

## U.S. INTERNAL IMMIGRATION ENFORCEMENT: NOT A MODEL BUT AN ALARUM

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Despite or because of geopolitical and demographic realities,<sup>1</sup> nativism in the United States and the European Union has been one response to immigration during difficult current economic cycles.<sup>2</sup> A global recession means more people in the destination countries are uncharacteristically unemployed.<sup>3</sup> Citizens and their

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1. So-called “push factors” that lead to emigration can include the following:

“conflicts, dissolution and/or disintegration of multicultural states, natural disasters or other environmental problems, discrimination, political instability or poor economic situations. . . . ‘[P]ull factors’ . . . that make a destination country attractive to a prospective migrant . . . include the need for a labour force, a positive economic situation . . . political and social stability, and . . . the presence of large communities from the source countries in the destination countries.”

*Fact Sheet: Facilitated Illegal Immigration into the European Union*, EUROPOL (Sept. 2009), <http://www.europol.europa.eu/index.asp?page=publications>. In addition, the more-open borders enabled by the Schengen Agreement among EU countries have increased movement across those borders. *The Schengen Area and Cooperation*, EUROPA, [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/l33020\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33020_en.htm) (last updated Mar. 8, 2009).

2. *E.g.*, JOHN HIGHAM, STRANGERS IN THE LAND 68–74 (1955).

3. See *Global Recession Led to Stricter Immigration Rules*, WALL ST. J.L. BLOG (July 6, 2010, 8:00 AM), <http://blogs.wsj.com/economics/2010/07/06/global-recession-led-to-stricter-immigration-rules/tab> (discussing the relationship between unemployment rates

political representatives are wary of any phenomena that could be partly to blame for their straits. Concomitant foreign threats to national security motivate the state's arguably rational desire to protect its borders against the entry of sworn enemies and low-priced job-seekers.<sup>4</sup> Enforcement efforts continue to fail because tens of millions of immigrants fleeing bad situations or undertaking to improve their lives or to reunite with their families are undeterred by extant law.<sup>5</sup> Hastily created and under-enforced restrictions in immigration laws<sup>6</sup> only nominally reduce unauthorized immigration<sup>7</sup> while resulting in measurable negative effects. First, enforcement is often discriminatory and harsh.<sup>8</sup> Second, critical labor shortages will remain unaddressed. Finally, immigrants abide in an underground and unregulated economy that creates a competitive disadvantage for law-abiding market players and deprives employed immigrants of basic legal protections.<sup>9</sup>

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and changes to immigration policies which discourage new immigration, and concluding that countries adopt policies that limit immigrant access to the labor force).

4. See Anil Kahan, *Immigration Enforcement and Federalism After September 11, 2001*, in IMMIGRATION, INTEGRATION, AND SECURITY: AMERICA AND EUROPE IN COMPARATIVE PERSPECTIVE 186–87 (Ariane Chebel D'Appollonia & Simon Reich eds., 2008).

5. Ariane Chebel D'Appollonia, *Immigration, Security, and Migration in the European Union*, in IMMIGRATION, INTEGRATION, AND SECURITY, *supra* note 4, at 208–09; Mark Metcalf, Op-Ed., *Failure to Enforce Deportations an Affront to Immigration Legacy*, ATLANTA J. CONST. (Sept. 27, 2010, 8:04 PM), <http://www.ajc.com/opinion/failure-to-enforce-deportations-641934.html>.

6. See James R. Edwards, Jr., *Two Sides of the Same Coin: The Connection Between Legal and Illegal Immigration*, CENTER FOR IMMIGR. STUD. (Feb. 2006), <http://www.cis.org/articles/2006/back106.pdf> (observing that the estimated illegal immigration population has tripled since 1980 despite the adoption of the Immigration Control and Reform Act in 1986). *But see Priorities Enforcing Immigration Law: Hearing Before Subcomm. on Homeland Sec.*, 111th Cong. 947 (2009) (statement of David Venturella, Executive Director of Secure Communities for U.S. Immigration and Customs Enforcement).

7. *But see* Jeffrey S. Passel & D'Vera Cohn, *U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade*, PEW HISPANIC CENTER (Sept. 1, 2010), <http://pewhispanic.org/files/reports/126.pdf> (stating that from March 2007 to March 2009 there was a sharp reduction in the unauthorized immigrant population in the United States, from 12 million in 2007 to 11.1 million in 2009).

8. *E.g.*, Lori A. Nessel, *Families at Risk: How Errant Enforcement and Restrictionist Integration Policies Threaten the Immigrant Family in the European Union and the United States*, 36 HOFSTRA L. REV. 1271, 1273–74, 1281–84 (2008); *Arizona Immigration Law Threatens Civil Rights and Public Safety*, SAYS ACLU, ACLU (Apr. 23, 2010), <http://www.aclu.org/print/immigrants-rights/arizona-immigration-law-threatens-civil-rights-and-public-safety-says-aclu>.

9. See Lorraine Schmall, *ICE Effects: Federal Worksite Non-Enforcement of U.S. Immigration Laws, 2007-2008*, 44 U.S.F. L. REV. 373, 376–77 (2009) (noting that unautho-

This Article will examine the de facto internal enforcement of U.S. immigration laws. It will make comparisons with the EU or member states where information is available and pertinent. The extent and patterns of immigration will be discussed. New data and research from other scholars illustrate the measurable negative effects. The Article does not examine external border enforcement, except to establish context, and bilateral or multinational trade agreements with the United States that are tangentially related to immigration are outside its purview. It does aspire to summarize the critique of immigration law in an effort to move the discussion toward assimilation, utilization, synergy, and a culture of respect.

Democratic and egalitarian principles adopted by both the United States and the EU are compromised by infrequent but targeted enforcement.<sup>10</sup> Workers whose only crime is crossing a political border to get a job and support a family are being hunted, arrested, convicted, sentenced, or deported to a now-foreign country, often leaving families behind.<sup>11</sup> Detention centers, looking like and run as prisons, had an average daily population of 58,746 in 2009, which was expected to increase to 60,454 in 2010.<sup>12</sup> Law enforcement behaviors, like racial profiling, impact native-born and naturalized citizens.<sup>13</sup> Local communities lose an employed population, students, and consumers.<sup>14</sup> Undocumented immigrants receive

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rized workers are not likely to confront their employers about poor working conditions due to the workers' fears that their illegal status will be exposed).

10. Even in the EU, which has followed the lead of the United States in adopting a law enforcement paradigm, "prevention methods like policing, arrests, detention, and deportation of illegal economic migrants are mild violations of Article 13, Section 2 of the UN Universal Declaration of Human Rights, which allows for people to flee from countries that they deem detrimental to their well-being." Atta Addo, *Porous Policies: Illegal Immigration in Europe*, 28 HARV. INT'L REV. 10, 10–11 (2006); see also Nessel *supra* note 8, at 1276, 1279–80.

11. See *Immigration Enforcement and Its Unintended Consequences: The Impact on America's Children*, IMMIGR. POL'Y CENTER (Mar. 2008), <http://immigrationpolicy.org/sites/default/files/docs/Raids04-08.pdf>.

12. OFFICE OF THE FED. DET. TR., U.S. DEP'T OF JUSTICE, *U.S. Marshals Service Summary Case Processing Statistics, Fiscal Year 1994-2010*, U.S. MARSHALL SERVICE, PRISONER TRACKING SYSTEM, <http://www.justice.gov/ofdt/summary.htm> (last visited Feb. 25, 2011).

13. See, e.g., Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 119–20 (2007) (describing a joint operation with federal and state agents who resorted to illegal racial profiling, which ultimately led to a \$400,000 settlement).

14. See Bill Ong Hing, *No Place for Angels: In Reaction to Kevin Johnson*, 2000 U. ILL. L. REV. 559, 599 (2000) (describing how integral immigrant communities become in

mixed messages about whether the risk of detection is outweighed by the advantages of irregular entry. In contrast to the federal government, states and smaller political units have afforded benefits to undocumented workers and their families,<sup>15</sup> and U.S. military regulations allow undocumented persons to enlist.<sup>16</sup> Sporadic under-enforcement obviates the use of the law as a deterrent. In the United States, an immigration law tailored specifically to deter employers from hiring “irregular” immigrants has led to the arrests and detentions of disproportionate numbers of employees, rather than the employers whose jobs brought and continue to keep immigrants in the country illegally.<sup>17</sup>

The United States and the EU might need the undocumented employees to fill critical labor shortages caused by aging and lower birth rates.<sup>18</sup> These shortages are exacerbated by a disproportionate number of high school graduates attending college<sup>19</sup> and therefore

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many areas across the United States); cf. Raul Perez, *Presentation to the Federal Reserve Bank of Atlanta, The Hispanic Market: An Opportunity*, UTILIS RES. AND CONSULTING (Oct. 25, 2004), [http://www.utilis-research.com/hcr\\_presentations/Fed\\_10\\_2004.pdf](http://www.utilis-research.com/hcr_presentations/Fed_10_2004.pdf) (citing H.R. 773, which would allow banks and credit unions to accept consular identification cards for the purpose of opening accounts).

15. See, e.g., Ragini Shah, *Sharing the American Dream: Towards Formalizing the Status of Long-Term Resident Undocumented Children in the United States*, 39 COLUM. HUM. RTS. L. REV. 637, 670–71 (2008) (discussing state and local laws that integrate undocumented children into communities).

16. E.g., Margaret Stock, *Essential to the Fight: Immigrants in the Military Eight Years After 9/11*, IMMIGR. POL’Y CENTER, 4 (Nov. 2009), available at <http://immigrationpolicy.org/special-reports/essential-fight-immigrants-military-eight-years-after-911>.

17. See Farhang Heydari, *Making Strange Bedfellows: Enlisting the Cooperation of Undocumented Employees in the Enforcement of Employer Sanctions*, 110 COLUM. L. REV. 1526, 1526 (2010) (asserting that while punishing employers who hire illegal immigrants would be the best way to control illegal immigration, U.S. immigration authorities most often focus on individual illegal immigrants).

18. Some estimate that Europe’s retiring baby boomers will leave behind 50 million skilled vacancies by 2060. E.g., Hugo Brady, *Towards a Better EU Migration Policy*, CENTRE FOR EUROPEAN REFORM (Apr. 8, 2009), <http://centreforeuropeanreform.blogspot.com/2009/04/towards-better-eu-migration-policy.html>; see also RUTH ELLEN WASEM, CONG. RESEARCH SERV. RL 32235, U.S. IMMIGRATION POLICY ON PERMANENT ADMISSION i (July 20, 2009), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32235.pdf> (observing that employers continue to demand “the best and the brightest” regardless of nationality in order to be competitive in a worldwide market).

19. See U.S. DEP’T OF LABOR, NAT’L CTR. EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS: 2009, <http://nces.ed.gov/programs/digest/d09/index.asp> (last visited Apr. 16, 2011) (reporting that “[d]uring the 2007–08 academic year, postsecondary degrees numbered 750,000 associate’s degrees; 1,563,000 bachelor’s degrees; 625,000 master’s degrees; 91,300 first-professional degrees; and 63,700 doctor’s degrees.”).

unavailable for blue collar and other manual labor employment.<sup>20</sup> Irregular immigrants to the United States come for work more than for any other reason.<sup>21</sup> Nearly all unauthorized male immigrants join and remain in the workforce.<sup>22</sup> There is continuing debate about whether irregular immigrants take jobs from U.S. citizens, or whether they perform jobs that no native worker can, or will, perform.<sup>23</sup> Regard-

20. See Roland Lechner, Ezequiel Hernandez & Rene Siqueiros, *Comparative Law Insight: Immigration Is a Key Tool*, 45 ARIZ. ATT'Y MAG. 44, 44 (2009) (discussing a “brain and brawn” drain when countries are unable or unwilling to shift skilled workers into the key labor shortage areas). See generally DOUGLAS MASSEY, JORGE DURAND & NOLAN J. MALONE, *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* (2003) (explaining that a bifurcated labor market in developed nations creates a structural demand for unskilled immigrant labor to fill undesirable jobs that native-born citizens do not take, regardless of wages).

21. The jobs connection is suggested by the most recent data showing dramatic decreases in irregular immigration. The annual inflow of unauthorized immigrants to the United States was nearly two-thirds smaller in the March 2007 to March 2009 period than it had been from March 2000 to March 2005, according to new estimates by the Pew Hispanic Center. This decline contributed to an overall eight percent reduction in the unauthorized immigrant population, which fell to 11.1 million in 2009 from 12 million in 2007. Passel & Cohn, *supra* note 7. Arguably more costly emigration from further-away Western Hemisphere countries dropped significantly over the same period.

The Pew Hispanic Center's analysis also finds that the most marked decline in the population of unauthorized immigrants has been among those who come from Latin American countries other than Mexico. From 2007 to 2009, the size of this group from the Caribbean, Central America and South America decreased 22%.

*Id.* at i–ii; see also Passel Jeffrey S. Passel & D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEW HISPANIC CENTER, i (Apr. 14, 2009) [hereinafter *Portrait of Immigrants*], <http://pewhispanic.org/files/reports/107.pdf>. In this period from 2007 to 2009, U.S. unemployment reached over nine percent. *Employment Status of the Civilian Noninstitutional Population, 1940 to Date*, U.S. DEP'T LABOR, BUREAU LAB. STAT., <http://www.bls.gov/cps/cpsaat1.pdf> (last visited Apr. 16, 2011). Between 2003 and 2007, when the U.S. unemployment rate was mostly below five percent, the number of unauthorized foreigners in the United States increased by about 500,000 per year, including 300,000 Mexicans. During this period of low U.S. unemployment rates, unauthorized foreigners spread from California and other traditional migrant destinations throughout the United States. Philip Martin, *Immigration Reform: What Does it Mean for Agriculture?*, POL'Y ISSUES, 1 (Sept. 2009), <http://www.aaea.org/publications/policy-issues/PI5.pdf>.

22. E.g., Randolph Caps, Karina Fortuny & Jeffrey S. Passel, *The Characteristics of Unauthorized Immigrants in California, Los Angeles County, and the United States*, URB. INST., vii (Mar. 2007) [http://www.urban.org/UploadedPDF/411425\\_Characteristics\\_Immigrants.pdf](http://www.urban.org/UploadedPDF/411425_Characteristics_Immigrants.pdf) (stating that in California, ninety-four percent of male illegal immigrants age eighteen to sixty-four were in the labor force in 2004, but only eighty-four percent of legal immigrants and eighty-two percent of native-born men were in the labor force during the same period, and finding similar numbers in the smaller market of Los Angeles as well as the larger national market).

23. Compare Cristina M. Rodriquez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 589 (2007) (reviewing polling data finding that a majority of Iowa citizens believed that immigrants were performing jobs that would otherwise be left unfilled), with Robert F. LaPorta, Op-Ed., *The High Cost of Immigration*, NEWSDAY,

less, it is clear that illegal entrants often take some of the country's most dangerous and least attractive jobs, such as those in the meat-packing, food services, and agricultural industries.<sup>24</sup> The agricultural industry also accounts for large numbers of undocumented workers.<sup>25</sup> An agricultural think tank in the United States reports that "[o]ver half of the hired workers employed on U.S. and California crop farms have been unauthorized for the past decade, a period during which unauthorized workers spread from crop farms to dairies and other livestock operations throughout the United States."<sup>26</sup>

Moreover, immigrants without green cards can rarely assume the positions for which they may have advanced training.<sup>27</sup> Thus, some of the United States' most critical employment needs remain unaddressed.<sup>28</sup> In the United States, at least, students are not being

Feb. 9, 1994, available at 1994 WL 459783 (arguing that immigrants are displacing American workers simply by taking jobs at lower wages and positing that without those immigrants, American workers would be given those same jobs at higher wages which they would be willing to accept).

24. Pia M. Orrenius & Madeline Zavodny, *Do Immigrants Work in Riskier Jobs?* 3 (Fed. Reserve Bank of Dall., Working Paper No. 0901, 2009), available at <http://dallasfed.org/research/papers/2009/wp0901.pdf> (stating that undocumented workers are "particularly overrepresented" in these types of jobs, especially the "most dangerous factory jobs").

25. *Portrait of Immigrants*, supra note 21, at iv; see also Letter from Daniel Carroll, Office Policy Dev. & Research, U.S. Dep't of Labor, to author (Oct. 23, 2009) (on file with author) (stating that in federal fiscal years 2005–2007, seventy-five percent of all hired farm workers were foreign born and fifty-two percent of that group were not authorized to work in the United States).

26. Martin, supra note 21, at 1.

27. While highly trained legal immigrants have difficulty obtaining employment befitting their skill level, illegal immigrants have an even harder time due to their lack of paperwork. See Kevin J. A. Thomas, *Racial and Ethnic Disparities in Education–Occupation Mismatch Status Among Immigrants in South Africa and the United States*, 11 J. INT'L MIGRATION AND INTEGRATION 383, 384 (2010) (explaining that the disparity between education and employment is most marked among immigrants); Kelley Bouchard, *Advocates for Newcomers Tear at Barriers to Opportunity*, ME. SUNDAY TELEGRAM, Aug. 5, 2001, at 1A, available at 2001 WLNR 9538426 (noting many immigrants have jobs that are far below their level of skill, experience, or education); David Fisher, *Melting Pot is Still Simmering: Steady Stream of Immigrants Underscores July Fourth*, SEATTLE POST-INTELLIGENCER, July 4, 2000, at A1, available at 2000 WLNR 1857486 (stating that many skilled immigrants accept low wage positions in unskilled jobs, often because their command of the English language does not enable them to obtain the employment for which they may be trained); see also Janice D. Villiers, *Closing the Borders: Reverse Brain Drain and the Need for Immigration Reform*, 55 WAYNE L. REV. 1877, 1889 (2009) (observing that the availability of employment visas is inadequate, resulting in many qualified individuals facing long delays before they can begin contributing to the skilled labor market).

28. See Rob Paral & Benjamin Johnson, *Maintaining a Competitive Edge: The Role of the Foreign-Born and U.S. Immigration Policies in Science and Engineering*, 3 IMMIGR. POL'Y IN FOCUS, 2–3 (Aug. 1, 2004),

trained in the areas of greatest need and growth.<sup>29</sup> According to the U.S. Department of Labor Employment Projections Program, which identifies the top thirty fastest growing employment needs and opportunities, biomedical engineers and network systems and data communications analysts will be the top two most-needed professionals over the next decade.<sup>30</sup> Other needed occupations include biochemists and biophysicists which ranked ninth; computer software engineers, applications specialists which ranked fifteenth; environmental engineers which ranked twenty-second; computer software engineers and systems software technicians which ranked twenty-fourth; and environmental engineers which ranked twenty-eighth.<sup>31</sup> But in evaluating college graduation rates in the United States, the Department of Education reports that students were five times more likely to graduate with degrees in business than in biological and biomedical sciences, and four times more likely to graduate with business degrees than those who pursued degrees in information technology or engineering.<sup>32</sup>

Certain professional fields within the United States draw heavily upon immigrant labor.<sup>33</sup> Foreign-born individuals comprise

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<http://www.americanimmigrationcouncil.org/sites/default/files/docs/Competitive%20Edge.pdf> (stating that the United States needs foreign-born scientists so that it can continue to advance in fields such as science and engineering).

29. See *id.* (acknowledging an insufficient quantity of native-born scientists who are trained in the United States).

30. T. Alan Lacey & Benjamin Wright, *Occupational Employment Projections to 2018*, 132 MONTHLY LAB. REV. 82, 91 (Nov. 2009), <http://www.bls.gov/opub/mlr/2009/11/art5full.pdf>.

31. *Id.*

32. Michael Planty et al., *The Condition of Education 2009*, NAT'L CTR. EDUC. STATISTICS, NCES 2009081, 98 (2009), available at <http://nces.ed.gov/pubs2009/2009081.pdf>.

33. See Steven Pearlstein, *Foreign Talent, Security's Sacrifice*, WASH. POST, May 13, 2005, at E1, available at 2005 WLNR 7563710 (noting that employers feel the impact of immigration restrictions, including Bill Gates, who stated that Microsoft shifts more work overseas as a result of fewer foreigners studying and staying in the United States); see also 8 U.S.C. § 1153(1)(b)(1)(B) (2006) (providing priority visas to immigrants who are outstanding professors and researchers from other countries); *Status of Visas and Other Policies for Foreign Students and Scholars: Hearing Before the Subcomm. on Research and Science Education of the H. Comm. on Science and Technology*, 110th Cong. 35 (Feb. 7, 2008) (statement of Allan E. Goodman, President and CEO, Institute of International Education) (alleging that more than one-third of U.S. Nobel Laureate winners were immigrants); Stuart Anderson, Op-Ed., *America's Future is Stuck Overseas*, N.Y. TIMES, Nov. 16, 2005, at A2 (stating that the United States gains sixty-two patent applications for every 100 foreign-born, American-trained, science or engineering PhD scholars). As with all data, interpretations are subject to argument. But several important voices express concern about a

16.6% of American scientists and engineers.<sup>34</sup> Furthermore, many U.S. professionals with PhDs are not native.<sup>35</sup> The U.S. Chamber of Commerce laments that “[e]ighty million to ninety million U.S. adults today[,] about half of the adult workforce[,] do not have the basic education and communication skills required to get or advance in jobs that pay a family-sustaining wage.”<sup>36</sup> Most labor specialists concede that those at the lowest rungs of the U.S. workforce are more likely to be adversely affected by unauthorized immigrant labor, arguably because imported workers are critical in filling jobs domestic workers cannot perform.<sup>37</sup>

Unstaunching flows of irregular immigrants, whose services are eagerly employed, create an underground economy that leaves workers and market competitors unprotected.<sup>38</sup> Theoretically, increasing the flow of immigrants into “need” areas would not only increase employer—and national—competitiveness, but would afford even temporary workers labor law protection. Law-abiding firms

shortage of Science, Technology, Engineering, and Mathematics (“STEM”) workers. See, e.g., Darrell M. West, *Policy Brief #187: Creating a “Brain Gain” for U.S. Employers: The Role of Immigration*, BROOKINGS INSTITUTION (Jan. 2011), [http://www.brookings.edu/papers/2011/01\\_immigration\\_west.aspx](http://www.brookings.edu/papers/2011/01_immigration_west.aspx) (stating that because employers need “knowledge workers,” and because this demand is unmet by native-born workers, employers turn to trained foreign workers and foreign graduates of U.S. universities, particularly in STEM fields); Joe Leahy, *Outsourcers Warn US Producing too Few Engineers*, FIN. TIMES, Sept. 1, 2010, <http://www.ft.com/cms/s/2/607d4946-b5f1-11df-a048-00144feabdc0.html#axzz1Bv7QxQbX> (asserting that the United States does not have the talent base to fill all information technology jobs and observing the tendency of businesses to hire skilled foreign workers).

34. Paral & Johnson, *supra* note 28, at 1.

35. E.g., Margaret D. Stock, *Immigration and National Security: Post-9/11 Challenges for the United States*, in 1 HOMELAND SECURITY: PROTECTING AMERICA’S TARGETS 117, 134 (James J. F. Forest ed., 2006) (finding that thirty-eight percent of all PhD scientists and engineers in the United States are foreign-born and that fifty-one percent of engineers with PhDs are foreign-born).

36. *Education and Workforce*, U.S. CHAMBER OF COMMERCE, <http://www.uschamber.com/workforce> (last visited Apr. 16, 2011).

37. See Vernon M. Briggs, *Illegal Immigration: The Impact on Wages and Employment of Black Workers*, 36 (2010), available at <http://digitalcommons.ilr.cornell.edu/briggstestimonies/26> (estimating that 7.4 million immigrant workers compete for jobs with about 43 million legal adult members of the labor force); see also *A Day Without a Mexican*, <http://www adaywithoutamexican.com> (last visited Apr. 23, 2011) (portraying a comedic satire of what California would look like without its Latino population).

38. Cf. *Fact Sheet: Worksite Enforcement*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, (last updated Apr. 30, 2009), <http://www.ice.gov/news/library/factsheets/worksite.htm> (stating that “[r]esponsible employers who seek to conduct their business lawfully are put at an unfair disadvantage as they try to compete with unscrupulous businesses. Such businesses gain a competitive edge by paying illegal alien workers low wages.”).

could operate on a level playing field with employers of immigrants. The U.S. Supreme Court, in agreeing with the National Labor Relations Board that undocumented workers have the right to form and join unions, did so partially in reliance upon its earlier reasoning that “acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.”<sup>39</sup> Native workers’ bargaining power would not be dissipated by job competitors who not only work for lower wages but who are free of labor and employment law transaction costs. Foreign-born workers would likely be channeled into low-visibility jobs, rather than where there are significant needs. And today, there are greater numbers of foreign-born workers in the United States than ever before—23.9 million in 2007, sixteen percent of the entire work force.<sup>40</sup> Only estimates can be made of the numbers among them who are without legal documentation.<sup>41</sup>

Dependent upon the business owner for employment and aware, especially in the current enforcement climate, that any contact with government authorities could expose them to detention—or even deportation—unauthorized workers are less likely to confront employers about harmful working conditions.<sup>42</sup> This leads to the under-enforcement of substantive labor rights in immigrant-dominated industries, a condition which could legitimately incentivize business owners to prefer undocumented workers.<sup>43</sup> Researchers

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39. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) (quoting *DeCanas v. Bica*, 424 U.S. 351, 356–57 (1976)).

40. Eric Newburger & Thomas Gryn, *The Foreign-Born Labor Force in the United States: 2007*, U.S. CENSUS BUREAU, 3 (2009), available at <http://www.census.gov/prod/2009pubs/acs-10.pdf>.

41. See Briggs, *supra* note 37, at 36 (estimating 7.4 million illegal immigrant workers are present in the United States as of 2007); see also B. Lindsay Lowell & Roberto Suro, *How Many Undocumented: The Numbers Behind the U.S.—Mexico Migration Talks*, PEW HISPANIC CENTER 2 (Mar. 21, 2002), available at <http://pewhispanic.org/reports/report.php?ReportID=6> (estimating that as of 2002, 5.3 million undocumented persons over the age of eighteen were likely to be participating in the U.S. labor force).

42. Schmall, *supra* note 9, at 376.

43. Both the United States and some EU immigrant-receiving nations deny basic rights or remedies to those illegally present. See, e.g., Marco Martiniello & Andrea Rea, *Belgium’s Undocumented Hold Lessons for EU*, MIGRATION INFO. SOURCE (Feb. 2004), <http://www.migrationinformation.org/feature/display.cfm?ID=195> (observing that “[o]ften facing dire need, [undocumented aliens and illegal residents] have no other means of surviv-

have noted unscrupulous firms' "opportunistic invocation of work authorization to fire workers involved in organizing [union] campaigns" and retaliatory threats to report workers who assert employment rights to immigration authorities.<sup>44</sup> In addition, many employers perceive that workers who have recently arrived from other countries are less likely to fight unfair or even illegal demands, show "attitude," or protest unfair or illegal workplace treatment.<sup>45</sup>

This problem is further complicated by the state of American jurisprudence. The U.S. Supreme Court has been nearly incomprehensible in its determination of whether undocumented workers enjoy and can enforce other federal rights. In *Sure-Tan, Inc. v. NLRB*, the Court agreed with the NLRB that undocumented workers are employees with rights to join unions, and held that an employer commits an unfair labor practice by reporting its employees to immigration authorities in retaliation for their union activity.<sup>46</sup> But later in *Hoffman Plastic Compounds, Inc. v. NLRB*, the Supreme Court ruled that it was "foreclosed by federal immigration policy" from affirming typical statutory remedies like reinstatement and back pay for union activists who were never legally allowed to work in the United States.<sup>47</sup> The Supreme Court has not decided whether immigration status is relevant in other contexts. A significant number of lower courts have allowed evidence of a criminal defendant's undocumented status, concluding that a defendant's status as an illegal alien

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ing than to work illegally and without labor rights."); see also Keith Cunningham-Parmeter, *Redefining The Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1390 (2009) (assessing the effect of extending labor protections to illegal employees and noting that employers will be less likely to hire illegal workers if those workers can assert claims for workplace violations, which in theory would lead to a decrease in illegal immigration).

44. Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law*, in THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET 48 (UCLA School of Law, Research Paper No. 07-36, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1075828](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1075828); see also Chirag Mehta, Nik Theodore & Marielena Hincapié, *Social Security Administration's No-Match Letter Program: Implications for Immigration Enforcement and Workers' Rights*, CENTER FOR ECON. DEV., 16 (Nov. 2003), available at [http://www.urbanecconomy.org/sites/default/files/SSAnomatchreport\\_58.pdf](http://www.urbanecconomy.org/sites/default/files/SSAnomatchreport_58.pdf) (stating that twenty-five percent of workers in the authors' study were fired in retaliation for complaining to their employer about poor worksite conditions).

45. Zatz, *supra* note 44, at 48; see also *United States v. Brignoni-Ponce*, 422 U.S. 873, 879 (1975) (reasoning that aliens are vulnerable to exploitation since they cannot complain about working conditions without fear of reprisals, including firings or deportation).

46. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, at 894-95 (1984).

47. 535 U.S. 137, 140, 146-47 (2002).

is probative of his character for truthfulness.<sup>48</sup> In civil cases, state and federal courts are considerably more divided. For example, in a recent lawsuit against a driver in a fatal traffic accident, the Supreme Court of Texas ignored the defendant's illegal presence in the United States, concluding that the plaintiff's

repeated injection into the case of [the defendant's] nationality, ethnicity, and illegal-immigrant status, including his conviction and deportation, was plainly calculated to inflame the jury against him. . . . Even assuming the immigration evidence had some relevance, its prejudicial potential substantially outweighed any probative value. . . . Such appeals to racial and ethnic prejudices, whether "explicit and brazen" or "veiled and subtle," cannot be tolerated because they undermine the very basis of our judicial process.<sup>49</sup>

The lack of legal direction adds confusion to civil rights and wage and hour law cases.<sup>50</sup>

Inconsistent, racially targeted, and under-enforcement upon illegal immigrants, even within the legal system, is a poor paradigm for EU enforcement strategies.

The disparate but critically overlapping public policy issues associated with immigration—stability of domestic economies and job markets; cultural acceptance and assimilation; housing, employment, health care, and education; public safety; political liberties and social justice—are all eclipsed by current efforts to enforce immigration laws.<sup>51</sup> Rather than utilizing and acculturating immigrants who fill a gap in our economic weal, the effort to find a way to make immigration laws work has led the government to "securitize" immigration through the new modus of criminal law.<sup>52</sup> Economists are

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48. See, e.g., *Marquez v. State*, 941 P.2d 22, 26 (Wyo. 1997).

49. *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 244–45 (Tex. 2010).

50. See, e.g., *Cunningham-Parmeter*, *supra* note 43, at 1371 (asserting that because courts have inconsistently applied cases that *do* exist in this area of law, immigrants' rights remain undefined).

51. *D'Appollonia*, *supra* note 5, at 208.

52. Through every cycle of history, a constellation of events that usually includes economic recession "securitizes" the approach to immigration law. See, e.g., RENS VAN MUNSTER, *SECURITIZING IMMIGRATION* 3–7 (2009) (describing immigration securitization

convinced harsh immigration laws are sparked by fear of unemployment, not crime.<sup>53</sup> If so, there is a disconnect between the purpose of the law and its arbitrary enforcement through arrest, detention, and deportation of criminal aliens.

The current immigration law elected to eliminate the “draw of employment” by making it a crime to hire undocumented workers.<sup>54</sup> However, after six years of enforcement, nearly ninety percent of those convicted of crimes have been those people who were illegally hired,<sup>55</sup> the small percentage of *employer*-defendants being disproportionately people of color.<sup>56</sup> Moreover, in the United States, at least, the Department of Homeland Security acknowledges that immigration laws have rarely been used to catch terrorists.<sup>57</sup>

and discussing the current evolution of EU policies whereby immigration is “increasingly rendered visible as a security issue . . . and not as, say, a humanitarian or economic issue”).

53. See, e.g., Pallavi Gogoi, *The Jobless Effect: The Toxic Mix of Illegal Immigration and Unemployment*, DAILYFINANCE.COM (July 21, 2010, 11:00 AM), <http://www.dailyfinance.com/story/careers/illegal-immigration-and-unemployment-toxic-mix/19560524> (noting that anti-immigrant attitudes are prevalent among people looking for work or concerned about being laid off); Tyler Cowen, *How Immigrants Create More Jobs*, N.Y. TIMES (Oct. 30, 2010), <http://www.nytimes.com/2010/10/31/business/economy/31view.html> (discussing the difficulty in viewing immigration as positive due to immigrants’ contributions to the U.S. economy and instead viewing it as negative due to unemployment).

54. See *Bringing In and Harboring Certain Aliens*, 8 U.S.C. § 1324(a)(1)(A) (2006).

55. Schmall, *supra* note 9, at 385 (“Of the 6527 arrests examined . . . most were of employees and only 151 were of officers or company managers.”); see U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2008 ANNUAL REPORT 17 (2008) (reporting only 135 criminal arrests of employers out of 1103 total worksite enforcement actions resulting in criminal arrests for the 2008 fiscal year). See generally Cindy Carcamo, *Immigration Agency: Criminal Deportations, Employer Arrests Up*, ORANGE COUNTY REG. (Oct. 6, 2010), <http://www.ocregister.com/articles/immigration-269850-year-ice.html> (stating that more unlawful entrants were deported after their crimes during the 2010 fiscal year than during any year previous); Palamo Esquivel, *Deportations of Illegal Immigrants Hit Record High, Officials Announce*, L.A. TIMES (Oct. 6, 2010, 12:42 PM), <http://latimesblogs.latimes.com/lanow/2010/10/record-number-of-deportations-of-illegal-immigrants-in-fiscal-2010-officials-announce.html> (recording 392,000 illegal immigrants were deported in the 2010 fiscal year, and 3200 employers were audited).

56. Schmall, *supra* note 9, at 386–87, Figure 2 (“The analysis of the eighty-six cases also indicates possible discriminatory enforcement. Not only were employees more likely than employers to be arrested, but most of those employers who were arrested had minority surnames. . . . ICE denies arbitrary enforcement and has stated specifically: ‘We don’t racially profile.’”)

57. Cf. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 191–96 (2010) (noting that regional and transnational partnerships, not U.S. immigration laws, are crucial in counterterrorism). It is arguably best for purposes of national security that immigration agencies are not charged with detaining terrorists. Based on past history, the vast majority of illegal aliens who are released and later issued final orders of removal by the Executive Office of Immigration Review (EOIR) will abscond. This is

Internal immigration laws, at least in the United States, have never been measured for their effects.<sup>58</sup> Despite a quarter century of relatively strict immigration laws, there is no proof they reduce relative levels of unlawful entries.<sup>59</sup> Moreover, in both the United States and the EU, legal entrants who overstay their visas or permits,<sup>60</sup> rather than irregular entrants or smuggling victims, account for nearly half the undocumented residents.<sup>61</sup> There is strong evidence that comparative economic conditions have the greatest influence on reducing illegal border crossings.<sup>62</sup> Eschewing illegalization in favor of tracked entry and a path toward regularization might allow for more efficient and more humane use of adaptation to inevitable immigration, encourage less law-shirking, and better equalize power between competitors who might employ non-native workforces.

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because the Office of Detention and Removal (DRO) lacks the trained personnel, infrastructure, and funding needed to detain all apprehended aliens while their immigration status is being adjudicated. See U.S. DEP'T OF HOMELAND SEC., YEARBOOK OF IMMIGRATION STATISTICS (2009): TABLE 38 (ALIENS REMOVED BY CRIMINAL STATUS AND REGION AND COUNTRY OF NATIONALITY: FISCAL YEARS 2000 TO 2009) (2009), <http://www.dhs.gov/files/statistics/publications/YrBk09En.shtm>.

58. See Jeffrey Manns, *Private Monitoring Of Gatekeepers: The Case of Immigration Enforcement*, 2006 U. ILL. L. REV. 887, 932 (2006) (noting that the Bureau of Immigration and Customs Enforcement has been incapable of overcoming obstacles—such as lack of funds, personnel, and the ability to monitor networks that facilitate illegal immigration, coupled with little available sanctions against undocumented aliens, ease of reentry, and low probability of enforcement—that it has effectively abandoned enforcement efforts).

59. See U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009 1 (2009) (indicating that the unauthorized immigrant population grew by twenty-seven percent between 2000 to 2009).

60. See *All Things Considered: Nearly Half of Illegal Immigrants Overstay Visas*, NATIONAL PUBLIC RADIO (June 14, 2006), <http://www.npr.org/templates/story/story.php?storyId=5485917>; Louis Jacobson, *Democratic Rep. Gutierrez Says 40 Percent of Illegal Immigrants Overstay Visas*, POLITIFACT.COM, <http://politifact.com/truth-o-meter/statements/2010/jul/12/luis-gutierrez/democratic-rep-gutierrez-says-40-percent-illegal-i> (last visited Apr. 16, 2011); *Modes of Entry for the Unauthorized Migrant Population*, PEW HISPANIC CENTER (May 22, 2006), <http://pewhispanic.org/files/factsheets/19.pdf> (noting estimates suggesting that out of an unauthorized population of 11.5 million to 12 million, 4 million to 5.5 million, or between 33% and 50%, overstay their visas).

61. *Modes of Entry*, *supra* note 60; Press Release, Brussels European Council, New Tools for an Integrated European Border Mgmt. Strategy (Feb. 13, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/85>.

62. See Gordon H. Hanson, *The Economics and Policy of Illegal Immigration in the United States*, MIGRATION POL'Y INST. (Dec. 2009), <http://www.migrationpolicy.org/pubs/Hanson-Dec09.pdf> (stating that flows of illegal workers follow economic performance and therefore stall during economic downturns).

## I. WHEN BORDER PATROLS ARE ELUDED: THE WORK OF THE IMMIGRATION AND CUSTOMS ENFORCEMENT ON UNITED STATES SOIL

Internal immigration enforcement is of great moment in both the EU and the United States.<sup>63</sup> European Union members have undertaken integrated border management that includes the creation of a military-like multinational border patrol, extraterritorial exchange of personal data, increased use of biometrics, and anticipatory interdiction.<sup>64</sup> Both the United States and the EU have increased arrests and detentions of those suspected of being, or found to be, illegally present.<sup>65</sup>

In the United States, as part of a post-9/11 overhaul of the federal agencies in charge of all aspects of national security, enforcement of immigration laws was moved to the megalith Department of Homeland Security, a presidential cabinet-level agency<sup>66</sup> with over twenty thousand employees and an annual budget of nearly six billion dollars.<sup>67</sup> ICE, the Immigration and Customs Enforcement

63. See, e.g., Commission of the European Communities, *Communication from the Commission to the European Parliament and the Council: An Area of Freedom, Security and Justice Serving the Citizen*, at 4, COM (2009) 262 final (June 10, 2009) (noting that while substantial progress in immigration policy has been made in the past ten years, more progress is needed).

64. Evelien Brouwer, *Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and Its Member States*, in EXTRATERRITORIAL IMMIGRATION CONTROL 199, 202–08 (Bernard Ryan & Valsamis Mitsilegas eds., 2010). Nations within the EU have also negotiated with leaders of the sending countries, often agreeing to give them financial aid in exchange for preventing immigrants from leaving or for repatriating them after they have been apprehended abroad. See Rachel Donadio & Suzanne Daley, *Revolts Raise Fear of Migration in Europe*, N.Y. TIMES, Mar. 9, 2011, <http://www.nytimes.com/2011/03/10/world/europe/10europe.html> (“Unable to build the kind of border fence that the United States has erected to keep Mexicans at home, countries like Spain and Italy have spent years forging close relationships with North African leaders, persuading them to prevent migrants from trying to sail the rough seas of the Mediterranean. . . . In return, Morocco, Tunisia and particularly Libya sometimes used brutal tactics to keep immigrants from ever getting near European shores, human rights activists say.”).

65. See Steven A. Camarota & Karen Jensenius, *A Shifting Tide: Recent Trends in the Illegal Immigrant Population*, CENTER FOR IMMIGR. STUDIES (July 2009), <http://www.cis.org/articles/2009/shiftingtide.pdf>; *Migration Statistics: Statistics Explained*, EUR. COMMISSION (May 27, 2010, 7:17 AM), [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Migration\\_statistics](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Migration_statistics).

66. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified as amended at 6 U.S.C. §§ 101-612 (2006)).

67. *About ICE: Ice Overview*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/overview> (last visited Apr. 16, 2011); *Fact Sheets*, U.S. IMMIGR.

agency, is responsible, astoundingly, for more than four hundred federal laws regulating drug smuggling,<sup>68</sup> human trafficking,<sup>69</sup> the sex trade,<sup>70</sup> illegal arms exports,<sup>71</sup> financial crimes,<sup>72</sup> commercial fraud,<sup>73</sup> money laundering,<sup>74</sup> cyber crimes,<sup>75</sup> child pornography,<sup>76</sup> child exploitation,<sup>77</sup> cultural heritage investigations,<sup>78</sup> as well as the employment-related crimes of moving, hiring, and harboring undocumented persons<sup>79</sup> and their use of stolen or fraudulent documents to obtain jobs.<sup>80</sup> ICE is complemented by over 20,000 U.S. Border Patrol agents operating in a separate agency tasked with protecting U.S. borders, at a \$10.1 billion cost.<sup>81</sup>

The Immigration Control and Reform Act (IRCA) became law in 1986.<sup>82</sup> It is penalty-driven<sup>83</sup> and enforced primarily by arrests

& CUSTOMS ENFORCEMENT, <https://www.ice.gov/news/library/factsheets> (follow “Chief Financial Officer—Management and Budget” hyperlink) (last visited Apr. 16, 2011).

68. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2007 ANNUAL REPORT 13 (2007), available at <http://www.ice.gov> (search “2007 annual report”).

69. *Id.* at 17.

70. *Id.* at 19.

71. *Id.*

72. *Id.* at 11.

73. *Id.*

74. *Id.*

75. *Id.* at 28.

76. *Id.* at 1.

77. *Id.* at 19.

78. *Id.* at 16.

79. See, e.g., *Immigration: Enforcing Employee Work Eligibility Laws and Implementing a Stronger Employment Verification System: Field Hearing Before the Subcomm. on Emp't-R-emp. Relations of the Comm. on Educ. & the Workforce U.S. H.R.*, 109th Cong. 15 (2006) (prepared statement of John Chakwin, Jr., Special Agent in Charge, U.S. Immigration and Customs Enforcement), available at <http://bulk.resource.org/gpo.gov/hearings/109h/28875.pdf>.

80. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 68, at 29.

81. U.S. CUSTOMS & BORDER PROTECTION, SNAPSHOT: A SUMMARY OF CBP FACTS AND FIGURES (2010), available at <http://www.cbp.gov/linkhandler/cgov/about/accomplish/snapshot.ctt/snapshot.pdf>; see also U.S. DEP'T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2008, at 3 (2009), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement\\_ar\\_08.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf) (reporting that the Department of Homeland Security made 791,568 apprehensions in 2008, with Border Patrol reporting ninety-one percent of apprehensions).

82. Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1101–07, 1151–61 (2006).

83. E.g., 8 U.S.C. § 1324(a)(1)(B)(i) (2006) (detailing possible punishment of a fine or imprisonment of ten years for individuals who knowingly or recklessly hire, induce, or bring an alien to the United States for employment); 8 U.S.C. § 1324(a)(2)(A)–(B) (2006) (detailing possible punishment of a fine or imprisonment for one year for each alien an em-

and detentions<sup>84</sup> at U.S. borders and by tracking the movement of labor. Under the law, it is illegal to recruit, harbor, and employ undocumented immigrants.<sup>85</sup> It is not a crime to work without authorization, but those who do are subject to civil fines and penalties including deportation under the Act.<sup>86</sup> Despite the congressional embrace of a law that seeks to deter and punish employers whose jobs are the magnet for irregular immigration,<sup>87</sup> the U.S. government routinely prosecutes employees for other federal crimes like fraud, where there is immigrant use of fabricated documents, or for identity theft for using others' documents.<sup>88</sup> In descending order of frequency, undocumented immigrants are detained or arrested by ICE: at the border,<sup>89</sup> at their workplaces,<sup>90</sup> during criminal investigations,<sup>91</sup> and finally, after criminal convictions.<sup>92</sup> The Bush administration favored workplace raids.<sup>93</sup> The Obama administration appears to have abandoned workplace raids and has, instead, focused on finding and then detaining or deporting immigrants who commit serious crimes, or who can be found in prison, at home, at work, or on the street.<sup>94</sup> ICE or deputized local police can stop, interrogate, and de-

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ployer brings or attempts to bring the United States, when the alien has not received prior authorization to enter or reside in the United States).

84. See, e.g., Apprehension and Detention of Inadmissible and Deportable Aliens, 8 C.F.R. § 236.1–6 (2010).

85. 8 U.S.C. § 1324(a)(1) (2006).

86. 8 U.S.C. § 1127(a) (2006).

87. The IRCA was passed in response to the admonition Congress received from the U.S. Supreme Court in a case finding a labor law violation when an employer, who knowingly hired undocumented workers, called U.S. immigration officials after those same workers organized a union. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891–94 (1984); see also 8 U.S.C. § 1324(a)(1)(A)(iii) (2006) (making it unlawful to conceal, harbor, or shield from detection any alien not lawfully entitled to enter or reside in the United States).

88. See *Identity and Benefit Fraud*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/identity-benefit-fraud> (last visited Apr. 16, 2011).

89. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 55, at 8–16.

90. See *id.* at 16–17.

91. See generally *id.* at 3–7.

92. See *id.* at 3.

93. See, e.g., Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL'Y J. 125, 140–41 (2009); Abby Sullivan, *On Thin ICE: Cracking Down on the Racial Profiling of Immigrants and Implementing a Compassionate Enforcement Policy*, 6 HASTINGS RACE & POVERTY L.J. 101, 114 (2008) (discussing the Bush administration's "crackdown strategy of bringing criminal charges" against illegal immigrants caught in workplace raids).

94. News releases from ICE reflect that arrests have not improved national security because arrestees were often guilty of relatively minor or immigration-related crimes. ICE detainees include those found guilty of "possessing with the intent to distribute marijuana;

mand proof of lawful presence in the United States in certain circumstances related to criminal or traffic investigations or immigrant use of public benefits.<sup>95</sup> ICE has access to a national database that tracks every state and local arrest and detention.<sup>96</sup> The agencies also utilize improved electronic resources to audit employee records for valid proof of identity, and then allow employers to “correct” the errors among their workforce or fire those without valid documents.<sup>97</sup>

Push-pull factors within U.S. and EU borders include significant demand for cheap labor and strong and consistent public dissatisfaction with the presence—and fact of—illegal entrants. Consequently, both Europe and America have “tough laws,” and increased border security, all the while being unable to do much about the numbers of irregular entrants. In 1986, when the last major legal changes were made to U.S. immigration law, a global study found higher unemployment was almost always accompanied by increased immigration and more attempts to create and enforce legal controls.<sup>98</sup> The shortcomings of most other countries’ laws were similar to those now inherent in U.S. immigration enforcement: the extent of the problem is beyond the resources of an agency that is overburdened and underfunded.<sup>99</sup> Law-shirking is more likely when there is little

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aiding and abetting aliens to defraud the United States; aggravated driving while intoxicated; damage to property; and shoplifting. Others arrested include immigration fugitives, or individuals with an order to depart the country, and individuals who had been previously deported.” *E.g.*, *ICE Arrests 19 in Southeastern New Mexico, Including 7 Criminal Aliens*, U.S. CUSTOMS AND IMMIGRATION ENFORCEMENT (Sept. 7, 2010), <https://www.ice.gov/news/releases/1009/100907roswell.htm>.

95. See, e.g., *Priorities Enforcing Immigration Law: Hearing Before the Subcomm. on Homeland Security of the H. Comm. on Appropriations*, 111th Cong. 942–59, 970–77 (2009) (testimony of David Venturella, Executive Director, Secure Communities Division of ICE Enforcement and Removal Operations) (discussing one of ICE’s criminal law initiatives—Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens—which involves retrieving information on every criminal arrestee, inmate, or probationer in order to identify those who are in the United States illegally).

96. See generally *National Crime Information Center*, FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ncic> (last visited Apr. 25, 2011).

97. See generally *What is E-Verify? Instant Verification of Work Authorization*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/portal/site/uscis> (follow “E-Verify Homepage” hyperlink; then follow “What is E-Verify?” hyperlink) (last visited Apr. 25, 2011) (allowing employers access to government records so that employers may verify their employees eligibility to work in the United States).

98. U.S. GOV’T ACCOUNTABILITY OFFICE, GGD-86-17BR, *ILLEGAL ALIENS: INFORMATION ON SELECTED COUNTRIES’ EMPLOYMENT PROHIBITION LAWS (1985)*, available at <http://www.gao.gov/products/GGD-86-17BR>.

99. While running for President in November 2007, then-Senator Barack Obama contended that an “employer has more of a chance of getting hit by lightning than being prose-

threat of enforcement,<sup>100</sup> and nonenforcement of law reduces its value as a deterrent.

Data on the immigration enforcement personnel for every Member State in the EU is not readily available, but the EU has created a unitary paramilitary force, similar to the ICE agency in the United States, called Frontex.<sup>101</sup> The agency is self-described as “a specialized and independent body tasked to coordinate the operational cooperation between Member States in the field of border security. The activities of Frontex are intelligence-driven.”<sup>102</sup> Frontex is primarily responsible for protecting borders that Member States are unable or unwilling to monitor,<sup>103</sup> and exemplifies the attempted coordination among the EU’s members.<sup>104</sup> While the EU has dramatically liberalized its rules for border crossings, especially among those who seek to do business or engage in gainful work, it has heightened concerns about irregular immigration.<sup>105</sup> And the EU has a very porous 7730 mile border, and a coastline of 41,006 miles.<sup>106</sup>

“The United States hosts more migrants than any other country and, by extrapolation, the largest contingent of undocumented

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cuted for hiring an undocumented worker.” Barack Obama, Remarks at the Democratic Debate in Las Vegas (Nov. 15, 2007), available at [www.factcheck.org/clinton\\_vs\\_obama.html](http://www.factcheck.org/clinton_vs_obama.html); see also Daniel T. Ostas, *Civil Disobedience in a Business Context: Examining the Social Obligation to Obey Inane Laws*, 47 AM. BUS. L.J. 291, 299 (2010) (discussing employers’ conscientious evasion of prevailing rules in hiring of undocumented workers).

100. Schmall, *supra* note 9, at 378.

101. *What is Frontex?*, FRONTEX, <http://www.frontex.europa.eu> (last visited Apr. 16, 2011); see also Conny Rijken & Eefje de Volder, *The European Union’s Struggle to Realize a Human Rights-Based Approach to Trafficking in Human Beings*, 25 CONN. J. INT’L L. 49, 72 (2009).

102. FRONTEX, *supra* note 101.

103. See *General Report 2009*, FRONTEX, at 2, 5, available at [http://www.frontex.europa.eu/gfx/frontex/files/general\\_report/2009/gen\\_rep\\_2009\\_en.pdf](http://www.frontex.europa.eu/gfx/frontex/files/general_report/2009/gen_rep_2009_en.pdf) (“In 2009, the EU member States and Schengen Associated Countries reported a total of 106,200 detections of illegal border crossings at the external borders of the EU.”).

104. *See Towards a Common European Immigration Policy*, EUR. COMMISSION, [http://ec.europa.eu/justice\\_home/fsj/immigration/fsj\\_immigration\\_intro\\_en.htm](http://ec.europa.eu/justice_home/fsj/immigration/fsj_immigration_intro_en.htm) (last updated Mar. 30, 2011).

105. *Communication from the Commission to the European Parliament and the Council: An Area of Freedom, Security and Justice Serving the Citizen*, at 4, COM (2009) 262 final (June 10, 2009) (“Tackling the factors that attract clandestine immigration and ensuring that policies for combating illegal immigration are effective are major tasks for the years to come.”).

106. *European Union*, CENT. INTELLIGENCE AGENCY—THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ee.html> (last updated Apr. 6, 2011).

workers.”<sup>107</sup> “Between 2000 and 2007, the unauthorized population grew by [an estimated] 3.3 million from 8.5 million to 11.8 million,”<sup>108</sup> a number that has decreased slightly since the recession in the United States.<sup>109</sup> Mexico is the leading source of unauthorized immigrants who clandestinely cross the 2000 mile border, even tunneling under the 646 miles that are fenced,<sup>110</sup> representing sixty percent of the unauthorized population.<sup>111</sup> Another twenty-two percent of those without documentation are from other Latin American nations.<sup>112</sup> Much smaller percentages of foreign nationals come from less accessible emigrating nations like India, the Philippines, and countries throughout Asia, the former Soviet Union, and sub-Saharan Africa.<sup>113</sup> More than eleven percent of the Mexican population now lives in the United States.<sup>114</sup> Critical remittances from within the United States to Mexico increased from \$3.5 billion in 1996 to \$23 billion in 2006, which also increased profitability at those U.S. banks that solicit Mexicano business.<sup>115</sup> For immigrants from all countries, sending money home is more certain to happen shortly upon arrival in the United States, but decreases significantly after several years.<sup>116</sup> Slightly over a quarter-million Mexicans were removed and returned to their country in 2008, about sixty-eight percent of all removals.<sup>117</sup>

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107. Schmall, *supra* note 9, at 375.

108. MICHAEL HOEFER, NANCY RYTINA & BRYAN C. BAKER, U.S. DEP’T HOMELAND SEC., POPULATION ESTIMATES: ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, at 2 (2010), *available at* [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf).

109. *Id.*

110. See Jacques Billeaud, *Fence Isn’t Cure—All for Porous US Border: Politicians’ Ads Often Fail to Note Its Shortcomings*, BOS. GLOBE, May 30, 2010, at 9, *available at* [http://www.boston.com/news/nation/articles/2010/05/30/fence\\_isnt\\_cure\\_all\\_for\\_porous\\_us\\_border](http://www.boston.com/news/nation/articles/2010/05/30/fence_isnt_cure_all_for_porous_us_border).

111. Passel & Cohn, *supra* note 7, at 4.

112. *Id.*

113. Steven A. Camarota, *Immigrants in the United States, 2007: A Profile of America’s Foreign-Born Population*, CENTER FOR IMMIGR. STUD. (Nov. 2007), at 4, *available at* <http://www.cis.org/articles/2007/back1007.pdf>.

114. JORGE G. CASTAÑEDA, EX MEX: FROM MIGRANTS TO IMMIGRANTS 15 (2007).

115. *Id.* at 18–19.

116. Raul Perez, *The Hispanic Market: An Opportunity*, UTILIS RES. & CONSULTING 30–33 (Oct. 25, 2004) (presentation delivered to the Federal Reserve Bank of Atlanta), [http://www.utilis-research.com/hcr\\_presentations/Fed\\_10\\_2004.pdf](http://www.utilis-research.com/hcr_presentations/Fed_10_2004.pdf).

117. ICE INTEGRATED DECISION SUPPORT (IIDS) SYSTEM DATA SET REPORT, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, REMOVALS AND RETURNS BY COUNTRY (as reported in IIDS through Feb. 22, 2010), <http://www.ice.gov/foia/readingroom.htm> (click “Immigration Statistics” expander; then follow “Removals and Returns by Country—As of February 22, 2010” hyperlink).

The wait for Mexicans to enter the United States legally is currently about ten years<sup>118</sup> and the numbers of visas available is lower than those available for non-contiguous nations with far smaller populations.<sup>119</sup>

Counting irregular immigrants is not part of the EU efforts at coordination. According to a 2009 news report, there were allegedly 106,200 detections of illegal border crossings at its seas and lands, in what looks like a discriminatory pattern of racial profiling.<sup>120</sup> There were 40,500 Albanians detected.<sup>121</sup> Afghans and Somalis were the next most numerous, with 14,500 and 9100 “detections” respectively.<sup>122</sup> These data omit internal immigration enforcement patterns.<sup>123</sup> Since estimates of about 8 million undocumented residents are based upon subtracting from the numbers of foreign-born (part of the U.S. Census) those with documentation granted by the U.S. State Department, data are more universally accepted than correlative data for the EU.<sup>124</sup> Later studies estimate between 1.9 and 3.8 million.<sup>125</sup> There is no database identifying the primary source of irregular immigrants in the EU, though by some estimates nearly seventy-five percent pass through Greece.<sup>126</sup> In each case, the immigrants come from significantly poorer nations and cause concern about overuse of social services in the host countries.<sup>127</sup> Both within

118. Stuart Anderson, *Family Immigration: The Long Wait to Immigrate*, NAT'L FOUND. FOR AM. POL'Y, at 1 tbl.1, [http://carnegie.org/fileadmin/Media/Publications/NFAP\\_Policy\\_Brief\\_Family\\_Immigration.pdf](http://carnegie.org/fileadmin/Media/Publications/NFAP_Policy_Brief_Family_Immigration.pdf).

119. See Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 761 (2000).

120. Owen Bowcott, *EU Border Agency Says Third Fewer Illegal Immigrants Spotted in Past Year*, GUARDIAN (London), May 25, 2010, <http://www.guardian.co.uk/uk/2010/may/25/eu-border-fewer-illegal-immigrants>.

121. *Id.*

122. *Id.*

123. *Id.*

124. Sergio Carrera & Massimo Merlino, *Undocumented Immigrants and Rights in the EU: Addressing the Gap Between Social Science Research and Policy-Making in the Stockholm Programme?*, at 14 n.65 (2009), <http://www.ceps.eu/ceps/download/2741>.

125. *Id.* at 14; Bowcott, *supra* note 120 (“‘Conservative estimates of the number of illegal migrants within the EU vary between three and six million,’ the report says. ‘Other estimates indicate eight million illegal migrants, of which 80% are inside the Schengen area, half of which entered legally [the rest being over-stayers]. There is currently no estimate of the annual flow of illegal migrants crossing the border illegally.’”).

126. Bowcott, *supra* note 120.

127. *European Pact on Immigration and Asylum*, Council of the European Union, at 3, (Sept. 24, 2008), available at <http://register.consilium.europa.eu/pdf/en/08/st13/st13440.en08.pdf> (“The European Union, however, does not have the resources

the EU and the United States, there are “apocalyptic image[s] of an increasingly massive exodus of desperate [people] fleeing poverty and war at home”<sup>128</sup> who use desperate and dangerous methods to enter host countries and replace native workers and businesses.<sup>129</sup> Moreover, fears of terrorism<sup>130</sup> have focused attention on immigration law enforcement, although the increasingly global economy has increased international mobility.<sup>131</sup> ICE alien removal statistics appear to contradict the antiterrorism goals for internal immigration enforcement.<sup>132</sup> In 2009, for example, there were forty-three Sudanese removed, compared with over a half-million Mexicans.<sup>133</sup>

## II. METHODS OF INTERNAL IMMIGRATION ENFORCEMENT IN U.S. WORKPLACE RAIDS

The first few years after immigration was moved into the new Department of Homeland Security, its internal enforcement operations were sporadic and largely ineffectual.<sup>134</sup> Under the Bush ad-

to decently receive all the migrants hoping to find a better life here. Poorly managed immigration may disrupt the social cohesion of the countries of destination. The organisation of immigration must consequently take account of Europe’s reception capacity in terms of its labour market, housing, and health, education and social services, and protect migrants against possible exploitation by criminal networks.”).

128. Hein de Haas, *Irregular Migration from West Africa to the Maghreb and the European Union: An Overview of Recent Trends*, 32 INT’L ORG. FOR MIGRATION RES. SERIES 9 (2008).

129. *Id.* at 12.

130. See Press Release, A Europe Open to Well Managed Migration Will Be Fairer, Richer, Stronger, Says Secretary-General in Brussels Address, U.N. Press Release SG/SM/9134 (Jan. 29, 2004).

131. VAN MUNSTER, *supra* note 52, at 15 (“[P]olitics is the setting up of a dispute where the abject confront society with a claim to be recognized as equal.”).

132. Cf. OFFICE OF IMMIGR. STAT., 2009 YEARBOOK OF IMMIGRATION STATISTICS 92 (charting number of deportable aliens located by country of nationality).

133. *Id.* The State Department lists four countries as state sponsors of terrorism: Cuba, Iran, Sudan, and Syria. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 191–96 (2010). Fifteen countries are listed as terrorist safe havens (“ungoverned, under-governed, or ill-governed areas of a country and non-physical areas where terrorists that constitute a threat to U.S. national security interests are able to organize, plan, raise funds, communicate, recruit, train, and operate in relative security because of inadequate governance capacity, political will, or both”), including Afghanistan, Algeria, Colombia, Indonesia, Iraq, Lebanon, Malaysia, Mali, Mauritania, Niger, Pakistan, the Philippines, Somalia, Venezuela, and Yemen. *Id.* at 208–12.

134. See Rep. Sheila Jackson Lee, *Why Immigration Reform Requires a Comprehensive Approach that Includes Both Legalization Programs and Provisions to Secure the Border*, 43 HARV. J. ON LEGIS. 267, 276 (2006) (noting that such vague policies unaccompanied by implementation plans are ineffective in dealing with undocumented immigrants).

ministration, ICE stepped up its worksite enforcement, resulting in a significant increase in arrests from 2005 to 2008.<sup>135</sup> In 2002, ICE made 25 criminal and 485 administrative arrests; in 2006, those numbers soared to 716 and 3667; in 2007, they increased slightly to 863 and 4077; and in 2008, they reached 1103 and 5184.<sup>136</sup> A study that charted raids and their aftermath found that a very small percentage of arrestees were convicted of illegally employing an undocumented worker; eighty percent of those convicted were employees.<sup>137</sup> Comparing 2002 and 2008, employees were nearly eleven times more likely to be arrested for working without documentation.<sup>138</sup> Yet the latest numbers still affect less than two percent of all undocumented workers and less than one percent of all employers. In 2008, ICE raids resulted in 6287 arrests of undocumented workers. Between 2007 and 2008, there were 86 workplace raids.<sup>139</sup> Compare those numbers with the approximately 12 million illegal immigrants and the estimated 7.6 million U.S. employers that existed at the time of the raids.<sup>140</sup> Enforcement resulted in actions against less than one-twentieth of one percent of all potential violators.

United States immigration laws have historically made working without authorization illegal,<sup>141</sup> but prohibitions against hiring an undocumented worker were codified only in the last twenty years.<sup>142</sup> In 1986, Congress amended the immigration laws to require an employer to take certain affirmative acts to verify work authorization and to make it a crime to hire, recruit, or refer for employment an illegal immigrant knowing the individual is unauthorized.<sup>143</sup> The law defines several distinct employer offenses related to illegal immigrants, including encouraging or inducing unauthorized immigrants

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135. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 55, at 17, Figure 9.

136. *Id.* at 17.

137. Schmall, *supra* note 9, at 385–86.

138. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 55, at 17, Figure 9.

139. Schmall, *supra* note 9, at 385.

140. U.S. Census Bureau, *USA QuickFacts from the U.S. Census Bureau*, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Feb. 25, 2011) (“Private non-farm establishments with paid employees [in] 2006 [equaled] 7,601,160.”).

141. *See, e.g.*, *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984).

142. *Id.* at 892–93 (reasoning that “[f]or whatever reason, Congress has not adopted provisions in the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization.”).

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

to enter the United States.<sup>144</sup> However, proving a “knowing” violation of the law is difficult.<sup>145</sup>

Making a case against an employer requires time and significant investments of investigative resources. The Model Penal Code, an exemplar of U.S. federal and state criminal law that provides a template for most prosecutions, concludes that a “person acts knowingly . . . when he is aware that it is practically certain that his conduct will cause such a result.”<sup>146</sup> Chain-of-command matters and informal operating procedures complicate cases, and few courts have found or agreed that “constructive knowledge” constitutes sufficient culpability.<sup>147</sup> Through 2008, there were few reported cases in which an employer or its agent knowingly violated the law.<sup>148</sup> Two of the most public raid cases that predated this Article, involving thousands of undocumented workers at Wal-Mart Stores, Inc. and Tyson Foods, Inc., resulted in acquittals or dismissals of nearly every criminal charge.<sup>149</sup>

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144. *Id.*

145. It is difficult to find a report of an employer’s conviction for immigration violations, especially since the cases are often litigated for years. *But see* Press Release, U.S. Attorney’s Office, Northern Virginia Business Owner and Wife Sentenced in Immigration Fraud Scheme (Apr. 16, 2009), *available at* [www.usdoj.gov/usao/dc/PressReleases/2009Archives/April/09-097.pdf](http://www.usdoj.gov/usao/dc/PressReleases/2009Archives/April/09-097.pdf) (noting that business owners were convicted of immigration fraud for operating a scheme which “called for myriad small-business owners to support the fraudulent labor-based immigration applications of aliens who were never intended to, and never did, work for the employers, or for non-existent aliens whose approved documentation would be used by real persons seeking immigration status”).

146. MODEL PENAL CODE § 2.02(2)(b) (2010).

147. *Compare* Collins Foods Int’l, Inc. v. INS, 948 F.2d 549, 554 (9th Cir. 1991) (reasoning that an employment offer before verification of legal status does not constitute constructive knowledge), *and* Trollinger v. Tyson Foods, Inc., 543 F. Supp. 2d 842, 853 (E.D. Tenn. 2008) (holding that a non-English application does not raise reasonable suspicion to constitute knowledge of illegal status), *with* Mester Mfg. Co. v. INS, 879 F.2d 561, 566–67 (9th Cir. 1989) (holding the knowledge element is satisfied where the employer was on notice of possible illegal status of the employee but failed to investigate).

148. *But see* United States v. Shum, 496 F.3d 390 (5th Cir. 2007) (reviewing witness testimony that defendant Shum provided false identifications to assist illegal workers in attaining employment); News Release, U.S. Immigr. & Customs Enforcement, QSI Supervisor, Employee Sentenced for Knowingly Hiring Illegal Aliens (Nov. 19, 2007), <http://www.ice.gov/pi/news/newsreleases/articles/071119springfield.htm> (discussing the case of a staffing agent employee who was aware that illegal aliens she helped hire were told to get new documents after their Social Security numbers did not match their names, and completed documents using information she knew to be false).

149. *E.g.*, United States v. Tyson Foods, Inc., 258 F. Supp. 2d 809 (E.D. Tenn. 2003) (jury acquitted defendants); Stephanie E. Tanger, *Enforcing Corporate Responsibility for Violations of Workplace Immigration Laws: The Case of Meatpacking*, 9 HARV. LATINO L. REV. 59, 60 (2006) (noting that two managers in the case pled guilty; however, the other

Empirical data show a disparate impact upon employers who appear to be members of minorities, or, at the least, have ethnic surnames. A near-complete list of those employers—or the employers' agents—is replete with Latino and Asian names. Among larger or incorporated employers, the likeliest criminal defendant works in the employer's human resources department. Such results may bespeak invidious discrimination. And because of the history of enslavement, conquest, exploitation, and discriminatory treatment of these same cohorts in the United States and in those countries that have become the EU, the likelihood of intentional discrimination is high.

On the other hand, the complexities of the criminal system of proof and of *mens rea* (the guilty mind) could be an equally legitimate explanation for the dizzying inequality in arrests and convictions. For the most part, the government has had an easier time convicting “ma and pa” stores and restaurants. Many of those sentenced for violating immigration laws were married couples or extended family members who ran businesses that employed recent immigrants from the owner's home country. Their businesses were typically very public—restaurants, gardeners, cooks. The ICE bureau's news releases make this clear.<sup>150</sup>

In 2007, ICE announced it would target employers who hire illegal immigrants with the goal of “reducing the pull of the ‘jobs magnet’ that draws illegal workers across the border in search of employment.”<sup>151</sup> ICE issued the following statement:

Employers who exploit illegal alien labor to reap greater profits for themselves can expect to pay a high price for their greed. Whether the violator is a multinational corporation or a small business, ICE is aggressively targeting employers who use illegal alien

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three indicted managers and the company itself were acquitted by a jury); *Wal-Mart Pays \$11M Over Illegal Labor*, CNNMONEY.COM (Mar. 18, 2005), [http://money.cnn.com/2005/03/18/news/fortune500/wal\\_mart\\_settlement](http://money.cnn.com/2005/03/18/news/fortune500/wal_mart_settlement) (identifying an \$11 million civil settlement with Wal-Mart Stores, Inc. as a result of an ICE investigation into the alleged hiring of illegal aliens by independent contractors that provided cleaning services to Wal-Mart stores).

150. See, e.g., ICE NEWS RELEASES ON WORKSITE ENFORCEMENT, <http://www.ice.gov/news/releases> (last visited Apr. 16, 2011).

151. ICE 2007 ANNUAL REPORT, *supra* note 68, at iii.

workers to gain an unfair business advantage and take jobs away from legal workers.<sup>152</sup>

ICE advanced two purposes for its use of these raids as a work-site enforcement mechanism: mitigating the risk of terrorist attacks posed by unauthorized workers employed in secure areas of critical U.S. infrastructure such as airports, seaports, nuclear plants, chemical plants, and defense facilities; and preventing exploitation of workers who are unable to access workplace protective laws.<sup>153</sup> Raids occurred at a rate of less than five per month, and fewer “than a quarter of the raided employers were arguably involved in the nation’s ‘critical infrastructure’; ultimately employees, not employers, were the overwhelming majority of those arrested in raids.”<sup>154</sup> Among those employers who were arrested, most had minority surnames.<sup>155</sup> The unpopularity of raids among the public—each raid was widely reported, accompanied by photos of officers in riot gear and lines of employees in handcuffs—may have led to their decreased use.<sup>156</sup> The results were ambiguous, and the law cases drag on.

Graphing the results of these raids illustrates that the targets were rarely employers working on critical U.S. infrastructure; they were, instead, the usual suspects, like restaurants and food processing plants.<sup>157</sup> Moreover, those arrested were usually minority small business owners<sup>158</sup> and not multinational companies pouring unauthorized immigrants into the U.S. workforce.

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152. Press Release, U.S. Immigration & Customs Enforcement, New York Restaurant Owner Among 11 Charged with Harboring in ICE Probe (Apr. 16, 2008), <http://www.ice.gov/pi/news/newsreleases/articles/080416buffalo.htm>.

153. See *Worksite Enforcement*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/pi/worksite/index.htm> (last visited Apr. 16, 2011).

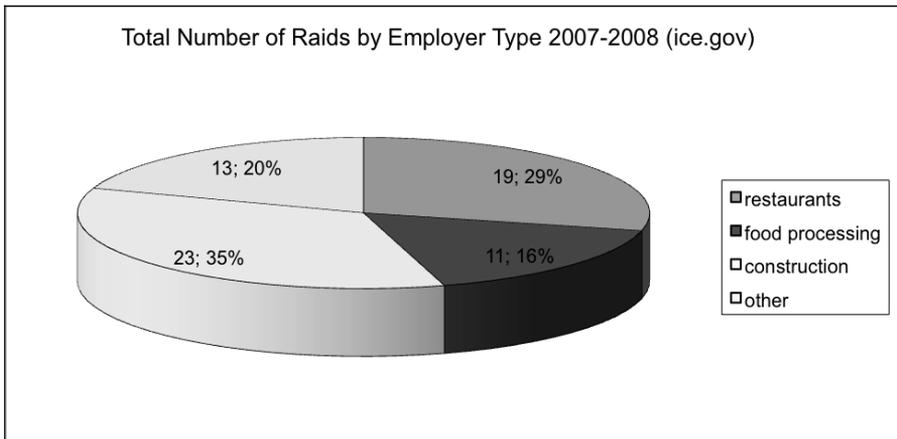
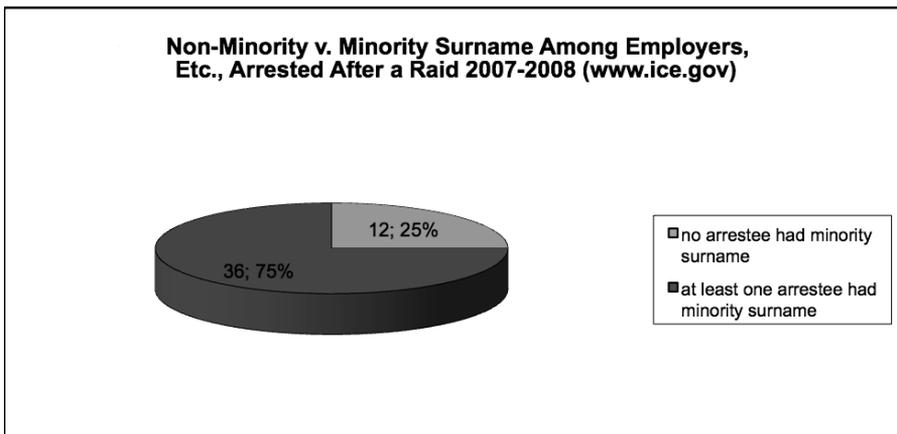
154. Schmall, *supra* note 9, at 374.

155. *Id.* at 391.

156. *E.g., id.* at 382 (describing workplace raids as intimidating and disruptive).

157. FIGURE 1, *infra* p. 182.

158. FIGURE 2, *infra* p. 182.

FIGURE 1<sup>159</sup>FIGURE 2<sup>160</sup>

**I-9 Audits:** According to press releases, the Obama administration completed six enforcement raids in the beginning of 2009, including four at Chinese restaurants and one at a construction site at a public university.<sup>161</sup> The administration's official policy is to substi-

159. Comprehensive support and data for FIGURE 1 on file with the author.

160. Comprehensive support and data for FIGURE 2 on file with the author.

161. *Accord* Press Release, U.S. Immigration and Customs Enforcement, Owner of 3 Virginia Restaurants Arrested for Harboring Aliens (Sept. 8, 2010) <http://www.ice.gov/news/releases/1009/100908fairfax.htm>; Press Release, U.S. Immigration and Customs Enforcement, Howard County Restaurant Owner Arrested Following Worksite

tute audits of employers suspected of hiring irregularities with workplace raids.<sup>162</sup> Espousing the same goals as its predecessors, ICE has conducted over two thousand audits, resulting in a series of penalties.<sup>163</sup> The ICE bureau's most widely reported 2009 audit in its effort to guarantee further homeland security was at a Krispy Kreme Doughnuts bakery, resulting in \$40,000 in fines.<sup>164</sup> No study yet exists reporting the exact numbers or any identities of those audited, and thus, disparate treatment cannot be fully evaluated.<sup>165</sup> Massive arrests, detentions, and deportations after I-9 audits have been no less insidious or harsh.<sup>166</sup>

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Investigation (Feb. 17, 2010) <http://www.ice.gov/news/releases/1002/100217baltimore.htm>; Press Release, U.S. Immigration and Customs Enforcement, ICE and BCSO Execute 7 Search Warrants at South Carolina Sites (Mar. 24, 2010) <http://www.ice.gov/news/releases/1003/100324beaufort.htm>; Press Release, U.S. Immigration and Customs Enforcement, Owners, Managers and Restaurant Corporations Sentenced for Hiring Illegal Aliens in Mississippi (Nov. 30, 2009) <http://www.ice.gov/news/releases/0911/091130jackson.htm>.

162. See Schmall, *supra* note 9, at 390 (“The departmental budget for the fiscal year 2010 no longer lists ‘Worksite Enforcement’ as a line item, as did the last Bush Administration. Thus, comparison between the administrations is difficult. The government promises to avoid human rights violations to increase fairness and help employers comply with the law. Further, the current administration wants to make it possible to electronically determine the immigration status of every worker and detect fraudulent use of identification.”); see also Press Release, U.S. Immigration and Customs Enforcement, ICE Assistant Secretary John Morton Announces 1,000 New Workplace Audits to Hold Employers Accountable for their Hiring Practices (Nov. 19, 2009) [hereinafter Morton Press Release] <http://www.ice.gov/pi/nr/0911/091119washingtondc2.htm>.

163. See Morton Press Release, *supra* note 162; see also Julia Preston, *Illegal Workers Swept from Jobs in Silent Raids*, N.Y. TIMES, July 10, 2010, at A1.

164. Press Release, U.S. Immigration and Customs Enforcement, Krispy Kreme Fined After I-9 Audit (July 7, 2009) <http://www.ice.gov/pi/nr/0907/090707cincinnati.htm>; Press Release, Jones Day, Immigration Compliance Update (Apr. 2010) <http://www.thefreelibrary.com/Immigration+Compliance+Update%3a+The+Four+Most+Important+Things>.

165. Press Release, U.S. Immigration and Customs Enforcement, San Diego-Area Bakery Owner, 3 Employees Charged with Harboring Illegal Workers (Oct. 15, 2010) (on file with author) (“ICE is focusing its resources on auditing and investigating employers suspected of knowingly employing illegal workers. The goal of the enforcement strategy is to promote national security, protect critical infrastructure and ensure fair labor standards. ICE is using all available criminal and administrative tools, including civil fines and debarment, to penalize and deter illegal employment.”).

166. See, e.g., Tim Rutten, Op-Ed., *Stripped of Jobs by Obama*, L.A. TIMES, Oct. 3, 2009, <http://www.latimes.com/news/opinion/la-oe-rutten3-2009oct03,0,1663738.column>.

### III. ICE HAS TWO OTHER TOOLS OF ENFORCEMENT: COMPUTERS AND COPS

#### A. *Electronic Verification of Employee Identity*

“E-Verify” is a computer system that compares information an employer is required by law to gather from its employees on IRS Form I-9 with records maintained by Homeland Security and the Social Security Administration, which is the agency in charge of issuing and recording Social Security numbers.<sup>167</sup> E-Verify compares Social Security numbers with names, ages, and addresses of the owners of those numbers. Social Security reviews of an employer’s records might result in the employer receiving a “no-match” letter, identifying workers whose names and social security numbers do not match. ICE proposed a rule mandating that employers who received no-match letters had to take certain steps to verify identities or be said to have “constructive knowledge” of the worker’s undocumented status. Such knowledge can be a predicate to criminal prosecution. Asked by Congress to conduct a feasibility study of E-Verify, the Government Accountability Office presented extensive data suggesting strict enforcement would be prohibitively expensive.<sup>168</sup> The E-Verify program cannot detect the use of counterfeit documents or determine whether an employee has presented valid documents that belong to someone else, which are the most prevalent forms of document “fraud.”<sup>169</sup> Employers are legally required to accept any of several proofs of lawful residence, with geometric complications.<sup>170</sup> With so many different types of documents that employers were required to examine and accept as proof, both voluntary compliance and the government’s ability to prove a willful violation of the law became more difficult.<sup>171</sup> Under the U.S. criminal justice system

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167. See *E-Verify*, DEP’T OF HOMELAND SEC., [http://www.dhs.gov/files/programs/gc\\_1185221678150.shtm](http://www.dhs.gov/files/programs/gc_1185221678150.shtm) (last visited Apr. 16, 2011).

168. See *Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Employment Verification System: Testimony Before the S. Comm on Soc. Sec., Comm. on Ways & Means* (2007) (statement of Richard M. Stana, Dir. Homeland Sec. & Justice Issues, Gov’t Accountability Office), in U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-924T, at 3, available at [www.gao.gov/new.items/d07924t.pdf](http://www.gao.gov/new.items/d07924t.pdf).

169. WESTAT, FINDINGS OF THE E-VERIFY PROGRAM EVALUATION, xxxii, 131, 132 (Sept. 2009).

170. 8 U.S.C. § 1324a(b)(1)(A)–(D) (2006).

171. See, e.g., *Collins Foods Int’l v. INS*, 948 F.2d 549, 554 n.15 (9th Cir. 1991) (reasoning that employers are unable to verify all documents due in part to the plethora of ac-

standard of reasonable doubt, a defendant-employer is presumed to be innocent and the government must prove beyond a reasonable doubt that the defendant knew it was employing an unauthorized alien.<sup>172</sup> Therefore, an employer's good faith doubts, negligence, or even recklessness are excusable and exculpatory.<sup>173</sup> However, a few U.S. federal courts have found defendants guilty who had "constructive knowledge"<sup>174</sup>—the IRCA does not define that term.<sup>175</sup> E-Verify is not optimally functional.<sup>176</sup> A disparate consortium of unions and business groups sued to delay enforcement of the mandatory rule and prevailed before a judge who found practical problems outweighed any benefit from the rule.<sup>177</sup> The court found, as a matter of fact, that the rule would subject employers to significant compliance costs and employees to an increased risk of wrongful termination.<sup>178</sup> The Department of Homeland Security has issued new rules that are said to simplify enforcement and compliance.<sup>179</sup>

Universal identification in whatever form adds several layers of potential impossibility of accurate enforcement. Some EU Member States have adopted biometric identification cards as proof of lawful presence within the country.<sup>180</sup> Invasive identification procedures implicate a balance between security and unfettered personal liberty, although the more traditional methods of raids, dragnets, and

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ceptable documents as well as the lack of all acceptable documents being included in the GAO handbook).

172. See 8 U.S.C. § 1324(a)(1)(A) (2006) (stating that it is unlawful "to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien"); see also *In re Winship*, 397 U.S. 358, 364 (1970) (requiring proof beyond a reasonable doubt of every fact necessary to amount to the crime charged).

173. See generally 8 U.S.C. § 1324(a)(1)(A) (2006) (making knowledge the mens rea element of the crime and thereby making irrelevant good faith doubts, negligence, and reckless conduct).

174. See, e.g., *New El Rey Sausage Co. v. INS*, 925 F.2d 1153, 1159 (9th Cir. 1991); *Mester Mfg. Co. v. INS*, 879 F.2d 561, 567 (9th Cir. 1989) (holding that constructive knowledge is satisfied even if no employee had actual knowledge of another employee's unauthorized status).

175. See 8 U.S.C. § 1324(a)(1)(A) (2006) (limiting statutory direction to requirement of "knowing" an alien is unauthorized).

176. Cf. WESTAT, *supra* note 169, at xxx (noting that the E-Verify inaccuracy rate for unauthorized workers is over fifty percent, mostly due to identity fraud).

177. *Am. Fed'n of Labor v. Chertoff*, 552 F. Supp. 2d 999, 1015 (N.D. Cal. 2007).

178. *Id.* at 1006.

179. See *Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Rescission*, 74 Fed. Reg. 41, 801-03 (Aug. 19, 2009) (to be codified at 8 C.F.R. pt. 264a).

180. E.g., U.K. Borders Act, 2007, c. 30, §§ 5-15; Borders, Citizenship and Immigration Act, 2009, c. 11, § 14-15 (Eng.).

audits have resulted in massive injustices.<sup>181</sup> However, the ID cards are expensive and require constant updating.<sup>182</sup> During recessionary periods, public employers in the EU and the United States must operate on smaller budgets; they naturally lag in technical improvement and in trained talent. Tracking entrants—and keeping track of them—necessitates reordering priorities within the U.S. Department of Homeland Security.

*B. Secure Communities and Section 287(g): The Law Enforcement Triumvirate*

Theoretically, ICE has access to all state and local crime databases to assist in locating undocumented or criminal fugitives. The “Secure Communities” initiative allows for memoranda of understanding among federal, state, and local policing units.<sup>183</sup> Local fingerprinting and other informational data are automatically shared with the Federal Bureau of Investigation and then forwarded to ICE. Although the biometric information-sharing program started slowly, it has grown tenfold since its inception.<sup>184</sup> According to ICE policy, “[t]he activation of the biometric federal information-sharing capability enables ICE to identify any alien booked into local law enforcement’s custody for a crime.”<sup>185</sup> It is noteworthy that the persons

181. See Neil A. Lewis, *Immigration Officials to Audit 1,000 More Companies*, N.Y. TIMES, Nov. 19, 2009, <http://www.nytimes.com/2009/11/20/us/20immig.html> (noting that ICE audits can result in large scale firings of immigrant workers by employers looking to avoid government raids and enforcement); see also Harmit Athwal, *Two Men Suffer Injuries After Immigration Raid*, INST. OF RACE REL. (July 9, 2010), <http://www.irr.org.uk/2010/july/ha000020.html> (asserting that many recent immigration raids have resulted in death or serious injury).

182. See *ID Cards—UK’s High Tech Scheme is High Risk*, LONDON SCH. OF ECON. & POL. SCI. (June 27, 2005), [http://www2.lse.ac.uk/newsAndMedia/news/archives/2005/IDCard\\_FinalReport.aspx](http://www2.lse.ac.uk/newsAndMedia/news/archives/2005/IDCard_FinalReport.aspx) (finding that U.K. ID cards may cost as much as £19.2 billion and that there may be problems verifying information, correcting data, and checking other databases).

183. *Secure Communities Standard Operating Procedures*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT 3, [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesops93009.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf) (last visited Apr. 24, 2011).

184. *Secure Communities: Quarterly Report*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT 4 (Aug. 11, 2010), available at [http://www.ice.gov/doclib/foia/secure\\_communities/r\\_congressionalfy10rdquarterreport.pdf](http://www.ice.gov/doclib/foia/secure_communities/r_congressionalfy10rdquarterreport.pdf)

185. *ICE ‘Secure Communities’ Program Now Activated in All of Texas Counties: Secure Communities Strategy Prioritizes Immigration Enforcement Actions Against Convicted*

subjected to these biometrics may not even be arrested or eventually charged with a crime, yet their fingerprints are sent to the FBI Commentator in the United States, which has long asserted that racial profiling leads to higher levels of police stops and arrests for non-whites.<sup>186</sup> Consequently, programs like Secure Communities are bound to have a disparate, and perhaps unconstitutional, impact upon people of color, or those deemed “foreign-looking.” ICE now has agreements with nearly six hundred police departments, covering areas in which approximately sixty percent of all immigrants reside.<sup>187</sup> It is not clear whether participation in Secure Communities is voluntary.<sup>188</sup> Data from this program’s results show a disturbing failure to focus on the most serious criminals: “The vast majority (seventy-nine percent) of the people deported due to [Secure Communities] are non-criminals or were picked up for lower level offenses, such as traffic offenses or petty juvenile mischief.”<sup>189</sup>

ICE also has the statutory right to allow state and local police to essentially become trained and work as ICE deputies, accruing the right to enforce federal immigration laws.<sup>190</sup> Section 287(g), as it is called, has appealed to the states, and many police departments have contracts with ICE.<sup>191</sup> Local police work under the ICE bureau’s supervision.<sup>192</sup> The program is popular, and there are more volunteers

*Criminal Aliens*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT 1 (Sept. 29, 2010), available at [www.aila.org/content/default.aspx?docid=33247](http://www.aila.org/content/default.aspx?docid=33247).

186. See, e.g., Grady Carrick, *Professional Police Traffic Stops Strategies to Address Racial Profiling*, FBI L. ENFORCEMENT BULL., Nov. 2000, at 9 (offering strategies for combating the “phenomenon” of racial profiling in traffic enforcement).

187. *Secure Communities IDENT/IAFIS Interoperability Monthly Statistics Through August 31, 2010*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT 1 (Sept. 7, 2010), available at [www.aila.org/content/default.aspx?docid=33189](http://www.aila.org/content/default.aspx?docid=33189).

188. Elise Foley, *Napolitano Confirms There Is No Opt-Out Option for Secure Communities*, WASH. INDEP. (Oct. 6, 2010), <http://washingtonindependent.com/99855/napolitano-confirms-there-is-no-opt-out-option-for-secure-communities>.

189. National Day Laborer Organizing Network, *Briefing Guide to “Secure Communities”*, CARDOZO SCHOOL OF LAW, [http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/NDLON\\_FOIA\\_Briefing%20guide.final.pdf](http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/NDLON_FOIA_Briefing%20guide.final.pdf) (last visited Apr. 16, 2011).

190. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, Div. C, 110 Stat. 3009–546, 554 (1996).

191. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, ICE.GOV, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Apr. 24, 2011) (noting that “[c]urrently ICE has 287(g) agreements with 71 law enforcement agencies in 25 states.”).

192. *Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law*, Hearing Before the H. Comm. on Homeland Security, 111th Cong. 7, 9 (2009) (state-

than ICE has spaces to train.<sup>193</sup> Local and state police are effectively deputized and given legal authority to enforce federal immigration law.<sup>194</sup> In certain communities, there appears to be strong popular sentiment against immigrants,<sup>195</sup> and local needs are satisfied where local law enforcement can join in the fight. However, two-thirds of immigrants in the United States are here legally.<sup>196</sup> Of the remaining one-third, few are “criminals.”<sup>197</sup>

Statistically, arrests and detentions of undocumented immigrants with criminal records are at their highest since the creation of the Department of Homeland Security.<sup>198</sup> The Obama administration

ment of William F. Riley, acting Executive Director of the Office of State and Local Coordination, U.S. Immigration and Customs Enforcement) [hereinafter Riley Statement].

193. *Id.* at 4–6. *But see* Alex Johnson, *Cities, Counties Can’t Stop Federal Immigration Checks*, MSNBC.COM (Oct. 15, 2010, 6:13:19 AM), [http://www.msnbc.msn.com/id/39576754/ns/us\\_news-security](http://www.msnbc.msn.com/id/39576754/ns/us_news-security) (discussing local communities and police departments that eschew participation, among which are self-designated “sanctuary cities” for immigrants).

194. Riley Statement, *supra* note 192, at 2–3.

195. *See, e.g., Many U.S. Voters Say No Citizenship For Immigrant Kids, Quinnipiac University National Poll Finds; Muslims Have Right To Mosque, But It’s Inappropriate*, QUINNIPIAC U. POLLING INST. (Sept. 13, 2010), <http://www.quinnipiac.edu/x1295.xml?ReleaseID=1497> (stating that twenty-four to sixty-eight percent of American voters believe that stricter enforcement is necessary, as opposed to integrating illegal immigrants into society). *But cf.* Karen Lee Ziner, *State Police Withdraw from Partnership with ICE*, PROVIDENCE J. (Jan. 7, 2011), [http://www.projo.com/news/content/ENDING\\_287\\_g\\_01-0711\\_E0LR400\\_v15.b27c4.html](http://www.projo.com/news/content/ENDING_287_g_01-0711_E0LR400_v15.b27c4.html) (discussing Rhode Island’s termination of its partnership with ICE to prevent more cases where 287(g) authority was used to remove illegal immigrants for minor violations); Brantley Hargrove, *Will an Arcane Legal Challenge Bring Down Nashville’s Controversial 287(g) program?*, NASHVILLE SCENE (Jan. 13, 2011), <http://www.nashvillescene.com/nashville/will-an-arcane-legal-challenge-bring-down-nashvilles-controversial-287g-program> (documenting a citizen’s challenge to ICE regulations as violating state and local law).

196. *See* HOFER, RYTINA & BAKER, *supra* note 108, at 3 (estimating that approximately 10,750,000 illegal immigrants resided in the United States in 2009).

197. *Compare* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-337R, INFORMATION ON CRIMINAL ALIENS INCARCERATED IN FEDERAL AND STATE PRISONS AND LOCAL JAILS, at 2–3 (2005), *available at* <http://www.gao.gov/new.items/d05337r.pdf> (indicating that the approximate number of criminal aliens incarcerated in U.S. prisons in 2004 was less than 300,000), *with* HOFER, RYTINA & BAKER, *supra* note 108, at 3 (estimating that the number of illegal immigrants in the country is estimated to be 10,750,000).

198. *See Immigration Enforcement Actions: 2009*, U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGR. STAT. 3 (Aug. 2010), *available at* [http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement\\_ar\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf) (stating that ICE detained a record number of aliens in 2009); Press Release, U.S. Immigration and Customs Enforcement, DHS/ICE Reveal Highest Immigration Enforcement Numbers on Record in Fiscal Year 2010, October 8, 2010, <http://www.ice.gov/news/releases/1010/101008washingtondc.htm>; Press release, U.S. Immigration and Customs Enforcement, Secretary Napolitano Announces Record-Breaking

has made this a Homeland Security priority.<sup>199</sup> That initiative, along with frequently skewed media representations,<sup>200</sup> leave an impression that immigrants are dangerous. Data show that less than five percent of the approximately 10 million undocumented immigrants present in the United States in 2005 had committed a crime for which they were incarcerated, and an overwhelming number of those crimes were immigration-related.<sup>201</sup> The Government Accountability Office reported in 2005 that twenty-one percent of criminal immigrants are incarcerated in federal prisons because of immigration-related convictions.<sup>202</sup> The American Immigration Council reports that since October 2008, only fifteen percent of all “hits” (i.e., ICE searches that found undocumented inmates) had been charged with or convicted of Level 1 crimes.<sup>203</sup> The ICE bureau’s July 2010 data show that “immigration” accounts for 89.1% of prosecutions.<sup>204</sup> Nearly one quarter of illegal alien criminal offenses were based on drug of-

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Immigration Enforcement Statistics Achieved Under the Obama Administration, October 6, 2010, <http://www.ice.gov/news/releases/1010/101006washingtondc2.htm> [hereinafter Secretary Napolitano Announcement].

199. See Secretary Napolitano Announcement, *supra* note 198.

200. Compare James Alan Fox, *A State of Confusion Over Illegals and Crime*, BOSTON.COM (July 29, 2010, 3:45 PM), [http://boston.com/community/blogs/crime\\_punishment/2010/07/a\\_state\\_of\\_confusion\\_over\\_i.html](http://boston.com/community/blogs/crime_punishment/2010/07/a_state_of_confusion_over_i.html) (arguing that higher crime rates associated with cities containing higher concentrations of Hispanic individuals are caused by socio-economic conditions, not by race or ethnicity), with Don Severe, Op-Ed., *In My View: Illegal Immigrants Bring Death, Violence*, GREEN VALLEY NEWS (Oct. 30, 2010, 9:23 PM), <http://www.gvnews.com/articles/2010/10/30/letters/doc4cccec236d111518901756.txt> (assessing a precipitous rise in violence against Customs and Border Patrol agents).

201. *But cf.* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-646R, INFORMATION ON CERTAIN ILLEGAL ALIENS ARRESTED IN THE UNITED STATES, at 22 (2005), available at <http://www.gao.gov/new.items/d05646r.pdf> [hereinafter GAO-05-646R] (noting that imprisonment based on a number of offenses, some of which were not immigration related—such as drug crimes or assaults—and some of which were immigration related, would be recorded in the report as immigration-related if the latter resulted in the longest sentence). Comparing the GAO’s 2005 report data with the U.S. general population, according to the U.S. Bureau of Justice Statistics, “[i]n 2008, over 7.3 million people were on probation, in jail or prison, or on parole at year-end—3.2% of all U.S. adult residents or 1 in every 31 adults.” U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, TOTAL CORRECTIONAL POPULATION (2010), <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=11>.

202. GAO-05-646R, *supra* note 201, at 22–23.

203. *Secure Communities: A Fact Sheet*, IMMIGR. POL’Y CENTER, <http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet> (last visited Apr. 16, 2011) (explaining that Level 1 crimes are those designated as “aggravated felonies”).

204. *Prosecutions for July 2010*, TRAC REPORTS, INC., <http://trac.syr.edu/tracreports/bulletins/h saa/monthlyjul10/fil> (last visited Apr. 16, 2011).

fenses,<sup>205</sup> and less than two percent of convictions were based on sex crimes or homicides.<sup>206</sup> News reports and academic studies showed examples of racial bias and undue influence in enforcement.<sup>207</sup>

### C. Local Initiatives and Federalism

Although the U.S. Constitution gives power over naturalization exclusively to Congress, and the Supreme Court has repeated found immigration to be a federal matter,<sup>208</sup> states and municipalities have undertaken local laws regulating immigrants and imposing duties on public officers, landlords, and potential or actual employers.<sup>209</sup> Arizona introduced two significant laws, which its opponents claim are preempted by federal law.<sup>210</sup> However, in *Chicanos Por La*

205. GAO-05-646R, *supra* note 201, at 9, 18.

206. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-423, INFORMATION ON CERTAIN ILLEGAL ALIENS ARRESTED IN THE UNITED STATES, at 23 (2005).

207. Before 2006, ICE teams were expected to arrest 125 "fugitives" per year and that seventy-five percent of those arrested were required to be "criminal aliens." However, in 2006, ICE changed the policy to require teams to arrest 1000 fugitives but did eliminate the corresponding criminal alien quota. See Bess Chiu, Lynly Egyes, Peter L. Markowitz & Jaya Vasandani, *Constitution on ICE: A Report on Immigration Home Raid Operations*, CARDOZO IMMIGRATION JUSTICE CLINIC (2009), [http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC\\_ICE-Home-Raid-Report\\_Updated.pdf](http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-Report_Updated.pdf).

208. U.S. CONST. art. I, § 8, cl. 4; *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (recognizing that immigration law, specifically "governing admission to our Nation and status within our borders" is a power committed to the federal government and "only rarely are such matters relevant to legislation by a State").

209. A great deal of scholarship exists addressing the federalism issues endemic to local efforts regulating undocumented immigrants. See, e.g., Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000) (arguing that the Supreme Court's treatment of immigration claims is at odds with U.S. constitutional law); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1729-30 (2010); cf. Gabriel J. Chin, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, 107 MICH. L. REV. FIRST IMPRESSIONS 1 (Sept. 2008), <http://www.michiganlawreview.org/firstimpressions/vol107/mccain.htm> (anecdotally illustrating alleged inconsistencies in immigration policies by discussing the citizenship of former presidential candidate, Senator John McCain).

210. ARIZ. REV. STAT. ANN. §§ 23-211 to 23-216 (2010) (West); ARIZ. REV. STAT. ANN. § 11-1051 (2010) (West); see Igbunugo Partners Int'l Law Firm, *Draconian Arizona Law Sparks Renewed Hope for Comprehensive Immigration Reform* (July 1, 2010), [http://mshale.com/article/Immigration/Immigration/Draconian\\_Arizona\\_Law\\_Sparks\\_Renewed\\_Hope\\_for\\_Comprehensive\\_Immigration\\_Reform/18522](http://mshale.com/article/Immigration/Immigration/Draconian_Arizona_Law_Sparks_Renewed_Hope_for_Comprehensive_Immigration_Reform/18522).

*Causa v. Napolitano*,<sup>211</sup> the Ninth Circuit Court of Appeals upheld the Legal Arizona Workers Act,<sup>212</sup> which places the burden of determining the legal status of employees on their employers, with severe state penalties available for companies that do not. Arizona has made E-verify mandatory for all employers doing business in the state.<sup>213</sup>

Arizona, a Mexican border state, recently adopted a law that uses IRCA violations as a reason for state and local police involvement.<sup>214</sup> The Arizona Act empowers its local police to detain, or arrest without warrant, any person suspected of being illegally present in the United States.<sup>215</sup> The Act also allows police, who have stopped, arrested, or detained a person for a non-immigration reason, to attempt to determine whether the person is illegally present in the United States.<sup>216</sup> The Act further requires certain state agencies to ascertain an individual's lawful presence in the United States when determining eligibility for any service, right, or privilege of either the United States or the State of Arizona.<sup>217</sup> Finally, the law creates a separate state crime for "trespassing [within the state] by illegal aliens."<sup>218</sup> The statute specifically addresses the custom of undocumented workers to gather in public places awaiting day labor, making it illegal to hire or to solicit work in such circumstances.<sup>219</sup> There were serious questions about the law at its inception,<sup>220</sup> including the danger of racial profiling, the worry about its vagueness, and the concern that immigration law is federally established, not state-

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211. 558 F.3d 856 (2009) (holding that the Arizona law was not expressly preempted because it did no more than impose conditions on state licenses to do business, and acknowledging that the Act did not attempt to define eligibility to work under the immigration laws), *cert. granted sub nom.* Chamber of Commerce of the United States v. Candelaria, 130 S. Ct. 3498 (2010).

212. ARIZ. REV. STAT. ANN. §§ 23-211 to 23-214.

213. § 23-214.

214. § 23-212.

215. S.B. 1070, 49th Leg., 2nd Reg. Sess. (Ariz. 2010) (enacted).

216. ARIZ. REV. STAT. ANN. § 11-1051.

217. *Id.*

218. See S. Res. 1070, 49th Leg., 2nd Reg. Sess. (Ariz. 2010) (amending ARIZ. REV. STAT. ANN. §13-1509), *currently enjoined by* United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010), *aff'd*, 2011 WL 1346945 (9th Cir. Apr. 11, 2011).

219. See ARIZ. REV. STAT. ANN. § 13-2928 (2010).

220. See, e.g., Igbunugo Partners Int'l L. Firm, *supra* note 210 (noting serious opposition to the law both in Arizona and nationally).

run.<sup>221</sup> A federal district court, on the petition of the U.S. Attorney General, enjoined operation of most of the statute.<sup>222</sup>

Whether borders should be open is beyond the purview of this Article. Recession and controls on the entry of foreigners for work are historically coincident. In countries like Spain, where unemployment hovers around twenty percent, concern about jobs for citizens naturally exists.<sup>223</sup> Most research suggests that immigration has a very small economic effect and dissipates over time as the labor market adjusts to the larger labor supply.<sup>224</sup> Immigrants in general, and undocumented immigrants in particular, increase competition for jobs at the bottom and might displace those discrete native working populations with poor communication skills or only marginal connection to the labor force.<sup>225</sup> Mandating fewer legal constraints, but allowing a receiving country to direct the flow of immigrants toward market needs for labor, makes more economic sense. In 2007, there were about 38 million first-generation legal immigrants residing in the United States, about thirteen percent of the total population.<sup>226</sup> Too few receive permission for temporary work in the United States. Even though a twenty-five year guest farm worker program was later discredited as racist and responsible for keeping even legal migrants from exercising any market power in the United States, it offers a paradigm for allowing the use of workers who are not yet legal residents to try to realistically meet agricultural labor demands.<sup>227</sup> Recession has tightened controls in the United

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221. See, e.g., Gabriel J. Chin, Carissa Byrne Hessick, Toni M. Massaro & Marc L. Miller, *Arizona Senate Bill 1070: A Preliminary Report* (2010), available at <http://ssrn.com/abstract=1617440>.

222. *United States v. Arizona*, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010), *aff'd*, 2011 WL 1346945 (9th Cir. Apr. 11, 2011).

223. See Suzanne Daley, *Safety Net Frays in Spain as Elsewhere*, N.Y. TIMES, June 27, 2010, <http://www.nytimes.com/2010/06/28/world/europe/28spain.html>.

224. E.g., Will Somerville & Madeleine Sumption, *Immigration and the Labour Market: Theory, Evidence, and Policy*, MIGRATION POL'Y INST. 3, <http://www.migrationpolicy.org/pubs/Immigration-and-the-Labour-Market.pdf> (last visited Apr. 16, 2011) (noting that the practical effect of immigration on average wages of all workers is fairly small).

225. See *id.*

226. Uma Segal, *United States: The Changing Face of the United States of America*, in IMMIGRATION WORLDWIDE: POLICIES, PRACTICES, AND TRENDS 32 (Uma A. Segal, Doreen Elliott & Nazneen S. Mayadas eds., 2010).

227. Cf. Demetrios G. Papademetriou, Doris Meissner, Marc R. Rosenblum & Madeleine Sumption, *Aligning Temporary Immigration Visas with US Labor Market Needs*, MIGRATION POL'Y INST. (July 2009), available at

States. According to the U.S. State Department, 424,371 H-type visas were granted in 2007; two years later only 278,168 H-type visas were given.<sup>228</sup> Temporary workers of distinguished merit and ability to perform services other than as a registered nurse (H1B) were awarded 110,367 visas; 621 visas were granted to free-trade agreement professionals (H1B1); 128 shortage area nurses obtained visas (H1C); 60,112 visas were given to temporary agricultural workers (H2A); and 44,847 visas were permitted for temporary workers performing other services (H2B).<sup>229</sup>

Recognized U.S. deficiencies in engineering, for example, cannot be quickly remedied except through talent importation by immigration.<sup>230</sup> A study of the budgetary effects of recruiting foreign STEM students who remain in the United States upon graduation shows significant positive effects on the U.S. economy.<sup>231</sup> The United States would meet some significant labor shortages and be able to tax the earnings at a fairly high rate.<sup>232</sup>

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[http://www.migrationpolicy.org/pubs/Provisional\\_visas.pdf](http://www.migrationpolicy.org/pubs/Provisional_visas.pdf) (noting that the U.S. visa system does not keep pace with the market for immigrant workers).

228. *Table XVI(A): Classes of Nonimmigrants Issued Visas (Including Crewlist Visas and Border Crossing Cards) Fiscal Years 2005–2008*, U.S. DEP'T OF STATE (2009), [http://www.travel.state.gov/pdf/FY09AnnualReport\\_TableXVI\\_A.pdf](http://www.travel.state.gov/pdf/FY09AnnualReport_TableXVI_A.pdf).

229. *Table XVI(B): Nonimmigrants Issued Visas (Including Crewlist Visas and Border Crossing Cards) Fiscal Years 2005–2008*, U.S. DEP'T OF STATE (2009), [http://www.travel.state.gov/pdf/FY09AnnualReport\\_TableXVI\\_B.pdf](http://www.travel.state.gov/pdf/FY09AnnualReport_TableXVI_B.pdf); *see also*, generally FIGURE 3, *infra* p. 194.

230. Lechner et al., *supra* note 20 (observing that any meaningful shift in numbers for engineering and hard-science degrees is at least ten to fifteen years away).

231. *See* Arlene Holen, *The Budgetary Effects of High-Skilled Immigration Reform*, TECH. POL'Y INST. 10–11 (2009), <http://www.techpolicyinstitute.org/files/the%20budgetary%20effects%20of%20high-skilled%20immigration%20reform.pdf> (stating that approximately 193,000 STEM graduates have recently left the United States due to immigration restrictions and asserting that those graduates would have helped improve the national gross domestic product had they been allowed to remain here).

232. *See generally* FIGURE 3, *infra*, p. 194.

FIGURE 3<sup>233</sup>**STEM Degrees Awarded to Nonresident Aliens**

	2003	2004	2005	2006	2007	Total
Bachelor's	27,226	28,641	29,221	29,392	28,911	143,391
Master's	51,315	54,089	51,885	50,473	47,505	255,267
Doctor's	7,580	8,610	9,830	11,288	12,224	49,532
						448,190

**Status Following Graduation**

	<i>Adjusted to Green Card</i>	<i>Adjusted to H-1B</i>	<b>Left United States/ Pursued Further Education</b>
Bachelor's	30%	70%	
Master's	30%	20%	50%
Doctor's	25%	45%	30%

**2008 Potential Earnings of Graduates Who Would Have Remained in the Absence of Immigration Constraints** (*Assuming an Annual Emigration Rate of 3.2%*):

	<u>Individual</u>	<u>Total</u>
Income	\$75,000	\$13,647 million

**Federal Tax Receipts Forgone in 2008 based on a Tax Policy Center Model in Leierson 2006** (Table 1):

<i>a</i>	Personal	FICA	Total
Tax liability	\$9,000	\$11,000	\$3,639 million

**Based on CBO 2007b** (Table 1).

<i>b</i>	Household Earnings	Effective Tax Rate	Total
Tax liability	\$84,500	17.3%	\$2,660 million

As paltry as the U.S. work visa limits are, the European Union has been even less proactive in targeting immigrants;<sup>234</sup> some reports indicate that the EU netted only five percent of the highly skilled.<sup>235</sup> In North America, only Canada has liberalized its immigration laws and processes, actively recruiting technology profes-

233. Holen, *supra* note 231, at 29.

234. See Gil S. Epstein, Astrid Kunze & Melanie E. Ward, *High-Skilled Migration and the Exertion of Effort by the Local Population*, 56 SCOT. J. POL. ECON. 332, 335 (2009).

235. E.g., Stefan Theil, *The Incredible Shrinking Continent*, NEWSWEEK, Feb. 19, 2010, <http://www.newsweek.com/2010/02/18/the-incredible-shrinking-continent.html>.

sionals.<sup>236</sup> It reports significant positive impacts.<sup>237</sup> Whether nativism or its corollary—racism—accounts for this underutilization of immigrants is not clear.<sup>238</sup>

The existence of a law that is not enforced, unenforceable, or discriminatorily enforced is the antithesis of the rule of law.<sup>239</sup> This trifecta disincentivizes compliance, it devalues legislative purpose,<sup>240</sup> and it teaches the community to generalize its disobedience to other under-enforced laws.<sup>241</sup> It typically coincides with harsh and discriminatory enforcement.<sup>242</sup> Although federal immigration law in the United States has devolved into local officers asking traffic violators for identification, there are myriad instances where those charged with enforcing the law cast a blind eye toward the possibility that the man or woman in a courtroom is illegally present in the United States.

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236. Jeffrey G. Reitz, *Tapping Immigrants' Skills: New Directions for Canadian Immigration Policy in the Knowledge Economy*, 11 L. & BUS. REV. AMS. 409, 414 (2005).

237. See *Annual Report to Parliament on Immigration, 2010*, CITIZENSHIP AND IMMIGRATION CANADA (2010), [http://www.cic.gc.ca/English/resources/publications/annual-report2010/section2.asp#part2\\_1](http://www.cic.gc.ca/English/resources/publications/annual-report2010/section2.asp#part2_1).

238. See, e.g., Philip Oreopoulos, *Why Do Skilled Immigrants Struggle in the Labor Market? A Field Experiment with Six Thousand Resumes* 24 (Nat'l Bureau of Econ. Research, Working Paper No. 15036, 2009) (finding employers responded more positively to applicants with nearly identical resumes where names "sounded" Canadian, and professional experience was domestic, not international).

239. Cf. Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1719 (2006) ("Underenforcement is one way the state participates in social contests over resources, power, and legitimacy by staying [or applying] its enforcement hand in selective ways.").

240. See, e.g., Daniel T. Ostas, *Cooperate, Comply, or Evade? A Corporate Executive's Social Responsibilities with Regard to Law*, 41 AM. BUS. L.J. 559, 573 (2004) (citing law and economics adherents Chief Judge Frank Easterbrook and Daniel Fischel's classic argument that firm managers sometimes face incentives to breach contracts where efficient).

241. E.g., Teresa Edwards, *The Relocation of Production and Effects on the Global Community*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 183, 190 (2002) (discussing environmental laws that are enforced less in countries that compete for business in the international forum).

242. Lori A. Nessel, *Families at Risk: How Errant Enforcement and Restrictionist Integration Policies Threaten the Immigrant Family in the European Union and the United States*, 36 HOFSTRA L. REV. 1271, 1273–74, 1281–84 (2008); see also Ediberto Roman, *The Alien Invasion?*, 45 HOUS. L. REV. 841, 843–44 (2008) (noting that media, political, and academic figures use attacks aimed mostly at Latino immigrant groups crossing the Mexican border, as opposed to other groups of immigrants).

#### **IV. CONCLUSION**

Completely open borders are too radical for even the most liberal state. But something much closer to the laissez-faire economic approach to immigration might prove essential to remaining competitive and compassionate. Each attribute is the essence of the United States and the EU. More immigration means fewer unfilled jobs and more industrial, scientific, and medical leadership. It might reduce crime. It will increase international esteem. Immigrants who are welcome and open will become legal, and legally protected stakeholders in their chosen countries.