given that nearly any comprehensive policy, no matter

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<sup>6</sup> See Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL. F. 27, 53 (2007); Pham, *Inherent Flaws*, *supra* note 2, at 987-98.

<sup>7</sup> See e.g., Pham, *Inherent Flaws*, *supra* note 2, at 987-98 (asserting the importance of centralization and uniformity); Victor C. Romero, *Devolution and Discrimination*, 58 N.Y.U. ANN. SURV. AM. L. 377, 381-85 (2002) (challenging the argument that devolution of immigration policymaking would serve as a check against federal discrimination); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997) (arguing that local participation serves as a “steam-valve” for federal immigration policy). Indeed, I have focused on these broader issues of centralization versus decentralization before. See Rick Su, *Immigration as Urban Policy*, 38 FORDHAM URB. L. REV. 363, 366-75 (2010).

<sup>8</sup> See e.g., Kobach, *supra* note 3 (asserting role of local enforcement); Pham, *Right Not to Cooperate*, *supra* note 1 (defending sanctuary policies); Laura Sullivan, *Enforcing*

how finely balanced, faces criticism from one or more sides in the immigration debates, it is no wonder that local policymaking in this area have received relatively little support.

This Part defends the role of local policymaking with respect to immigration. It does so, however, not by arguing the merits of any specific policy or the value of decentralized power. Rather, I posit here that having some policy to guide the conduct of local law enforcement authorities is, in most cases, simply better than having none at all. Indeed, as I show below, the absence of a departmental policy on immigration does not necessarily mean immigration becomes irrelevant as a local issue; given the manner in which the federal government is now regulating and enforcing our nation's immigration laws, even the most mundane police activities are likely to have immigration consequences. In most cases, the absence of local policies simply means that the ultimate discretion over how immigration matters are handled is devolved to individual police officers to decide in the field. In this regard, even if police officers can often be trusted to exercise sound judgment, the dangers of unfettered and unsupervised discretion should also not be underestimated, whether from the perspective of immigration enforcement or local policing.

### **A. The Convergence of Immigration and Local Policing**

Of course, given that immigration is so uniquely federal, it needs to be asked why local leaders even need to concern themselves with immigration. This section suggests that one answer lies in the manner in which the issue of immigration is now being handled at the federal level. With increasing federal interest in local cooperation, local police often have no choice but to consider what their stance on immigration enforcement might be. Moreover, recent reforms to how immigration is regulated means that federal immigration law is now, more than ever, intertwined with nearly every aspect of local policing. What this means is that ignoring immigration as a matter of policing today is not only becoming increasingly difficult for local policymakers, but is likely to be just as much a policy position as one officially promulgated.

In the early days of federal regulation, it was easy to treat immigration enforcement and local policing as distinct and separate endeavors. This made sense when the primary federal focus was border security and overseas screening.<sup>9</sup> However, with public and federal attention now fixed on the burgeoning population of undocumented immigrants within the United States and federal efforts increasingly turning towards interior enforcement strategies, the line between federal and local is fast eroding. Local participation is now prominently featured in several major enforcement initiatives at the federal

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*Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CAL. L. REV. 567 (2009) (same).

<sup>9</sup> See ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 244 (2006).

level.<sup>10</sup> Moreover, the unprecedented dispersal of immigrant populations to regions that, up until now, had few immigrants and thus a small number of federal immigration officials has prompted the federal government to be even more aggressive in seeking the assistance of local law enforcement as a substitute.<sup>11</sup> In light of these developments, if immigration is becoming more prominent in local policymaking, it is in large part because the federal government's enforcement strategy is increasingly requiring that it be placed on local agendas.

At the same time, the changing structure of our immigration laws is making it more difficult for local law enforcement agencies to ignore the immigration consequences of their officer's actions in the field. With each round of legal reforms, our nation's focus has been steadily gravitating away from refining the immigration categories that determine who may enter. Instead, the focus has steadily shifted towards regulations that seek to influence immigration flows by curtailing the entitlement and protections of immigrants already admitted, including greatly expanding the circumstances in which admitted immigrants can be removed.<sup>12</sup> A significant development along these lines is the dramatic expansion of criminal offenses that can now lead to deportation.<sup>13</sup> One consequence is that a removal category once reserved for the most serious offenders now includes relatively minor offenses like check fraud and petty theft. Another is that the state criminal justice system and the federal immigration regime are now, more than ever, inextricably intertwined.<sup>14</sup> Indeed, the shadow of federal deportation looms so large that it is nearly impossible to ignore its relevance at every stage of state criminal proceedings, especially in jurisdictions with large immigrant populations. Even the Supreme Court, which has long

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<sup>10</sup> See LISA M. SEGHEIT ET AL., CONG. RESEARCH SERV., RL 32270, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 3 (2009), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32270.pdf>.

<sup>11</sup> See Jerry Seper, *Sheriff's Deputies Help ICE Roundup Illegal Aliens*, WASH. TIMES, Nov. 28, 2006, at A5.

<sup>12</sup> See Daniel Kanstrom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1907-08 (2000); Juliet Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1581-82 (2008).

<sup>13</sup> See Jennifer M. Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1827-32 (2007); Teresa Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 10 GEO. IMM. L.J. 611 (2003); Juliet Stumpf, *The Immigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

<sup>14</sup> See Daniel Kanstrom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 651 (2004); Stephanie Czekalinski, *Dispatch Investigation: Deportation Nation, Justice Denied*, COLUMBUS DISPATCH, Dec. 6, 2010, at A1 (noting the lack of coordination between local and federal agents and how that sometimes thwarts the mission of the criminal justice system when the issue of immigration is involved).

distinguished deportation as a civil matter, seems to be finding it harder to see immigration as entirely distinct from criminal law.<sup>15</sup>

What all this means is that even if immigration continues to be primarily a federal responsibility, it is no longer possible for local law enforcement to remain silent on immigration-related issues as a matter of departmental policy. It is important to note that many of the legal pressures are external; most local law enforcement officials are hardly eager to participate in this federal endeavor. Yet as local participation in federal immigration enforcement is increasingly being sought by federal authorities, localities and local law enforcement departments are being explicitly called upon to examine their role.<sup>16</sup> Moreover, as immigration becomes more interwoven with criminal law, even basic law enforcement decisions such as which suspects will be detained and the offenses with which they will be charged necessarily carry significant immigration consequences. For many jurisdictions, immigration now permeates nearly every aspect of policing.

### B. Trends in Policing and Police Supervision

As the above showed, one reason why local law enforcement agencies are engaged in immigration policymaking is because of the growing influence of federal immigration laws on everyday policing. This section suggests that another reason is the importance of policymaking more generally to the administration of policing. In other words, the enactment of local policies on immigration is also a response to the needs of modern policing.

With the expansion of police forces around the country, policing today is increasingly focused on bureaucratic administration. Alongside issues such as balancing budgets and managing priorities, there is a growing emphasis on personnel management at the departmental level, especially with respect to the broad discretion traditionally enjoyed by line-level officers.<sup>17</sup> To be sure, discretion remains an important part of effective and responsive policing; given the myriad responsibilities and countless scenarios that they face, it is difficult to imagine policing as a rote activity in which no discretion is entrusted.<sup>18</sup> At the

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<sup>15</sup> See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480, 1483 (holding that failure to warn a criminal defendant about the immigration consequences of a plea may constitute ineffective assistance of counsel); see also Teresa Miller, *Lessons Learned, Lessons Lost: Immigration Enforcement's Failed Experiment with Penal Severity*, 38 FORDHAM URB. L. J. 217, 233 ("Never before had scholars broadly discussed the relationship between certain immigration processes (like deportation) and crime control in terms of convergence or merger.").

<sup>16</sup> See Harris, *supra* note 1, at 29-32.

<sup>17</sup> See generally MICHAEL K. BROWN, *WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM* (1988).

<sup>18</sup> See Hadar Aviram & Daniel L. Portman, *Inequitable Enforcement: Introducing the Concept of Equity into Constitutional Review of Law Enforcement*, 61 HASTINGS L.J. 413, 423 (2009).

same time, it is often abuses of that discretion that lead to police misconduct and departmental corruption.<sup>19</sup>

The proper balancing of this discretion has long been a concern for courts.<sup>20</sup> Yet the management of police discretion has also been a major theme within the world of policing itself. Take, for example, the rise of the professional police force. With historical roots in the progressive reform movement of the early twentieth century, the movement toward professionalization stresses, among other things, the need for clear departmental standards, guidelines, and protocols as a means of curbing corruption, brutality, and other abuses.<sup>21</sup> Another is the growing interest in community policing. A response to anti-police sentiment bred by the increasing militarization of police departments in the 1980s and early 1990s, the community policing model is founded upon the idea that effective policing requires enlisting neighborhood cooperation and cultivating community trust.<sup>22</sup> There are tensions between professionalization and community policing, to be sure.<sup>23</sup> What these movements share, however, is recognition of the importance of departmental supervision over the conduct of line-level officers. Supervision is not only important to the administration of a modern police force as the professional police model stresses, it is also central to the successful implementation of specific initiatives like community policing.

Though developed in response to concerns about policing more generally, the increasing relevance of federal immigration laws to everyday police activities now means that immigration is also of concern to professional and community policing. As the infamous Rampart Scandal that rocked the Los Angeles Police Department in the late 1990s demonstrates,<sup>24</sup> incidents of corruption, intimidation, and other police misconduct frequently involve exploitation of the legal vulnerabilities created by federal immigration regulations.<sup>25</sup> Similarly, with the growth of immigrant communities in nearly every major police jurisdiction, community policing is increasingly attuned to gaining their trust and cooperation in order to effectively keep peace in and around immigrant neighborhoods.<sup>26</sup> Language and ethnicity already operate as

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<sup>19</sup> See SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990*, 21 (1993); Erik K. Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1108-21 (2000).

<sup>20</sup> See generally Aviram & Portman, *supra* note 18.

<sup>21</sup> See STEVEN KELLY HERBERT, *POLICING SPACE: TERRITORIALITY AND THE LOS ANGELES POLICE DEPARTMENT* 59-63 (1997).

<sup>22</sup> See generally ROBERT R. FRIEDMANN, *COMMUNITY POLICING: COMPARATIVE PERSPECTIVES AND PROSPECTS* (1992).

<sup>23</sup> See *id.* at 73 (describing conflicts between professionalization and community policing, even as both are occurring simultaneously).

<sup>24</sup> The Rampart Scandal involved an anti-gang unit in the Los Angeles Police Department that was revealed to have stolen and sold drugs and "framed, planted evidence on, turned over to the INS, and even beat and shot suspects in the name of gang suppression." ROBERT GOTTLIEB ET AL., *THE NEXT LOS ANGELES: THE STRUGGLE FOR A LIVABLE CITY* 123 (2006).

<sup>25</sup> See Anne-Marie O'Connor, *Rampart Set up Latinos to Be Deported, INS Says*, L.A. TIMES, Feb. 24, 2000, at 1.

<sup>26</sup> See Harris, *supra* note 1, at 37-38.



barriers between many police departments and the immigrant communities that they serve. Yet, as many have noted, another important factor is whether and how line-level police officers are instructed to handle immigration issues that may arise in the course of their everyday duties. For example, fear of detection may prevent undocumented crime victims and witnesses from assisting police in their investigations.<sup>27</sup> Moreover, as more families include members with both legal and undocumented status, such policies affect police interactions with legal residents in the community as well, even if they have no fears of being subject to deportation themselves.<sup>28</sup>

### C. Pragmatism and Policymaking

In light of the growing influence of federal immigration laws on the everyday operations of policing, it is no surprise that local law enforcement agencies have shown an interest and awareness of immigration issues. Indeed, local law enforcement officials are oftentimes more attuned to such concerns than other local leaders. A 2005 study conducted in California showed that while most local leaders reported that immigrants and ethnic organizations had very little contact with and influence on city hall, heads of local police departments demonstrated the highest awareness of immigrant needs and expressed the strongest interest in reaching out and establishing tangible relationships with their communities.<sup>29</sup> Today, as the controversy over local immigration enforcement escalates, police chiefs and law continue to express interest in how immigration and federal immigration laws affect their work.<sup>30</sup>

Similarly, given the need to manage how their personnel respond to immigration issues in the field, more and more local law enforcement agencies are turning to policymaking. A recent survey showed that approximately half of all police chiefs and county sheriffs participating in the survey reported that their department had some kind of policy instructing officers what to do regarding immigration status.<sup>31</sup> To be sure, accounts of these policies tend to fixate on sensational enforcement dragnets like those lead by Sheriff Arpaio in Arizona<sup>32</sup>

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<sup>27</sup> See Sullivan, *supra* note 8, at 579-82.

<sup>28</sup> See Pham, *Right Not to Cooperate*, *supra* note 1, at 1399-1400.

<sup>29</sup> See S. KARTHICK RAMAKRISHNAN & PAUL G. LEWIS, PUB. POL'Y INST. OF CAL., IMMIGRANTS AND LOCAL GOVERNANCE: THE VIEW FROM CITY HALL 33-34, 75-76 (2005).

<sup>30</sup> See generally, Debra A. Hoffmaster et al., *Police Executive Research Forum, Police and Immigration: How Chiefs Are Leading Their Communities through the Challenges* (Mar. 2011), <http://www.policeforum.org/library/immigration/PERFImmigrationReportMarch2011.pdf>.

<sup>31</sup> See Scott H. Decker et al., *Immigration and Local Policing: Results from a National Survey of Law Enforcement Executives*, in THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES 176 (Mary Malina ed., 2009), <http://policefoundation.org/indexStriking.html>.

<sup>32</sup> See, e.g., Editorial, *Immigration Outsourced*, N.Y. TIMES, Apr. 9, 2008, [http://www.nytimes.com/2008/04/09/opinion/09wed1.html?\\_r=1](http://www.nytimes.com/2008/04/09/opinion/09wed1.html?_r=1).

or exaggerated portrayals of cities like San Francisco as lawless sanctuaries.<sup>33</sup> Most policies, however, tend to be quite pragmatic in their approach—balancing competing interests and emphasizing the role of departmental supervision in close cases. Take, for example, the immigration policy of the Denver Police Department. On the one hand, it instructs its officers not to “initiate police actions with the primary objective of discovering the immigration status of a person” and to refrain from taking “enforcement action against a person solely because he/she is suspected of being an undocumented immigrant.”<sup>34</sup> On the other hand, enforcement action can be taken with “the approval of an on duty supervisor or commander,” and “suspects believed to be an undocumented immigrant . . . [and] arrested for other charges” are to be tagged and referred to federal authorities by county officials.<sup>35</sup>

Of course, departmental supervision in general is still far from ideal. Most law enforcement agencies have implemented no policy or procedure for their officers to follow. Further, in jurisdictions where policies exist, it is not unusual for them to be unwritten, unclear, or under-enforced.<sup>36</sup> As a result, not only are officers in the field often confused about their course of action, but the communities are uncertain about how local law enforcement will respond. In light of these and other issues, many have stressed the need for local law enforcement agencies to clarify and publicize their policies and adequately train their officers about their requirements.<sup>37</sup> Yet, as suggested below, the limitations of immigration policymaking may not simply be the result of failures in police administration or gaps in local government oversight. Rather, emerging legal restrictions on the adoption of these policies may also be an important culprit.

### III. RESTRICTING LOCAL POLICYMAKING

As the foregoing illustrated, there are good reasons as to why local law enforcement agencies should be encouraged to promulgate clear and transparent policies regarding immigration.<sup>38</sup> Yet, as this Part shows, recent legal developments at the federal and state level have been pushing in the opposite

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<sup>33</sup> See McKinley, *supra* note 4 (“San Francisco found itself under criminal investigation by the United States attorney for the Northern District of California, and city officials were eager to show that their city was not a lawless haven for illegal-immigrant criminals.”).

<sup>34</sup> See DENVER POLICE DEP’T, POLICE DEPARTMENT OPERATIONS MANUAL § 104.52(3)(a)-(b) (2010), available at <http://www.denvergov.org/Portals/326/documents/104.pdf>.

<sup>35</sup> *Id.*

<sup>36</sup> See Decker, *supra* note 31, at 176; Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1482-84 (2006).

<sup>37</sup> See, e.g., Sullivan, *supra* note 8, at 597-99.

<sup>38</sup> It may be that the federal government may need to develop more transparent and clear policies with respect to the immigration enforcement by federal agents as well. See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-67, IMMIGRATION ENFORCEMENT: ICE COULD IMPROVE CONTROLS TO HELP GUIDE ALIEN REMOVAL DECISION MAKING (2007), available at <http://www.gao.gov/new.items/d0867.pdf>.

direction. First, growing restrictions on different types of law enforcement policies are steadily narrowing the scope of permissible local policymaking. Second, by targeting local policymaking alone, and not the underlying conduct of police officers in the field, these restrictions on departmental policies and supervision are actually leading to a broad expansion of police discretion at the level of line-level officers.

### A. Limiting Non-Enforcement

The movement against local immigration policymaking is being pursued most earnestly in the context of local non-enforcement policies. At the heart of this is the controversy over so-called “sanctuary cities,” which refer to jurisdictions where the ability of line-level officers to participate in or contribute to federal immigration enforcement efforts is limited in some way. To be sure, localities often contest their designation as sanctuary cities,<sup>39</sup> especially those whose policies include a combination of enforcement and non-enforcement mandates tailored to different circumstances. Yet as a general matter, the sanctuary designation is generally used to refer to policies that include one or more of the following provisions: (1) “don’t ask” policies that limit independent investigations of an individual’s immigration status, (2) “don’t tell” policies that limit communications between local law enforcement officers and federal authorities, and (3) “don’t enforce” policies that limit the ability to arrest and detain for the purpose of immigration enforcement.<sup>40</sup>

Sanctuary policies vary widely from jurisdiction to jurisdiction. Despite this variation, they are often justified on similar grounds. Many believe such policies are necessary to gain the trust and cooperation of immigrant communities, who may otherwise avoid approaching local police for fear of entangling themselves or their communities in an immigration dragnet or the possibility of police harassment.<sup>41</sup> Indeed, many law enforcement officials have expressed concern that local enforcement of federal immigration laws may expose their officers to more allegations of civil rights violations.<sup>42</sup> Others articulate more economical considerations; they argue that immigration is a federal responsibility and drains scarce and valuable local resources when local

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<sup>39</sup> See Mike Glenn, *Debate Flares Anew on HPD's Immigrant Policy*, HOUS. CHRON., Sept. 26, 2006, at B1; see also Elise Foley, *Communities Try to Distance Themselves From 'Sanctuary City' Label*, IOWA IND., Aug. 9, 2010, at <http://iowaindependent.com/40829/communities-try-to-distance-themselves-from-sanctuary-city-label>; Reeve Hamilton & Matt Stiles, *Houston, State Cops Have Similar Immigrant Policy*, TEX. TRIB., May 4, 2010, <http://www.texastribune.org/immigration-in-texas/sanctuary-cities/houston-state-cops-have-similar-immigrant-policy>. See generally Rose Cuison Villazor, *What Is a "Sanctuary?"*, 61 SMU L. REV. 133 (2008).

<sup>40</sup> See Kittrie, *supra* note 36, at 1455; see also Sullivan, *supra* note 8, at 574.

<sup>41</sup> See Harris, *supra* note 1, at 33-44; Sullivan, *supra* note 8, at 578-83.

<sup>42</sup> See Frank Moraga, *Police Balk at Having to Do INS Work; Several Local Agencies Denounce Justice Plan*, VENTURA COUNTY STAR, Apr. 6, 2002, at B1.

law enforcement involve themselves in the enforcement of federal laws.<sup>43</sup> Of course, critiques of so-called sanctuary provisions are prevalent as well. As a matter of immigration policymaking, they are often criticized for frustrating national interests in federal immigration enforcement;<sup>44</sup> and as a matter of policing, they are commonly called into question every time a sensational offense is committed by a removable immigrant who might have evaded police detection in the past.<sup>45</sup>

It was because of many of these reasons that the federal government passed one of the earliest restrictions on local immigration policymaking. In a pair of laws passed in 1996, Congress included two nearly identical provisions barring any state and local government entity or official from “prohibit[ing] or in any way restrict[ing] any [other] government entity or official from sending or receiving . . . information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”<sup>46</sup> The structure of this law is worth noting: rather than requiring local cooperation directly, it encourages such cooperation by prohibiting mayors, police chiefs, commanding officers, and the like from instructing line-level police officers to refrain from communicating with or otherwise assisting federal immigration authorities. To be sure, the federal anti-sanctuary provision does not mandate that police officers participate in federal immigration enforcement. Moreover, as Los Angeles noted in successfully defending its own policy, the federal law is largely limited to “don’t tell” policies that limit communications between local law enforcement and federal authorities,<sup>47</sup> and as such does not specifically address “don’t ask” or “don’t enforce” measures that limit independent inquiry, investigation, or enforcement. Yet it is clear that Congress intended to compel as much local participation as it

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<sup>43</sup> See Karen Brandon, *U.S. Weighs Local Role on Immigration; Some Police Fear Dual Duty Would Hurt Minority Ties*, CHI. TRIB., Apr. 14, 2002, at 10; see also Denise Hoying & Parker Stephens, *General Provisions: Amend Chapter 80 of Title 36 of the Official Code of Georgia Annotated, Related to General Provisions Applicable to Counties, Municipal Corporations, and Other Governmental Entities, so as to Prohibit Immigration Sanctuary Policies by Local Governmental Entities; Provide for Penalties; Provide for Related Matters; Provide an Effective Date; Repeal Conflicting Laws; and for Other Purposes*, 26 GA. ST. U. L. REV. 95, 105 (2009), available at, [http://digitalarchive.gsu.edu/cgi/viewcontent.cgi?article=3329&context=colpub\\_review](http://digitalarchive.gsu.edu/cgi/viewcontent.cgi?article=3329&context=colpub_review).

<sup>44</sup> See Villazor, *supra* note 39, at 136 (“This politically motivated disapproving use of the word sanctuary has unfairly conflated legitimate state and local policies that serve local interests or policies that comply with the Constitution or federal laws with legislation that is intended to supersede immigration law.”).

<sup>45</sup> See, e.g., Peggy O’Hare, “Sanctuary” Policy Irks Some in HPD: Accused Killer Helped by “Hands-off” Proviso, HOUS. CHRON., Mar. 7, 2003, at A31.

<sup>46</sup> See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, § 434 (prohibiting state and local governments from restricting government employees who wish to provide immigration information to federal authorities); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 § 642 (same).

<sup>47</sup> See Joel Rubin, *Judge Backs LAPD Policy: Jurist Tosses out a Lawsuit Challenging Curbs on Officers’ Immigration Inquiries*, L.A. TIMES, June 26, 2008, at 1.

could by making sure that no one can tell a local police officer to say “no.” Moreover, there are signs that the federal government is expressing interest in using new federal laws against concealing, harboring, or shielding undocumented immigrants from detection as a means of challenging new non-enforcement measures.<sup>48</sup>

Even more noteworthy than these federal restrictions is the flurry of anti-sanctuary activity at the state level in recent years. Since 2005, several states including Missouri, Colorado, Tennessee, and Georgia have enacted similar constraints on their own subdivisions.<sup>49</sup> Further, many of these laws take the additional step of allowing the state to condition the receipt of state funding on local compliance.<sup>50</sup> No constraint on local policymaking thus far, however, matches the scope of Arizona’s S.B. 1070, the controversial immigration enforcement law passed in the summer of 2010.<sup>51</sup> Though initially described by some as “empowering” local enforcement, I have argued before that it is better understood as an attack on local discretion given the way it mandates enforcement activity regardless of any preexisting policies to the contrary.<sup>52</sup> This is highlighted by the fact that S.B. 1070 includes one of the most stringent anti-sanctuary provisions ever enacted. Not only does it prohibit any “policy that limits or restricts the enforcement of federal immigration laws *to less than the full extent permitted by federal law*,” but it also takes the unprecedented step of authorizing any resident of the state to sue any jurisdiction that violates this mandate.<sup>53</sup> Indeed, the “full extent permitted” language and the accompanying cause of action against localities are so expansive that some have already questioned whether they can even be applied in a literal manner.<sup>54</sup> Moreover, it is important to note that although many provisions of S.B. 1070 have been enjoined pursuant to a federal lawsuit, these provisions were specifically

<sup>48</sup> See C.W. Nevius, *Supe's Push on Sanctuary Could Backfire*, S.F. CHRON., Dec. 12, 2009, at C1; see also IND. CODE ANN. § 274A(a)(1)(A) (prohibiting harboring and concealing of undocumented immigrants).

<sup>49</sup> See CO. REV. STAT. § 29-29-101 (Supp. 2010); GA. CODE ANN. § 36-80-23 (Supp. 2009); MO. REV. STAT. § 67.307 (Supp. 2010).

<sup>50</sup> See, e.g., GA. CODE ANN. § 36-80-23(c) (“Any local government body that acts in violation of this Code section shall be subject to the withholding of state funding or state administered federal funding other than funds to provide services specified in subsection (c) of Code section 50-36-1.”); MO. REV. STAT. § 67.307(b)(2) (“Any municipality that enacts or adopts a sanctuary policy shall be ineligible for any moneys provided through grants administered by any state agency or department until the sanctuary policy is repealed or is no longer in effect.”).

<sup>51</sup> S.B. 1070, 2010 Ariz. Sess. Laws 0113, amended by 2010 Ariz. Sess. Laws 0211 (H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010)).

<sup>52</sup> Rick Su, *Commentary, The Overlooked Significance of Arizona's New Immigration Law*, 108 MICH. L. REV. FIRST IMPRESSIONS 76, 77 (2010), <http://www.michiganlawreview.org/assets/fi/108/su.pdf>.

<sup>53</sup> ARIZ. REV. STAT. ANN. § 11-1051(F)-(H) (Supp. 2010) (emphasis added).

<sup>54</sup> Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47, 75 (2010).

exempted from the injunction order and thus currently have full legal effect in Arizona.<sup>55</sup>

The emergence of these laws is understandable given the strong political momentum behind increased enforcement. Yet it is notable that in targeting only the policymaking powers of local law enforcement agencies, these restrictions leave individual police discretion largely intact as a matter of law. Indeed, by specifically targeting the ability of law enforcement agencies to limit actions taken by its officers in the field, it can be argued that individual police discretion is actually enhanced in practice. Line-level officers are still allowed to decide, for example, to never contact federal immigration authorities in connection with a routine traffic stop. Yet, while that discretion is preserved, anti-sanctuary laws prevent any such decision from being instituted at a departmental level, or even by an immediate supervisor with respect to the conduct of a line-level officer directly under his supervision.

This split between individual and departmental discretion is not an accident of the anti-sanctuary movement. This bifurcation has always been important for two reasons. First, it is legally expedient. This is most clear at the federal level where principles of federalism limit the federal government's ability to mandate local participation in federal programs.<sup>56</sup> As the Second Circuit noted in *City of New York v. United States*, the federal anti-sanctuary law did not constitute an impermissible commandeering of the local policymaking process or an unconstitutional conscription of local officials because it "prohibit[s] state and local governmental entities or officials only from directly restricting the *voluntary* exchange of immigration information" by their employees with immigration authorities.<sup>57</sup> Of course, this conclusion is dependent on treating local law enforcement officials as distinct from the department and locality they work for, even if they are formally a part of those entities when they are on duty.

Second, the bifurcation of individual discretion and departmental discretion has also proven to be politically expedient. While attacking the departments for which they work and the communities that they serve, political efforts against sanctuary policies at the state level have often sought to drive a wedge by appealing to the individual officers themselves. At a recent meeting of the Combined Law Enforcement Associations of Texas, Governor Perry of Texas advocated for a state-wide anti-sanctuary law by arguing that these local and departmental policies have "handcuffed" them from doing the job that they swore

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<sup>55</sup> See *United States v. Arizona*, 703 F. Supp. 2d 980, 986 (D. Ariz. 2010) *aff'd*, No. 10-16645, 2011 WL 1346945, at \*20 (9th Cir. Apr. 11, 2011).

<sup>56</sup> See *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that the federal government lacked the power to force a state to choose to "take title" of low-level radioactive waste generated within its borders or enact a state program for its disposal); see also *United States v. Printz*, 521 U.S. 898, 935 (1997) (holding that the federal government could not "conscript" local law enforcement officials to perform background checks on potential gun buyers in furtherance of a federal program); *id.* at 931 n.15 (1997) (noting that there is no distinction between state and federal governments with respect to the constitutional protections of federalism).

<sup>57</sup> *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999) (emphasis added).

to do, and that the state intended to free them from those restraints.<sup>58</sup> Similarly, many of the state anti-sanctuary laws that have been passed not only restrict their ability to limit enforcement through policymaking, but also require that the departments specifically inform their officers about their right and duty to cooperate directly with state and federal officials in immigration enforcement matters regardless of what their department or commanding officers might say.<sup>59</sup> Moreover, while Arizona's S.B. 1070 took the unique step of making law enforcement agencies more vulnerable to suits for resisting immigration enforcement in violation of the state law, it also specifically requires those same law enforcement agencies to indemnify line-level officers who are sued for carrying out immigration enforcement.<sup>60</sup> The irony of this double bind in Arizona is worth iterating: on the one hand, local police departments are unable to limit immigration enforcement under state law for fear of state imposed liability; on the other hand, they are also responsible for any lawsuits that may arise from actions taken by law enforcement officers over whom they have increasingly less control.

The expansion of the individual police discretion with respect to immigration enforcement has also allowed for the expansion of formal anti-sanctuary laws indirectly. Take, for example, one of the limitations of the original federal anti-sanctuary provision. As noted earlier, by focusing on communications the law primarily addressed "don't tell" policies without necessarily affecting, for example, "don't ask" variants. By preventing officers from conducting independent investigations or inquiries, "don't ask" policies are sometimes thought of as approximating "don't tell" policies by ensuring police officers do not have any information to communicate to federal authorities even if they are permitted to do so by federal law.<sup>61</sup> Yet with police discretion largely intact, these workarounds are proving to be less than perfect substitutes. Writing about the inclusion of immigration information in the FBI's National Crime Information Center database, Laura Sullivan recently argued that this federal initiative threatened to subvert local sanctuary policies by making the acquisition of immigration information too automatic in the course of a law enforcement official's everyday duties, and thus too easy for such officials to get involved in immigration enforcement.<sup>62</sup> Similar concerns were also raised in a special report

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<sup>58</sup> See James Pinkerton, *Perry Vows to Abolish Sanctuary Cities in Texas*, HOUS. CHRON. TEX. POLITICS BLOG (Oct. 7, 2010, 4:31 PM), [http://blogs.chron.com/texaspolitics/archives/2010/10/perry\\_vows\\_to\\_a.html](http://blogs.chron.com/texaspolitics/archives/2010/10/perry_vows_to_a.html); see also Anna M. Tinsley, *Perry Takes Aim at Texas' Sanctuary Cities for Illegal Immigrants*, FORT WORTH STAR-TELEGRAM, Oct. 9, 2010, <http://www.star-telegram.com/2010/10/08/2532919/perry-takes-aim-at-texas-sanctuary.html>.

<sup>59</sup> See CO. REV. STAT. §29-29-101 (2006); MO. REV. STAT. § 67.307 (Supp. 2010).

<sup>60</sup> ARIZ. REV. STAT. ANN. § 11-1051(K) (Supp. 2010).

<sup>61</sup> Indeed, after rescinding its old "don't tell" sanctuary policy, New York City instituted a new "don't ask" sanctuary policy. Susan Sachs, *Mayor's New Immigrant Policy, Intended to Help, Raises Fears*, N.Y. TIMES, July 23, 2003, at A1.

<sup>62</sup> See Sullivan, *supra* note 8, at 569.

commissioned after the Rampart Scandal severely tarred the reputation of the Los Angeles Police Department. Finding that officers involved were able to get around the department's "don't ask" policy by either working closely with federal agents stationed in their field office, or simply calling in federal agents when they wished to intimidate a witness or make them "disappear," the report noted the need for stronger departmental oversight over communications between police officers and federal authorities. Yet this is precisely the kind of limitations that federal law specifically forecloses.<sup>63</sup>

## B. Limiting Enforcement

Given the manner in which federal and state efforts have targeted local non-enforcement policies in recent years, it would appear that if local law enforcement agencies are to adopt any policies at all, it should be one that emphasizes enforcement rather than restraint. Indeed, since the passage of the federal anti-sanctuary law, federal policy seems to have been pushing precisely in this direction. Local law enforcement officials are now authorized by Congress to arrest undocumented immigrants in certain circumstances,<sup>64</sup> and can enter into an agreement with the federal government in which local officials are deputized as federal enforcement agents.<sup>65</sup> Moreover, the federal government is now required by law to respond to any and all inquiries about immigration status from local law enforcement officials, and federal agencies maintain several databases and a special hotline for precisely this purpose.<sup>66</sup> Moreover, for much of the last decade the Department of Justice has stood behind a legal memo arguing that local law enforcement officials have "inherent authority" to enforce federal immigration laws with or without federal authorization.<sup>67</sup>

So, can local law enforcement departments design policies that feature steps toward immigration enforcement when certain conditions are met, say, when a suspect has been arrested? Further, can a department actually *require* that its officers perform certain actions, such as inquire about immigration status and contact federal immigration authorities for verification if certain identification

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<sup>63</sup> REPORT OF THE RAMPART INDEPENDENT REVIEW PANEL: A REPORT TO THE LOS ANGELES BOARD OF POLICE COMMISSIONERS CONCERNING SPECIAL ORDER 40 9, 19 (Feb. 1, 2001), [http://www.oiglapd.org/Special\\_Order\\_40\\_708061\\_v1.pdf](http://www.oiglapd.org/Special_Order_40_708061_v1.pdf).

<sup>64</sup> See 8 U.S.C. § 1252c (2006).

<sup>65</sup> Congress allows state and local law enforcement agencies to enter into enforcement agreement with the federal government, otherwise known as 287(g) agreements. See *id.* § 1357(g).

<sup>66</sup> See *id.* § 1373(c) (requiring Department of Homeland Security to "respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status . . . for any purpose authorized by law, by providing the requested verification or status information").

<sup>67</sup> See Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to the Attorney General, Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations 7-8 (Apr. 3, 2002), available at <http://www.aclu.org/FilesPDFs/ACF27DA.pdf>.



documents are not forthcoming? Given much of the concern about local immigration enforcement revolves around potential abuses that arise from the improper exercise of police discretion, of which racial profiling has been the most notable, the adoption of clear enforcement procedures and protocol that both establish uniform guidelines and steer officers away from impermissible factors might be both preferable and more amenable to debate and refinement than ad hoc decision-making. Yet, as the rest of this section explains, not unlike the legal restrictions on non-enforcement policies, recent developments are starting to call these enforcement-oriented policies into question as well.

Admittedly, in comparison to our examination of anti-sanctuary measures, the restrictions here are more tentative. That is because the most significant legal development here is not the passage of a particular law. Rather, it lies in the preemption argument that the federal government has raised against Arizona's S.B. 1070, which, though successful at the district and appellate court level, might still be subject to review by the Supreme Court.<sup>68</sup> In light of this, there are inherent limits to what can be predicted by the analysis below. To the extent this challenge reflects emerging sentiments with respect to local immigration mandates generally, however, the particular manner in which it is being pursued may shine light on the kind of restrictions that may arise from either this lawsuit or other developments going forward.

Arizona's S.B. 1070 has several provisions, many of which were directly challenged by the federal government. The most controversial of these provisions, however, are two enforcement mandates that govern the conduct of all law enforcement officials in the state. The first requires the immigration status of all arrestees be determined before release.<sup>69</sup> The second requires "reasonable attempts" to be made to determine the immigration status of anyone encountered in a "lawful stop, detention or arrest" if "reasonable suspicion exists" that such person is unlawfully present in the United States, with the proviso that certain forms of identification establishes a presumption of citizenship or lawful presence.<sup>70</sup> As noted above, the expansiveness of these mandates is certainly a cause for concern.<sup>71</sup> Yet unlike provisions of S.B. 1070 that create separate criminal penalties under state law,<sup>72</sup> these mandates

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<sup>68</sup> See Plaintiff's Motion for Preliminary Injunction and Memorandum of Law in Support Thereof, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB).

<sup>69</sup> ARIZ. REV. STAT. ANN. § 11-1051(B) (Supp. 2010) ("Any person who is arrested shall have the person's immigration status determined before the person is released."). The district court rejected the state's argument that "any person" language in the statute, in context, actually means any person reasonably suspected of being present in the country unlawfully. See *United States v. Arizona*, 703 F. Supp. 2d 980, 999 (D. Ariz. 2010).

<sup>70</sup> ARIZ. REV. STAT. ANN. § 11-1051(B).

<sup>71</sup> See Chin et al., *supra* note 54, at 17-18.

<sup>72</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-1509 (creating a crime for the failure to carry immigration registration papers); *id.* § 13-2929 (creating a state crime for a person in violation of a criminal office to transport or harbor undocumented immigrants or encourage or induce them to come to Arizona).

ultimately envision some form of contact and coordination with federal authorities. Though flawed they may be, at the very least they provide some kind of structure and process with respect to how immigration issues are to be handled as a matter of local law enforcement.

All of this affected the manner in which the federal government challenged Arizona on the grounds of federal preemption. To be sure, immigration enforcement is a federal responsibility. Moreover, with plenary power over the issue, the federal government has the final word over immigration policymaking. Nonetheless, whether these two enforcement mandates are actually preempted by existing federal law is not as straightforward as it may first appear. It might be an easier case if the federal government was able to focus their arguments on the underlying conduct being mandated—to assert, for example, that all local enforcement of federal immigration laws is foreclosed without specific authorization or request by federal authorities. Yet in light of all the various federal efforts to *encourage* local enforcement outlined above, this proved to be a difficult argument.<sup>73</sup>

It is telling then that rather than focusing on the underlying enforcement actions themselves, what the federal government ultimately centered its case on was the fact that Arizona was turning the federal government's encouragement into a state-wide mandate.<sup>74</sup> Indeed, its argument against these provisions rested on the tremendous volume of inquiries and referrals that the mandates would produce. On the one hand, the federal government argued that they would impose an undue burden on legal residents and even American citizens, thus frustrating the subtle balance of federal law.<sup>75</sup> It did not argue, however, that the burdens imposed by the underlying action—inquiries at lawful stops or after arrests—are themselves impermissible absent a statewide mandate. On the other hand, the federal government asserted that the sheer number of inquiries and potential suspects these mandates might produce would frustrate federal administration by taxing its capacity and possibly diverting resources from other priorities. All of this is made worse by the fact that Congress requires the federal

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<sup>73</sup> See *supra* notes 64-66 and accompany text; see also Chin et al., *supra* note 54, at 29 (arguing that the preemption argument is “potentially at issue here, because the states do have some authority over immigrants, and there is no statute by which the United States has excluded states from regulating noncitizens entirely”).

<sup>74</sup> Actually, the main focus of the federal government's argument was more subtle and theoretical. In short, rather than focus on any provision in isolation, the federal government argued that the law as a whole constituted an act of policymaking, and more specifically an attempt by a state to fashion its own immigration policy. The ability to make immigration policy, however, is constitutionally reserved to the federal government in consideration of the interests of the nation. See Plaintiff's Motion for Preliminary Injunction and Memorandum of Law in Support Thereof, *supra* note 68, at 12-22. The district court refused to consider this argument on its own and as applied to S.B. 1070 as a whole. See *United States v. Arizona*, 703 F. Supp. 2d 980, 995-98 (D. Ariz. 2010).

<sup>75</sup> See *United States v. Arizona*, 703 F. Supp. 2d at 1001, 1003-04.

government to respond to all immigration inquiries.<sup>76</sup> Both of these arguments prevailed at the district court level.<sup>77</sup> As a result, both of these enforcement mandates were preliminarily enjoined.

To be sure, when this case reached the appellate level, the Ninth Circuit Court of Appeals adopted an argument different from the one raised by the federal government in affirming the district court's injunctions. Rather than focusing on S.B. 1070's burden on federal resources or its frustration of federal enforcement priorities, the appeals court interpreted federal immigration law to require the close supervision of the Attorney General whenever states are involved in the enforcement of immigration laws.<sup>78</sup> This supervision, the court held, is to be instituted primarily through memorandum of understandings negotiated between the federal and state governments under the federal 287(g) program. There are some problems with the panel's holding in this regard, especially given the fact that 287(g) agreements are relatively rare and Congress seems to have gone out of its way to suggest that 287(g) supplement but do not supersede other federal encouragement of independent police action. For our purposes, however, it is worth noting that although the underlying rationale is different,<sup>79</sup> like the district court's opinion, the legal line for the court of appeals is not whether local law enforcement officials communicate with federal authorities, but rather the creation of policies and laws that "dictat[e] how and when state and local officers *must* communicate with the Attorney General regarding the immigration status of an individual."<sup>80</sup> Moreover, as Judge Bea noted in his partial dissent, even at this level of the litigation, the federal government still refused to assert that line-level officers cannot independently participate in immigration enforcement on their own.<sup>81</sup> In this respect, although the legal foundation of the appellate court differed from that of the district court, the underlying conclusion that federal law preempt state-wide policy mandates, but not necessarily the exercise of individual police discretion in the field, continues to hold.

Of course, one may ask what, if anything, does the ongoing litigation over Arizona's immigration law have to do with the scope of *local* policymaking? True, the federal lawsuit is against a state and not a locality. More importantly, it was instituted by the federal government with substantial local support; declarations from several local law enforcement officials in Arizona were filed as a part of the federal government's case<sup>82</sup> and seven cities

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<sup>76</sup> See *id.* at 1001-02, 1005-06.

<sup>77</sup> See *id.* at 1002, 1006.

<sup>78</sup> See *United States v. Arizona*, No. 10-16645, 2011 WL 1346945, at \*5 (9th Cir. Apr. 11, 2011).

<sup>79</sup> See *id.* at \*24-\*25 (Bea, J., concurring in part and dissenting in part).

<sup>80</sup> See *id.* at \*6.

<sup>81</sup> See *id.* at \*35 (Bea, J., concurring in part and dissenting in part).

<sup>82</sup> See Declaration of Roberto Villasenor, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB), available at <http://www.justice.gov/opa/documents/declaration-of-roberto-villasenor.pdf>; Declaration of Phoenix Police Chief Jack Harris, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010).

recently filed an amicus brief in support of the federal government's position on appeal.<sup>83</sup> In that respect, federal success actually frees local law enforcement departments from the state's mandate. Yet, it is worth noting that neither the scope nor nature of the federal government's argument are so cabined, and it would arguably apply as easily to local policies as those enacted at the state level. Indeed, many existing policies now fall into similar molds described in the federal government's lawsuit against Arizona. Albuquerque, for example, recently "repealed" its sanctuary policy by requiring that all arrestees have their immigration status checked, though the mayor was quick to stress that police *will not* check the immigration status of any victims or witnesses.<sup>84</sup> Houston, which mandates that police officers not detain or arrest anyone solely on the basis of suspicions of undocumented status, nevertheless requires that the police check all arrestees against a database that includes information on immigration status.<sup>85</sup> The immigration policy in Denver, which we examined above, also reveals a similar combination of enforcement limits and enforcement mandates.<sup>86</sup> Again, it may be that these policies are unwise. According to the federal government's argument, however, they may also run afoul of federal preemption. Indeed, the fact that local law enforcement will be working in collaboration with federal authorities to determine immigration status, and thus potentially tax and divert federal resources, makes a local policy more rather than less problematic under the federal government's argument. Moreover, although local policies in most cases will not impose burdens as extensive as those with statewide effect, there are nevertheless many local jurisdictions with sizable populations, including some that approach or exceed that of Arizona as a whole.

By casting doubt on the constitutionality of enforcement mandates, this development suggests a further narrowing of permissible local immigration policymaking more generally. More importantly, this narrowing seems to be accompanied by a corresponding expansion of individual police discretion. Again, this does not appear to be an oversight. Rather the manner in which the challenge bifurcates local law enforcement officials and their agencies, and supports the discretion of the former at the expense of supervision by the latter, is a central reason for the government's novel argument. The fact is the federal government has little desire to argue that law enforcement officials cannot make

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(No. CV 10-1413-PHX-SRB), available at <http://www.justice.gov/opa/documents/declaration-of-jack-harris.pdf>; Declaration of Tony Estrada, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB), available at <http://www.justice.gov/opa/documents/declaration-of-tony-estrada.pdf>.

<sup>83</sup> Brief for the County of Santa Clara, California et al. as Amici Curiae Supporting the Appellee, United States v. Arizona, No. 10-16645, 2011 WL 1346945 (9th Cir. Apr. 11, 2011), available at <http://www.ca9.uscourts.gov/datastore/general/2010/10/25/amicus.brief21.pdf>.

<sup>84</sup> See Dan Boyd, *Policy on Immigrants Assailed*, ALBUQUERQUE J., Feb. 4, 2011, <http://www.abqjournal.com/news/xgr/04210152005newsxgr02-04-11.htm>.

<sup>85</sup> See Circular from Harold L. Hunt, Chief of Police, to the Houston Police Department, Persons Who Violate Criminal Laws (Oct. 10, 2006), available at [http://static.texastribune.org/media/documents/hpd\\_circular.pdf](http://static.texastribune.org/media/documents/hpd_circular.pdf); see also Glenn, *supra* note 4.

<sup>86</sup> See *supra* notes 34-35 and accompanying text.

the kind of inquiries that the Arizona law requires. As we have seen, both federal law and federal practice encourages individual police officers to do so with or without departmental approval. The federal government has at times entered into formal 287(g) arrangements with local law enforcement that are structured around the kind of inquiries that Arizona's law requires, especially regarding those who are detained.<sup>87</sup> So, as rare as they may be, it could be that the federal government simply wants enforcement to proceed through these bilateral federal agreements rather than unilateral state mandate, as the Ninth Circuit argued in its opinion. Yet federal law not only seems to support the possibility of independent police action, but it also appears that the federal government is not entirely willing to limit such action solely to the scattered instances where a formal agreement has been reached. As a result, the federal challenge focused entirely on the mandate rather than the underlying police conduct. In that sense, the federal position here is strikingly similar to the one it assumed in the passage of the federal anti-sanctuary statute: law enforcement officials should have the ability to participate in immigration enforcement efforts or decide not to, but no one, including the police department for whom they work, is allowed to undermine that choice in any way.

In combination with the anti-sanctuary movement, the emerging controversy about potential limits over enforcement policies places local policymakers in a confused and difficult situation. Indeed, possibly none find themselves in more of a legal limbo than the localities and law enforcement agencies in Arizona. The early success of the lawsuit against the Arizona law meant that they are freed from having to engage in federal immigration enforcement. But because the expansive anti-sanctuary statute in S.B. 1070 was neither directly challenged nor subsequently enjoined, local law enforcement agencies cannot legally take any steps to prevent their officers from enforcing immigration laws or risk being sued through the newly created cause of action. Nor, as suggested above, would local policies that lean towards tailored enforcement mandates as a limit or control on police discretion necessarily escape scrutiny. In the end, however, local law enforcement agencies in Arizona may be just the first to be so mired in this legal limbo. Given the state of federal law and the direction in which it and other state laws are developing, it is not clear that cities and police departments in other jurisdiction will be able to avoid being placed in a similar position.

#### IV. POLICING POLICE DISCRETION

Taking seriously the legal convergence of the two legal developments outlined above—restrictions on local policies that either limit *or* require cooperation with federal immigration enforcement efforts—it is no wonder that efforts to actually define how line-level officials should respond to immigration

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<sup>87</sup> Seghetti, *supra* note 10, at 14-18.

in the course of local policing seem so uncertain. Moreover, when combined with the public controversy that seems to plague any local policy on immigration and policing, it is no surprise that the policies that exist remain under-enforced, if not unwritten or unpublicized.<sup>88</sup> All the while, by not addressing individual police discretion, that discretion is actually enhanced in practice as the local and departmental policies that constrain it are being called into question.

This development is troubling. What, if anything, can be done about it? The face is that there are no easy answers. The most obvious candidate for the development of a centralized and uniform immigration policy is through direct federal or state mandates, which are unfortunately plagued by constitutional limitations. Alternatively, local policymaking could tap into the pragmatism and managerial expertise that many local law enforcement agencies possess, but this would ultimately require less intrusion into their ability to set policies, which is not the direction in which current legal developments are now heading.

### **A. The Limits of Centralized Control**

Given the haphazard and politicized manner in which limitations against local policymaking are emerging, one might suppose that what is necessary is a coordinated and concerted effort to define the role of local law enforcement with respect to immigration—namely, an effort that involves more than banning local policies from being promulgated. What may be needed is a centralized and uniform guidelines specifying what procedures local law enforcement should follow, and the criteria that they should consider, with respect to immigration issues that they may encounter in the field. The federal level, of course, would be an ideal level for the promulgation of these policies not only because immigration is a national interest, but also because this would be the best way to ensure uniform standards and procedures across the country. Alternatively, it may be assumed that the states, being significantly less numerous than local police jurisdictions, would be a second best option.

As a means of controlling police discretion in an area of national interest, federal or even state control might be more ideal than a patchwork of departmental standards. Yet the prospect of guidelines more precise than what has been passed so far may be legally constrained by the structural organization of our federal system. Simply stated, while the federal government has the final word on immigration regulation and enforcement, it has limited ability to actually impose specific mandates on local law enforcement officials. Conversely, while the states have substantially more power over local law enforcement officials, they lack the ability to set immigration policy more generally. Let us consider these limitations in more detail.

While the prospect of a clear and transparent federal policy regarding the conduct of all local law enforcement officials sounds appealing, it is unlikely that

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<sup>88</sup> See sources cited *supra* note 36.

one can be implemented in a comprehensive manner without running afoul of the constitution. The limitations are inherent in how our federal system insulates state and local governments from federal intrusion. As the Supreme Court famously proclaimed, state sovereignty means that the federal government cannot command states or localities to promulgate laws or regulations or get around these protections by commandeering state or local officials directly into administering a federal program.<sup>89</sup> Thus, although the federal government has been allowed to preempt local enforcement restrictions or even enforcement mandates, it is not clear that they can expressly set the terms, conditions, and procedures with which federal immigration enforcement must be carried out by law enforcement officials at the local level.

The states, of course, are not constitutionally limited in the same manner. To be sure, their ability to mandate local action may be constrained by other restrictions in their respective state constitutions. Yet, for the most part, it is generally assumed that as subdivisions of the state, localities and local officials are entirely under the control of the state. State policymaking in this regard, however, runs afoul of constitutional limitations. As the federal lawsuit over Arizona's immigration law shows, the fact that states are better situated to effectuate local action does not give them the ability to use that power to affect federal immigration policymaking more generally. Ultimately, any state policy must be in accordance with federal law, and more importantly as a political matter, federal priorities if they want to avoid being stricken or bogged down by federal opposition. And given the diversity of state responses, and the confusion over what is in fact the federal position, any state policies would likely face federal challenge.

I do not want to suggest that there is no way to develop a centralized policy on the role of local law enforcement in the context of immigration enforcement. Conditioning the receipt of federal funds on state and local compliance with a particular local immigration enforcement procedure is one possibility, if only Congress can come to an agreement on what such a procedure might be.<sup>90</sup> Another is if the federal government and the states reach a mutual consensus where states voluntarily implement a uniform policy on local immigration enforcement, which is much more unlikely given the even more strained relationship between the federal government and the states on this matter. In any case, these options have thus far not been the preferred course of action for either the federal government or the states. All the while, concerns about police discretion in immigration matters remain.

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<sup>89</sup> See cases cited *supra* note 56.

<sup>90</sup> A more expansive federal anti-sanctuary provision, passed by the House but not the Senate in 2006, was structured precisely in this manner. See Matt Stiles et al., *House Puts Pressure on "Sanctuary" Cities: Rep. Culberson's Measure Threatens to Cut off Funding*, HOUS. CHRON., June 30, 2006, at A1.

### B. Reaffirming Local Policymaking

If a uniform and centralized immigration policy at the federal level regarding the role of local law enforcement is the gold standard, local policymaking may still be an appealing substitute. At the very least, it would allow for the development of some transparent policy to guide police discretion than having none at all. In other words, if, as the above suggests, political and legal constraints make the emergence of a truly comprehensive policy at the federal or state level unlikely, perhaps local policymaking as either a second (or third) best alternative should not be so easily dismissed. To be clear, I do not mean to suggest that there are no additional benefits that local policymaking might bring to the table; in fact, I have stressed these arguments in the past to defend giving localities more control over immigration.<sup>91</sup> But even if one is dismissive of those arguments, I want to suggest here that there should still be grounds for consensus around the idea that some clear standards are better than none. And as the law currently stands, the entities most likely to develop these policies are at the local level.

In the short run then, the easiest way to ensure that some policy exists is to rethink the way the federal government and the states are micromanaging local law enforcement administration through restrictions and prohibitions. Of course, clear ceilings and floors should be set to ensure policies do not go too far, either in infringing individual rights or directly frustrating federal interests. Yet there is no more certain way to accomplish this than for these restrictions to target the underlying action that is of concern (e.g., inquiries about immigration status at routine traffic stops, or on the basis of race) rather than simply the local policies that require or prohibit these actions. Indeed, as it stands now, by discouraging or outright prohibiting only the act of local policymaking itself, all that recent developments have accomplished is to make the alternative of having no policy at all more appealing.

There are real concerns that encouraging or even permitting local policymaking may result in some very bad policies. They certainly will result in patchwork of enforcement responses across different jurisdictions. But bad policies are at least open to debate and subject to revisions, none of which are the case when immigration enforcement is largely at the discretion of individual police officers or informal departmental customs.<sup>92</sup> Tellingly, whereas the federal government and the states now appear locked in a grand political battle over the most basic aspects of immigration law, local policies have been steadily evolving as various communities try to adjust to the realities of immigration's impact on policing and community safety. For some, this may not be sufficient to recommend local policymaking above all else. But until a more

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<sup>91</sup> See Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 844-49 (2008); see also Su, *supra* note 7, at 366-75.

<sup>92</sup> See Luna, *supra* note 19, at 1164.



comprehensive solution can be reached, this may be precisely the kind of pragmatic backstop that we need to preserve.

## V. CONCLUSION

The role of local law enforcement officials in immigration regulation and enforcement is far from settled. Indeed, it is and will likely continue to be a subject of fierce debate and substantial legal confusion, all of which tracks the contentiousness of the immigration debates as a whole. Under these circumstances, it makes sense that the federal government and the states have become increasingly interested in regulating the manner in which local law enforcement agencies conduct, or fail to conduct, immigration enforcement in their jurisdiction. Yet, as this essay shows, by targeting local immigration policymaking exclusively, these regulations not only narrow the ability of localities and local law enforcement agencies to control police discretion and the abuses that might arise from insufficient supervision of how that discretion is exercised in the field.

There are, to be sure, political points to be scored by targeting local immigration policies, especially those that make the greatest effort to be clear and transparent. But by discouraging local immigration policymaking, and also not being able to put an alternative procedure in place, federal and state efforts in this regard simply increase the likelihood of confusion and abuse to the detriment of immigration regulations and policing more generally. This essay suggests that we need to rethink this regulatory trend. Local policymaking may not seem to be the most efficient or effective way to determine the role of local police officers with respect to immigration enforcement. It should, however, be preferable to having no policies at all, which happens to be precisely the direction in which the emerging restrictions on local policymaking are pushing.