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Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment

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POLICING THE IMMIGRATION POLICE: ICE PROSECUTORIAL DISCRETION AND THE FOURTH AMENDMENT

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INTRODUCTION

A persistent puzzle in immigration law is how the removal adjudication system should respond to the increasing prevalence of violations of noncitizens' constitutional rights by arresting officers. Scholarship in this area has focused on judicial suppression of unconstitutionally obtained evidence, typically by arguing that the Supreme Court should overrule its 1984 decision in *INS v. Lopez-Mendoza* not to enforce the exclusionary rule in civil immigration court. This Essay, in contrast, considers the role of Immigration and Customs Enforcement (ICE) attorneys in upholding the Fourth Amendment, taking as a launching point the recent exercise of prosecutorial discretion by ICE attorneys in Charlotte, North Carolina, in cases arising from systemic unlawful policing.

Part I briefly describes how ICE lawyers (also called "Trial Attorneys" or "ICE prosecutors") in the Charlotte Immigration Court have closed deportation cases against noncitizens arrested through unlawful policing by local officers in North Carolina, following a Department of Justice (DOJ) report on the discriminatory targeting of Latinos in Alamance County, North Carolina. The Essay then explores two potential bases for an ICE prosecutor's decision to take remedial action when arresting officers violate the constitution. First, Part II examines ICE prosecutors' constitutional responsibilities as executive branch attorneys in light of

∗ Assistant Professor of Law, University of Georgia. For helpful comments, I thank Jennifer Chacón, Dan Coenen, Clare Norins, and Juliet Stumpf, as well as participants at the Emerging Immigration Law Teachers Conference at UC Irvine Law School and the UGA Law School Junior Faculty Retreat. Thanks also to the *Columbia Law Review*, especially Lissette Duran, for superb editorial assistance. Finally, I wish to acknowledge the research support of Dean Rebecca White and UGA Law School, for which I am grateful.

the Supreme Court's decision to underenforce the Fourth Amendment in the context of immigration arrests. Part III then considers whether ICE's remedial actions in North Carolina comport with internal agency guidelines for exercising prosecutorial discretion in deportation cases.

I. CHARLOTTE ICE ATTORNEYS' REMEDIAL ACTIONS FOLLOWING UNLAWFUL POLICING BY LOCAL OFFICERS

On September 18, 2012, the DOJ announced that its two-year investigation of law enforcement practices in Alamance County, North Carolina, had uncovered pervasive discriminatory policing against Latinos by Sheriff Terry S. Johnson and his deputies.[1] The report concluded that Sheriff Johnson fostered a culture of police bias against Latinos, directing police to "go out there and get me some of those taco eaters" or to "bring me some Mexicans."[2] Among other findings, deputies were between four and ten times more likely to stop Latino drivers on major county roadways, to target Latino communities with vehicle checkpoints, and to arrest Latinos for minor traffic violations while issuing citations or warnings to non-Latinos for comparable violations.[3] The DOJ also found discrimination in the county's booking and detention practices related to immigration status checks.[4]

The Alamance County Sheriff's Office is not the only law enforcement agency to have engaged in unlawful police practices against immigrants. Recent reports suggest correlations between an increased local role in immigration enforcement and routine Fourth and Fifth Amendment violations.[5] The DOJ has found systemic police abuses

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1. Press Release, U.S. Dep't of Justice, Justice Department Releases Investigative Findings on the Alamance County, N.C., Sheriff's Office (Sept. 18, 2012) [hereinafter U.S. Dep't of Justice, Findings], http://www.justice.gov/opa/pr/2012/September/12-crt-1125.html (on file with the *Columbia Law Review*).

2. Anne Blythe, U.S. Justice Department Sues Alamance County Sheriff, Accusing Him of Discriminating Against Latinos, News & Observer (Dec. 20, 2012), http://www.newsobserver.com/2012/12/20/2557060/us-justice-department-sues-alamance.html (on file with the *Columbia Law Review*).

3. U.S. Dep't of Justice, Findings, supra note 1.

4. Id.

5. See, e.g., Trevor Gardner II & Aarti Kohli, Chief Justice Earl Warren Inst. on Race, Ethnicity & Diversity, The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program 1 (2009), available at http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf (on file with the *Columbia Law Review*) (describing correlation between implementation of cooperative immigration jail enforcement program in Irving, Texas, and dramatic rise in discretionary arrests of Latinos for minor traffic offenses and other petty offenses). See generally Jennifer M. Chacón, A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights, 59 Duke L.J. 1563, 1615–20 (2010) [hereinafter Chacón, A Diversion of Attention] (summarizing critics' claims that state and local participation in immigration enforcement is leading to

similar to those in Alamance County in locations such as Maricopa County, Arizona,[6] and New Haven, Connecticut.[7] Federal officers, too, regularly ignore the Fourth Amendment and other constitutional protections when making immigration arrests.[8]

Policing practices that violate noncitizens' constitutional rights are thus a persistent and growing feature of immigration enforcement. In part, this is a predictable consequence of the nature and scale of the contemporary enforcement system, which boasts the second-largest investigative force in the federal government and substantial integration with state and local law enforcement agencies throughout the country.[9] Through a combination of cooperative relationships, data-sharing technology, and well-resourced jail screening programs, immigration enforcement typically begins with low-level contact with local law enforcement and proceeds along a virtually seamless line to federal deportation proceedings.[10] Additionally, in recent years a number of

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"unprofessional and even illegal policing tactics"); Developments in the Law—Immigrant Rights & Immigration Enforcement, 126 Harv. L. Rev. 1565, 1646 (2013) [hereinafter Immigrant Rights & Immigration Enforcement] (discussing how recent developments in immigration enforcement "increase the temptation" for state and local officials to violate Fourth Amendment).

6. Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, to Bill Montgomery, Maricopa Cnty. Att'y (Dec. 15, 2011), available at http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf (on file with the *Columbia Law Review*) (detailing DOJ's findings, including that Sheriff Joseph Arpaio's deputies were four to nine times more likely to stop Latinos in their vehicles, frequently detain and search Latinos in their cars, homes, and workplaces without legal justification, mistreat arrestees with limited English proficiency, and fail to provide police protection to Latino residents); Press Release, U.S. Dep't of Justice, Department of Justice Files Lawsuit in Arizona Against Maricopa County, Maricopa County Sheriff's Office, and Sheriff Joseph Arpaio (May 10, 2012), http://www.justice.gov/opa/pr/2012/May/12-crt-602.html (on file with the *Columbia Law Review*).

7. Peter Applebome, Police Gang Tyrannized Latinos, Indictment Says, N.Y. Times (Jan. 24, 2012), http://www.nytimes.com/2012/01/25/nyregion/connecticut-police-officers-accused-of-mistreating-latinos.html (on file with the *Columbia Law Review*) (discussing arrest of four police officers in East Haven following DOJ investigation of mistreatment of immigrants, particularly Latino residents).

8. See, e.g., Bess Chiu et al., Cardozo Immigration Justice Clinic, Constitution on ICE: A Report on Immigration Home Raid Operations 1 (2009), available at http://cw.routledge.com/textbooks/9780415996945/human-rights/cardozo.pdf (on file with the *Columbia Law Review*) (describing unconstitutional ICE search and seizure activities).

9. See David Gray et al., The Supreme Court's Contemporary Silver Platter Doctrine, 91 Tex. L. Rev. 7, 27–31 (2012).

10. See, e.g., Marc R. Rosenblum & William A. Kandel, Cong. Research Serv., R42057, Interior Immigration Enforcement: Programs Targeting Criminal Aliens 13–19 (2012), available at http://www.fas.org/sgp/crs/homesec/R42057.pdf (on file with the *Columbia Law Review*) (discussing ICE enforcement programs that target noncitizens who encounter state and local criminal justice systems); Adam B. Cox & Thomas J. Miles, Policing Immigration, 80 U. Chi. L. Rev. 87, 93 (2013) (discussing expansive reach of

states have passed legislation authorizing or requiring local authorities to enforce federal immigration law[11]—for example, by verifying the immigration status of every person who is stopped, detained, or arrested.[12] As a result of these developments, state and local officers now act as the immigration system's "force multipliers,"[13] arresting four times more immigrants referred for removal hearings than federal officers.[14]

Significantly, both federal and local officers enforcing immigration law have a diminished incentive to comply with the Fourth Amendment due to the Supreme Court's 1984 decision in *INS v. Lopez-Mendoza*[15] not to judicially impose the exclusionary rule in civil immigration proceedings.[16] Since many of these immigration or low-level criminal arrests never result in criminal prosecutions, where the exclusionary rule does apply (subject to exceptions),[17] rights violations go largely unchecked and undeterred.[18]

Secure Communities biometric information sharing program); Immigrant Rights & Immigration Enforcement, supra note 5, at 1645–49 (explaining increasing role of local and state officials in immigration enforcement).

11. See, e.g., Ala. Code § 31-13-6 (Supp. 2012); Ariz. Rev. Stat. Ann. § 11-1051 (2012); Ga. Code Ann. § 17-5-100(b) (2013); Utah Code Ann. § 76-9-100 to -109 (LexisNexis Supp. 2013).

12. See, e.g., Ariz. Rev. Stat. Ann. § 11-1051(B); Ga. Code Ann. § 17-5-100; Ind. Code Ann. § 5-2-18.2-4 (LexisNexis 2013); S.C. Code Ann. § 17-13-170 (Supp. 2012); Utah Code Ann. § 76-9-1003.

13. Kris W. Kobach, The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests, 69 Alb. L. Rev. 179 (2005).

14. Compare Kate M. Manuel, Cong. Research Serv., R42690, Immigration Detainers: Legal Issues 8 (2012), available at http://www.fas.org/sgp/crs/homesec/R42690.pdf (on file with the *Columbia Law Review*) (reporting ICE issued 201,778 detainers against persons held in local jails following arrests by local law enforcement in first eleven months of fiscal year 2010), with John Simanski & Lesley M. Sapp, Office of Immigration Statistics, Dep't of Homeland Sec., Immigration Enforcement Actions: 2011, at 3 & tbl.1 (2012), available at http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf (on file with the *Columbia Law Review*) (reporting ICE made total of 53,610 immigration arrests in fiscal year 2010).

15. 468 U.S. 1032, 1050 (1984).

16. See, e.g., Gray et al., supra note 9, at 27–31 (discussing effect of *Lopez-Mendoza* on officers' incentives in making immigration arrests).

17. See generally Ronald J. Allen et al., Comprehensive Criminal Procedure 658–709 (3d ed. 2011) (discussing scope of exclusionary rule).

18. Civil rights lawsuits are occasionally filed, of course, and some have been successful, but these are cumbersome and expensive, and it is doubtful they deter much beyond the most egregious and systematic police misconduct. See Peter Margulies, Noncitizens' Remedies Lost?: Accountability for Overreaching in Immigration Enforcement, 6 Fla. Int'l U. L. Rev. 319, 321–22 (2011) (discussing legislatively and judicially imposed constraints on availability of damage suits in immigration context); Edward Rubin, The Myth of Non-Bureaucratic Accountability and the Anti-Administrative

Following the DOJ's findings in Alamance County, the Department of Homeland Security (DHS) terminated the federal agreement in effect with the county that had authorized local enforcement of federal immigration laws,[19] a measure that DHS has sometimes taken in other jurisdictions.[20] More surprising, however, were the actions of the Trial Attorneys who represent the government in the Charlotte Immigration Court. Many of the noncitizens arrested by Sheriff Johnson's officers through unlawful policing practices were already in the federal immigration system facing deportation for civil immigration violations. After the issuance of the DOJ's September report, ICE began to systematically close deportation proceedings in cases arising in Alamance County.[21] According to immigration attorney Marty Rosenbluth, who represented over a dozen of the affected noncitizens, the Charlotte Trial Attorneys exercised favorable discretion in cases that it normally would have prosecuted if not for Sheriff Johnson's discriminatory policing.[22] ICE reportedly declined to proceed against noncitizens apprehended in

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Impulse, *in* Public Accountability: Designs, Dilemmas and Experiences 52, 75 (Michael W. Dowdle ed., 2006) (explaining why civil actions seeking judicial enforcement of rights may have little deterrence value).

19. Billy Ball, DOJ Ends Federal Immigration Program in Alamance County, Indy Week (Sept. 26, 2012), http://www.indyweek.com/indyweek/doj-ends-federal-immigration-program-in-alamance-county/Content?oid=3157331 (on file with the *Columbia Law Review*).

20. See, e.g., Press Release, U.S. Dep't of Homeland Sec., Statement by Secretary Napolitano on DOJ's Findings of Discriminatory Policing in Maricopa County (Dec. 15, 2011), http://www.dhs.gov/news/2011/12/15/secretary-napolitano-dojs-findings-discriminatory-policing-maricopa-county (on file with the *Columbia Law Review*) (terminating Maricopa County Sheriff's Office's 287(g) jail model agreement and restricting its access to Secure Communities Program following DOJ's finding of discriminatory policing).

21. Billy Ball, Deportations Dropped in Alamance County, But How Many?, Indy Week (Nov. 21, 2012) [hereinafter Ball, Deportations Dropped], http://www.indyweek.com/indyweek/deportations-dropped-in-alamance-county-but-how-many/Content?oid=3197209 (on file with the *Columbia Law Review*). In a telephone interview, Marty Rosenbluth stated that with a substantial amount of advocacy he had been able to get ICE to close around six Alamance County deportation cases before the DOJ issued its report in September, but that following the report these closures became virtually automatic. Telephone Interview with Marty Rosenbluth, Exec. Dir. & Att'y, N.C. Immigrant Rights Project (Sept. 10, 2013) [hereinafter Telephone Interview with Marty Rosenbluth] (on file with the *Columbia Law Review*).

22. Billy Ball, Marty Rosenbluth: Fighting for the Rights of Undocumented Immigrants, Indy Week (Jan. 30, 2013), http://www.indyweek.com/indyweek/marty-rosenbluth-fighting-for-the-rights-of-undocumented-immigrants/Content?oid=3255480 (on file with the *Columbia Law Review*); Telephone Interview with Marty Rosenbluth, supra note 21. In October, one month after the DOJ's findings were made public, an ICE spokesperson confirmed that cases initiated by Alamance County deputies were being dropped; however, the agency apparently has not tracked the total number of such decisions. Ball, Deportations Dropped, supra note 21.

Alamance County even where they were unrepresented by counsel,[23] and reopened at least one matter where the respondent had already been ordered deported in order to exercise favorable discretion.[24] In a telephone interview, Rosenbluth stated that later in 2012 the ICE prosecutors in Charlotte similarly exercised bulk discretion in a number of deportation cases arising from an illegal police traffic checkpoint in Jackson County, North Carolina (though, as with the Alamance County cases, a significant amount of advocacy by immigrant representatives was required).[25]

Charlotte ICE is the only regional office known to this author to have systematically exercised discretion to remedy upstream constitutional violations by state or local authorities.[26] As a general matter, ICE attorneys have a reputation for zealously pursuing immigration cases without significant consideration of humanitarian circumstances or other factors that might warrant discretion.[27] In

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23. Ball, Deportations Dropped, supra note 21; Telephone Interview with Marty Rosenbluth, supra note 21.

24. Chris Lavender, Illegal Immigrant Won't Face Deportation, Times-News (Feb. 15, 2013, 4:33 PM), http://www.thetimesnews.com/news/top-news/illegal-immigrant-won-t-face-deportation-1.96262 (on file with the *Columbia Law Review*).

25. Telephone Interview with Marty Rosenbluth, supra note 21.

26. In a few rare cases, immigrants have been able to get deportation proceedings terminated through lawsuits against ICE for Fourth Amendment violations, but this kind of settlement is distinct from the exercise of prosecutorial discretion. See, e.g., Landmark Settlement in New Haven Immigration Raid Case a Victory for YLS Worker & Immigrant Rights Clinic Students, Yale Law Sch. (Feb. 15, 2012), http://www.law.yale.edu/news/15003.htm (on file with the *Columbia Law Review*) (noting in addition to monetary damages, ICE's settlement of lawsuit alleging unlawful searches and seizures in New Haven included dropping any pending deportation proceedings against eleven plaintiffs).

27. See Am. Bar Ass'n Comm'n on Immigration, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases 1-25 to 1-29 (2010), available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf (on file with the *Columbia Law Review*) (noting "insufficient use of prosecutorial discretion" as systemic issue); Chi. Appleseed Fund for Justice, Assembly Line Injustice: Blueprint to Reform America's Immigration Courts 16–18 (2009), available at http://appleseednetwork.org/wp-content/uploads/2012/05/Assembly-Line-Injustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf (on file with the *Columbia Law Review*) (noting tendency of ICE attorneys to adhere to "deport-in-all-cases culture"); Chi. Appleseed Fund for Justice, Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System 39–48 (2012), available at http://www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf (on file with the *Columbia Law Review*) (observing persistence of ICE's "deport at all costs" approach in immigration court); ICE Seeks to Deport the Wrong People, TRAC Immigration (Nov. 9, 2010), http://trac.syr.edu/immigration/reports/243/ (on file with the *Columbia Law Review*) (reporting between one-third and one-quarter of ICE's deportation requests are rejected by immigration

Maricopa County, Arizona, for example, where DOJ also found evidence of serious police abuses, there is no indication that Trial Attorneys suppressed tainted evidence, declined to pursue deportation proceedings, or took any kind of discretionary remedial actions.[28] Until very recently, Sheriff Joseph Arpaio continued to aggressively enforce state and federal immigration laws.[29] And though the sheriff's own federal immigration authority has been revoked, ICE continues to screen Maricopa jails for deportable detainees.[30]

These divergent approaches in the agency's regional field offices reflect the significant discretionary power that government attorneys wield in implementing prosecutorial and administrative powers. But the Charlotte attorneys' apparent deviation from ICE's typically unflinching zeal in pursuing immigration enforcement actions raises an important question: Are ICE prosecutors legally justified in dropping deportation

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courts); see also Deborah E. Anker, Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment, 19 N.Y.U. Rev. L. & Soc. Change 433, 445–57 (1992) (reporting in study of 149 asylum hearings, ICE attorneys took oppositional stance in every case).

28. Just three weeks after the DOJ issued its Maricopa County findings and DHS terminated Sheriff Arpaio's authority to enforce federal immigration law, ICE attorneys from the Eloy, Arizona, district office presented a fifty-page Powerpoint to the Maricopa County Attorney's Office with detailed guidance on how to charge criminal violations of Arizona law in ways that make it easier for ICE to secure deportations. See Stephen Lemons, Bill Montgomery's Smoking Gun: ICE PowerPoint Shows Monty's Minions How to Deport More Immigrants, Phx. New Times: Feathered Bastard (Feb. 15, 2013, 1:57 PM), http://blogs.phoenixnewtimes.com/bastard/2013/02/bill_montgomerys_smoking_gun_i.php (on file with the *Columbia Law Review*); Dominique J. Honea et al., Powerpoint: Immigration Consequences of Common Arizona Convictions (Jan. 6, 2012), available at http://media.phoenixnewtimes.com/8565705.0.pdf (on file with the *Columbia Law Review*). The Maricopa County Attorney's Office has long worked closely with Sheriff Arpaio in enforcing federal and state laws against immigrant arrestees. See, e.g., Ray Stern, Bill Montgomery Prosecuting Fewer Illegal Immigrants for Smuggling Themselves into Country, Phx. New Times: Valley Fever (Nov. 5, 2012, 8:21 AM), http://blogs.phoenixnewtimes.com/valleyfever/2012/11/bill_montgomery_prosecuting_fe.php (on file with the *Columbia Law Review*).

29. See, e.g., Marisa Franco, Cut Ties Between Maricopa County and ICE, Politic365 (Mar. 20, 2013, 5:50 PM), http://politic365.com/2013/03/20/cut-ties-between-maricopa-county-and-ice/ (on file with the *Columbia Law Review*) (reporting on workplace immigration raid conducted by Arpaio's deputies in March 2013).

30. See Michael Kiefer, ICE Agents to Do Maricopa County Jail Screening, Ariz. Republic (Dec. 19, 2011, 9:55 PM), http://www.azcentral.com/news/articles/2011/12/19/20111219ice-agents-do-maricopa-county-jail-screening.html (on file with the *Columbia Law Review*) ("The U.S. Department of Homeland Security on Monday announced it will send 50 Immigration and Customs Enforcement agents to Maricopa County to perform immigration screening of county jail inmates."); see also ICE, U.S. Dep't of Homeland Sec., Activated Jurisdictions 1 (2013), available at http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf (on file with the *Columbia Law Review*) (showing Secure Communities, ICE's biometric information sharing program, has been activated in Maricopa County since January 16, 2009).

cases or taking other remedial measures when noncitizens are apprehended through unlawful policing? The following sections provide two independent bases for answering that question in the affirmative.

II. EXECUTIVE RESPONSIBILITY TO PROTECT UNDERENFORCED CONSTITUTIONAL RIGHTS

A. *Scope of Fourth Amendment Protections for Noncitizens*

A preliminary inquiry before considering the government's constitutional responsibilities in immigration enforcement concerns the scope of unauthorized noncitizens' Fourth Amendment rights in this country. First, it is helpful to distinguish between the strength of the Constitution's protections at the border and in the country's interior. As recent news events have highlighted, the Fourth Amendment offers little protection against intrusive, suspicionless searches of citizens and immigrants alike who seek to enter the United States.[31] In light of national security concerns inherent in guarding the country's ports of entry, the Supreme Court gives the government much wider latitude with respect to the reasonableness of searches and seizures at the border.[32]

In contrast, persons apprehended in the interior United States by local and state law enforcement or by federal immigration officers are entitled to the full protection of the Fourth Amendment regardless of their immigration status. To be sure, some of the language in *United States v. Verdugo-Urquidez*[33] provided fodder for the notion that Fourth Amendment protections might be graduated depending upon the noncitizen's immigration status or substantive connections with this country.[34] The case involved U.S. federal agents' warrantless search of a Mexican citizen's home, in Mexico, in connection with the murder of a

31. See, e.g., Mark Memmott, U.S. Defends Warrantless Searches of Electronic Devices at Border, NPR: The Two-Way (Sept. 10, 2013, 1:05 PM), http://www.npr.org/blogs/thetwo-way/2013/09/10/221040881/government-defends-warrantless-searches-of-electronic-devices (on file with the *Columbia Law Review*).

32. See, e.g., United States v. Flores-Montano, 541 U.S. 149, 150 (2004) (upholding suspicionless search of gas tank at border); United States v. Arnold, 533 F.3d 1003, 1010 (9th Cir. 2008) (upholding suspicionless search of laptop at border), abrogated in part by United States v. Cotterman, 709 F.3d 952 (9th Cir. 2013) (en banc). See generally Jennifer M. Chacón, Border Exceptionalism in the Era of Moving Borders, 38 Fordham Urb. L.J. 129, 134–41 (2010) (discussing scope of Fourth Amendment at border).

33. 494 U.S. 259, 271 (1990).

34. See D. Carolina Núñez, Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment, 85 S. Cal. L. Rev. 85, 87–95 (2011) (discussing this aspect of *Verdugo*).

U.S. drug enforcement agent in that country.[35] Verdugo was brought to the United States for prosecution, where he asserted the Fourth Amendment barred the government from relying on evidence seized in the warrantless arrest. The case eventually reached the Supreme Court, which held that the Constitution does not apply extraterritorially to protect property located outside the United States.[36] Although that ground was sufficient to support the Court's judgment, then-Justice Rehnquist's plurality opinion also stated that noncitizens in the United States only "receive constitutional protections when they have come within the territory of the United States and *developed substantial connections with this country*."[37]

Justice Rehnquist's "substantial connections" language was dicta that failed to garner the support of a majority of the Court.[38] Accordingly, most courts and commentators have found *Verdugo* irrelevant to the Fourth Amendment rights of noncitizens within the United States.[39] Nevertheless, a seed was planted, in some circumstances leading lower courts to inquire whether noncitizens asserting unlawful searches or seizures have sufficient connections with this country. Most of these courts concluded that voluntarily entering the country (even without authority) is sufficient to trigger the applicability of the Fourth Amendment.[40]

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35. 494 U.S. at 262.

36. Id. at 268–72. See also id. at 274–75 ("At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application.").

37. Id. at 271 (emphasis added). Although Justices Kennedy, White, O'Connor, and Scalia joined Justice Rehnquist's opinion, courts and commentators have referred to the Court's opinion as a plurality opinion because "Justice Kennedy's concurrence diverged substantially from the reasoning of the Court . . . even rejecting the fundamental line of reasoning employed by the Court . . . ". Núñez, supra note 34, at 88 n.8 (citing commentators and courts referring to *Verdugo* as a plurality opinion). See also id. at 100-101 (parsing Justice Kennedy's concurrence).

38. Although Justice Kennedy joined the Court's opinion, his separate concurrence rejected much of Justice Rehnquist's analysis, and notably emphasized that "[i]f the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment would apply." 494 U.S. at 278 (Kennedy, J., concurring). See also Núñez, supra note 34, at 100-101 (parsing Justice Kennedy's concurrence in *Verdugo*).

39. Núñez, supra note 34, at 102–05 (collecting cases and academic commentary).

40. See id. at 105–07 (collecting cases). A small handful of lower courts appear to require more than just voluntary entry into the country to establish substantial connections, see id. at 107–08, while a few others have gone so far as to establish a categorical rule that previously deported felons who unlawfully reenter the country cannot claim the protections of the Fourth Amendment. See id. at 108–11.

The notion that undocumented noncitizens in the interior United States might not be able to avail themselves of the protections of the Fourth Amendment is at odds with a great deal of controlling precedent. First, Supreme Court doctrine dating back to the nineteenth century establishes that the Constitution's criminal procedure protections apply to noncitizens based solely on their presence within the United States.[41] Furthermore, there would have been no reason for the *Lopez-Mendoza* Court to consider whether the exclusionary rule should apply in immigration proceedings if the respondents did not enjoy Fourth Amendment rights in the first place. Indeed, eight Justices in *Lopez-Mendoza* agreed that the Fourth Amendment protects undocumented noncitizens.[42]

Finally, *Arizona v. United States*[43] reinforces the Court's long-held view that all searches and seizures of noncitizens within the country are subject to the strictures of the Fourth Amendment. Although the Court struck down most of Arizona's S.B. 1070 statute on preemption grounds, it declined to find facially unconstitutional section 11-1051(B) ("section 2(B)"), which requires state officers to make a "'reasonable attempt . . . to determine the immigration status'" of anyone who is lawfully stopped, if "'reasonable suspicion exists that the person . . . is unlawfully present

41. See, e.g., Johnson v. Eisentrager, 339 U.S. 763, 770–71 (1950) ("[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."); Wong Wing v. United States, 163 U.S. 228, 238 (1896) ("[A]ll persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] [A]mendments . . . ."); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding protections of Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality"); see also Plyler v. Doe, 457 U.S. 202, 211–12 (1982) (interpreting Equal Protection Clause to apply to undocumented noncitizens within U.S. territory); United States v. Cortes, 588 F.2d 106, 110 (5th Cir. 1979) ("Once aliens become subject to liability under United States law, they also have the right to benefit from [Fourth Amendment] protection.").

42. See INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (plurality opinion); id. at 1051 (Brennan, J., dissenting); id. at 1055 (White, J., joined by Stevens, J., dissenting); id. at 1060 (Marshall, J., dissenting). Moreover, in defining what constitutes an egregious constitutional violation for purposes of enforcing the limited judicial exclusionary rule in immigration court, numerous courts of appeals confirm the applicability of the Fourth Amendment in immigration arrests. See, e.g., Cotzojay v. Holder, No. 11-4916-ag, 2013 U.S. App. LEXIS 15626, at *22 (2d Cir. July 31, 2013) ("[I]t is uncontroversial that the Fourth Amendment applies to aliens and citizens alike."); Oliva-Ramos v. Att'y Gen., 694 F.3d 259, 275 (3d Cir. 2012) (holding exclusionary rule should be applied in removal proceedings where Fourth Amendment violation is egregious); Puc-Ruiz v. Holder, 629 F.3d 771, 778 (8th Cir. 2010) (finding violation of noncitizen's Fourth Amendment rights insufficiently egregious to warrant exclusionary rule); Gutierrez-Berdin v. Holder, 618 F.3d 647 (7th Cir. 2010) (same); Gonzalez-Rivera v. INS, 22 F.3d 1441 (9th Cir. 1994) (finding egregious violation).

43. 132 S. Ct. 2492 (2012).

in the United States.'"[44] Nevertheless, the Court clarified that the constitutionality of section 2(B) would depend on how the provision was enforced in practice, specifically noting that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns" and citing two bedrock Fourth Amendment cases in support of this position.[45] The Court then explained how the challenged provision might be interpreted narrowly to avoid running afoul of the Constitution's prohibition of unlawful searches and seizures.[46] Nothing in the Court's decision suggested there might be a different constitutional result if the detained noncitizen lacked lawful immigration status.

In cases not subject to border exceptionalism, then, noncitizens are entitled to the same Fourth Amendment protections as citizens, even if present without authorization.[47] Nevertheless, for reasons explained below, the Supreme Court has declined to fully enforce compliance with the Fourth Amendment in arrests leading to removal proceedings, instead sharing that supervisory responsibility with the executive.

B. *Background on Judicial Underenforcement of the Constitution*

Due to concerns about its institutional role, the judiciary sometimes refrains from fully enforcing constitutional rights. The literature on constitutional underenforcement, developed by scholars such as Lawrence Sager in a variety of contexts outside of immigration law, explains that the judiciary's self-imposed institutional limitations on

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44. Id. at 2507 (quoting Ariz. Rev. Stat. Ann. § 11-1051(B) (2012)).

45. Id. at 2509 (citing Arizona v. Johnson, 555 U.S. 323, 333 (2009); Illinois v. Caballes, 543 U.S. 405, 407 (2005)).

46. Id. at 2509.

47. Whether the Fourth Amendment has been violated in any particular situation involving the search or seizure of an immigrant is a highly fact-specific inquiry. To be sure, the Supreme Court allows race and national origin to be considered—among multiple factors—in establishing probable cause sufficient to make an immigration arrest. See, e.g., United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976) (upholding border area checkpoint policy to subject motorists to secondary immigration inspection "largely on the basis of apparent Mexican ancestry"); cf. United States v. Brignoni-Ponce, 422 U.S. 873, 884–86 (1975) (holding roving immigration patrol's sole reliance on "apparent Mexican ancestry" of vehicle occupants insufficient to establish reasonable suspicion of immigration violations). However, that doctrine does not turn on a rule that noncitizens have diminished constitutional rights, but rather reflects the explicit assumption that sufficient numbers of unauthorized noncitizens, at least in certain parts of the country, share "Mexican appearance" (for instance) to make an officer's perception of that characteristic relevant. Id. at 886–87. It bears emphasizing here, however, that the Alamance County cases involved targeting Latinos for highway stops and discriminatory treatment of Latinos who violated traffic laws as compared with non-Latinos, neither of which law enforcement actions are justified under the Supreme Court's Fourth Amendment case law.

constitutional enforcement do not limit the strength of the constitutional norm itself.[48] Consequently, theorists argue that the political branches remain responsible for respecting and enforcing the full extent of the underenforced constitutional provision.[49]

In a number of situations, which typically involve complex political choices by elected officials, the judiciary declines to fully enforce the Constitution. For instance, while the political question doctrine counsels courts to refrain from inquiring whether certain challenged government conduct violates the Constitution, that deference says nothing about whether the Constitution has in fact been violated.[50] Other examples of judicial reluctance to intrude on the political branches' policy choices, even where constitutional rights are implicated, include lawsuits against executive officers or governments, which are subject to immunity doctrines of institutional deference.[51] More provocatively, Professor Sager also argues that rational basis review of equal protection challenges to economic regulations says nothing about whether the Constitution prohibits only irrational policy judgments, and instead merely exhibits the Court's desire to give the political branches breathing room when making policy judgments.[52]

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48. See, e.g., Lawrence G. Sager, Justice in Plainclothes 84–92 (2004) [hereinafter Sager, Plainclothes]; Russell M. Gold, Beyond the Judicial Fourth Amendment: The Prosecutor's Role, 47 U.C. Davis L. Rev. (forthcoming 2014) (manuscript at 1) (on file with the *Columbia Law Review*) ("When a right is institutionally underenforced, the political branches must enforce the full breadth of the constitutional norm and not merely its judicially-enforced shadow."); Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1220–21 (1978) [hereinafter Sager, Fair Measure] ("[C]onstitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of these limits should be understood as delineating only the boundaries of the federal courts' role in enforcing the norm . . . ."); David A. Strauss, Presidential Interpretation of the Constitution, 15 Cardozo L. Rev. 113, 128–30 (1993) (explaining "constitutional law, as developed by the Supreme Court, reflects in part the Court's views of its own institutional capacities" and accordingly might differ from constitutional interpretation by executive branch).

49. Sager, Plainclothes, supra note 48, at 88, 91–94, 116; Sager, Fair Measure, supra note 48, at 1227–28; see also Trevor W. Morrison, Constitutional Avoidance in the Executive Branch, 106 Colum. L. Rev. 1189, 1225 (2006) ("Thus, when institutional or other factors inhibit robust judicial enforcement of a particular constitutional provision, it falls to the executive (and legislative) branch to enforce the provision more fully.").

50. Sager, Plainclothes, supra note 48, at 90–91.

51. See Alden v. Maine, 527 U.S. 706, 754 (1999) (holding states are entitled to sovereign immunity); Harlow v. Fitzgerald, 457 U.S. 800, 809 (1982) (explaining qualified immunity standard for certain government officials).

52. See Sager, Plainclothes, supra note 48, at 115–16 ("[T]he extravagant permissibility of [rational basis review] is in significant measure the consequence of self-conscious deference to state legislatures and to Congress."); Sager, Fair Measure, supra note 48, at 1215–20.

The takeaway is that the judiciary's prudentially imposed limits on its power to enforce the Constitution do not excuse the political branches' shared responsibility to uphold the underenforced provisions.[53] The President and all subordinate members of the executive branch take an oath to "preserve, protect and defend the Constitution."[54] This shared duty suggests that in situations where institutional factors inhibit robust judicial guardianship of the Constitution, the executive branch's obligation to ensure full enforcement is actually elevated. An Office of Legal Counsel opinion authored by Walter Dellinger in 1996 expressed this counterbalancing dynamic:

> The judiciary is limited, properly, in its ability to enforce the Constitution, both by Article III's requirements of jurisdiction and justiciability and by the obligation to defer to the political branches in cases of doubt or where Congress or the President has special constitutional responsibility. In such situations, the executive branch's regular obligation to ensure, to the full extent of its ability, that constitutional requirements are respected is heightened by the absence or reduced presence of the courts' ordinary guardianship of the Constitution's requirements.[55]

As David Strauss explains, it would be "circular buck-passing" for the executive branch to water down its own constitutional obligations by incorporating the Court's lenient scrutiny.[56] Of course, the appropriate means by which the executive should ensure that the Constitution is respected will depend on the particular provision at issue.[57]

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53. Sager, Plainclothes, supra note 48, at 88, 93–94, 116; Sager, Fair Measure, supra note 48, at 1221; see also Gold, supra note 48 (manuscript at 8) ("The executive and legislative branches remain charged with enforcing the full breadth of an underenforced constitutional norm and not solely its judicially-enforceable component.").

54. U.S. Const. art. II, § 1, cl. 8 (internal quotation marks omitted). This oath "is a solemn undertaking, a binding of the person to the cause of constitutional government, an expression of the individual's allegiance to the principles embodied in that document." In re Lindsey, 158 F.3d 1263, 1273 (D.C. Cir. 1998) (per curiam).

55. The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 180 (1996) (footnote omitted).

56. Strauss, supra note 48, at 128–29; see also Cornelia T.L. Pillard & T. Alexander Aleinikoff, Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in *Miller v. Albright*, 1998 Sup. Ct. Rev. 1, 55 ("If the political branches parrot the courts' lenient scrutiny, everyone has deferred to everyone else, and nobody has done the full-fledged constitutional analysis.").

57. Morrison, supra note 49, at 1225–26.

C. *Underenforced Constitutional Rights in Immigration Arrests*

Case law with respect to the application of the Fourth Amendment to immigration arrests presents a textbook example of shared constitutional responsibility between the judiciary and the executive. As noted above, in 1984 the Supreme Court decided *INS v. Lopez-Mendoza*, which presented the question whether the exclusionary rule should apply to suppress evidence in immigration proceedings that immigration agents secured in violation of the Fourth Amendment.[58] The Court applied the framework set out in *United States v. Janis*,[59] weighing the perceived deterrence benefits against the likely social costs of extending the exclusionary rule to immigration proceedings.[60] On the deterrence side, the Court noted several factors suggesting little benefit to imposing judicial suppression of tainted evidence. First, the majority surmised that even when the Fourth Amendment has been violated, there will often be sufficiently attenuated evidence of deportability.[61] Second, the Court found that because most noncitizens put into deportation proceedings at that time opted for voluntary departure without exercising their rights to a hearing (this is no longer the case[62]), arresting officers would be unlikely to shape their conduct in anticipation of the exclusion of evidence.[63] The Court also found that the potential availability of alternative remedies, such as declaratory relief, undercut the need for use of the exclusionary rule as a deterrent of unconstitutional behavior in immigration enforcement.[64]

What the majority found "most important," however, was the immigration agency's "own comprehensive scheme for deterring Fourth Amendment violations by its officers."[65] The Court catalogued the agency's regulations governing stops, interrogations, and arrests, its trainings and disciplinary procedures for immigration officers, and a

58. 468 U.S. 1032 (1984).

59. 428 U.S. 433, 459–60 (1976).

60. *Lopez-Mendoza*, 468 U.S. at 1041–50.

61. Id. at 1043.

62. See Immigration Court Processing Time by Outcome, TRAC Immigration, http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php (on file with the *Columbia Law Review*) (last updated Sept. 2013) (showing in fiscal year 2012, for example, cases in which noncitizens were granted voluntary departure accounted for only 26,499 of 206,323 completed immigration court matters).

63. *Lopez-Mendoza*, 468 U.S. at 1044.

64. Id. at 1045.

65. Id. at 1044.

DOJ policy in effect at that time, which provided for administrative exclusion of evidence seized through intentionally unlawful conduct.[66]

The Court then identified two principal costs of applying the exclusionary rule in immigration proceedings. First, where suppression of evidence of deportability leads to a successful termination of the proceedings, the rule would facilitate the noncitizen's continuing violation of immigration laws.[67] Second, adjudication of Fourth Amendment violations would bog down the "deliberately simple" and "streamlined" administration of immigration laws.[68] While the majority lamented that the Fourth Amendment rights of noncitizens might be violated,[69] it concluded that the balance between costs and benefits weighed against application of the exclusionary rule in deportation proceedings.[70] And a critical driver of this conclusion was the Court's perception that "the INS has already taken sensible and reasonable steps to deter Fourth Amendment violations by its officers, and this makes the likely additional deterrent value of the exclusionary rule small."[71]

The majority opinion ends with the following passage, which leaves little doubt that the Court's decision not to apply the exclusionary rule in the context of immigration arrests rested on self-imposed limits to judicial enforcement of the Fourth Amendment, delegating precautionary and remedial measures for run-of-the-mill violations to the political branches: "'There comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement *in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches*.' That point has been reached here."[72] *Lopez-Mendoza* can thus be seen as an example of judicial reluctance to shoulder the full burden of supervising compliance with

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66. Id. at 1044–45.

67. Id. at 1046–47. The Court contrasted this result with the effect of suppressing evidence in criminal proceedings, where the crime typically is not a continuing one. Id. As the Court's more recent decisions recognize, however, immigration status is complex and often in transition. See, e.g., Arizona v. United States, 132 S. Ct. 2492, 2506 (2012) (noting "significant complexities involved in enforcing federal immigration law, including the determination whether a person is removable").

68. *Lopez-Mendoza*, 468 U.S. at 1048–50.

69. Id. at 1046 ("Important as it is to protect the Fourth Amendment rights of all persons, there is no convincing indication that application of the exclusionary rule in civil deportation proceedings will contribute materially to that end."); see also id. at 1050 (plurality opinion) ("We do not condone any violations of the Fourth Amendment that may have occurred in the arrests of respondents . . . .").

70. Id. at 1050 (majority opinion).

71. Id.

72. Id. (emphasis added) (citation omitted) (quoting United States v. Janus, 428 U.S. 433, 459 (1976)).

the Constitution. The Court acknowledged the applicability and importance of the Fourth Amendment in the context of immigration arrests, but for jurisprudential reasons shared responsibility with the executive branch to enforce that right, requiring imposition of a judicially supervised exclusionary rule only in egregious cases.[73]

It is not particularly novel to observe that the Supreme Court has delegated significant enforcement responsibility for violations of constitutional criminal procedure rights to the executive branch.[74] With respect to the Fourth Amendment in particular, Russell Gold argues that because the Court gradually constricted the scope of the exclusionary rule in criminal prosecutions for institutional rather than analytic reasons, it left intact the executive branch's responsibility to uphold the fuller breadth of the Constitution's search and seizure protections as established in the Court's earlier precedents.[75] Despite the territory already covered by other scholars, however, there is profit in examining the implications of judicial constitutional underenforcement of the Fourth Amendment for the immigration enforcement system.

Many commentators have argued that the Supreme Court should revisit its holding in *Lopez-Mendoza* and judicially enforce the

73. The plurality portion of O'Connor's opinion implied a possible exception to the general inapplicability of the exclusionary rule in cases involving "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness." Id. (plurality opinion). The egregiousness exception has been adopted by a number of courts of appeals. See Elizabeth A. Rossi, Revisiting *INS v. Lopez-Mendoza*: Why the Fourth Amendment Exclusionary Rule Should Apply in Deportation Proceedings, 44 Colum. Hum. Rts. L. Rev. 477, 526–30 (2013) (examining differences among circuit courts with respect to egregious violations exception).

74. See, e.g., Anthony O'Rourke, Structural Overdelegation in Criminal Procedure, 103 J. Crim. L. & Criminology 407, 433 (2013) (explaining Court's Fourth Amendment exclusionary rule decisions are best explained in light of institutional discomfort with supervising procedural violations in criminal context); Thomas S. Schrock & Robert C. Welsh, Up from *Calandra*: The Exclusionary Rule as a Constitutional Requirement, 59 Minn. L. Rev. 251, 255–57 (1975) (explaining under Supreme Court's "fragmentary" conception of criminal prosecution, Fourth Amendment directly regulates only executive branch, abjuring judicial intervention except where police violations are constitutionally intolerable). See generally Dan T. Coenen, A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue, 42 Wm. & Mary L. Rev. 1575 (2001) (discussing means by which Supreme Court invites political branches to collaborate in protecting constitutional values in criminal procedure and other areas of law).

75. Gold, supra note 48 (manuscript at 20–21). Gold summarizes this doctrine as establishing that, regardless of the level of judicial intervention, the government should not benefit "from an illegal search or seizure by using not-sufficiently-attenuated fruits of the poisonous tree against the victim of the constitutional violation for non-impeachment purposes." Id. (manuscript at 21).

exclusionary rule in removal hearings.[76] To be sure, the key deterrence and cost assumptions the Court relied upon to reach its decision in 1984 no longer appear to be accurate.[77] But it is critical to recognize that, although the Supreme Court made a prudential decision in *Lopez-Mendoza* to limit the exclusionary remedy in immigration proceedings to egregious Fourth Amendment violations, that decision did not diminish the scope of the constitutional right itself. If anything, the judiciary's institutional deference in this area only heightens the executive branch's corresponding responsibility to ensure its enforcement actions do not rely on or sanction unconstitutional arrests.

Seen in this light, the Charlotte ICE Trial Attorneys' decisions to administratively close proceedings against noncitizens whose rights were violated by the Alamance County Sheriff's Office appropriately reflected their role, as executive branch officials, to ensure that the government does not benefit from violations of the Constitution at any point in the immigration enforcement process.[78] That ICE declined to pursue deportation—as opposed to suppressing evidence of deportability—reflects the executive's freedom to fashion different remedial actions than those employed by the judiciary as it shares implementation of the Fourth Amendment in immigration enforcement.[79]

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76. See, e.g., Chacón, A Diversion of Attention, supra note 5, at 1624–27; Stella Burch Elias, "Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting *Lopez-Mendoza*, 2008 Wis. L. Rev. 1109, 1115; Rossi, supra note 73, at 483–84; Immigrant Rights & Immigration Enforcement, supra note 5, at 1657.

77. See, e.g., Immigrant Rights & Immigration Enforcement, supra note 5, at 1649–55 (arguing, inter alia, that Court after *Arizona v. United States* now recognizes unlawful immigration presence to be civil offense and describing how voluntary departure rate has significantly fallen since *Lopez-Mendoza*); see also Oliva-Ramos v. Att'y Gen., 694 F.3d 259, 271–82 (3d Cir. 2012) (discussing Supreme Court's acknowledgment that its conclusions "'might change, if there developed reason to believe that Fourth Amendment violations . . . were widespread,'" and remanding for further consideration of that issue) (quoting *Lopez-Mendoza*, 468 U.S. at 1050).

78. For further discussion regarding the substantial integration of state and local law enforcement in contemporary immigration enforcement, see supra notes 9–14; infra notes 99–101 and accompanying text.

79. In immigration court, termination of proceedings is often a practical consequence of suppressing or excluding unconstitutionally obtained evidence, because in many cases the government's best or only evidence of removability is the noncitizen's admission or other not-sufficiently-attenuated poisonous fruit related to statements the noncitizen made when arrested. Accordingly, declining to pursue removal at an early juncture will often be a better use of ICE's limited resources than administratively suppressing evidence but forging ahead with prosecution. For a thorough consideration of the means by which the Supreme Court has invited the political branches to collaborate in protecting constitutional values, including through alternate remedies than those employed by the judiciary, see Coenen, supra note 74; see also Akhil Reed Amar, The Constitution and Criminal Procedure 43–45 (1997) (suggesting legislative, executive, and

Additionally, by refusing to proceed with removal proceedings against targets of unlawful police discrimination, the Trial Attorneys may incentivize North Carolina law enforcement to respect the Constitution in the first instance. If states and counties that play a part in federal immigration enforcement actually wish to see the noncitizens they apprehend deported, exercising favorable discretion in these cases should deter state and local police enforcing immigration law from employing unlawful policing practices against noncitizens.[80] To be sure, some states have indicated that their goal in targeting noncitizens for immigration enforcement is simply to encourage them to leave or refrain from entering the state.[81] If one takes this social control objective at face value, an increased refusal by ICE to seek deportation in particular cases may have little overall deterrent effect, since state or local governments could reasonably assume that noncitizens in fear of arrest or harassment are not likely to factor potential prosecutorial discretion in future immigration proceedings into their decisions about where to live. Still, at present, law enforcement officers throughout the country, whether state or federal, have little incentive to respect the Constitution when stopping noncitizens they suspect or hope might be deportable. While complete deterrence may not be possible, it is certainly possible for the government to create and reinforce incentives for the police to adhere to the Constitution when they apprehend noncitizens.

At bottom, ICE's decision to exercise favorable discretion in the Alamance County cases demonstrates that the application of remedial measures in immigration court to address unlawful arrests by federal or local authorities need not wait for *Lopez-Mendoza* to be overruled or further legislation to be enacted. This conclusion has implications for other ICE prosecutors who wish to embrace their responsibility to protect the constitutionality of the immigration enforcement process

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judicial regimes each have different roles in enforcing right of people to be secure from unreasonable searches and seizures).

80. See, e.g., Gold, supra note 48 (manuscript at 2–3) (discussing role of prosecutorial discretion in discouraging violations of Fourth Amendment by police); Dallin H. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 706 (1970) (describing how Toronto police modified their behavior in response to prosecutorial suppression of unlawfully obtained evidence); David Alan Sklansky, Is the Exclusionary Rule Obsolete?, 5 Ohio St. J. Crim. L. 567, 580–81 (2008) (describing correlation between likelihood that unconstitutional evidence will be excluded and police's adherence to Constitution).

81. For example, the explicit stated purpose for Arizona's S.B. 1070 was to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States" and to cause immigrant "attrition through enforcement." Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, § 1, 2010 Ariz. Sess. Laws 450, 450.

where there is reason to believe noncitizens were apprehended through violations of the Fourth Amendment.

III. AGENCY GUIDELINES ON PROSECUTORIAL DISCRETION

This Part considers whether the remedial actions taken by the Charlotte Trial Attorneys in the unlawful policing cases comport with their discretionary authority. As in any massive enforcement scheme where resource constraints allow officials to process only a tiny fraction of the total number of persons eligible for benefits and sanctions, discretion is inherent in the immigration removal system.[82] Additionally, the agency has had various written prosecutorial discretion policies in place since at least the 1970s.[83] While racial profiling or other unlawful policing tactics are not specifically discussed in the agency's current policy memoranda, taking such factors into account is in line with several of the agency's guidelines for the exercise of favorable discretion.

On June 17, 2011, ICE Director John Morton issued a memorandum ("Morton Memo") setting forth guidelines on the use of prosecutorial discretion to close low-priority immigration matters.[84] The Morton Memo arguably took a step further than the agency's previous policies on prosecutorial discretion by "articulating the expectations for and responsibilities of ICE personnel when exercising their discretion."[85]

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82. See generally Michael Lipsky, Street-Level Bureaucracy: Dilemmas of the Individual in Public Services 13–16 (30th anniversary expanded ed. 2010) (1980) (discussing inherent discretion in large enforcement bureaucracies).

83. Shoba Sivaprasad Wadhia, In Defense of DACA, Deferred Action, and the DREAM Act, 91 Tex. L. Rev. See Also 59, 66 (2013), http://www.texaslrev.com/in-defense-of-daca-deferred-action-and-the-dream-act/ (discussing revelation in 1970s of immigration agency's "deferred action" policy then in effect); Letter from Hiroshi Motomura, Susan Westerberg Prager Professor of Law, UCLA Sch. of Law, et al., to the President of the United States 1–2 (May 28, 2012) (on file with the *Columbia Law Review*) ("In the immigration context, the Executive Branch has exercised its general enforcement authority to grant deferred action since at least 1971.").

84. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec., to all Field Office Directors, All Special Agents in Charge & All Chief Counsel, U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) [hereinafter Morton, Exercising Prosecutorial Discretion], available at http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (on file with the *Columbia Law Review*).

85. Bill Ong Hing, The Failure of Prosecutorial Discretion and the Deportation of Oscar Martinez, 15 Scholar 437, 452 (2013); see also Shoba Sivaprasad Wadhia, Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law, 10 U.N.H. L. Rev. 1, 15 (2012) (explaining unique aspects of Morton Memo). For examples of previous agency guidance on prosecutorial discretion, see Memorandum from Bo Cooper, Gen. Counsel, U.S. Immigration & Naturalization Serv., U.S. Dep't of Justice, to Comm'r, U.S. Immigration & Naturalization Serv., U.S. Dep't of Justice (n.d.) (on file with the *Columbia*

In particular, the Morton Memo emphasized the responsibility of ICE's Trial Attorneys to consider whether prosecution is warranted under the facts in all immigration removal proceedings.[86]

The Morton Memo set forth a nonexhaustive list of humanitarian factors that ICE officials are to consider in determining whether to exercise discretion by declining to pursue deportation.[87] The agency's rationale for prudent enforcement discretion was as follows:

> [ICE] has limited resources to remove those illegally in the United States. ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency's enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system.[88]

The memo observed that appropriate prosecutorial discretion is warranted at all stages of immigration proceedings, but emphasized that earlier discretion is preferable in order to conserve government resources.[89] A second ICE memo, also issued by John Morton on June 17, 2011 ("Second Morton Memo"), addressed the specific situation of cases involving victims, witnesses to crimes, and plaintiffs in good faith civil rights lawsuits, and instructed that "[a]bsent special circumstances or aggravating factors, it is . . . against ICE policy to remove individuals in the midst of a legitimate effort to protect their civil rights or civil liberties."[90] A few months later, ICE issued additional prosecutorial

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Law Review); Memorandum from William J. Howard, Principal Legal Advisor, U.S. Dep't of Homeland Sec., to All OPLA Chief Counsel (Oct. 24, 2005) (on file with the *Columbia Law Review*); Memorandum from Doris Meissner, Comm'r, U.S. Immigration & Naturalization Serv., U.S. Dep't of Justice, to Regional Directors et al., U.S. Immigration & Naturalization Serv.,, U.S. Dep't of Justice (Nov. 17, 2000) (on file with the *Columbia Law Review*); Memorandum from Julie L. Myers, Assistant Sec'y, U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec., to All Field Office Directors and All Special Agents in Charge, U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec. (Nov. 7, 2007) (on file with the *Columbia Law Review*).

86. Morton, Exercising Prosecutorial Discretion, supra note 84, at 3.

87. Id. at 4–5. Positive factors include the noncitizen's ties and contributions to the community, including family relationships; whether the person has a U.S. citizen or permanent resident spouse, child, or parent; whether the person or the person's spouse is pregnant or nursing, or has severe mental or physical illness; and the likelihood of relief from removal. Id. at 4. Negative factors weighing against discretion include whether the person poses a national security or public safety concern; the person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud; and any criminal history. Id. at 4–5.

88. Id. at 2.

89. Id. at 5.

90. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec., to All Field Office Directors et al., U.S.

discretion documents, including a memorandum from Peter Vincent, ICE's Principal Legal Advisor, which specified that each Chief Counsel field office should focus on criteria from the Morton Memo when determining whether incoming cases warrant a favorable exercise of discretion.[91]

None of these agency prosecutorial discretion documents specifically enumerates unlawful arrest as a basis for declining to pursue removal. Nevertheless, exercising favorable discretion in cases that arise out of unconstitutional policing practices falls within the spirit of several of the agency's guidelines. First, as noted above, the Second Morton Memo specified that ICE should not seek to deport persons pursuing legitimate civil rights complaints.[92] Although plaintiffs in civil rights lawsuits warrant "[p]articular attention," the memo did not limit discretion to that circumstance, suggesting that, absent "serious adverse factors," the agency prioritizes vindication of constitutional rights violations over deportation.[93] While noncitizens whose rights have been violated may not attempt to file civil rights lawsuits for a variety of reasons,[94] ICE prosecutors may have other grounds upon which to assess noncitizens' good faith constitutional claims, such as affidavits,[95]

Immigration & Customs Enforcement, Dep't of Homeland Sec., Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs 1–2 (June 17, 2011) [hereinafter Morton, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs], available at https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf (on file with the *Columbia Law Review*).

91. Memorandum from Peter S. Vincent, Office of the Principal Legal Advisor, U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec., to All Chief Counsel, Office of the Principal Legal Advisor, U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec. (Nov. 17, 2011), available at http://www.aila.org/content/default.aspx?docid=37680 (on file with the *Columbia Law Review*). Another document issued that day was a (likely internal) memo that provided additional guidance to ICE Trial Attorneys regarding a separate fast-track review process. Memorandum, Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review (Nov. 17, 2011), available at http://www.aila.org/content/default.aspx?bc=1016|6715|8412|37681 (on file with the *Columbia Law Review*). This document seemed to indicate that cases not falling within fast-track review should continue to be evaluated in accordance with the Morton Memo, which was described as "the cornerstone for assessing whether prosecutorial discretion is appropriate in any circumstance." Id. at 3.

92. Morton, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, supra note 90, at 2.

93. Id.

94. See Margulies, supra note 18, at 321–23 (describing barriers to civil rights suits by noncitizens).

95. For example, an ICE prosecutor in New Orleans recently agreed to dismissal without prejudice after a noncitizen submitted an affidavit detailing constitutional violations during his immigration arrest at home, indicating that "upon further review it does not further DHS' interests to pursue this case at this time." Department's Motion to

prehearing conferences,[96] testimony,[97] interviews with arresting officers or witnesses, and, of course, findings by other agencies such as the DOJ of pervasive rights violations.

Second, suppressing tainted evidence or declining prosecution where there have been upstream rights violations promotes one of ICE's expressed agency priorities: protecting the integrity of the immigration system.[98] "Integrity" is nowhere specifically defined in the agency's prosecutorial discretion guidance materials or in statutes or regulations. But remedying and deterring unlawful arrests clearly furthers the integrity of the immigration enforcement system under any reasonable definition of that term. There may be some difficult cases in which different components of systemic integrity are in opposition—as when integrity is threatened both by unlawful policing and a particular noncitizen's fraudulent behavior or serial immigration violations—but resolution of such tensions is part and parcel of the work of government attorneys charged with exercising prudent discretion in their enforcement of the law.

Declining to seek removal against noncitizens whose constitutional rights have been violated is all the more necessary to promote the integrity of the system in light of the significant, even integral, part that state and local law enforcement now play in the immigration enforcement system. As described above, technological advances, cooperative relationships, and entrepreneurial efforts by states have dramatically increased the role of nonfederal actors in the immigration enforcement system.[99] Indeed, because state and local authorities are now responsible for the bulk of the cases flooding an underresourced immigration enforcement system,[100] they act in essence as agents of the

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Dismiss Without Prejudice, In re [REDACTED] (Dep't of Justice Mar. 13, 2013) (on file with the *Columbia Law Review*); see Respondent [REDACTED] Motion to Suppress Evidence and Terminate Proceedings, In re [REDACTED] (Dep't of Justice Feb. 1, 2013) (on file with the *Columbia Law Review*) (alleging Fourth Amendment violations in case).

96. See 8 C.F.R. § 1003.21 (2013) (providing for prehearing conferences).

97. See, e.g., In re Barcenas, 19 I. & N. Dec. 609, 611 (B.I.A. 1988) (holding noncitizen may challenge legality of government's evidence through testimony).

98. Morton, Exercising Prosecutorial Discretion, supra note 84, at 2. As a practical matter, suppressing or excluding unconstitutionally obtained evidence in immigration court may well lead to termination of the proceedings, because in many cases the government's only evidence of removability consists of the noncitizen's statements when arrested or other not-sufficiently-attenuated poisonous fruit. See supra note 79. Accordingly, as the Charlotte Trial Attorneys may have recognized, it is a better use of ICE's resources to decline to pursue removal in such cases at an early juncture than to administratively suppress evidence but continue to seek removal.

99. See supra notes 9–14 and accompanying text.

100. See Hiroshi Motomura, The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line, 58 UCLA L. Rev. 1819, 1848–58 (2011) (explaining how developments in immigration enforcement allow state

federal government.[101] By suppressing evidence or declining to pursue deportation against noncitizens arrested through constitutional rights violations by state or local law enforcement, ICE thus protects the adjudicative system's integrity.[102]

Nothing in the nonexhaustive lists of positive and negative discretionary factors set forth in the ICE guidance documents suggests that the agency's attorneys lack the authority to decline to pursue cases in which there have been unlawful enforcement actions at the arrest stage, at least in cases not falling within a high-priority category for removal (because, for example, of significant criminal history).[103] As a practical matter, law enforcement stops that result only in civil deportation proceedings typically will not involve noncitizens with serious criminal histories, multiple immigration violations, or other circumstances suggesting a threat to public safety.[104] The available data appear to bear this assumption out, as the vast majority of noncitizens referred for deportation through state and local law enforcement have either no criminal history or only one or two misdemeanor convictions.[105] In short, while difficult judgment calls will undoubtedly

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and local decisionmakers to "act as gatekeepers, filling the enforcement pipeline with cases of their choice"); see also supra notes 13–14 and accompanying text (explaining that states and localities arrest four times more noncitizens referred to removal proceedings than federal officers).

101. Kobach, supra note 13, at 235 ("The more than 800,000 state and local law enforcement officers in the United States constitute a vital force multiplier."); Motomura, supra note 100, at 1855 (explaining tensions between federal and state or local priorities regarding immigration enforcement as a principle-agent problem); see also David Harris, Good Cops: The Case for Preventive Policing 3 (2005) (arguing after 9/11 DOJ "transformed state and local police agencies into an adjunct force in the federal effort to fight the war on terror").

102. See Gray et al., supra note 9, at 11–15 (explaining judicial integrity rationale for applying exclusionary rule to state officers' violations of Fourth Amendment).

103. Indeed, the Charlotte ICE prosecutors' discretionary decisions not to pursue removal in some cases in the wake of the DOJ's report on Alamance County were apparently sanctioned by higher-ups in the agency. See Ball, Deportations Dropped, supra note 21.

104. See, e.g., Ingrid V. Eagly, Prosecuting Immigration, 104 Nw. U. L. Rev. 1281, 1334 (2010) (discussing very low rate at which federal prosecutors decline to prosecute criminal immigration violations). In cases that do involve federal or state criminal prosecutions, allegations of constitutional violations are much more likely to be vetted through preliminary motions in the criminal court. But cf. Jason A. Cade, The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court, 34 Cardozo L. Rev. 1751, 1775–800 (2013) (explaining factors creating incentives for noncitizens to plead guilty as early as possible in low-level state prosecutions rather than engage in motion practice or other defenses).

105. Marc R. Rosenblum & William A. Kandel, Cong. Research Serv., R42057, Interior Immigration Enforcement: Programs Targeting Criminal Aliens 32 tbl.8 (2012), available at http://www.fas.org/sgp/crs/homesec/R42057.pdf (on file with the *Columbia*

arise, many cases in which noncitizens are apprehended through unchecked rights violations will fall outside the agency's high-priority targets for removal. Thus, ICE Trial Attorneys will frequently be within their discretionary authority to dismiss those cases without running afoul of other prosecutorial discretion guidelines.

CONCLUSION

ICE prosecutors wield significant enforcement discretion as gatekeepers to the adjudicative component of a massive enforcement apparatus. By declining to seek removal in many of the Alamance County cases, the Charlotte Trial Attorneys employed this discretion in ways that protect the overall integrity of the deportation system and that police the immigration enforcement efforts of law officers. These remedial actions can be justified as part of the executive branch's shared responsibility to uphold the constitutional rights of those it seeks to subject to deportation or as an exercise of prosecutorial discretion pursuant to specific agency authority.

It remains to be seen whether other ICE prosecutors will follow suit. But unless and until the Supreme Court revisits the prudence of a judicially imposed exclusionary rule in immigration court, prosecutorial discretion has a significant role to play in deterring constitutional violations and safeguarding the integrity of the immigration enforcement system.

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Law Review) (showing statistics for arrests under Secure Communities and section 287(g) programs by type of offense from fiscal year 2006 to fiscal year 2012).