Immigration Law and Long-Term Residents: A Missing Chapter in American Criminal Law

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I. INTRODUCTION

I am a criminal law professor. I know about penal codes, police practices, sentencing, and the use of incarceration to punish criminals. Like most criminal law professors, I know precious little about American immigration law. I have always considered it to be a different part of the law school curriculum, and one that had little, if anything, to do with criminal law. Even when I have taught federal criminal law, immigration law played no part in the curriculum for the course. Over the past few years, however, it has become evident to me that things have changed. In today's world, immigration enforcement practices and domestic law enforcement activities are two sides of the same coin, at least for non-citizens. What criminal law professors and practitioners alike are discovering is that immigration law—including the practices of detention and deportation, as well as prosecution for re-entry and document fraud—has emerged as a key missing chapter in American criminal law.[1]

Indeed, it is not one chapter but a series of chapters—a book, perhaps many volumes—that would be needed to introduce even the major themes of the interface between crime and immigration policy. For example, one volume alone ought to attend the theoretical and practical issues raised by the massive regulation, enforcement and discretion at the border. Some of the fascinating chapters in that book would include discussion of public and private attitudes and responses to

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[1] Very few criminal law scholars have begun to explore the intersection of criminal law and immigration law. *See, e.g.*, Marc L. Miller, Introduction to Symposium, *Immigration Law: Assessing New Immigration Enforcement Strategies and the Criminalization of Migration*, 51 EMORY L.J. 963 (2002); Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?*, 51 EMORY L.J. 1059 (2002); Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131 (2002) (In this case, Professor Wright is a criminal law and procedure scholar, while Professor Taylor specializes in immigration law.).

border crossing,[2] the debates over physical,[3] technological and institutional[4] responses to border crossing, and the interplay between economic and immigration policy.[5] Teachers of criminal procedure are remiss if they do not have at least a passing familiarity with the distinct rules that govern search and seizure law as it relates to border enforcement.

Another volume should explore the interplay of immigration and terror policies and, in particular, assess the historical patterns of the United States's response to threats on the basis of country, ethnic and religious origins.[6] The comparisons to the problem of "racial profiling" in the stops of motorists on highways and the use of so-called administrative searches are obvious, but the national security justifications presented in the immigration enforcement context significantly change the analysis of these issues. As is also true with all border enforcement issues, the law enforcement practices at our national borders present classic criminal procedure issues that can affect everyone, not only immigrants.

Then there are chapters on the United States's response and dimensions of human rights—the response to claims of political asylum,[7] the special issues of minors who enter the country alone,[8] the many dimensions of human trafficking and prostitution,[9] and regulations and laws creating a climate hostile to immigrants, legal and illegal.[10] Scholars whose research and teaching interests include conditions of confinement, juvenile law, international criminal law, or

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[2] There is a debate over whether illegal entry is or ought to be a crime. But few would doubt that alien smuggling and drug smuggling that blend with immigration violations should be crimes.

[3] Topics would include the controversial building of a fence between along the country's southern border. *See* Spencer S. Hsu, *In Border Fence's Path, Congressional Roadblocks*, WASH. POST, Oct. 6, 2006, at A-1 (addressing efforts to block building of fence). In a more high-tech vein, the subjects of security cameras, motion sensors, remote sensing, etc., deserve study.

[4] Under this chapter would be the use of troops and the *posse comitatus* limitation as well as the deployment of the national guard.

[5] For a comprehensive study of the economic impact of immigration on a state with a high population of immigrants, see KEVIN F. MCCARTHY & GEORGES VERNEZ, IMMIGRATION IN A CHANGING ECONOMY: CALIFORNIA'S EXPERIENCE (1997).

[6] The internment of Japanese Americans in 1940s comes to mind. More recently, the rounding up of undocumented Muslim men after 9/11 is the obvious example.

[7] *See generally* Susan Tiefenbrun, *The Saga of Susannah—A U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Protection Act of 2000*, 2002 UTAH L. REV. 107 (2002).

[8] *See generally* Carolyn J. Seugling, *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*, 37 VAND. J. TRANSNAT'L L. 861 (2004).

[9] Federal criminal law scholars are already familiar with other cross-border crimes such as drug smuggling and money laundering. The smuggling of human beings against their will for purposes of prostitution is just another form of cross-border crime. So, too, is the practice of smuggling people into the United States for a fee.

[10] Here, we could include English-only laws and laws that penalize landlords for renting property to undocumented persons.

federal criminal law would do well to turn their attention to the relevant legal issues presented in these areas of immigration regulation.

The chapter I will address today is at first glance less graphic than some of the issues I have just mentioned. I focus here on the many millions of long-term residents of the United States who for one reason or another do not have citizenship, legal residency or a visa.[11] The sheer volume of people without legal residency status and the changes in law enforcement policy regarding persons found within national borders—as opposed to those found in transit while crossing the border—have serious criminal law implications. Current policies signal a change in the role of state and local police officers and their relations with immigrant communities. The integration of federal immigration enforcement into local criminal law enforcement also dramatically affects a defense attorney's responsibilities in representing immigrants as even a minor crime can have dramatic consequences. The use of state criminal justice processing systems to ferret out defendants without legal residency also alters the nature of a prosecutor's plea bargaining position in those cases, not to mention the sentencing authority of a trial judge. Finally, the use of criminal prosecution for federal crimes related to immigration violations—a blunt tool previously used judiciously for "real" criminals—is now increasingly used in cases involving individuals attempting to return to their families after deportation or who purchase phony documents for use in obtaining employment.

The sum effect of these enforcement activities is to put millions of hard-working immigrants in fear of all law enforcement and in jeopardy of criminal prosecution on account of their undocumented status. The breakup of families due to the detention, deportation, and possible prosecution of family members also creates grave humanitarian issues.

II. VIGOROUS IMMIGRATION ENFORCEMENT AND THE GROWING INTERSECTION OF IMMIGRATION AND CRIMINAL LAW

Although the current plight of long-term undocumented residents involves people from many parts of the world, it is overwhelmingly a story about Latino people—men, women, and children. The vast majority of people living in the United States without either legal authorization or United States citizenship are citizens of Mexico and other Latin American countries.[12] As a group, they are decent, hard-working people, and many have been in this country for many years.

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[11] According to the Pew Hispanic Center, "As of March 2005, the undocumented population has reached nearly 11 million including more than 6 million Mexicans, assuming the same rate of growth as in recent years." JEFFREY S. PASSEL, ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION, 1 (Pew Hispanic Center 2005), *available at* http://pewhispanic.org/files//reports/44.pdf. The report also finds that "[a]lthough most undocumented migrants are young adults, there is also a sizeable childhood population. About one-sixth of the population—some 1.7 million people—is under 18 years of age." *Id.*

[12] *Id.* at 2.

They have often raised their American-citizen children while working tough jobs to support their families here and in their native countries.[13] They have served in the United States military,[14] owned businesses and other property, and generally built thriving communities.

Yet today such people live with fear. I hope today to shed some light on the fact that these people now often find themselves thrust into a process that has all the features of a criminal prosecution. Indeed, in the end, they are likely to end up being prosecuted for a federal crime. There are two main avenues by which Latinos who have been long-term residents of the United States now find themselves behind bars in immigration detention centers—the commission of minor crimes and worksite enforcement raids.

Once Latinos are caught in the immigration enforcement net, they are then incarcerated in detention centers pending hearings at which a judge determines whether they can stay in the United States or must be returned to their native

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[13] *See, e.g.*, Geri Smith, *Channeling the Remittance Flood*, BUS. WK., Dec. 28, 2005, *available at*, http://www.businessweek.com/bwdaily/dnflash/dec2005/nf20051228_4272.htm?chan=search (noting that Mexicans living in the U.S. sent approximately $20 billion to Mexico in 2005 and telling the story of a married couple with children who regularly send money from their jobs in Iowa to the husband's mother in Mexico City).

[14] As of May 2006, it was estimated that there were approximately 68,711 non-citizens in the United States military, accounting for approximately five percent of the total number of enlisted persons. Laura Barker & Jeanne Batalova, *The Foreign Born in the Armed Services*, Migration Policy Institute, Jan. 15, 2007, *available at* http://www.migrationinformation.org/USfocus/display.cfm?ID=572. Ten percent of that total is comprised of Hispanic persons. *Id.*

Non-citizens are among the casualties of the current conflicts in Iraq and Afghanistan. As of March 2004, for example, six soldiers, ten Marines and one sailor who were not American citizens had lost their lives in Operation Iraqi Freedom. *See* Donna Miles, *Posthumous Citizenships on Fast Track, Include Family Benefits*, U.S. Dep't of Defense, Mar. 5, 2004, http://www.defenselink.mil/news/newsarticle.aspx?id=27122. The military grants posthumous citizenship to certain non-citizens killed in action who die fighting on behalf of the United States. Among those granted posthumous citizenship was U.S. Army Pvt. Rey David Cuervo, a 24-year-old scout with the 1st Squadron, 2nd Armored Cavalry Regiment, killed in Baghdad on December 28, 2003, when an improvised explosive device hit his vehicle. Cuervo, a native of Mexico, had lived in Texas since he was six years old. Friends said he had planned to attain U.S. citizenship after returning from Iraq. *Id.*

Non-citizens also have fought on behalf of the United States in previous conflicts, some with great distinction. For example, during World War II, U.S. Army Staff Sgt. Macario Garcia, a citizen of Mexico, saved the lives of the men in his squad by single-handedly assaulting two enemy machine gun emplacements, although painfully wounded himself. In the process, he killed six enemy soldiers and captured four more. On August 23, 1945, he became the third Hispanic recipient of our nation's highest award for valor, the Congressional Medal of Honor, bestowed by President Truman. *See* Hispanic Online's Hispanic Heritage Plaza, http://www.hispaniconline.com/hh02/history_heritage_hisp_medal_of_honor_garcia.html (last visited Dec. 6, 2007); Staff Seargant Macario Garcia, http://mx.geocities.com/castanosmx/mgarcia-i.html (last visited Dec. 6, 2007). *See* Michael A. Olivas, *The "Trial of the Century" that Never Was: Staff Sgt. Macario Garcia, the Congressional Medal of Honor, and the Oasis Café*, in WWII LATINA/O CULTURAL CITIZENSHIP (M. Rivas-Rodriguez, ed., Austin:Univ. of Tex. Press 2007).

countries. The horrific conditions of confinement in immigration detention centers (what one author has dubbed "the American gulag"[15]) and lack of rights at their immigration hearings do not resemble anything a criminal lawyer in a civilized democracy would recognize. The undocumented person goes through a process that has all the earmarks of our criminal justice system, except that it operates in an "Alice in Wonderland" type of inhumane and inefficient manner, explicitly denying basic constitutional rights[16] and rarely relying on humanitarian reasons to allow individuals to remain in the United States.[17]

Not surprisingly, immigration hearings usually result in a detainee's exile from the place she has come to know as "home."[18] The exile of so many long-term residents does not change the human reality that a large number of them will attempt to return to their homes and risk federal felony prosecution in the process. The story often ends with a federal criminal conviction when an exiled resident attempts to return to her home and family. These new policies thus guarantee a flood of new convictions over time.

The conviction, incarceration, and subsequent re-deportation of undocumented Latinos is the closing scene of the story of how America is purging undocumented Latinos and others from its territory. The sheer numbers of individuals affected by the new emphasis on criminal prosecution of undocumented persons make it incumbent on scholars to study and teach the ways in which immigration and criminal law increasingly intersect.[19]

A review of the website of the Department of Homeland Security's Immigration and Customs Enforcement ("ICE") fairly documents that some of the federal enforcement of our immigration laws does directly serve the purpose of protecting our national security by ridding the country of dangerous criminals and intercepting individuals who make their living smuggling undocumented people

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[15] *See* MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS (2004) (detailing the poor conditions of confinement in America's immigration detention centers).

[16] The lack of due process rights and the right to counsel at immigration hearings is beyond the scope of this article. For discussions of these topics, see David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003 (2002); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000).

[17] *See* Smith, *infra* note 24, at 770–81 (detailing immigration law system that restricts discretionary relief from removal, discourages immigrants from applying for discretionary relief, and restricts judicial review).

[18] In almost every case, individuals so detained are eventually deported. *See* Demleitner, *supra* note 1, at 1063 (noting that expanded grounds for deportation has led to dramatic increase in numbers of people deported reaching more than 70,000 in 2001); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 652 (2004) (noting that "[d]eportation is now often a virtually automatic consequence of a non-citizen's criminal conviction for even a minor state misdemeanor").

[19] To further complicate matters, family law is also implicated in many of the cases involving immigration and criminal issues.

and contraband items into the country.[20] I do not doubt that much of the illegal activity related to immigration law calls for a law enforcement response that includes criminal prosecution. As regards this type of law enforcement, I applaud ICE and the good work that its agents do in capturing and prosecuting the true criminals infiltrating our borders. But this type of enforcement is by no means the focus or goal of current ICE and national prosecution policy.

The recent surge of deportations and prosecutions of undocumented Latino residents are the result of new immigration enforcement priorities that are ostensibly pursued as part of the federal government's anti-terror effort.[21] Although public officials make the claim that the current treatment of undocumented residents is a matter of national security, such treatment has little in fact to do with national security, at least national security of the kind that has defined public discourse since September 11, 2001.[22]

Long-term residents were previously much less likely to come to the attention of immigration authorities. Therefore, they were free to live their lives in the United States without fear of detection and deportation. Today, however, there is a more vigorous effort to discover persons living illegally within U.S. borders, an effort that gained momentum after the tragedy of 9/11 and after the reorganization and renaming of the former "Immigration and Naturalization Service" (INS) into what is now the Bureau of "Immigration and Customs Enforcement" (ICE). The following sections outline the two primary ways in which Latino immigrants find themselves at risk of prosecution and deportation.

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[20] ICE's webpages regularly publicize the capture of drug smugglers, child pornography smugglers, and other dangerous criminals that ICE agents have arrested. *See, e.g.*, U.S. Immigration and Customs Enforcement, Public Information: ICE News Media Gallery, http://www.ice.gov/pi/news/multimedia/archive/index.htm (last visited Dec. 6, 2007).

[21] Important changes in the law that facilitate the pursuit of these new enforcement priorities actually came about years before the attacks of September 11th. The Immigration and Nationality Act of 1996 "changed some fundamental elements of the law's approach." Several changes reduced the protections afforded to noncitizens (including noncitizens who have legal residency status) who are present in the United States (as opposed to those caught crossing the border). *See* ALEINIKOFF, MARTIN & MOTOMURA, *infra* note 33, at 536 (addressing the Immigration and Naturalization Act of 1996, implemented by regulations at 8 C.F.R. §§ 101(a)(13), 212, 235(a)(1), 241).

[22] The TRACFED research service of Syracuse University concluded in a recent report that:

> [T]he detailed data about [Homeland Security's] criminal [immigration] enforcement effort makes clear, terrorism cases in fact make up only a tiny fraction of its actual work. Overwhelmingly, the DHS is involved in the prosecution of traditional kinds of immigration cases that appear to have very little to do with intercepting bombers. In fact, only seven of the 37,765 prosecutions filed arising out its immigration enforcement were classified as involving international terrorism during FY 2004, and only one out of 20,771 prosecutions involved international terrorism during FY 2003.

TRAC DHS, *Immigration Enforcement, New Findings*, 2005, *available at* http://trac.syr.edu/tracins/latest/131/.

A. *Removal of Undocumented Latinos Who Commit Minor Crimes: The Story of Luisa Nelly Ortiz*[23]

Detention in immigration centers is often the first of a series of events that quite predictably ends with the prosecution of immigrants for federal offenses, followed by their punishment and subsequent re-deportation. The past few years have seen a steady increase in the numbers of undocumented individuals who wind up in immigration detention centers. By one account, "[f]rom 1994 to 2001, the detention population more than tripled from 5532 to 19,533," and in 2002, approximately 202,000 non-citizens were detained overall.[24]

This increase can be attributed in large part to the increased involvement of local law enforcement in federal immigration enforcement. Individuals arrested and prosecuted are now systematically being screened to determine their immigration status in many jurisdictions, and non-citizens are being reported to ICE.[25] Thus, upon completion of the criminal process in state courts, undocumented individuals are typically transferred into the custody of federal immigration officials for hearings to determine whether they can remain in the country or must be returned to their native countries.

Although their involvement in the criminal justice system may precipitate their entry into the immigration detention system, people held for immigration violations are not charged with a crime as such. Instead, the courts adhere to the position that deportation is not punishment,[26] and their cases are handled through the immigration courts that are considered civil in nature. Thus, they are (at least in theory) not subject to punishment and stigmatization. They are merely "detained" through a civil immigration process for possible "removal," previously known as deportation.

In order to immerse myself in the real world of immigration detention, I asked my colleagues in the Immigration Clinic of the University of Houston Law Center to arrange for me to visit with some incarcerated individuals at a federal immigration detention center in Houston. I visited the women's detention center operated by Corrections Corporation of America, an ordinary-looking, one-story building surrounded by a high fence with barbed wire, looking every inch like some of the prisons that I have toured with my students in the past. Just inside the front door, there was a small waiting area filled that day with Spanish-speaking

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[23] The detainee's name and some minor details of her story have been changed to protect her privacy.

[24] *See* James F. Smith, *United States Immigration Law as We Know It:* El Clandestino, *The American Gulag, Rounding Up the Usual Suspects*, 38 U.C. DAVIS L. REV. 747, 787–88 (2005).

[25] *See, e.g.*, Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 91–94 (2005); Kanstroom, *supra* note 18, at 666.; Michael M. Hethmon, *The Chimera and the Cop: Local Enforcement of Federal Immigration Law*, 8 D.C. L. REV. 83 (2004).

[26] *See* Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) ("nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want").

Latino adults and a few children waiting to see their wives, mothers, and sisters inside.

We were led into an interview room where we met with some of the women. This is the story of one of those women: Luisa "Nelly" Ortiz, who is 68 years old. Nelly came to Houston in 1989 when she was 50 years old. She traveled by bus from her native country of El Salvador, entering legally with a tourist visa, to escape the ravages of war in El Salvador. U.S. law provided an opportunity for her to gain legal residency status.[27] Unfortunately, Nelly did not avail herself of the opportunity to obtain legal residency.[28]

During her residency in Houston, Nelly, like many immigrants, showed an entrepreneurial spirit and eventually became a small shop owner on Houston's southwest side where many immigrant Latinos live. For decades, she operated a small variety store. She has one son, Edwin, who lives in Houston and visits her regularly. Prior to her incarceration, she owned two houses, one of which was her home and the other which she rented to tenants. Today, Nelly is old, worn down from years of hard work and medical problems.[29]

In all her years in Houston, Nelly had never had any trouble with the law. In 2004, however, she ran into trouble with a cousin who asked her to sell a diamond ring in her store. According to Nelly, the cousin asked Nelly to try to sell the ring, and if she could not sell it, she should just sell it at a pawn shop. Nelly eventually pawned the ring. As the story goes, the cousin later asked for the return of the ring and was angered to learn it had been pawned. The ring was allegedly worth $10,000, although there was never any proof of this fact.

The matter might have been handled by filing a civil lawsuit, but it was not. The relative called the police instead, and theft charges were filed. Most criminal cases of this type, especially when committed by a first offender, can be resolved by pleading guilty and agreeing to pay restitution. In Nelly's case, after a fifteen-minute consultation with a court-appointed criminal lawyer, she took her lawyer's advice and pled guilty to a felony, agreeing to pay $10,000 in restitution.[30] Aside

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[27] Recognizing that refugees from Nicaragua, El Salvador, and other Center American countries had entered to escape war-torn countries, Congress in 1997 permitted such individuals to attain legal residency. The Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), Pub. L. No. 105-100, § 203, 111 Stat. 2193, 2197 (1997).

[28] Her immigration lawyer informed me that she had begun the process at one point, but for some reason it had not been completed. In addition, she might have applied for asylum as a refugee of war upon entry to the United States, but that avenue was also not pursued. Finally, she arrived too late to be eligible to obtain legal residency status under the Immigration Reform and Control Act of 1986 that granted legal residency to approximately 15 million long-term undocumented people. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

[29] She suffers from diabetes, poor eyesight, and possibly Alzheimer's disease as well. Her immigration lawyer suspects that her mental condition is deteriorating because of her incarceration.

[30] Nelly's immigration lawyer expressed frustration that her criminal lawyer did not challenge the valuation of the ring which affected the severity of the conviction and the amount of restitution. It is hard to imagine that the diamond ring could have had such a great value given the drastic depreciation that jewelry experiences after initial purchase.

from providing her shoddy representation in the criminal law case, the lawyer also obviously did not realize the immigration consequences of pleading guilty for a client like Nelly. The judge sentenced her to a term of probation and required her to pay $250 per month in restitution as a condition of her probation.

Two years later, when this amount proved to be more than she could pay, she was arrested for violating the terms of her probation. Nelly spent four months in the county jail awaiting a hearing on the violation. Ultimately, this criminal proceeding was dismissed, but she was then transferred to an immigration detention facility for possible deportation.

As Nelly's case demonstrates, for a person without legal residency status—and even for those who *do* have legal residency[31]—any run-in with the police now has dramatically more serious implications than is true for persons with legal residency. It is hard to exaggerate the severity of the consequences for Nelly. After 9/11, local law enforcement in many jurisdictions has become vigilant in screening individuals who are incarcerated to determine whether they are United States citizens, and they have systematized the reporting of offenders who are not citizens to federal immigration officials.[32] Thus, the prospect of spending any time in a county jail means that any non-citizen now stands to be deported in addition to being criminally punished. Any chance that such a person might have obtained legal residency or citizenship will also likely be extinguished on account of the conviction.[33]

Nelly's pro bono immigration attorney tells me that he expects the immigration judge to order her removed (deported).[34] This elderly and infirm woman has been incarcerated for seven months—three months in an immigration detention center, following four months in the county jail on the probation violation charge. She has lost virtually all of the assets she owned before incarceration. She now faces being returned to El Salvador, a country to which she no longer has any real ties. She has no idea how she will survive alone in El Salvador with no income or family to care for her. At her age and with her poor

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[31] Legal residents can lose their status and become subject to removal upon conviction for certain criminal offenses. *See* 8 U.S.C. § 1227 (1988).

[32] *See supra* note 21.

[33] In Nelly's case, a conviction for a theft offense is usually considered a "crime of moral turpitude" and it disqualifies her from obtaining legal residency under the law granting legal residency to Central Americans. *See supra* note 27. As it turns out, it does not make her deportable because the crime occurred too many years after her *legal* admission into the country. However, the fact that she overstayed her tourist visa does make her subject to removal. *See generally* THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP, PROCESS AND POLICY, 621 (5TH ed. 2003).

[34] When I last spoke to the lawyer, he said that if he could find a doctor willing to testify to Nelly's Alzheimer's disease, then he could probably get the Chief of ICE to put her case on a "deferred action," meaning that they would not execute the removal order due to her inability to assist in her own defense because of her mental condition. Without the funds to hire a psychiatrist, however, he has been unable to retain a psychiatrist's services. With only one week remaining before her hearing, he holds out little hope of preventing Nelly's deportation.

physical and mental condition, removal to El Salvador likely amounts to a death sentence.

Nelly's story offers many lessons for the criminal law professor, not to mention criminal law practitioners. First, it highlights the fact that the government has embarked upon a concerted effort to use pre-existing bureaucratic processes, such as the criminal justice system, as a means of ferreting out undocumented persons. This explicit linkage between the two systems means that criminal law must be practiced in conjunction with immigration law. Defense lawyers should screen their clients' residency status as a matter of routine practice. The failure to do so is nothing less than malpractice.

For non-citizen clients, a defense attorney must determine the immigration consequences of a criminal conviction and the consequences attending the various punishment options that might be available. The immigration consequences of various types of convictions and punishments are not intuitive—it is not necessarily true that a minor crime or a non-custodial punishment will not make a person subject to removal. A genuine expertise in immigration law is required. Defense attorneys must either master immigration law or develop relationships with immigration lawyers for purposes of consultation.

Moreover, for those interested in the collateral consequences of sentencing practices, the immigration implications of sentencing should be an obvious topic of interest as well.[35] If deportation is a routine outcome following criminal prosecutions involving non-citizens, should the fact that the defendant will be deported be taken into account at sentencing to reduce the punishment? In addition, there is the question of whether a person's undocumented status should affect their eligibility for various criminal sentencing alternatives.[36]

Nelly's story also reminds us of the sad fact that the poor so often receive inferior legal services by court-appointed lawyers, and those systemic failures are more pronounced for undocumented persons who suffer for it in the criminal system as well as the immigration system. Any discussion of the right to counsel and ineffective assistance of counsel could be enhanced by focusing on the perils of immigration consequences for the clients of unwary criminal practitioners.

B. *Removal of Undocumented Latino Workers: Worksite Enforcement Raids*

In addition to the linking of the criminal law and immigration law networks, a second reason for the growing population of Latino detainees is the aggressive use of "worksite enforcement" raids now regularly conducted by ICE. In these worksite raids, government agents take control of the premises and round up

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[35] *See, e.g.*, Demleitner, *supra* note 1 (addressing immigration enforcement benefits used as a means of obtaining cooperation from removable immigrants).

[36] *See, e.g.*, Mitchell Ignatoff, *Way Off the Mark in Denying PTI to Undocumented Aliens*, 187 N.J. L.J. 395 (2007) (arguing that a New Jersey Appellate Court was wrong in denying an undocumented criminal defendant eligibility for pre-trial intervention program).

undocumented Latino workers. The operations more closely resemble police activity in arresting criminals than civil law enforcement. Agents wearing vests that read "ICE Police" place handcuffs on persons suspected of immigration violations, load them into police vans or buses, and lead them to a place that looks just like a jail (and often *is* a jail that has contracted with ICE to "detain" people[37]) where they will await their hearings. Indeed, the nature of these worksite raids, involving a heavy police presence (approximately 100 agents in a recent raid) combined with the use of helicopter surveillance to freeze a worksite, more closely resembles a large-scale police operation, such as a SWAT team operation, than normal criminal law enforcement. The difference between this law enforcement effort and ordinary police work is that most of the arrested individuals are caught committing the acts of *existing* in the country and *working* without proper documentation.

The increase in such enforcement since 2002 is remarkable. The numbers of undocumented workers "arrested"[38] during worksite enforcement raids and detained on civil immigration violations has increased over seven-fold from 2002 to 2006, from 485 to 3667.[39] Of course, these numbers still represent a small percentage of the millions of undocumented workers in the United States, but the government has given every indication of its intent to step up such activities.[40] According to the ICE website, the purpose of this change in enforcement priorities relates to homeland security and terrorism: "U.S. Immigration and Customs Enforcement (ICE) considers worksite enforcement part of an effective and ongoing effort to keep our homeland safe. ICE's Worksite Enforcement Unit fights illegal immigration to mitigate possible threats posed by unauthorized workers employed in secure areas of our nation's critical infrastructure."[41]

However, many of these raids do not appear to have any connection to national security or critical infrastructure. In Houston, for example, a large contingent of ICE agents seized control of a waste management worksite and

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[37] *See supra* note 15.

[38] ICE uses the word "arrest" in connection with the detention of immigrants on administrative immigration violations. *See* U.S. Immigration and Customs Enforcement, *Worksite Enforcement*, Oct. 15, 2007, http://www.ice.gov/pi/news/factsheets/worksite.htm. Of course, the individuals are detained on suspicion of civil, not criminal, violations.

[39] *Id.*

[40] In a statement before the U.S. House of Representatives Committee on Ways and Means, the Assistant Secretary of ICE said, "[w]orksite enforcement is a top priority for the Department [of Homeland Security] and the Administration." *See Impacts of Border Security and Immigration on Ways and Means Programs: Hearing Before the H. Comm. on Ways and Means*, 109th Cong. 76 (2006) (statement of The Honorable Julie L. Myers, Assistant Secretary, U.S. Immigration and Customs Enforcement, U.S. Dep't of Homeland Security).

[41] U.S. Immigration and Customs Enforcement, Public Information, Topics of Interest, http://www.ice.gov/pi/topics/index.htm (last visited Dec. 6, 2007).

arrested 53 undocumented workers in an early morning raid.[42] ICE arrested 245 employees of an independent contractor that supplies cleaning services for Wal-Mart stores in a nationwide sweep of the company.[43] Construction workers and workers shelving merchandise have similarly been arrested in raids.[44] None of these cases indicate any direct connection to homeland security or terrorism.

The largest raid to date nabbed 1297 undocumented workers at Swift & Co. meatpacking plants in six states.[45] Since meat is an important part of the food supply, one can see the link to protecting the "nation's critical infrastructure."[46] Still, the raid does not appear to be premised on any suspicions of terrorist activity.

ICE representatives have also justified the raids as a way of *protecting* immigrants who seek to enter the United States illegally:

> [I]f we do not continue to make greater strides in this area, immigrants will continue to risk their lives for the prospect of a well-paying job in this country, often by turning to smugglers who exploit and force them to live in the shadows once they arrive . . . . To be clear, the magnet of employment is fueling illegal immigration . . . .[47]

In other words, Latinos currently working in "well-paying jobs in this country" should be purged in order to send a message to others who would risk their lives trying to follow in their footsteps. Note, too, that it is not a concern about the infiltration of criminals or terrorists that drives the policymaking but rather a generalized desire to stop people who seek to enter for purposes of work.

Besides losing their jobs and facing removal, many of the workers being rounded up in raids now also face the prospect of federal prosecution for having used someone else's Social Security information to obtain the job. Federal

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[42] *See* Kevin Moran & Susan Carroll, *Feds Detain 53 Workers in Immigration Roundup: Waste Company Says it was Using a Government Program to Screen the Applicants*, HOUS. CHRON., Feb. 1 2007, at B-1.

[43] *See* U.S. Immigration and Customs Enforcement, News Release, *ICE Provides $2.5 Million to Pennsylvania Law Enforcement Agencies for their Assistance in Immigration Investigation of Wal-Mart and Contract Companies*, Aug. 14, 2006, http://www.ice.gov/pi/news/newsreleases/articles/060814dc.htm.

[44] *See* Inside ICE Newsletter, *U.S. Immigration and Customs Enforcement, ICE Arrests 125 Illegal Aliens at Wal-Mart Construction Site*, http://www.ice.gov/pi/news/insideice/articles/insideice_120505_web6.htm (last visited Dec. 6, 2007); U.S. Immigration and Customs Enforcement, News Release, *14 Illegal Aliens Arrested Working at Wal-Mart Distribution Center by ICE Special Agents*, Dec. 20, 2005, http://www.ice.gov/pi/news/newsreleases/articles/051220northplatte.htm.

[45] *See* Jennifer Talhelm, *Senators Meet on Recent Immigration Raid*, WASH. POST, Jan. 23, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/01/23/AR2007012300404.html.

[46] *See* Topics of Interest, *supra* note 41.

[47] *See Impacts of Border Security and Immigration on Ways and Means Programs*, *supra* note 40.

prosecutors announced the indictment of 274 of the workers arrested in the raid of the Swift & Co. meatpacking plants for using other people's Social Security numbers.[48] One U.S. Attorney has described this crime in rather melodramatic terms suggesting the workers had used the Social Security numbers in order to steal money from innocent people: "It is a serious federal crime to hijack and steal a citizen's good name and credit to illegally stay in the United States. These federal indictments demonstrate federal law enforcement's commitment to address rampant identity theft and immigration fraud."[49]

A more accurate description of this activity, in my view, would be that people desperate to work in the United States are sold Social Security cards and other documents for large sums of money, which they then use to get jobs. They work hard and live their lives in an otherwise law-abiding manner, paying part of their earnings into another person's Social Security account.[50] Eventually, the Social Security Administration reconciles those accounts, and the money paid by undocumented persons goes into a general account. The question is not how many undocumented workers are bilking Americans by using their social security numbers, but how many Americans will benefit from the earnings of undocumented workers. On the other hand, the use of another's Social Security number is not a matter to be ignored by law enforcement as it has the potential to lead to fraudulent activities that can harm true number holder. Still it is not the case that the immigrants using these numbers for purposes of obtaining work are committing any act of theft in the process.

The dual role of ICE agents as federal immigration law enforcers as well as criminal law enforcers should be noted by criminal law scholars and teachers as a topic of interest. The use of these worksite enforcement raids raise many fascinating Fourth Amendment issues relating to the legal justification for the seizure of places of employment and of the employees, as well as Fifth Amendment issues related to the subsequent questioning of employees.

Another series of interesting topics of study and discussion also lurk in this area of worksite enforcement raids. Is the criminalization of worker migration good legal policy? If so, what type of punishment is appropriate for such offenses? In addition to the prosecutions of undocumented workers who use social security

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[48] *See* U.S. Immigration and Customs Enforcement, News Release, *ICE Makes Additional Criminal Arrests at Swift & Company Plants*, July 11, 2007, http://www.ice.gov/pi/news/newsreleases/articles/070711washingtondc.htm.

[49] U.S. Immigration and Customs Enforcement, News Release, *53 Former Employees at Swift & Company Meatpacking Plant in Cactus, Texas, Charged in Federal Indictments*, Jan. 10, 2007, http://www.ice.gov/pi/news/newsreleases/articles/070110amarillo.htm (quoting U.S. Attorney Richard B. Roper, Northern District of Texas).

[50] Derrick Z. Jackson, Op-Ed, *Undocumented Workers Contribute Plenty*, BOSTON GLOBE, Apr. 12, 2006, at A13, *available at* http://www.boston.com/news/globe/editorial_opinion/oped/articles/2006/04/12/undocumented_workers_contribute_plenty (reporting that in 2003 undocumented workers paid approximately $7 billion dollars into Social Security that they will not collect).

cards belonging to others, there are also charges brought against employers, usually for harboring illegal aliens.[51]

Other issues include the law enforcement criteria by which certain employers are chosen for investigation. Might there be any concerns about selective enforcement or racial profiling? Does having a disproportionately high percentage of Latino workers bring greater suspicion on a worksite? Will this lead to discrimination against Latino workers, whether they are citizens, legal residents, or undocumented?

Worksite enforcement raids raise other questions about the greater role being played by state and local law enforcement in immigration enforcement. At present, ICE encourages the assistance of state and local law enforcement in discovering worksites that hire undocumented workers. ICE provides financial rewards to state and local agencies that assist ICE in discovering worksites where undocumented workers are employed. A recent raid of a company contracted by Wal-Mart to do its cleaning led to a pay out of $2.5 million for Pennsylvania law enforcement agencies involved in the investigation.[52] Is it beyond a local law enforcement agency's jurisdiction to investigate federal immigration violations?[53] Does the availability of large monetary rewards to state and local law enforcement for assisting federal immigration officials skew the enforcement priorities of state and local agencies?[54]

In short, as ordinary policing work becomes more intertwined with federal immigration enforcement, more issues of interest to criminal law practitioners, scholars and teachers present themselves. The current attempt to purge undocumented Latino workers from within our borders provides a vast array of issues pertaining both to criminal procedure as well as substantive criminal law.

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[51] *See, e.g.*, U.S. Immigration and Customs Enforcement, *Worksite Enforcement*, Aug. 14, 2007, http://www.ice.gov/pi/news/factsheets/worksite_operations.htm (detailing numerous worksite raids and charges brought against employers for harboring illegal aliens, which is a violation of 8 U.S.C. § 1324 & 18 U.S.C. § 2).

[52] *See* U.S. Immigration and Customs Enforcement, News Release, *ICE Provides $2.5 Million to Pennsylvania Law Enforcement Agencies for their Assistance in Immigration Investigation of Wal-Mart and Contract Companies*, Aug. 14, 2006, http://www.ice.gov/pi/news/newsreleases/articles/060814dc.htm.

[53] For two quite distinct viewpoints, see Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005); and Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, ___ S.M.U. L. REV. ___ (forthcoming 2008).

[54] During the days of the "War on Drugs," I raised similar concerns regarding the so-called "equitable sharing" program by which the federal government enticed state and local law enforcement to cooperate in the investigation of drug cases leading to asset forfeitures. *See* Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159 (1995).

III. THE REST OF THE STORY: DEPORTED IMMIGRANTS RETURN ONLY TO BECOME FEDERAL INMATES AND THEN DEPORTED ANEW

About two years ago, I accompanied the students in my sentencing seminar to my annual field trip to the federal courthouse to attend a sentencing hearing as part of our study of the Federal Sentencing Guidelines. The guidelines specialists in the Federal Probation Office typically select a few interesting hearings for the class to attend. On this particular day, we witnessed the sentencing of a Latino man in his mid-twenties convicted of re-entry after deportation.[55] The judge explained to the defendant that he was required to sentence him to a term of approximately five years because of his prior criminal record.[56] It seems that this man had been brought by his parents from Mexico to the Houston area when he was one month old. He had grown up in the Houston area, graduating from a Houston high school. Since then he had been gainfully employed. Not unlike a lot of people in society, this young man had some minor run-ins with the law over the past few years. He had driven under the influence of alcohol on two occasions and committed a simple assault on a girlfriend during a dispute that got out-of-hand. For most offenders convicted of these offenses the punishment is relatively light—fines, probation, and perhaps a short period in jail. For this young man, the real punishment was deportation. By the time we learned of his case that day in federal court, he had already attempted to return home after deportation. Now he stood convicted of a felony and facing a sentence of five years in prison because his underlying misdemeanors were treated as an "aggravated felony."[57]

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[55] 8 U.S.C. § 1326.

[56] The basic statutory maximum penalty for re-entry after deportation is a fine and imprisonment for not more than two years, or both. However, with regard to an alien whose "removal" was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), the statutory maximum term of imprisonment is ten years. Moreover, if deportation was subsequent to conviction for an aggravated felony, the statutory maximum term of imprisonment is twenty years. *Id.*

[57] The complicated law of sentencing in immigration cases permits the addition of eight "levels" in one's "base offense level" for purposes of the Federal Sentencing Guidelines calculation of a crime's seriousness if the offender illegally re-entered the country having previously been deportation after the commission of an "aggravated felony." *See* U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(C) (2003). "Aggravated felony" is defined by reference to its definition for purposes of immigration law. The Circuit Courts have defined the term "aggravated felony" to include state misdemeanor convictions if the underlying conduct is included in the list of types of crimes that Congress defined as "aggravated felonies" for purpose of immigration law. *See* Immigration and Naturalization Act § 101(a)(43), 8 U.S.C. § 1101 (2006). Thus, it matters not that a person may have been convicted of a misdemeanor in state court; for purposes of an immigration law determination of deportability, and later for purposes of sentencing upon illegal re-entry after deportation, some misdemeanors can be considered "aggravated felonies." *See, e.g.*, Toledo-Flores v. United States, 149 Fed. App'x 241 (5th Cir. 2005) (per curiam), *cert. dismissed*, 127 S.Ct. 638 (2006) (upholding sentencing increase for illegal re-entry after deportation following aggravated felony based on state misdemeanor for cocaine possession). The Supreme Court has decided that it does not work in the opposite direction—a state felony does not become an "aggravated felony" for purposes of immigration law unless it is also a felony under federal law. In this case, the conduct underlying a

Most people who come across the border without documentation have been deported in the past. When they are intercepted, they can be charged with the felony offense of re-entry after deportation. At present, it is simply not feasible to prosecute all the people caught re-entering the United States. In the San Diego area alone it is reported that:

> [o]f the 565,581 illegal aliens apprehended in fiscal year 1992, the U.S. Attorney prosecuted 245 felony immigration cases and another 5,000 misdemeanors. . . . If every alien apprehended at the border were prosecuted for felony reentry (most are reentering), the size of the entire federal prison system would need to quadruple in a single year based on cases in this one district alone.[58]

Apparently, the federal government may indeed be on a campaign to increase the size of the federal system to accommodate the scores of undocumented persons being convicted of immigration crimes. The Bureau of Justice Statistics reports that from 1995 to 2003, the number of people in prisons who were sentenced for immigration offenses grew 394% from 3420 to 16,903. At present, prisoners in the Federal Bureau of Prisons under sentence for immigration offenses comprise 11.2% of the total inmate population or 20,970 of the 187,241 people in federal prisons.[59] As of 2004, immigration crimes "represent the single largest group of all federal prosecutions, about one third (32%) of the total."[60] By contrast, drugs comprise 27%, and weapons cases account for only 9%.

If the government continues its aggressive campaign to prosecute undocumented persons who re-enter after deportation—in combination with its aggressive deportation of minor criminals and undocumented workers—federal prisons will soon be filled with people who returned to the United States simply because they felt compelled to return to their families here and because they wanted to work.[61]

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drug-related state felony would be considered a misdemeanor under the federal Controlled Substances Act. Thus, it did not qualify as an aggravated felony for immigration law purposes. *See* Lopez v. Gonzales, 127 S. Ct. 625 (2006).

[58] NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 107 (Aspen 2004) (citations omitted).

[59] U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS, STATE OF THE BUREAU 2005, at 51 (2005), *available at* http://www.bop.gov/news/PDFs/sob05.pdf.

[60] *See* TRAC DHS, *supra* note 22. Most of this increase appears to be due to a dramatic surge in prosecutions of misdemeanor cases in the Southern District of Texas. From 2003 to 2004, the number of cases referred for criminal prosecution in this district increased 345%. Most of these cases involved undocumented people caught attempting to cross the border, not re-entry after deportation. *Id.*

[61] *See id.* (reporting a 65% increase in Department of Justice referrals for federal criminal immigration prosecution from 2004 to 2005, with most of the increase in the Southern District of Texas, which saw a 345% increase in that same period).

As long as criminal and immigration systems are increasingly interlinked, undocumented people will lose the security they have long enjoyed to live their lives in relative peace in this country. Nor are they likely to see the police as a protective agency if any encounter with the police can result in their deportation.[62] This means that millions of people will be less inclined to volunteer to cooperate with the police in their investigations, and they will be easy targets for criminals who know that undocumented people are less likely to report their crimes to the police. The chilling effect on the relationship of the Latino community and their police departments reaches beyond the undocumented, too. *All* Latinos will consider themselves subject to additional scrutiny and suspicion, making them less inclined to welcome interactions with the police.

The increase in the number of Latinos being prosecuted in federal court for attempting to return to the United States has brought more attention to some of the sentencing issues that attend these cases. For example, the Supreme Court has recently resolved a circuit court split on the proper definition of an "aggravated felony" for purposes of the illegal re-entry offense.[63] There is also a growing jurisprudence on whether a downward departure from the sentencing guidelines range should be granted to a person who returns after having achieved "cultural assimilation."[64] A final wrinkle is the federal sentencing rule that prohibits the use of supervised release (previously known as probation or parole) for non-citizens convicted of crimes, regardless of their risk of flight.

To date, Congress has been unable to agree on any new immigration reform legislation that might create the possibility of obtaining legal status for these millions of undocumented residents.[65] ICE continues its worksite enforcement sweeps,[66] and the criminal justice systems of some major metropolitan areas continue to screen jail entrants for citizenship and systematically transfer non-citizens into the custody of ICE. Thus, we can expect to see a continuation of the flow of people being prosecuted by federal officials for illegal re-entry after deportation and a further increase in the percentage of the federal prison population that consists of people convicted of immigration violations.

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[62] Anthony Faiola, *Looking the Other Way on Immigrants: Some Cities Buck Federal Policies*, WASH. POST, Apr. 10, 2007, at A01 (reporting that a growing number of cities have refused to allow their police officers to question people about their immigration status, rejecting federal calls to assist in immigration enforcement).

[63] *See supra* note 57.

[64] *See, e.g.*, United States v. Lozano-Alvarez, 226 Fed. App'x 531 (6th Cir. 2007) (citing three circuits—5th, 9th, and 11th—that have recognized cultural assimilation as a cognizable basis for downward departure, but taking no position on the issue).

[65] Jonathan Weisman, *Immigration Bill Dies in Senate: Bipartisan Compromise Fails to Satisfy the Right or the Left*, WASH. POST, June 29, 2007, at A1.

[66] U.S. Immigration and Customs Enforcement, News Release, *ICE Arrests 31 Illegal Workers in Catskill Worksite Enforcement Operation: Men were Doing Construction and Maintenance at a Local Resort*, July 10, 2007, http://www.ice.gov/pi/news/newsreleases/articles/070710albany.htm.

IV. CONCLUSION

I do not propose any grand solutions to the immigration problems this country faces. My concern here is as a scholar, and as a citizen encouraging the open discussion and rational resolution of critical issues of public policy. I would begin by encouraging my colleagues who teach criminal law and procedure to include some discussion of immigration in their courses. For substantive criminal law classes, the use of the criminal justice system to enforce immigration violations raises questions of the criminal/civil divide and the purposes and functions of the criminal law. More generally immigration can help students and faculty focus on the role of the criminal justice system as a tool of social policy. Put another way, immigration is a setting where students can usefully be asked to discuss and examine the role of the criminal justice system as a means of addressing the issue of immigrant laborers.

For criminal procedure classes, the special institutions and rules of detention, adjudication and deportation for undocumented residents are all worthy of attention.

Comparisons between immigration detention and adjudication and criminal adjudication and corrections might have the surprising consequence of making already troubled United States criminal justice systems look relatively good.

The importance of these issues is only likely to increase, and to provoke new chapters, like the implications for our federal system. Now that local law enforcement bureaucracies have implemented systems to screen arrestees to determine whether they have legal residency or citizenship, the local criminal justice systems in this country will probably be linked to federal immigration enforcement for the foreseeable future. It is usually hard to turn back the clock and expect bureaucracies to be *less efficient* in communicating with other law enforcement agencies on what is ultimately a law enforcement matter.

Perhaps, over time, the increasingly close link between criminal justice and immigration will be open for serious reconsideration. For now, reality urges that my criminal justice colleagues and I take much better account of the crime and immigration interface in our role as teachers and scholars. But I would be happier, and I believe our society would be better, if policy moved in the opposite direction. My own perspective is that other than for human and drug trafficking, the criminal laws ought to have little role to play in whatever immigration policies the United States ultimately chooses. Criminal law, I believe, should have as little a role to play in eras of hostility to "illegal immigrants" as it does in eras when a more flexible and welcoming attitude prevails.