Title
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THE DISCRETION THAT MATTERS: FEDERAL IMMIGRATION ENFORCEMENT, STATE AND LOCAL ARRESTS, AND THE CIVIL–CRIMINAL LINE

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This Article starts by analyzing the conventional wisdom, crystallized in the Ninth Circuit's 1983 decision in Gonzales v. City of Peoria, *that state and local law enforcement officers do not require express federal authorization to make arrests for criminal violations of federal immigration law. This view, I explain, is based on overreliance on the line between civil and criminal. Even if a state or local arrest for an immigration crime still leaves federal prosecutors with substantial discretion not to bring criminal charges, it is highly likely that the federal government will force arrestees to leave the United States through the civil removal system, where much less discretion has been exercised. In immigration law, the discretion to arrest has been the discretion that matters. As long as this remains true, state and local arrest authority for immigration crimes reflects assumptions that have the potential to supersede much federal control over immigration enforcement. This consequence of state and local arrests assumes great practical importance when the lessons from* Gonzales *are applied to federal programs—such as § 287(g) agreements and Secure Communities—in which state and local nonimmigration arrests expose noncitizens to federal immigration enforcement. Though federal decisionmakers may exercise greater and more regularized discretion in response to a larger state and local role, such federal discretion will be fundamentally reactive. Any federal policy that allows state and local governments to be gatekeepers—to permit state and local priorities to decide which noncitizens will be exposed to federal immigration enforcement—risks abdication of federal authority over immigration.*

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INTRODUCTION

Peoria is a suburb of Phoenix that lies mainly in Maricopa County, Arizona. Peoria currently has a population of over 140,000,[1] and Maricopa County is the source of considerable immigration-related news and controversy, much of it involving its sheriff, Joe Arpaio.[2] But back in 1983, when Peoria was a much smaller community of just over 12,000 inhabitants,[3] it was the locale for the Ninth Circuit decision in *Gonzales v. City of Peoria*.[4] That case is routinely cited for the following proposition: State and local law enforcement officers may make arrests for violations of the criminal provisions of federal immigration law without express federal authorization, as long as state and local law authorizes the arrest and probable cause exists. Put more plainly, federal law does not preempt state or local arrests for federal immigration crimes.

1. *See* U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS, http://quickfacts.census.gov/qfd/states/04/0454050.html (last revised July 8, 2009).

2. *See, e.g.*, Marc Lacey, *Despite Setbacks, Arizona Sheriff Won't Yield the Spotlight*, N.Y. TIMES, Apr. 15, 2011, at A12.

3. *See* U.S. CENSUS BUREAU, 1980 CENSUS OF POPULATION, CHARACTERISTICS OF POPULATION, NUMBER OF INHABITANTS ARIZONA 4–12 tbl.5 (reporting that Peoria had 12,251 inhabitants in 1980).

4. 722 F.2d 468 (9th Cir. 1983), *overruled in part on other grounds by* Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999).

This Article explains why the reasoning and conclusion in *Gonzales* are troubling, and why this matters. This focus on one federal appeals court decision may seem narrow, but *Gonzales* is an especially revealing case. It was decided at the early stages of two major immigration law enforcement trends of this generation. One trend is the expanding state and local role. The other is the more frequent reliance on criminal law. An assessment of *Gonzales* sheds light not only on these trends, but also on the nature of immigration enforcement generally.

Much has been written about the role of states and localities in immigration—a concept often labeled immigration federalism—and on the relationship between criminal law and immigration law. On immigration federalism, commentators have addressed the question of whether state and local law enforcement officers have the inherent authority to make arrests for civil violations of federal immigration law,[5] as well as questions about the validity of state and local laws that address immigration or immigrants through education, employment, housing, or similar matters.[6] On the relationship between criminal law and immigration law, commentators have addressed the immigration consequences of criminal convictions;[7] the dramatic increase in federal criminal prosecutions for federal immigration violations;[8] and the emergence of state and local criminal laws that textually follow, mimic, or mirror federal immigration laws.[9] Despite this attention, very few scholars have examined how immigration federalism is affected by the relationship between criminal law and immigration law, or why this relationship is significant.

Filling this gap, this Article uses *Gonzales* to illuminate three interwoven aspects of immigration enforcement in the state and local context. The first

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5. *See* Non-Preemption of the Auth. of State & Local Law Enforcement Officials to Arrest Aliens for Immigration Violations, 26 Op. O.L.C. 1 (2002), *available at* http://www.aclu.org/FilesPDFs/ACF27DA.pdf; Assistance by State & Local Police in Apprehending Illegal Aliens, 20 Op. O.L.C. 26 (1996).

6. This topic has attracted a body of scholarship too voluminous to catalog here. Some of my own thinking on this subject is set out in Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2055–65, 2070–83 (2008).

7. *See, e.g.*, DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

8. *See generally* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281–83, 1353 fig.4 (2010); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post–September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 654–55 (2004).

9. *See generally* Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. (forthcoming 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648685; Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749 (2011).

of these is the allocation of immigration authority among federal, state, and local governments. Who makes the decisions that give content to immigration law in action? The second is the exercise of discretion in immigration enforcement at the arrest and prosecution stages. What is the enforcement discretion that matters? The third is the distinction between arrests for civil and for criminal violations of federal immigration law. How does the civil–criminal line define the contours of state and local arrest authority?

To answer these questions, I rely initially on a snapshot of immigration enforcement from federal fiscal year 2009, the most recent year for which full federal data were available as this Article went to press in late July 2011. But the choice of 2009 reflects more than just data availability; that year provides a crossroads vantage point for looking both back and forward in time. Today, the state and local role in immigration enforcement is expanding, with new patterns emerging. This Article offers guidance for the key choices that federal decisionmakers face in this new period.

Part I starts with an overview of the *Gonzales* decision. Part II then looks at prosecutorial discretion in immigration law and criminal law, noting key similarities and differences. In criminal law, meaningful discretion is exercised at various stages. In immigration law, however, the decision to make an arrest has been the discretion that matters. Part III next looks at the civil–criminal line in the context of state and local authority to enforce federal immigration laws. Conferring greater state and local arrest authority for criminal violations of federal immigration law is based on the misleading assumption that such arrests will funnel cases into the federal criminal justice system. In fact, state and local criminal arrests are just as likely to trigger federal civil removal. This allows state and local police to use arrest powers to decide who will be exposed to federal immigration enforcement. They become the gatekeepers, especially if federal priorities have little or no tempering effect on state and local arrest patterns that reflect political dynamics at state and local levels.

Part IV expands the discussion to broader implications for immigration enforcement. Rethinking the conventional wisdom in *Gonzales* raises serious questions about federal programs—such as Secure Communities and agreements under Immigration and Nationality Act § 287(g)—that expressly involve state and local governments in federal immigration enforcement. If state and local governments can make arrests that expose removable noncitizens to an immigration enforcement system in which federal officials exercise little discretion, the federal government may be abdicating much of its authority over immigration enforcement. To be sure, this expansion of the practical ability of state and local governments to initiate removal will put political pressure

on federal decisionmakers to assert greater post-arrest enforcement discretion. But even if they do so, federal discretion will be merely reactive within an enforcement system largely driven by state and local actors.

I. *GONZALES V. CITY OF PEORIA*

The plaintiffs in *Gonzales* were eleven individuals of Mexican ancestry.[10] One was a U.S. citizen, and three were Mexican citizens living in the United States as lawful permanent residents. The decision identified the seven others as "citizens and permanent residents of Mexico who migrate to Maricopa County, Arizona to harvest citrus crops."[11] The eleven plaintiffs alleged that over a period of four years, from 1977 to 1981, Peoria police officers "engaged in the practice of stopping and arresting persons of Mexican descent without reasonable suspicion or probable cause and based only on their race and appearance."[12] The plaintiffs sued the City and some of its officials and police officers, detailing how the officers had stopped, questioned, and detained them. The arrests took place in the parking lots of supermarkets, the U.S. Post Office, and a shopping center, where officers had stopped the plaintiffs because they "fit the profile of an illegal alien," or because of "suspicious behavior."[13] The plaintiffs alleged that the officers, acting pursuant to city policies, had violated the U.S. Constitution's Fourth and Fourteenth Amendments as well as the Civil Rights Act of 1871.[14]

Among the issues in the case, the one of concern here is: "Do the Peoria City Police have authority under state and federal statutes to arrest for violations of immigration law?"[15] The plaintiffs argued that immigration enforcement was an exclusively federal matter, and that state and local police were therefore barred from making immigration law arrests.[16] The Ninth Circuit panel responded by noting that the City of Peoria only asserted the power to enforce the criminal provisions of federal immigration law, in particular 8 U.S.C. § 1325.[17] According to that section, an alien is guilty of a federal misdemeanor when the alien "(1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes

10. Gonzales v. City of Peoria, 537 F. Supp. 793 (D. Ariz. 1982), *aff'd*, 722 F.2d 468 (9th Cir. 1983), *overruled in part on other grounds by* Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999).
11. *Id.* at 794.
12. 722 F.2d at 472.
13. *Id.* at 478–79.
14. *Id.* at 472.
15. *Id.*
16. *Id.* at 474.
17. *Id.*

examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact . . . ."[18]

The Ninth Circuit assumed for the sake of analysis that local enforcement is precluded when federal regulation is so pervasive that no opportunity for state activity remains."[19] It explained that "the *civil* provisions of the [Immigration and Nationality] Act regulating authorized entry, length of stay, residence status, and deportation, constitute . . . a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration."[20] But the Act's criminal provisions, the court reasoned, "are few in number and relatively simple in their terms. They are not, and could not be, supported by a complex administrative structure. It therefore cannot be inferred that the federal government has occupied the field of criminal immigration enforcement."[21]

The *Gonzales* court emphasized that its holding was limited to criminal federal immigration violations.[22] This line between civil and criminal was based on ample precedent that had generally established, outside the immigration context, that state and local law enforcement officers may make arrests for federal crimes, assuming that state and local law authorizes them to do so.[23] The court was careful to observe that the U.S. Constitution requires probable cause for an arrest, and that Arizona law allows law enforcement officers to make misdemeanor arrests based on probable cause.[24] But the Ninth Circuit concluded that when these prerequisites are met, federal law allows local enforcement of the criminal provisions of federal immigration law.[25]

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18. Immigration and Nationality Act (INA) § 275, 8 U.S.C. § 1325 (2006). Most immigration lawyers refer to provisions by INA section numbers; prosecutors and defense lawyers more commonly use the 8 U.S.C. numbering. This Article provides citations from both the INA and 8 U.S.C. to reflect this practice.

19. *Gonzales*, 722 F.2d at 474.

20. *Id.* at 474–75 (emphasis added).

21. *Id.* at 475.

22. *Id.* at 476.

23. *See* Ker v. California, 374 U.S. 23, 31 (1963); Miller v. United States, 357 U.S. 301, 305 (1958); Johnson v. United States, 333 U.S. 10, 15 & n.5 (1948); United States v. DiRe, 332 U.S. 581, 589 (1948); United States v. Bowdach, 561 F.2d 1160, 1168 (5th Cir. 1977).

24. 722 F.2d at 476–77; *see also* U.S. CONST. amends. IV, XIV; 42 U.S.C. § 1983 (2006).

25. 722 F.2d at 475 ("[F]ederal law does not preclude local enforcement of the criminal provisions of the [Immigration and Nationality] Act."). In reaching this conclusion, the court rejected the argument that the text of 8 U.S.C. § 1324(c), by expressly authorizing state and local law enforcement officers to enforce federal criminal provisions prohibiting the transporting and harboring of certain aliens, and impliedly limited the authority of state and local officers to make arrests for violations of 8 U.S.C. §§ 1325 or 1326. *See id.* (following People v. Barajas, 147 Cal. Rptr. 195, 198–99 (Ct. App. 1978)).

Over the years, much more controversy has surrounded a related question: Do state and local officers have the inherent authority to arrest individuals for *civil* violations of federal immigration law?[26] Those who address this related question typically start by citing the criminal immigration arrest authority under *Gonzales* as assumed background.[27]

Perhaps because of this role in immigration federalism—more one of assumption than analysis—*Gonzales* has not attracted much scholarly scrutiny, with a few thoughtful exceptions.[28] Critics of *Gonzales*, most recently Huyen Pham and Michael Wishnie writing independently, have questioned the logic of a civil–criminal line for preemption purposes. One objection is that federal immigration crimes are more numerous and intertwined with civil provisions than *Gonzales* acknowledged.[29] This point is even more persuasive in light of Ingrid Eagly's fresh analysis of the recent dramatic increase in federal criminal prosecutions for immigration violations.[30] A second objection is that arrests for criminal violations may practically open the door to arrests for civil violations. The reasoning is that untrained state and local officers may be unable to distinguish the civil violation of mere unlawful presence from the probable cause required to make an arrest for the crime of misdemeanor unlawful entry.[31]

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26. *Compare* Assistance by State & Local Police in Apprehending Illegal Aliens, *supra* note 5, at 32 ("State and local police lack recognized legal authority to stop and detain an alien *solely on suspicion of civil deportability*, as opposed to a criminal violation of the immigration laws or other laws."), *with* Non-Preemption of the Auth. of State & Local Law Enforcement Officials to Arrest Aliens for Immigration Violations, *supra* note 5, at 1–2 (withdrawing the analysis of civil enforcement in the 1996 OLC opinion, and concluding that state and local arrest authority extends to both civil and criminal violations of federal immigration law). *See generally* THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1015–27 (6th ed. 2008).

27. For decisions that uphold state or local arrest authority in the context of criminal violations but without expressly distinguishing criminal from civil immigration violations, see United States v. Santana-Garcia, 264 F.3d 1188, 1194 (10th Cir. 2001); United States v. Vasquez-Alvarez, 176 F.3d 1294, 1297–1300 (10th Cir. 1999); United States v. Salinas-Calderon, 728 F.2d 1298, 1301 & n.3 (10th Cir. 1984).

28. *See* Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 977–78 (2004); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1090–93 (2004); *see also* Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 979–82 (1995); Linda Reyna Yañez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 HISP. L.J. 9, 21–31 (1994); Cecilia Renn, Comment, *State and Local Enforcement of the Criminal Immigration Statutes and the Preemption Doctrine*, 41 U. MIAMI L. REV. 999, 1014–22 (1987).

29. *See* Pham, *supra* note 28, at 978; Wishnie, *supra* note 28, at 1093 n.53; Yañez & Soto, *supra* note 28, at 27–29.

30. *See* Eagly, *supra* note 8.

31. *See* Pham, *supra* note 28, at 978 & n.68; *see also* Manheim, *supra* note 28, at 982; Renn, *supra* note 28, at 1018–19.

The essence of *Gonzales* is its expansion of state and local arrest authority on the condition that the arrest is for a criminal immigration violation. Like other critics of the decision, I am unconvinced by its conceptual lynchpin: the line between civil and criminal. But I also believe that the reasons for skepticism go well beyond the question of whether the criminal provisions of federal immigration law preempt state and local enforcement because they are comprehensive, or because civil and criminal immigration violations are hard to distinguish in practice. The problems with *Gonzales* run much deeper and matter more broadly than the decision's basic holding.

More fundamentally, analyzing *Gonzales* exposes core misconceptions about immigration enforcement. A key lesson from this analysis is that the federal government abdicates much of its immigration authority when it allows state and local governments to decide which potentially removable noncitizens to bring into contact with federal immigration enforcement. The magnitude of this problem does not depend on the number of state and local arrests based on *Gonzales*. Though no relevant data seem to be available, the number of such *Gonzales* arrests may be small. The real problem is that the misconceptions underlying *Gonzales* pervade other aspects of immigration enforcement. As Part IV explains, these fundamental flaws have become evident in light of more recent developments, especially federal authorization of state and local enforcement activity under Immigration and Nationality Act (INA) § 287(g) and the Department of Homeland Security's (DHS) Secure Communities initiative. This is why analyzing *Gonzales* sheds light not only on immigration enforcement and the civil–criminal line, but also on immigration federalism in general.

II. ENFORCEMENT DISCRETION IN IMMIGRATION LAW—AND IN CRIMINAL LAW

Much of the broad acceptance of *Gonzales*[32] can be attributed to overlooking two key aspects of immigration law, both relating to enforcement discretion. For this purpose, I define discretion broadly to include not only decisions to proceed against identified individuals, but also systemic choices to commit resources and to set priorities. First, the enforcement discretion that matters in immigration law has been in deciding who will be arrested—not in deciding who, among those arrested, will be prosecuted. Second, arrests for criminal violations of federal immigration law open up the possibility not only

32. 722 F.2d 468 (9th Cir. 1983), *overruled in part on other grounds by* Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999).

of criminal prosecutions, but also of civil removal proceedings. In fact, civil removal is more likely than criminal prosecution.

Unpacking these two features of immigration enforcement requires analyzing the stages of enforcement discretion in immigration law and criminal law cases. The following diagram frames the inquiry by posing the question of when decisions are made as time progresses (from left to right).[33] Examining these stages illuminates not only when discretion matters, but who exercises it—federal or state and local decisionmakers?

FIGURE 1. Stages of Enforcement Discretion

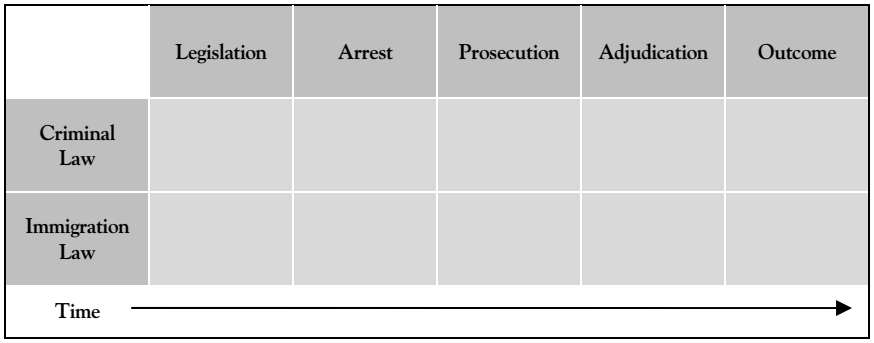

Figure 1 depicts in simple terms how the imposition of penalties for criminal law or immigration law violations starts with the decision to legislate. This defines the offending conduct and some sort of penalty, in either general or specific terms. A government officer must next decide whether to arrest or otherwise expose an individual to the penalties authorized by legislation. The third stage involves the decision whether to prosecute the individual, or instead to seek some alternative disposition or drop the matter entirely. Fourth, decisionmakers must adjudicate the prosecuted cases, determining whether a violation has occurred and, if so, what penalty to impose, if any. The fifth stage is the actual outcome. A sentence after a guilty verdict in a criminal case may be carried out, or it might be commuted. A noncitizen who is issued a civil removal order may or may not actually leave the United States.

33. This diagram is suggested by the analysis in William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001). *See also* WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE THE SUSPECT INTO CUSTODY 64–81 (1965).

A. Legislation

What legislation is relevant when a state or local law enforcement officer exercises criminal arrest authority under *Gonzales*? Recent estimates put the unauthorized population of the United States at around 11.2 million.[34] Roughly 40 percent—about 4.5 million—are believed to have entered lawfully—perhaps as a student, tourist, or some other type of nonimmigrant status—but then overstayed or otherwise violated a condition of admission. These noncitizens are typically deportable—and therefore removable from the United States—under INA § 237(a)(1)(C)(i) for violating a condition of admission.[35] Without more, however, they have committed no federal crime.

The other 60 percent—about 6.7 million unauthorized migrants—are believed to have entered without inspection at a port of entry.[36] Unlawful entry is a misdemeanor criminal offense under 8 U.S.C. § 1325.[37] It also makes a noncitizen removable as a civil matter under INA § 212(a)(6)(i). This latter provision makes noncitizens inadmissible—and therefore removable—if they are in the United States without first presenting themselves at a border crossing or other port of entry.[38] These unlawful entrants are often called EWIs, short for entrants without inspection.

To be sure, unlawful entry is not the only immigration-related federal crime. Another is unlawful reentry after a prior removal order.[39] Moreover, noncitizens who work without authorization may have committed various identity theft offenses, such as possessing or using a false immigration document, or falsely representing a social security number as one's own.[40] These offenses may be committed by unauthorized migrants who earlier committed the crimes

34. *See* JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., U.S. UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 1 (2011) (estimating the total U.S. unauthorized population at 11.2 million as of March 2010). For an earlier, similar estimate, see MICHAEL HOEFER, NANCY RYTINA & BRYAN C. BAKER, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, at 1 (2010) (estimating the U.S. unauthorized population at 10.8 million as of January 2009).

35. INA § 237(a)(1)(C)(i), 8 U.S.C. § 1227(a)(1)(C)(i) (2006). Deportability grounds, set forth in INA § 237(a), apply only to noncitizens who have been admitted. *See generally* ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 26, at 508–11.

36. *See* ANDORRA BRUNO, CONG. RESEARCH SERV., UNAUTHORIZED ALIENS IN THE UNITED STATES 1–2 (2010) (summarizing prior estimates of this percentage).

37. INA § 275, 8 U.S.C. § 1325.

38. *Id.* § 212(a)(6)(i), 8 U.S.C. § 1182(a)(6)(i) (making inadmissible any "alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General").

39. *See id.* § 276, 8 U.S.C. § 1326.

40. *See, e.g.*, 18 U.S.C. § 1546(a) (2006) (possession or use of a false immigration document); 42 U.S.C. § 408(a)(7) (2006) (false representation of a Social Security number).

of unlawful entry or reentry, or by unauthorized migrants whose violations are civil, having been admitted but later falling out of lawful status. In recent years, the federal government has filed an increasing number of these immigration-related criminal charges for crimes other than unlawful entry.[41]

Though these other criminal charges might be brought, my purpose here is to define in rough terms the universe of persons whom state and local law enforcement officers could arrest under *Gonzales* for a federal immigration crime. This definition requires acknowledging one further nuance. State laws set out varying prerequisites for misdemeanor arrests. Arizona requires probable cause,[42] but in some other states, the arresting officer must actually observe a violation.[43] These requirements may reduce the number of authorized *Gonzales* arrests, but they do not change the fact that 6.7 million EWIs is the best—though very rough—estimate of the potential reach of *Gonzales* arrests.

B. Arrest

Arrest is the second stage of enforcement discretion. A central point in my analysis is that arrest has been the stage of discretion that matters. Again, I use the term discretion in the broad sense that includes systemic choices. Some are very general, such as a decision to fund border or interior enforcement at varying levels of intensity. Other systemic choices are more targeted, such as a decision to raid a particular workplace, or to track down an individual noncitizen who has failed to appear for removal after being ordered to do so. The combined consequence is that only a small fraction of EWIs are arrested in any year. Overall, the available statistics suggest less than a 10 percent chance that any EWI will be arrested in the U.S. interior in any given year. The vast majority of unauthorized migrants are never arrested, let alone put in removal proceedings. Given the overall odds, those who are arrested would seem to be especially unlucky.

Supporting data for this conclusion are admittedly elusive. Focusing first on federal arrests, the federal DHS reported 613,003 "Border Patrol apprehensions and [Immigration and Customs Enforcement] administrative arrests"

41. *See* Eagly, *supra* note 8, at 1281–83, 1353 fig.4. If state and local officers do not have inherent arrest authority for the immigration crime of unlawful entry, questions beyond the scope of this Article will arise about state and local arrest authority for more serious immigration-related crimes—such as producing counterfeit identity documents—that may more closely resemble common criminal offenses.

42. ARIZ. REV. STAT. ANN. § 13-3883(5) (2010).

43. *See generally* Atwater v. City of Lago Vista, 532 U.S. 318, 344 n.12 (2001) (listing state statutes delineating misdemeanor arrest authority of law enforcement officers).

in federal fiscal year 2009.[44] However, this figure of 613,003 out of the estimated 6,700,000 EWIs in the United States exaggerates an EWI's actual chances of arrest. First, included in these apprehensions and administrative arrests are noncitizens who were inspected and admitted (or paroled) into the United States, and whose unlawful presence, without more, is not a federal crime.[45] Second, this figure exaggerates the overall possibility of arrest because many of the 613,003 apprehensions and arrests occurred in border areas, where the same individuals may have been arrested more than once. Third, estimating the actual chances that an EWI will be arrested after joining the estimated population of 6.7 million inside the United States requires subtracting Border Patrol arrests at the border. Of the 613,003 apprehensions and arrests, the Border Patrol was responsible for 556,032 of them.[46] Though the Border Patrol makes some arrests far from the border,[47] it usually does not. Immigration and Customs Enforcement (ICE) agents, who bear general responsibility within the federal government for interior immigration enforcement, made only 56,971 arrests in 2009.[48]

Another challenge is estimating how many state and local arrests should be added to the federal arrest figures to refine the estimated overall arrest rate. Few relevant data are available. In 2009, there were about 72,000 state and local arrests pursuant to INA § 287(g) agreements.[49] Research reveals no meaningful data on arrests based on *Gonzales* or on claims of inherent state or local authority to make arrests for civil violations of federal immigration law.[50] Nothing known about the number of state and local arrests alters the general picture that emerges from 613,003 federal arrests and apprehensions as compared to millions of potential arrestees.

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44. *See* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2009 YEARBOOK OF IMMIGRATION STATISTICS 91 tbl.33 (2010) [hereinafter 2009 DHS YEARBOOK OF IMMIGRATION STATISTICS]. Throughout this Article, statistics for a particular year refer to the federal fiscal year.

45. Parole refers to the government practice of allowing noncitizens physically into the United States while continuing to treat them, for immigration law purposes, as if they are outside the United States. *See* INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (2006); ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 26, at 663–65.

46. *See* 2009 DHS YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 44, at 93 tbl.35.

47. *See* INA § 287(a)(3), 8 U.S.C. § 1357(a)(3) (defining the geographic reach of arrest authority of immigration officers as within a "reasonable distance from an external boundary of the United States"); 8 C.F.R. § 101.1(b) (defining immigration officers); *id.* § 287.1 (defining "reasonable distance" as one hundred air miles).

48. *See* 2009 DHS YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 44, at 93 tbl.35.

49. U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., OIG-10-63, THE PERFORMANCE OF 287(G) AGREEMENTS 6 tbl.2 (2010), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-63_Mar10.pdf.

50. *See* Non-Preemption of the Auth. of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations, *supra* note 5.

The overall arrest rate is low for exceedingly complex reasons, full discussion of which is beyond the scope of this Article.[51] My main point for this part of the analysis is more straightforward: The arrest rate is low. But several aspects of the low arrest rate deserve mention. In a few select cases, DHS has identified particular individuals as potentially removable from the United States, yet has decided formally not to arrest and or try to remove them. For example, DHS may designate some cases for "deferred action" status.[52] But specific, affirmative decisions not to arrest identified removable individuals have been exceptional.

For the much greater number of unauthorized migrants who simply remain unidentified, the low arrest rate partly reflects the level of resources committed to apprehending unauthorized migrants. A massive and sustained commitment of resources would be necessary—though probably not sufficient—to apprehend the 6.7 million arrestees under *Gonzales* for entry without inspection, or for that matter, the 11.2 million unauthorized migrants who could be apprehended and placed in civil removal proceedings. Though hiring more ICE or Border Patrol agents would presumably increase federal arrest capacity, it is sobering to consider a cost estimate in a study initiated by James Ziglar when he was the commissioner of the Immigration and Naturalization Service (INS) under President George W. Bush. The study, conducted in 2002 but not widely publicized until 2011, concluded that INS funding would be adequate to meet congressional enforcement mandates only with a sevenfold increase to $46 billion.[53] And that was almost a decade ago, when the unauthorized population was an estimated 9.4 million, or 1.8 million fewer than today.[54] Moreover, a much greater commitment of resources to immigration enforcement would not necessarily increase the number of arrests proportionally. The arrest rate for unauthorized migrants depends on many other factors, including choices about where to direct resources—to the border and ports of entry or the interior, to the border with Mexico or Canada,

51. *See generally* Motomura, *supra* note 6, at 2049–55.

52. *See* ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 26, at 778–80; Robert Hopper & Juan P. Osuna, *Remedies of Last Resort: Private Bills and Deferred Action Status*, IMMIGR. BRIEFINGS, June 1997, at 10–15; Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819, 822–23 (2004). For early general guidelines for the exercise of prosecutorial discretion, including arrest discretion, see Memorandum From Doris Meissner, Comm'r, Immigration & Naturalization Serv., on Exercising Prosecutorial Discretion (Nov. 17, 2000) [hereinafter Meissner Memorandum], *available at* http://www.scribd.com/doc/22092970/INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.

53. *See* James W. Ziglar & Edward Alden, *The Real Price of Sealing the Border*, WALL ST. J., Apr. 8, 2011.

54. *See* PASSEL & COHN, *supra* note 34, at 9 tbl.2.

to arrests at worksites or bus stations, to certain worksites but not others, and to some regions but not others.

Even more fundamentally, the chronic and knowing underenforcement of immigration law has been an essential part of U.S. immigration history for over a century.[55] This is true even though federal policies have put on a stern public face through visible signs of enforcement. Expressions of strong enforcement include formidable, technologically sophisticated border fencing and worksite raids—especially during President George W. Bush's second term—that visited severe hardships on the migrants in the interior.[56] Though such enforcement is very real and not just symbolic, it remains selective and often reflects domestic political pressures more than judgments about where enforcement might yield higher arrest rates.[57] Whether this history of underenforcement can fairly be called de facto U.S. federal policy is an intricate inquiry that centers on the history of labor migration to the United States. Especially crucial has been the emergence of Mexico starting in the early twentieth century as a source of flexible, compliant, and cheap labor.[58] This, too, is an inquiry beyond the scope of this Article, but these complexities underlying the arrest rate do not change the key fact for this analysis—that the arrest rate remains low.

Acknowledging that arrest and eventual removal are unlikely has been commonplace in informed assessments of U.S. immigration law over the past generation. For example, the 1982 U.S. Supreme Court decision in *Plyler v. Doe*[59] established that no state can limit access to K–12 public education based on a child's immigration status.[60] A key factor in the Court's reasoning was that unlawful presence in the United States has little to do with whether an unauthorized migrant is actually deported. Justice Brennan wrote for the majority that "the confluence of Government policies has resulted in

55. Motomura, *supra* note 6, at 2049–54.

56. *See* PETER ANDREAS, BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE 111 (1st ed. 2000) (suggesting that a "winning image" has become a politically viable alternative to successful enforcement); JOSEPH NEVINS, OPERATION GATEKEEPER: THE RISE OF THE ILLEGAL ALIEN AND THE MAKING OF THE US-MEXICO BOUNDARY 10 (2002) ("Perhaps most important, from the perspective of political elites, [Operation Gatekeeper] has been very successful in creating the image of a secure boundary . . . .").

57. *See* David A. Martin, *Eight Myths About Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 525, 545 (2007) ("Border measures . . . step on almost no influential toes. Border crackdowns are therefore used to demonstrate enforcement seriousness, alienating few and placating many. But focusing only on the border is an ineffective way to master our enforcement problems. The key fulcrum for effectiveness is the workplace.").

58. For fuller discussion, see HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 47–48, 176–80 (2006); Motomura, *supra* note 6, at 2049–55.

59. 457 U.S. 202 (1982).

60. *Id.* at 230.

'the existence of a large number of employed illegal aliens . . . whose presence is tolerated, whose employment is perhaps even welcomed . . . .'"[61] True today as a generation ago, the arrest and deportation of any particular unauthorized migrant is predictably improbable.

In short, a tremendous amount of enforcement discretion is exercised at the arrest stage. Moreover, *Gonzales* reflects the assumption that state and local authority to exercise this arrest discretion depends on whether a federal immigration violation is criminal or civil. But this civil–criminal line yields a misguided definition of state and local arrest authority, and it threatens a troubling abdication of federal decisionmaking responsibility. To explain why, I reach the next question: What enforcement discretion do federal government officials exercise after an arrest?

C. Prosecution

After a noncitizen who appears to be removable is arrested, the exercise of discretion remains broad in theory. DHS can exercise prosecutorial discretion and not proceed against a removable noncitizen who is in custody,[62] but this has happened only in a small percentage of cases. There are signs that this is changing, and Part IV explains the practical and policy pressures for greater and more regularized post-arrest discretion. But the available data from the recent past show that as compared to the chances of initial arrest, the odds of prosecution after arrest are much higher. For this purpose, I use a broad definition of prosecution that includes any federal government action against the noncitizen. This might mean, for example, pressing criminal charges or initiating civil removal proceedings.[63] Here again, the statistics are very imprecise. More refined data would permit better informed decisionmaking and analysis, but the available data support some general conclusions.

Some relevant statistics come from the Executive Office for Immigration Review (EOIR), which is part of the Department of Justice. EOIR includes immigration courts, which conduct removal proceedings, and the Board

61. *Id.* at 219 n.18 (quoting Doe v. Plyler, 458 F. Supp. 569, 585 (E.D. Tex. 1978)); *see also id.*, 457 U.S. at 226 ("[T]here is no assurance that a child subject to deportation will ever be deported.").

62. *See* Memorandum From William J. Howard, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, on Prosecutorial Discretion (Oct. 24, 2005) [hereinafter Howard Memorandum on Prosecutorial Discretion], *available at* http://www.scribd.com/doc/22092975/ICE-Guidance-Memo-Prosecutorial-Discretion-William-J-Howard-10-24-05; Meissner Memorandum, *supra* note 52.

63. Of course, the consequences of arrest in criminal law go beyond prosecution and adjudication. Arrests have other motivations and consequences. But because they do not represent some formal means of federal immigration enforcement, these other motivations and consequences do not raise the concerns, as discussed in Part IV, about state and local arrest authority that arise in connection with the very high likelihood that an immigration arrest will result in a civil removal.

of Immigration Appeals, which hears appeals from removal decisions. Recall from Part II.B on Arrests that there were 613,003 Border Patrol apprehensions and ICE administrative arrests in 2009. In the same period, immigration courts received 321,525 new removal proceedings.[64] Though these data roughly suggest that about half of arrests result in removal proceedings, analyzing rather than simply comparing these two numbers indicates that the actual prosecution rate has been much higher.[65]

Forcing an arrested unauthorized migrant to leave the United States does not always require the federal government to initiate a removal proceeding in immigration court. For example, the government does not need a new removal proceeding to reinstate a removal order that was issued previously.[66] Nor is a proceeding required for expedited removal under INA § 235(b), which can follow an arrest not only at the border, but sometimes away from it.[67]

Even if a formal removal order in a given case will require a removal proceeding, the federal government may give arrested unauthorized migrants the choice to leave before a proceeding takes place. The migrants may then decide—especially with government persuasion or pressure—that leaving without a formal proceeding and removal order will be in their best interests. They may not want to endure the removal process, especially if they face detention until an immigration judge decides their cases. Informed arrestees may also want to avoid the negative consequences of a formal removal order, which would make them inadmissible for a period of ten years[68] and expose them to stiffer penalties if they return unlawfully and are arrested again.[69] To estimate the number of cases that moved from arrest to some type of immigration prosecution in 2009, these other types of compelled departures from the United States must be added to the 321,525 formal removal proceedings. Doing so

64. *See* OFFICE OF PLANNING, ANALYSIS, & TECH., EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2009 STATISTICAL YEAR BOOK, at C3 tbl.3 (2010) [hereinafter 2009 EOIR STATISTICAL YEAR BOOK]. Of course, some of these removal proceedings are attributable to arrests in a prior year, but this source of inexactitude should not take away from the very general conclusions that I draw from the available figures.

65. Of course, some prosecutions in one year may be attributable to arrests in a prior year, but that is the least of the complexities discussed here.

66. *See* INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2006) (reinstatement of removal). *See generally* ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 26, at 1077–92. Other forms of removal that do not require a removal proceeding are authorized by INA § 238(b), 8 U.S.C. § 1228(b) (administrative removal orders); *id.* § 240(d), 8 U.S.C. § 1229b(d) (stipulated removal).

67. *See* INA § 235(b)(1), 8 U.S.C. § 1225(b)(1) (expedited removal); Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004) (expanding the availability of expedited removal to within one hundred miles of the border if certain conditions are met). *See generally* ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 26, at 676–87.

68. *See* INA § 212(a)(9)(ii), 8 U.S.C. § 1182(a)(9)(ii).

69. *See id.* § 276, 8 U.S.C. § 1326.

suggests that the federal government actively tried to force the noncitizen to leave the United States at a rate that significantly exceeds half of the 613,003 arrests that year.

Three other figures are relevant to the prosecution rate, though they do not enhance precision. In fact, they relate more directly to the adjudication and outcome phases of enforcement discretion that Parts II.E and II.F address, but I mention these figures now because they indirectly inform estimates of the prosecution rate. After all, forced departures from the United States reflect decisions to prosecute, so the number of forced departures sets a minimum for what the prosecution rate must be.

First, EOIR reported 185,314 removal orders or voluntary departures in 2009 in 232,212 removal proceedings.[70] A voluntary departure, despite the label, is a compelled departure.[71] Noncitizens who resign themselves to leaving the United States typically prefer voluntary departure because it carries fewer collateral burdens, such as a period of ineligibility to return. If a high percentage of post-arrest prosecutions lead to some type of forced departure in the adjudication and outcome phases, 185,314 removal orders or voluntary departures would suggest a relatively low prosecution rate given the 613,003 Border Patrol apprehensions and ICE administrative arrests. But extrapolating from this figure of 185,314 removal orders or voluntary departures radically understates the prosecution rate because it excludes removal orders that did not require a removal proceeding.

Second, DHS reported 393,289 "aliens removed or returned" in 2009, though without distinguishing border from interior enforcement. DHS defined this category as "the compulsory and confirmed movement of an inadmissible or deportable alien out of the United States based on an order of removal."[72] Though this number relates to the later adjudication and outcome stages of enforcement discretion, it indirectly hints at the prosecution rate, since these 393,289 were prosecuted. If a high percentage of post-arrest prosecutions lead to some type of forced departure in the adjudication and outcome phases, this suggests a prosecution rate of around two-thirds of the 613,003 arrests. But the rate must actually be higher because these 393,289 aliens removed or returned exclude compelled departures that did not involve a removal order.

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70. 2009 EOIR STATISTICAL YEAR BOOK, *supra* note 64, at D1–D2 (reporting that, in federal fiscal year 2009, immigration courts reached a decision in 232,212 removal proceedings, 185,314, or 79.8 percent, of which resulted in removal orders or voluntary departure). On inadmissibility due to a prior removal order, see INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i).

71. *See* INA § 240B, 8 U.S.C. § 1229c; ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 26, at 820–26.

72. 2009 DHS YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 44, at 95 tbl.36 n.1.

Third, DHS reported 580,107 "returns" in 2009, defined as "the confirmed movement of an inadmissible or deportable alien out of the United States not based on an order of removal."[73] To derive the minimum prosecution rate from the number of actual forced departures, one might add these 580,107 returns without formal removal orders to the 393,289 aliens removed or returned with formal removal orders in the same year. This suggests a minimum prosecution rate of over 100 percent of the 613,003 Border Patrol apprehensions and ICE administrative arrests. One explanation for the excess may be simply that some are attributable to arrests in a prior year. Moreover, some noncitizens are forced to leave the country without being arrested; the federal government may have issued a Notice to Appear in a removal proceeding without taking the individual into custody. And because most of the 580,107 returns are in border cases,[74] this number provides little exactitude in assessing the likelihood that the federal government will act to compel the departure of a removable noncitizen who is arrested inside the United States. But even with a big discount, the sum of 580,107 returns without removal orders and 393,289 "aliens removed or returned" with formal removal orders suggests a prosecution rate high enough to confirm that any decision not to press charges against an individual in custody has been exceptional.

All told, the available government statistics provide only a very rough sense of the odds that the federal government will act to force an arrested, apparently removable noncitizen to leave the United States. Even a bare minimum would focus on the 613,003 arrests and apprehensions and 393,289 "aliens removed or returned" in 2009. A more accurate estimate of a minimum prosecution rate would add some of the 580,107 returns without removal orders. Despite the imprecision, the federal government must have prosecuted more than these 393,289 cases, and likely many more than two out of every three individuals arrested. Regardless of the exact odds, the key point is that relatively little discretion has been exercised when the decision is whether to force a noncitizen's departure. Instead, the arrest stage has been when government officers—including state and local law enforcement officers under *Gonzales*—exercise the discretion that matters.

D. An Odd Turn?

A careful reader may have noticed what may seem like an odd turn in the preceding discussion of prosecution. *Gonzales* is a case establishing state

73. *Id.* at 95 tbl.36 n.2.
74. *Id.*

and local law arrest authority for criminal violations of federal immigration law. The core group of potential arrestees consists of the estimated 6.7 million unauthorized migrants who committed the misdemeanor crime of unlawful entry. I explained that in immigration enforcement, the chances of arrest are very low, but the chances of some form of prosecution after arrest have been very high. The discretion to arrest has been the discretion that matters.

To show the likelihood of prosecution after arrest, it might have been logical to discuss post-arrest prosecutorial discretion to bring criminal charges. Such discretion is exercised in any criminal prosecution of noncitizens arrested for unlawful entry under 8 U.S.C. § 1325 or other immigration-related federal crimes. Instead, I switched to a discussion of civil immigration penalties—namely, removal or other forms of forced departure—rather than discussing criminal prosecution. Why?

The answer is of paramount importance. It centers on the relationship between the criminal and the civil provisions of federal immigration law. Federal prosecutions for criminal violations of federal immigration law are rising dramatically.[75] But the criminal provisions remain part of an overall strategy of immigration law enforcement that includes both criminal and civil penalties.[76]

When federal prosecutors threaten to bring criminal charges for an immigration violation, they use the threat as a bargaining chip that is often directed toward civil removal, not criminal conviction. To be sure, when unauthorized migrants reenter multiple times after removal, or engage in more serious or widespread forms of immigration fraud relating to entry or false documents, the federal government might deploy stronger, criminal penalties. But against the vast majority of noncitizens who are unlawfully present, the federal government has found it satisfactory to accomplish civil removal, even if it could bring criminal charges too.[77]

Going back at least to the mid-1990s, the federal government initiatives have attempted to coordinate immigration law enforcement with criminal prosecution for immigration-related offenses.[78] The limited capacity of the

75. *See* Eagly, *supra* note 8, at 1281–83, 1353 fig.4.

76. *See id.* at 1300–37.

77. *See id.* at 1334 ("Although the number of immigration prosecutions has reached an unprecedented high, recent data show that the number of individuals apprehended and removed each year by immigration authorities still vastly outnumbers those who are actually prosecuted."); *see also id.* at 1329 (describing "flip-flop" indictments that use the threat of felony unlawful reentry conviction to secure the noncitizen's agreement to plead guilty to misdemeanor unlawful entry); Joanna Jacobbi Lydgate, Comment, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 511 (2010) (same).

78. For a discussion of an early initiative to bring criminal charges for more serious immigration-related offenses, see Alan Bersin & Judith Feigin, *The Rule of Law at the Border: Reinventing*

criminal justice system contrasts with the possibility of quicker civil removal in the immigration law system. Especially if removal will not require a formal proceeding or order, the federal government may see civil immigration removal in any given case as the preferred, efficient alternative to criminal penalties. The very fact that federal criminal prosecutions have risen dramatically[79] makes it all the more likely that resource constraints will force the federal government to see civil removal as the desired (or at least a satisfactory) outcome in many of these unlawful entry cases, whether or not there is a criminal prosecution at an earlier stage.

Of course, any logistical or legal constraints on criminal prosecutions and civil removal proceedings will affect which mix of outcomes the federal government will pursue. If the criminal prosecution of unlawful entrants can take place in group proceedings that take guilty pleas from a large number of defendants at the same time, then the federal government may find criminal prosecution more attractive than civil removal.[80] But if criminal prosecutions must meet strict due process standards,[81] civil removal would be more feasible in a great number of cases. Given these variables, the relationship between criminal penalties and civil removal is fluid.

A glance back to *Gonzales* reveals a key lesson here. Recall that the decision is typically cited for the proposition that state and local officers may make arrests for criminal violations of federal immigration laws.[82] By using the civil–criminal line to define state and local arrest authority, *Gonzales* assumes a sharp distinction between the criminal and the civil. In fact, the federal government's prosecution of those arrested for the most common criminal violation—unlawful entry—straddles the criminal–civil line. The line is permeable in practice, leaving the government free to choose between criminal and civil options in any given case.

The point is that in situations like *Gonzales*, the local police officers who make the arrests have exercised the discretion that matters. Even if federal prosecutors have the range of discretion that is typical in criminal law and decide

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Prosecution Policy in the Southern District of California, 12 GEO. IMMIGR. L.J. 285 (1998). For a discussion of more recent developments, see Eagly, *supra* note 8, at 1300–37.

79. *See* Eagly, *supra* note 8, at 1353 fig.4 (showing the total number of immigration crime cases terminated in federal courts from 1923 through 2009); Lydgate, *supra* note 77 (analyzing Operation Streamline, a federal enforcement initiative that requires the criminal prosecution of unlawful border crossers on the U.S.–Mexico border).

80. Lydgate, *supra* note 77, at 532–33 (discussing due process concerns with Operation Streamline).

81. United States v. Roblero-Solis, 588 F.3d 692, 693 (9th Cir. 2009) (holding that the procedure for accepting guilty pleas in proceedings conducted under Operation Streamline violates FED. R. CRIM. P. 11).

82. *See supra* text accompanying notes 17–27.

not to bring criminal charges, the arrested unauthorized migrants will still end up in the immigration system. Once there, civil removal may be just as bad or worse from their perspective.[83] And even if federal prosecutors file criminal charges, removal of the unauthorized migrants remains a principal government goal.[84]

E. Adjudication

Once removal proceedings start, the range of possible outcomes narrows further because discretion in this adjudication phase is also severely limited. A very general picture emerges from the three sets of data that Part II.C on Prosecution offered to indicate a minimum rate of prosecution of noncitizens after arrest. First, EOIR reported 185,314 removal orders or voluntary departures in 2009 in 232,212 removal proceedings.[85] Second, DHS reported 393,289 "aliens removed or returned" in 2009, defined as "the compulsory and confirmed movement of an inadmissible or deportable alien out of the United States based on an order of removal."[86] Third, DHS reported 580,107 "returns" in 2009, defined as "the confirmed movement of an inadmissible or deportable alien out of the United States not based on an order of removal."[87]

Given the 613,003 arrests and apprehensions in 2009, these figures suggest that once the federal government seeks to force a removable noncitizen to depart, a very high percentage of cases resulted in a disposition anticipating departure. That disposition might be a removal order, a grant of voluntary departure, or a less formal assurance of departure. To be sure, a removable noncitizen may benefit from a formal grant of discretionary relief from removal in this adjudication stage. Acting as prosecutor, DHS may acquiesce in a grant of relief by an immigration judge in immigration court.[88] Or, even if DHS does

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83. *Cf.* Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (stating, in the context of a lawful permanent resident, that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes"); INS v. St. Cyr, 533 U.S. 289 (2001) (stating, in the context of a lawful permanent resident, that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence" (internal quotation marks omitted)).

84. *See* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1573–79 (2010).

85. *See* 2009 EOIR STATISTICAL YEAR BOOK, *supra* note 64, at D1–D2 (reporting that in federal fiscal year 2009, immigration courts reached a decision in 232,212 removal proceedings, 185,314, or 79.8 percent, of which resulted in removal orders or voluntary departure). On inadmissibility due to a prior removal order, see INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i) (2006).

86. *See* 2009 DHS YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 44, at 95 tbl.36 n.2.

87. *See id.*

88. *See* Memorandum From John Morton, Assistant Secretary, U.S. Immigration & Customs Enforcement, on Guidance Regarding the Handling of Removal Proceedings of Aliens With Pending or Approved Applications or Petitions (Aug. 20, 2010) [hereinafter Morton Memorandum

not acquiesce, an immigration judge might decide to grant relief, such as asylum or cancellation of removal.[89] But asylum is available only to those who can show a well-founded fear of persecution and meet other requirements.[90] For cancellation of removal, federal immigration law severely curtails threshold eligibility through minimum residence or physical presence requirements, crime-based disqualifications, and qualifying hardship tests.[91] Obtaining relief is a difficult task that often requires the assistance of highly skilled attorneys, and yet legal representation is the noncitizen's financial responsibility.[92] Only 28,599 noncitizens were granted relief from removal in immigration court in 2009, a very small number compared to the 613,003 apprehensions and arrests.[93]

F. Outcome

A criminal prosecution or a civil removal proceeding can produce a variety of outcomes. In a criminal prosecution, a determination of guilt leads to some form of sentence, which typically would then be served. In a civil removal proceeding, the analogous result would be removal from the United States. At this enforcement stage as well, a competent government official may exercise some discretion. A criminal sentence may be commuted, or a pardon may even be granted. Similarly, the issuance of a final removal order against a removable

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on Removal Proceedings of Aliens], *available at* http://www.scribd.com/doc/36524371/John-Morton-Memo; Memorandum From Peter S. Vincent, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, on Guidance Regarding U Nonimmigrant Status (U Visa) Applicants in Removal Proceedings or With Final Orders of Deportation or Removal (Sept. 25, 2009), *available at* http://www.ice.gov/doclib/foia/dro_policy_memos/vincent_memo.pdf; Howard Memorandum on Prosecutorial Discretion, *supra* note 62, at 8; Memorandum From William J. Howard, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, on Exercising Prosecutorial Discretion to Dismiss Adjustment Cases (Oct. 6, 2005), *available at* http://www.aila.org/content/default.aspx?docid=17718; Meissner Memorandum, *supra* note 52, at 2 (stating that prosecutorial discretion includes the decision to execute a removal order).

89. *See* INA § 208, 8 U.S.C. § 1158 (asylum); *id.* § 240A, 8 U.S.C. § 1229b (cancellation of removal).

90. *See id.* §§ 101(a)(42), 208, 8 U.S.C. §§ 1101(a)(42), 1158 (asylum). *See generally* ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 26, at 847–947.

91. *See* INA § 240A, 8 U.S.C. § 1229b. *See generally* ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 26, at 790–812.

92. There is no right to appointed counsel in immigration court proceedings. *See* INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A); ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 26, at 1029–36.

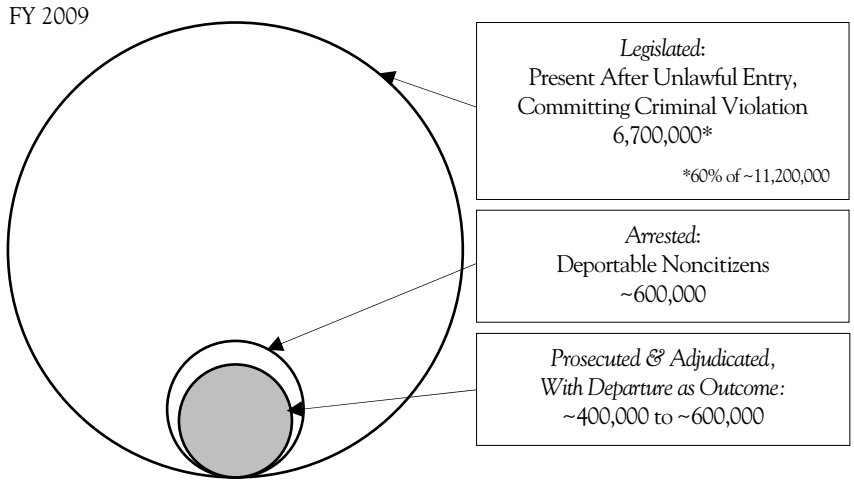
93. 2009 EOIR STATISTICAL YEAR BOOK, *supra* note 64, at D2 (relief granted); 2009 DHS YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 44, at 91 tbl.33 (apprehensions and arrests). As mentioned in Part II.C, some of the adjudicated cases did not start with an apprehension or arrest, so relief from removal was probably granted in a lower percentage of cases than these two figures would suggest.

noncitizen opens up the last stage of enforcement, where discretion might still be exercised.

In systemic terms, discretion is exercised to execute—or not to execute—removal orders when certain amounts and types of resources are allocated to the practical steps required for physical removal, including the apprehension of absconders. Physical removal might actually be impeded or prevented by the inability to obtain travel documents for noncitizens, or by the refusal of their countries of citizenship to accept them.[94] On an individual basis, stays of removal are typically temporary, pending the final outcome in a given case.[95] In some instances, however, discretion at this stage can take the form of an decision not to remove a particular noncitizen from the United States, even though a final removal order has issued.[96] In general terms, the 393,289 "aliens removed or returned" and 580,107 "returns" in 2009 indicate that a very high percentage of cases in which the federal government seeks to force the departure of a removable noncitizen result in departure as the ultimate outcome.

Figure 2 sums up the key points from Part II and shows the very rough scale of the stages of enforcement discretion.

FIGURE 2. The Discretion That Matters[97]



94. *See* Zadvydas v. Davis, 533 U.S. 678 (2001).

95. *See* Nken v. Holder, 129 S. Ct. 1749 (2009).

96. *See* Meissner Memorandum, *supra* note 52, at 2 (stating that prosecutorial discretion includes the decision to execute a removal order).

97. *See* sources cited in notes 34–36, 44, 64–74 *supra*.

G. The Discretion That Matters

Discussions of immigration enforcement devote much attention to prosecutorial discretion. I have been using this term in its broad meaning, which encompasses any form of enforcement discretion, including systemic choices, policies, and practices that influence whether an arrest occurs at all.[98] More typically, however, agency officials, courts, and commentators use prosecutorial discretion to refer to the second stage of discretion.[99] This is the stage after arrest and before the adjudicatory stage in immigration court, if the case gets that far, and the ultimate outcome.

Using the term prosecutorial discretion imprecisely as a loose synonym for enforcement discretion can mislead if it suggests that the prosecution phase is the locus of discretion in immigration enforcement. But as Figure 2 indicates, the immigration enforcement discretion exercised at the arrest stage has been the discretion that matters. The next question, addressed in Part III, asks how this fact affects our assessment of the *Gonzales* rule, which distinguishes sharply between criminal and civil violations of federal immigration law in defining the contours of state and local arrest authority.

III. STATE AND LOCAL ARRESTS AND THE CIVIL–CRIMINAL LINE

So far I have explained two observations about immigration enforcement. First, the discretion that matters in immigration enforcement has not been the discretion to prosecute, but the discretion to arrest. Second, arrests for civil or criminal violations do not lead separately to two systems of prosecution. Though arrests for criminal immigration violations can lead to criminal prosecution, the federal government may choose to initiate only civil removal proceedings.

This Part explains how these two observations combine to expose some deeper problems with *Gonzales*[100] and, more importantly, with the assumptions on which it is based. This analysis calls for comparing several different types of arrests by law enforcement officers for a federal criminal violation. The arrest might be made by a federal officer or by a state or local officer. And the crime

98. *See, e.g.*, ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 26, at 776; Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 511–14 (2009); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010).

99. *See, e.g.*, ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 26, at 776–83; KANSTROOM, *supra* note 7, at 230–34; Cox & Rodríguez, *supra* note 98, at 517–19; Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611 (2006); Wadhia, *supra* note 98, at 246–65.

100. 722 F.2d 468 (9th Cir. 1983), *overruled in part on other grounds by* Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999).

might be a violation of a federal immigration law or it might be a violation of a federal law not involving immigration at all. The category of nonimmigration crimes covers an immense array of offenses, but the distinction between this category and immigration crimes is useful for reasons that should become evident momentarily.

The following simple matrix labels the four possibilities as Case 1 through Case 4 to allow comparisons of immigration crimes with nonimmigration crimes, and federal arrests with state or local arrests. The matrix excludes arrests for state and local nonimmigration crimes, which Part IV addresses.

FIGURE 3. Crimes and Arresting Officers: Four Cases

	Federal Nonimmigration Crime	**Federal Immigration Crime**
Arrest by Federal Officer	**Case 1**	**Case 3**
Arrest by State/Local Officer	**Case 2**	**Case 4**

A. Case 1: Federal Arrest for a Federal Nonimmigration Crime

To start with the most straightforward situation, in Case 1, a federal officer arrests an individual for a federal crime unrelated to immigration law. To address enforcement discretion in criminal law as distinct from immigration law, let us assume that the defendant is a U.S. citizen, not a noncitizen for whom any resulting conviction may carry immigration consequences. Case 1 is referred for possible federal prosecution, which in turn places the burden of prosecuting on the federal government. Federal prosecutors generally negotiate plea bargains. In cases not resolved through a guilty plea, prosecutors must prepare and present the case against the defendant at a jury trial.

Though all of these burdens are substantial, federal prosecutors can temper them by exercising the discretion that is typical of criminal law. They can try to resolve cases through plea bargaining, bringing only a select few cases to trial. They can reduce charges in some cases, or not press charges at all. All of these patterns of prosecutorial discretion tend to temper patterns of arrests by federal officers, as prosecutors signal to enforcement agents which potential

arrestees are likely to be prosecuted. This guides officers' decisions about which potential arrestees to pursue. To be sure, even if the pattern among prosecutors is not to bring criminal prosecutions, officers may persist with arrests in order to offer some resistance or at least to express disagreement with the prosecutors. In general, however, a consistent pattern of decisions not to prosecute certain offenses will exert pressure on officers to limit arrests for those offenses in order to conserve resources for arrests that will lead to prosecutions.[101]

B. Case 2: State or Local Arrest for a Federal Nonimmigration Crime

Now take Case 2: A state or local officer arrests a U.S. citizen for a federal crime not involving immigration law. Though the arresting officer reports to a state or local government official, the case is referred to federal prosecutors. Again, these criminal cases in federal court put burdens on the federal government when it comes to prosecuting the criminal case. But just as in Case 1, federal prosecutors can temper those burdens by exercising prosecutorial discretion reflecting federal enforcement priorities.

In Case 2, however, the effects of federal prosecutorial discretion on state and local arrest patterns will be less direct than in Case 1. Compared with federal law enforcement officers, state and local officers are even further removed from federal prosecutors and may not have strong incentives to enforce federal criminal laws in the first place. But all else being equal, state and local officers, like federal officers, can be expected to put a lower priority on arrests for federal offenses if they know that federal prosecutors will assign a low priority to prosecuting arrestees for those offenses, or will not press charges at all.[102]

C. Case 3: Federal Arrest for a Federal Immigration Crime

The complexities begin in earnest with Case 3: A federal officer arrests an individual for a criminal violation of federal immigration law. Suppose, for example, that federal immigration officers make arrests in a situation like *Gonzales*—probable cause to arrest a noncitizen for unlawful entry. Recall the discussion in Part II of the overlap between federal criminal immigration law prosecutions and civil removal proceedings for immigration violations. Case 3 will involve a combination of federal officers and agencies, probably the judicial district's U.S. Attorney in the Department of Justice for the potential

101. *See generally* LaFave, *supra* note 33, ch. 5; Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1450, 1456, 1479, 1490 (2004).

102. *See* O'Neill, *supra* note 101, at 1479, 1490.

criminal prosecution, and ICE for the potential removal proceeding. These federal decisionmakers will set in motion a process that may choose between criminal or civil proceedings, or mix them. For example, the outcome may be to combine, into a single negotiated guilty plea, a sentence of time served and stipulated removal from the United States.

In Case 3, the choice among criminal proceedings, civil proceedings, or some combination of the two complicates the feedback loop that runs from arrest to prosecution and then back to arrest patterns. The tempering effect of prosecutorial discretion on arrest patterns is less pronounced than in either Case 1 or Case 2. The reason is that in all likelihood, a decision not to prosecute criminally will not result in complete dismissal of charges. The rough figures set out in Part II suggest that whether or not there is a criminal prosecution, ICE will still pursue the civil penalty of removal from the United States by initiating a removal proceeding or by otherwise seeking to compel the noncitizen's departure from the United States.

For removable noncitizens who are arrested, this scenario—a civil removal proceeding, but no criminal prosecution—represents the majority of cases.[103] In these cases, a decision not to press criminal charges does not have as strong a tempering effect on arrest patterns as a decision not to prosecute might have in nonimmigration cases like Case 1 or Case 2, in which the federal government's choices are limited to criminal prosecution options. For such nonimmigration crimes, decisions not to prosecute will make officers less keen to arrest, all else being equal. But in Case 3—a federal arrest for an immigration crime—the arrested noncitizen will still be put into a removal proceeding, whether or not criminal charges follow. From the arresting officer's point of view, the arrest remains meaningful in that the effort and resources devoted to the arrest lead to a tangible result, even if that result is civil removal rather than a criminal conviction. The high likelihood of a removal proceeding diminishes any tempering of arrest patterns because of a decision not to prosecute criminally.

But because Case 3 arises within the federal government, a decision not to press criminal charges against an arrested noncitizen still has some tempering effect on federal officers' arrest patterns,[104] even though the option to initiate removal proceedings remains. One reason is that the capacity of the civil removal system is limited. John Morton, the director of ICE, explained in June 2010 that given present funding levels, the maximum capacity of the civil removal system is about 400,000 removals per year—under 4 percent of the

103. *See* Eagly, *supra* note 8, at 1353.
104. *See* O'Neill, *supra* note 101, at 1479, 1490.

unauthorized population.[105] Coordination within the federal government, and within DHS in particular among units that include ICE, tempers the overall level of federal arrests to a number that the system can handle. This flow of arrestees into the prosecution and later stages of enforcement has been restricted enough to allow civil or sometimes criminal charges against arrestees at the very high rate that Part II detailed. Otherwise, either an unmanageable caseload would overwhelm the systems for civil immigration removal and immigration-related criminal prosecutions, or post-arrest discretion would need to be exercised more often than has been true.

Beyond influencing the sheer number of arrests, federal priorities as to which potentially removable noncitizens should be prosecuted have a tempering effect on federal arrest patterns.[106] Federal officials may decide to identify removable noncitizens with serious criminal records, to raid worksites in a particular industry, to emphasize national security concerns, or to exercise some other type of discretion—either systemic or individualized. These priorities can be variable and significant,[107] influencing how federal agencies and officers exercise their discretion to devote resources to arresting some removable noncitizens but not others.

D. Case 4: State or Local Arrest for a Federal Immigration Crime

In Case 4, a state or local law enforcement officer makes an arrest for a criminal violation of federal immigration law. This was the situation in *Gonzales*. On the surface, the chain of events resembles Case 3, but the institutional dynamics are quite different. Though a state or local officer first exercises arrest discretion, the federal government is then responsible for the prosecution, adjudication, and outcome phases of enforcement. As Part II acknowledged, the number of state and local arrests that rely on *Gonzales* may be small. But as Part IV explains, it is essential to understand the relationship between federal and state or local actors when state and local arrests bring removable noncitizens to the attention of federal authorities, because this

105. *See* Memorandum From John Morton, Assistant Sec'y, U.S. Immigration & Customs Enforcement, on Civil Immigration Enforcement (June 30, 2010) [hereinafter Morton Memorandum on Civil Immigration Enforcement], *available at* http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf.

106. *See* Meissner Memorandum, *supra* note 52, at 6 (instructing that investigations should be focused on identifying aliens who represent a high priority for removal).

107. *See, e.g.*, United States v. Arizona, 703 F. Supp. 2d 980, 995–96 (D. Ariz. 2010) (discussing the declaration of David Palmatier on federal priorities), *aff'd*, 2011 WL 1346945 (9th Cir. Apr. 11, 2011); Morton Memorandum on Civil Immigration Enforcement, *supra* note 105.

relationship has broader implications for other aspects of the state and local role in immigration enforcement.

Most importantly, the tempering influences in the other three cases are greatly diminished in Case 4. Federal decisions not to prosecute may have little or no tempering effect on a state or local government that makes arrest decisions reflecting entirely different motivations and priorities. This is true even though state and local arrests in situations like Case 4 interact with the federal enforcement system in varying ways, depending on how ICE responds. Assume that ICE takes custody of an individual who has been arrested by a state or local officer. In contrast to an arrest for a nonimmigration crime as in Case 2, a decision not to prosecute criminally will not lead to the unauthorized migrant's release. From that point on, even if no federal criminal prosecution follows, the case will be in the federal immigration enforcement system, either as a civil removal proceeding or as removal without a formal proceeding. In either civil removal scenario, post-arrest discretion is much more limited, as Part II explained. State and local jurisdictions and officers that see immigration enforcement as part of their law enforcement duties will be especially inclined to view civil removal as a tangible result that makes the arrest worthwhile.

The other possibility is that federal immigration officials at ICE may decline to take custody of an unauthorized migrant arrested by state or local officers in Case 4, effectively deciding that they will neither bring criminal charges nor subject the arrestee to civil removal, at least not at that time.[108] If ICE responds in this way to a state or local arrest, the federal government is exercising an important form of post-arrest discretion. As long as state and local arrests based on *Gonzales* as in Case 4 are few in number—as they appear to be—ICE decisions not to take custody of state and local arrestees preserve Part II's overall picture of enforcement discretion, with arrest discretion as the discretion that matters. But recall from the Introduction that my reason for relying initially on a snapshot of enforcement in 2009 is to gain a vantage point for looking not only at traditional practices but also to emerging patterns of discretion. If, in the future, state and local arrests—under *Gonzales* or otherwise—funnel a larger number of cases to ICE, the federal government faces a variety of response options with broader implications, as Part IV discusses.

108. When this happens, one of the state or local arrests mentioned in Part II will not be included in the 613,003 arrests and apprehensions that DHS reported for 2009.

E. Lessons From the Four Cases—and Looking Ahead

Filling in the matrix of four basic types of cases adds crucial information and shows that a state or local arrest for a federal immigration crime opens up the possibility of a civil removal proceeding—regardless of whether there is criminal prosecution.

FIGURE 4. Crimes and Arresting Officers: Four Outcomes

	Federal Nonimmigration Crime	**Federal Immigration Crime**	**Federal Civil Removal Proceeding**
Arrest by Federal Officer	**Case 1: Criminal Prosecution?**	**Case 3: Criminal Prosecution and/or Removal Proceeding?**	
Arrest by State/Local Officer	**Case 2: Criminal Prosecution?**	**Case 4: Criminal Prosecution and/or Removal Proceeding?**	

The key lesson is that state and local arrest authority under *Gonzales* may set the federal removal system into motion after the vast bulk of the enforcement discretion has already been exercised. These state and local officers can make arrests without regard to federal enforcement priorities, yet they are insulated from many of the tempering influences that prosecutors exert on arrest patterns when they decide not to bring criminal charges. This tempering is much stronger in Case 1 and Case 3, when the federal government officers both make arrests and exercise substantial prosecutorial discretion. This tempering is also much stronger in Case 2, when state or local officers make arrests for nonimmigration crimes, but the federal government still exercises substantial prosecutorial discretion.

All of this suggests that because the discretion to arrest has been the discretion that matters in immigration enforcement, and because arrest can lead to civil removal at least as readily as to criminal prosecution, the contours of state and local arrest authority should not depend on whether the arrest is for criminal or civil violations of federal immigration law. In fact, any concerns

about state and local arrest authority may be even more justified, not less, when the arrest is for criminal instead of civil violations. The reason is that initially labeling a case as a federal criminal matter, and then not prosecuting criminally, may make decisionmakers in the civil removal system reluctant to exercise in the noncitizen's favor what little discretion they have. In sum, nothing justifies greater state and local arrest authority for criminal immigration violations than for civil violations.[109]

So far, I have addressed Case 4 only in the short term, on the assumption that current patterns of discretion continue, with the immigration enforcement discretion that matters remaining the decision to arrest, not the decision to bring criminal or civil charges. I have also assumed that the outcomes of cases put into the federal criminal or civil removal systems as a result of state and local arrests will do little to temper state and local arrest patterns that reflect motivations and priorities that vary from those of the federal government. But as I have acknowledged, the state and local role in immigration law is evolving. The number of *Gonzales* arrests may increase or, more likely, state or local enforcement may expand in other ways that generate pressures for changes in the patterns of federal enforcement discretion. Part IV discusses these prospects as part of analyzing the broader implications of *Gonzales*.

IV. BROADER IMPLICATIONS

Gonzales raises some fundamental questions about the significance of the civil–criminal line for state and local involvement in immigration enforcement. In turn, these questions prompt some general observations on several overlapping topics that reach far beyond *Gonzales* itself. The first topic is express delegation of federal immigration enforcement to state and local governments. The second is immigration enforcement discretion. The third topic is immigration enforcement in general. I conclude with some thoughts on the fourth topic, immigration federalism.

109. In a perceptive article, Gabriel J. Chin and Marc Miller criticize state and local criminal laws that mirror federal immigration laws. They are concerned, as am I, about the nature and number of prosecutions in state and local courts that such subfederal laws would produce. State and local arrest authority for criminal violations of federal immigration law seems to be outside the scope of their inquiry, but my analysis suggests that their skepticism of state and local prosecutions should apply to state and local immigration arrests as well. *See* Chin & Miller, *supra* note 9 (manuscript at 15–17).

A. Express Delegation of Federal Immigration Enforcement

This Article started with the Ninth Circuit's decision in *Gonzales*,[110] which addressed the inherent authority of state and local law enforcement officers to make arrests for criminal violations of federal immigration law, even if the federal government does not delegate authority expressly. The misconceptions that underlie *Gonzales* generate serious concerns about any federal program that expressly authorizes state or local law enforcement officers to decide whether a noncitizen is exposed to federal immigration enforcement.

A noteworthy example is the express authority that the federal government may grant to state and local governments pursuant to INA § 287(g).[111] Under § 287(g), the federal DHS may authorize state and local law enforcement officials to carry out specified immigration law enforcement functions under an agreement that provides for training and federal supervision of the state and local officers involved. This is typically not a blanket deputization of state and local officers to act as federal immigration enforcers, but rather a mechanism to add an immigration status check to ongoing law enforcement activities.[112] As of October 2010, DHS had § 287(g) agreements with sixty-nine jurisdictions in twenty-four states.[113]

The other prominent—and much more extensive—federal program that establishes a state and local enforcement role is Secure Communities.[114] Under this DHS initiative, fingerprints of all individuals arrested by state and local law enforcement officers are checked at the time of booking against both the FBI criminal history database and the DHS biometric databases. The stated purpose is to facilitate the removal of noncitizens with criminal convictions, with a priority on noncitizens who have been charged with more serious crimes.[115] With much broader coverage than § 287(g) agreements, Secure

110. 722 F.2d 468 (9th Cir. 1983), *overruled in part on other grounds by* Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999).

111. INA § 287(g), 8 U.S.C. § 1157(g) (2006).

112. *See Section 287(g) of the Immigration and Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/287g (last visited June 11, 2011).

113. *See Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/287g.htm (last visited June 11, 2011).

114. *See generally Secure Communities*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities (last visited June 11, 2011).

115. *Id.*

Communities includes over 1300 counties in 42 states as of May 2011.[116] DHS plans nationwide coverage by 2013.[117]

These three types of state and local involvement in immigration enforcement—express grants of authority under the Secure Communities initiative and § 287(g) agreements and the inherent state and local arrest authority under *Gonzales*—share one key element. With all three, the consequences of a state or local criminal arrest reach beyond the criminal justice system. No matter how the criminal case proceeds, all three types of authority give state and local law enforcement officers the discretion to decide whether a noncitizen will be exposed to the federal government's system for the civil removal of noncitizens who are in the United States unlawfully.

But there is one big difference: A federal immigration crime is required for a *Gonzales* arrest, whereas any arrest for any infraction is enough to set § 287(g) or Secure Communities into motion. Because the universe of state and local crimes is vast as compared to federal immigration crimes, § 287(g) agreements and especially Secure Communities have a much greater potential for exposing noncitizens to federal immigration enforcement. And once a state or local arrest brings noncitizens to ICE's attention, they are subject to the same discretion patterns detailed in Parts II and III for *Gonzales* arrests.

The crucial question for § 287(g) agreements and Secure Communities is what happens to state or local arrestees who are identified as potentially removable. If the federal government puts them into the immigration removal system, their removal would seem highly probable because they are unlikely to benefit from the favorable exercise of discretion. Put more generally, if the discretion to arrest remains the discretion that matters, and a substantial number of noncitizens are arrested under these three forms of state and local authority, and ICE puts a high percentage of them into the removal system, then the federal government is effectively conceding a large share of its enforcement discretion to state and local actors. If these things happen, state and local governments will not only choose who will be exposed to federal

116. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ACTIVATED JURISDICTIONS (2011), http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf.

117. *Id*. There are other bases for state and local involvement in federal immigration enforcement. I focus on § 287(g) and Secure Communities because they have attracted the most attention in policy debates, but my observations about these two programs would also apply in large measure to other vehicles, such as the Criminal Alien Program, *see Fact Sheet: Criminal Alien Program*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Mar. 29, 2011), *available at* http://www.ice.gov/news/library/factsheets/cap.htm, and the claim that the enforcement of all federal immigration laws is within inherent state and local authority, *see* Non-Preemption of the Auth. of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations, *supra* note 5.

immigration enforcement, but also largely determine who will ultimately be removed. But ascertaining if this is true requires the next step in the analysis.

B. Discretion in Immigration Enforcement

My comments linking *Gonzales*, § 287(g) agreements, and Secure Communities assume that the discretion to arrest continues to be the enforcement discretion that matters. Part II explained this assumption by comparing the low percentage of potential arrestees who are actually arrested with the high percentage of arrestees who are either prosecuted criminally, put in civil removal proceedings, or both.

What if the locus of discretion were to shift? I have suggested that *Gonzales* arrests may already hint at changes, with ICE declining to take arrestees into federal custody. *Gonzales* arrests may be too few to signal or spur an overall change in federal thinking about enforcement discretion. But the federal government also has discretion not to take custody of a noncitizen identified under Secure Communities or a § 287(g) agreement. By sheer force of greater numbers, the implementation of § 287(g) and Secure Communities can do much more than *Gonzales* arrests to force the federal government to change—or at least to rethink—its patterns of enforcement discretion. Especially Secure Communities allows state and local governments to expose a much larger number of noncitizens to federal immigration enforcement than in the past. For reasons of both practical capacity and political consequences, the federal government may then feel considerable pressure to decrease the percentage of cases pursued in criminal proceedings, civil proceedings, or both.

Current implementation of Secure Communities suggests some rethinking of federal enforcement discretion, and perhaps some actual changes, though the signals remain mixed and preliminary. On the one hand, ICE's own data suggest that the majority of those removed either have no prior criminal record at all, or have been convicted of lower-level offenses, not the serious crimes cited in the initiative's statement of purpose.[118] This may suggest that state and local arrestees are ending up in the removal pipeline, with traditional patterns of minimal post-arrest discretion. On the other hand, concentrating on serious crimes would mean that the federal government would be taking no action—neither criminal charges nor a civil removal proceeding—against most noncitizens identified by Secure Communities. This would represent a

118. *See Secure Communities IDENT/IAFIS Interoperability Statistics*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT 2 (May 23, 2011), *available at* http://www.ice.gov/doclib/foia/sc-stats/nationwide_ interoperability_stats-fy2011-feb28.pdf.

significant expansion of federal discretion at the prosecution stage of immigration enforcement. Understanding what is at stake requires looking more closely at immigration enforcement in general.

C. Immigration Enforcement in General

Analysis of *Gonzales*—and of enforcement discretion more generally—reveals one basic paradox of current federal immigration enforcement. The chances are very high that removable noncitizens arrested by federal officers will be put into civil removal, if not prosecuted criminally. Once put into civil removal, the chances are very high that they will be ordered and actually removed. But of the 11.2 million unauthorized migrants in the United States, only a few are arrested. The 11.2 million are somewhere within the borders of the United States, but the federal government does not know exactly who they are or where they live or work. The decisionmaking that leads to this state of affairs is diffuse. Those who want the federal government to pursue immigration enforcement more vigorously will protest, but their complaints, too, will be scattered.

Contrast a federal government decision to initiate no criminal charges or civil removal proceeding at all against a removable individual who not only has been identified by name, but also has been brought into custody of at least state or local officers, if not federal. In this scenario, the federal government is much more politically exposed. The decision not to proceed—whether it reflects resource constraints or policy priorities—is much more likely to attract criticism, including the accusation that the government is disregarding the law. A closely related phenomenon has arisen in the context of the DREAM Act, which is proposed federal legislation that would grant lawful immigration status to unauthorized migrants who were brought to the United States at a young age and attend college or serve in the military.[119] As part of their advocacy efforts for the legislation, some potential DREAM Act beneficiaries have deliberately made their identities known to the federal government, essentially daring ICE to arrest them and initiate removal proceedings.[120]

By identifying removable noncitizens and making them available for the federal government to take into custody, the combination of the *Gonzales* rule, § 287(g) agreements, and Secure Communities can give the federal

119. *See* Development, Relief, and Education for Alien Minors (DREAM) Act of 2011, S. 952, H.R. 1842, 112th Cong., 2d Sess. (2011).

120. *See* Julia Preston, *After a False Dawn, Anxiety for Illegal Immigrant Students*, N.Y. TIMES, Feb. 8, 2011, at A15.

government more information about potentially removable individuals than the federal enforcement apparatus can handle—either politically given various constituencies opposed to certain types of enforcement, or practically given its limited capacity. This pressure as a consequence of state and local involvement in immigration enforcement may be slight as long as this phenomenon is mainly associated with a small number of *Gonzales* arrests. But the pressure mounts when the federal government expressly grants enforcement authority to state and local governments, leaving ICE to deal with the larger group of potentially removable noncitizens identified by § 287(g) agreements, and the even larger group identified by Secure Communities.

The directions that these trends will take remain unclear. One possibility is that the federal government will come under strong political pressure to prosecute all of these noncitizens, at least by bringing civil removal proceedings, if not criminal charges. This shift will require a sizeable increase in resources devoted to some combination of the civil removal system and criminal prosecution. In this scenario, the federal government will do relatively little to temper state and local arrest patterns, and state and local law enforcement officers will be driving the enforcement apparatus by making the arrest decisions that matter.

Such a course of events would require a fundamental rethinking of U.S. immigration law and policy, especially the longstanding practice of underenforcement. This is not a simple matter of ratcheting up enforcement with higher fences, tougher laws, and more frequent raids. It would also require serious readjustments in the lawful admission scheme for both permanent and temporary migration, in the U.S. economy generally, and in U.S. approaches to international economic development. These are matters beyond the scope of this Article, but I mention them here to suggest that the federal government is unlikely to respond to § 287(g) agreements and Secure Communities by trying to remove all noncitizens identified under these programs.

Alternatively, the federal government could respond by exercising more discretion not to proceed against noncitizens who are arrested by state and local law enforcement officers. There are signs of movement in this direction. In the Secure Communities context, ICE has declined to take custody of many individuals arrested by state and local officers and identified as possible immigration violators.[121] For cases that have passed into federal hands, similar trends

121. *See Secure Communities IDENT/IAFIS Interoperability Statistics*, *supra* note 118 (indicating that ICE took into custody only some of the noncitizens identified by Secure Communities).

As this Article was going to press, two new memoranda from John Morton, director of ICE, expanded the scope of federal enforcement discretion. *See* Memorandum From John Morton, Assistant Sec'y, U.S. Immigration & Customs Enforcement, on Exercising Prosecutorial Discretion

may be emerging. In August 2010, ICE Director John Morton issued a memorandum that set forth a process for dismissing cases after civil removal proceedings have been initiated in immigration court.[122] And ICE has made it clear that it intends to exercise discretion to initiate removal proceedings at a rate within its annual capacity of 400,000 removals.[123]

Another possibility is that the federal government, as the principal in principal–agent relationships with state and local governments, will assert enough control to make states and localities set aside motivations and priorities that vary from those of the federal government. But such control may be very elusive, as shown by a report by the Warren Institute at the University of California, Berkeley, on the Criminal Alien Program (CAP), another federal initiative that involves state and local police in federal immigration enforcement.[124] Though the federal mandate behind CAP is to identify removable noncitizens with serious criminal offenses, the police department in Irving, Texas, implemented CAP in ways that led to a dramatic increase in discretionary arrests of Hispanics for petty offenses, especially minor traffic infractions.[125] This is just one case study, but it suggests the complexities of any federal efforts to limit the influence of local priorities—and local prejudices.

The subtle obstacles to federal control include a feature of delegation itself. In any principal–agent situation, the traditional concern is the one that I have just explained. The agent—here the state and local actors—may act beyond the control of the principal—here the federal government. But there is an additional problem. Federal officials who happen to share the views of some state and local governments, but who are unable to sway their federal colleagues, can deploy the relatively unbridled involvement of those states

Consistent With the Civil Immigration Enforcement Priorities of the Agency for Apprehension, Detention, and Removal of Aliens (June 17, 2011); Memorandum From John Morton, Assistant Sec'y, U.S. Immigration & Customs Enforcement, on Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011). The memoranda were intended to respond to criticisms that the Secure Communities Initiative lacked guidelines for the exercise of federal enforcement discretion. These and related concerns had led several states to end or curtail their participation in Secure Communities. *See* Julia Preston, *U.S. Pledges to Raise Deportation Threshold*, N.Y. TIMES, June 18, 2011, at A14.

122. *See* Morton Memorandum on Removal Proceedings of Aliens, *supra* note 88.

123. *See* Morton Memorandum on Civil Immigration Enforcement, *supra* note 105.

124. *See* TREVOR GARDNER II & AARTI KOHLI, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM (2009), *available at* http://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf. I am grateful to Stephen Lee for calling my attention to this example.

125. *See id.*

and localities to give some practical effect to priorities that federal decisionmaking has rejected in theory.[126]

In short, daunting challenges emerge from the combination of *Gonzales*, § 287(g) agreements, and Secure Communities. One challenge is making enforcement discretion rational. Even if federal officials exercise discretion by refusing to take custody of some removable noncitizens who are arrested by state or local law enforcement, that discretion is severely circumscribed. The first choice is a simple, binary one—to take custody or not. Then, if ICE initiates a removal proceeding, the statutory framework for discretionary relief from removal is very limited due to strict threshold eligibility requirements, including extremely demanding hardship standards.[127] Expanding post-arrest discretion so that it matters as much as arrest discretion underscores the need for more capacious statutory vehicles for immigration judges to grant discretionary relief from removal. This would let a larger group of decisionmakers exercise discretion throughout the removal process in the prosecution, adjudication, and outcome phases. At least as importantly, it is also the only way to infuse discretionary relief with the predictability and adherence to standards and precedent that are essential to elevating discretion above random acts of executive grace.[128]

But even an expansion in federal enforcement discretion would not neutralize the more fundamental changes in immigration enforcement that may result from *Gonzales* arrests, § 287(g) agreements, and Secure Communities. In subtle but effective ways, these forms of state and local involvement threaten to usurp basic aspects of federal control over immigration enforcement. The core problem is that state and local decisionmakers will act as gatekeepers, filling the enforcement pipeline with cases of their choice for civil removal and possibly criminal prosecution as well. Even assuming that more federal post-arrest discretion becomes available and actually offsets the state and local choices made by exercising arrest discretion, any such federal discretion is fundamentally reactive.

Recall that the unauthorized population of the United States is an estimated 11.2 million, but only a small percentage are ever apprehended, let

126. *See generally* Jon Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717 (2010) (explaining how delegation through privatization can allow government principals to avoid constraints that may limit their decisionmaking).

127. *See* INA § 240A, 8 U.S.C. § 1229b (2006). *See generally* ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 26, at 790–812.

128. *See* Cox & Rodríguez, *supra* note 98, at 513 ("[E]xtremely broad criminal liability, coupled with the existence of prosecutorial discretion and inevitable underenforcement of the law, results in the delegation of great authority to the officials who decide whether to initiate a criminal prosecution.").

alone deported. Federal enforcement strategy reflects priorities, which can be affirmative or negative. An example of an affirmative federal priority is national security. Filling the federal enforcement pipeline with state or locally generated cases that do not address national security concerns limits the federal government's operating latitude. To be sure, immigration cases related to national security may not be so numerous that they suffer from a diversion of resources. Nonetheless, the zeal of state and local officials in channeling arrestees into the federal system will impose burdens on federal resources and produce an overall pattern that may vary considerably from deliberate federal priority-setting.[129]

The gatekeeper problem raises deeper concerns in the context of negative priorities. These are factors that it is a federal priority *not* to consider, but which may influence state and local governments in making arrests and thus identifying candidates for federal immigration enforcement pursuant to *Gonzales* arrests, § 287(g) agreements, or Secure Communities. The most prominent and most disturbing factors are race and ethnicity. If the federal immigration enforcement system is ultimately preoccupied with handling an influx of cases that reflect enforcement preferences and prejudices of state and local gatekeepers, no increase in federal enforcement discretion exercised after arrest will be able to restore confidence in the evenhandedness of immigration law enforcement. With federally enabled state and local gatekeeping, § 287(g) agreements and Secure Communities may allow the very assertion of state and local priorities that prompted the federal government's lawsuit to block the implementation of Arizona's SB 1070.[130]

Here, the civil–criminal line does clever rhetorical work that merits scrutiny. *Gonzales* authorizes arrests for federal criminal violations, and § 287(g) agreements and Secure Communities generally assume an arrest for a state or local crime. These premises label unauthorized migrants not only as in the United States unlawfully, but also as criminals. This tag makes it easy to forget that a state or local decision to base any arrest or prosecution on race or ethnicity would be reprehensible even if those targeted were concededly guilty of very serious crimes. The civil–criminal line leads to masking that is more troubling when the violations merely straddle a blurred line between civil violations and misdemeanor crimes. The criminal label makes it even harder as a matter of public perception for the federal government to use post-arrest

129. *See* Eagly, *supra* note 9, at 1785–88 (discussing demands on federal resources when state and local arrests require immigration status checks).

130. Support Our Law Enforcement and Safe Neighborhoods Act, S. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *amended by* H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010); Complaint, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10 Civ. 1413).

enforcement discretion to offset any effective transfer of enforcement prerogatives from federal to state and local hands.

D. Concluding Thoughts on Immigration Federalism

Many discussions of federalism in various areas of law assume that the federal government can influence, if not dictate, the treatment of any given situation even if a state or local decisionmaker has an active role. This assumption is the basis for the trust typically placed in various forms of cooperation between the federal government and states and localities. But because immigration enforcement operates in ways that may distinguish immigration enforcement from other federalism contexts, the scope of federal preemption may need to be broader here.

This Article started by analyzing *Gonzales* and then explored how the conceptual foundations of that decision influence § 287(g) agreements and Secure Communities. One essential lesson is that because the federal government has exercised minimal post-arrest discretion, the key decisionmaking moment has been the initial identification of a potentially removable noncitizen by some form of arrest. In turn, faith in the neutrality of arrest rests on faith in the civil–criminal line, which is an unsound conceptual tool in immigration federalism because its apparent clarity hides a vast realm of enforcement discretion. This is true for federal immigration crimes in *Gonzales* arrests, and for arrests for state or local crimes covered by § 287(g) agreements or Secure Communities.

With the recent dramatic expansion of the state and local role in bringing removable noncitizens into contact with federal enforcement, the federal government may exercise greater post-arrest discretion, but any such post-arrest discretion will be essentially reactive if state and local governments become the gatekeepers. If state and local involvement reflects regional and local prejudices, the outcome may be a serious abdication of federal authority over immigration and, in turn, over access to citizenship itself. For this reason, the federal government should reassess all of its programs that may allow state and local governments to assume this gatekeeping role. And absent express delegation, federal preemption should limit any state and local immigration enforcement—including arrest authority under *Gonzales*. For the purpose of preemption analysis, it is essential to recognize that the practical consequence of a state or local decision to arrest a potentially removable noncitizen is the making of immigration law itself.