Criminal Law & Migration Control: Recent History & Future Possibilities

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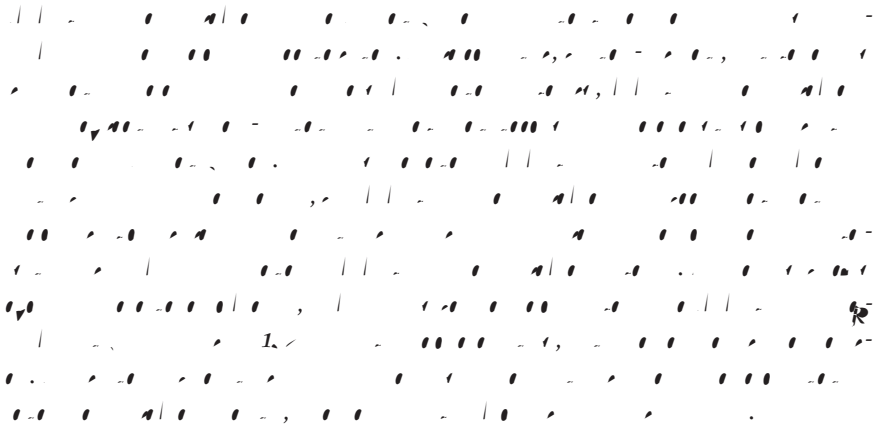

Even before the British colonies along the Atlantic Coast of North America openly rebelled against Great Britain in the 1770s, colonists like Benjamin Franklin were bemoaning the quality of incoming immigrants, and in particular, their criminality. Franklin famously warned about the "thieves" and "villains" transported from the jails of England to the colonies.[1] These concerns ironically ran alongside complaints that the Crown was unfairly restricting productive migrants from coming to the colonies.[2]

The notions of immigrant inferiority and criminality run through the story of this self-styled "nation of immigrants," always in tension with market systems that benefited from more robust immigrant flows. The desire for low-cost laborers to fuel capitalist expansion across North America existed alongside racialized fears of immigrant workers. Strong economic and political forces impelled migration into the United States even as residents who had arrived in the country a mere generation before decried succeeding waves of immigrants as unassimilable, racially "other," and morally degenerate. Immigration restrictions and criminal laws stood as twin methods to regulate these incoming immigrant groups, with the latter serving as a useful mechanism for controlling and containing populations that were often desired as workers, and therefore not barred from entry,

The last year during which the U.S. Congress passed legislation to normalize the legal status of a large group of unauthorized migrants was 1986. The Immigration Reform and Control Act (IRCA) was a compromise legislative package.[6] There was the legalization component of the law, which allowed nearly three million residents present without legal authorization to regularize their immigration status and, eventually, to apply for citizenship. And on the other side of the compromise was the employer sanctions component of the law, which was conceptualized as a mechanism for ending the job magnet that was seen as the key "pull factor" driving migration, mostly from Mexico, into the United States.[7] The bill had the intended effect of regularizing the status of many – but not all – long-time immigrant residents.[8] It did not, however, demagnetize the border. This was partly due to the fact that the federal government did little to enforce the law's employer sanctions provisions.[9] Perhaps this was the inevitable outcome of a law that ignored the practical realities of labor migration in the United States.

From the nation's founding until shortly before the enactment of the IRCA, migration from Mexico into the United States was unrestricted numerically.[10] Indeed, from 1942 through 1964, the United States actively promoted labor migration from Mexico with a program designed to facilitate the immigration of temporary agricultural workers from Mexico known as the Bracero program.

during proceedings, mandatory removal, and a lifetime bar on return. The list grew to include not simply crimes like rape and murder, but also relatively minor theft offenses and the like, and the new deportability provisions applied retroactively.[15]

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and felons as a consequence of the very act of crossing the border. These changes to policy were both driven by and reified age-old notions of the racialized migrant as a criminal threat. Now, indeed, border crossers were criminals, though, circularly, their crime was crossing the border. And immigrants were increasingly seen as criminals at the very time the immigration system was being built up to detain them like criminals as a precursor to removing them, including for minor offenses.[25]

As a matter of constitutional law, immigration regulation is an exclusively federal concern. But while shifts in federal law and policy drove these developments, changing state and local law enforcement policies were key drivers of the ballooning removal rates during this period. State criminal law prosecutions had been on the rise since the 1970s, and the resulting state law convictions provided a basis for the potential removal of many noncitizens on the newly expanded list of criminal removal grounds.[26] The role played by states and localities in immigration enforcement also was not limited to these indirect effects. The federal government was incorporating state and local law enforcement directly into their immigration enforcement efforts at the very same time that some states and localities were adjusting their own policies and practices to further facilitate federal immigration enforcement efforts.

One provision of the immigration legislation that Congress passed in 1996 outlined a process whereby state and local governments could contract with the federal government to gain immigration enforcement authority.[27] Known as 287(g) agreements, named after the section of the Immigration and Nationality Act that outlines their legal authority, memoranda of understanding enacted pursuant to this provision allow state and local law enforcement agents trained and supervised by federal agents to perform immigration enforcement functions.[28] Although there was clearly some congressional enthusiasm for such collaborations, the executive branch did not enter into its first 287(g) agreement until 2002.[29]

But governmental reluctance to embrace the program changed after the terrorist attacks on the United States on September 11, 2001. Spurred in part by a push from states and localities and in part by increased federal interest in and capacity for immigration enforcement, the largely dormant 287(g) program took off. At the peak of the program in 2011, there were seventy-two 287(g) agreements.[30]

Many states and localities also maintained that they had the inherent authority, as part of their police powers, to engage in certain immigration enforcement activities even without the supervision of the federal government. Cities enacted laws that created local penalties for employers and landlords who hired or rented homes to undocumented immigrants.[31] Some states required state and local law enforcement agents to inquire into immigration status in the course of their

routine policing activities, and attempted to create state penalties for employers who hired unauthorized workers.[32] While courts found some of these laws preempted – that is, that states and localities could not engage in some of these efforts without overstepping their jurisdictional authority and usurping powers entrusted solely to the federal government – courts also left many of these practices intact. States were empowered to take away the state business licenses of employers who hired unauthorized workers, or to require their own police to inquire into immigration status during routine police stops.[33] These legal changes heralded a cultural shift in state and local policing. For some "state and local law enforcement officials and agents, the policing of immigration status changed from something that was solely within the purview of federal agents to something that was a legitimate – and sometimes a leading – aspect of their own policing mission."[34]

Not every jurisdiction, however, leapt into immigration enforcement efforts. Many states and localities adopted policies intended to signal their independence from and lack of involvement in federal immigration enforcement efforts. Some entities, like the Los Angeles Police Department (LAPD) – which had adopted a policy in 1979 prohibiting its officers from inquiring into the immigration status of those they stopped – continued or created prohibitions on immigration investigation notwithstanding the changes at the federal level.[35] Indeed, as federal enforcement efforts increased, some jurisdictions explored and adopted noncooperation policies for the first time. The rollout of the federal Secure Communities program complicated these efforts.

Many immigrants and their allies had hoped that the administration of President Barack Obama would reverse the trends that had increasingly criminalized their communities and encouraged the hyperpolicing of their neighborhoods. That did not happen. Throughout his first term and part of his second term, President Obama continued the policies and practices of the Bush administration: mass prosecutions continued on the border, long-time lawful permanent residents continued to be removed for relatively minor offenses, government lawyers continued to push for expansive judicial interpretations of crime-related grounds for removal, and the administration continued to expand its reliance on immigration detention.[36]

Indeed, the Obama administration actually tightened the linkage between criminal law enforcement and immigration enforcement with the nationwide rollout of the so-called Secure Communities program. Under this program, all state and local arrest data were automatically screened by the Department of Homeland Security (DHS) to determine whether to pursue the arrestees for immigration offenses. This was true regardless of whether the state or locality wanted to engage in this joint effort and whether the arrest that led to the screening ultimately resulted in charges, much less convictions.[37] Police officers' decisions to

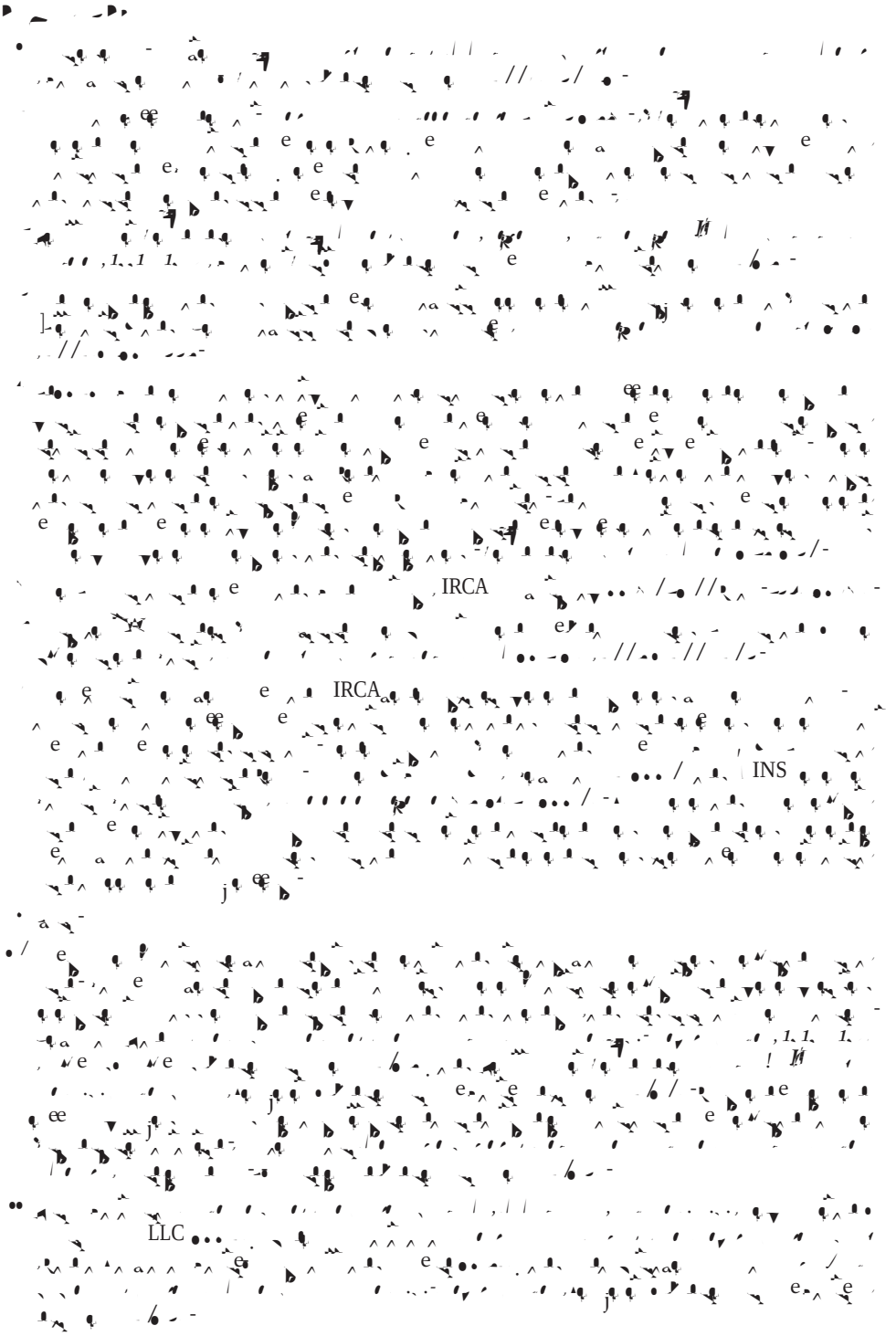
arrest thus became the critical determinant of whether an immigrant would be screened by DHS.

Reaction to the Secure Communities program varied. Some jurisdictions unsuccessfully sought to opt out of the program.[38] Others, however, embraced their new role in immigration enforcement, "stepping up their policing and arrest efforts in immigrant communities, and holding individuals upon DHS or U.S. Immigration and Customs Enforcement (ICE) request, even in the absence of probable cause of criminality.

an administration so cognizant of the unfairness of the nation's criminal law enforcement systems as a sorting mechanism placed such uncritical reliance on using criminal justice contact as a reliable means of sorting migrants.[44]

In late 2014, in a move that would have further narrowed the enforcement discretion for line agents, DHS

its criminal code to cap the maximum sentence for misdemeanor offenses at 364 rather than 365 days in an effort to ensure that misdemeanor offenses would nev-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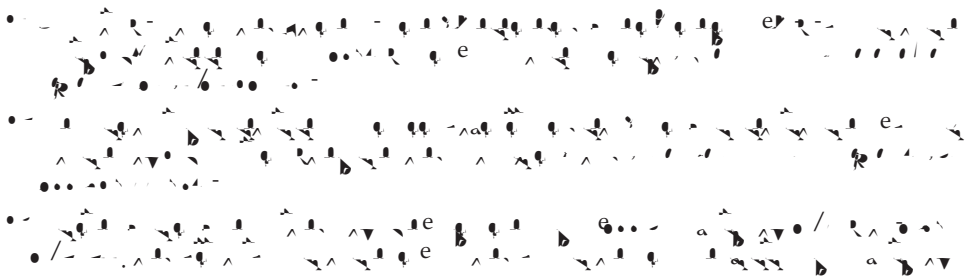

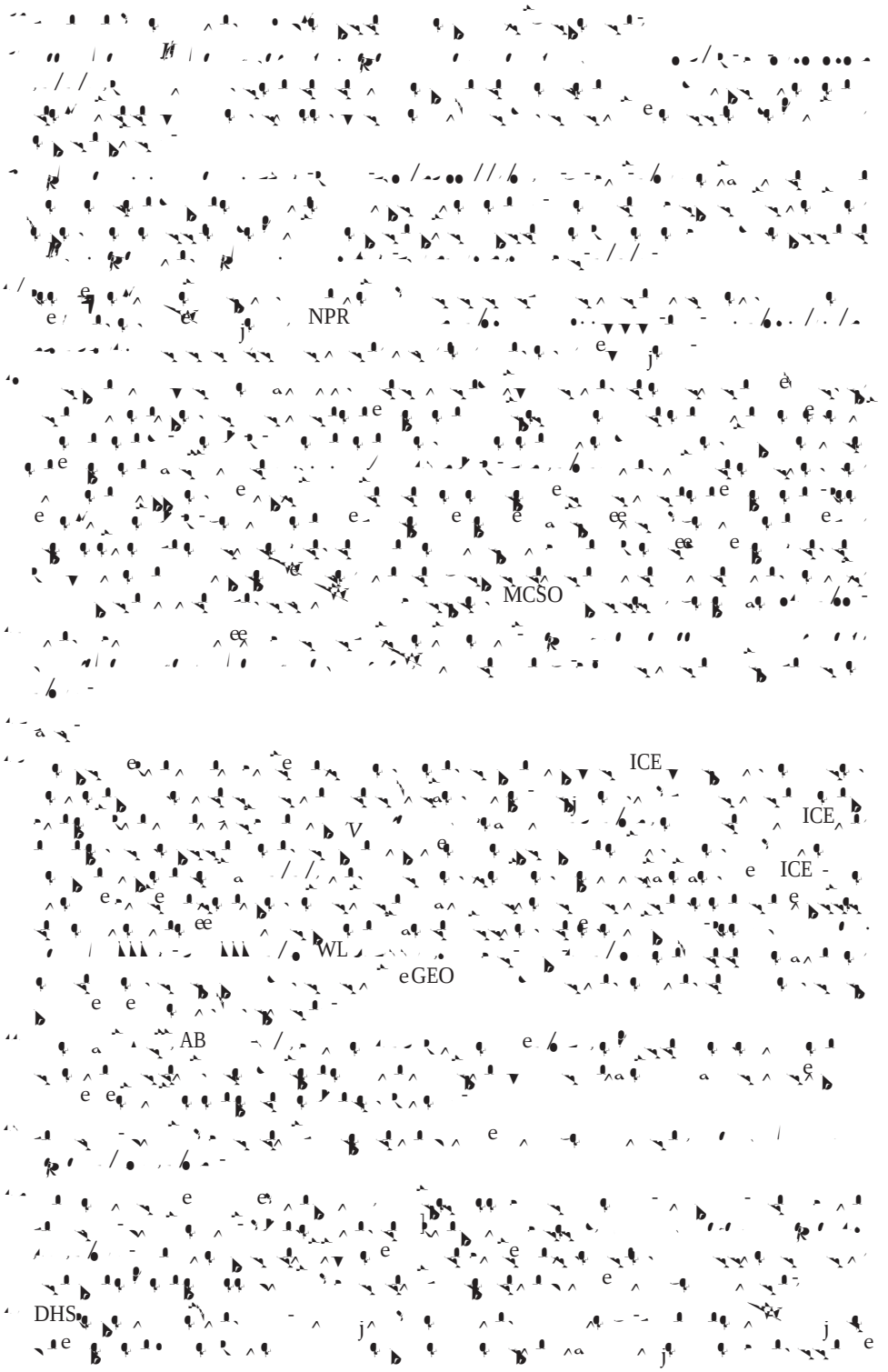
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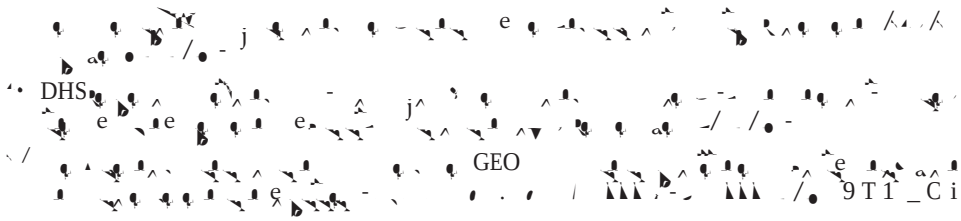
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