

---

---

# The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement

Anil Kalhan\*

*This Article proposes privacy as a descriptive and normative framework to analyze the constellation of recent initiatives to expand interior enforcement of federal immigration laws. By expanding the circumstances in which individuals are expected to demonstrate their lawful presence in the United States, these various initiatives seek to transform the significance of immigration and citizenship status in day-to-day life from something largely invisible and irrelevant to something visible and salient in a variety of settings. This transformation, however, carries underappreciated social costs. Building upon scholarship theorizing privacy as protecting a set of social or structural interests, and using the U.S. Supreme Court's decision in *Katz v. United States* as a conceptual starting point, the Article argues that recognizing and protecting immigration and citizenship status privacy in certain contexts serves valuable social purposes. While the Fourth Amendment itself may ultimately establish a weak constraint against interior enforcement, in other contexts courts and state and local governments have increasingly recognized and protected privacy interests in immigration and citizenship*

---

\* Visiting Assistant Professor, Fordham Law School. A.B., Brown University; M.P.P.M., Yale School of Management; J.D., Yale Law School. I am grateful to Tim Casey, Jennifer Chacón, Sherry Colb, Michael Dorf, Hiroshi Motomura, Alison Nathan, Smita Narula, Jayashri Srikantiah, Shoba Sivaprasad Wadhia, Verity Winship, and Michael Wishnie for helpful conversations and reviews of earlier drafts, to Meagan Crowley and Ashok Mathai for their dedicated research assistance, and to Kirin Gill and the UC Davis Law Review staff for their excellent editorial work. I am especially thankful to Jennifer Chacón for inviting me to speak about the ideas in this Article at the Symposium *Katz v. United States: 40 Years Later*, which was held at the UC Davis School of Law in March 2007, and I appreciate the thoughtful comments offered by the other Symposium participants and by many others who provided feedback on this project in late 2007 and early 2008. I also acknowledge with appreciation the hospitality extended by the Symposium organizers and the UC Davis community, and the research grant support for this project provided by Fordham Law School.

*status in precisely these structural terms. Although these responses are an incomplete solution to the privacy-related harms that may arise from expanded interior enforcement, they contribute to a public conversation that may recognize more directly the social value of preserving zones in society in which status remains invisible, irrelevant, and private.*

TABLE OF CONTENTS

INTRODUCTION .....	1139
I. THE CHANGING PATTERNS OF MIGRATION, IMMIGRATION POLICY, AND THE NEW INTERIOR ENFORCEMENT .....	1149
A. <i>Immigration Anxiety and the Shifting Targets of     Enforcement</i> .....	1150
B. <i>Interior Enforcement and the Omnipresent Border</i> .....	1157
II. IMMIGRATION AND CITIZENSHIP STATUS PRIVACY .....	1168
A. <i>Katz, Immigration and Citizenship Status, and the     “Secrecy Paradigm”</i> .....	1169
B. <i>Individual and Structural Privacy Interests</i> .....	1178
III. BORDER ENFORCEMENT, INTERIOR ENFORCEMENT, AND THE FOURTH AMENDMENT .....	1189
A. <i>Border Enforcement and “Plenary Power”</i> .....	1191
B. <i>Border Enforcement and Noncriminal Searches     and Seizures</i> .....	1197
C. <i>The Elusiveness of Fourth Amendment Limits     on Interior Enforcement</i> .....	1205
IV. LEGISLATING PROTECTIONS FOR IMMIGRATION AND CITIZENSHIP STATUS PRIVACY .....	1209
CONCLUSION .....	1216

INTRODUCTION

This Article considers the privacy implications of recent initiatives designed to expand the “interior enforcement” of federal immigration laws. While immigration enforcement efforts traditionally have focused on the physical border itself, since the mid-1990s, and to an even greater extent since the terrorist attacks of 2001, the federal government and a number of states and localities have intensified efforts to regulate immigration away from the physical border, in the interior of the country. The specific proposals have taken a variety of different forms, but collectively they seek to expand the range of areas in day-to-day life where individuals are expected to demonstrate their lawful presence in the United States.<sup>1</sup> To some extent, the expansion of interior enforcement during the last few years has relied upon old methods, such as workplace raids by federal immigration agents in search of noncitizens who might be working in the United States without authorization.<sup>2</sup> But rather than relying exclusively upon federal immigration agents, who number only a few thousand, the new interior enforcement initiatives also seek to enlist hundreds of thousands of other public and private actors as “force multipliers” in the collection of immigration and citizenship status information from individuals whom they encounter and the identification of noncitizens who potentially might be subject to deportation.<sup>3</sup>

These new interior enforcement initiatives target both unauthorized immigrants and other noncitizens who might be subject to deportation proceedings. Recent estimates indicate that the number of unauthorized immigrants in the United States may total as many as twelve million individuals, and advocates of expanded interior enforcement hope to reduce this number primarily by encouraging what they describe as a process of mass “self-deportation” and by

---

<sup>1</sup> See MARK KRİKORIAN, CTR. FOR IMMIGRATION STUDIES, BACKGROUND: DOWNSIZING ILLEGAL IMMIGRATION: A STRATEGY OF ATTRITION THROUGH ENFORCEMENT 5 (2005), available at <http://www.cis.org/articles/2005/back605.pdf> (advocating policies that involve “expanded use of verification of legal status at a variety of important points”); Linda Bosniak, *The Undocumented Immigrant: Contending Policy Approaches*, in *DEBATING IMMIGRATION* 85, 90-91 (Carol M. Swain ed., 2007).

<sup>2</sup> See Raquel Aldana, *Of Katz and Aliens: Privacy Expectations and the Immigration Raids*, 41 UC DAVIS L. REV. 1081, 1092-97 (2008).

<sup>3</sup> Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 350 (2005); see also Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. (forthcoming 2008) (manuscript at 3-4, on file with UC Davis Law Review).

detering other would-be immigrants from coming to the United States unlawfully.<sup>4</sup> The new interior enforcement initiatives also target individuals who may have entered the United States lawfully but subsequently have become subject to deportation proceedings and possible “delegalization” on account of post-entry events, such as criminal convictions.<sup>5</sup> This category of individuals has grown tremendously over the past twenty years, especially as Congress has expanded the criminal grounds that make individuals subject to deportation from only a handful of very serious criminal offenses to a lengthy catalogue of both serious and comparatively minor offenses.<sup>6</sup>

As dimensions of an individual’s public identity, immigration and citizenship status have long played ambiguous roles in the United States. On the one hand, status obviously matters deeply when determining an individual’s entitlement to rights and benefits in a variety of social and legal contexts.<sup>7</sup> At the most basic level, only U.S. citizens and lawfully admitted noncitizens are permitted to enter the United States, and noncitizens, unlike U.S. citizens, may be deported. To vote in federal elections and the vast majority of state and local elections, for example, one must be a U.S. citizen.<sup>8</sup> Among different categories of noncitizens, one’s particular immigration status also can bear tremendous and readily apparent significance. An individual admitted as a lawful permanent resident may remain in the United States indefinitely, while an individual admitted temporarily as a “non-immigrant” must depart after his or her term of admission expires. An individual who is not lawfully present in the United States is not automatically entitled to remain at all. Depending on the terms of their admission, non-immigrants also may be restricted in their ability to

---

<sup>4</sup> See *infra* notes 97-100 and accompanying text.

<sup>5</sup> Aarti Shahani, *Legalization and De-Legalization*, GOTHAM GAZETTE, Apr. 2006, <http://www.gothamgazette.com/article/immigrants/20060404/11/1808>.

<sup>6</sup> See *infra* Part I.A.

<sup>7</sup> LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 37-38 (2006).

<sup>8</sup> See Jamin Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1414-17 (1993). Courts have held also that noncitizens may be constitutionally excluded from the federal civil service, see, e.g., *Mow Sun Wong v. Campbell*, 626 F.2d 739, 745 (9th Cir. 1980), and, if the positions involve policy-making or important sovereign functions, that they may be excluded from public employment by state and local governments, see, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432, 743-44 (1982). See generally Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLIN L. REV. 51 (1985).

seek employment in the United States. And constitutionally, some categories of noncitizens are entitled to greater protection than others.<sup>9</sup>

On the other hand, in many other contexts both citizenship and immigration status have traditionally been legally and socially irrelevant. Alexander Bickel famously celebrated what he took to be the limited extent to which formal citizenship status bears significance under the Constitution, which extends many of its most important protections to “persons” rather than “citizens.”<sup>10</sup> As a result, lawful permanent residents are entitled to many of the same rights and are subject to many of the same obligations as U.S. citizens, and despite the important distinctions between lawful permanent residents and non-immigrants, even non-immigrants have many of the same rights and benefits as U.S. citizens. Indeed, even individuals who are not lawfully present in the United States have a “dual legal identity” that simultaneously renders them “regulated objects of immigration control” but also “subjects of membership in limited but important respects.”<sup>11</sup> Unauthorized immigrants also have a dual social identity, since they work and live in mixed status settings together with U.S. citizens and lawfully present noncitizens and quite frequently are members of mixed status families.<sup>12</sup> And in most aspects of day-to-day

---

<sup>9</sup> See, e.g., David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 48 (“Certain categories of aliens enjoy a strong measure of constitutional protection, while others have reduced protection, and on some issues, it appears, no protection.”).

<sup>10</sup> ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 33 (1974) (“Remarkably enough — and as I will suggest, happily — the concept of citizenship plays only the most minimal role in the American constitutional scheme.”).

<sup>11</sup> Linda Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 956; see also Bosniak, *supra* note 1, at 86-87 (“[U]ndocumented immigrants are formally afforded a host of important rights in both the federal and state contexts, including the rights to contract, to own property, and to sue. They are also formally entitled to claim a range of statutory and common-law protections extended generally to residents, consumers, and employees.”).

<sup>12</sup> MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 2 (2004); see also JEFFREY S. PASSEL, PEW HISPANIC CTR., *SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.* 6-9 (2006), available at <http://pewhispanic.org/files/reports/61.pdf>; Aldana, *supra* note 2 at 1118-19. As Saskia Sassen notes, the “daily practices” of unauthorized migrants, which can include “raising a family, schooling children, holding a job,” and “participation in civic activities,” are “a form of citizenship practices, and their identities as members of a community of residence assume some of the features of citizenship identities,” at times in a manner indistinguishable from individuals who are formally authorized as citizens or lawful immigrants. SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS* 294-95 (2006).

---

---

life, formal immigration and citizenship status have traditionally played no role.<sup>13</sup>

By making status more visible and salient on a day-to-day basis, the new interior enforcement initiatives challenge the existing equilibrium between those domains in which immigration and citizenship status are relevant and those in which they are not. The effects of this shift, however, will not only be visited upon unauthorized immigrants and other noncitizens who might be subject to deportation proceedings. Because an individual's status — like other kinds of personal status information — is not ordinarily visible to the world, some inquiry or investigation is necessary to determine an individual's citizenship or immigration status. By explicitly requiring (or actively encouraging) state and local police, corrections officials, welfare agencies, public hospitals and health agencies, motor vehicle licensing agencies, private employers, private landlords, and other nonfederal actors to be aware of an individual's status, rather than blind to it, the new interior enforcement initiatives require *all* individuals in the United States — citizen or noncitizen, permanent resident or temporary non-immigrant, lawfully present or unauthorized — to reveal their immigration and citizenship status in many more situations than traditionally has been the case. By attempting to eliminate zones in which immigration and citizenship status are invisible and irrelevant, the new interior enforcement initiatives are, in a very real sense and very much by design, making the border omnipresent.

This Article proposes the use of “privacy” as a conceptual lens through which to understand and evaluate this constellation of different interior enforcement initiatives as a single, unified phenomenon involving a series of efforts to expand the range of areas in which immigration and citizenship status are visible and socially relevant. Scholars and advocates have recognized that expanding the number of public and private actors involved in the collection, processing, and dissemination of immigration and citizenship status information may present significant costs for both individuals and society at large in specific policy areas.<sup>14</sup> However, these observers

---

<sup>13</sup> Indeed, in most aspects of day-to-day life, one's identity itself plays no role. See Roger Clarke, *Human Identification in Information Systems: Management Challenges and Public Policy Issues*, 7 INFO. TECH. & PEOPLE 6 (1994), available at <http://www.anu.edu.au/people/Roger.Clarke/DV/HumanID.html> (“There remain many circumstances . . . in which the identity of the person with whom an organisation performs transactions is of no consequence. In fact, the majority of transactions undertaken between individuals, and between individuals and corporations, are still conducted anonymously.”).

<sup>14</sup> See Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187*,

have not tended to conceptualize and analyze these issues explicitly in terms of “privacy.”<sup>15</sup>

This gap is striking, especially given how central privacy-related questions seem to be in these proposals.<sup>16</sup> To what extent should privacy interests in immigration and citizenship status be understood to exist at all, and to what extent and in what manner should those interests be legally recognized? While it might be entirely appropriate to obtain, maintain, or disseminate citizenship and immigration status information in some contexts, both individuals and society as a whole may have legitimate interests in preserving the privacy and invisibility of status in other contexts. To the extent that such privacy concerns are legitimate in some circumstances, how should society protect immigration and citizenship status privacy interests in those contexts, while simultaneously preserving the ability to obtain, process, and disseminate that status information in others?

This Article begins to address this underexamined intersection between immigration and privacy.<sup>17</sup> Building upon recent scholarship advancing the idea of privacy as a social or structural value, I argue that recognizing and protecting immigration and citizenship status privacy in certain contexts — in other words, preserving zones in society in which immigration and citizenship status remain both invisible and irrelevant — serves valuable social interests above and beyond the interests of any particular individuals who might otherwise be compelled to disclose their status. Attention to the privacy-related interests implicated by an individual’s immigration or citizenship

---

*and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1440-52 (1995).

<sup>15</sup> See Bosniak, *supra* note 1, at 89 (“The rationales articulated by defenders of . . . [policies protecting confidentiality of immigration status] are usually instrumental . . . and practical in nature.”).

<sup>16</sup> Indeed, at least implicitly, immigration restrictionists seem to recognize the significance of privacy interests in this context, as they encourage advocacy tactics that are designed to diminish the privacy of individuals perceived to be noncitizens. Some restrictionist groups, for example, actively have encouraged their supporters to confront day laborers while they are seeking work and to take photographs or shoot video of them. See, e.g., Timothy Dwyer, *Virginia Day Laborers Being Photographed, Followed*, WASH. POST, Nov. 8, 2005, at B01; Terry McCarthy, *Stalking the Day Laborers*, TIME, Nov. 28, 2005, at 36; Susan McMillan et al., *“If We Can Take One Big Employer Down . . .”*, BUS. WK., Aug. 21, 2006, at 30; Federation for American Immigration Reform, *Confronting Illegal Day Labor Issues in Your Community*, [http://www.fairus.org/site/PageServer?pagename=team\\_team6c4e](http://www.fairus.org/site/PageServer?pagename=team_team6c4e) (last visited Jan. 25, 2008).

<sup>17</sup> Consideration of the privacy interests implicated by immigration and citizenship status also may inform analysis of privacy interests in analogous forms of identity or status information, such as marital status, sexual orientation, health status, or national origin.

status may help negotiate the longstanding tension in the regulation of immigration in the United States between the law's exclusionary impulses, in which status is deemed an appropriate and relevant basis upon which to make distinctions, and its more protective or inclusive impulses, in which status is regarded as playing no legitimate role.<sup>18</sup>

Of course, by acknowledging and considering the privacy interests at stake in immigration and citizenship status, I do not suggest that such interests should automatically be protected in all contexts or in the face of all countervailing values and concerns. Rather, the protection afforded to privacy interests in immigration and citizenship status should be determined in a nuanced, context-sensitive manner since those interests — like the competing concerns against which those interests must be balanced — may be stronger or weaker in different settings.<sup>19</sup> Moreover, it is useful but not sufficient to simply describe the issues at stake in these interior enforcement initiatives as ones involving “privacy” in the abstract.<sup>20</sup> As Daniel Solove has elaborated, the term “privacy” encompasses a number of different kinds of potentially harmful activities.<sup>21</sup> Those activities may be present in different interior enforcement programs in varying degrees, and their implications may vary in different settings. Developing a framework to better understand the various ways in which privacy-related harms potentially might occur in different interior enforcement initiatives, and how the strength of privacy-related interests in immigration and citizenship status might vary in different contexts, may facilitate more refined choices about how to design different legal

---

<sup>18</sup> Scholars distinguish between laws concerning “immigration” policy, which concerns the regulation and enforcement of immigration status and the right to entry and presence, or laws concerning “alienage” or “immigrant” policy, which regulates the day-to-day rights and obligations of noncitizens who are present in the United States. See BOSNIAK, *supra* note 7, at 37-76; HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 46-47, 113-14 (2006); Bosniak, *supra* note 1, at 85-86. In recent decades, the law's exclusionary tendencies with respect to noncitizens have been embodied largely in immigration law, while its more inclusive impulses have tended to be more prevalent in alienage or immigrant law. See Bosniak, *supra* note 1, at 85-86.

<sup>19</sup> As Judge Richard Posner has written: “[T]he degree to which a disclosure of personal information inflicts harm depends less on what information is disclosed than to whom, and to how many, and what use it is put to by people to whom it is disclosed.” RICHARD POSNER, NOT A SUICIDE PACT 142 (2006).

<sup>20</sup> See, e.g., Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 480 (2006) (“Abstract incantations of ‘privacy’ are not nuanced enough to capture the problems involved.”).

<sup>21</sup> See *id.* at 489-90.



regimes to protect against those harms and to balance those interests against other societal concerns.

In this Article, I begin the process of developing that descriptive and normative framework, focusing primarily on the issues arising from initiatives concerning the “direct” enforcement of federal immigration laws by law enforcement officials, such as federal immigration agents and state and local police.<sup>22</sup> The conceptual starting point for this Article’s analysis of immigration and citizenship status privacy is the Supreme Court’s redefinition of the interests underlying the Fourth Amendment in *Katz v. United States*, whose principles have often migrated to other legal contexts in which privacy interests are relevant.<sup>23</sup> After discussing in Part I some of the recent shifts in migration patterns and immigration policy that have brought the new interior enforcement initiatives to the forefront of contemporary policy debates, and describing the potential effects of those initiatives on the visibility and salience of immigration and citizenship status, Part II discusses the significance of *Katz* and the Court’s post-*Katz* jurisprudence to the idea that privacy interests in immigration and citizenship status might warrant some measure of legal protection.

While *Katz* carried great promise to expand the scope of Fourth Amendment, in practice the Court’s decisions applying *Katz* have instead greatly limited the Amendment’s ambit. In particular, the Court has adopted an overly narrow and blunt conception of what Fourth Amendment “privacy” entails, neglecting a range of values and interests that a broader and more nuanced understanding of privacy

---

<sup>22</sup> See Anil Kalhan, *Immigration Enforcement and Federalism After September 11, 2001*, in IMMIGRATION, INTEGRATION AND SECURITY: EUROPE AND AMERICA IN COMPARATIVE PERSPECTIVE (Ariane Chebel d’Appollonia & Simon Reich eds.) (forthcoming 2008) (manuscript at 2-3, on file with UC Davis Law Review) (distinguishing between “direct” and “indirect” modalities of immigration enforcement); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. (forthcoming 2008) (manuscript at 23-25, on file with UC Davis Law Review) (same). The framework I develop here is also relevant to privacy questions arising from more “indirect” forms of interior enforcement. Such initiatives include laws requiring both public actors, such as welfare agencies, educational institutions, public hospitals, and drivers’ license bureaus, and private actors, such as employers and landlords, to verify immigration and citizenship status of individuals whom they encounter in order to determine eligibility for the services and benefits those institutions provide. See *infra* Part I.B. I leave the privacy implications of those initiatives largely to be analyzed in future work.

<sup>23</sup> 389 U.S. 347, 350 (1967); see RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW: CASES AND MATERIALS* 78 (2d ed. 2002) (“[T]he principles and concepts that have evolved in Fourth Amendment cases to protect privacy have been transported by legislatures and courts to many other areas of privacy law.”).

would recognize. Although some of the Court's Fourth Amendment cases have at least nominally recognized the importance of context in determining the legitimacy of one's expectations of privacy,<sup>24</sup> most of the Court's post-*Katz* jurisprudence has remained largely inattentive to the context in which government intrusions upon privacy interests take place. For example, the Court has largely treated Fourth Amendment privacy as an all-or-nothing proposition: if an individual has disclosed information to *any* third party, the Court has treated the disclosure as having eviscerated any privacy interests in the information at all — even if the disclosure was a carefully limited one.<sup>25</sup> The Court also has tended to limit its conception of privacy to the protection of a set of discrete individual interests, disregarding a broader set of social or structural values that a number of privacy scholars have identified as central to understanding privacy's importance. As Part II discusses, in the limited Fourth Amendment case law explicitly discussing privacy interests in immigration and citizenship status, which mostly has arisen in the context of border enforcement, the Court has underestimated the individual privacy interests and neglected the broader structural privacy interests that are at stake when government officials seek status information.

As a result, the Court has tended to discount the extent to which immigration and citizenship status information implicate any significant privacy-related concerns under the Fourth Amendment at all. However, outside of the Fourth Amendment context, courts increasingly have treated immigration and citizenship status rather differently. These courts have implicitly relied upon a broader conception of privacy that acknowledges the structural interests in protecting status information in certain contexts, above and beyond the particular individual interests of those about whom that status information is sought. For example, lower courts have protected noncitizens suing their employers for alleged labor and employment law violations from efforts to learn their immigration and citizenship status through discovery when status information is irrelevant. These courts have recognized that compelling disclosure of status information under such circumstances may deter noncitizen workers

---

<sup>24</sup> See, e.g., *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (“[W]herever an individual may harbor a reasonable ‘expectation of privacy,’ . . . he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted.” (citing *Katz*, 389 U.S. at 361)).

<sup>25</sup> See Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 *STAN. L. REV.* 119, 122 (2002).

from seeking to vindicate their legal rights, thereby undermining full enforcement of labor and employment laws for citizens and noncitizens alike. Part II argues that an approach to the Fourth Amendment reflecting a similar, structural conception of privacy could, at least conceptually, offer comparable protection for immigration and citizenship status privacy in other contexts — for example, in the encounters between noncitizens and state and local law enforcement, where scholars, advocates, and many police officials themselves have raised similar concerns about the social costs that result when noncitizens are dissuaded from communicating and cooperating with the police.

Part III considers whether the Court's highly deferential approach to governmental searches and seizures at the physical border makes it even more unlikely that the Court will embrace a more nuanced approach to immigration and citizenship status privacy along the lines advanced in Part II. At least conceptually, this need not invariably be the case. While the Court has afforded tremendous deference to the federal government at the physical border itself, on account of its sovereign interests in regulating the border and the ostensibly administrative or noncriminal purposes for border searches and seizures, the Court already has recognized that the case for that deference becomes less justifiable as the modalities of immigration enforcement move away from the core, paradigmatic area of border enforcement to a variety of different contexts within the interior of the country. Independently, the case for deference also is diminished when those activities involve actors other than federal immigration officials. These distinctions between searches and seizures at the border and those in the interior, and between the interests of federal officials and nonfederal actors, tracks the Court's longstanding approach to the federal immigration power more generally, which extends greater protection to noncitizens who have entered the United States than to noncitizens outside of the nation's borders and scrutinizes state and local alienage classifications more closely than federal classifications.

Moreover, the Court's case law on administrative and "special needs" searches has recognized that when purportedly administrative investigatory tactics become intertwined with criminal law enforcement purposes, greater Fourth Amendment scrutiny is warranted. As in other areas involving regulatory or administrative searches and seizures, the Court's border exception cases have assumed that less judicial oversight is required in part due to the noncriminal purposes of those searches and seizures. However, as Part III discusses, the lines between immigration and criminal law

enforcement have blurred in recent years, rendering it increasingly questionable to characterize many immigration-related interior enforcement activities as purely administrative or noncriminal in nature. This trend makes it even more important that the procedural protections ordinarily available in the criminal law enforcement context, including the protections of the Fourth Amendment, be applied more vigorously to immigration enforcement activities.

The Court's case law on border searches and seizures, the federal immigration power, and administrative searches therefore all support a more context-sensitive approach to protecting privacy in immigration and citizenship status information than the Court has taken in most of its post-*Katz* jurisprudence. However, as Part III discusses, the Court's limited case law involving interior enforcement suggests that it is unlikely to extend Fourth Amendment protection to privacy interests in immigration and citizenship status to any meaningful extent. The Court has been particularly deferential to interior investigations of individuals' status involving direct interrogation by federal officials, leaving such encounters largely unrestrained by the Fourth Amendment despite the potential for coercion, selective enforcement, or manipulation. While the Court's relatively context-sensitive case law on border searches, the federal immigration power, and administrative searches all support a less deferential approach when nonfederal officials conduct investigations concerning status, early indications suggest that the Court will be no less deferential to investigations in these circumstances. Having initially considered the privacy interests involved in immigration and citizenship status in cases involving federal officials at or near the physical border itself, where the justification for deference is greater, the Court seems to be extending that deferential paradigm to cases involving nonfederal actors within the interior of the United States without regard to the various ways one might legitimately distinguish the privacy-related concerns presented under those rather different circumstances.

Nevertheless, even if the Fourth Amendment ultimately erects only a weak constraint against the new interior enforcement initiatives, that need not mean that privacy interests in immigration and citizenship status must be left unprotected altogether. Part IV considers whether legislative and administrative solutions to protect privacy interests in immigration or citizenship status may offer meaningful substitutes for or supplements to the Fourth Amendment's protections. The question of whether legislative entities or administrative agencies can implement Fourth Amendment values more or less effectively than courts is an old one, and the issues arising from interior immigration enforcement offer another arena in which to explore those questions.

Already, some states and localities have acted to protect the privacy interests of their noncitizen residents by directing their officials to be blind to status to varying degrees when interacting with members of the public. Such responses represent only a partial potential solution, since the jurisdictions that adopt such policies are likely to be those that already are more hospitable to the needs of immigrants. Moreover, the ability of state and local governments to maintain these policies over time if the federal government seeks to preempt them, as a matter of federal supremacy, remains highly uncertain. However, those initiatives are productively contributing to an ongoing political conversation concerning the extent to which immigration and citizenship status should be visible and relevant in different legal and social domains.

Whether courts, Congress and the Executive Branch, or state and local governments — or some combination of all three — should protect immigration and citizenship privacy interests, developing the right balance between those interests and competing concerns asserted by proponents of expanded interior enforcement will depend upon a more finely tuned understanding of the activities affecting those interests and the potential harms that may result. The goal of this Article is to begin the process of articulating a framework to help answer these questions.

I. THE CHANGING PATTERNS OF MIGRATION, IMMIGRATION POLICY,  
AND THE NEW INTERIOR ENFORCEMENT

The recent proposals to expand interior enforcement of federal immigration laws have proliferated in the wake of dramatic shifts in both the patterns of immigration to the United States and immigration policy priorities. As both legal and illegal immigration have increased and become more geographically dispersed in recent years, and as policymakers have expanded the list of post-entry grounds that render individuals potentially deportable, many more individuals within the interior of the country have become potential targets of immigration enforcement than traditionally has been the case. The new interior enforcement initiatives place greater emphasis on targeting this larger pool of potentially deportable individuals, effectively constructing a series of virtual border checkpoints throughout the country's interior where individuals are required to disclose their immigration and citizenship status. In the process, these initiatives not only make the border essentially omnipresent throughout the country's interior, but also necessarily diminish the privacy of immigration and citizenship status information for both citizens and noncitizens alike.

A. *Immigration Anxiety and the Shifting Targets of Enforcement*

For decades, it has been customary in the United States to think about immigration enforcement predominantly as an issue involving control of the physical border, and in particular the land border between the United States and Mexico.<sup>26</sup> Enforcement initiatives have reflected this understanding, devoting the vast majority of enforcement resources to the Border Patrol and other efforts to restrict unauthorized migration across the southern border. In recent years, however, a number of developments have complicated the conventional picture of both the nature of unauthorized migration and the immigration enforcement policies that should be implemented in response.

The conventional picture emerged in the aftermath of major immigration policy shifts in the 1960s. The new immigration laws that were adopted during the 1960s restricted what previously had been numerically unrestricted and relatively high levels of lawful immigration from Mexico.<sup>27</sup> However, in the aftermath of these legislative changes, actual regulation of the southern border remained limited, leading to significant growth in the number of individuals entering the United States without legal authorization, the overwhelming majority of whom were Mexican citizens.<sup>28</sup> According to government estimates cited by the Supreme Court in the early 1970s, approximately eighty-five percent of all unauthorized immigrants to the United States were of Mexican descent.<sup>29</sup> The Court painted a picture in which many if not most of these individuals were surreptitious entrants who crossed the border and entered the United States without formal inspection by immigration officials.<sup>30</sup>

Federal enforcement priorities have long reflected this conventional understanding, largely prioritizing enforcement activities by federal officials at or near the physical border over enforcement activities in

---

<sup>26</sup> See BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 115 (2004) (“[T]he so-called illegal immigration problem has become synonymous with the control, or lack thereof, of the southwest border.”).

<sup>27</sup> *Id.* at 97-100.

<sup>28</sup> See DOUGLAS S. MASSEY ET AL., *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* 39-47 (2002); ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 334-35, 340-44 (2006).

<sup>29</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-89 (1975).

<sup>30</sup> *Id.*; see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 552 (1976) (characterizing “principal problem” concerning illegal immigration from Mexico as “aris[ing] from surreptitious entries”); *De Canas v. Bica*, 424 U.S. 351, 357 (1976) (noting “significant influx into [California] of illegal aliens from neighboring Mexico”).

the interior of the country. Until enactment of the Immigration Reform and Control Act of 1986 (“IRCA”), which required employers to verify employees’ eligibility to work in the United States and established a system of civil and criminal sanctions for employers who hire workers without legal authorization to work, the United States did not formally have much by way of “interior enforcement” at all.<sup>31</sup> Resources for border enforcement, by contrast, have increased dramatically during the past twenty years, with funding increasing 519% and staffing levels increasing 221% between 1986 and 2002.<sup>32</sup> The vast majority of those resources have been devoted to regulation of the southern border with Mexico, although in recent years Congress also has significantly increased the resources devoted to enforcement of the land border with Canada.<sup>33</sup> To a considerable extent, this traditional emphasis on border enforcement, and in particular regulation of the southern border with Mexico, has continued in recent years.<sup>34</sup> Indeed, in the wake of the public debate in 2006 over comprehensive immigration reform, the only immigration legislation which members of Congress ultimately were able to agree upon was a bill authorizing construction of a double-layered fence along 700 miles of the 2000-mile land border between United States and Mexico, a project whose estimated costs run into the billions of dollars.<sup>35</sup>

---

<sup>31</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in pertinent part in scattered sections of 8 U.S.C.). On IRCA and its employer sanctions scheme, see generally Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193.

<sup>32</sup> Press Release, Migration Policy Inst., Indep. Task Force on Immigration & America’s Future, Migration Studies Say Border Enforcement Alone Won’t Trim Illegal Migration (Dec. 6, 2005), available at [http://www.migrationpolicy.org/ITFIAF/1206\\_releases.php](http://www.migrationpolicy.org/ITFIAF/1206_releases.php); see also MASSEY ET AL., *supra* note 28, at 96 (discussing transformation of Border Patrol “from a backwater agency with a budget smaller than that of many municipal police departments . . . to a large and powerful organization with more officers licensed to carry weapons than any other branch of the federal government save the military”).

<sup>33</sup> See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, §§ 402-403, 115 Stat. 272, 342-45.

<sup>34</sup> In 2002, for example, border enforcement accounted for approximately 58% of all federal immigration enforcement spending, compared to 9% for interior investigations and 33% for detention and removal operations. See DAVID DIXON & JULIA GELATT, MIGRATION POLICY INST., IMMIGRATION FACTS: IMMIGRATION ENFORCEMENT SPENDING SINCE IRCA, TASK FORCE FACT SHEET NO. 10, at 8 (2005), available at [http://www.migrationpolicy.org/ITFIAF/FactSheet\\_Spending.pdf](http://www.migrationpolicy.org/ITFIAF/FactSheet_Spending.pdf).

<sup>35</sup> Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638; see Jonathan Weisman, *With Senate Vote, Congress Passes Border Fence Bill*, WASH. POST, Sept. 30, 2006, at A1. On comprehensive immigration reform, see, for example, Sheila Jackson

These enforcement efforts also have traditionally been implemented almost exclusively by federal officials. The role of state and local governments in the day-to-day enforcement of the civil provisions of federal immigration laws, by contrast, has been highly limited.<sup>36</sup> While the states played an active role in regulating immigration to the United States prior to the enactment of the first federal immigration statutes in the late nineteenth century,<sup>37</sup> scholars, advocates, and government officials have largely presumed — until recently — that under the legal regime in place since then, state and local governments lack any general or inherent legal authority to engage in activities to enforce federal immigration laws.<sup>38</sup>

---

Lee, *Why Immigration Reform Requires a Comprehensive Approach That Includes Both Legalization Programs and Provisions to Secure the Border*, 43 HARV. J. LEGIS. 267 (2006); Tamar Jacoby, *Immigration Nation*, FOREIGN AFF., Nov.-Dec. 2006, at 50.

<sup>36</sup> See Kalhan, *supra* note 22 (manuscript at 11-12). While individual police departments had on occasion engaged in some immigration-related enforcement activities, these activities were relatively isolated. During the 1990s, Congress explicitly authorized some state and local participation in civil immigration enforcement activities on a structured and relatively constrained basis. See, e.g., 8 U.S.C. § 1103(a)(10) (Supp. V 2005) (conferring Attorney General with emergency powers to authorize state and local law enforcement officials to enforce federal immigration laws in event of “an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border”); 8 U.S.C. § 1357(g) (2000) (authorizing Attorney General under non-emergency circumstances to enter written agreements with state or local jurisdictions to permit designated state or local officers to participate in specified enforcement activities under federal supervision). Beyond these limited, highly structured modes of state and local participation authorized by Congress, state and local law enforcement officials have traditionally played little sustained role in civil immigration enforcement matters.

<sup>37</sup> See generally Gerald Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993) (discussing regulation of immigration by states before 1875).

<sup>38</sup> E.g., *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”); 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, 987-98 (2004) (arguing that immigration power is exclusively federal and must be exercised in nationally uniform manner); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT’L L. 121, 134 (1994) (“It has long been assumed that control of immigration and the treatment of aliens within the United States are exclusive federal responsibilities.”); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1088-90 (2004) (discussing “widely understood and accepted” conclusion that state and local governments lack power to enforce provisions of federal immigration laws). *But see*, e.g., Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. (forthcoming 2008) (on file with UC Davis Law Review) (arguing that Constitution permits immigration power to be shared among federal, state, and local governments); Kalhan, *supra* note 22 (manuscript at 27-34) (discussing potential role



But despite these massive federal investments in border enforcement, the overall number of unauthorized immigrants has continued to increase dramatically, with recent estimates placing the unauthorized population at between eleven and twelve million individuals.<sup>39</sup> Given the strength of economic and social factors propelling immigrants to the United States, and the sheer size of the U.S.-Mexico border, the fortification of border enforcement in visible, high traffic areas has not stopped unlawful entrants from coming to the United States, many of whom have instead entered in more remote, less highly patrolled regions.<sup>40</sup> While the flows of unauthorized immigrants from Mexico had previously been largely circular, with as many as fifty percent of all unauthorized immigrants returning home within twelve months, the increased fortification of the border has dramatically decreased the rate of return migration, causing many unauthorized immigrants to stay longer in the United States than they previously would have.<sup>41</sup>

Moreover, it increasingly has become apparent that significant numbers of unauthorized immigrants have not crossed the border surreptitiously, without being inspected and lawfully admitted by immigration officers at a designated port-of-entry, but rather are individuals who have, in fact, been inspected and lawfully admitted to the United States. Recent studies estimate that as many as forty to fifty percent of all unlawfully present individuals have not entered without inspection, but rather have lawfully entered in a temporary immigration category and then “overstayed” their original period of admission.<sup>42</sup> Under such circumstances, however, “lawful presence” is

---

of states and localities in protecting immigrants’ rights); Rodriguez, *supra* note 22 (discussing functional role that states and localities play in integrating immigrants and managing demographic change).

<sup>39</sup> PASSEL, *supra* note 12, at 2; U.S. DEP’T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2005, at 6 (2006), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL\\_PE\\_2005.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL_PE_2005.pdf).

<sup>40</sup> See MASSEY ET AL., *supra* note 28, at 105-12.

<sup>41</sup> See Douglas S. Massey, Op-Ed., *The Wall That Keeps Illegal Workers In*, N.Y. TIMES, Apr. 4, 2006, at A23; see also MASSEY ET AL., *supra* note 28, at 105-18, 126-36.

<sup>42</sup> E.g., PEW HISPANIC CTR., MODES OF ENTRY FOR THE UNAUTHORIZED MIGRANT POPULATION 1 (2006), available at <http://pewhispanic.org/files/factsheets/19.pdf>; see also Orde Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1460 (2006). In addition, a significant number of individuals have entered the United States with false documents or genuine documents that were fraudulently obtained, although the extent to which such entries take place remains unknown. See RUTH ELLEN WASEM, CONG. RES. SERV., IMMIGRATION FRAUD: POLICIES, INVESTIGATIONS, AND ISSUES 1-2 (2007), available at <http://openrcs.cdt.org/document/>

not an entirely straightforward or consistent concept. Many individuals who have remained in the United States past the expiration of the initial period of their admission — and who therefore may be “out of status” — may nevertheless not be deemed “unlawfully present” in the United States for at least some purposes.<sup>43</sup> For example, depending on the circumstances and timing, a non-immigrant who filed a timely, nonfrivolous application before the expiration of their authorized stay to extend or change their non-immigrant status, or to adjust to immigrant status, might be lawfully present for some purposes while that application is pending.<sup>44</sup> Similarly, an individual who has been granted “voluntary departure,” which may be granted in lieu of being placed in deportation proceedings or being issued a final deportation order, is also deemed to be lawfully present for some purposes during their authorized period of voluntary departure.<sup>45</sup>

With tremendous growth in immigration since the 1990s, anxiety over the effects of large-scale immigration — both legal and illegal — has increased as well.<sup>46</sup> While immigrants traditionally have been concentrated in particular geographic locations, as migration has increased and become less temporary in recent years the patterns of

---

RL34007.

<sup>43</sup> See Memorandum from Thomas E. Cook, Acting Ass't Comm'r, INS, U.S. Dep't of Justice, Guidance on Interpretation of “Period of Stay Authorized by the Attorney General” in Determining “Unlawful Presence” Under Section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (Act), app. at 3 (Apr. 2, 2003), available at [http://www.cyrusmehta.com/related/Memo\\_dt\\_March\\_27\\_2002.pdf](http://www.cyrusmehta.com/related/Memo_dt_March_27_2002.pdf) [hereinafter Cook Memorandum] (distinguishing between period of authorized “status” and “period of stay authorized by the Attorney General”); Memorandum from Michael A. Pearson, Executive Assoc. Comm'r, INS, U.S. Dep't of Justice, Period of Stay Authorized by the Attorney General After 120-day Tolling Period For Purposes of Section 212(a)(9)(B) of the Immigration and Nationality Act, reprinted in 77 INTERPRETER RELEASES 316, 317 (2000) [hereinafter Pearson Memorandum] (same). See generally Cyrus D. Mehta, *Unlawful Presence vs. Unlawful Status*, Apr. 25, 2003, <http://www.cyrusmehta.com/News.aspx?SubIdx=831> (summarizing and discussing Cook Memorandum and Pearson Memorandum).

<sup>44</sup> See Cook Memorandum, *supra* note 43, app. at 4.

<sup>45</sup> 8 U.S.C. § 1229c (2000 & Supp. V 2005); see Pearson Memorandum, *supra* note 43, at 320.

<sup>46</sup> See Cristina M. Rodríguez, *Guest Workers and Integration, Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 245 (arguing that local regulations ostensibly responding to “specific problem of illegal immigration . . . arguably represent part of a larger struggle to adapt to and resist immigration more generally — a form of resistance to demographic change”); Rodríguez, *supra* note 22 (manuscript at 19); Alex Kotlowitz, *Our Town*, N.Y. TIMES, Aug. 5, 2007, § 6 (Magazine), at 30.

migration have also become more geographically dispersed. In the early 1990s, approximately three-fourths of all immigrants lived in six states: California, Texas, New York, New Jersey, Illinois, and Florida.<sup>47</sup> Today, the percentage of the foreign-born settling in those six states has decreased, but with overall levels of immigration increasing during the 1990s, the absolute numbers of foreign-born residents have increased significantly in both the traditional receiving states and many other states in a relatively short period of time.<sup>48</sup> In the early 1990s, approximately eighty-eight percent of unauthorized immigrants lived in the six traditional settlement states for the foreign-born.<sup>49</sup> By 2004, this percentage had dropped to sixty-one percent, as the overall number of unauthorized immigrants outside the six traditional receiving states increased almost tenfold, from 400,000 in 1990 to 3.9 million in 2004.<sup>50</sup> Moreover, increasing numbers of immigrants have bypassed traditional gateway cities and settled directly in suburban and rural communities that have not previously experienced significant levels of immigration.<sup>51</sup> As a result, many states and localities that have not previously faced immigration to any considerable extent have experienced both intangible anxiety and at least some tangible consequences owing to these significant increases in immigration.

Anxiety over the growth in immigration during the past two decades also has dovetailed with anxiety over crime, and in response, Congress has dramatically expanded the criminal grounds that render lawfully present noncitizens potentially deportable. Until the 1980s, only a limited number of criminal offenses, including crimes involving moral turpitude, drug trafficking offenses, and certain weapons offenses, rendered lawful permanent residents deportable.<sup>52</sup> In most cases, even these individuals could seek discretionary relief from deportation, based on an administrative adjudicator's individualized assessment of

---

<sup>47</sup> See Greg Anrig, Jr. & Tova Wang, *Introduction to IMMIGRATION'S NEW FRONTIERS: EXPERIENCES FROM THE EMERGING GATEWAY STATES 1* (Greg Anrig, Jr. & Tova Wang eds., 2006).

<sup>48</sup> AUDREY SINGER, BROOKINGS INST., *THE RISE OF NEW IMMIGRANT GATEWAYS 4-6* (2004), available at [http://www3.brookings.edu/urban/pubs/20040301\\_gateways.pdf](http://www3.brookings.edu/urban/pubs/20040301_gateways.pdf); Anrig & Wang, *supra* note 47, at 1.

<sup>49</sup> JEFFREY S. PASSEL, PEW HISPANIC CTR., *UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 12* (2005), available at <http://pewhispanic.org/files/reports/46.pdf>.

<sup>50</sup> *Id.* Because of the tremendous increase in unauthorized immigration during this period throughout the country, the absolute numbers of unauthorized immigrants also continued to grow significantly in the six traditional receiving states. *Id.*

<sup>51</sup> SINGER, *supra* note 48, at 6-8; see also Rodríguez, *supra* note 46, at 244.

<sup>52</sup> See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938-39 (2000).

factors including rehabilitation, the effect of deportation on lawfully present family members, involvement in the community, and ties to their countries of origin.<sup>53</sup> However, since 1988, Congress has steadily (and at times retroactively) expanded the list of prior criminal convictions that may serve as substantive grounds of deportability to include a broad range of comparatively minor violent and nonviolent offenses, including even offenses that state laws might classify as misdemeanors.<sup>54</sup> In addition, Congress has sharply constricted the opportunities for individuals who are deportable on criminal grounds to obtain discretionary relief from deportation based on the equities of their particular cases.<sup>55</sup>

As a result of this broad expansion of the grounds of deportability, the targets of immigration enforcement have begun to shift in recent years, as well, to include large categories of lawful permanent residents who traditionally have not been the targets of immigration enforcement efforts. From 1985 to 2005, the total number of individuals removed from the United States increased from approximately 23,000 to over 208,000.<sup>56</sup> More than half of all individuals removed in 2003 were deported from the country's interior.<sup>57</sup> The increase in the number of individuals removed on criminal grounds has been particularly dramatic. Between 1986 and 2005, the number of noncitizens deported on criminal grounds increased from less than 2000, representing three percent of all deportations, to almost 90,000, representing approximately forty-three

---

<sup>53</sup> *Id.*; see *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998) (discussing positive and adverse factors to be considered in immigration judge's exercise of discretion to grant or deny relief from removal).

<sup>54</sup> See Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 484-86 (2007); Morawetz, *supra* note 52, at 1938-43.

<sup>55</sup> See Legomsky, *supra* note 54, at 482-83; Morawetz, *supra* note 52, at 1938-43; Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 393-94 (1999); Juliet P. Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. UNIV. L. REV. 367, 382-83 (2006).

<sup>56</sup> See U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2005 YEARBOOK OF IMMIGRATION STATISTICS 95, available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS\\_2005\\_Yearbook.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf); U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT, IMMIGRATION ENFORCEMENT ACTIONS: 2004, at 6, available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/AnnualReportEnforcement2004.pdf>.

<sup>57</sup> STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 501 (4th ed. 2005).

percent of all deportations.<sup>58</sup> Since 1999, deportation of individuals with criminal convictions has been the federal government's highest stated interior enforcement objective.<sup>59</sup>

*B. Interior Enforcement and the Omnipresent Border*

Faced with these rapidly growing numbers of unauthorized immigrants in both traditional and emerging gateway jurisdictions, on the one hand, and with the increased priority placed on deportation of lawfully present noncitizens based on post-entry grounds, on the other, authorities have increasingly sought to expand immigration enforcement activities to target individuals within the interior of the country. These new interior enforcement initiatives, which have been sought at both the federal and subfederal levels, dramatically seek to increase the number of individuals and institutions involved in immigration enforcement activities beyond the few thousand federal agents with primary responsibility to enforce the federal immigration laws.<sup>60</sup> Instead, the new interior enforcement initiatives seek to enlist hundreds of thousands of other public and private actors as "force multipliers" in the federal government's enforcement activities.<sup>61</sup> While the roots of these initiatives may be found in the immigration debates of the 1980s and 1990s,<sup>62</sup> federal, state, and local efforts to

---

<sup>58</sup> U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT, IMMIGRATION ENFORCEMENT ACTIONS: 2005, at 5, available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement\\_AR\\_05.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement_AR_05.pdf).

<sup>59</sup> See *Challenges to Implementing the INS Interior Enforcement Strategy: Hearing Before Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 107th Cong. 2 (2002) (statement of Richard M. Stana, Director, Justice Issues, U.S. Gen. Accounting Office).

<sup>60</sup> State and local immigration-related proposals have proliferated sharply in the past two years. By one count, at least 1400 immigration-related pieces of legislation had been introduced in state legislatures alone by the summer of 2007, approximately 170 of which were enacted. See DIRK HEGEN, NAT'L CONFERENCE OF STATE LEGISLATURES, 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION (2007), <http://www.ncsl.org/programs/immig/2007ImmigrationUpdate.htm>.

<sup>61</sup> Kobach, *supra* note 3, at 181; see KRİKORIAN, *supra* note 1, at 5.

<sup>62</sup> See, e.g., Spiro, *supra* note 38, at 130-32 (noting state laws in 1980s and 1990s criminalizing employment of undocumented immigrants, requiring prison and mental health authorities to share immigration status information with federal officials, and preempting local "sanctuary" ordinances; and discussing state legislative proposals in early 1990s to regulate immigration status more aggressively). Perhaps most prominently, in 1994, California voters approved Proposition 187, a ballot initiative which restricted access of unauthorized immigrants to a variety of public services, including education and non-emergency healthcare, and required state and local officials to collect status information and to inform federal immigration officials about

adopt these new interior enforcement initiatives have accelerated in the past several years.

Under these initiatives, both the federal government and some state and local governments have sought to rely upon both “direct” and “indirect” modalities of interior enforcement.<sup>63</sup> Direct enforcement initiatives have sought to expand the role of federal agents and to enlist state and local institutions in status verification for the purpose of immigration regulation and enforcement itself — for example, by encouraging state and local law enforcement officials, such as police, highway patrol, or corrections officials, to obtain status information from individuals they encounter, to identify individuals suspected of being deportable, and to share status information with federal officials or detain those individuals on the federal government’s behalf.<sup>64</sup> In addition, some restrictionist groups have actively encouraged private groups and individuals also to become involved in direct enforcement activities, by attempting to identify noncitizens suspected of being unlawfully present and reporting those individuals to federal immigration officials.<sup>65</sup>

Indirect enforcement initiatives, by contrast, seek to restrict access to various rights, benefits, and services on the basis of immigration or citizenship status, thereby requiring the collection of status information to apply those eligibility criteria.<sup>66</sup> The principal means of

---

anyone they suspected to be unlawfully present in the United States. See Peter H. Schuck, *The Message of Proposition 187*, 26 PAC. L.J. 989, 990 (1995). Federal court litigation over Proposition 187 initially led to the invalidation of most of its main provisions on the grounds that they either were preempted by the federal immigration laws or constituted an impermissible regulation of federal immigration status by the State of California and ultimately led to a settlement agreement. See *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1251 (C.D. Cal. 1997); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 786-87 (C.D. Cal. 1995).

<sup>63</sup> See Kalhan, *supra* note 22 (manuscript at 2-3); Rodríguez, *supra* note 22 (manuscript at 23-25).

<sup>64</sup> Kobach, *supra* note 3, at 181. See generally Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL’Y REV. 323 (2005).

<sup>65</sup> While many of these groups’ activities have focused on the border itself, they also have become increasingly active within the interior of the United States. See sources cited *supra* note 16; see also Julia C. Mead, *Anti-Immigrant Group Active on East End*, N.Y. TIMES, Apr. 23, 2006, § 14LI, at 3.

<sup>66</sup> See Kalhan, *supra* note 22 (manuscript at 2); Pham, *supra* note 3 (manuscript at 8); Rodríguez, *supra* note 22 (manuscript at 24-25). For example, local ordinances recently adopted by a number of communities, most prominently Hazleton, Pennsylvania, have sought to prohibit employers from hiring or renting property to unauthorized immigrants and to deny business permits, contracts, and grants to those who employ or assist unauthorized immigrants. Courts have enjoined a number of

indirect enforcement for the past twenty years has been the employer sanctions regime that Congress adopted in 1986 as part of IRCA, and recent proposals in Congress have sought to tighten IRCA's existing employer sanctions regime by imposing more stringent requirements upon employers.<sup>67</sup> In addition, some state and local governments have sought to supplement IRCA with employer sanctions provisions of their own.<sup>68</sup> But the new interior enforcement initiatives go well beyond employer sanctions by significantly expanding the range of situations in which authorities may utilize eligibility criteria based on citizenship or immigration status. Such initiatives thereby seek to place many other public and private actors in the position of obtaining immigration and citizenship status information — including state and local institutions, such as welfare agencies,<sup>69</sup> educational institutions,<sup>70</sup> public hospitals and health agencies,<sup>71</sup> and motor vehicle licensing bureaus,<sup>72</sup> as well as private institutions, such as landlords<sup>73</sup> and

---

these schemes, and in the wake of those decisions, a number of other localities have begun to reconsider the use of these ordinances. *E.g.*, *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 555-56 (M.D. Pa. 2007); *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 777-78 (N.D. Tex. 2007); *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1060 (S.D. Cal. 2006); *see* J. Harry Jones, *Escondido Scuttles Rental Law*, SAN DIEGO UNION-TRIB., Dec. 14, 2006, at A1; Jon Hurdle, *New Jersey Town Scraps Law on Illegal Immigration*, REUTERS, Sept. 18, 2007, <http://www.reuters.com/article/domesticNews/idUSN1844508020070918>.

<sup>67</sup> *See, e.g.*, Comprehensive Immigration Reform Act of 2007, S. 1639, 110th Cong. §§ 301-310 (2007); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. §§ 274(a), 301-305 (as passed by Senate, May 25, 2006).

<sup>68</sup> *See, e.g.*, Fair and Legal Employment Act, ARIZ. REV. STAT. ANN. §§ 23-211 to -214 (1995 & Supp. 2007).

<sup>69</sup> *See, e.g.*, COLO. REV. STAT. § 24-76.5-103 (2001 & Supp. 2007); GA. CODE ANN. § 50-36-1(a), (c) (2006) (requiring all state and local agencies to “verify the lawful presence in the United States [of any adult] who has applied for state or local public benefits”); *see also* *Soskin v. Reinertson*, 353 F.3d 1242 (10th Cir. 2004) (upholding Colorado policy, pursuant to congressional authorization, denying Medicaid benefits to certain categories of noncitizens).

<sup>70</sup> *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 15-1803 to -1825 (Supp. 2007) (adding provisions of Proposition 300 in 2006 that prohibit unauthorized immigrants from receiving state financial assistance for various educational programs and state educational institutions).

<sup>71</sup> *See, e.g.*, Sarah Kershaw, *U.S. Rule Limits Emergency Care for Immigrants*, N.Y. TIMES, Sept. 22, 2007, at A1 (discussing elimination of Medicaid coverage of chemotherapy for unauthorized immigrants).

<sup>72</sup> *See, e.g.*, REAL ID Act of 2005, Pub. L. 109-13, Div. B., 119 Stat. 302 (establishing status-based eligibility standards for drivers' licenses and other state identification documents as prerequisites for their use for certain federal purposes); *Cubas v. Martinez*, 870 N.E.2d 133 (N.Y. 2007) (upholding regulations that effectively impose “lawful presence” requirement for driver's license eligibility). *See generally*

transportation carriers.<sup>74</sup> Other indirect enforcement proposals would go even further.<sup>75</sup> While these indirect measures do not always require these actors to share status information with federal immigration officials, they necessarily require these actors to obtain status information and in many cases may result in that information being maintained and stored.<sup>76</sup>

At the federal level, the government in recent years has sought to expand its traditional means of direct interior enforcement, principally by significantly increasing the use of high-visibility workplace raids by

---

Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213 (2004) (arguing in favor of extending driver's license eligibility to noncitizens); Margaret D. Stock, *Driver Licenses and National Security: Myths and Reality*, 10 BENDER'S IMMIGR. BULL. 422 (2005) (criticizing proposals to prohibit unauthorized immigrants from obtaining driver's licenses).

<sup>73</sup> See, e.g., *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 529-33 (M.D. Pa. 2007) (discussing tenancy provisions in Hazleton immigration ordinances). California recently prohibited local governments within the state from requiring landlords to verify or disclose the immigration or citizenship status of tenants. CAL. CIV. CODE § 1940.3 (Supp. 2008); see Randal Archbold, *State Strikes Balance on Immigration*, N.Y. TIMES, Oct. 14, 2007, at A27.

<sup>74</sup> See Pham, *supra* note 3 (manuscript at 1-2, 19-22) (discussing application of federal law prohibiting transport of unlawfully present noncitizens to transportation carriers, such as Greyhound Bus Lines). In one recent case, the government attempted to apply this provision to a pair of humanitarian volunteers in Arizona who transported three barely conscious unauthorized immigrants from the desert to a church facility to receive medical care. Without deciding the full scope of the provision, the district court dismissed the indictment, finding that the defendants had relied upon a protocol previously approved by the government to provide such assistance. See Billie Stanton, *2 Arrested for Aiding Migrants Cleared*, TUCSON CITIZEN, Sept. 2, 2006, available at <http://www.tucsoncitizen.com/daily/local/24911.php>.

<sup>75</sup> For example, Senator Hillary Rodham Clinton has stated that her proposed universal healthcare plan would not cover unauthorized immigrants. Beth Fouhy, *Clinton Health Plan for Americans Only*, ASSOCIATED PRESS, Oct. 19, 2007, available at <http://abcnews.go.com/Politics/wireStory?id=3748101>; see also KRIKORIAN, *supra* note 1, at 5 (advocating "need to find other instances in which legal status might be verified, and thus illegals barred, such as . . . opening a bank account, applying for a car loan or a mortgage, getting a business or occupational license, and obtaining government services of any kind"); Pham, *supra* note 3 (manuscript at 26-27) (discussing proposals for status-based limits on eligibility for federally reimbursed healthcare services and government-funded charitable services). As Gerald Neuman has argued, taken to a logical extreme the extension of such policies could justify the treatment of unauthorized immigrants as "de facto outlaws," individuals who are disentitled altogether from a whole range of basic legal protections in a manner analogous to the treatment of individuals declared as "outlaws" under old English law. Neuman, *supra* note 14, at 1440-52.

<sup>76</sup> See Pham, *supra* note 3 (manuscript at 8); Rodríguez, *supra* note 22 (manuscript at 24-25); see also Solove, *supra* note 20, at 505-25 (discussing privacy-related concerns arising from processing and storage of information).



federal immigration agents searching for noncitizens who might be working in the United States without authorization.<sup>77</sup> Recent immigration reform proposals in Congress would have increased funding for the government to expand the number of personnel devoted to these workplace enforcement efforts.<sup>78</sup> The government also has expanded its efforts to identify, apprehend, and deport so-called “absconders” or “fugitives,” a category of approximately 600,000 individuals who have outstanding final orders of removal but have not been deported.<sup>79</sup>

More dramatically, however, the federal government has also utilized a number of different means designed to encourage the voluntary, direct cooperation of state and local police and corrections officials in federal immigration enforcement efforts.<sup>80</sup> These federal initiatives, which have not all been adopted or widely implemented, have not mandated state and local involvement in federal immigration enforcement, which would likely run afoul of anticommandeering principles under the Constitution.<sup>81</sup> Instead, they have used a variety of other mechanisms to encourage and induce state and local officials to become involved in federal enforcement activities. First, the federal

---

<sup>77</sup> See Aldana, *supra* note 2 (discussing expansion of workplace raids by federal immigration agents since 2006); NAT'L COUNCIL OF LA RAZA & THE URBAN INST., *PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN* 10-12 (2007), available at <http://www.nclr.org/content/publications/detail/49166>.

<sup>78</sup> See, e.g., Comprehensive Immigration Reform Act of 2007, S. 1639, 110th Cong. §§ 301-310 (2007).

<sup>79</sup> See Aldana, *supra* note 2, at 1113-28; see also Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative*, 29 N.Y.U. REV. L. & SOC. CHANGE 573, 582-85 (2005); N.C. Aizenman & Spencer S. Hsu, *U.S. Targeting Immigrant 'Absconders'*, WASH. POST, May 5, 2007, at A1. A significant number of the individuals identified as “absconders” may, in fact, have the right to remain in the United States. Extensive errors in the government's immigration records have been well-documented. See, e.g., HANNAH GLADSTEIN ET AL., *MIGRATION POLICY INST., BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE, 2002-2004*, at 13 (2005), available at [http://www.migrationpolicy.org/pubs/MPI\\_report\\_Blurring\\_the\\_Lines\\_120805.pdf](http://www.migrationpolicy.org/pubs/MPI_report_Blurring_the_Lines_120805.pdf); Aldana, *supra* note 2, at 1116-23. Moreover, as many as two-thirds of these removal orders were issued during in absentia hearings, conducted in many cases without adequate notice to the noncitizen. GLADSTEIN ET AL., *supra*, at 8; see also Leslie Berestein, *Errors Raise Specter of Deportation*, SAN DIEGO UNION-TRIB., Oct. 2, 2007, at B1.

<sup>80</sup> See Kalhan, *supra* note 22 (manuscript at 13-18).

<sup>81</sup> See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (holding it unconstitutional for Congress to mandate state executive officials to implement federal policy objectives); *New York v. United States*, 505 U.S. 144 (1992) (holding it unconstitutional for Congress to compel state legislatures or agencies to adopt laws or regulations to advance federal policy objectives).

government has actively encouraged state and local jurisdictions to enter into voluntary deputization agreements with the federal government, pursuant to section 287(g) of the Immigration and Nationality Act (“INA”), to designate and authorize certain state and local law enforcement officers to perform a specified set of federal immigration enforcement functions.<sup>82</sup> Although Congress enacted INA section 287(g) in 1996, the federal government has more aggressively encouraged the use of these deputization agreements since 2001, and the number of jurisdictions that have entered into these agreements has increased significantly in the past few years.<sup>83</sup>

The federal government also has attempted to induce individual state and local officials into participating in direct immigration enforcement activities in the absence of these deputization agreements by entering hundreds of thousands of civil immigration records, mostly those of “absconders,” into the FBI’s main criminal database, the National Crime Information Center (“NCIC”).<sup>84</sup> The NCIC is a nationwide clearinghouse of largely crime-related records that is maintained by the FBI, but mostly accessed by state and local officials. State and local police query the NCIC millions of times each day in the course of encountering members of the public during their normal policing duties.<sup>85</sup> By expanding the categories of individuals whose records are included in the NCIC to include hundreds of thousands of civil immigration records, the government has sought to induce individual police officers to identify and detain suspected civil immigration violators whose names appear in the database upon making routine queries — irrespective of the reasons and circumstances surrounding the encounter. Critics have contended that the inclusion of civil immigration records in the NCIC is itself unlawful and may cause state or local officials to make arrests for suspected civil immigration violations that they lack authority to make.<sup>86</sup> However, in 2002, the

---

<sup>82</sup> 8 U.S.C. § 1357(g) (2000).

<sup>83</sup> As of September 2007, at least 28 state and local jurisdictions had entered into such agreements with the Justice Department. U.S. Immigration & Customs Enforcement, *Delegation of Immigration Authority Section 287(g): Immigration and Nationality Act* (Sept. 6, 2007), <http://www.ice.gov/pi/news/factsheets/070906factsheet287gprover.htm>.

<sup>84</sup> See GLADSTEIN ET AL., *supra* note 79, at 6-7; Wishnie, *supra* note 38, at 1086-87.

<sup>85</sup> In recent years, the NCIC has processed over four million queries per day — most from state and local police — with an average response time of approximately .06 seconds. See Press Release, FBI, An NCIC Milestone (Aug. 9, 2006), *available at* <http://www.fbi.gov/pressrel/pressrel06/ncic080906.htm>.

<sup>86</sup> Compare Wishnie, *supra* note 38, at 1095-1101 (arguing use of NCIC to facilitate immigration enforcement by state and local police is unlawful), with Kobach,

Department of Justice also changed its longstanding legal position on state and local authority to make civil immigration arrests, announcing its revised view that state and local police have “inherent authority” to enforce and make arrests for civil violations of the immigration laws even in the absence of any deputization agreement between their jurisdiction and the federal government.<sup>87</sup> Courts have not definitively resolved which position is correct.

Finally, proposals in Congress would go even further. Proposed legislation first introduced in 2003 would cut off certain federal funding streams from states and localities that fail to enact their own provisions specifically authorizing their law enforcement officials to participate in federal immigration enforcement activities and would by obtaining, maintaining, and providing to federal authorities identifying information about noncitizens who are suspected of violating the immigration laws.<sup>88</sup> The proposed legislation also would confer immunity upon state and local agencies from suit for any non-criminal wrongdoing that allegedly arises from federal immigration enforcement activities.<sup>89</sup>

---

*supra* note 3, at 180-82 (arguing use of NCIC is permissible because state and local police have “inherent” authority to enforce civil provisions of federal immigration law). The entry and dissemination of these records through the NCIC is also the subject of a pending federal lawsuit challenging the Justice Department’s practices. *Nat’l Council of La Raza v. Ashcroft*, 468 F. Supp. 2d 429, 431-32 (E.D.N.Y. 2007), *appeal docketed*, No. 07-0816 (2d Cir. Mar. 2, 2007).

<sup>87</sup> Compare Teresa Wynn Roseborough, Deputy Ass’t Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, *Assistance by State and Local Police in Apprehending Illegal Aliens*, 20 Op. Off. Legal Counsel 26 (1996) (concluding that state and local police lack any “recognized legal authority to arrest or detain aliens solely for purposes of civil deportation proceedings as opposed to criminal prosecution”), and Memorandum, *Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File*, from Douglas W. Kmiec, Ass’t Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Joseph R. Davis, Ass’t Dir., Legal Counsel, FBI 9 (Apr. 11, 1989), available at [http://www.aclu.org/pdfs/immigrants/1989\\_olc\\_opinion.pdf](http://www.aclu.org/pdfs/immigrants/1989_olc_opinion.pdf) (same), with Memorandum, *Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations*, from Jay S. Bybee, Ass’t Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to U.S. Att’y Gen. 13 (Apr. 3, 2002), available at <http://www.aclu.org/FilesPDFs/ACF27DA.pdf> (asserting that state and local law enforcement officials have “inherent power” to enforce federal civil immigration laws). See also *Bronx Defenders v. U.S. Dep’t of Homeland Sec.*, No. 04 Civ. 8576, 2005 WL 3462725, at \*3 (S.D.N.Y. Dec. 19, 2005) (stating that Justice Department “flip-flopped” by opining in 2002 that “state and local law enforcement could, in fact, lawfully enforce the civil provisions of the immigration law”).

<sup>88</sup> Clear Law Enforcement for Criminal Alien Removal Act of 2003, H.R. 2671, 108th Cong. §§ 102-107 (2003).

<sup>89</sup> *Id.* § 110(b).

In addition to these federal initiatives, some states and localities have acted on their own to adopt statutes, ordinances, and administrative orders that seek to involve their officials directly in immigration enforcement activities. Several states and localities have authorized or required their law enforcement officials to inquire about and verify the immigration status of individuals with whom they come in contact. In some instances, these jurisdictions have implemented these initiatives by authorizing their law enforcement officials to enter into deputization agreements with the federal government pursuant to INA section 287(g).<sup>90</sup> Other jurisdictions, however, have authorized state and local enforcement of suspected federal immigration law violations in the absence of such an agreement by requiring law enforcement officials to verify the status of individuals whom they encounter.<sup>91</sup> For example, in July 2007, the government of Prince William County, Virginia, directed its police department not only to enter into a deputization agreement with the federal government under INA section 287(g), but also to inquire into the citizenship of anyone who has been lawfully detained for allegedly violating a state law or county ordinance “if there is probable cause to believe such person is in violation of federal immigration law and when such inquiry will not expand the duration of the detention.”<sup>92</sup> Similarly, in September 2007, the New Jersey Attorney General issued a decree ordering all state and local law enforcement officers in New Jersey to inquire into the immigration and citizenship status of all individuals

---

<sup>90</sup> See *supra* note 83 and accompanying text.

<sup>91</sup> See, e.g., Rodríguez, *supra* note 22 (manuscript at 23-24) (discussing legislation adopted in Georgia, Oklahoma, Colorado, and Prince William County, Virginia). At least one local sheriff in New Hampshire sought unsuccessfully to prosecute an individual for violating the state’s criminal trespass law by allegedly being unlawfully present in the United States. Order on Motions to Dismiss and Objections at 1, *New Hampshire v. Barros-Batistele*, Nos. 05-CR-1474 & 05-CR-1475 (N.H. Dist. Ct. Aug. 12, 2005), available at [http://www.nh.gov/judiciary/district/criminal\\_trespass\\_decision.pdf](http://www.nh.gov/judiciary/district/criminal_trespass_decision.pdf); see Michael R. Boland, Jr., Comment, *No Trespassing: The States, the Supremacy Clause, and the Use of Criminal Trespass Laws to Fight Illegal Immigration*, 111 PENN. ST. L. REV. 481 (2006) (discussing *Barros-Batistele* and use of state trespass laws).

<sup>92</sup> Prince William County, Va., Immigration — Reaffirm County Policy with Respect to Compliance with Federal Law and Issue Directives Incident to Such Reaffirmation to the Prince William County Police Department and the Prince William County Staff, Res. 07-609, at 2 (July 10, 2007), available at <http://www.pwcgov.org/docLibrary/PDF/006881.pdf> [hereinafter Prince William County Resolution]. The county directed its police department to develop standards to determine probable cause under such circumstances and procedures to verify lawful presence. *Id.*

they arrest for certain offenses.<sup>93</sup> The New Jersey order also instructs officers to notify federal immigration officials if they have “reason to believe that the person may not be lawfully present in the United States.”<sup>94</sup> More sweepingly, a proposal in the Alaska assembly would require state and local police to ask individuals whether they are U.S. citizens even during routine traffic stops and other minor encounters with members of the public.<sup>95</sup> Less sweepingly, in 2003, New York City adopted a policy that permits (but does not require) law enforcement officers to inquire as to immigration and citizenship status when “investigating illegal activity other than mere status as an undocumented alien.”<sup>96</sup>

In effect, the new interior enforcement initiatives seek to construct virtual border checkpoints throughout the country’s interior, identifying “events necessary for life in a modern society” where it may be possible to “exercise control” over individuals in a manner analogous to the control exercised at the physical border itself.<sup>97</sup> Perhaps recognizing that mass deportation of several million individuals is unrealistic, advocates support the expansion of interior enforcement as part of an “attrition policy” designed to make the lives

---

<sup>93</sup> N.J. Att’y Gen., Law Enforcement Directive No. 2007-3, at 3 (Aug. 22, 2007), available at [http://www.nj.gov/lps/dcj/agguide/directives/dir-le\\_dir-2007-3.pdf](http://www.nj.gov/lps/dcj/agguide/directives/dir-le_dir-2007-3.pdf) [hereinafter N.J. Law Enforcement Directive] (ordering state, county, and local law enforcement officers to “inquire about . . . citizenship, nationality and immigration status” when making arrests for indictable crimes or driving while intoxicated); see also David W. Chen & Kareem Fahim, *Immigration Checks Ordered in New Jersey*, N.Y. TIMES, Aug. 23, 2007, at B1.

<sup>94</sup> N.J. Law Enforcement Directive, *supra* note 93, at 3. The decree also sets limits on what state and local officers may do when their jurisdictions enter into deputization agreements with the federal government under INA section 287(g), permitting them only to inquire about status information after an individual has been arrested for an indictable offense or driving while intoxicated. *Id.* at 5-6. However, the directive also leaves open a number of practical questions. For example, the directive does not provide any guidance on what might give an officer “reason to believe” that an individual is unlawfully present or how an officer should seek to determine an individual’s immigration status upon arrest. See Kareem Fahim & David W. Chen, *Police Voice Concerns Over a Directive on Immigrants*, N.Y. TIMES, Aug. 24, 2007, at B5; Deborah Jacobs, Op-Ed., *AG Directive Lacks Key Guidelines*, TRENTON TIMES, Sept. 8, 2007, at A11.

<sup>95</sup> Kyle Hopkins, *Citizenship Occupies Assembly*, ANCHORAGE DAILY NEWS, Sept. 12, 2007, available at <http://www.adn.com/news/alaska/story/9296175p-9210887c.html>.

<sup>96</sup> N.Y. City, N.Y., Exec. Order No. 41, at § 4(a) (2003), available at [http://www.nyc.gov/html/imm/downloads/pdf/exe\\_order\\_41.pdf](http://www.nyc.gov/html/imm/downloads/pdf/exe_order_41.pdf) [hereinafter N.Y. City Exec. Order No. 41].

<sup>97</sup> See KRİKORIAN, *supra* note 1, at 5.

of unauthorized immigrants “as difficult and unpleasant as possible.”<sup>98</sup> While hoping that these initiatives might increase the number of noncitizens who are actually placed in deportation proceedings, proponents of expanded interior enforcement place greater emphasis on their hopes of encouraging what they describe as a process of mass “self-deportation” by unauthorized immigrants.<sup>99</sup> Proponents also hope that by erecting status-based barriers that make it more difficult to participate in many aspects of day-to-day life, the new interior enforcement initiatives will effectively deter other would-be immigrants from entering and remaining in the United States without legal authorization in the first place.<sup>100</sup>

The creation of a virtual border within the country’s interior necessarily diminishes the privacy of immigration and citizenship status information for both citizens and noncitizens alike. At least three sets of activities stemming from these initiatives may affect these privacy interests in status information.<sup>101</sup> Not all of these initiatives require all three sets of activities to be performed, and the extent to which privacy concerns are implicated may vary depending upon the manner in which the particular scheme is designed. First, the new interior enforcement initiatives typically demand the *collection* of immigration and citizenship status in some manner from the individuals with whom the enforcement actors have contact. The manner of collection may vary depending on the design of the enforcement scheme and the circumstances of the enforcement agent’s encounter. In many cases information will be gathered through the use of questioning or interrogation, which itself may range from a

---

<sup>98</sup> *Id.* According to a recent estimate by the Center for American Progress, the costs of any effort to deport all undocumented individuals in the United States would exceed \$206 billion over five years. RAJEEV GOYLE & DAVID A. JAEGER, CTR. FOR AM. PROGRESS, *DEPORTING THE UNDOCUMENTED: A COST ASSESSMENT 1-2* (2005), available at [http://www.americanprogress.org/kf/deporting\\_the\\_undocumented.pdf](http://www.americanprogress.org/kf/deporting_the_undocumented.pdf).

<sup>99</sup> KRİKORIAN, *supra* note 1, at 5; William Safire, *Self-Deportation?*, N.Y. TIMES, Nov. 21, 1994, at A15 (quoting California’s then-Governor Pete Wilson’s statement in support of Proposition 187 that “[i]f it’s clear to you [as an unauthorized immigrant] that you cannot be employed, and that you and your family are ineligible for services, you will self-deport”); see Bosniak, *supra* note 1, at 92 (noting proponents’ view that expanded “verification and reporting requirements serve as an indispensable enforcement supplement”).

<sup>100</sup> KRİKORIAN, *supra* note 1, at 5. The extent to which any of these policies are effective in deterring unauthorized migration remains highly uncertain. See Stock, *supra* note 72, at 424-25; cf. Wishnie, *supra* note 38 (arguing that employer sanctions’ provisions in federal law have failed to deter illegal immigration).

<sup>101</sup> Here, I draw upon Daniel Solove’s taxonomy of activities that affect privacy interests. See Solove, *supra* note 20, at 490-91.

simple request to answer questions voluntarily, under relatively noncoercive circumstances, to more intrusive or coercive forms of interrogation, arising from stops, arrests, or seizures.<sup>102</sup> Collection of status information also may involve requests or demands for documentation of immigration or citizenship status, in situations that again may involve various degrees of voluntariness or coercion. For example, the recent proposal in Alaska would require law enforcement officials to request status information from all members of the public during all routine encounters, such as traffic stops.<sup>103</sup> Some immigrant community advocates have suggested that the federal government's NCIC policies are designed to cause individual law enforcement officers to do the same, even in the absence of a formal policy of the kind proposed in Alaska.<sup>104</sup>

Second, upon collection, the new initiatives in many cases may require or encourage immigration and citizenship status information to be *maintained* and *processed* in various respects.<sup>105</sup> Once collected, actors involved in enforcement activities may store the collected status information and process that information in a number of different ways. Most notably, enforcement actors may process status information by connecting it to and aggregating it with other forms of identifying information, such as information contained in federal immigration status databases or other databases containing personal information. Actors involved in enforcement also might provide members of the public access to those databases, so that they may ensure that the information is accurate or may put the information to other, secondary uses. As with collection, interior enforcement initiatives may vary in the extent to and manner in which they require or permit maintenance and processing of status information.

Finally, the enforcement initiatives may require or facilitate the *dissemination* of status information to others.<sup>106</sup> With some of these initiatives, dissemination to federal immigration officials may be the principal purpose of the entire scheme. Both the Prince William County resolution and the New Jersey order, for example, explicitly attempt to define the circumstances in which federal authorities

---

<sup>102</sup> See *id.* at 499-505 (discussing activities affecting privacy interests that involve collection of personal information); see also *infra* Part III.C.

<sup>103</sup> See Hopkins, *supra* note 95.

<sup>104</sup> See *supra* notes 84-87 and accompanying text.

<sup>105</sup> See Solove, *supra* note 20, at 505-25 (discussing activities affecting privacy interests that involve processing of personal information).

<sup>106</sup> See *id.* at 525-52 (discussing activities affecting privacy interests that involve dissemination of personal information).

should be notified of suspected immigration law violators.<sup>107</sup> In other instances, however, dissemination of status information to federal authorities may be permitted or encouraged, but not explicitly required.<sup>108</sup> Moreover, these initiatives may in some circumstances result in improper dissemination or misuse of status information. Although these uses may not be related to or contemplated by the enforcement policies themselves, in the absence of guidelines and safeguards to confine the manner in which status information is used and disseminated, the risk of improper use or dissemination may nevertheless exist.

## II. IMMIGRATION AND CITIZENSHIP STATUS PRIVACY

In light of the dramatic expansion of interior enforcement initiatives designed to reveal immigration and citizenship status information, to what extent do the Fourth Amendment and other sources of law protect privacy interests that might exist in such information? The answers to that question, of course, depend considerably on how we understand and define the concept of “privacy” itself. However, as privacy experts themselves frequently acknowledge, privacy is a notoriously elusive concept that scholars have struggled to define. “A rather large percentage of scholarship in the area of privacy law,” notes Orin Kerr, “is focused on trying to determine the meaning of privacy.”<sup>109</sup> Courts have not been immune from this confusion over the meaning of privacy, which to some extent may be seen in the Supreme Court’s decision in *Katz v. United States*. While *Katz*’s recognition that the Fourth Amendment protects intangible interests in privacy represented a landmark shift, the Court did not elaborate on the scope of the Fourth Amendment’s protection of these privacy interests, stating simply that it declined to conclude that the Fourth

---

<sup>107</sup> Prince William County Resolution, *supra* note 92, at 2 (requiring police to verify whether any noncitizen is lawfully present in United States, and if not, to “cooperate with any request by federal immigration authorities to detain the alien or transfer the alien to the custody of the federal government”); N.J. Law Enforcement Directive, *supra* note 93, at 3 (requiring law enforcement officers to notify federal officials if they “ha[ve] reason to believe that the person may not be lawfully present in the United States”).

<sup>108</sup> See, e.g., N.Y. City Exec. Order No. 41, *supra* note 96, § 4(b) (stating that law enforcement officers “shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity”).

<sup>109</sup> Orin S. Kerr, *Reply to Colb and Swire*, 102 MICH. L. REV. 933, 934 n.2 (2004); see also James Q. Whitman, *Two Western Cultures of Privacy*, 113 YALE L.J. 1153, 1153 (2004) (“[H]onest advocates of privacy protections are forced to admit that the concept of privacy is embarrassingly difficult to define.”).



Amendment embodies “a general constitutional right to privacy.”<sup>110</sup> Left to define the scope of these interests in future cases, the Court has adopted a rather narrow conception of privacy for Fourth Amendment purposes, as many observers have noted. Consistent with this narrow conception of privacy, the Court has tended to regard intrusions upon privacy interests in personal status and identity information, including immigration and citizenship status, as necessarily involving only minimal harm. This conclusion tracks the conception of privacy that the Court has adopted in its post-*Katz* jurisprudence, one that limits “private” information to that which is kept entirely secret and emphasizes the degree to which particular individuals experience harms resulting from intrusions upon privacy.

In recent years, however, some privacy scholars have begun to elaborate a broader understanding of information privacy rooted not simply in “a right of ‘individual control’ over information, but in the idea of privacy as a social good.”<sup>111</sup> Unlike the conception of privacy underlying much of the Supreme Court’s post-*Katz* jurisprudence, this new conception of privacy does not simply regard privacy as an individual right, intended to protect only against personal harms that particular individuals may suffer, but rather emphasizes the more systemic and structural impact on society as a whole that may result when privacy harms occur.<sup>112</sup> While the Court has tended to minimize the privacy interests at stake in immigration and citizenship status and other identity and status information in its post-*Katz* Fourth Amendment cases, outside the Fourth Amendment context some courts have been more inclined to acknowledge privacy-related interests implicated in immigration and citizenship status information and the broader societal harms that may result from intruding upon those interests.

A. *Katz, Immigration and Citizenship Status, and the “Secrecy Paradigm”*

In *Katz*, the Supreme Court sought to reformulate its standard for analyzing the types of interests protected against unreasonable government “searches” under the Fourth Amendment. Prior to *Katz*,

---

<sup>110</sup> *Katz v. United States*, 389 U.S. 347, 350 (1967).

<sup>111</sup> Paul M. Schwartz & William M. Treanor, *The New Privacy*, 101 MICH. L. REV. 2163, 2177 (2003) (discussing work by Julie Cohen, Priscilla Regan, Paul Schwartz, and Daniel Solove).

<sup>112</sup> See DANIEL J. SOLOVE, *THE DIGITAL PERSON* 93-101 (2004) (distinguishing between “invasion” and “architectural” conceptions of privacy); Schwartz & Treanor, *supra* note 111, at 2177-81.

the Supreme Court had limited the ambit of the Fourth Amendment's protection to searches that intruded upon "material things — the person, the house, his papers, or his effects."<sup>113</sup> In redefining the scope of the Fourth Amendment's protection to extend beyond physical trespasses upon such tangible objects in "constitutionally protected areas," *Katz* rejected the notion that an emphasis on such concepts could provide a "talismanic solution to every Fourth Amendment problem."<sup>114</sup> With respect to the particular Fourth Amendment problem before it, concerning the interception of the defendant's conversation on a public telephone, the Court distinguished between "[w]hat a person knowingly exposes to the public," which is not constitutionally protected, and "what he seeks to preserve as private, even in an area accessible to the public," which might be, and held that the scope of the Fourth Amendment included infringements upon intangible privacy interests such as a telephone conversation in an enclosed phone booth.<sup>115</sup>

Conceptually, *Katz*'s reconfiguration of the Fourth Amendment's scope to encompass the protection of privacy expectations, both tangible and intangible, constituted a landmark shift carrying great potential to expand the Amendment's ambit. However, as many observers have noted, the Court's decisions applying *Katz* have instead greatly limited the scope of the Fourth Amendment's protections.<sup>116</sup> In part, the erosion of the Fourth Amendment's protections since *Katz* resulted from the Court's narrow conception of privacy as complete secrecy. In *Katz*, the Court stated that individuals have no protected expectation of privacy from the government in what they have "knowingly expose[d] to the public."<sup>117</sup> As Sherry Colb has argued, this notion is reasonable enough in the abstract.<sup>118</sup> To the extent that individuals have already exposed information in a manner that makes that information freely observable to members of the public at large, it is not reasonable for such individuals to expect to preserve privacy in that information from government officials.<sup>119</sup>

---

<sup>113</sup> *Olmstead v. United States*, 277 U.S. 438, 464 (1928).

<sup>114</sup> *Katz*, 389 U.S. at 351 n.9.

<sup>115</sup> *Id.* at 351.

<sup>116</sup> See, e.g., Colb, *supra* note 25, at 120-21 (arguing that "[t]he logical 'moves' that unify almost all of the Court's [Fourth Amendment] cases . . . have steadily eroded privacy in specific cases, and conceptually promise to eliminate it all together, because they do not admit of any logical stopping point").

<sup>117</sup> *Katz*, 389 U.S. at 351.

<sup>118</sup> See Colb, *supra* note 25, at 124-26 (describing concept of "knowing exposure" as "[b]asically [s]ound").

<sup>119</sup> See *id.*

However, the Court has treated this notion of “knowing exposure” as a crude, all-or-nothing proposition in at least two respects. First, if an individual has disseminated information to *any* third party — however limited that disclosure might be, and regardless of any other circumstances surrounding that disclosure — then the Court no longer deems the information “private” to any extent.<sup>120</sup> In these instances, the Court has treated as “nonprivate” information shared with third parties in the context of relationships within which it may be entirely reasonable to expect that privacy will be maintained.<sup>121</sup> For example, in *United States v. Miller*, the Court held it permissible for the government to subpoena an individual’s financial records from his bank, including account records and copies of checks and deposit slips, free from any Fourth Amendment constraints.<sup>122</sup> The Court reasoned that because the subpoenaed records were in the possession of a third party, the bank, and because the depositor had voluntarily provided that financial information to the bank, the records were not the depositor’s “private papers” and thus he had no protected expectation of privacy in them.<sup>123</sup> While acknowledging that the depositor had provided the information to the bank “only for a limited purpose” and with an assumption that “the confidence placed in the third party [would] not be betrayed,” the Court deemed these circumstances irrelevant.<sup>124</sup> In so doing, the Court implied that individuals can never have any legitimate expectation of privacy when they share information with third parties, regardless of the circumstances.<sup>125</sup>

---

<sup>120</sup> *Id.* at 153 (noting that Court’s conception of privacy “treat[s] as knowingly exposed to the world (and thus to the police as well) not only those things that have been exposed to the public at large, but also those things that have been knowingly exposed to *any* third party”); Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1107-09 (2002); William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1022 (1995).

<sup>121</sup> Colb, *supra* note 25, at 155-59; Andrew J. DeFilippis, *Securing Informationships: Recognizing a Right to Privity in Fourth Amendment Jurisprudence*, 115 YALE L.J. 1086, 1099-1102 (2006); *see also* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted By Society,”* 42 DUKE L.J. 727, 740 (1993) (finding disjunction between expectations of privacy among members of public in empirical study and those recognized in Supreme Court decisions in situations involving partial disclosure of information).

<sup>122</sup> *United States v. Miller*, 425 U.S. 435, 444 (1976).

<sup>123</sup> *Id.* at 443.

<sup>124</sup> *Id.*

<sup>125</sup> *See id.*

Similarly, in *Smith v. Maryland*, the Court held that an individual had no protected expectation of privacy in the telephone numbers dialed from his home telephone, and therefore that the police did not need to obtain a warrant to monitor and obtain those numbers from the telephone company using a pen register.<sup>126</sup> The Court noted that unlike the contents of telephone conversations, in which individuals could legitimately expect that privacy would be protected, telephone subscribers largely realize that outgoing telephone numbers are routinely collected and maintained by the phone company “for a variety of legitimate business purposes,” such as billing and tracing harassing phone calls.<sup>127</sup> In order to facilitate the collection and storage of outgoing telephone numbers, the Court also emphasized, pen registers are “routinely used by telephone companies ‘for the purposes of checking billing operations, detecting fraud and preventing violations of law.’”<sup>128</sup> As with the financial records at issue in *Miller*, therefore, the Court in *Smith* concluded that because the telephone subscriber transmitted the outgoing telephone numbers to the phone company to place outgoing calls, and because the phone company could maintain permanent records of the phone numbers that customers dial, the subscriber had no protected expectation of privacy in those call records.<sup>129</sup>

Second, the Court has not distinguished in its post-*Katz* cases between intentional exposure of information to the public and ways of handling information that create a risk of exposure.<sup>130</sup> For example, in *California v. Greenwood*, the Court concluded that an individual forfeits any protected expectation of privacy in the contents of a garbage bag by leaving it to be picked up by a sanitation worker at curbside, and therefore held it permissible for the police to go through the contents of the bag without a search warrant.<sup>131</sup> Despite the fact that the garbage was placed at curbside “only temporarily” in an opaque bag — which the garbage collector was “expected to pick up” at a designated time, “mingle with the trash of others, and deposit at the garbage dump” — and by leaving the trash at curbside the individual in no sense intended to invite the collector or anyone else to rifle through the bag’s contents, the Court rejected the notion of

---

<sup>126</sup> *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979).

<sup>127</sup> *Id.* at 742-43.

<sup>128</sup> *Id.* at 742 (quoting *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 174-75 (1977)).

<sup>129</sup> *Id.* at 742-43, 745-46.

<sup>130</sup> See Colb, *supra* note 25, at 122.

<sup>131</sup> *California v. Greenwood*, 486 U.S. 35 (1988).

any reasonable expectation of privacy in the contents of the bag.<sup>132</sup> While the Court recognized that there was “little likelihood that [the trash] would be inspected by anyone” within the public at large, given the limited time that it remained at curbside, the Court nevertheless concluded that because garbage bags left at curbside “are readily accessible to animals, children, scavengers, snoops, and other members of the public,” police officers similarly are entitled access to their contents.<sup>133</sup>

Under this “secrecy paradigm,”<sup>134</sup> which has prevailed in much of the Court’s post-*Katz* jurisprudence, one accordingly might conclude that there are few instances, if any, in which an individual’s identity or citizenship status should legitimately be recognized as “private.” An individual’s citizenship or immigration status is never *completely* secret; invariably, some third parties are aware of that status. Indeed, status itself is a governmental creation, and in the United States, the federal government has broad power to categorize noncitizens.<sup>135</sup> Individuals may be required to share information about their status in certain circumstances because, as noted earlier, citizenship and immigration status may legitimately be relevant in determining an individual’s entitlement to rights and benefits in certain contexts.<sup>136</sup> Under the Court’s prevailing conception of privacy, “knowing exposure” of one’s status to some individuals and institutions in the course of ascertaining eligibility for those entitlements — most obviously, for example, when an individual makes that status known to border officials verifying an individual’s entitlement to enter the United States or another country, or to federal officials verifying an individual’s eligibility for federal benefits — might be understood to eviscerate altogether any privacy protection for status information that might otherwise exist in other contexts.

However, as many observers have noted, this narrow conception of privacy fails to recognize that people often reasonably expect and depend upon preserving privacy even when they share information

---

<sup>132</sup> *Id.* at 40.

<sup>133</sup> *Id.*

<sup>134</sup> SOLOVE, *supra* note 112, at 198-202.

<sup>135</sup> Indeed, unlike citizens, both immigrants and non-immigrants are required to register with the government and carry proof of their registration with them at all times. See 8 U.S.C. §§ 1301, 1304(e) (2000); see also *Etuk v. Slattery*, 936 F.2d 1433, 1436-37 (2d Cir. 1991) (discussing registration requirements for lawful permanent residents); Gregory Dicum, *A Study in Green: My National I.D. Card, Your Civil Liberties*, HARPER’S MAG., Feb. 2002, at 48, 48-49.

<sup>136</sup> See *supra* notes 7-12 and accompanying text.

with others.<sup>137</sup> The fact that an individual has disclosed information to some individuals, groups, or institutions does not mean that they should reasonably expect that information to become freely available to the world at large, and therefore to law enforcement. To the contrary, an individual's interest in maintaining privacy often involves not simply the desire to preserve secrecy or confidentiality in personal information, but rather the desire to maintain control over that information.<sup>138</sup> Moreover, in many instances, disclosure of personal information is not entirely voluntary, but instead is either formally or practically necessary. Increasingly, individuals must disclose personal information to a variety of third parties — financial institutions, medical providers, employers, landlords, retailers — simply as a condition of living and participating in modern society.<sup>139</sup> Disclosure of immigration and citizenship status often takes place under comparable circumstances. One cannot engage in international travel at all, for example, without making one's status known to some U.S. and foreign government officials. However, even under circumstances in which individuals have disclosed personal information to third parties on a limited basis, they may continue to have a legitimate interest in being able to limit or control any further dissemination of that information.<sup>140</sup>

Some recent Fourth Amendment cases hint at greater protection of privacy interests in information that may have been disclosed to third parties on a selective or limited basis.<sup>141</sup> For example, in *Ferguson v.*

---

<sup>137</sup> See, e.g., Colb, *supra* note 25, at 153-59; DeFilippis, *supra* note 121, at 1091-94; Solove, *supra* note 120, at 1108-09 (2002); see also Slobogin & Schumacher, *supra* note 121, at 740 (discussing empirical study of individuals' expectations of privacy).

<sup>138</sup> See, e.g., ALAN WESTIN, *PRIVACY AND FREEDOM* 7 (1967) (arguing that privacy involves "claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others"); Charles Fried, *Privacy*, 77 *YALE L.J.* 475, 482-83 (1968); Solove, *supra* note 120, at 1109-10.

<sup>139</sup> See *United States v. Miller*, 425 U.S. 435, 451 (1976) (Brennan, J., dissenting); DeFilippis, *supra* note 121, at 1112-15; Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 *S. CAL. L. REV.* 1083, 1089-95 (2002).

<sup>140</sup> As Sherry Colb has noted, most individuals do not reasonably expect, for example, that "opening a checking account [is] the equivalent of posting all of our daily transactions on a public web site," or that "signing up for telephone service [is] the equivalent of publishing a list of the numbers we call in the newspaper." Colb, *supra* note 25, at 156-57.

<sup>141</sup> See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); see Colb, *supra* note 25, at 179-84; see also Joseph Thai, *Is Data Mining Ever a Search Under Justice Stevens' Fourth Amendment?*, 74 *FORDHAM L. REV.* 1731, 1746-50 (2006) (discussing *Ferguson*).

*City of Charleston*, the Supreme Court invalidated a state hospital's procedures to screen patients receiving prenatal care for possible cocaine use and to refer those women who tested positive for substance abuse treatment or, in certain circumstances, for criminal prosecution.<sup>142</sup> Under the hospital's procedures, patients agreed to provide urine samples to the hospital staff as part of their prenatal treatment, and without obtaining any additional consent, the staff subsequently tested some of those samples based on criteria which, according to the Court, provided neither probable cause nor reasonable suspicion of cocaine use.<sup>143</sup> Ten women who were arrested and criminally charged after testing positive for cocaine use challenged the urine tests on Fourth Amendment grounds.<sup>144</sup>

The Court invalidated the hospital's procedures, holding that the urine test constituted a search for Fourth Amendment purposes and that the hospital was therefore required to obtain additional consent before screening the urine for law enforcement purposes.<sup>145</sup> While the Court could have regarded the patients' expectations of privacy in their urine samples and subsequent drug test results as having been eviscerated by their giving those samples to third parties on the hospital staff, the Court instead concluded that additional consent was required before the patients' urine samples and test results could be disseminated to the police for law enforcement purposes.<sup>146</sup> As observers have noted, and as Justice Antonin Scalia objected in dissent, the case signals a possible shift away from the Court's existing doctrinal rules concerning expectations of privacy in information that has been shared with third parties.<sup>147</sup>

Outside the Fourth Amendment context, the Supreme Court and other courts have also taken a more nuanced approach to privacy, recognizing directly that personal information — including immigration and citizenship status information itself — may warrant privacy protection in some circumstances even if it has previously been disclosed to some third parties on a selective or limited basis. Exemption 6 of the Freedom of Information Act ("FOIA"), for example, protects against disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly

---

<sup>142</sup> *Ferguson*, 532 U.S. at 86.

<sup>143</sup> *Id.* at 70-73.

<sup>144</sup> *Id.* at 73-74.

<sup>145</sup> *Id.* at 83-86.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 95-96 (Scalia, J., dissenting); see Colb, *supra* note 25, at 170-73, 181-82; Thai, *supra* note 141, at 1747.

unwarranted invasion of personal privacy.”<sup>148</sup> The purpose of this exemption from disclosure is “to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.”<sup>149</sup> To determine whether particular records are protected from disclosure as a “clearly unwarranted invasion of personal privacy,” a court must balance the individual’s privacy interest against the public interest under FOIA in ensuring that agency action is subjected to public scrutiny.<sup>150</sup>

In several cases, the Supreme Court and other courts have concluded that immigration and citizenship status information can be protected from disclosure to members of the public under Exemption 6 notwithstanding the readily apparent availability of that information to some third parties. In *Department of State v. Washington Post Co.*, the State Department denied the *Washington Post*’s FOIA request for documents indicating whether two Iranian nationals living in Iran held valid U.S. passports or were U.S. citizens.<sup>151</sup> In challenging the State Department’s denial of the request under Exemption 6, the *Washington Post* argued in part that because U.S. citizenship “is a matter of public record,” the information could not be withheld under the exemption at all. The Court rejected this argument, noting that the “public nature” of information in files covered by Exemption 6 — including not only citizenship status but also place of birth, date of birth, marital status, past criminal convictions, and acquisition of citizenship — might be relevant, under the totality of circumstances in a particular case, to whether disclosure would result in a “clearly unwarranted invasion of personal privacy,” but did not render the information outside the scope of Exemption 6 altogether.<sup>152</sup>

Lower federal courts have subsequently considered the ways in which citizenship status information might appropriately be withheld from disclosure under Exemption 6 to prevent a “clearly unwarranted invasion of personal privacy” notwithstanding the lack of total secrecy

---

<sup>148</sup> 5 U.S.C. § 552(b)(6) (2000). See generally HARRY A. HAMMITT ET AL., LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 2004, at 151-92 (2004) (discussing case law and principles underlying Exemption 6 of FOIA).

<sup>149</sup> *Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 599 (1982).

<sup>150</sup> *Dep’t of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

<sup>151</sup> 456 U.S. at 596.

<sup>152</sup> *Id.* at 602 n.5. The Court reached a similar conclusion in determining that release of FBI criminal history records would constitute an invasion of privacy under Exemption 6 even though much of the information contained in those records was not completely secret, but rather had previously been disclosed elsewhere to some third parties and members of the public. *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 749 (1989).



in that information. In *Hemenway v. Hughes*, the plaintiffs challenged the partial denial of a private individual's FOIA request seeking the citizenship status and other information about all individuals accredited to attend State Department press briefings.<sup>153</sup> In sustaining the State Department's refusal to disclose citizenship status information, the district court readily acknowledged the lack of complete secrecy in that information, but concluded nevertheless that the availability of that information to some third parties did not justify complete disclosure of that information to the public at large:

An individual's citizenship, like medical records, religious and sexual preferences, or nationality, is not a matter that is normally exposed to public view. A passport — which the plaintiff correctly notes contains citizenship information — is not a document that a member of the general public might inevitably see in the course of everyday life, or indeed would be entitled to see. Although a passport must be shown to a government official to ensure safe passage across international borders, the degree of intrusion required in that situation is far less than that required by the “open access” approach advocated by the plaintiff. Indeed, where international travel is involved, the intrusion is limited only to that required to maintain national security and identify non-nationals. An individual might be required to show his passport to a government official while living in a foreign country, but information contained in the passport is not disseminated to the public at large.<sup>154</sup>

Noting the harms that might result from disclosure of citizenship status information — including “persistent discrimination within particular communities in this country” or potential attacks from terrorist or dissident groups — the court declined to require disclosure of citizenship status information.<sup>155</sup> The court concluded that, as with information concerning an individual's “religious and sexual preference or ethnic background,” control over whether to disclose citizenship status information should be left to each individual's discretion.<sup>156</sup>

Much of the Court's Fourth Amendment jurisprudence has built upon *Katz's* statement that individuals have no protected expectation

---

<sup>153</sup> 601 F. Supp. 1002, 1003 (D.D.C. 1985).

<sup>154</sup> *Id.* at 1006-07.

<sup>155</sup> *Id.* at 1006.

<sup>156</sup> *Id.* at 1007.

of privacy in what they “knowingly expose to the public.”<sup>157</sup> However, *Katz* also stated that the Fourth Amendment may constitutionally protect information that individuals “seek to preserve as private, even in an area accessible to the public.”<sup>158</sup> In this respect, the more context-sensitive approach to secrecy and selective disclosure reflected in Fourth Amendment cases such as *Ferguson* and the FOIA cases applying Exemption 6 is more faithful to *Katz* than much of the Court’s post-*Katz* jurisprudence.<sup>159</sup> Individuals disclose personal information on a selective basis in many different public or quasi-public settings in which they nevertheless may legitimately expect some degree of privacy to be maintained. As with the disclosure of the urine samples in *Ferguson*, which were provided to hospital officials as a condition for receiving prenatal treatment, the disclosure of immigration or citizenship status information to particular officials for particular purposes should not necessarily lead to the conclusion that all cognizable privacy interests in that status information have been eviscerated altogether.

#### B. Individual and Structural Privacy Interests

The Supreme Court’s emphasis in *Katz* and its subsequent Fourth Amendment cases on individual expectations of privacy also has tended to reinforce a conception of privacy that focuses almost exclusively on individual interests and individualized harms. This individualistic understanding of privacy is hardly unique to *Katz* or the Fourth Amendment. To the contrary, violations of privacy more generally have long been understood to involve

[A] series of discrete wrongs — invasions — to specific individuals. These wrongs occur to the actions of particular

---

<sup>157</sup> *Katz v. United States*, 389 U.S. 347, 351 (1967).

<sup>158</sup> *Id.* at 352 (emphasis added).

<sup>159</sup> Of course, Exemption 6 under FOIA, which protects privacy interests by restricting disclosure of personal information to the public at large, involves a different legal regime than the Fourth Amendment, which protects information in which an individual has an expectation of privacy from disclosure to government officials. By discussing these cases under Exemption 6, I seek only to highlight the rather different way in which these courts have regarded the relevance of selective disclosure to third parties to the continued existence and strength of any privacy interest that might be protected at all. While the Court’s post-*Katz* case law has treated an individual’s limited disclosures of information as tantamount to unlimited disclosures to the public at large, the cases under Exemption 6 recognize that limited disclosures of information need not destroy the legitimacy of an individual’s expectation that the information will continue to remain shielded from others.

wrongdoers. The injury is experienced by the individuals who are wronged . . . . Under the invasion conception, privacy protections safeguard against these wrongs to individuals. Protection consists of rights and remedies for each instance of harm, and in certain cases, criminal punishments for the wrongdoers.<sup>160</sup>

Through this individualist lens, the notion that one might ever have a significant privacy interest in one's immigration or citizenship status might seem counterintuitive. Courts have increasingly regarded the degree of intrusiveness upon privacy interests to be minimal when government investigations have sought information related to an individual's identity. For example, in *Hiibel v. Sixth Judicial District Court*, the Supreme Court considered the validity of Nevada's "stop and identify" statute, which requires individuals to identify themselves to police officers in the course of an otherwise valid stop based on reasonable suspicion of involvement in criminal activity.<sup>161</sup> The Court concluded that the demand to disclose an individual's identity in that case involved only a minimal intrusion upon privacy interests, holding that requiring individuals to identify themselves was permissible so long as "the request for identification is . . . reasonably related to the circumstances justifying the stop."<sup>162</sup>

*Hiibel* did not give law enforcement officials free reign to demand identifying information in all circumstances, since the Court still required officials to have both reasonable suspicion to justify the initial stop and a reasonable relationship between the circumstances of the stop and the reasons to demand identification.<sup>163</sup> However, the Court made clear that it regarded the intrusion upon privacy interests under those circumstances to be limited, stating that "[a]nswering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances."<sup>164</sup>

<sup>160</sup> SOLOVE, *supra* note 112, at 94; *see also* Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1457 (1996) (noting widespread understanding that "the Fourth Amendment privacy right is a matter of individual entitlement"); Schwartz & Treanor, *supra* note 111, at 2177 ("Scholars have frequently seen the privacy tort as concerned predominantly with individual interests . . .").

<sup>161</sup> 542 U.S. 177, 181-82 (2004).

<sup>162</sup> *Id.* at 188, 191; *see also* Daniel Steinbock, *National Identity Cards: Fourth and Fifth Amendment Issues*, 56 FLA. L. REV. 697, 717-21 (2004).

<sup>163</sup> *Hiibel*, 542 U.S. at 188-89; *see also* Tracey Maclin, *Police Interrogations During Traffic Stops: More Questions Than Answers*, THE CHAMPION, Nov. 2007, at 34, 37.

<sup>164</sup> *Hiibel*, 542 U.S. at 191.

With respect to inquiries concerning immigration or citizenship status, which also involve aspects of an individual's identity, the Court has similarly regarded the degree of intrusion upon privacy interests to be minimal in most circumstances. As Justice William Rehnquist observed, "stops [for the purpose of inquiring about citizenship] involve only a modest intrusion [and] are not likely to be frightening or significantly annoying."<sup>165</sup> Even Justice William Brennan, in dissenting from a decision by the Court authorizing a nonroutine search at the border on the basis of "reasonable suspicion," minimized the idea that inquiries into immigration and citizenship status involve any significant intrusion, noting that — at least at the international border itself — "[t]ravelers . . . are routinely subjected to questioning, patdowns, and thorough searches of their belongings" that "involve relatively limited invasions of privacy."<sup>166</sup>

This individualistic conception of privacy also might lead one to conclude that disclosure of citizenship or immigration status therefore only "harms" those who are unlawfully present and have no entitlement to conceal their unauthorized status. One might rest this conclusion on the notion that noncitizens who are unlawfully present in the United States, by virtue of their lawbreaking, have forfeited any Fourth Amendment privacy interest in their status that they might otherwise have had.<sup>167</sup> From this perspective, the only concern might be that arising from the risk of error. A "perfect" search revealing only the status information of individuals who are unlawful present, without requiring disclosure of any "innocent" personal information

---

<sup>165</sup> *United States v. Ortiz*, 422 U.S. 891, 898-99 (1975) (Rehnquist, J., concurring); see also *Mena v. City of Simi Valley*, 354 F.3d 1015, 1017 (9th Cir. 2004) (Kleinfeld, J., dissenting from denial of rehearing en banc) ("The whole notion that there is something intimate and private about one's citizenship that is protected by the Fourth Amendment is wrong."); Note, *Border Searches and the Fourth Amendment*, 77 *YALE L.J.* 1007, 1012 (1968) (suggesting that notice that certain limited, routine searches are likely at border diminishes extent to which they should be deemed intrusive).

<sup>166</sup> *United States v. Montoya de Hernandez*, 473 U.S. 531, 551 (1985) (Brennan, J., dissenting). Justice Brennan emphasized that at the international border itself, these measures "typically are conducted on all incoming passengers," minimizing the risk of arbitrariness or abuse in the exercise of discretion. *Id.*

<sup>167</sup> See Colb, *supra* note 160, at 1459 ("People feel differently about guilty versus innocent holders of Fourth Amendment privacy rights . . . . The idea of forfeiture captures the intuition that guilty people really do not deserve the right when its exercise consists of the concealment of incriminating evidence."). As a staff attorney for one leading immigration restrictionist organization argues: "[A]n illegal alien has no expectation of privacy from another person's knowledge of his or her immigration status." Michael M. Hethmon, *The Chimera and the Cop: Local Enforcement of Federal Immigration Law*, 8 *UDC/PCSL L. REV.* 83, 104 (2004).

by that individual or anyone else — including the status of individuals who are lawfully present — might be understood to present no concern under the Fourth Amendment.<sup>168</sup> To the extent that “less than perfect” searches could necessarily require U.S. citizens and lawfully present noncitizens to disclose their citizenship and immigration status, compelled disclosure of one’s status might be considered to involve a rather limited intrusion. Under this view, individuals who are lawfully present have “nothing to hide” and suffer little harm by disclosing their status.<sup>169</sup>

To some extent, this view underestimates the individual privacy interests at stake in identity and status information. As some privacy scholars have argued, individuals may have a legitimate privacy interest in remaining anonymous in certain contexts, an interest that could be interpreted to encompass aspects of individual identity such as one’s name and one’s immigration or citizenship status.<sup>170</sup> This privacy interest may be of considerable importance even to U.S. citizens and noncitizens who are lawfully present in the United States. Opponents of national identification systems, for example, argue that compelling individuals to disclose their identities may demean individual personhood and dignity.<sup>171</sup> Opponents also note with concern the historical use of identity documents and verification processes as a means of exercising sometimes oppressive social control over particular groups by tracking, monitoring, and controlling their interactions and movements within society.<sup>172</sup>

In particular, as the court suggested in *Hemenway*, compelling disclosure of immigration or citizenship status could make individuals vulnerable in some circumstances to discrimination or related harms.<sup>173</sup> This concern is by no means purely hypothetical in the United States, given the history of xenophobia and nativism directed

---

<sup>168</sup> See Colb, *supra* note 160, at 1477-78; Colb, *supra* note 25, at 172 n.205.

<sup>169</sup> Daniel J. Solove, “*I’ve Got Nothing to Hide*” and Other Misunderstandings of Privacy, 44 SAN DIEGO L. REV. (forthcoming 2007) (on file with UC Davis Law Review); see, e.g., *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477, 504 (M.D. Pa. 2007) (noting defendants’ argument that “disclosure of immigration status is not a matter so highly personal and sensitive that anonymity is required to protect a plaintiff’s interest [in not having that information disclosed]”).

<sup>170</sup> See, e.g., Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 237-51 (2002) (arguing that right to some measure of “public anonymity” should be protected).

<sup>171</sup> See, e.g., Richard Sobel, *The Demeaning of Identity and Personhood in National Identification Systems*, 15 HARV. J.L. & TECH. 319 (2002).

<sup>172</sup> *Id.* at 343-49; Steinbock, *supra* note 162, at 708-10.

<sup>173</sup> *Hemenway v. Hughes*, 601 F. Supp. 1002, 1006-07 (D.D.C. 1985).

towards particular immigrant groups and towards immigrants in general.<sup>174</sup> With respect to immigration and citizenship status information, this concern encompasses at least two distinct categories of potentially harmful activities. First, the *process* of being compelled to disclose identity or status information could facilitate or encourage arbitrary or selective enforcement in the form of racial profiling if it confers too much discretion to those officials seeking that information. Although the Supreme Court has held that federal immigration officials may not stop or detain individuals in the interior of the United States to inquire into their status “on less than a reasonable suspicion that they may be aliens,” that generous and nebulous standard still may leave many individuals vulnerable to racial profiling or other forms of arbitrary discrimination.<sup>175</sup> In this context, not surprisingly, evidence has suggested that racial profiling by federal immigration agents has indeed been a significant problem.<sup>176</sup> Regardless of whether they are unlawfully present in the United States, individuals forced to reveal their immigration or citizenship status to officials engaged in racial profiling in their investigations may face an increased risk of suffering personal costs as a result of those tactics.<sup>177</sup>

---

<sup>174</sup> See, e.g., Joe R. Feagin, *Old Poison in New Bottles: The Deep Roots of Modern Nativism*, in *IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 13, 13-39 (Juan F. Perea ed., 1997) (discussing history of nativism and xenophobia in United States).

<sup>175</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975); see *infra* Part III.A, C. This risk may be exacerbated if the actors seeking that status information are not well-versed in the many complexities of immigration law, as, for example, state and local law enforcement officers in most instances will not be. See David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 36 (2006) (“[A] very good city police officer might have no idea how to spot questionable immigration documents, or even which visa designations might allow a person to enter the U.S. And make no mistake: immigration enforcement is one of the most complicated bodies of law in the United States.”).

<sup>176</sup> See Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 351-55 (2002); Wishnie, *supra* note 38, at 1102-15.

<sup>177</sup> See, e.g., BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 160-68 (2007); DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* 94-107 (2002). For many U.S. citizens targeted by such tactics, the personal costs may extend well beyond the indignities associated with being targeted on the basis of race or ethnicity. According to a 2006 study, as many as 7% of all U.S. citizens, or approximately 13 million individuals, do not have ready access to official documents authoritatively establishing their citizenship status. BRENNAN CENTER FOR JUSTICE, *CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS’ POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 2* (2006), available at [http://www.brennancenter.org/page/-/d/download\\_file\\_39242.pdf](http://www.brennancenter.org/page/-/d/download_file_39242.pdf). Depending upon the particular circumstances in which they are expected to disclose their

Second, as a result of being compelled to disclose immigration and citizenship status, both unauthorized and lawfully present noncitizens may become more vulnerable to discrimination or harassment based on that revealed status itself. In this respect, the individual interest in maintaining some measure of privacy in one's status is analogous to the associational privacy and anonymous speech interests that the Supreme Court has recognized and protected under the First Amendment, where the Court has also been concerned with the vulnerability that members of disfavored groups may face if forced to disclose their group membership or identities as speakers.<sup>178</sup> Like members of a disfavored group, individuals who are citizens of a particular unpopular nation — or even simply members of the disfavored category of “noncitizens” more generally<sup>179</sup> — might face possible hostility or discrimination on account of their status.<sup>180</sup> For

---

status, the costs and risks to these U.S. citizens may be considerable, including the risk of being erroneously detained as potentially deportable. See *Understanding the Realities of REAL ID: Hearing Before Subcomm. on Oversight of Government Management, the Federal Workforce, and the District of Columbia of the S. Comm. on Homeland Security & Government Affairs*, 110th Cong. (2007) (statement of Wendy R. Weiser and Myrna Pérez, Brennan Center for Justice) (discussing variety of harms that U.S. citizens might experience as result of expanded use of proof of citizenship requirements), available at [http://www.brennancenter.org/page/-/d/download\\_file\\_48288.pdf](http://www.brennancenter.org/page/-/d/download_file_48288.pdf); Marisa Taylor, *Immigration Officials Detaining, Deporting American Citizens*, MCCLATCHEY NEWSPAPERS, Jan. 24, 2008, available at <http://www.mcclatchydc.com/227/story/25392.html> (discussing increase in number of U.S. citizens erroneously detained and deported, in part due to faulty screening for lawful presence by state and local officials “with less experience in immigration matters”).

<sup>178</sup> See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 460-63 (1958); see also DANIEL J. SOLOVE, MARC ROTENBERG & PAUL M. SCHWARTZ, *INFORMATION PRIVACY LAW* 451-70 (2d ed. 2006) (discussing privacy of group associations).

<sup>179</sup> Cf. *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (holding that state classifications based on alienage are “inherently suspect and subject to close judicial scrutiny” because “[a]llies as a class are a prime example of a ‘discrete and insular’ minority . . . for whom such heightened judicial solicitude is appropriate”); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 160-62 (1980) (defending heightened judicial scrutiny of alienage-based classifications under Equal Protection Clause).

<sup>180</sup> Such harms can occur not only at the point at which such information is disclosed or collected, but also after it has been processed or stored. For example, in the aftermath of the 1984 assassination in India of Indira Gandhi by two Sikh bodyguards, thousands of Sikhs were killed and hundreds of thousands displaced in targeted, anti-Sikh violence. See Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 COLUM. J. ASIAN L. 93, 142-43 & n.203 (2006). Subsequent investigations have established that much of this anti-Sikh violence was highly organized, involving political party workers who used government-created voter registration, school registration, and ration lists to identify Sikh individuals and households to be targeted. See, e.g., JASKARAN KAUR, TWENTY

example, in *Lozano v. City of Hazleton*, the district court considered whether to permit plaintiffs with “uncertain immigration status” to proceed anonymously with litigation challenging the City of Hazleton’s recent indirect enforcement ordinances using pseudonyms.<sup>181</sup> After weighing numerous factors, the court concluded that permitting the plaintiffs to use pseudonyms in the litigation served both the public interest and the plaintiffs’ own private interests, including interests in maintaining privacy in their immigration status.<sup>182</sup> The court emphasized the potential for harassment and intimidation of the plaintiffs on the basis of their race, immigration status, and involvement with the “highly publicized and controversial lawsuit,” noting that even opponents of the ordinances who had “more secure social and legal status than the anonymous plaintiffs” had suffered harassment and intimidation owing to their race, perceived citizenship status, and political opposition to the ordinances.<sup>183</sup>

Given the risk of these harms, it might follow that individuals should only be compelled to reveal their status when the need to advance competing concerns outweighs the risk of those individual harms in a particularized, context-sensitive manner. More fundamentally, however, even an individualistic understanding of privacy that gives more weight to such harms neglects the broader, structural harms that privacy also protects against — harms that are not simply visited upon particular individuals but which rather are associated with the social and legal structure more generally.<sup>184</sup> This

---

YEARS OF IMPUNITY: THE NOVEMBER 1984 POGROMS OF SIKHS IN INDIA 30 (2004), available at <http://www.ensaaf.org/pdf/reports/complete-1984report-v2.pdf>. Identity information maintained in government records has similarly been used to facilitate targeted violence against members of disfavored groups in other countries, such as Sri Lanka. See AMITAV GHOSH, *The Greatest Sorrow: Times of Joy Recalled in Wretchedness* (2005), in *INCENDIARY CIRCUMSTANCES* 36, 44-45 (2005) (discussing parallels between anti-Sikh violence in India in 1984 and anti-Tamil violence in Sri Lanka in 1983, including similar use of “the information-gathering function of government . . . [for] the sinister purpose of targeting minority populations”). While noncitizens in the United States of course might not be at risk of such severe forms of targeted violence, the examples illustrate the manner in which government-maintained identity or status information can be used to facilitate targeted hostility or discrimination against members of disfavored groups, even if in less severe form.

<sup>181</sup> 496 F. Supp. 2d 477, 505 (M.D. Pa. 2007).

<sup>182</sup> *Id.* at 504-15. The Court also entered a protective order limiting the ability of the defendants to obtain immigration and citizenship status information about the plaintiffs through discovery. *Id.* at 506 n.28.

<sup>183</sup> *Id.* at 507-11.

<sup>184</sup> See SOLOVE, *supra* note 112, at 96-97; Solove, *supra* note 139, at 1116-17.



“structural turn”<sup>185</sup> in recent privacy scholarship recognizes that privacy does not only protect individual interests, but also protects broader social values — for example, by restraining government power and preventing government coercion.<sup>186</sup> When one moves away from an exclusively individualistic model of privacy, the concern that particular wrongdoers might benefit from privacy protections becomes secondary, given the possibility of realizing broader social goals through those protections. For example, the harms associated with increased racial profiling are not simply individual harms experienced only by the particular individuals targeted, but also are social harms experienced by the community at large.<sup>187</sup> In this respect, the manner in which privacy constrains the likelihood of selective and arbitrary immigration enforcement is very much akin to the manner in which privacy protects against other kinds of structural harms.

Outside the Fourth Amendment context, some courts and commentators have begun to understand the privacy interests at stake in immigration and citizenship status information in precisely these structural terms. In recent years, for example, immigrant workers suing their employers for labor and employment law violations have increasingly faced questions during discovery concerning their national origin and immigration and citizenship status. The escalation of these inquiries has come in the wake of the Supreme Court’s decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, which held in a 5-4 decision that the National Labor Relations Board lacks the authority to award backpay to unauthorized immigrant workers for violations of the National Labor Relations Act.<sup>188</sup> The Court reasoned that permitting unauthorized immigrant workers to be awarded

---

<sup>185</sup> Neil Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1087, 1099 (2006) (reviewing SOLOVE, *supra* note 112).

<sup>186</sup> Solove, *supra* note 20, at 488; *see also* Stuntz, *supra* note 120, at 1065.

<sup>187</sup> As David Harris has observed: “Personal costs to those who have to bear the burden of the[] encounters [that result from racial profiling] are great. But societal costs may be even greater.” HARRIS, *supra* note 177, at 93-94; *see* HARCOURT, *supra* note 177, at 145-71 (discussing social costs resulting from “ratchet effect” that profiling may cause); HARRIS, *supra* note 177, at 117-28 (arguing that racial profiling undermines legitimacy of legal system, faith in rule of law, uniformity in sentencing, and effectiveness of community policing).

<sup>188</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151-52 (2002); *see* Catherine L. Fisk & Michael J. Wishnie, *Hoffman Plastic Compounds, Inc. v. NLRB: The Rules of the Workplace for Undocumented Immigrants*, in IMMIGRATION STORIES 311-41 (David Martin & Peter Schuck eds., 2005).

backpay would conflict with the policy embodied in IRCA, which made it unlawful to hire unauthorized workers.<sup>189</sup>

While employers have sought to extend the exemption from liability recognized in *Hoffman* to other labor and employment laws, including federal wage and hour laws, federal antidiscrimination laws, and state torts and workers compensation laws, a number of courts have continued to permit unauthorized immigrant employees to be awarded remedies for violations of these other laws.<sup>190</sup> Nevertheless, aggressively seeking to limit their potential liability when faced with labor and employment litigation, employers also have increasingly sought to use the civil discovery process to determine the immigration status of plaintiffs pursuing labor and employment claims against them.<sup>191</sup> Even before *Hoffman*, preliminary evidence already suggested that noncitizens tend to underreport labor and employment law violations by employers.<sup>192</sup> In the wake of *Hoffman*, the more frequent demands being placed upon plaintiffs to disclose their status through discovery have intimidated immigrant workers to an even greater extent than before into not bringing or abandoning potentially legitimate claims against their employers.<sup>193</sup>

Recognizing the potential in *terrorem* effect of such discovery, some courts have acted to protect the privacy of plaintiffs' status in situations where it is not relevant to the litigation. In *Rivera v. NIBCO, Inc.*, for example, several immigrant employees sued their former employer alleging national origin discrimination under Title VII and state law.<sup>194</sup> After the defendant sought to obtain information about the plaintiffs' immigration status through discovery, the plaintiffs successfully obtained a protective order from the district court preventing the defendant from using discovery to seek information

---

<sup>189</sup> *Hoffman Plastic Compounds*, 535 U.S. at 147-51.

<sup>190</sup> See, e.g., *Madeira v. Affordable Hous. Found.*, 469 F.3d 219 (2d Cir. 2006); see also Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 496-97 & nn.106-09 (2005) (discussing post-*Hoffman* cases considering availability of remedies to unauthorized immigrants under Fair Labor Standards Act, state workers' compensation laws, state tort law, and Title VII).

<sup>191</sup> See Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 40 CORNELL INT'L L.J. (forthcoming 2008) (manuscript at 17-22, on file with UC Davis Law Review); Ho & Chang, *supra* note 190, at 475.

<sup>192</sup> See Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 676-79 (2003) (discussing preliminary evidence).

<sup>193</sup> See Ho & Chang, *supra* note 190, at 492-93.

<sup>194</sup> 364 F.3d 1057, 1061 (9th Cir. 2004).

concerning the plaintiffs' immigration status and eligibility for employment.<sup>195</sup> Following the Supreme Court's decision in *Hoffman*, which occurred in the midst of the litigation, the plaintiffs proposed a bifurcated proceeding in which the case would first proceed to trial on liability. If the plaintiffs succeeded in establishing liability, the court would then conduct an in camera proceeding to ensure that backpay would only be awarded to those plaintiffs who were legally entitled to that remedy in the aftermath of *Hoffman*, while simultaneously preserving the plaintiffs' still anonymity.<sup>196</sup>

The U.S. Court of Appeals for the Ninth Circuit affirmed the protective order. The court emphasized the chilling effect on the willingness of undocumented workers to vindicate their legal rights if employers were permitted to obtain immigration status information through the discovery process. The court also noted the possibility that employers might retaliate against undocumented workers who assert their legal rights by reporting them to federal immigration officials for deportation, citing numerous examples in which such retaliation had taken place. Moreover, the court also noted the potential chilling effect that even legally authorized workers might face if subjected to discovery into immigration status:

Documented workers may fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends; similarly, new legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding. Any of these individuals, failing to understand the relationship between their litigation and immigration status, might choose to forego civil rights litigation.<sup>197</sup>

Recognizing the important role of employees acting as "private attorneys general" to fully enforce the provisions of Title VII, the court concluded that protecting the plaintiffs' privacy interests in their immigration status not only advanced their individual interests, but

---

<sup>195</sup> *Id.* at 1062. The protective order did not prevent the employer from conducting its own independent investigation of the plaintiffs' status outside the discovery process. *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 1065; see also Cunningham-Parmeter, *supra* note 191 (manuscript at 19) (noting that lawfully present workers, many of whom live in mixed-status families, may be dissuaded from pursuing labor and employment claims if "extensive discovery about status" leads to "invasive questions about their families and themselves").

also served the public interest in ensuring full enforcement of the nation's civil rights laws.<sup>198</sup>

Other courts have similarly protected immigration status information from discovery in the context of employment cases, recognizing that if forced to disclose their status, unauthorized worker plaintiffs “might withdraw from the suit rather than [disclose their status] and face termination and/or potential deportation.”<sup>199</sup> Courts have similarly recognized and protected privacy interests in immigration status in other situations in which doing so advances the public interest in facilitating beneficial litigation. In *Lozano*, for example, the court gave some weight to the public interest “in determining the constitutionality of ordinances like the one[s] passed in Hazleton,” noting that in the absence of anonymity for the plaintiffs, “future such plaintiffs would likely decline to participate in the lawsuit, and the public interest in testing the constitutionality” of such ordinances would be compromised.<sup>200</sup>

Comparable kinds of structural, privacy-related harms can arise when police and other state and local officials seek immigration and citizenship status information from members of the public whom they encounter.<sup>201</sup> Advocates, scholars, and even many police officials

---

<sup>198</sup> *Rivera*, 364 F.3d at 1066 (“Given Title VII’s dependence on private enforcement, we find that the national effort to eradicate discrimination in the workforce would be hampered by the discovery practices NIBCO seeks to validate here.”); see *Cunningham-Parmeter*, *supra* note 191 (manuscript at 20) (noting that “many federal agencies rely almost entirely on complaints filed by employees” to ensure full enforcement of labor and employment laws).

<sup>199</sup> *Flores v. Albertsons, Inc.*, No. CV0100515AHM, 2002 WL 1163623, at \*6 (C.D. Cal. Apr. 9, 2002); see *EEOC v. Rest. Co.*, 448 F. Supp. 2d 1085, 1087 (D. Minn. 2006); *Avila-Blum v. Casa de Cambio Delgado, Inc.*, 236 F.R.D. 190, 191-92 (S.D.N.Y. 2006); *EEOC v. Bice of Chi., Inc.*, 229 F.R.D. 581, 582-83 (N.D. Ill. 2005); *EEOC v. First Wireless Group, Inc.*, 225 F.R.D. 404, 406-07 (E.D.N.Y. 2004); *Flores v. Amigon*, 233 F. Supp. 2d 462, 464-65 (E.D.N.Y. 2002); *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002); *Liu v. Donna Karan Int’l, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002); see also *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (per curiam) (holding, in pre-*Hoffman* case, that discovery of immigration status information is improper where legal protections “are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant”). At least one scholar has questioned the extent to which protective orders offer meaningful protection for privacy interests for plaintiffs in labor and employment litigation, arguing that plaintiffs may find more robust protection by asserting the privilege against self-incrimination. *Cunningham-Parmeter*, *supra* note 191 (manuscript at 22-29).

<sup>200</sup> *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 511-12 (M.D. Pa. 2007).

<sup>201</sup> See *Wishnie*, *supra* note 192, at 679. Similar concerns about structural privacy also underlie so-called “rape shield” laws, which protect women’s sexual privacy by limiting the admissibility of evidence concerning a victim’s prior sexual conduct during rape prosecutions. See Michelle J. Anderson, *From Chastity Requirement to*

themselves have raised concerns that members of immigrant communities may be reluctant to come forward to the police as crime victims or to cooperate as witnesses if they perceive the police to be involved in immigration enforcement activities.<sup>202</sup> Though further research is necessary, some empirical evidence supports the notion that this sort of chilling effect already exists.<sup>203</sup> Yet, while the Fourth Amendment provides the most direct constitutional basis to regulate police investigations in the interest of protecting privacy-related values, the narrow, all-or-nothing conception of Fourth Amendment privacy embodied in the Court's post-*Katz* jurisprudence seems unlikely to accommodate these interests particularly well.

### III. BORDER ENFORCEMENT, INTERIOR ENFORCEMENT, AND THE FOURTH AMENDMENT

To date, the Supreme Court has most directly considered the privacy interests implicated by immigration and citizenship status in the context of its border enforcement cases under the Fourth Amendment. Under these cases — which have not involved the Fourth Amendment's criminal procedural protections, but rather the more deferential standards applicable to administrative or non-criminal searches and seizures — the Court has generally afforded federal officials considerable latitude to conduct immigration and customs enforcement activities. Perhaps naturally, this deference is strongest at the physical border itself, where the Court has deemed “routine,” suspicionless searches and seizures of individuals and property for purposes of enforcing immigration and customs laws to be *per se* reasonable, and therefore exempt from the Fourth Amendment's warrant and probable cause requirements, “simply by

---

*Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 86-94 (2002) (discussing “sexual privacy purpose” underlying federal rape shield law). In seeking to preserve women's sexual privacy, rape shield laws do not simply seek to prevent the individual humiliation and secondary trauma that might be visited upon individual women, but also seek to prevent women from being deterred from reporting rapes and cooperating with law enforcement officials seeking to prosecute those crimes. *Id.* at 93.

<sup>202</sup> See DAVID HARRIS, *GOOD COPS: THE CASE FOR PREVENTIVE POLICING* 5-9 (2005); Kittrie, *supra* note 42, at 1475-80; Wishnie, *supra* note 192, at 673 (“Intuitively, it seems likely that immigrants, especially undocumented immigrants, are deterred from reporting crimes they suffer for fear that they or a family member will be deported.”).

<sup>203</sup> See Kalhan, *supra* note 22 (manuscript at 24-26); see also Wishnie, *supra* note 192, at 673-75 (discussing evidence suggesting “that immigrants, especially undocumented immigrants, hesitate to report crimes and other unlawful activity that they experience or witness”).

virtue of the fact that they occur at the border.”<sup>204</sup> While “nonroutine” searches or seizures at the border must be justified by reasonable suspicion, the Court has nevertheless applied a lower standard at the border for such searches than the probable cause standard that otherwise would apply to most of those searches in the interior of the country.<sup>205</sup>

The Court has considered searches and seizures by federal officials to determine arriving individuals’ citizenship and immigration status, and therefore their entitlement to enter and be admitted to the United States, to be “routine.”<sup>206</sup> The Court has never elaborated in detail on why this is the case.<sup>207</sup> While the Court has not explicitly required the federal government’s interests to be balanced against the privacy interests of the individual when authorizing routine searches, it is clear that the Court has deemed the intrusion upon those privacy interests to be minimal for routine searches, consistent with the individualistic conception of privacy that underlies most traditional understandings of the Fourth Amendment.<sup>208</sup>

The “border exception” sits at the intersection of two established and much criticized areas of constitutional doctrine: the “plenary power” doctrine and the various exceptions to ordinary Fourth Amendment requirements for primarily administrative, noncriminal searches and seizures. Both areas are highly deferential to government

---

<sup>204</sup> *United States v. Ramsey*, 431 U.S. 606, 616 (1977); see Jon Adams, *Rights at United States Borders*, 19 B.Y.U.J. PUB. L. 353, 354-55 (2005); Henry G. Watkins, *The Fourth Amendment and the INS: An Update on Locating the Undocumented and a Discussion on Judicial Avoidance of Race-Based Investigative Targeting in Constitutional Analysis*, 28 SAN DIEGO L. REV. 499, 503-06 (1991).

<sup>205</sup> *United States v. Montoya de Hernandez*, 473 U.S. 531, 551 (1985).

<sup>206</sup> See *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).

<sup>207</sup> The distinction between “routine” and “nonroutine” searches and seizures generally turns on the level of intrusiveness. See *United States v. Johnson*, 991 F.2d 1287, 1291 (7th Cir. 1993) (suggesting that searches and seizures be deemed routine when they “do not pose a serious invasion of privacy” and would not “embarrass or offend the average traveler”); see also *United States v. Braks*, 842 F.2d 509, 511-12 (1st Cir. 1988) (enumerating factors to be considered in determining whether search or seizure is routine or nonroutine, including whether search or seizure would “abrogate” individual’s “reasonable expectations of privacy”).

<sup>208</sup> See *supra* notes 165-66 and accompanying text. When considering the reasonableness of more intrusive, “nonroutine” searches, the Court has required reasonable suspicion, but has indicated that the government’s sovereign interests should weigh more heavily in the balance than the privacy interests of the individual. See *Montoya de Hernandez*, 473 U.S. at 540 (holding that for nonroutine searches “the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is . . . struck much more favorably to the Government at the border”).

actions, and many of the criticisms of the deference extended in those areas apply with comparable force to the deference afforded the government under the border exception. However, despite being deferential, neither doctrine leaves government action entirely free from constitutional limits. While courts have yet to face many significant cases involving interior enforcement at some distance away from the border, analogous limits also constrain the extent to which the government should continue to be given latitude when its enforcement activities move away from searches and seizures by designated federal officials at the border itself to interior enforcement activities conducted by a much larger constellation of federal, state, and local officials. In some of its early cases involving immigration enforcement close to the border, but not at the physical border itself, the Court has appeared to recognize such limits. Nevertheless, in its limited case law concerning interior enforcement activities, the Court has not applied the Fourth Amendment in a manner likely to set meaningful constraints.

#### A. *Border Enforcement and “Plenary Power”*

Albeit tepidly,<sup>209</sup> the Court has offered at least two distinct justifications for its “border exception” to the probable cause and warrant requirements. At times, the Court has characterized individual expectations of privacy to be lower at the border than in the country’s interior.<sup>210</sup> The Court’s explanation of precisely why that might be the case has not been entirely satisfactory; it often has relied on conclusory statements or incantations of history and tradition with little more.<sup>211</sup>

---

<sup>209</sup> STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* 442 (7th ed. 2004) (stating that border search cases “make little effort to justify the exception on policy grounds”).

<sup>210</sup> See *Montoya de Hernandez*, 473 U.S. at 539 (stating that “expectation of privacy [is] less at the border than in the interior”); *United States v. Ramsey*, 431 U.S. 606, 623 n.17 (1977) (stating that there are “limited justifiable expectations of privacy for incoming material crossing United States borders”).

<sup>211</sup> See Paul Rosenzweig, Comment, *Functional Equivalents of the Border, Sovereignty, and the Fourth Amendment*, 52 U. CHI. L. REV. 1119, 1123 (1985) (“Although susceptible to criticism, this historical justification has become the Court’s standard reply to challenges to the border search exception.”). The Court has frequently relied upon the discussion in *Carroll v. United States*, 267 U.S. 132, 154 (1925), which stated:

Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled

In *United States v. Ramsey*, for example, the Court simply invoked, in a footnote, “the longstanding, constitutionally authorized right of customs officials to search incoming persons and goods” and the lack of any “statutorily created expectation of privacy.”<sup>212</sup> However, given the formal significance of international border crossings under international law, support for this conclusion could be grounded in the actual notice to travelers of the likelihood that routine searches and seizures ordinarily will be conducted at the border.<sup>213</sup> At the same time, in justifying both routine and nonroutine searches and seizures at the border, the Court also has emphasized the strength of the federal government’s sovereign interests in regulating the border, noting the “right of the sovereign to protect itself by stopping and examining persons and property crossing into this country.”<sup>214</sup>

In these respects, the Court’s recognition of the strength of the government’s sovereign interest in regulating the border is closely related to its recognition of the federal government’s broad power over immigration and naturalization, a judicially created principle known as the “plenary power” doctrine.<sup>215</sup> The plenary power doctrine

---

to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

*Carroll*, however, was decided long before the development of the “expectations of privacy” framework that the Court has followed since *Katz*, which purported to jettison the focus on “constitutionally protected areas.” *Katz v. United States*, 389 U.S. 347, 351 (1967). In relying upon *Carroll* to conclude that expectations of privacy are diminished at the border, the Court has made little effort to retrofit its assertion in *Carroll* with its post-*Katz* methodology.

<sup>212</sup> 431 U.S. at 623 n.17; see also *Montoya de Hernandez*, 473 U.S. at 539 (asserting that privacy expectations are lower at border without explanation) (citing *Carroll*, 267 U.S. at 154).

<sup>213</sup> See Rosenzweig, *supra* note 211, at 1133.

<sup>214</sup> *Ramsey*, 431 U.S. at 617; see also *United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004) (“The Government’s interest in preventing the entry of unwanted persons and effects is at its zenith at the international border,” because “the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity.”); *Montoya de Hernandez*, 473 U.S. at 540 (noting that at international border, “Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government”); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) (stating that federal power to exclude noncitizens “can be effectuated by . . . ‘reasonably requiring one entering the country to identify himself as entitled to come in’” (quoting *Carroll*, 267 U.S. at 154)).

<sup>215</sup> See Kevin R. Johnson, *U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law*, 47 VILL. L. REV. 897, 910 (2002); Rosenzweig, *supra* note 211, at 1128-31.



purports to limit constitutional and judicial constraints on the substantive decisions of Congress in the exercise of its power to regulate immigration. Though not enumerated in the Constitution, the federal government's power to regulate immigration has been recognized by the Court as deriving from the inherent sovereignty of the United States under international law and several specific constitutional provisions.<sup>216</sup> In discussing the border exception, the Court has explicitly invoked and tied the exception to the federal government's immigration power.<sup>217</sup> On at least one occasion, the Court even has referred to the federal government's authority to conduct routine, suspicionless searches and seizures of individuals at the border as "plenary."<sup>218</sup>

In recognizing Congress's broad power over immigration, the Court has asserted that the judiciary must afford considerable deference to Congress's substantive determinations, deeming them largely free from constitutional constraints. "In the exercise of its broad power over immigration and naturalization," the Court has said, "Congress regularly makes rules that would be unacceptable if applied to citizens."<sup>219</sup> By contrast, state and local efforts to directly regulate immigration itself — at its core, the "determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain"<sup>220</sup> — or to formulate other policies that discriminate on the basis of alienage generally have been found unlawful, either as interfering with the federal government's conduct of foreign relations,<sup>221</sup> as preempted by federal statutes,<sup>222</sup> or as inconsistent with equal protection.<sup>223</sup>

---

<sup>216</sup> See Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 502-04, 532-33 (2001).

<sup>217</sup> *Almeida-Sanchez*, 413 U.S. at 272 (citing *Chae Chan Ping v. United States*, 130 U.S. 581, 603-04 (1889)).

<sup>218</sup> *Montoya de Hernandez*, 473 U.S. at 537 (citing *Ramsey*, 431 U.S. at 616-17).

<sup>219</sup> *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976).

<sup>220</sup> *De Canas v. Bica*, 424 U.S. 351, 355 (1976); see Wishnie, *supra* note 216, at 523 (stating that immigration power, at its core, involves "direct regulation of entrance and abode").

<sup>221</sup> *Spiro*, *supra* note 38, at 134-45; see *Chy Lung v. Freeman*, 92 U.S. 275, 279-80 (1875).

<sup>222</sup> Wishnie, *supra* note 216, at 510. *But see De Canas*, 424 U.S. at 351 (upholding California prohibition on employment of undocumented immigrants in face of preemption challenge).

<sup>223</sup> See generally Koh, *supra* note 8 (discussing equal protection principles applicable to alienage-based classifications).

The plenary power doctrine has been endlessly criticized.<sup>224</sup> However, the Court has never treated Congress's immigration power as literally "plenary," in the sense of being absolute and unqualified. For example, the Court has recognized on many occasions, dating back to the turn of the twentieth century, that deportation procedures must conform to the requirements of the Due Process Clause, which extends its protections not only to "citizens," but to all "persons."<sup>225</sup> The Court has been particularly inclined to extend these protections to "deportable" noncitizens who have entered the United States and lawful permanent residents with established ties to the United States, who stand in a stronger constitutional position than noncitizens outside the United States who lack such ties.<sup>226</sup> Even for substantive immigration decisions at the core of the immigration power, concerning the regulation of entrance and abode, the Court's more recent decisions have suggested some constitutional limitations. For example, in the course of upholding a substantive immigration classification against equal protection challenge in *Fiallo v. Bell*, the Court asserted "a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens."<sup>227</sup>

---

<sup>224</sup> See, e.g., Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 162-63 (2002); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 863 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255-60; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 21-24 (1984).

<sup>225</sup> See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Yamataya v. Fisher*, 189 U.S. 86 (1903).

<sup>226</sup> See, e.g., *Zadvydas*, 533 U.S. at 693; *Landon v. Plasencia*, 459 U.S. 21 (1982); *Bridges v. Wixon*, 326 U.S. 135 (1945); see also Martin, *supra* note 9, at 52-59, 92-101.

<sup>227</sup> 430 U.S. 787, 792 n.5 (1997); see also *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) (invalidating substantive immigration classification on equal protection grounds); Cleveland, *supra* note 224, at 161-62 (discussing recent constitutional limits placed upon plenary power doctrine). The Court also has invalidated immigration provisions concerning the admission or deportation of noncitizens where they have conflicted with structural principles such as separation of powers, asserting that while Congress has "plenary authority" over immigration and naturalization it must choose a "constitutionally permissible means of implementing that power." *INS v. Chadha*, 462 U.S. 919, 940-41, 958-59 (1983) (invalidating statutory provision authorizing either house of Congress to exercise "legislative veto" over executive decisions to grant discretionary relief from deportation).

Given the explicit relationship between the border exception to the Fourth Amendment and the federal immigration power, it makes sense for the same kinds of constitutional limits that are applicable to Congress's exercise of the immigration power also to apply to searches and seizures conducted at the international border. Indeed, while it has been deferential to the federal government's sovereign interests, the Court itself has acknowledged the possibility of such limits, and has never concluded that absolutely "anything goes" even at the border itself. In *Ramsey*, for example, the Court noted explicitly that the border exception was "subject to substantive limitations imposed by the Constitution," and left open the possibility that it might hold a search or seizure at the border "unreasonable" if it were carried out in a "particularly offensive manner."<sup>228</sup> Because the border exception cases do not hold that noncitizens are categorically subject to less protection under the Fourth Amendment, the case for such limits in the search and seizure context may be stronger than in the context of substantive immigration classifications.<sup>229</sup> Unlike substantive immigration classifications, for example, which on their face only distinguish among noncitizens, routine searches and seizures at the border necessarily affect both citizens and noncitizens alike, since it is always necessary for border officials to conduct some inquiry or search, however limited or routine, to determine an individual's citizenship and immigration status.<sup>230</sup>

---

<sup>228</sup> *United States v. Ramsey*, 431 U.S. 606, 618 n.13 (2007); *see also United States v. Flores-Montano*, 541 U.S. 149, 155-56 (2004) (noting possibility that "some searches of property [may be] so destructive as to require a different result").

<sup>229</sup> In *United States v. Montoya de Hernandez*, the Supreme Court explicitly declined to address "whether aliens have lesser Fourth Amendment rights at the border." 473 U.S. 531, 540 n.4 (1985). Subsequently, the Court held that non-resident aliens lacking "sufficient connections" to the United States cannot rely upon the Fourth Amendment to challenge searches and seizures by U.S. officials conducted in other countries. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). The Court also hinted that even some noncitizens within the United States might be outside the Fourth Amendment's protection if they lacked sufficient voluntary ties to the United States to be considered a part of its political community, and at least one lower court has agreed. *Id.* at 265-66, 272; *see United States v. Esparza-Mendoza*, 265 F. Supp. 2d 1254, 1258-73 (D. Utah 2004), *aff'd on other grounds*, 386 F.3d 953 (10th Cir. 2004). However, Justice Anthony Kennedy, who provided the fifth vote for the Court's decision, rejected this argument, stating that he had "little doubt" that the Fourth Amendment's "full protections" would have applied had the search occurred in a residence within the United States. *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring); *see Gerald L. Neuman, Whose Constitution?*, 100 YALE L.J. 909, 912, 990-91 (1990); Wishnie, *supra* note 192, at 680-85.

<sup>230</sup> *Cf. United States v. Brignoni-Ponce*, 422 U.S. 873, 883-84 (1975) (stating in context of routine stop and search in country's interior, that "[a]lthough we may

Moreover, as the Supreme Court and some lower federal courts have recognized, once one moves away from the border and into the interior, the justifications for deference become more difficult to maintain. At the actual physical border itself, the justification for routine, suspicionless searches and seizures for immigration and customs enforcement purposes is strengthened by the fact that all traffic crossing the border necessarily is, by definition, international. Individuals crossing an international border reasonably expect to face routine searches and seizures to determine whether they are authorized to enter the country. Because such searches are conducted of all individuals seeking admission at designated entry ports, and because only designated federal officials may conduct these searches, the potential for abuse of discretion is limited.<sup>231</sup> The Court also has stated that the border exception applies with equal force, based on the same rationale, at locations that are the “functional equivalent” of the actual border, citing as examples searches of passengers and cargo who have arrived in the interior of the country on a nonstop international flight or searches at “an established station near the border, at a point marking the confluence of two or more roads that extend from the border.”<sup>232</sup>

But just as the Court has recognized heightened constitutional protection for noncitizens who have entered the United States, the Court also has required a higher degree of suspicion for routine customs- and immigration-related stops away from the border and in the country’s interior, where the traffic is not exclusively international and enforcement officers must rely upon other indicia to determine whether an individual is an appropriate subject of immigration or customs enforcement. In *United States v. Brignoni-Ponce*, the Court held that in order for “roving patrols” by the Border Patrol to conduct

---

assume for purposes of this case that the broad congressional power over immigration . . . authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in the country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens”).

<sup>231</sup> See *United States v. Sandoval-Vargas*, 854 F.2d 1132, 1136 (9th Cir. 1988) (stating that only designated customs, immigration, and Coast Guard officials may conduct routine border searches, and since “[s]earches conducted by other law enforcement agents are not considered border searches, . . . [they] must therefore meet the traditional demands of the fourth amendment”); see also *Montoya de Hernandez*, 473 U.S. at 551 (Brennan, J., dissenting).

<sup>232</sup> *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973). Determining precisely what constitutes a “functional equivalent” of the physical border has not, however, proven straightforward. See Johnson, *supra* note 215, at 908-09; Rosenzweig, *supra* note 211, at 1123-28.

automobile stops in the border region to question individuals for routine immigration enforcement purposes, the officers were required to have reasonable suspicion that the “particular vehicle may contain aliens who are illegally in the country.”<sup>233</sup> The Court invalidated the particular stop in question because the only basis for suspicion was the apparently Mexican ancestry of the car’s occupants.<sup>234</sup> Significantly, however, the Court authorized the Border Patrol’s use of “Mexican appearance” as a “relevant factor” in determining whether reasonable suspicion for an immigration stop exists.<sup>235</sup> As a result, the consideration of race in immigration enforcement activities near the border has persisted, raising concerns about racial profiling in immigration enforcement.<sup>236</sup>

### B. *Border Enforcement and Noncriminal Searches and Seizures*

The border exception also is sometimes characterized as a particular example of the exception to the ordinary probable cause and warrant requirements for searches conducted primarily for non-criminal purposes, such as administrative searches or searches intended to advance “special needs, beyond the normal need for law enforcement.”<sup>237</sup> These cases encompass a number of different categories, including administrative housing inspections, commercial premises, inventory searches of automobiles, highway checkpoints, drug testing of government employees, prisoners and probationers, and searches of high school students. But in each instance, the Court has applied similar principles excusing compliance with the Fourth Amendment limits that ordinarily would apply in criminal investigations. Instead, the Court has balanced the government’s interests against the extent to which the search intrudes upon privacy interests to determine whether the search is reasonable. Throughout

---

<sup>233</sup> *Brignoni-Ponce*, 422 U.S. at 881.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> See Bernard Harcourt, *United States v. Brignoni-Ponce and United States v. Martinez-Fuerte: The Road to Racial Profiling*, in *CRIMINAL PROCEDURE STORIES* 319-49 (Carol S. Steiker ed., 2006); Johnson, *supra* note 215, at 905-06.

<sup>237</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 872 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)); see 5 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 10.5(a), at 194 (4th ed. 2006) (noting that reasoning relied upon to uphold other administrative searches is “equally applicable to the routine border search”); SALTZBURG & CAPRA, *supra* note 209, at 442-52; Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87, 99.

this area, the Court has struggled to draw a meaningful line between searches and seizures that are intended “primarily” to advance criminal law enforcement purposes, on the one hand, and those that are primarily intended to advance noncriminal law enforcement purposes, whether labeled as “administrative,” or “regulatory,” or “special needs.”<sup>238</sup>

At one level, searches and seizures for immigration enforcement purposes appear to fit well within this administrative or “special needs” rubric. Both exclusion and deportation orders have long been understood to be civil directives, rather than a form of criminal punishment.<sup>239</sup> As early as *Fong Yue Ting v. United States*, which first recognized the federal government’s power to expel noncitizens from the United States, the Supreme Court emphasized that

[an] order of deportation is not a punishment for a crime . . . but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which . . . [Congress] has determined that his continuing to reside [in the United States] shall depend.<sup>240</sup>

In recent years, the Court has continued to characterize deportation proceedings as civil proceedings that do not involve punishment.<sup>241</sup>

As a result, while the Court has long held that noncitizens are entitled to procedural due process in deportation proceedings,<sup>242</sup> the constitutional guarantees that ordinarily apply in criminal proceedings have never been held to apply to the same extent in deportation

---

<sup>238</sup> See generally 1 JOSHUA DRESSLER & ALAN S. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATION 311-41 (4th ed. 2006) (discussing case law on administrative, “special needs,” and other searches conducted for noncriminal law enforcement purposes).

<sup>239</sup> See IRA J. KURZBAN, KURZBAN’S IMMIGRATION LAW SOURCEBOOK 224 (10th ed. 2006); see also Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1650 (1992) (noting Court’s “persistent habit . . . of characterizing exclusion and deportation as ‘civil’ rather than ‘criminal’ matters”).

<sup>240</sup> 149 U.S. 698, 730 (1893). The Court explicitly distinguished deportation from the crime of banishment, “in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment.” *Id.* (emphasis added).

<sup>241</sup> See, e.g., *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999); see also *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) (“[A] deportation hearing is intended to provide a streamlined determination of eligibility to remain in this country, . . . not to punish past transgressions . . . .”); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 308-09 & n.9 (2000).

<sup>242</sup> See *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903).

proceedings.<sup>243</sup> Deportation proceedings take place before administrative adjudicators, not judges, and noncitizens facing deportation have no right to trial by jury.<sup>244</sup> To prove deportability, the government need only establish its case by “clear, unequivocal, and convincing evidence,” rather than by the proof “beyond a reasonable doubt” standard required in criminal cases and even some civil proceedings.<sup>245</sup> The Supreme Court has held that violations of the Fourth Amendment ordinarily cannot be remedied in deportation proceedings through application of the exclusionary rule, unless they are so “egregious” as to “transgress notions of fundamental fairness.”<sup>246</sup> While courts have recognized a right to counsel in deportation proceedings as a matter of due process under the Fifth Amendment, and the INA guarantees a right to the assistance of counsel, albeit not at the government’s expense, courts have held that noncitizens in deportation proceedings have no right to counsel under the Sixth Amendment.<sup>247</sup> In addition, the Supreme Court and other courts have held that deportation is not limited by the Ex Post Facto Clause,<sup>248</sup> the Double Jeopardy Clause,<sup>249</sup> or the Bill of Attainder Clause.<sup>250</sup> The Eighth Amendment right to be free from cruel and unusual punishment, under which the Supreme Court has recognized

<sup>243</sup> See Legomsky, *supra* note 54, at 515-16; Pauw, *supra* note 241, at 309-10; cf. Motomura, *supra* note 239, at 1650 (arguing that Court’s “reluctance to give real content to procedural due process” in immigration context stems in part from characterizing deportation proceedings as civil).

<sup>244</sup> See *Fong Yue Ting*, 149 U.S. at 730.

<sup>245</sup> Compare *Woodby v. INS*, 385 U.S. 276, 277 (1966) (holding that government must prove deportability by “clear, unequivocal, and convincing evidence”), with *In re Winship*, 397 U.S. 358, 368 (1970) (holding that due process requires proof “beyond a reasonable doubt” to obtain criminal conviction).

<sup>246</sup> *Lopez-Mendoza*, 468 U.S. at 1051-52; see also *In re Cervantes-Torres*, 21 I. & N. Dec. 351, 353-54 (B.I.A. 1996); *In re Sandoval*, 17 I. & N. Dec. 70, 76 (B.I.A. 1979); Jonathan Hafetz, *The Rule of Egregiousness: INS v. Lopez-Mendoza Reconsidered*, 19 WHITTIER L. REV. 843, 851-56 (1998); Judy C. Wong, *Egregious Fourth Amendment Violations and the Use of the Exclusionary Rule in Deportation Hearings: The Need for Substantive Equal Protection Rights for Undocumented Immigrants*, 28 COLUM. HUM. RTS. L. REV. 431, 450-52 (1997).

<sup>247</sup> 8 U.S.C. § 1362 (2000); e.g., *Stroe v. INS*, 256 F.3d 498, 500 (7th Cir. 2001).

<sup>248</sup> See *Galvan v. Press*, 347 U.S. 522, 531-32 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-96 (1952); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913).

<sup>249</sup> See, e.g., *Seale v. INS*, 323 F.3d 150, 159-60 (1st Cir. 2003); *De La Teja v. United States*, 321 F.3d 1357, 1364-65 (11th Cir. 2003); *United States v. Yacoubian*, 24 F.3d 1, 10 (9th Cir. 1994).

<sup>250</sup> See, e.g., *Linnas v. INS*, 790 F.2d 1024, 1029-30 (2d Cir. 1986).

to require proportionality in criminal punishment, also has been held inapplicable to deportation.<sup>251</sup>

At the same time, however, the notion that deportation is not akin to criminal punishment but rather is merely a civil matter — “nothing more than a polite mechanism for sending home individuals who . . . are not fit to be members of our community”<sup>252</sup> — is now more widely understood to involve a legal fiction, particularly in its most extreme implications. Supreme Court Justices and other federal judges, beginning with the three dissenting Justices in *Fong Yue Ting* itself, have repeatedly acknowledged the severe stakes for noncitizens facing the prospect of deportation, at times criticizing directly the notion that deportation does not involve punishment.<sup>253</sup> Scholars and advocates have long argued that given its severe consequences for noncitizens, deportation more appropriately should be understood as a quasi-criminal form of punishment, for which at least some of the Constitution’s criminal procedural protections should apply, notwithstanding its formal designation as a “civil” matter.<sup>254</sup>

The quasi-criminal nature of deportation has only become more pronounced in recent years with the dramatic expansion of the criminal grounds of deportability and restriction of opportunities to

---

<sup>251</sup> Compare *Hernandez-Rivera v. INS*, 630 F.2d 1352, 1356 (9th Cir. 1980) (finding that deportation is not subject to Eighth Amendment prohibition against cruel and unusual punishment), and *Oliver v. INS*, 517 F.2d 426, 428 (2d Cir. 1975) (same), with *Ewing v. California*, 538 U.S. 11 (2003) (holding that Eighth Amendment prohibits criminal sentences for non-capital criminal offenses that are “grossly disproportionate” to crime).

<sup>252</sup> Pauw, *supra* note 241, at 306.

<sup>253</sup> *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1948) (Brewer, J., dissenting) (“Deportation is punishment. It involves first an arrest, a deprivation of liberty; and, second, a removal from home, from family, from business, from property.”); *id.* at 753-55 (Field, J., dissenting); *id.* at 763 (Fuller, C.J., dissenting); see also *Lehmann v. United States*, 357 U.S. 685, 691 (1957) (Black, J., concurring) (“To banish [noncitizens] from home, family, and adopted country is punishment of the most drastic kind . . . .”); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (“[D]eportation is a drastic measure and at times the equivalent of banishment of exile.” (citation omitted)); *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (“[A]lthough deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling.” (citations omitted)); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (stating that deportation may result in loss of “all that makes life worth living”); *Scheidemann v. INS*, 83 F.3d 1517, 1527 (3d Cir. 1996) (Sarokin, J., concurring) (“The legal fiction that deportation following a criminal conviction is not punishment is difficult to reconcile with reality . . . .”).

<sup>254</sup> See, e.g., Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1893-94 (2000); Pauw, *supra* note 241, at 337-44; Schuck, *supra* note 224, at 24-27.



obtain discretionary relief from deportation, as discussed above.<sup>255</sup> These expanded deportability grounds rest on a different theoretical basis and seek to advance different policy objectives than the grounds of deportability that long previously had prevailed. Traditionally, deportation largely served to correct defects in the admission process, permitting the government to remove noncitizens who either never were lawfully admitted at a port of entry or should not have been — in effect, as Stephen Legomsky notes, “provid[ing] a remedy akin to rescission.”<sup>256</sup> By contrast, the new deportation regime largely targets individuals who concededly were lawfully and appropriately admitted to the United States, but who have engaged in conduct that Congress has deemed to be harmful to the public welfare.<sup>257</sup>

Moreover, the steady increase in recent decades in the number of immigration-related criminal offenses enacted by Congress has further blurred the line between civil immigration matters and criminal matters. Since the mid-1980s, Congress has attached increasingly severe criminal consequences to a growing number of immigration offenses that previously would have exclusively resulted in civil immigration consequences, both by expanding the number of immigration-related crimes and increasing the available penalties for those offenses.<sup>258</sup> By one count, federal law now includes at least forty-seven separate provisions for immigration-related criminal offenses.<sup>259</sup> The same agencies responsible for investigating and enforcing civil violations of the immigration laws — U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection — now play a significant criminal law enforcement role as well, with responsibility to investigate and enforce immigration-related criminal offenses as well as other criminal offenses committed by noncitizens, most notably including drug offenses.<sup>260</sup> Criminal arrests have become a much larger percentage of all arrests taking place in workplace raids

---

<sup>255</sup> See *supra* Part I.A.

<sup>256</sup> LEGOMSKY, *supra* note 57, at 500; see also Legomsky, *supra* note 54, at 487.

<sup>257</sup> See LEGOMSKY, *supra* note 57, at 500.

<sup>258</sup> See Legomsky, *supra* note 54, at 476-82; Stumpf, *supra* note 55, at 384-86. Federal immigration law consists of both *civil* provisions, which authorize deportation, fines, and other civil penalties for immigration law violations, and *criminal* provisions, which traditionally have authorized criminal punishment for a subset of offenses deemed to be more serious. See Wishnie, *supra* note 38, at 1089-90.

<sup>259</sup> Kobach, *supra* note 3, at 219-21.

<sup>260</sup> See Stumpf, *supra* note 55, at 386-90 (discussing growing role of Immigration and Customs Enforcement and Customs and Border Protection as criminal law enforcement agencies, and noting that their “appearance and powers” are now “almost indistinguishable from those of a criminal law enforcement organization”).

by federal immigration agents, increasing from almost five percent of all workplace arrests in 2002 to approximately sixteen percent in 2006.<sup>261</sup> Federal prosecutors typically decline to prosecute very few of the immigration-related cases referred to them, and the number of immigration-related criminal arrests and prosecutions accordingly has increased dramatically in recent years.<sup>262</sup> From 1996 to 2000, the number of individuals prosecuted for immigration-related offenses increased from approximately 6600 to over 15,600, the vast majority of whom were charged with illegal entry or reentry into the United States.<sup>263</sup> Recent proposals in Congress would expand the catalogue of immigration-related crimes even further — for example, by making “unlawful presence” in the United States a criminal offense.<sup>264</sup>

These developments have increasingly blurred the line between criminal matters and civil immigration matters. To an increasing

---

<sup>261</sup> U.S. Immigration & Customs Enforcement, Fact Sheet: Worksite Enforcement, Oct. 15, 2007, <http://www.ice.gov/pi/news/factsheets/worksite.htm>. This trend has continued. During the first three quarters of 2007, criminal arrests constituted approximately 17% of all arrests taking place in ICE workplace raids. *Id.*

<sup>262</sup> For example, in 2000 federal prosecutors agreed to prosecute 97% of all immigration-related cases referred to them, compared to only 74% of all criminal referrals. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: IMMIGRATION OFFENDERS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 2000, at 3 (2002), available at <http://ojp.usdoj.gov/bjs/abstract/iofcjs00.htm>; see also Legomsky, *supra* note 54, at 479-80.

<sup>263</sup> U.S. DEP’T OF JUSTICE, *supra* note 262, at 1.

<sup>264</sup> See Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 203 (as passed by House of Representatives, Dec. 16, 2005) (proposing to create new federal crime of being “present in violation of the immigration laws or the regulations”). As written in H.R. 4437, the proposal effectively would have made all immigration law violations into criminal offenses. These violations include a number of minor infractions that currently constitute civil immigration offenses, such as failure to report a change of address to the government within 10 days under 8 U.S.C. § 1227(a)(3)(A) (2000), failure of international students on student visas to maintain a full course load under 8 U.S.C. § 1227(a)(1)(C) (2000), and failure of a H-1B non-immigrant worker to secure a new employment sponsor within a certain number of days after termination of employment by one’s previous sponsor under 8 U.S.C. § 1227(a)(1)(C) (2000). See AM. IMMIGRATION LAWYERS ASS’N, THE BORDER PROTECTION, ANTITERRORISM, AND ILLEGAL IMMIGRATION CONTROL ACT OF 2005 (H.R. 4437), AS AMENDED AND PASSED BY THE HOUSE ON 12/16/05 SECTION-BY-SECTION ANALYSIS 5-6, available at <http://www.aiala.org/content/default.aspx?docid=18258>. H.R. 4437 also would have made unlawful presence an “aggravated felony,” thereby attaching the severe immigration consequences associated with that category of offenses. H.R. 4437, § 201.

While tempering some of the more extreme provisions in H.R. 4437, subsequent legislative proposals for comprehensive immigration reform have incorporated a number of its other enforcement-related provisions, which would have the effect of blurring the civil-criminal line in immigration enforcement even further. See, e.g., Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. §§ 201-235 (2007).

extent, immigration enforcement has become a subset of the government's effort more generally to control crime, advancing punitive rather than regulatory goals.<sup>265</sup> Procedurally, the blurring of these lines renders increasingly difficult any effort to sharply delineate between immigration enforcement activities that are strictly "civil" or regulatory and those enforcement activities that seek to advance criminal law enforcement goals. As a result, some scholars and advocates have argued for the extension to the deportation context of a number of procedural protections that ordinarily are available in the criminal context, but which have not traditionally been available in the deportation because it is nominally civil and administrative.<sup>266</sup>

The increasing difficulty of sharply distinguishing between noncriminal and criminal enforcement activities in the immigration context echoes a similar, longstanding concern at the heart of many of the Supreme Court's administrative search and "special needs" cases. Critics have expressed concern at the Court's willingness to relax the Fourth Amendment's requirements for searches and seizures that are ostensibly conducted for noncriminal purposes in situations where criminal prosecutions are likely to result.<sup>267</sup> In recent years, the Court has not been entirely insensitive to this concern, declining to excuse searches and seizures that ostensibly advance noncriminal goals from the Fourth Amendment's ordinary requirements where it has concluded that their primary purpose was in fact to advance criminal law enforcement objectives.<sup>268</sup>

For example, in *City of Indianapolis v. Edmond*, the Court invalidated the establishment of a series of highway checkpoints at which motorists were stopped without individualized suspicion in an effort to interdict illegal drugs. Despite the moderate success of the program, the Court refused to apply its relaxed Fourth Amendment standard for noncriminal searches and seizures, determining that because the primary purpose of the checkpoint scheme was to detect

---

<sup>265</sup> See, e.g., Kanstroom, *supra* note 254, at 1892 (discussing "ascendancy of . . . crime control" as justification underlying deportation policies); Legomsky, *supra* note 54, at 487-89.

<sup>266</sup> See, e.g., Kanstroom, *supra* note 254, at 1894; Pauw, *supra* note 241, at 337-44. *But cf.* Legomsky, *supra* note 54, at 518-27 (advocating return to "civil regulatory model" of immigration regulation).

<sup>267</sup> See, e.g., 1 DRESSLER & MICHAELS, *supra* note 238, at 311 ("[T]he line between a traditional criminal investigation and a search or seizure designed primarily to serve non-criminal law enforcement goals, is thin and, quite arguably, arbitrary. Yet, it is also a line of considerable constitutional significance.").

<sup>268</sup> See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Chandler v. Miller*, 520 U.S. 305 (1997).

evidence of ordinary criminal wrongdoing, the police could not be excused from the Fourth Amendment's "usual requirement" that seizures be based on individualized suspicion.<sup>269</sup> While Indianapolis maintained that the program should be sustained based on its "lawful secondary purposes" of ensuring road safety, the Court rejected this argument, noting that to conclude otherwise would permit police "to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check."<sup>270</sup> Instead, after scrutinizing the purposes of the checkpoint program, the Court concluded that because the Indianapolis checkpoint program's primary purpose was "ultimately indistinguishable from the general interest in crime control," the lack of any individualized suspicion to support the automobile stops violated the Fourth Amendment.<sup>271</sup>

Especially with the blurring of the line between immigration and criminal law enforcement, immigration enforcement matters increasingly present similar dilemmas. Given the dramatic expansion in immigration-related criminal offenses, it is not always apparent whether individuals arrested for immigration law violations will only be charged as deportable or also will be prosecuted for allegedly violating an immigration-related criminal law. Moreover, in recent years, observers have expressed concerns about the use of civil immigration proceedings as a means of evading the more stringent procedural protections and requirements of the criminal justice system. This concern has been particularly salient in the aftermath of the terrorist attacks of September 11, 2001, as the federal government has increasingly sought to recast its day-to-day, civil immigration enforcement efforts as enforcement priorities implicating national security.<sup>272</sup> In a number of instances since 2001, the government has

---

<sup>269</sup> *Edmond*, 531 U.S. at 47 ("When law enforcement authorities pursue primarily general crime control purposes at checkpoints . . . stops can only be justified by some quantum of individualized suspicion."). The Court in *Edmond* explicitly sought to distinguish the use of suspicionless searches at the physical border, where "the need for such measures to ensure public safety can be particularly acute." *Id.* at 48.

<sup>270</sup> *Id.* at 46.

<sup>271</sup> *Id.* at 48.

<sup>272</sup> In this context, the federal government has sought to resituate many of its civil immigration enforcement activities within the longstanding, extensive set of federal-state-local partnerships designed to combat shared federal and state criminal law enforcement priorities such as violent crime, organized crime, drugs, and terrorism. See Kalhan, *supra* note 22 (manuscript at 13-14); see also HARRIS, *supra* note 202, at 3 (describing Department of Justice's post-2001 policing practices as designed to "transform[] state and local police agencies into an adjunct force in the federal effort to fight the war on terror"); Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 427 (2006).

relied upon civil immigration proceedings — including the availability of prolonged detention and less stringent time limits within which to charge individuals being held — to investigate cases in which its actual objectives were in fact simultaneously civil and criminal.<sup>273</sup> As with the checkpoints at issue in *Edmond*, the government’s use of the immigration enforcement process “primarily” involved “general crime control purposes.”<sup>274</sup> Under such circumstances, the government should have afforded the suspects in question the constitutional protections available in connection with criminal proceedings.<sup>275</sup> As the lines between civil and criminal immigration matters continue to blur, these concerns will only increase in importance, and the deference traditionally afforded to investigations into immigration and citizenship status at the physical border will only become more difficult to justify with the expansion of enforcement activities in the interior.

### C. *The Elusiveness of Fourth Amendment Limits on Interior Enforcement*

As William Stuntz has noted, the Supreme Court’s approach to elaborating Fourth Amendment doctrine has not tended to “defin[e] its goals with any precision,” but rather has “seemed to flow out of a few paradigmatic problems” and has “[left] courts to analogize new cases to the familiar paradigms.”<sup>276</sup> With respect to cases involving immigration and citizenship status, there is some risk of a similar dynamic developing in which courts extend the deferential Fourth Amendment standards that the Supreme Court has fashioned in the “paradigmatic” context of federal enforcement at the border to the rather different contexts arising from these interior enforcement initiatives, even when those initiatives involve nonfederal actors. As discussed above, this outcome is not necessarily dictated by the Court’s case law, since the Court’s cases have recognized that the deference afforded to federal officials for enforcement activities taking place at the border may not be justified for interior enforcement

---

<sup>273</sup> See MUZAFFER A. CHISHTI ET AL., *MIGRATION POLICY INST., AMERICA’S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11*, at 54-55 (2003); Harris, *supra* note 175, at 17-19.

<sup>274</sup> *Edmond*, 531 U.S. at 47.

<sup>275</sup> *Id.* Similar concerns about evading criminal procedural protections have arisen from the government’s use of the material witness statute. See CHISHTI ET AL., *supra* note 273, at 58-62; HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, *WITNESS TO ABUSE: HUMAN RIGHTS ABUSES UNDER THE MATERIAL WITNESS LAW SINCE SEPTEMBER 11* (2005), available at <http://hrw.org/reports/2005/us0605.pdf>.

<sup>276</sup> Stuntz, *supra* note 120, at 1060.

activities — even when those activities are in relative proximity to the actual border itself, much less when they are even further within the country's interior.<sup>277</sup>

Nevertheless, it seems unlikely that the Fourth Amendment will offer substantial protection of privacy interests in immigration and citizenship status in the face of the new interior enforcement initiatives. First, in many instances, courts will deem government officials entirely unconstrained by the Fourth Amendment because the encounters in which they seek to determine an individual's immigration or citizenship status will be deemed to involve no more than "mere questioning." In such instances, the Supreme Court has given federal immigration officials tremendous latitude to interrogate individuals as to their status, at times rather coercively, without regarding their encounters as searches or seizures under the Fourth Amendment at all. In *INS v. Delgado*, for example, the Court upheld the validity of workplace raids conducted by the Immigration and Naturalization Service ("INS").<sup>278</sup> Two raids were conducted pursuant to "area warrants," and one was conducted with consent of the employer, but all of the raids were conducted without individualized suspicion as to the unauthorized status of any particular worker.<sup>279</sup> Although the workers were systematically interrogated concerning their status, the Court concluded that neither the workplace as a whole nor the particular individuals questioned were seized by the INS agents during the course of the raid.<sup>280</sup> The INS had engaged in a significant and conspicuous show of force — conducting the raid with a large number of agents and stationing agents to block the workplace exits during the raid. Nevertheless, the Court concluded that the workers only had been subjected to a "brief encounter" with the INS agents that "could hardly result in a reasonable fear that [they] were not free to continue working or to move about the factory."<sup>281</sup> While *Delgado* involved federal immigration officials, the logic of the opinion would seem to apply with equal force to state and local law enforcement officials, since the Court's conclusion was that no Fourth Amendment event had taken place in the course of the workplace raid at all.

Even in situations in which individuals have been seized, the Court has been reluctant to regard inquiries into an individual's immigration or citizenship status as an independent Fourth Amendment event

---

<sup>277</sup> See *supra* Part III.A.-B.

<sup>278</sup> *INS v. Delgado*, 466 U.S. 210, 221 (1984).

<sup>279</sup> *Id.* at 212.

<sup>280</sup> *Id.* at 217-18.

<sup>281</sup> *Id.* at 220-21.

unless the questioning increases the level of intrusiveness, such as by prolonging the encounter. In *Muehler v. Mena*, the Supreme Court upheld a custodial interrogation concerning the immigration status of a § 1983 plaintiff who claimed that her Fourth Amendment rights were violated in the course of a raid of her home by several local police officers who were investigating a gang-related shooting.<sup>282</sup> During the raid, which was conducted pursuant to a valid search warrant, the police officers allegedly detained the plaintiff in handcuffs for two to three hours without explaining the reasons for her detention or even identifying themselves as police officers.<sup>283</sup> While she was detained, the police officers asked the plaintiff about her immigration status.<sup>284</sup> A federal immigration agent who accompanied the officers on the raid followed up with more specific questions about the plaintiff's status and the whereabouts of her immigration documentation.<sup>285</sup> When she replied that her documents were in her purse, one of the local police officers searched the purse without the plaintiff's consent and handed the plaintiff's immigration documentation to the federal immigration officer, who reviewed them.<sup>286</sup>

The Ninth Circuit concluded that the officers “unduly invaded [the plaintiff's] privacy by inquiring unnecessarily into her citizenship status” and, on that basis alone, that the plaintiff had sufficiently alleged a violation of her Fourth Amendment rights.<sup>287</sup> Noting the lack of any basis in the record to suspect that the plaintiff — a legal resident — might be unlawfully present in the United States, the court inferred that the officers questioned the plaintiff on the basis of the plaintiff's ethnicity.<sup>288</sup> While it acknowledged that federal immigration agents are authorized by statute to interrogate noncitizens believed to be unlawfully present in the United States, the Ninth Circuit nevertheless concluded that such agents required particularized reasonable suspicion that the individual is not a citizen before they may “interrogate that individual regarding his citizenship.”<sup>289</sup>

The Supreme Court, however, reversed. The Court concluded that the court of appeals had rested its conclusion upon a “faulty premise” by assuming that the officers' inquiries into the plaintiff's status

---

<sup>282</sup> 544 U.S. 93, 102 (2005).

<sup>283</sup> *Id.* at 95-96.

<sup>284</sup> *Id.* at 96.

<sup>285</sup> *Id.* The plaintiff was a lawful resident. *Id.*

<sup>286</sup> *Mena v. City of Simi Valley*, 332 F.3d 1255, 1262 (9th Cir. 2003).

<sup>287</sup> *Id.* at 1264.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975)).

“constituted a discrete Fourth Amendment event” requiring reasonable suspicion.<sup>290</sup> To the contrary, the Court held that “mere police questioning does not constitute a seizure,” and that because the questioning did not further prolong the plaintiff’s detention any further, there was no “additional seizure” under the Fourth Amendment.<sup>291</sup> The Court accordingly concluded that “the officers did not need reasonable suspicion to ask [her] for her name, date and place of birth, or immigration status.”<sup>292</sup> The Court criticized the Ninth Circuit’s reliance on *Brignoni-Ponce*, maintaining that while that case required particularized reasonable suspicion to *stop* automobiles in areas near the Mexican border, it “expressed no opinion as to the appropriateness of questioning when an individual was *already seized*,” as the plaintiff had been in *Mena*.<sup>293</sup>

As a result of these decisions, the Court has edged towards giving a green light to federal, state, and local law enforcement officials to interrogate individuals concerning their status in almost any context.<sup>294</sup> The Court appears prepared to permit these officials to obtain immigration and citizenship status free from many Fourth Amendment constraints — regardless of the scope of the officials’ enforcement authority, and even if the questioning extends beyond the suspicion that initially justified the seizure, as ordinarily would be required. Interrogation of the kind taking place in both *Delgado* and *Mena* certainly implicates privacy-related concerns, including the potential for excessive government coercion, selective or arbitrary enforcement, and manipulation of the individual being interrogated.<sup>295</sup>

---

<sup>290</sup> *Mena*, 544 U.S. at 100-01.

<sup>291</sup> *Id.* at 101.

<sup>292</sup> *Id.* (citing *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *INS v. Delgado*, 466 U.S. 210, 212 (1984)).

<sup>293</sup> *Id.* at 101 n.3 (emphasis added); *see also* *Mena v. City of Simi Valley*, 354 F.3d 1015, 1017 (9th Cir. 2004) (Kleinfeld, J., dissenting from denial of rehearing en banc) (“The gravamen of the interference with individual liberty in [*Brignoni-Ponce*] was the stop, not the questioning.”); *United States v. Torres-Monje*, 433 F. Supp. 2d 1028, 1034 (D.N.D. 2006) (holding that in light of *Mena*, state trooper did not violate Fourth Amendment by asking defendants, in course of traffic stop for speeding, “if they had green cards or resident alien cards” because it did not “unreasonably prolong[]” length of traffic stop).

<sup>294</sup> *See, e.g.*, Devon W. Carbado, (*E*)*racing the Fourth Amendment*, 100 MICH. L. REV. 946, 990-1004 (2002) (analyzing and criticizing *Delgado*); Kittrie, *supra* note 42, at 1462 (discussing implications of *Mena*).

<sup>295</sup> *See* Solove, *supra* note 20, at 499-505 (discussing privacy-related harms that can arise from interrogation); *see also* Maclin, *supra* note 163, at 37 (noting that “even lawful intrusions can be unreasonably exacerbated by police conduct that may not be either a search or seizure and does not prolong a legitimate police seizure,” such as



The Court's approach in both cases, however, fails to establish any meaningful restraint against those potential harms, part of a broader problem in which the privacy-related harms that may result in the context of interrogation tend to be left underprotected.<sup>296</sup>

#### IV. LEGISLATING PROTECTIONS FOR IMMIGRATION AND CITIZENSHIP STATUS PRIVACY

Even if courts ultimately conclude that the Fourth Amendment does not establish any meaningful protections for privacy interests in immigration and citizenship status or any significant limits on immigration enforcement activities away from the border, that need not mean that privacy interests in immigration and citizenship status must remain entirely unprotected. In the absence of judges elaborating constitutional protections for these privacy interests, legislatures and administrative entities already are stepping in to fill the vacuum. Indeed, this pattern is one that has recurred in a number of areas under the Fourth Amendment. As the Supreme Court has continued to weaken the protections available under the Fourth Amendment in the years since *Katz*, Congress has repeatedly acted to supplement these limited or nonexistent constitutional protections with statutory regimes designed to protect privacy interests when it has concluded that the Supreme Court has underprotected those interests under the Fourth Amendment or relegated them outside the Amendment's ambit altogether. As with these other areas encompassed by the Fourth Amendment, however, the legislative efforts to protect immigration and citizenship status privacy, which have come almost exclusively from state and local governments, represent only a partial potential solution.

The extent to which this has been an ongoing trend with Fourth Amendment privacy interests in the years since *Katz* is striking. As Daniel Solove has observed, this statutory "codification" of Fourth Amendment privacy values in the face of declining constitutional protections has led to a "dualist system of criminal procedure," governed not only by constitutional decisions coming from the

---

interrogation, "but is nonetheless unrelated or unnecessary to the accomplishment of the lawful intrusion").

<sup>296</sup> See Solove, *supra* note 20, at 505 ("Despite recognizing the harms and problems of interrogation . . . the law only addresses them in limited situations."); see also Russell Covey, *Interrogation Warrants*, 26 *CARDOZO L. REV.* 1867 (2005) (arguing that interrogations by law enforcement should be subject to Fourth Amendment requirements).

judiciary, but also by a growing body of statutes.<sup>297</sup> A number of examples illustrate this phenomenon.<sup>298</sup> For example, following the Supreme Court's decisions in *Katz* and *Berger v. New York*, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act to supplement and expand the protections available under the Fourth Amendment for wiretapping.<sup>299</sup> After the Court held, in *Smith v. Maryland*, that individuals have no protected expectation of privacy in telephone numbers obtained from the telephone company using a pen register, Congress enacted the Pen Register Act to regulate government surveillance using a pen register or trap-and-trace device.<sup>300</sup> In the wake of the Supreme Court's decision in *United States v. U.S. District Court*, Congress established an elaborate system under the Foreign Intelligence Surveillance Act to authorize and oversee foreign intelligence gathering activities within the United States.<sup>301</sup> During the mid-1980s, Congress enacted the Stored Communications Act to protect electronic communications stored by third parties, which would likely fall outside the scope of the Fourth Amendment under the Court's decisions governing individual privacy in information held by third parties.<sup>302</sup> Following the Court's decision in *United States v. Miller*, which held that bank records are unprotected by the Fourth Amendment since they are maintained and held by third parties,

---

<sup>297</sup> Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 *FORDHAM L. REV.* 747, 747 (2006); see also Orin S. Kerr, *Congress, the Courts, and New Technologies: A Response to Professor Solove*, 74 *FORDHAM L. REV.* 779, 779 (2005) ("[L]aw governing new and rapidly changing technologies has become predominantly statutory. Congress has created what is in effect a parallel Fourth Amendment to regulate many areas of privacy when technology is in flux.").

<sup>298</sup> See Solove, *supra* note 297, at 754-56.

<sup>299</sup> Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 211-25 (codified as amended at 18 U.S.C. §§ 2510-2520 (2000 & Supp. V 2005)); see *Katz v. United States*, 389 U.S. 347, 359 (1967); *Berger v. New York*, 388 U.S. 41, 62-64 (1967).

<sup>300</sup> 18 U.S.C. §§ 3121-3124 (2000 & Supp. V 2005); see *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979).

<sup>301</sup> Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1811 (2000)); *United States v. U.S. Dist. Court*, 407 U.S. 297, 320-21 (1972).

<sup>302</sup> Electronic Communications Privacy Act of 1986, tit. II, §§ 201-202, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended at 18 U.S.C. §§ 2701-2712 (2000 & Supp. V 2005)); see *United States v. Miller*, 425 U.S. 435 (1976) (holding that government may subpoena individual's financial records from his bank free from any Fourth Amendment constraints).

Congress enacted the Right to Financial Privacy Act to regulate government access to bank records.<sup>303</sup>

State and local governments also have stepped in to protect Fourth Amendment interests when they have deemed the Supreme Court's protection inadequate. For example, when the Supreme Court has interpreted the Fourth Amendment narrowly, as it has in cases concerning information disclosed to third parties,<sup>304</sup> a significant number of state courts have declined to adopt the same interpretations for analogous provisions under their state constitutions.<sup>305</sup> State legislatures have been active as well. For example, after the Supreme Court held that concededly pretextual traffic stops on the basis of race remain valid under the Fourth Amendment so long as the officers have probable cause to believe a traffic violation has taken place, a number of states and localities have acted to require police departments to formulate policies prohibiting racial profiling.<sup>306</sup>

Even though courts have yet to consider the privacy issues arising from recent interior immigration enforcement initiatives to any meaningful degree, a loosely comparable process to enact legislative protections of privacy interests in immigration and citizenship status already has been taking place, largely at the state and local levels.<sup>307</sup> This process actually first began over twenty years ago, when at least twenty-four local governments and one state adopted policies, either by ordinance or executive order, prohibiting their officials from reporting immigration status information to or cooperating with

---

<sup>303</sup> Financial Institutions Regulatory and Interest Rate Control Act of 1978, tit. XI, §§ 1100-1122, Pub. L. 95-630, 92 Stat. 3641, 3697-3710 (codified as amended at 12 U.S.C. §§ 3401-3422 (2000)); see *Miller*, 425 U.S. at 443; Solove, *supra* note 297, at 758.

<sup>304</sup> See *supra* Part II.A.

<sup>305</sup> See Stephen E. Henderson, *Learning from All Fifty States: How to Apply the Fourth Amendment and Its State Analogues to Protect Third Party Information from Unreasonable Search*, 55 CATH. U. L. REV. 373 (2006).

<sup>306</sup> *Whren v. United States*, 517 U.S. 806, 818-19 (1996); see, e.g., Johnson, *supra* note 215, at 901, 918 & n.138 (discussing *Whren* and state legislation concerning racial profiling).

<sup>307</sup> On occasion, however, federal agencies have also implemented policies designed to protect privacy interests in immigration status. For example, both the EEOC and the NLRB have taken the position that when investigating and enforcing their respective statutory mandates under Title VII and the National Labor Relations Act, they will not inquire into workers' immigration status. See Ho & Chang, *supra* note 190, at 529 & nn.236-37.

federal immigration authorities.<sup>308</sup> Today, a number of jurisdictions continue to have such policies, especially at the local level.<sup>309</sup>

Like the burgeoning interior enforcement initiatives, these privacy protection initiatives have taken a variety of different forms.<sup>310</sup> Some jurisdictions have adopted so-called “don’t ask” policies, which attempt to define guidelines for and limits on the circumstances in which officials may collect immigration and citizenship status information.<sup>311</sup> These limits can vary significantly. For example, New York City’s executive order does not permit law enforcement officers to inquire about immigration status “unless investigating illegal activity other than mere status as an undocumented alien.”<sup>312</sup> Other jurisdictions place similarly broad limits upon inquiries into status.<sup>313</sup> By contrast, the recent New Jersey directive requires inquiries concerning immigration status of all individuals who have been arrested for certain offenses — regardless of whether there is any basis to believe they are unlawfully present — but does not permit any officer to “inquire about or investigate the immigration status of any victim, witness, potential witness, or person requesting or receiving police assistance.”<sup>314</sup> The New Jersey directive also instructs officers

---

<sup>308</sup> See Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation With the INS*, 7 LA RAZA L.J. 50, 50-53 & nn.4, 10-11 (2004); Craig B. Mousin, *A Clear View From the Prairie: Harold Washington and the People of Illinois Respond to Federal Encroachment of Human Rights*, 29 S. ILL. U. L.J. 285, 293-96 (2005); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1382-85 (2006); Linda Reyna Yanez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 HISP. L.J. 9, 33-34 (1994).

<sup>309</sup> See Kittrie, *supra* note 42, at 1466-75; Pham, *supra* note 308, at 1387-91.

<sup>310</sup> See Kittrie, *supra* note 42, at 1474-75 (summarizing and categorizing different approaches).

<sup>311</sup> See *id.* at 1474 & n.161 (citing policies enacted by Denver, Minneapolis, Seattle, and Washington, D.C.).

<sup>312</sup> N.Y. City Exec. Order No. 41, *supra* note 96, § 4(a).

<sup>313</sup> See Kittrie, *supra* note 42, at 1474 & n.161.

<sup>314</sup> N.J. Law Enforcement Directive, *supra* note 93, at 4. The workability of these limits is highly uncertain, since in many cases officials may not be able to immediately determine in a straightforward way whether individuals whom they have encountered are in fact “victims” or potential witnesses. See Jacobs, *supra* note 94. The New Jersey directive itself contains no definition of who constitutes a “victim,” a category of individuals that can be difficult to define. See generally Jessie K. Liu, *Victimhood*, 71 MO. L. REV. 115 (2006). The variety of definitions under laws to protect victims’ rights in the criminal justice system illustrates the difficulty. See, e.g., N.J. CONST. art. I, ¶ 22 (defining victim to include (1) someone “who has suffered physical or psychological injury or has incurred loss of or damage to personal or real property as a result of a crime or an incident involving another person operating a motor vehicle

not to implement the order in a manner that would involve prohibited racial profiling.<sup>315</sup>

Other policies are so-called “don’t tell” policies, which do not restrict officials from inquiring about status, but restrict the circumstances under which that information may be disseminated to others, including federal immigration officials.<sup>316</sup> Still others are “don’t ask and don’t tell” policies, which incorporate elements of both.<sup>317</sup> At times, state administrative agencies have adopted similar policies.<sup>318</sup>

In other Fourth Amendment contexts, scholars have tangled over whether federal legislative solutions to regulate government investigations are preferable to judicial oversight through the development of constitutional rules.<sup>319</sup> Some of those discussions may

---

while under the influence of drugs or alcohol” and (2) “the spouse, parent, legal guardian, grandparent, child or sibling of the decedent in the case of a criminal homicide”); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex, U.N. Doc. A/Res/40/34/Annex (Nov. 29, 1985) (defining “victims of crime” to include individuals “who, individually or collectively, have suffered harm including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights” as result of domestic criminal law violations, including “where appropriate, the immediate family or dependents of the direct victim”). Even assuming that officers are instructed to apply an established definition of the term “victim” rather than being left to exercise discretion to determine who constitutes a victim, it may not be clear at the time of arrest whether the individual whose immigration status information is being sought is, in fact, a “victim” whose privacy interests in their status should be protected.

<sup>315</sup> N.J. Law Enforcement Directive, *supra* note 93, at 6.

<sup>316</sup> See Kittrie, *supra* note 42, at 1474 & n.162 (citing policy enacted by Philadelphia).

<sup>317</sup> See *id.* at 1474 & n.163 (citing policies enacted by Los Angeles, New York, and San Francisco).

<sup>318</sup> See, e.g., JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANTS RIGHTS 237 (2005) (noting policy of New York State Department of Labor to maintain confidentiality when investigating unpaid wages claims, rather than sharing information with federal immigration officials).

<sup>319</sup> Scholars have differed, for example, over the desirability of judicial versus legislative solutions when technology is in flux. Compare Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 805 (2004) (arguing that statutory rules governing criminal investigation are preferable to judicially crafted constitutional rules when technology is in flux), with Sherry F. Colb, *A World Without Privacy: Why Property Does Not Define the Limits of the Right Against Unreasonable Searches and Seizures*, 102 MICH. L. REV. 889, 900-03 (2004) (arguing for strong judicial role in protecting Fourth Amendment privacy interests affected by new technologies), and Solove, *supra* note 297, at 766 (“[I]n areas where the courts have backed off and left a void that Congress attempted to fill, the statutes have not, in large part, measured up.”). See also JEFFREY ROSEN, *THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE* 210-11 (2004).

inform similar debates over the most appropriate means of protecting privacy interests in immigration status as well. However, given both the federalism dynamic and the broad power of Congress to regulate immigration, the various state and local regimes to protect privacy interests in immigration and citizenship status present somewhat different considerations. Those jurisdictions that do seek to establish privacy protections for immigration and citizenship status may find it difficult to maintain those regimes if the federal government seeks to preempt them.

New York City, for example, first promulgated its rules regulating immigration status privacy in the late 1980s. Under Executive Order No. 124, which was first issued in 1989 by Mayor Edward Koch, all city employees were prohibited from disseminating information regarding any noncitizen to federal immigration authorities unless: (1) the law required them to do so, (2) the noncitizen authorized them in writing to do so, or (3) the noncitizen was suspected of engaging in criminal activity.<sup>320</sup> In New York, the consensus in support of this legal regime was sufficiently strong that the executive order was reissued by Koch's successors, David Dinkins and Rudolph Giuliani.<sup>321</sup>

In 1996, Congress sought to prevent state and local jurisdictions from enforcing immigration status privacy protection regimes, enacting provisions in two statutes that effectively prohibited state and local governments from restricting their agencies and officials from: (1) exchanging immigration or citizenship status information with the INS, (2) maintaining such information, or (3) exchanging such information with any other federal, state, or local government entity.<sup>322</sup> While New York City challenged the constitutionality of these provisions, arguing that they violated the Tenth Amendment and Republican Guarantee Clause by interfering with the manner in which

---

<sup>320</sup> N.Y. City, N.Y., Exec. Order No. 124 (1989), *available at* [http://www.nycourts.gov/library/queens/PDF\\_files/Orders/ord124.pdf](http://www.nycourts.gov/library/queens/PDF_files/Orders/ord124.pdf); *see also* *City of New York v. United States*, 179 F.3d 29, 31 & n.1 (2d Cir. 1999) (discussing Executive Order No. 124).

<sup>321</sup> *City of New York*, 179 F.3d at 32; *see also* Rudolph W. Giuliani, Mayor of New York, N.Y., Address to Conference on the New Immigrants (Sept. 30, 1996), *available at* <http://www.nyc.gov/html/rwg/html/96/immig.html> (discussing Executive Order No. 124 and arguing that undocumented immigrants should be protected "from being reported to the I.N.S. while they are using city services that are critical for their health and safety, and for the health and safety of the entire City").

<sup>322</sup> *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 434, Pub. L. No. 104-193, 110 Stat. 2105, 2275 (codified as amended at 8 U.S.C. § 1644 (2000)); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 642, Pub. L. No. 104-208, 110 Stat. 3009-546, (codified at 8 U.S.C. § 1373 (2000)); *City of New York*, 179 F.3d at 31-32.

state and local governments exercised control over the official duties of their employees, the U.S. Court of Appeals for the Second Circuit rejected this challenge.<sup>323</sup> The Second Circuit held that the provisions did not affirmatively compel state and local entities or their officials to administer any federal mandates, but merely prohibited officials from inhibiting the “voluntary exchange” of immigration status information with federal officials.<sup>324</sup>

However, the Second Circuit did acknowledge the substantiality of New York City’s concerns, noting that it was “undeniable” that the federal provisions interfered with the city’s control and use of “confidential information obtained in the course of municipal business.”<sup>325</sup> The court expressed concern that “if some expectation of confidentiality is not preserved” in immigration and citizenship status information, it might become “difficult or impossible” for the city to “obtain[] . . . pertinent information, which is essential to the performance of a wide variety of state and local government functions.”<sup>326</sup> Accordingly, the court left open the possibility that a constitutional challenge might succeed if the city sought to defend more “generalized confidentiality policies that are necessary to the performance of legitimate municipal functions,” but do not “single[] out a particular federal policy for non-cooperation.”<sup>327</sup> In 2001, New York City voters responded by adopting an amendment to the city’s charter embodying the structural privacy principles that the court had tentatively articulated:

The city has the power to determine the duties of its employees, and it is essential to the workings of city government that the city retain control over information obtained by city employees in the course of their duties. In the exercise of this power, the mayor may promulgate rules requiring that information obtained by city employees be kept confidential to the extent necessary to preserve the trust of individuals who have business with city agencies. To the extent set forth in such rules, each agency shall, to the fullest extent permitted by the laws of the United States and the state of New York, maintain the confidentiality of information in its possession relating to the immigration status or other private

---

<sup>323</sup> *City of New York*, 179 F.3d at 34-35.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 36.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 37.

information that was provided by an individual to a city employee in the course of such employee's duties.<sup>328</sup>

Pursuant to this authority, in 2003 Mayor Michael Bloomberg adopted a more general confidentiality policy than the one invalidated by the Second Circuit, a policy that protects privacy interests in not only immigration status information, but also information about sexual orientation, status as a victim of domestic violence or sexual assault, status as a crime witness, and status as a recipient of public assistance.<sup>329</sup> By reformulating its policies more generally as privacy policies necessary to ensure that the city can perform essential municipal functions, New York City has attempted to satisfy the parameters tentatively suggested by the Second Circuit, suggesting that protection of structural privacy interests in status information might yet survive federal government efforts to preempt them.

#### CONCLUSION

As critics of the new interior enforcement initiatives have argued, the expansion of interior enforcement has consequences not only for those who may be unlawfully present in the United States, but for citizens and lawfully present noncitizens as well. Those consequences certainly may involve the individual harms that both unauthorized and lawfully present individuals will experience as a result of the greater visibility of their own status and increased demands to disclose that status. However, more fundamentally, the expansion of interior enforcement threatens a broader set of social or structural privacy harms resulting from the authorization and encouragement of hundreds of thousands of public and private actors to demand status information from private individuals in a range of contexts in which that information previously has been irrelevant. When noncitizens and citizens in immigrant communities are dissuaded from communicating and cooperating with the police as crime victims or witnesses, or when imbalances of power between powerful institutions and private individuals leave those institutions and their officials with too much discretion and too little accountability, the costs of these initiatives will be experienced by many people other than those individuals who may be unlawfully present.

---

<sup>328</sup> N.Y. CITY, N.Y., CHARTER § 8(g) (2004).

<sup>329</sup> N.Y. City Exec. Order No. 41, *supra* note 96; see Kittrie, *supra* note 42, at 1473-74.



Privacy offers a useful descriptive and normative framework for understanding the new interior enforcement initiatives and the individual and social harms that may result from their expansion. A robust, context-sensitive approach to privacy would recognize the need for greater protection of status-related privacy interests in the interior of the United States than at the border and greater protection from nonfederal actors involved in a range of different activities than from federal officials who are charged with enforcement of the immigration laws. In the absence of strong Fourth Amendment protections, some states and localities have acted to protect these privacy interests by directing their officials to be blind to status to varying degrees when interacting with members of the public. These policies recognize that privacy interests in immigration and citizenship status do not simply implicate a set of individual interests against discrete intrusions, but also a set of social or structural interests shared by the community as whole.

However, federal officials continue to resist efforts by state and local governments to find ways to protect the privacy of their residents' status.<sup>330</sup> Given the strength of the tools that the federal government has at its disposal to exert leverage over state and local governments, not least of which being the spending power, the federal government might not find it terribly difficult to overcome these privacy protection policies if it mustered sufficient will to do so. As the U.S. experience in any number of policy areas since the New Deal makes clear, Washington often has been successful in its efforts, relying upon various degrees of coercion and cooperation, to enlist state and local institutions in the implementation of federal policy objectives when political will and leverage at the federal level has been sufficiently strong.<sup>331</sup>

Most of the initiatives to protect privacy interests in immigration and citizenship status have come from states and localities seeking to resist federal interior enforcement initiatives that they deem

---

<sup>330</sup> Recently, for example, the Department of Homeland Security ("DHS") actively resisted an initiative proposed by the State of New York to extend eligibility for driver's licenses to all state residents without regard to immigration and citizenship status — a proposal that was revised in the face of that federal pressure and ultimately dropped. See Danny Hakim, *Spitzer Dropping His License Plan*, N.Y. TIMES, Nov. 14, 2007, at A1; Danny Hakim, *Chertoff Push Over Licenses Led to a Shift*, N.Y. TIMES, Oct. 31, 2007, at A1. DHS also recently sued the State of Illinois for attempting to restrict employers from participating in a new federal pilot program to verify prospective employees' immigration status and eligibility to work until DHS improves the accuracy of its databases and the timeliness of status verification. See Frank James, *Illinois Sued By U.S. Over Worker Law*, CHI. TRIB., Sept. 25, 2007, at 3.

<sup>331</sup> Kalhan, *supra* note 22 (manuscript at 35).

inconsistent with the obligations they owe to all of their residents. Certainly, many other states and localities will not choose to adopt such privacy protections for their residents or to do so immediately. Indeed, as discussed above, a number of states and localities have to the contrary been eager to cooperate with federal enforcement initiatives. Given the patchwork of approaches that may result, and the ongoing possibility that the federal government might seek to preempt local initiatives, the significance of these state and local policies to protect privacy in status information will not simply be found in the substance of those policies themselves. Rather, these initiatives ultimately may be just as important, if not more important, as contributions to an ongoing public conversation in which state and local communities effectively “dissent” from the national status quo on immigration policy by exercising the decision-making authority available to them.<sup>332</sup>

Considered together, as a whole, the various policies to expand interior immigration enforcement seek to fundamentally change the significance of immigration and citizenship status in day-to-day life, transforming status from something largely invisible and irrelevant into something visible and salient in a variety of legal and social domains. This transformation, however, carries significant and underappreciated costs. As the new interior enforcement initiatives proliferate, and the costs of this rapidly accelerating trend become more clear, it is important to more directly consider and appreciate the social value of preserving zones in society where immigration and citizenship status remain invisible and irrelevant, and private.

---

<sup>332</sup> See generally Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005) (exploring possibilities, under circumstances in which decision-making power is disaggregated, for actors such as subfederal institutions to “dissent” through exercise of their decisionmaking authority).