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Panel on Federalism in Practice -- National and Local Perspectives on States' Use of Criminal Law to Regulate Undocumented or Unauthorized Migration

Raymond T. Diamond

Louisiana State University Law Center, ray.diamond@law.lsu.edu

Ingrid Eagly

Hiroko Kusuda

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**PANEL ON FEDERALISM IN PRACTICE –
NATIONAL AND LOCAL PERSPECTIVES ON
STATES’ USE OF CRIMINAL LAW TO REGULATE
UNDOCUMENTED OR UNAUTHORIZED
MIGRATION***

In November 2010, the Journal hosted a panel on Federalism in Practice as part of its Fall Symposium. Below is a transcript of the discussion which took place at Loyola University New Orleans College of Law. This transcript consists of the speakers’ remarks along with audience participation and questions. The Journal has attempted to preserve the character and substance of the discussion. While this is not a traditional Article, the Journal felt that it would be fitting to include in our Spring volume.

PROFESSOR ANDREA ARMSTRONG [MODERATOR]: This panel is going to take a slightly different approach to the same issue discussed in the first panel, namely the intersection of state criminal law and immigration law. Instead of presenting prepared papers, we have three fantastic experts on this panel and we’ve asked each of them to reflect for five to ten minutes on the intersection of state criminal law and immigration law from their unique perspectives and then we’ll begin our roundtable discussion. After that point, we’ll also be looking to you, the audience, for questions.

First, let me introduce each of the panelists. Professor Diamond is currently the Jules F. and Frances L. Landry Distinguished Professor of Law at Louisiana State University Law Center. Prior that appointment he was a professor at Tulane University Law School here in New Orleans, where he held the John Koerner Professorship in Law, and was previously the C.J. Morrow Research Professor of Law, and was an Adjunct Professor for African Diaspora Studies. His expertise is widely known and his scholarship has touched on a variety of these issues. What may be interesting for some of you is that his scholarship most recently has looked

* In an effort to preserve the unique character of the panel, the editors have reprinted the text of the speakers’ remarks essentially as delivered. To assist the reader in understanding the text, however, the editors and speakers have provided references to authorities that are central to the debate.

at the Second Amendment and he has been cited by the Supreme Court in its recent Second Amendment jurisprudence.

Next, we will hear from Professor Eagly, who is an Acting Professor of Law at University of California, Los Angeles Law School. She teaches Evidence and the Criminal Defense Clinic. She has an amazing public interest background, working on criminal defense issues and immigration issues, including receiving a Skadden Fellowship to work on immigrant worker rights issues at the Legal Assistance Foundation of Chicago and a Soros Criminal Justice Fellowship to direct a domestic violence program. Her scholarship has also appeared widely in the *UCLA Law Review*, the *Clinical Law Review*, and the *Northwestern University Law Review*.

The last member of our expert panel is Professor Hiroko Kusuda, and she is one of our golden own here at Loyola University of New Orleans. Professor Kusuda is a Clinical Professor of Immigration Law, assisting student attorneys to gain essential skills in representing immigrants before the Immigration Courts, the Board of Immigration Appeals, as well as in the federal courts. She is also a Staff Attorney with the Catholic Legal Immigration Network, which is a subsidiary of the U.S. Conference of Catholic Bishops. She coordinates, in that capacity, a state-wide detention project which includes direct representation of detained immigrants, as well as presentations on legal rights of immigrants. She's is a member of the Executive Board for the American Immigration Lawyers Association and is a frequent guest speaker on the pressing issues of immigration.

We'll hear from each of the experts in the order they were introduced and then begin our discussion. Professor Diamond?

PROFESSOR RAYMOND T. DIAMOND: Well, thank you very much, and I hope my time doesn't begin right away, because I need to say "thank you" first, to the Journal for having this symposium; secondly, to Professor Medina for inviting me; and, thirdly, to all of you for welcoming me back someplace where I feel at home. You may know that I have taught here at Loyola as an adjunct on a couple of occasions, but what I know you don't know is that when I studied for the bar exam way back in the last millennium, it was in Loyola's library that I studied, so I always feel very at home when I come back to Loyola.

What I want to talk about today is in perhaps equal parts, first about practical considerations, but secondly about theory. There is a practical consideration here with respect to the police enforcement of SB 1070. It unavoidably subjects persons lawfully in the country to police stops.¹ It is

1. See ARIZ. REV. STAT. § 11-1051(B) (2010) ("For any lawful stop, detention or arrest made

undoubtedly true that police stop people all the time. So the question is: What is different about this particular burden, that when a person is lawfully stopped and police have a reasonable suspicion that a person is not in the country legally, that they should investigate that suspicion? What is different is that such persons must be prepared to prove their status, and/or to be arrested when they cannot do so, and that this burden will likely fall on a class of individuals in the main, and almost exclusively, to be distinguished by race and national origin.²

This burden is racial. Police will make their determinations as to reasonable suspicion on the basis of appearance, on the basis of accent. They are making a determination of reasonable suspicion on the basis of national origin, something that the framers of the Fourteenth Amendment considered to be coincident with race.³ So it seems to me that this burden is not only racial, it is an invidious piece of racial discrimination, and the question that we have is whether the state can undertake this investigation and these arrests consistent with a compelling interest. SB 1070 maintains that the state has a compelling interest “in the cooperative enforcement of federal immigration laws throughout all of Arizona.”⁴ As I will relate

by a law enforcement official or a law enforcement agency of this state or a law enforcement official or a law enforcement agency of a county, city, town or other political subdivision of this state in the enforcement of any other law or ordinance of a county, city or town or this state where *reasonable suspicion exists that the person is an alien and is unlawfully present in the United States*, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released.” (emphasis added)).

2. See, e.g., Alicia E. Barrón, *Truck Driver Forced to Show Birth Certificate Claims Racial-profiling*, AZ.FAMILY.COM, Apr. 21, 2010, <http://www.azfamily.com/news/91769419.html> (television news account of an Hispanic man stopped days before Arizona's governor signed SB1070 into law, arrested, transported to immigration authorities, and forced to provide a birth certificate before being released). As the Supreme Court explained in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the “single factor [of] apparent Mexican ancestry,” as was apparently the case in this incident, “would [not] justify . . . a reasonable belief of” of alienage. *Id.* at 885-86.

Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens. The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but *standing alone* it does not justify stopping all Mexican-Americans to ask if they are aliens.

Id. at 866-87 (emphasis added) (footnote omitted).

3. See e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (discussing the Fourteenth Amendment “[t]hese provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws”).

4. 2010 Ariz. Sess. Laws 113 (“The legislature finds that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona. The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work

shortly, I question, however, whether that is a compelling interest.

Presuming that the interest is compelling, the means chosen to effectuate the interest must be narrowly tailored, and this means is not narrowly tailored.⁵ Effectively, this is a race specific means, and in fact, there are race neutral means of carrying out this interest. Such means would be very burdensome on police and indeed, very burdensome on every person in the state— if, for example, every person whether citizen or non-citizen irrespective of race or national origin were subject to citizenship examination.⁶ Yet, this would be a burden shared across racial lines. And because of the nature of the burden as one shared by all, it is entirely possible that Arizona's legislature would not undertake to impose this burden. Instead, what we have is the state imposing the burden of what it presumes is good governmental policy on Hispanics, a racially identifiable minority and a very fine example of what *Carolene Products* denominated as “discrete and insular minorities.”⁷ As a practical consideration, then, I don't think that this particular portion of the statute can be maintained because, as a practical matter, it will involve invidious racial discrimination that cannot be justified.

Now what I want to do, as well, and this gets into theory, is to question whether it is any interest at all of the state to attend to the enforcement of federal law respecting the presence or movement of any person, whether citizen or alien, legal or not into the state from outside the nation. I want to question whether it's any business of the states at all, not simply whether the state has a compelling interest but whether the state has any interest at all.

The best case for Arizona that it has the power to attend to immigration, to attend to movement of non-citizens in the state of Arizona, can be made in Article 1, Section 9, in what we refer to as the 1808 Clause.⁸ The 1808 Clause provided that Congress would have no power until 1808 to prevent “[t]he Migration or Importation of such Persons as any of the

together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”).

5. See *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995) (noting that racial classifications “are constitutional only if they are narrowly tailored measures that further compelling governmental interests”).

6. This is not to say that such police stops and inquiries would comport with 4th Amendment requirements.

7. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

8. U.S. CONST. art. 1, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”).

States now existing shall think proper to admit.”⁹ At its very first opportunity, Congress did undertake to end the African-slave trade effective January 1, 1808.¹⁰ Before January 1, 1808, all of the states regulated the immigration of persons into the United States, and particularly with respect to slaves.¹¹ Many of the states, from Massachusetts all the way down to Georgia, either allowed or, in most cases, disallowed the importation of Africans into the United States.¹² North Carolina and Georgia, at one point,

9. *Id.*

10. ANNALS OF CONG. 1806-1807, 1266-1270.

11. See W.E.B. DU BOIS, THE SUPPRESSION OF THE AFRICAN SLAVE TRADE 230-43 (1896).

12. Several states, primarily in the North, banned the slave trade at early points after the Constitution was proposed, and even before it was ratified by the necessary nine states. See Act of Feb. 22, 1788, ch. 40, 1788 N.Y. Laws (an act concerning slaves); Act of Apr. 4, 1801, 1801 N.Y. Laws (banning the import and export of slaves except for person previously owning slaves undertaking a bona fide relocation to the state); Act of Mar. 25, 1788, ch. 11, 1788 Mass. Acts (Massachusetts bans slave trade); Act of Mar. 29, 1788, ch. CXLIX, § 2, 1788 Pa. Laws (Pennsylvania manumits all slaves brought to the state by any resident or person intending permanent residence). Similarly, Connecticut banned the involvement of its residents in the slave trade on October 9, 1788, just months after the Constitution was ratified. See Act of Oct. 8, 1788, 1788 Conn. Pub. Acts 368 (an act to prevent the slave trade), *amended by* 1792 Conn. Pub. Acts 412 (Connecticut strengthens penalties associated with the 1788 act).

At about this point, South Carolina would embark upon a series of temporary bans on importation of slaves that the state would continue to renew until it made the ban permanent in 1803. See Act of Nov. 4, 1788, 1788 S.C. Acts (banning importation of non-domestic slaves until 1793); Act of Dec. 21, 1792, 1792 S.C. Acts (extended the 1788 ban until 1795); Act of Dec. 20, 1794, 1794 S.C. Acts (extended the ban until 1797); Act of Dec. 19, 1796, 1796 S.C. Acts (extended ban until 1799). The ban on importation of slaves lapsed for a period of almost two years until it was revived and extended. See Act of Dec. 20, 1800, 1800 S.C. Acts (reviving the ban and extending it to 1803). It was extended not only to all slaves of both foreign and domestic source, but also to free persons of African descent. See Act of Dec. 20, 1800, S.C. Acts (excepting migrants with no more than ten slaves); see also Act of Dec. 19, 1801, 1801 S.C. Acts (made criminal penalties more stringent). *But see* Act of Dec. 18, 1802, 1802 S.C. Acts (provided that the limitations on importation did not apply to citizens of other states in transit with slave property to a third state). Finally in 1803, the ban was made permanent. Act of Dec. 3, 1803, 1803 S.C. Acts (limited and made permanent the prohibition on slave importation to those originating in the West Indies and South America, and limited the ban on importation of domestic slaves to those without certificates of good character).

Less extreme than South Carolina, its immediate neighbor to the north would ban for one year the import of slaves and indentured servants of African ancestry. See 1794 N.C. Sess. Laws ch. II (prevented the further importation and bringing of slaves and indented servants of colour into the state). The state would limit the ban the following year, however. See 1795 N.C. Sess. Laws ch. XVI (North Carolina bans importation of slaves from the West Indies as well as the Windward and Leeward Islands). By contrast, Georgia moved in 1793 to bans importation of slaves from the West Indies, the Windward and Leeward Islands, and Florida. See Act of Dec. 19, 1793, 1793 Ga. Laws. The state extended the ban to all slaves five years later, with exceptions for persons migrating to Georgia and for Georgians inheriting slaves from elsewhere. Act of Jan. 31, 1798, 1798 Ga. Laws. By virtue of a provision in a new constitution ratified later that year, the ban on importation of foreign slaves was made permanent. GA. CONST., art. IV, § 11.

Other states would act with finality. See 1796 Md. Laws ch. LXVII, § I (Maryland bans slave importation, with exceptions for migrants from other states); Act of Mar. 14, 1798, ch.

allowed the importation of Africans, but not West Indians or other slaves from the New World.¹³ This was after slave revolts that became the Haitian revolution. Again, the states, all of them, regulated immigration in the United States.

The states regulated the movement across state lines not only of slaves but also of free blacks.¹⁴ It is interesting that in 1860, Indiana, Illinois, and Oregon all had limitations on movement of free black people across state lines,¹⁵ and only in that year did Iowa end its restriction on black immigration.¹⁶ The Illinois Constitution of 1848 directed the legislature to pass laws prohibiting importation of slaves as well as the migration of free Negroes,¹⁷ and in 1853 the legislature responded to that command.¹⁸ The Indiana Constitution of 1851 had provided that “[n]o negro or mulatto shall come into, or settle in the State, after the adoption of this Constitution.”¹⁹ Oregon’s 1859 Constitution forbade the entry of all Negroes whether free or slave.²⁰

Thirty years earlier in 1830, Indiana, Illinois, and Ohio had mandated bonds for good behavior of all free Negroes.²¹ New Jersey, a northern state, was among slave states in the early 1800s, and there were limitations on

DCCXXVII, §12, 1798 N.J. Laws (New Jersey bans slave importation).

This is not to say that during this period the only immigration concerns the states had respected slavery and race. Connecticut and South Carolina, for example, also passed laws banning the transportation of convicts into their jurisdictions. *See* 1788 Conn. Pub. Acts 367 (an act to prevent the importation of convicts); Act of Nov. 4, 1788, 1788 S.C. Acts (an act for preventing the transportation of convicted malefactors from foreign countries into this state).

13. *See id.*

14. Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 415-82 (1986).

15. Act of Feb. 12, 1853 (forbidding migration of free Negroes into Illinois, providing for fines and expulsions for violation of the prohibition, and for sale at auction for those unable to pay fines); IND. CONST. of 1851, art. XIII (prohibiting all Negroes whether slave or free from entry); OR. CONST. of 1859, art. XVIII (prohibiting all Negroes whether slave or free from entry). *See also* Finkelman, *supra* note 14, at 439.

16. *See* Finkelman, *supra* note 14, at 432.

17. ILL. CONST. of 1848, art. XIV.

18. Act of Feb. 12, 1853 (forbidding migration of free Negroes, providing for fines and expulsions for violation of the prohibition, and for sale at auction for those unable to pay fines).

19. IND. CONST. of 1851, art. XIII.

20. OR. CONST. of 1859, art. XVIII.

21. Act of Jan. 17, 1829, 1829 Ill. Rev. Laws 1st Spec. Sess. 1-4; Act of Feb. 1, 1831, 1833 Ind. Rev. Laws 1; Act of Jan. 25, 1807 Ohio Gen. Assem. Laws 1-5, repealed by Act of Feb. 101, 1849 Ohio Laws 17-18; Act of Apr. 13, 1827, 1827 Mich. Rev. Laws 1st & 2nd Councils 1-10, amended by Act of June 23, 1828, 1828 Mich. 3rd leg. Council 1st sess. 1-2. The amendment was repealed in 1933. 1833-34 Mich. Laws 1258, and the underlying statute was repealed in 1837. *See also* Finkelman, *supra* note 14, at 434.

movement of blacks into New Jersey, as well as other slave states.²²

This freedom to regulate immigration into their territory is what that the states lost, in my estimate, with the Fourteenth Amendment.²³ The *Dred Scott* case infamously said to us that “[Negroes] had no rights which the white man was bound to respect,”²⁴ but it also was the first judicial determination of the limits of citizenship,²⁵ and Chief Justice Taney’s opinion in the case determined that people of African descent were not contemplated by the framers as citizens, and that while the states could recognize state citizenship, Negroes were permanently barred from citizenship status.²⁶ Now the Fourteenth Amendment defines citizenship,

22. Finkelman, *supra* note 14, at 434.

23. See U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

24. *Scott v. Sandford (Dred Scott)*, 60 U.S. 393, 407 (1856).

25. See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 53 (2006).

26. *Dred Scott*, 60 U.S. 393. “In effect, Chief Justice Taney maintained that blacks, regardless of their status as free or slave, were mere inhabitants of the United States, never to be citizens, *id.* at 418-19, even if a state independently granted them citizenship, *id.* at 405-06. In reaching his conclusion, Chief Justice Taney gave emphasis to the mass of discriminatory state legislation and constitutional law limiting the rights of free blacks. *Id.* at 412-16. See also L. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860* (1961). Chief Justice Taney ignored or otherwise deliberately dismissed a body of politically and physically liberating legislative and constitutional law that both free and slave states had adopted in the wake of the American Revolution—law that had cast doubt upon the legitimacy of the point that the Chief Justice was making. See *Dred Scott*, 60 U.S. (19 How.) at 564, 572-76 (Curtis, J., dissenting); see also Diamond & Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255, 260-62 (1983). The citizenship *vel non* of free blacks under the 1787 Constitution as unamended is not the subject and is beyond the scope of this Article. Yet, it must be pointed out that Chief Justice Taney's opinion regarding the citizenship of blacks was not shared by a majority of the Supreme Court. Chief Justice Taney's opinion was styled ‘the opinion of the court,’ *Dred Scott*, 60 U.S. (19 How.) at 399, but it was joined in full only by Justice Wayne, who saw fit to write his own opinion nonetheless. *Id.* at 454. Justice Daniel wrote his own opinion and did not join at all in the Taney opinion, but agreed with the Chief Justice on a point for point basis. *Id.* at 469. Four Justices, Grier, Nelson, Campbell, and Catron, agreed with the result as announced by Chief Justice Taney, but did not reach the issue of citizenship. *Id.* at 457 (Nelson, J., concurring); *id.* at 469 (Grier, J., concurring); *id.* at 494 (Campbell, J. concurring); *id.* at 519 (Catron, J., concurring). Two Justices, McLean and Curtis, dissented with respect to both the result and the issue of citizenship. *Id.* at 529 (McLean, J., dissenting); *id.* at 564 (Curtis, J., dissenting). Thus, only three members of the Court had declared that blacks were outside the Constitution because of their race, and two members had dissented vigorously. This alignment hardly constituted a firm national consensus on this issue.” Raymond T. Diamond, *No call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 93, n.108 (1989).

by its very terms—a person is a citizen who was born in the United States or who is naturalized, and is a citizen of the state in which that person resides as well.²⁷ Under the terms of the 14th Amendment, the rights and privileges of citizens of the United States are protected,²⁸ and one of those privileges is movement across state lines, protected if not under the Privileges and Immunities Clause of the 14th Amendment, then by that Amendment's Due Process Clause.²⁹ I would make the argument that if it is so, then the power states exercised before the Fourteenth Amendment to regulate immigration and movement of noncitizens into their territory, was lost by virtue of the Fourteenth Amendment.

A question raised for practitioners of the political arts is whether Congress will exercise its power under Section 5 of the 14th Amendment³⁰ to explicitly override efforts like those in Arizona and what has been proposed here in Louisiana.³¹ The further question is whether there will be congressional efforts to empower the states to undertake laws like this—a constitutionally questionable undertaking³²—or whether Congress will simply leave the issue to the courts by standing silent.

PROFESSOR ANDREA ARMSTRONG [MODERATOR]: Thank you very much Professor Diamond. Professor Eagly?

PROFESSOR INGRID EAGLY: I want to start out by thanking Loyola University New Orleans College of Law, Professor Isabel Medina, and the Journal of Public Interest Law for inviting me to participate in this conversation today. It is wonderful to be a part of this symposium which addresses the critical intersection between immigration law and criminal law. Because this area of law is so rapidly changing, it is particularly important to address the policy issues that are at stake.

27. U.S. CONST. amend. XIV, § 1. *See also* United States v. Wong Kim Ark, 169 U.S. 649, 702-03 (1898).

28. U.S. CONST. amend. XIV, § 1.

29. *Saenz v. Roe*, 526 U.S. 489, 502-05 (1999); *Edwards v. California*, 314 U.S. 160, 178-80 (1948). The holding in these two cases are certainly consistent with dicta in *The Slaughterhouse Cases*, 83 U.S. 36 (1872), to the effect that privileges and immunities protected by the 14th Amendment include those rights “which owe their existence to the Federal government, its National character, its Constitution, or its laws.” *Id.* at 79.

30. “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5.

31. *See* H.B. 1205, Reg. Sess. (La. 2010).

32. Congress has no power to authorize states to violate the Constitution. “Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Immigration crime is now the most prosecuted crime in our federal criminal justice system. It is not just the most prosecuted crime, but it actually constitutes over half of the federal criminal docket.³³ Noncitizens are now 40% of all defendants being sentenced under the Federal Sentencing Guidelines.³⁴ If we were to add in those who were sentenced to petty crimes and magistrate courts, the percentage of noncitizen defendants would be even higher.³⁵

As the panelists this morning have already begun to document, for some time we have not just been seeing the increased criminalization of migration in the federal system, but we have also been seeing similar shifts at the state level. Arizona's Senate Bill 1070,³⁶ which was talked about earlier today, is being hotly contested in the courts and we do not necessarily know how that litigation will ultimately be resolved.³⁷ SB 1070 is by far the most common example of this criminalization trend and the one that has received the most media attention.

If SB 1070 were ever fully implemented in the courts, it would do a number of things. Essentially, it would grant local law enforcement officers broader authority to stop individuals to ask questions regarding immigration status and make arrests for violations of the immigration law.³⁸ It would also create certain new crimes—such as failing to carry alien registration papers and working without authorization to be legally present in the United States.³⁹ The explicit purpose of the law is to enforce immigration: to borrow the language of the statute itself, “to make attrition through enforcement the public policy of all state and local government agencies in Arizona.”⁴⁰ But, SB 1070 is only one such law and there are a number of other laws that were passed previously in Arizona and in other states. In addition, a number of “copy cat” bills have been proposed or adopted in the wake of SB 1070.

As we launch into our panel discussion, I want to provide a brief

33. Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281-82 (2010).

34. *Id.* at 1282 n.5.

35. *Id.* at 1288.

36. 2010 Ariz. Sess. Laws 1070, *amended by* H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

37. *See, e.g.*, *United States v. Arizona*, 703 F. Supp. 2d. 980 (D. Ariz. 2010) (preliminarily enjoining enforcement of many provisions of SB 1070). The district court decision is currently on appeal to the Ninth Circuit. *See United States v. Arizona*, No. 10-16645, 2010 WL 5162508 (9th Cir. 2010).

38. *See, e.g.*, Sec. 2(B), amending ARIZ. REV. STAT. ANN. § 11-1051(B) (2010).

39. Sec. 3, adding ARIZ. REV. STAT. ANN. § 13-1509 (2010); Sec. 5, adding ARIZ. REV. STAT. ANN. § 13-2928(C) (2010).

40. S.B. 1070, 49th Leg., 2nd Reg. Sess. § 1 (Ariz. 2010).

conceptual sketch of what these emerging state laws contain so that we can start to understand in more detail how they are actually being used to enforce migration. Broadly speaking, these laws can be broken down into three general categories: substantive criminal laws, procedural court rules, and laws and policies that affect law enforcement authority.

In regard to the first category, we have state laws that actually criminalize alienage-related offenses or conduct that we associate with immigration. A number of states have passed laws that actually require proof of alienage as an element in a crime. They include crimes such as alien gun possession, driving while undocumented, working while undocumented, and various document-related fraud crimes, such as using false documents to conceal one's alien status.⁴¹ A number of states have also adopted smuggling, trafficking, or harboring crimes, some of which require proof of alienage as an element.⁴²

We are also seeing a wider use of state and local criminal laws that have been on the books for a long time to target acts that are perceived to be associated with illegal migration. For example, laws criminalizing driving without legal permission can, in practice, be used to prosecute those who lack a driver's license as a result of their immigration status.⁴³

With regard to the second category, we are seeing an expansion of state procedural rules that treat noncitizen defendants differently from citizens. Some of these rules can be described as curtailing rights. Consider, for example, laws that create a presumption against granting of bond to those perceived to be undocumented.⁴⁴ Other rules require judges,

41. See, e.g., CAL. PENAL CODE § 114 (West Supp. 2010) (making it a felony punishable by five years in prison or a fine of \$25,000 to use false documents to conceal one's true citizenship or resident alien status); NEV. REV. STAT. ANN. § 202.360 (2006) (making it a felony for a person who is illegally or unlawfully in the United States to possess a firearm); 18 PA. CONS. STAT. ANN. § 6105(c)(5) (West 2000) (prohibiting aliens and persons illegally in the United States from possessing, using, or selling firearms).

42. See, e.g., COLO. REV. STAT. § 18-13-128 (2009) (making it a felony to, "for the purpose of assisting another person to enter, remain in, or travel through the United States or the state of Colorado in violation of immigration laws, . . . provide[] or agree[] to provide transportation to that person in exchange for money or any other thing of value"); FLA. STAT. ANN. § 787.07 (West 2007) (making it a misdemeanor to "transport[] into this state an individual who the person knows, or should know, is illegally entering the United States from another country"); OKLA. STAT. tit. 21 § 446 (Supp. 2010) (making it illegal to transport, conceal, or harbor aliens "knowing or in reckless disregard" of the fact that they entered or remain in the United States illegally).

43. See Julia Preston & Robert Gebeloff, *Unlicensed Drivers Who Risk More Than a Fine*, N.Y. TIMES, Dec. 10, 2010, at A1.

44. Arizona's new bond law is particularly restrictive. It mandates the detention, without bond, of defendants charged with "serious felony offenses" who have "entered or remained in the United States illegally." Ariz. Prop. 100 (2006) (HCR 2028), *amending* ARIZ. CONST. art. II, § 22 & ARIZ. REV. STAT. ANN. § 13-3961 (2010), *available at* <http://www.azsos.gov/election/2006/>

corrections officers, and other law enforcement officers to investigate immigration status and make reports to federal authorities of people who are suspected of being deportable.⁴⁵

The third category includes those state and local laws that generally expand the authority of local police and other law enforcement officers to investigate immigration-related offenses and to refer people to federal authorities. Essentially, these laws allow local police to engage in immigration screening as part of their routine police work on the ground. Some states have passed laws preventing localities from adopting policies that would limit the authority of officers to enforce immigration law while engaging in routine police enforcement activities.⁴⁶ We are also increasingly seeing states engaging in cooperative agreements with the federal government. For example, under the so-called 287(g) program, local police officers and correctional officers screen for immigration status with the support of federal funding.⁴⁷

I think it is important to provide this brief sketch of the laws that support the criminal immigration enforcement scheme at the local level as a first step to understanding how these laws operate in practice. As compared to the federal criminal justice system, which is relatively standardized across the country, we know much less about state and local criminal justice systems. Therefore we know less about the defendants who are actually being charged under these new laws. We also know less about how these new procedural rules are actually being implemented in practice. Finally, we know less about what is happening to people who are arrested and then referred to immigration without first being criminally prosecuted.

Some of the laws that have been passed recently may ultimately be found to be preempted. However, others may remain viable. As a result, it is important as we move forward to begin to understand how these laws actually function in practice so that policymakers can more effectively

info/pubpamphlet/english/Prop100.htm.

45. See, e.g., COLO. REV. STAT. § 29-29-103(2)(a)(I) (2009) (requiring that “[a] peace officer who has probable cause that an arrestee for a criminal offense is not legally present in the United States . . . report such arrestee to [ICE]”); ME. REV. STAT. ANN. tit. 34-A § 3043(1) (1988) (requiring officials at correctional facilities or private institutions supported by public funds to inquire into the nationality each person admitted there, and if it appears that the person is an alien, to notify ICE of the date and reason for admission, the length of confinement, the country of which the person is citizen, and the date the alien entered the United States); MO. ANN. STAT. § 577.680 (West Supp. 2010) (directing all state and local law enforcement agencies to verify with DHS the immigration status of all individuals charged with a crime and jailed).

46. See, e.g., ARIZ. REV. STAT. ANN. § 11-1051(A) (2010) (prohibiting Arizona officials, agencies, and political subdivisions from limiting enforcement of federal immigration laws).

47. 8 U.S.C. § 1357(g) (2006).

evaluate their effects on criminal process.

PROFESSOR ANDREA ARMSTRONG [MODERATOR]: Thank you very much, Professor Eagly. Professor Kusuda?

PROFESSOR HIROKO KUSUDA: Again, I would like to thank you, Professor Medina, and the Journal for allowing me to be on this wonderful panel. I would like to speak my perspective as an immigration attorney who represents people in court proceedings and before the administrative agencies and see that we already face criminalization of immigrants on a daily basis. I just wanted to reiterate the issue that other panelists have pointed out, which is a cost to the state to attempt such a vast undertaking in regulating the behavior of a noncitizen or alleged non-citizens. As you know, Arizona's SB 1070⁴⁸ is being litigated in courts, and so far, apparently, at the cost to the state of Arizona over \$1,000,000⁴⁹ and Governor Brewer apparently has set aside \$500,000 more for future litigation purposes.⁵⁰ According to recent reports, the legislators of Utah, where recently a copy-cat bill was introduced, came down to Phoenix to investigate whether or not this proposed Utah bill would impact their own jurisdictions and the state in general, and they wanted to assess the economic impact of that bill.⁵¹ And the Phoenix Chamber of Commerce gave them a devastating presentation basically saying that the total estimated cost will be over \$90,000,000;⁵² as a result, several conferences have been cancelled based upon the negative press.

The other states have been proposing, and have attempted to pass similar bills. A similar bill was introduced in Louisiana in a last legislative session in spring. House Bill 1205 was introduced by representative Harrison, titled "Louisiana Taxpayer and Citizen Protection Act of 2010," which is an 18-page bill.⁵³ Unfortunately, he's not going to be here today to discuss this bill, but we actually went to a legislative session this past spring

48. S.B. 1070, 49th Leg., 2nd Reg. Sess. § 1 (Ariz. 2010).

49. Howard Fischer, *Cost of Defending SB 1070 Tops \$1 M*, EAST VALLEY TRIBUNE, Oct. 27, 2010, http://www.eastvalleytribune.com/arizona/immigration/article_1ff68ba2-e243-11df-bc3e-001cc4c002e0.html.

50. Ginger Rough, *Fund Tied to SB 1070 Nears \$500,000*, ARIZ. REPUBLIC, July 9, 2010, <http://www.azcentral.com/arizonarepublic/local/articles/2010/07/09/20100709defensefund0709.html>.

51. Nicole Gonzalez, *Utah Leaders Find Immigration Law Could Impact Economy*, DESERET NEWS, Sept. 30, 2010, <http://www.deseretnews.com/article/700069718/Utah-leaders-find-immigration-law-could-impact-economy.html>.

52. Alicia E. Barrón, *Boycotts Over SB-1070 Could Cost Phoenix Up to \$90 Million*, AZ.FAMILY.COM, May 11, 2010, <http://www.azfamily.com/outbound-feeds/yahoo-news/Boycotts-over-immigration-law-could-cost-Phoenix-up-to-90-million-93489339.html>.

53. H.B. 1205, 1st Reg. Sess. (La. 2010).

and tried to discuss this bill with the representative. We were successful in persuading the judiciary committee to pull the bill because the cost implication was huge to the state of Louisiana.

That said, I'm going to move onto the legislative attempt to introduce similar bills, and the second point I wanted to make is our public safety issue. The advocates of such bills are saying that immigrants' behavior jeopardizes public safety of the citizens of the state. We encounter people in all kinds of situations, many of whom are crime victims such as domestic violence. These people are commonly afraid to call the police because of lack of immigration status. And, one of the cases that we had a couple of years ago was of a family of five, a mother was heavily beaten up and taken to an emergency room and the hospital actually called us. They had nowhere else to go, and they were afraid to go back to their house, and we eventually were able to rescue the entire family by filing a so-called Victims of Trafficking and Violence Protection Act⁵⁴ petition, which was ultimately successful and regularized their status, however, because of the fear they had, they could not go to the authorities seeking protection from the abuser; a U.S. citizen.

Another example we've encountered at the Loyola Law Clinic was a case of immigrant workers who were burglarized, some of whom were murdered in an attempt to rob them. They were the victims of a crime but because they were undocumented workers living in a trailer, they were held in a parish jail for over six months as material witnesses because the prosecutor didn't want them to be deported by the federal authorities. So the witnesses were kept in jail and could not communicate with anyone else. Through different sources we were able to find them and represent them in immigration proceedings, and eventually we were able to help them obtain U visas which provides protection for victims of serious crimes.⁵⁵

When you talk about public safety, when people are victimized but cannot come out to seek protection from law enforcement officials—it's a serious problem. We understand noncitizens do commit crimes, but they also become victims, and when they have no voice in the system, it is a serious problem for us and the community as a whole.

54. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000). See also William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) ("TVPRA"). In addition to expanding protections for trafficking victims generally, the TVPRA made procedural and substantive changes to immigration legal relief for unaccompanied alien children. Specifically, Section 235 of the TVPRA increased many protections for unaccompanied alien children seeking relief from removal, including Special Immigrant Juvenile status and asylum.

55. See *U Visa for Immigrants who are Victims of Crimes*, U.S. IMMIGRATION SUPPORT (2010), <http://www.usimmigrationsupport.org/visa-u.html>.

Also, there is another argument that advocates for states advance—the federal government is not doing its job, so we are going to do it for them. If you listened to the oral argument before the Ninth Circuit earlier this week concerning the U.S. government’s law suit against SB 1070, you could hear that the lawyer for the Arizona governor was arguing that the federal government was not controlling illegal immigration behavior. He said something along the line of—Arizona is trying to do the best it can, but the federal government is not doing the job.⁵⁶ The judge, Carlos Bea, asked this lawyer, saying

Is this your argument that a state can take a look at whether or not the federal government is enforcing its laws? And if the federal government is not enforcing its laws, it can enforce the laws for the federal government? For instance, if I don’t pay my income tax to the federal government, can California come along and sue me for not paying my income tax?⁵⁷

And the lawyer for the state didn’t have an answer for that question. What the judge was asking was exactly what states are saying they want to do, can we do it if we feel the federal government is not doing its job of regulating immigration law?

Arizona’s argument that the federal government is not doing its job does not make sense because the U.S. government has deported the highest number of people in the fiscal year 2009-2010.⁵⁸ Almost 400,000⁵⁹ people have been deported from this country this past fiscal year.⁶⁰ And a staggering 2.6 trillion dollars have been allocated to spend on deportation.⁶¹ According to Director John Morton of Immigration and Customs Enforcement, it will cost the U.S. government sixty-five billion dollars to

56. *Watch Recording for Case: USA v. State of Arizona No. 10-16645EB*, U.S. COURTS FOR THE NINTH CIRCUIT (2010), http://www.ca9.uscourts.gov/media/view_subpage.php?pk_vid=0000006117; see also *United States v. Arizona*, No. 10-16645, 2010 WL 5162508 (9th Cir. 2010). The case history and pleadings are available at http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000470.

57. *Court Hears Arizona Immigration Law Appeal*, NAT’L PUB. RADIO, Nov. 1, 2010, <http://www.npr.org/templates/story/story.php?storyId=130982809>.

58. Peter Slevin, *Deportation of Illegal Immigrants Increases Under Obama Administration*, WASH. POST, July 26, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/25/AR2010072501790.html>.

59. *Id.*

60. *Report: New Obama Budget Should Cut Spending on Failed Immigration Enforcement*, DEPORTATION NATION, Feb. 11, 2011, <http://www.deportationnation.org/2011/02/report-new-obama-budget-should-cut-spending-on-failed-immigration-enforcement/>.

61. Moses Apsan, *Mass Deportation Of illegal Immigrants Cost \$2.6 trillion over ten years-Immigration Reform Solution*, JOURNAL.US, <http://news.jornal.us/article-4716.Mass-Deportation-Of-illegal-Immigrants-Cost-26-trillion-over-ten-years-Immigration-Reform-Solution.html> (last visited Mar. 1, 2011).

deport an estimated number of ten million undocumented people in this country.⁶² So think about it, Louisiana is suffering from budgetary cuts, for example, the costs of higher education are being seriously cut. Now we are going to have to drastically increase the state budget in helping the federal government to enforce federal law. It seems to me it doesn't make any sense. Louisiana is a state that is known to have a very low number of foreign-born populations, but one of the highest number of immigration detainees in the country.⁶³ We are known to be the highest receiving state of the country, that's why we have four long-term immigration detention centers.⁶⁴ And it is a well known fact that 90% of the population of detainees is not represented by immigration lawyers.

PROFESSOR ANDREA ARMSTRONG [MODERATOR]: Thank you very much. Unfortunately, Representative Joe Harrison, who was slated to appear today, had to cancel. Representative Harrison has sponsored a bill here in Louisiana that may be relevant to our discussion. In his absence, I would like to provide a very brief summary of the bill and hear reactions from our expert panelists.

The Louisiana proposed Act, House Bill 1205, is an act, relative to immigration, to provide for the determination of citizenship status for persons charged with certain crimes.⁶⁵ The act provides for the notification to certain entities; it provides for the rebuttable presumption that certain persons are a flight risk; provides for establishing certain discriminatory practice; but also in one of the following clauses, provide for non-discriminatory treatment.⁶⁶ Perhaps Professor Diamond can help us reconcile the interaction of those two separate provisions.

The stated purposes of the act might also be relevant. The act is required, according to the proposed bill, because "it is a compelling public interest of this state to discourage illegal immigration by requiring all agencies within the state to fully cooperate with federal immigration authorities in the enforcement of federal immigration laws."⁶⁷ Furthermore,

[t]he state of Louisiana further finds that when illegal immigrants have been harbored and sheltered in this state and encouraged to reside in

62. Ruben Navarrette, *What is Immigration?*, RED, BROWN, AND BLUE, Dec. 1, 2010, <http://redbrownandblue.com/index.php/opinion-what-is-immigration>.

63. Hiroko Kusuda, et al., *Hurricane Katrina: 5 Years Later*, CATH. LEGAL IMMIGR. NETWORK, INC., Aug. 27, 2010, <http://cliniclegal.org/blog/1008/hurricane-katrina-5-years-later>.

64. The four detention centers are Oakdale Federal Detention Center, LaSalle Parish Detention Center, Tensas Parish Detention Center and South Louisiana Correctional Center.

65. H.B. 1205, 1st Reg. Sess. (La. 2010).

66. *Id.*

67. § 1312.

this state through the issuance of identification cards that are issued without verifying immigration status, these practices impede and obstruct the enforcement of federal immigration law, undermine the security of our borders, and impermissibly restrict the privileges and immunities of the citizens of Louisiana.⁶⁸

There are also several subsections of the proposed law and one of the largest sub-sections addresses the public benefits provided by agencies of the state.⁶⁹ This subsection requires that agencies verify the status of the people using those services and that affirmative proof of status may be required. Only a few exceptions are listed, such as emergency room treatment and immunizations.⁷⁰

How do you verify your immigration status? Well, in the bill it says that you fill out an affidavit, and it has to be notarized, and then that creates a rebuttable presumption.⁷¹ The state will still send your information on for verification, but the affidavit appears to create a rebuttable presumption that you have legal authorization to be in the United States.⁷² In addition, the bill also creates an additional criminal penalty for the filing of a false or incorrect affidavit.⁷³

There's a criminal section of the statute which would require police officers to determine at the time of booking the immigration status of the detainee.⁷⁴ The police should make a "reasonable effort" to verify that the person has been lawfully admitted, and if they can't determine it at the time of booking, depending on the documents that the person may have with them, then the police must notify the Department of Homeland Security as soon as is practicable.⁷⁵ Note, there is discretion built into the statute.

A few additional sections of note. The proposed act contains a relatively low criminal standard—reckless disregard—for the crimes of unlawful assistance, unlawful harboring, and unlawful transportation of aliens.⁷⁶ The act also puts a lot of effort into making contractors de facto enforcers of the act, such that contractors are required to verify the immigration status of their employees.⁷⁷ Last, the act requires a state

68. *Id.*

69. § 1314.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. § 1315.

75. *Id.*

76. § 1317.

77. § 1319.

university student to prove their documented status in order to receive the preferential and lower resident tuition rate.⁷⁸

So those are a few highlights of the proposed bill in Louisiana. I would love to get our experts' take on a few of the provisions. Maybe Professor Diamond, if you could start us off with discussion?

PROFESSOR RAYMOND T. DIAMOND: My first reaction is that Louisiana is running, in many respects, the same play as Arizona is, and one piece of the play is the exposition of a compelling interest in cooperation with the federal government with respect to federal immigration law.⁷⁹ The doubt I would raise is that the state's interest is not as it argues it to be, cooperation with the federal government. Instead the state's apparent interest is to impose on the federal government state priorities respecting immigration. I would suggest that this is not, by any stretch of the imagination, a compelling interest. It runs directly contrary to the idea that all of us understand who have ever read the case *McCulloch v. Maryland*,⁸⁰ that the U.S. Constitution's Supremacy Clause⁸¹ means that when a state policy runs contrary to a federal policy, when a state priority runs contrary to a federal law, it's the state policy or priority that falls to federal law.⁸²

PROFESSOR INGRID EAGLY: I have a brief comment on the structure of the proposed Louisiana bill.⁸³ It is a comprehensive bill that includes both civil and criminal provisions. In many respects, the civil provisions mirror California Proposition 187, which was passed by voters during the 1990s.⁸⁴ Essentially the Louisiana bill proposes that healthcare workers, educators, and other public employees be converted into enforcers of immigration laws.⁸⁵ The criminal provisions of the bill contain elements of all three types of laws that I discussed during my brief comments. In particular, it contains substantive immigration crimes, procedural rules for

78. § 1321.

79. *See generally* H.B. 1205, 1st Reg. Sess. (La. 2010).

80. *McCulloch v. Maryland*, 17 U.S. 316, 405-407 (1819).

81. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

82. *McCulloch* perhaps most famously held that "the states have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by [C]ongress . . ." *McCulloch*, 17 U.S. at 436.

83. H.B. 1205, 1st Reg. Sess. (La. 2010).

84. Cal. Prop. 187, 1994 Cal. Legis. Serv. Prop. 187 (West).

85. H.B. 1205, 1st Reg. Sess. §§ 1314, 1321, 1319 (La. 2010).

noncitizens, and expanded immigration law enforcement authority.⁸⁶

PROFESSOR HIROKO KUSUDA: A criminal section of the Arizona bill basically mandates the detention of persons until law enforcement officers can determine the immigration status of that person. This section was troublesome to the Ninth Circuit panel. I kind of sense that they were concerned about how long a state authority can detain a person and at when point it raises a red flag. And the proposed Louisiana bill also says the peace officer “shall” attempt to notify the United States Department of Homeland Security as soon as practicable about the status of the citizen.⁸⁷ That should cause a big concern to us and everyone because it’s a deprivation of liberty and freedom which is one of the constitutional rights that every citizen in this country enjoys.

In practicality, the Department of Homeland Security can actually issue a detainer to any person who is arrested under the suspicion that the person is not in this country without lawful status.⁸⁸ It’s called an immigration detainer, but it expires after forty-eight hours of arrest, and after which the local sheriff’s office has to make a determination whether or not the person’s going to be released.⁸⁹ If Immigration and Customs Enforcement (ICE) doesn’t come and take over the detainees’ custody, the jail has to release him; otherwise they would be subject to a lawsuit called a writ of habeas corpus petition.⁹⁰ So, this is area of the law that is going to be prone to a legal challenge if such law is passed in this state, however, but Louisiana has been successful in passing a similar law in the past.

I’d like to share a post-Katrina issue that immigrants faced in the metropolitan area of New Orleans. Have you ever seen people working in dusty uniforms with no face masks, or no uniforms, at damaged building or gutting houses? Those people were targeted in post-Katrina New Orleans under the law passed by the Louisiana legislature in 2002, called “Operating a Vehicle without Lawful Presence in the United States.”⁹¹ But the euphemism of this statute is “Driving While Undocumented.” The statute basically says that no alien student or non-resident alien shall operate a motor vehicle in the state without documentation demonstrating that the person is lawfully present in the U.S.⁹² Although it was on the

86. *Id.* §§ 1314, 1315, 1317, 1327.

87. § 1315.

88. 8 C.F.R. § 287(d)(3) (West 2011).

89. *Id.*

90. *Immigration Detainers: A Comprehensive Look*, IMMIGRATION POLICY CTR. (Feb. 28, 2011), <http://www.immigrationpolicy.org/just-facts/immigration-detainers-comprehensive-look>.

91. LA. REV. STAT. ANN. § 14:100.13 (2010).

92. *Id.*

books since 2002, this law had never been enforced until Hurricane Katrina arrived in this city.

In October of 2005, police officers allegedly trained by federal officials, were instructed to enforce this particular statute. This enforcement action led to several lawsuits attacking this statute in New Orleans and also in Jefferson Parish. Both district court levels held that the statute was preempted by federal law, which meant that the state cannot enforce the immigration law as it is within the federal power.

As Professor Diamond stated the statute, on its face, is race-neutral. One of the Orleans Parish cases held that the actual enforcement part of it was race-based. The Orleans Parish Criminal District Court Judge Hunter, during the trial which I was observing, took over the cross-examination of the police officer who arrested this worker, and asked, Officer Fagan, if he had received training in immigration law.⁹³ The officer responded, he was sent to “a one day immigration seminar in early 2006 because, he ‘spoke a little Spanish.’”⁹⁴ The judge asked “[w]ell, how do you know they are illegal aliens?”⁹⁵ The officer responded “[h]ow do I know?” The judge inquired “[h]ow do you know if a white driver is an illegal alien?”⁹⁶ The officer responded “I’m not really sure how to answer that.”⁹⁷ The court then asked “[h]ow do you know if a black driver is an illegal alien?”⁹⁸ The officer said “I don’t know how to answer that one either.”⁹⁹ The judge went on to inquire about how the officer would possibly know if an Asian, Middle Eastern, or Indian was an illegal alien.¹⁰⁰

So based on that conversation, the judge basically determined that the statute was not only preempted, but its enforcement was based on the racial profiling on the part of the police officer, so therefore the motion to quash was granted.¹⁰¹ Unfortunately, there were similar cases happening in different parts of the state that resulted in criminal prosecution based on the statute. There is currently a circuit split as to the constitutionality of the statute, and the issue has not been resolved by the Louisiana Supreme Court.¹⁰² But as far as Orleans Parish and Jefferson Parish are concerned,

93. *Louisiana v. Herrera*, No. 467-763 (La. 2/1/06).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Louisiana v. Herrera*, No. 467-763 (La. 2/1/06).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Compare State v. Gonzalez-Perez*, 07-1813 (La. App. 1 Cir. 2/27/08); 997 So. 2d 1, 7-8,

the statute has not been enforced, because the Fourth Circuit Court of Appeal upheld the decisions of the district court that this law is clearly preempted by federal law.¹⁰³ However, East Baton Rouge Parish, where the First Circuit Court of Appeal resides, upheld the constitutionality of this statute.¹⁰⁴ Basically the First Circuit held that Louisiana is not regulating immigration, it is just regulating highway traffic, and thus it is within the state's power to determine who can lawfully operate a vehicle on a state highway.¹⁰⁵

I also want to provide the background of how this statute was passed in 2002, which is interesting. The title is "Prevention of Terrorism on the Highways," and it states that the legislative purpose was to "enact laws which complement federal efforts to uncover those who seek to use the highways of this state to commit acts of terror, and who seek to gain driver's licenses for the purpose of masking their illegal status in the state."¹⁰⁶ It was disappointing that we weren't aware this law's existence. We learned from our experience that citizens' vigilance played an important role in knowing this law is on the book, as we don't always know what's going to happen as to its enforcement in other parishes. Again, unfortunately the Louisiana Supreme Court so far has not taken up any writs or appeals filed by the criminal defense bar.

PROFESSOR RAYMOND T. DIAMOND: Something strikes me about the stated concern about terrorism. It reminds one very much of the Japanese exclusion and internment cases from World War II,¹⁰⁷ and what we recall about those cases is that the Japanese citizens and Americans of Japanese descent were subjected to curfews and to internment in World War II, the reason being vital concern about national security. The Supreme Court accepted that this concern about national security during wartime, concern about sabotage in the zone of the interior, did in fact constitute a compelling interest, and the court found that the means of subjecting ethnic Japanese to curfew and internment was narrowly tailored to the end of maintaining security.¹⁰⁸

The end of the story, however, is not with the curfews and the

rehearing denied 09-0292 (La. 12/18/09); 23 So. 3d 930 (concluding that law was not preempted by federal law), *with* State v. Lopez, 05-0685 (La. App. 4 Cir. 12/20/06); 948 So. 2d 1121, 1125 (finding law was preempted by federal law).

103. *Lopez*, 948 So. 2d at 1125.

104. *Gonzalez-Perez*, 997 So. 2d at 7-8.

105. *Id.*

106. LA. REV. STAT. ANN. § 14:100.11 (2010).

107. *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

108. *See Korematsu*, 323 U.S. 214; *Hirabayashi*, 320 U.S. 81.

internment but that years later, it emerged that the government *lied* about the national security interest. In fact, there was no concern about terrorism. As a result, writs of *coram nobis* were granted in the case of Fred Korematsu¹⁰⁹ and Gordon Hirabayashi.¹¹⁰ Similarly, one wonders whether Louisiana has a true concern about terrorism, or if this purported concern is simply the vehicle for the state to do what it wants to do anyway with respect to undocumented aliens. Again, I don't know the answer, but I think our history of *Koramatsu* and *Hirabayashi* suggests to us that we ought to be concerned about what that answer is.

PROFESSOR INGRID EAGLY: I would just add one more comment regarding the proposed law. As new substantive immigration crimes are added to state criminal codes, there is little formal tracking of enforcement levels. The federal government has a much better system of tracking of enforcement levels of federal criminal statutes. But, at the state level, often data is recorded by category of crime, rather than specific code section.

Louisiana is one state, however, that has tracked enforcement of the new immigration crime on its books—driving while undocumented.¹¹¹ I submitted a Public Records Act request to the state of Louisiana regarding enforcement of this 2002 law, which punishes those who operate a vehicle without lawful presence in the United States with up to one year of hard labor and a fine of up to \$1000.¹¹² The enforcement pattern that emerges is interesting. First, in 2003, 2004, and 2005 there was only one prosecution under the driving while undocumented law.¹¹³ In fact, prosecution under the law did not begin in earnest until 2006.¹¹⁴ The initial cases brought under the law mostly resulted in sentences of probation and a fine.¹¹⁵ Later, after one Louisiana appellate court found that the law was not preempted,¹¹⁶ we started to see a movement towards prison sentences.¹¹⁷ In 2009, there were nineteen people sentenced to prison, and only seven sentenced to probation under the Louisiana driving while undocumented law.¹¹⁸

109. *Korematsu v. United States*, 584 F. Supp. 1406 (1984).

110. *Hirabayashi v. United States*, 828 F.2d 591 (1987).

111. LA. REV. STAT. ANN. § 14:100.13 (2010).

112. Enforcement Data, Louisiana Laws with respect to Nonresident Aliens or Alien Students Statistical Analysis Center, Louisiana Commission on Law Enforcement (July, 1 2010) (on file with author) [hereinafter Louisiana Enforcement Data].

113. *Id.*

114. *Id.*

115. *Id.*

116. *State v. Lopez*, 05-0685 (La. App. 4 Cir. 12/20/06); 948 So. 2d 1121, 1125. *But see State v. Gonzalez-Perez*, 07-1813 (La. App. 1 Cir. 2/27/08); 997 So. 2d 1, 7-8, *rehearing denied* 09-0292 (La. 12/18/09); 23 So. 3d 930 (concluding that law was not preempted by federal law).

117. Louisiana Enforcement Data, *supra* note 112.

118. *Id.*

Understanding these shifts in sentencing outcomes for state immigration crimes is something that I think is important for future research.

PROFESSOR ANDREA ARMSTRONG [MODERATOR]: Excellent. Well, maybe I could just inject another question for the panel to consider, which is the question of due process rights. We've talked today, both in the earlier panel and now, about equal protection analysis as well as about preemption, but I haven't heard any discussion yet about due process. I wonder if any of the panelists have some thoughts about what due process adds to this debate.

PROFESSOR RAYMOND T. DIAMOND: Well, I might have some thoughts about that. I'm of a radical set, and in that respect, I share a particular piece of radicalism with Justice Thomas. I believe that the Privileges and Immunities Clause of the Fourteenth Amendment is under-recognized, indeed, nearly unrecognized in our jurisprudence. This clause was the subject of great disservice in the *Slaughterhouse Cases*.¹¹⁹ What those of us who have read the *Slaughterhouse Cases* know is that this constitutes the first and only time when a clause of the United States Constitution has been interpreted to mean, for all practical purposes, nothing.¹²⁰

It does strike me, as it struck Justice Thomas in *McDonald v. City of Chicago*,¹²¹ the rights that Supreme Court jurisprudence protects as incorporated and thus protected against state intrusion under the 14th Amendment's Due Process Clause might more logically be protected under the Privileges and Immunities Clause.¹²² In *McDonald*, decided this last summer on the question of whether the Second Amendment right to keep and bear arms is a right that extends against state encroachment the majority

119. *The Slaughterhouse Cases*, 83 U.S. 36 (1872).

120. *Id.* Justice Field, dissenting in the *Slaughterhouse Cases*, was first to recognize this point:

[Under the majority opinion, t]he amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference.

Id. at 96; see also CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 56-69 (1997). "In the Court's view, the 'privileges or immunities' clause *had no operational meaning*." (emphasis in original). *Id.* at 66.

121. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3059 (2010) (Thomas, J., concurring).

122. *Id.*

of the court confirmed that it is a right, but only four of the members opined that this is a right to be subjected to Due Process analysis, involving the question of whether the right is fundamental and thus protected.¹²³ Justice Thomas, who would discard the protection of non-procedural rights under the Due process Clause,¹²⁴ wrote that we ought to consider the right under the Privileges and Immunities Clause.¹²⁵

My position is that the right to cross state lines is protected as a fundamental right,¹²⁶ and while unlike Justice Thomas I have no hesitation in accepting the right's protection under the Due Process Clause, I would maintain that it ought to be protected under the Privileges and Immunities clause as well. But Justice Thomas stands alone in his position and it seems there is no majority of the Supreme Court willing to accept such an argument. And so, I think we have to look at that right as a function of the sort of liberty, and I think a fundamental liberty of citizens, indeed, of *persons* under the Fourteenth Amendment, to cross state lines.¹²⁷

On that basis, if it is a fundamental right of citizens, indeed, persons to travel across state lines and to negotiate our way from a foreign country into the United States, subject to regulation by the federal government, there are arguments to be made that states who interfere in the federal scheme of regulation are interfering with a liberty protected under the Due Process Clause irrespective of equal protection concerns.

PROFESSOR INGRID EAGLY: I agree with Professor Armstrong that equal protection and due process are important to these debates, yet they

123. *Id.* at 3026.

124. In the view of Justice Thomas, the Due Process Clause "speaks only to 'process,'" and not to substantive rights. *Id.* at 3059.

125. *Id.* at 3059, 3061-62.

126. *See Saenz v. Roe*, 526 U.S. 489 (1999).

Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the *Slaughter-House Cases*, 16 Wall. 36 (1872), it has always been common ground that this Clause protects the third component of the right to travel. Writing for the majority in the *Slaughter-House Cases*, Justice Miller explained that one of the privileges conferred by this Clause "is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bonâ fide residence therein, with the same rights as other citizens of that State." *Id.* at 80. Justice Bradley, in dissent, used even stronger language to make the same point: "The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens." *Id.* at 112-113.

Id. at 503-04.

127. *See id.*

tend to be omitted from the dominant discourse. Consider the example of Arizona. The federal government's challenge to the Arizona law was heard first by the United States District Court.¹²⁸ The federal government's challenge is based almost exclusively on a claim of federal preemption of state law in the area of immigration and does not incorporate equal protection or due process claims.¹²⁹ I think it is important to recognize, however, that other challenges to the law have included such claims. For example, a suit brought by a coalition of civil rights groups—including MALDEF, APALC, the ACLU, and the National Immigration Law Center—alleges that the law violates equal protection because it was enacted with the intent to discriminate on the basis of race and national origin.¹³⁰ In addition, the same suit alleges that portions of the law violate the Fourteenth Amendment's guarantee of due process by allowing law enforcement to, among other things, detain persons in order to determine their immigration status.¹³¹ The district court judge in the case, *Friendly House v. Whiting*, recently found that the plaintiffs' equal protection and due process claims were sufficient to survive the Governor's motion to dismiss.¹³² As these claims are further developed in the courts, I expect that concerns about racial profiling and due process will also draw more attention in the public debate.

PROFESSOR RAYMOND T. DIAMOND: It strikes me that your comments bring something else to mind. I am a legal historian by trade or perhaps by practice, and your remarks remind me of *Plessy v. Ferguson*, an 1896 case which gave us "separate but equal."¹³³ *Plessy* was an octoroon, not distinguishable from most of the people in this room and he argued in *ex rel. Plessy*, the case before the Louisiana Supreme Court that was appealed to the U.S. Supreme Court, that judgments had been made about his racial status on the basis of his appearance.¹³⁴ The court noted the possibility that the people running the railroad might make a mistake in making a racial identification.¹³⁵ This is the same kind of mistake of racial identifications that may well occur in on the spot enforcement of the Arizona statute. *Ex rel. Plessy* suggested that if such mistakes are made,

128. See *United States v. Arizona*, 703 F. Supp. 2d. 980 (D. Ariz. 2010).

129. Complaint, *United States v. Arizona*, 703 F. Supp. 2d. 980 (D. Ariz. 2010) (No. 2:10CV01413), 2010 WL 2653363.

130. Complaint at 56, ¶ 187, *Friendly House v. Whiting*, No. CV 10-1061-SRB (D. Ariz. 2010).

131. *Id.* ¶ 188.

132. See Order on Motion to Dismiss, *Friendly House v. Whiting*, No. CV 10-1061-PHX-SRB (D. Ariz. Oct. 8, 2010), <http://www.nilc.org/immlawpolicy/LocalLaw/Friendly-House-Order-on-Motion-to-Dismiss.pdf>.

133. *Plessy v. Ferguson*, 163 U.S. 537, 550-52 (1896).

134. *Ex parte Plessy*, 45 La. Ann. 80, 83 (1893).

135. *Id.*

that the object of the mistake would have a an action in tort. This could lead to a very fine discussion in the Arizona context of Cheryl Harris' seminal article, "Whiteness as Property," but time counsels against that.¹³⁶

PROFESSOR HIROKO KUSUDA: My thoughts on this is that immigration judges refuse to entertain any constitutional arguments that we make before them, however, we make such arguments everyday. For example, we always argue that aliens are entitled to due process rights under the Constitution. Hopefully some day, when the cases go up on the appellate level, somebody will listen to us; yes, the U.S. Constitution should be rigorously enforced in the administrative immigration proceedings.

I just wanted to share personal experience with a Japanese internment case. Fifteen years ago, I was a very new lawyer, wasn't practicing law very much because I was pregnant with my first child, and this old gentleman came to me and said, "Hiroko, I know you are not busy. Can you take a look at this document?" It was in a huge envelope containing these very brownish, old documents but I agreed because I did have a lenty of time to read.

As I was reading the documents, I came to find out he was a U.S. citizen born in Pala Alto, California, in 1918, and he went back to Japan, grew up there, but he came back as a young man to be an agricultural worker in California. And he enlisted in the Army, and there became a decorated Army soldier. He was fast, he was very good, and he was given many awards, and then Pearl Harbor happened. And he was discharged without any reason whatsoever, with a bus fare, and went back to his home where he had no job. Then, the Executive order of 9066 was issued by President Roosevelt;¹³⁷ he had to leave California. He could comply with the two contradictory orders, apparently. One was that you are not supposed to leave your house because of the curfew, and if you were to leave you had to report to a location from which he would be sent to a concentration camp. So he decided to skip town, he left.

Years went by. He came to New Orleans and really worked hard and became a very well-respected person in the community. He became a supporter of many, many people of Japanese ancestry in the New Orleans area. And he became an old rich man; I did not think he did not have a care in the world. So I was surprised when he told me and said, "I just wanted to get my honor back. Can you help me?" I realized that he lost the claim filed under the Civil Liberties Act at the administrative level because he

136. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993) (discussing legal implications of racial perceptions).

137. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

was not interned, he was not qualified. They basically told him “Don’t worry about it, just go away.”

So I did the research and realized that we would have to file a lawsuit against the U.S. government to pursue his claim further, so we did just that, and eventually the case was settled, and he received the settlement, over fifty years after he was expelled from his home town. I talked to him this morning to get a permission to talk about his case specifically. He was really humbled by my offer. He is ninety-two now, and “Waiting for the God to call me,” he said.

In the U.S. Supreme Court decision in *Korematsu* the Justices basically upheld the constitutionality of the President’s Executive Order, stating that:

Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.¹³⁸

In fact, this order’s constitutionality was affirmed based upon one person’s statement, General DeWitt.¹³⁹ He was a general of the War Department at the time, and he basically said there is evidence of espionage by Japanese citizens, and people of Japanese descent.¹⁴⁰ Some people argued that this law only applies to noncitizens in the United States. American people were wronged by the Japanese people who had no legal paper who can’t complain about this treatment. The history shows that that was not true. It makes me sad that an argument similar to this is circulating around this country. General DeWitt testified in San Francisco before the board, he said, “I don’t want any of them here,” meaning persons of Japanese ancestry.¹⁴¹ He continued to say,

They are a dangerous element. There is no way to determine their

138. *Korematsu v. United States*, 323 U.S. 214, 223 (1944).

139. *Id.* at 227; see also *Lt. Gen. John L. DeWitt's Final Report: Japanese Evacuation from the West Coast 1942*, THE VIRTUAL MUSEUM OF THE CITY OF SAN FRANCISCO, <http://www.sfmuseum.org/war/dewitt0.html> (last visited Mar. 1, 2011).

140. *Korematsu*, 323 U.S. at 227.

141. *Id.* at 236.

loyalty. The west coast contains too many vital installations essential to the defense of the country to allow any Japanese people on this coast The danger of the Japanese was, and is now—if they are permitted to come back—espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area¹⁴²

He made this allegation without a shred of credible evidence. So the sentiment that emanates from this statement eerily mirrors what's happening in this country, in certain parts of the country, and I hope we don't repeat the same mistake ever again.

PROFESSOR ANDREA ARMSTRONG [MODERATOR]: We have time to reflect together as a group, so if there are any questions that have been percolating in your mind, now would be the time to come to one of the microphones or raise your hand.

QUESTION FROM PROFESSOR JENNIFER CHACÓN: I have one, and it goes to Professor Kusuda and Professor Eagly, I think. This is about the driving while undocumented law, and specifically the statistics that you are looking at that show an increased rate of arrests post-2006, and it made me think of a recent study by the Warren Institute, and they've done a couple now, looking at jurisdictions where 287(g) has gone into effect, noting the changes in the arrest profile that occurred. There seemed to be a spike in the arrests of Latinos. And sometimes you see more aggressive police enforcement after 287(g) programs have been implemented.¹⁴³ And the lead charge in those cases tends to be minor offenses, such as document-related offenses. In Florida they looked at driving without a license, which obviously is something you can't really ascertain by seeing the person, so that may suggest that something else was motivating stops in these cases. And it made me wonder whether the increase that we're seeing in the arrests and prosecutions of the driving while undocumented relate in any way to any 287(g) collaborations or whether there's any kind of state/federal collaboration in enforcement efforts and the use of certain state laws in prosecutions.

¹⁴² *Id.*

¹⁴³ Trevor Gardner II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*. THE WARREN INSTITUTE (2009), http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf; see also Immigration and Nationality Act § 287(g) (1996), 8 U.S.C. §1357(g) (2006).

PROFESSOR INGRID EAGLY: I think that is an important question. It allows me to clarify some of the limitations of the data that we currently have available. The study you are referring to, which was conducted by the Warren Institute at Berkeley,¹⁴⁴ was based on data from Travis County, Texas. Their data was obtained from a public records request filed by the American Civil Liberties Union of Texas.¹⁴⁵ The Travis County data was very fine-grained: it tracked defendants from the point of arrest to the point of prosecution and eventual removal. However, these sort of detailed records from the point of arrest to removal are rare and hard to obtain.¹⁴⁶

For example, in the response that I received from the State of Louisiana regarding enforcement of the driving while undocumented law, the data were much more limited. As the Statistical Analysis Center for the Louisiana Commission on Law Enforcement explained its response, “[t]he following are not exhaustive numbers since we were unable to compare these figures with deportations by INS or fines that were imposed but not a part of the Department of Corrections records.”¹⁴⁷ Thus, the records that I referenced earlier are limited to what is contained in the Department of Corrections database. Therefore, the data does not reflect how many people are being arrested and charged under the law without making their way into Department of Corrections records.

PROFESSOR HIROKO KUSUDA: Fortunately, we don’t have any 287(g) programming in this area, however, we do have a Secure Communities program fully implemented in several parishes, which is more troublesome, because under 287(g), the federal government “trains” local enforcement officials which implicates all kinds of complications.¹⁴⁸ In Secure Community, nobody has to lift a finger, as it is simply an automatic transmission of the fingerprint information and sharing criminal background data between the federal government with state jurisdictions.¹⁴⁹

It is very difficult for us to track how they implement the system and the merging between state and federal criminal justice systems. ICE

144. Gardner & Kohli, *supra* note 143.

145. See generally Andrea Guttin, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas*, IMMIGRATION POLICY CTR. (Feb. 2010), <http://www.immigrationpolicy.org/special-reports/criminal-alien-program-immigration-enforcement-travis-county-texas>.

146. Gardner & Kohli, *supra* note 143, at 3-4 (explaining that the arrest records obtained for the study were “unique” and “extremely rare”).

147. Louisiana Enforcement Data, *supra* note 112.

148. *Memorandum of Agreement Between U.S. Department of Homeland Security Immigration and Customs Enforcement and Louisiana State Police*, LOUISIANA STATE POLICE (Dec. 12, 2009), http://www.ice.gov/doclib/foia/secure_communities-moa/r_louisiana_11-30-09.pdf.

149. *Secure Communities: A Fact Sheet*, IMMIGRATION POLICY CTR., (Nov. 4, 2010), <http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet>.

apparently favors this program, because they intend to complete national wide implementation of this program by 2013. And I understand that in terms of the tracking data, I can only give you anecdotal information that I obtained from the local criminal defense bar. According to them prosecution under the Louisiana Statute is basically concentrating in the Southeast, southeastern part of the state, because that's where the concentration of Latin populations are, New Orleans specifically. There are many prosecutions to this day, especially the jurisdiction that upheld the constitutionality of the "Driving While Undocumented" statute.¹⁵⁰ I haven't gotten the final number yet, but so far the Louisiana Supreme Court has not shown any intent to deal with this situation.

So, yes, the local enforcement is actually happening now because of the 287(g) programs, like in Tennessee,¹⁵¹ where Professor McKanders practices, which is the most troublesome and prevalent. But as far as Louisiana is concerned, we do have more problems, as there is no one person to blame for racial profiling because the machine is doing its own work. Can machines racially profile people? That's another issue that we will have to litigate another day.

QUESTION FROM PROFESSOR KARLA MCKANDERS: I have a question for Professor Diamond. I have been doing research on the 1850 Fugitive Slave Act,¹⁵² and the administrative body that it created, that issued certificates of removal to send slaves back to the slaveholding state and the slave owner. And I was wondering, have you done any research in this area?

And then my second question is some immigration scholars have indicated that comparing the early system migration of African slaves to America is not a valid, shouldn't be included in an immigration system because Africans were considered property, and I was wondering what your thoughts are on using that justification to exclude the migration of African-Americans in the United States from our conception of immigration law?

PROFESSOR RAYMOND T. DIAMOND: As to the first question, I've not researched this recently, but as to the second, I disagree. I think the 1808 Clause, as does the rest of the Constitution, recognizes implicitly though not explicitly that Africans brought to the country as slaves were

150. *State v. Gonzalez-Perez*, 07-1813 (La. App. 1 Cir. 2/27/08); 997 So. 2d 1, 7-8, *rehearing denied* 09-0292 (La. 12/18/09); 23 So. 3d 930.

151. *Memorandum of Agreement*, TENNESSEE HIGHWAY PATROL (Oct. 15, 2009), http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gtennesseehighwaypatrol101509.pdf.

152. Fugitive Slave Act, 9 Stat. 463 (1850).

property. While implicitly the Constitution addresses Africans brought into the country and Africans in the country as slaves or free, it addresses them explicitly only as "persons."¹⁵³ A very interesting conflict was presented between two different sets of anti-slavery activists. Some argued that the 3/5 Clause, the 1808 Clause, and the Fugitive Slave Clause were clearly

153. The Constitution does not explicitly mention slavery and race and deals squarely with the issue of slavery in only three places. Article I, Section 2, Clause 3, the "3/5 Clause," apportioned direct or capitation taxes and membership in the House of Representatives in accordance with population, but counted a slave as only three-fifths of a person. Article I, Section 9, Clause 1, the 1808 Clause, forbade Congress to limit the importation of slaves until 1808, a period of twenty years. Article IV, Section 2, Clause 3, the Fugitive Slave Clause, provided that fugitive slaves who escaped into another state would be returned to their owners. Yet, the wording in each instance is delicate. The 3/5 Clause provides:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. CONST. art. I, § 2, cl. 3. The 1808 Clause provided:

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

U.S. CONST. art. I, § 9, cl. 1. And the Fugitive Slave Clause, in language that could be applied to indentured servants as well as escaped slaves, provided:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

U.S. CONST. art. IV, § 2, cl. 3. Antislavery activists would argue that these indirect references to slaves meant that the Constitution was an antislavery document. *See, e.g.*, 2 THE FREDERICK DOUGLASS PAPERS 226-27 (John W. Blassingame ed. 1979) (remarks of Samuel R. Ward, Jan. 17, 1850) [hereinafter DOUGLASS PAPERS]; *see also* 3 *id.* at 385-86 (Douglass' address entitled *What to the Slave is the Fourth of July?* (July 5, 1852)); 3 *id.* at 151-62 (remarks during a debate on whether the Constitution is antislavery in intent (May 20-21, 1857)); *id.* at 163, 181-83 (address on the Dred Scott decision (May 14, 1857)); ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 73-102 (1970).

Antislavery forces were far from unanimous on this position. *See, e.g.*, WILLIAM PHILLIP, THE CONSTITUTION A PRO-SLAVERY COMPACT (1856); *see also* WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 229-48 (1977). Even Douglass at one time had argued that the effect of the Constitution and the intent of its framers was to be a proslavery document. *See* 2 DOUGLASS PAPERS, *supra*, at 231-32 (remarks of Frederick Douglass (Jan. 17, 1850)).

Debate on the pro-slavery effect and intent behind the Constitution is a matter as well of more recent vintage. Justice Thurgood Marshall argued the pro-slavery underpinnings of the Constitution in *The Constitution's Bicentennial: Commemorating the Wrong Document?* 40 VAND. L. REV. 1337 (1987). He was subjected to great criticism for his position. *See, e.g.*, William Bradford Reynolds, *Another View: Our Magnificent Constitution*, 40 VAND. L. REV. 1343 (1987) [hereinafter Reynolds, *Another View*]; *see also* William Bradford Reynolds, *Securing Liberty in an Egalitarian Age*, 52 MO. L. REV. 585 (1987) [hereinafter Reynolds, *Securing Liberty*]. *But see* Michael Middleton, *Securing Justice: A Response to William Bradford Reynolds*, 52 MO. L. REV. 607 (1987); Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 93 (1989).

pro-slavery, rendering the Constitution a pro-slavery document.¹⁵⁴ Others argued that the avoidance of the term “slave” or “slavery” evinced an implicit purpose not to give constitutional warrant to slavery.¹⁵⁵

The language of the 1808 Clause is that “[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”¹⁵⁶ While the expression “[i]mportation of such Persons as any of the States now existing shall think proper to admit” suggests that Africans were objects of commerce, the language “[m]igration . . . of such Persons as any of the States now existing shall think proper to admit” speaks to a recognition that enslaved Africans were in fact people.

There is a case, the first of the Negro seamen cases, in which Justice Johnson sitting as a circuit justice in 1823, ruled on a South Carolina statute which forbade Negro sailors from disembarking at port.¹⁵⁷ Justice Johnson recognized that it was Congress’ power under the Commerce Clause that would allow for it to regulate the passage of persons into the country.¹⁵⁸ He wrote of free persons, and yet it was the same Commerce Clause which would allow for Congress to regulate trade in persons into the country.¹⁵⁹ Congress’s commercial regulatory authority extended to trade in persons who were property, thus allowing Congress to regulate the African slave trade, but Congress’s power to “establish an uniform Rule of Naturalization”¹⁶⁰ necessarily involves either as a matter of implied power or necessary and proper power, the power to regulate immigration as well, the power to admit or deny entry to aliens who would be subjects of a rule of naturalization. Hence, I disagree with the critics. The Commerce Clause certainly allows for Congress to regulate the African slave trade, and that point standing alone would support those who disagree with me. But I would suggest that congressional power, pretermitted by the 1808 Clause, to regulate the migration or importation of a single class of individuals—“such Persons as any of the States now existing shall think proper to admit,” not persons in the first instance and property in the second—carries with it, either as a matter of implied power or necessary and proper power,

154. Marshall, *supra* note 153; Middleton, *supra* note 153; and Diamond, *supra* note 153.

155. Reynolds, *Another View*, *supra* note 153; Reynolds, *Securing Liberty*, *supra* note 153.

156. U.S. CONST. art. I, § 9, cl. 1.

157. *Elikson v. Deliesseline*, 8 F. Cas. 493, 493 (C.C.S.C. 1823) (No. 4,366).

158. *Id.* at 495.

159. *Id.*

160. U.S. CONST. art I, § 8, cl. 4.

the power to regulate immigration as well. Again, I disagree with the critics.

PROFESSOR ANDREA ARMSTRONG [MODERATOR]: Thank you.

QUESTION FROM PROFESSOR BILL ONG HING: I would like to ask a question about litigation strategies, and I hope it's not going to be too far afield; if it is, you don't have to answer it, but I think it connects to some of the points that were made earlier on. I was flipping through the CLE materials that were handed out earlier today, and I was shocked when I came across, and maybe I shouldn't be shocked, but I was nonetheless, at an amicus brief that is contained within these materials in the Arizona, Legal Arizona Workers Act case in the Supreme Court, the amicus brief as put in by the Chamber of Commerce, the U.S. Chamber of Commerce, that it, is the same U.S. Chamber of Commerce that has been instrumental in funneling money from known and unknown sources to candidates who are incredibly hostile to the rights of undocumented migrants and others.¹⁶¹

So to be taking a position in litigation that a state law that penalizes undocumented migrants, albeit by imposing sanctions against employers who hire them, seems to some degree surprising. So to what extent is there maybe a hopeful, and I realize that it's not entirely hopeful, to what degree is there a strategy in litigation through this kind of almost an idea of a citizen proxy, where you have literally an organization that represents U.S. citizens and companies which, in light of recent Supreme Court decisions, stand on equal footing with those citizens for purposes of donating money to candidates. Does this in some way kind of break up or shake up how we think about litigation which so far today has been presented mainly through the model of preemption?

PROFESSOR HIROKO KUSUDA: It is important to work with non-traditional partners. For example, American Immigration Lawyers Association and U.S. Chamber of Commerce oftentimes form an alliance commonly referred to as "strange bedfellows." Putting aside the differences, there is a case that they have teamed up in the past in getting a number of worker visas increased.¹⁶²

I am concerned there is also a direct relationship between the corporate profit and immigrant detention. For example, a corporation may introduce a bill written by their lobbyists, such as the case with the Correction Corporation of America, a for-profit company that earns profit

161. Brief for the United States as Amicus Curiae Supporting Petitioners, Chamber of Commerce of U.S. v. Whiting, 130 S. Ct. 534 (2010) (No. 90-115), 2010 WL 3501180.

162. Chamber of Commerce of U.S. v. Chertoff, 8:08-cv-03444-AW (D. Md. S.D. 2008).

from incarcerating noncitizens, which has been reported to be actively involved in drafting state legislation that favors their position. In terms of forming a litigation strategy, we do pick our partners, well, as long as our interests overlap. We also work with various religious groups. The Catholic Church takes a very strong position on migration and admission of immigrants in this country. On certain issues we disagree; however, there has been a very strong working relationship between us and them. We also work with the Lutheran Church.

QUESTION FROM PROFESSOR BILL ONG HING: Thank you. You know, well also, the Chief of Staff, actually is on the Board of the Department of Corrections. But, you know if you look at the litigants in some of the cases mentioned, some of the plaintiffs actually were business owners, they were landlords, and they were a restaurant owner, and others. They used that litigation strategy as well, and that puts, that played a critical role. And I think you are right, that it's a strategy that is important.

AUDIENCE QUESTION: I'm wondering, to what extent we ought to take some lessons from what happened a couple of days ago in Iowa, where three of the state Supreme Court justices who were on the court when it held; I'm not really familiar with who or what the law was, but basically it held that same-sex marriage was constitutional.¹⁶³ And then, these three justices were voted out of office in an election, where typically they had been re-elected.¹⁶⁴

I am wondering whether we should take any lessons from that in this context because here we are dealing with folks who are: A) noncitizens, who are, in this political climate, not very popular, and that's not a unique event as we all know. But B), you compound that with the fact that they have some involvement with the criminal justice system. So you have two groups of people, or two interactions, two statuses which make a person not popular, and you provide them in one individual, and that makes them really not popular. And, so I'm wondering to what extent we should take lessons from what happened in Iowa, given that most state court judges are elected, just like they are in Iowa.

PROFESSOR RAYMOND T. DIAMOND: Your question puts the following question to me. Which is it, what is the decision-making body which ought to be making these decisions about immigration, abortion, racial or gender or sexual preference discrimination, or anything else controversial? I do not speak to these other matters, though I do note a

163. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

164. See Chris Geidner, *In Iowa, Judges Are Ousted*, METRO WEEKLY (Nov. 3, 2010, 1:16 AM), <http://www.metroweekly.com/poliglot/2010/11/in-iowa-judges-are.html>.

substantial history of courts undertaking decision-making on them, but I think that there is an argument that these issues of immigration are inherently political, and that the Constitution recognizes that it's Congress' power to make these decisions.

I have argued today that it is not constitutional for the state to make certain sorts of decisions about immigration, as has been done in Arizona. As a political matter, it may be the better course of action for Congress to act, to undertake actively to refuse that which Arizona and other states are doing now—or to make a decision, a political decision, to confirm the judgment of the states, even if not their particular legislation.

One wonders if we would be in a better place if we have an active national discussion, about what our immigration policy ought to be, instead of having discussions in our courts about the limits of immigration policy, in a way which potentially exposes the judiciary to the criticism that is displacing the political will of the states on a matter inherently political. Moreover, many of the critics will fail—whether deliberately obtuse or not—to recognize that there are legal and not simply policy issues that are likely to control results in legal challenges to state immigration enforcement.

AUDIENCE QUESTION: I have one question. Ok, you talk about immigration and illegal immigrants. And I guess my question is, where do we stop? Do we let everyone in from an impoverished nation; they could just walk in, illegally, across our borders? I mean, I think that we have a right to exist without having to be taxed to support people who cannot afford it, that are not citizens. And, I don't understand. I do understand, like with the Japanese, I thought what they've done [the United States government] was terrible, and I do understand some of the things, there was a young man in the paper who had served in the military, was honorably discharged, and now they want to send him back because he's an illegal alien.

But at some point, the American people have to take a stand. Apparently, Washington and our national government is not going to, so are we just hopeless and defenseless in our own country? We have to wait for them to decide what they're going to do about controlling immigration, or should we just open our borders to every poor country? Africa, the people in China who are treated so terribly, India, you know any poor country or country where the people are treated terribly. Do we just have to open our borders to them and let them over here? When we are excluding scientists, and doctors, and statesmen, and teachers and professors?

PROFESSOR ANDREA ARMSTRONG [MODERATOR]: Thank you.

Professor Eagly, would you like to comment on some of the issues she raises?

PROFESSOR INGRID EAGLY: I am happy to start a conversation regarding your question. We do have a very large undocumented population in the United States—over eleven million undocumented people are present in this country by recent estimates.¹⁶⁵ You highlight the question of whether unauthorized migration should be addressed through enforcement or rather through comprehensive immigration reform. I realize that there is public sentiment, like the sentiment that you express, favoring increased enforcement. However, there is also strong public sentiment favoring immigration reform.

AUDIENCE RESPONSE: It could be, you know, overhauling the immigration law, but I just think that we have to have, the people of the United States who are citizens here, have to feel their citizenship counts for something.

PROFESSOR INGRID EAGLY: I think you are raising issues that go to the heart of these debates. One of the things that we have to think about when we are looking at enforcement at the local level is not just whether the locality has the authority to enforce the law, but also whether we want a uniform immigration policy. Overall, we have a national immigration policy that focuses very little on enforcement. As the system has evolved, we increasingly rely on the criminal justice system to funnel migrants into the deportation system. Within this civil-criminal enforcement system, if localities function differently with respect to their prioritizations of certain crimes, the immigration functioning at the local level can vary drastically from region to region. For example, data released recently under the federal Secure Communities program in response to a Freedom of Information Act request, reveals how many people were removed as a result of certain criminal convictions at the county level.¹⁶⁶ From county to county there are different prioritizations of removals. Some counties focus on those who are convicted of serious felonies, while others have higher rates of removal of those who have been convicted of only a petty crime, or have no criminal record at all.¹⁶⁷

165. MICHAEL HOEFER, NANCY RYTINA & BRYAN C. BAKER, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGR. STAT., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2008, 2-3 & fig.1 (2009), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf.

166. See U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: NATIONWIDE INTEROPERABILITY BY CONVICTION REPORT (2010), available at http://www.ice.gov/doclib/foia/secure_communities/nationwide_interoperability_conviction-july.pdf.

167. *Id.*

So, on a *de facto* level, we see the criminal system fostering very different immigration policies at the local level. I will stop there to let the other panelists respond to these questions.

PROFESSOR RAYMOND T. DIAMOND: Well, I think the question really speaks a frustration which is shared by very, very many in the country. But the problem is larger than simply illegal immigration. During the days of the Prohibition, we couldn't protect our border to the north from importation of alcohol.¹⁶⁸ In today's world, we can't protect our borders from cocaine coming into the country from South America, or from heroin and other drugs coming in from Asia, or any drug coming in from Mexico,¹⁶⁹ and many sense that we cannot protect our borders against entry by persons unauthorized by immigration authorities. We try mightily, and we do many effective things but many things we do are ineffective and whether effective or not, whatever we do is expensive. I think all of this helps explain the sort of frustration expressed by the question.

Having said this, the question really is, what are our political decision-makers going to do with that frustration. As citizens, we have the right to ask them to do something about our frustration. The statute in Arizona, as well as bills in Louisiana and elsewhere, along with the positions taken by the nine states and eighty-eight members of Congress, in signing briefs in support of the Arizona statute¹⁷⁰—all are indications that political decision makers sense frustration. I think a very significant question is whether the right political power center is acting. That power center, given the Supremacy Clause, does not reside anywhere in state government, but in Congress. States don't make immigration law, and the federal courts don't make immigration law either. So I will confirm what the questioner doesn't need any confirmation of, that these are legitimate concerns.

PROFESSOR HIROKO KUSUDA: I wanted to share the most recent Pew Hispanic Centers report on documented immigrants in this country. Apparently a most recent report estimated about 11.9 million undocumented people in this country.¹⁷¹ And apparently the population

168. DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 21, 106-07 (1979).

169. U.S. DEP'T OF JUSTICE NAT'L DRUG INTELLIGENCE CTR. No. 2010-Q0317-001, NATIONAL DRUG THREAT ASSESSMENT 2010, <http://www.justice.gov/ndic/pubs38/38661/>.

170. Brief for States of Michigan, et al. as Amici Curiae Supporting Defendants-Appellants, United States v. Arizona (2010) (No. 10-16645), 2010 WL 5162508; Brief for Members of Congress Brian Bilbray, et al. as Amici Curiae Supporting Defendants-Appellants, United States v. Arizona (2010) (No. 10-16645), 2010 WL 5162520; Brief of Intervenor-Appellant Arizona State Senator Russell Pearce Supporting Defendants-Appellants, United States v. Arizona (2010) (No. 10-16645), 2010 WL 5162516.

171. Jeffrey Passel & D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEW HISPANIC CTR., i (Apr. 14, 2010), <http://pewhispanic.org/files/reports/107.pdf>.

grew very rapidly between 1990-2006. However, the number apparently has since stabilized, and in this new analysis the center estimates that the rapid growth of unauthorized immigrant workers also has halted.¹⁷² It finds that there are 8.3 million undocumented immigrants in the U.S. labor force in March of 2008.¹⁷³

I agree with your position that we can't keep accepting people from all over the world without proper rules and procedures in place. One of which I think is very important, for the U.S. government to do, is that we have to demand accountability from employers. According to the most recent announcement from the Secretary of Department of Homeland Security, "[s]ince January 2009, ICE has audited more than 3200 employers suspected of hiring illegal labor."¹⁷⁴ They audited "225 companies and individuals, and imposed approximately \$50 million in financial sanctions."¹⁷⁵ This doubled the total amount of audits administered during the entire previous administration.¹⁷⁶

That being said, there are still not enough employer sanctions. My personal experience dealing with a worksite raid in 2008, which was the largest immigration raid in the history of the United States, occurred in Mississippi.¹⁷⁷ And almost 600 arrests were made of a variety of workers, U.S. citizens, green card holders, and undocumented people.¹⁷⁸ The most recent report noted that only one employee manager of the company that hired over 3000 workers was charged and convicted.¹⁷⁹ So here is evidence of the federal government not doing its job. There is already a law on the books, which was passed to punish U.S. employers who hire undocumented workers, which has to be enforced. And also, yes, we do have to worry about people who are fleeing from persecution as we have an international obligation to protect human rights. Also as one of the most powerful nations in the country, the United States should take a leadership role in stabilizing a country that is going through civil turmoil. For example, Somalia where there is no functioning government since 1991, and

172. *Id.*

173. *Id.*

174. *Secretary Napolitano Announces Record-breaking Immigration Enforcement Statistics Achieved under the Obama Administration*, DEPT OF HOMELAND SECURITY (Oct. 6, 2010), http://www.dhs.gov/ynews/releases/pr_1286389936778.shtm.

175. *Id.*

176. *Id.*

177. *Feds detain nearly 600 in Miss. plant raid*, MSNBC.COM (Aug. 26, 2008, 7:11 PM), http://www.msnbc.msn.com/id/26410407/ns/us_news-crime_and_courts/.

178. *Id.*

179. *Interior Immigration Enforcement—Breaking the Law Doesn't Pay*, FED'N FOR AMERICAN IMMIGRATION REFORM, http://www.fairus.org/site/News2?page=NewsArticle&id=16641&security=1601&news_iv_ctrl=1007 (last visited Mar. 1, 2011).

Honduras where people are suffering the gang violence. Some have geo- and socio-political issues that may be beyond our control, however, I do share your concern that we can do better than we have been doing in executing our obligations.

RESPONSE FROM PROFESSOR BILL ONG HING: I actually want to disagree a little bit with the last two panelists' comments, a couple of points, and respond to your concerns.

First of all, part of the reasoning that you gave for your frustration over undocumented immigration that I think, Professor Diamond, you implicitly agreed with, when you said that you understand the sheer frustration and that there is a solid basis for that frustration. That's the part I would ask us to be cautious about, because part of your frustration as I understood it, one of the phrases or sentences that you used was with respect to the cost of the immigrants, that we as citizens are bearing.

That's something we should be a little bit careful about because I've read the economic reports, that's what I do every time there's a new economic report done on the economic impact of immigrants, and they are basically two-fold. One is with respect to employment displacement, and the other is with respect to costs, hard costs. And believe me, we didn't get into it, taxwise, and employment creation-wise by the immigrants that are here, especially when it comes to undocumented. Undocumented put in way more than you or I put in proportionally that is taken back out in terms of our tax refunds, in terms of our services, and you only have to look at the immigration policy center website and each individual state that they've looked at with respect to both of those issues, you will find the states with the most immigrants, every decade for the last 100 years, have the lowest unemployment rates.¹⁸⁰ The states with the least number of immigrants have the highest unemployment rate.¹⁸¹

The other thing that I would be a little bit cautious about is stating that, and I think you said that we're "excluding" professionals and scientists. In fact, that's not true of the scientists and the people with professional abilities. Their visas are pretty plentiful. It's actually the families, you know, family categories that have to wait many, many years, okay? It's not the professionals you are alluding to. We can go look at the website of the immigration numbers; there's not a backlog in those categories. Those folks get to come in.

180. Rob Paral & Madura Wijewardena, *The Unemployment and Immigration Disconnect: Untying the Knot Part I of III*, IMMIGRATION POLICY CTR. 3 (May 19, 2009), <http://www.immigrationpolicy.org/special-reports/untying-knot-series-unemployment-and-immigration>.

181. *Id.*

And with enforcing employer sanctions, there's a real problem when we are blaming the employers, okay? I agree a hundred percent, and you didn't say this, okay? That employers exploit the hell out of undocumented workers, okay? Not all of them, but a lot of them do. And there are a lot of ways of going after those employers that exploit undocumented workers, without the use of employer sanctions. There are health and safety laws, there are minimum wage laws, and there are other conditional laws. I offer enforcing those, and the truth is, if you enforce those laws, you may in fact make those jobs a little bit more appealing to lawful residents and citizens of the United States.

So I'm all for that, let's go after the employers who exploit, but let's go after them with labor laws and employment laws. Because the problem with employer sanctions laws is that they buy into the notion that there's a problem with undocumented migration, and I don't think there's a problem with undocumented immigration.

If you were here earlier, and listened to a little bit of what I said, we have to understand why people are here. And I think if we understood why people are here, we'd calm down, because a lot of what the reasons that people are here, they're way beyond the control of their movement. It's more within our control as shareholders of corporations that our, that our investment, our retirement funds are invested in. We have got to be complaining to these multinational corporations that our mutual funds are invested in. That's where the power is. We shouldn't be blaming the undocumented.

Nobody is asking the United States to take every poor person in the world, but I will agree with one thing that's implicit in what you are saying, and that's that I do not believe that more enforcement money or a very generous amnesty will solve the undocumented immigration problem. Let me repeat that—the most generous legalization program and spending billions more at the border, neither one of those is going to solve the undocumented immigration problem. That problem is not going to be solved until we work with those countries and get them to shape up with their economy, and I'm telling you, the United States has, is complicit in that.

It doesn't take a brain surgeon to figure out that the United States has more to gain from NAFTA,¹⁸² that the United States corporations have more to gain from the WTO,¹⁸³ which is NAFTA on steroids. Let's not blame the people who are really economic refugees. They're not here

182. 19 U.S.C.S. § 3301 (1993) (North American Free Trade Agreement).

183. World Trade Organization.

because they would rather be here. They would rather be home working. There are three or four of us that have said that already. It's the truth. Spend some time with them, interview them, and ask them, "where would you rather be?" They'd rather be living their dreams in Mexico if they had the work. They are here to feed their families, that's why no matter how much money you put at the border, you can mine that goddamn border, they're going to continue coming if we don't solve the real push factors that are causing this.

PROFESSOR ANDREA ARMSTRONG [MODERATOR]: What I'd like to do is, we have one additional contribution from Dean Demleitner, and then I'd like to offer the panelists an opportunity for some closing thoughts, briefly, because we are at the end of our time after this brief discussion.

DEAN NORA V. DEMLEITNER: I'm guilty about taking our time, especially speaking after Professor Hing, but I think there is one point that I don't think has been covered by the media surprisingly enough, because I do believe that there is at least one group that has a true stake in this enforcement policy. A financial stake, and that's the Corrections Corporation of America. If it is accurate, the latest media reports that they were actively involved in drafting the Arizona legislation.¹⁸⁴ And a few years ago, they were telling their shareholders in public documents—don't worry, even if the regular prison population were to decline, which is still hasn't, there is this large unmined population, undocumented immigrants, and even documented immigrants with a criminal conviction who we want to detain. And, if you are looking at their profit reports, they were absolutely correct. So, it's a great move strategically for them to support this type of legislation. So I am concerned that they're frustrated, whether correct or not, that there is somebody who is truly benefiting from these laws.

PROFESSOR ANDREA ARMSTRONG [MODERATOR]: Okay, so should we start with Professor Diamond and then close with Professor Kusuda?

PROFESSOR RAYMOND T. DIAMOND: I will return to a theme that I've mentioned at least a couple of times, and simply ask this question: if on one level, Arizona's real concerns are legitimate, that is, its concern with the public fisc, the question is, "what should Arizona do about it?"

The most recent comments suggest that that cost may not be as high as Arizona worries. What I will suggest is that the debate we need to have about immigration is a debate that needs to take a place in the political

184. See Laura Sullivan, *Prison Economics Help Drive Arizona Immigration Law*, NAT'L PUB. RADIO (Oct. 28, 2010), <http://www.npr.org/templates/story/story.php?storyId=130833741&ps=cpr>.

branches of government, at the federal level. It's a debate which has begun, and this conversation we're having today is part of it.

I'm not inclined as to disagree with Will Rogers that "this country has come to feel the same when Congress is in session as when the baby gets hold of a hammer,"¹⁸⁵ but I do believe that when Congress has access to information, we can at least ask it to make an intelligent decision.

PROFESSOR INGRID EAGLY: I think the last question from Dean Demleitner is an important one. I do think that correctional policies and funding streams can potentially shape enforcement priorities.

For example, there is a question, as Dean Demleitner highlights, as to whether the federal or state government will bear the incarceration costs for undocumented defendants. Since 1996, we have had a federal program that reimburses localities for a portion of the correctional expenses incurred with holding certain undocumented persons for a minimum number of days.¹⁸⁶ So, there are built-in financial incentives for states. Namely, they can receive a reimbursement by incarcerating persons who qualify under the program for at least four days.¹⁸⁷ Whether these incentives play out in practice is an important area for future research.

The Travis County, Texas data that we discussed earlier are also relevant to Dean Demleitner's question. In Travis County, researchers found that enforcement patterns did in fact shift when Travis County implemented the so-called "Criminal Alien Program" or "CAP."¹⁸⁸ CAP is a federally-funded program that involves localities in screening arrestees for immigration status.¹⁸⁹ As the study by the Warren Institute at Berkeley demonstrated, after the program was implemented in Irving, Texas, arrests of Latinos for petty offenses increased dramatically.¹⁹⁰

PROFESSOR BILL ONG HING: I'm sorry if I sounded like I was picking on you.

PROFESSOR HIROKO KUSUDA: I should have supplemented my earlier comment on this matter. I have to give a little more credit to the U.S. Congress in passing trafficking a bill, Violence Against Women Act,

185. LAURENCE J. PETER, PETER'S QUOTATIONS: IDEAS FOR OUR TIME 221 (1979).

186. 8 U.S.C. § 1231(i) (2006).

187. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-337R, INFORMATION ON CRIMINAL ALIENS INCARCERATED IN FEDERAL AND STATE PRISONS AND LOCAL JAILS 13 (2005), http://www.governor.state.az.us/documents/BorderSecurity/ICAIFSPLJ_Report_April2005.pdf.

188. Guttin, *supra* note 145.

189. *Id.*

190. Gardner & Kohli, *supra* note 143.

which gives relief to certain victims of trafficking and victims of crime.¹⁹¹ Also there has been a recent Department of Justice's effort in going after employers who benefit from trafficking and abusing workers, especially H2-B workers.¹⁹² But these efforts have to substantially increase awareness so that people will understand what kind of cruel treatment employees have been subjected to, and a relief the immigrant workers are entitled. In our clinic we represent immigrant workers who were trafficked and abused. I totally agree with you, and both civil and criminal wrongdoings on the part of the employer should be punished.

In closing, I think the most troublesome element of state criminalization of immigrants, is the fact that immigrants are not commonly savvy or "street smart." When they are arrested on the street, they confess, or they make incriminating statements because they are afraid and they believe they are not entitled to an attorney to consult, they don't know they don't have to say anything. So their statements come back and haunt them in the subsequent immigration proceedings, because such statements are almost always considered admissible evidence by most immigration judges. Moreover, noncitizens are not entitled to appointed counsel; therefore, they are placed in the most difficult situation. Arresting immigrants who are not familiar with the American criminal justice system and illegally obtaining information that incriminates them, without giving them a tool to defend themselves, is the most troublesome aspect of this attempt by local jurisdictions. I think that this problem continues unless or until one day Congress decides to appoint noncitizens counsel in immigration proceedings. I think that these unrepresented people who represent themselves in the adversarial immigration court proceedings face a very difficult task, and that's the reason why we make a monthly visit to immigration detention center, to empower them in a limited capacity that we have, to let them know these are your rights. But sometimes it's too late by the time we talk to them, so I sincerely hope that the state of Louisiana will not follow Arizona's lead.

PROFESSOR ANDREA ARMSTRONG [MODERATOR]: Well, I hope that you'll join me in thanking Professor Medina and students with the Journal of Public Interest Law, Loyola University New Orleans, its staff and its students who helped make this symposium possible. And last, but not least, our expert panelists who brought all of their expertise to bear on some very, very difficult questions, so thank you very much.

191. 18 U.S.C.A. § 2261 (West 2011).

192. *Florida Couple Pleads Guilty to Forced Labor Conspiracy of 39 Filipino Guest Workers*, FED. BUREAU OF INVESTIGATION (Sept. 17, 2010), <http://miami.fbi.gov/dojpressrel/pressrel10mb091710.htm>.

APPENDIX

Regular Session, 2010

HOUSE BILL NO. 1205

BY REPRESENTATIVE HARRISON

EMPLOYMENT: Creates the Louisiana Taxpayer and Citizen Protection Act of 2010

AN ACT

To enact Chapter 21 of Title 49 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 49:1311 through 1323, relative to immigration; to provide for the determination of citizenship status for persons charged with certain crimes; to provide for verification of persons determined to be a foreign national; to provide for time limitation for verification; to provide for notification to certain entities; to provide for rebuttable presumption that certain persons are a flight risk; to provide for participation in certain verification system; to provide for establishing certain discriminatory practice; to provide for requiring agencies and political subdivisions to verify lawful presence of persons applying for certain benefits; to provide for nondiscriminatory treatment; to require certain applicants to be verified through the Systematic Alien Verification for Entitlement Program; to require certain entities to monitor certain program; to require publication of annual report and certain recommendations; to require certain entities to submit a report of errors to certain agency; to require certain withholding of state income tax under certain circumstances; to provide relative to postsecondary education; to direct the Attorney General to negotiate terms of certain memorandum; to prohibit certain actions by government entities; to provide for establishing a Fraudulent Documents Identification Unit within the Department of Public Safety subject to availability of funding; to provide for a purpose; to provide for employment of sufficient employees; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Chapter 21 of Title 49 of the Louisiana Revised Statutes of 1950, comprised of R.S. 49: 1311 through 1323, is hereby enacted to read as follows:

CHAPTER 21. THE LOUISIANA TAXPAYER AND CITIZEN
PROTECTION ACT OF 2010

PART I. GENERAL PROVISIONS

§1311. Title

This Chapter may be cited as the “Louisiana Taxpayer and Citizen Protection Act”.

§1312. Legislative intent

The state of Louisiana finds that illegal immigration is causing economic hardship and lawlessness in this state and that illegal immigration is encouraged when public agencies within this state provide public benefits without verifying immigration status. The state of Louisiana further finds that when illegal immigrants have been harbored and sheltered in this state and encouraged to reside in this state through the issuance of identification cards that are issued without verifying immigration status, these practices impede and obstruct the enforcement of federal immigration law, undermine the security of our borders, and impermissibly restrict the privileges and immunities of the citizens of Louisiana. Therefore, the people of the state of Louisiana declare that it is a compelling public interest of this state to discourage illegal immigration by requiring all agencies within the state to fully cooperate with federal immigration authorities in the enforcement of federal immigration laws. The state of Louisiana also finds that other measures are necessary to ensure the integrity of various governmental programs and services.

§1313. Definitions

As used in this Chapter the following terms shall have the definitions ascribed in this Chapter unless context clearly requires otherwise:

- (1) “Public employer” means every department, agency, or instrumentality of the state or a political subdivision of the state.
- (2) “Subcontractor” means a subcontractor, contract employee, staffing agency, or any contractor regardless of its tier.
- (3) “Unauthorized alien” means an alien as defined in Section 1324a(h)(3) of Title 8 of the United States Code.

PART II. PUBLIC BENEFITS

§1314. Public benefits

- A. Except as provided in Subsection C of this Section or where exempted by federal law, each agency and each political subdivision of this state shall verify the lawful presence in the United States of any natural person fourteen years of age or older who has applied for state or local public benefits, as defined in 8 U.S.C. 1621, or for federal public benefits, as defined in 8 U.S.C. 1611, that is administered by an agency or a political subdivision of this state.
- B. The provisions of this Section shall be enforced without regard to race, religion, gender, ethnicity, or national origin.
- C. Verification of lawful presence under the provisions of this Section shall not be required:
 - (1) For any purpose for which lawful presence in the United States is not restricted by law, ordinance, or regulation.
 - (2) For assistance for health care items and services that are necessary for the treatment of an emergency medical condition, as defined in 42 U.S.C. 1396b(v)(3), of the alien involved and are not related to an organ transplant procedure.
 - (3) For short-term, noncash, in-kind emergency disaster relief.
 - (4) For public health assistance for immunizations with respect to diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.
 - (5) For programs, services, or assistance such as soup kitchens, crisis counseling and intervention, and short-term shelter specified by the United States attorney general, in the sole and unreviewable discretion of the United States attorney general after consultation with appropriate federal agencies and departments which:
 - (a) Deliver in-kind services at the community level, including through public or private nonprofit agencies.
 - (b) Do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance

provided on the income or resources of the individual recipient.

- (c) Are necessary for the protection of life or safety.
- D. (1) Verification of lawful presence in the United States by the agency or political subdivision required to make such verification shall require that the applicant execute an affidavit under penalty of perjury that:
- (a) He is a United States citizen.
 - (b) He is a qualified alien under the federal Immigration and Nationality Act and is lawfully present in the United States.
- (2) The agency or political subdivision providing the state or local public benefits shall provide notary public services at no cost to the applicant.
- E. For any applicant who has executed the affidavit described in Subparagraph (1)(b) of Subsection D of this Section, eligibility for benefits shall be verified through the Systematic Alien Verification for Entitlements (SAVE) Program operated by the United States Department of Homeland Security or an equivalent program designated by the United States Department of Homeland Security. Until such eligibility verification is made, the affidavit may be presumed to be proof of lawful presence for the purposes of this Section.
- F. Any person who knowingly and willfully makes a false, fictitious, or fraudulent statement of representation in an affidavit executed pursuant to Subsection D of this Section shall be subject to criminal penalties applicable in this state for fraudulently obtaining public assistance program benefits. If the affidavit constitutes a false claim of U.S. citizenship under 18 U.S.C. 911, a complaint shall be filed by the agency requiring the affidavit with the United States attorney general for the applicable district based upon the venue in which the affidavit was executed.
- G. Agencies or political subdivisions of this state may adopt variations to the requirements of the provisions of this Section which demonstrably improve the efficiency or reduce delay in the verification process, or to provide for adjudication of unique individual circumstances where the verification procedures in this Section would impose unusual hardship on a legal resident of

Louisiana.

- H. It shall be unlawful for any agency or a political subdivision of this state to provide any state, local, or federal benefit, as defined in 8 U.S.C. 1621, or 8 U.S.C. 1611, in violation of the provisions of this Section.
- I. Each state agency or department which administers any program of state or local public benefits shall provide an annual report to the governor, the president pro tempore of the Senate and the speaker of the House of Representatives with respect to its compliance with the provisions of this Section. Each agency or department shall monitor the Systematic Alien Verification for Entitlements Program for application verification errors and significant delays and shall provide an annual public report on such errors and significant delays and recommendations to ensure that the application of the Systematic Alien Verification of Entitlements Program is not erroneously denying benefits to legal residents of Louisiana. Errors shall also be reported to the United States Department of Homeland Security by each agency or department.

PART III. CRIMINAL

§1315. Criminal: booking of arrested person, submission of booking information summary; citizenship, immigration status

- A. It is the duty of every peace officer making an arrest, or having an arrested person in his custody, promptly to conduct the person arrested to the nearest jail or police station and cause him to be booked.
- B. A person is booked by an entry, in a book kept for that purpose, showing his name and address, a list of any property taken from him, the date and time of booking, and the submission of a booking information summary as provided for in Paragraph (C) of this Section to the person making the entry in the police or jail book. Every jail and police station shall keep a book for the listing of the above information as to each prisoner received. The book and booking information summaries shall always be open for public inspection. The person booked shall be imprisoned unless he is released on bail.
- C. (1) At the time of booking, the peace officer causing the arrested

person to be booked shall deliver to the person at the jail or police station who accepts custody of the arrestee a booking information summary which shall include at least the following information:

- (a) The proper legal name of the arrestee, if known.
 - (b) The charge or charges upon which the person was arrested and the name of the person making the arrest.
 - (c) A short recitation of the facts or events which caused the defendant to be arrested.
 - (d) The names of all other persons arrested as a result of the same events or facts.
- (2) If the peace officer presenting an arrestee for booking is unable to submit a complete booking information summary, he shall provide the person receiving custody of the arrestee a written statement or form, explaining why a complete booking information summary cannot be presented.
- D. (1) At the time of booking, the peace officer causing the arrested person to be booked shall attempt to determine the citizenship or immigration status of the person being booked.
- (2) If the arrested person is a foreign national, the peace officer shall make a reasonable effort to verify that the person has been lawfully admitted into the United States. If the verification of lawful status cannot be determined from documents in the possession of the arrested person, the peace officer shall attempt to notify the United States Department of Homeland Security as soon as is practicable.
- E. The office of state police shall be responsible for investigating and apprehending persons or entities that participate in the manufacture, sale, or distribution of fraudulent documents used for identification purposes, including but not limited to fraudulent identification documents prepared for persons who are unlawfully residing within the state of Louisiana. The office of state police is hereby authorized to create a unit devoted to such investigations by rule promulgated in accordance with the Administrative Procedure Act.

§1316. Unlawful harboring, concealing, or sheltering of an alien

- A. It shall be unlawful for any person to harbor, conceal, or shelter from detection any alien in any place within the state of

Louisiana, including any building, when the offender has knowledge of the fact that the alien has entered or remained in the United States in violation of law and if either of the following occur:

- (1) The offender has the intent of assisting the alien in eluding a federal, state, or local law enforcement agency, or the United States Citizenship and Immigration Services Bureau.
 - (2) The offender has the intent of assisting the alien in avoiding or escaping arrest, trial, conviction, or punishment.
- B. For the purposes of this Section, “alien” has the same meaning as defined in the Immigration and Nationality Act, 8 U.S.C. 1101(a)(3).
- C. Nothing in this Section shall be construed so as to prohibit or restrict the provision of any state or local public benefit described in 8 U.S.C. 1621(b), or regulated public health services provided by a private charity using private funds.
- D. (1) Whoever commits the crime of unlawfully harboring, concealing, or sheltering an alien on a first conviction shall be fined not more than one thousand dollars, or imprisoned for not more than six months, or both.
- (2) Whoever commits the crime of unlawfully harboring, concealing, or sheltering an alien on a second or subsequent conviction shall be fined not more than two thousand dollars, or imprisoned for not more than one year, or both.
- E. The following shall be affirmative defenses to prosecution under this Section:
- (1) The person was providing humanitarian aid as a designated representative of a nonprofit organization which is tax exempt pursuant to Section 501(c)(3) of the Internal Revenue Code.
 - (2) The person was the attorney or his designee, or such other persons authorized to represent clients in immigration matters pursuant to 8 C.F.R. 1292.1, or their designee, and who was assisting the alien and providing representation to the alien in the course and scope of the attorney’s or other authorized representative’s employment.

§1317. Unlawful transportation of a n alien

- A. It shall be unlawful for any person to transport, move, or attempt to transport in the state of Louisiana any alien, knowing or in reckless disregard of the fact that the alien has entered or remained in the United States in violation of law, in furtherance of the illegal presence of the alien in the United States.
- B. For the purposes of this Section, “alien” has the same meaning as defined in the Immigration and Nationality Act, 8 U.S.C. 1101(a)(3).
- C. Nothing in this Section shall be construed so as to prohibit or restrict the provision of any state or local public benefit described in 8 U.S.C. 1621(b), or regulated public health services provided by a private charity using private funds.
- D.
 - (1) Whoever commits the crime of unlawfully transporting an alien on a first conviction shall be fined not more than one thousand dollars, or imprisoned for not more than six months, or both.
 - (2) Whoever commits the crime of unlawfully transporting an alien on a second or subsequent conviction shall be fined not more than two thousand dollars, or imprisoned, with or without hard labor, for not more than one year, or both.
- E. The following shall be affirmative defenses to prosecution under this Section:
 - (1) The person was providing humanitarian aid as a designated representative of a nonprofit organization which is tax exempt pursuant to Section 501(c)(3) of the Internal Revenue Code.
 - (2) The person was the attorney or his designee, or such other persons authorized to represent clients in immigration matters pursuant to 8 C.F.R. 1292.1, or other designee, representing the alien and who was transporting the alien in the course and scope of the attorney’s or other authorized representative’s employment.

PART IV. STATUS VERIFICATION

§1318 Status Verification

- A. "Status Verification System" means an electronic system operated by the federal government, through which an authorized official of an agency of the state of Louisiana or of a political subdivision therein may make an inquiry, by exercise of authority delegated pursuant to Section 1373 of Title 8 of the United States Code, to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by Part V of this Chapter. The Status Verification System shall be deemed to include:
- (1) The electronic verification of work authorization program of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, P.L. 104-208, Division C, Section 403(a); 8 U.S.C. 1324a, and operated by the United States Department of Homeland Security, known as the Basic Pilot Program.
 - (2) Any equivalent federal program designated by the United States Department of Homeland Security or any other federal agency authorized to verify the work eligibility status of newly hired employees, pursuant to the Immigration Reform and Control Act of 1986 (IRCA), D.L. 99-603.
 - (3) Any other independent, third-party system with an equal or higher degree of reliability as the programs, systems, or processes described in this Section.
 - (4) The Social Security Number Verification Service, or such similar online verification process implemented by the United States Social Security Administration.
- B. The following entities may create, publish or otherwise manufacture an identification document, identification card, or identification certificate and may possess an engraved plate or other such device for the printing of such identification; provided, the name of the issuing entity shall be clearly printed upon the face of the identification:
- (1) Businesses, companies, corporations, service organizations and federal, state and local governmental agencies for

employee identification which is designed to identify the bearer as an employee.

- (2) Businesses, companies, corporations and service organizations for customer identification which is designed to identify the bearer as a customer or member.
 - (3) Federal, state, and local government agencies for purposes authorized or required by law or any legitimate purpose consistent with the duties of such an agency, including, but not limited to, voter identification cards, driver licenses, nondriver identification cards, passports, birth certificates and social security cards.
 - (4) Any public school or state or private educational institution, as defined by Title 17 of the Louisiana Statutes of 1950, to identify the bearer as an administrator, faculty member, student or employee.
 - (5) Any professional organization or labor union to identify the bearer as a member of the professional organization or labor union.
 - (6) Businesses, companies or corporations which manufacture medical-alert identification for the wearer thereof.
- C. All identification documents as provided for in Paragraph (3) and (4) of Subsection B of this Section shall be issued only to United States citizens, nationals and legal permanent resident aliens.
- D. The provisions of Subsection C of this Section shall not apply when an applicant presents, in person, valid documentary evidence of:
- (1) A valid, unexpired immigrant or nonimmigrant visa status for admission into the United States.
 - (2) A pending or approved application for asylum in the United States.
 - (3) Admission into the United States in refugee status.
 - (4) A pending or approved application for temporary protected status in the United States.
 - (5) Approved deferred action status.
 - (6) A pending application for adjustment of status to legal

permanent residence status or conditional resident status. Upon approval, the applicant may be issued an identification document provided for in Paragraph (3) and (4) of Subsection B of this Section. Such identification document shall be valid only during the period of time of the authorized stay of the applicant in the United States or, if there is no definite end to the period of authorized stay, a period of one (1) year. Any identification document issued pursuant to the provisions of this subsection shall clearly indicate that it is temporary and shall state the date that the identification document expires. Such identification document may be renewed only upon presentation of valid documentary evidence that the status by which the applicant qualified for the identification document has been extended by the United States Citizenship and Immigration Services or other authorized agency of the United States Department of Homeland Security.

- E. The provisions of Subsection B of this Section shall not apply to an identification document described in Paragraph (4) of Subsection B of this Section that is only valid for use on the campus or facility of that educational institution and includes a statement of such restricted validity clearly and conspicuously printed upon the face of the identification document.
- F. Any driver license issued to a person who is not a United States citizen, national or legal permanent resident alien for which an application has been made for renewal, duplication or reissuance shall be presumed to have been issued in accordance with the provisions of Subsection D of this Section; provided that, at the time the application is made, the drivers license has not expired, or been cancelled, suspended or revoked. The requirements of Subsection D of this Section shall apply, however, to a renewal, duplication or reissuance if the Department of Public Safety is notified by a local, state, or federal government agency of information in the possession of the agency indicating a reasonable suspicion that the individual seeking such renewal, duplication or reissuance is present in the United States in violation of law. The provisions of this Subsection shall not apply to United States citizens, nationals, or legal permanent resident aliens.

PART V. PUBLIC EMPLOYERS

§1319. Public employers

- A. Every public employer shall register with and utilize a Status Verification System as described in R.S. 49:1317 of this Chapter to verify the federal employment authorization status of all new employees.
- B. (1) After July 1, 2010, no public employer shall enter into a contract for the physical performance of services within this state unless the contractor registers and participates in the Status Verification System to verify the work eligibility status of all new employees.
- (2) After July 1, 2010, no contractor or subcontractor who enters into a contract with a public employer shall enter into such a contract or subcontract in connection with the physical performance of services within this state unless the contractor or subcontractor registers and participates in the Status Verification System to verify information of all new employees.
- (3) The provisions of this Subsection shall not apply to any contracts entered into prior to the effective date of this Section even though such contracts may involve the physical performance of services within this state after July 1, 2010.
- C. (1) It shall be a discriminatory practice for an employing entity to discharge an employee working in Louisiana who is a United States citizen or permanent resident alien while retaining an employee who the employing entity knows, or reasonably should have known, is an unauthorized alien hired after July 1, 2010, and who is working in Louisiana in a job category that requires equal skill, effort, and responsibility, and which is performed under similar working conditions, as defined by 29 U.S.C. 206(d)(1), as the job category held by the discharged employee.
- (2) An employing entity which, on the date of the discharge in question, was currently enrolled in and used a Status Verification System to verify the employment eligibility of its employees in Louisiana hired after July 1, 2010, shall be exempt from liability, investigation, or suit arising from any action under this Section.
- (3) No cause of action for a violation of this Section shall arise

anywhere in Louisiana law but from the provisions of this subsection.

PART VI. CONTRACTORS

§1320. Contractors; withholding of income tax on compensation paid to alien contractors

- A. In conformity with the Louisiana Taxpayer and Citizen Protection Act, a contracting entity shall be required to withhold individual income tax from the compensation paid to an individual independent contractor who is contracting for the performance of services in this state and who fails to provide to the contracting entity documentation verifying the independent contractor's employment authorization, pursuant to the prohibition against the use of unauthorized alien labor through contracts set forth in 8 U.S.C. 1324(a)(4). The withholding of taxes shall apply to all compensation which exceeds the amount of compensation the contracting entity is required to report as income on United States Internal Revenue Service Form 1099. The rate of withholding shall be the maximum marginal income tax rate as provided in R.S. 47:32(A)(3), without any exemptions.
- B. Any contracting entity failing to comply with the withholding requirements of this Section shall become personally liable for such tax in addition to any applicable interest, penalties and attorney fees. The tax, interest, penalties, and attorney fees shall be payable as provided in this Chapter, the amount of which may be determined, computed, and collected by any method generally provided for in this Chapter. However, the provisions of this Subsection shall not apply to a contracting entity which is exempt from federal withholding provisions with respect to such individual independent contractor pursuant to a properly filed Internal Revenue Service Form 8233 or its equivalent.
- C. Nothing in this Section is intended to create, or should be construed as creating, an employer-employee relationship between a contracting entity and an individual independent contractor.

PART VII. HIGHER EDUCATION

§1321. Higher education

- A. In addition to any other powers and duties authorized by Title 17 of the Louisiana Revised Statutes of 1950, each postsecondary system management board may adopt a policy that allows a graduate of a public or approved nonpublic high school to qualify for that tuition and mandatory attendance fee amounts at an institution under its supervision and management shall be equal to tuition and mandatory attendance fee amounts applicable to students who are residents of Louisiana at such an institution if the student resided in the state while attending classes at a public or approved nonpublic high school for at least two years prior to graduation.
- B. If the student cannot present to the institution valid documentation of United States nationality or an immigration status permitting study at the institution, he shall nevertheless be eligible for resident tuition and mandatory fee amounts if does one of the following:
 - (a) He provides to the institution a copy of a true and correct application or petition filed with the United States Citizenship and Immigration Services to legalize his immigration status.
 - (b) Files an affidavit with the institution stating that he will file an application to legalize his immigration status at the earliest time he is eligible to do so, provided that such time is no later than the later of the following:
 - (i) One year after the date on which the student enrolls for study at the institution.
 - (ii) If there is no formal process to permit children of parents without lawful immigration status to apply for lawful status without risk of deportation, one year after the date the United States Citizenship and Immigration Services provides such a formal process.
- C. Any student who completes the required criteria prescribed in Subsection(B) of the Section shall not be disqualified on the basis his immigration status from any scholarship or financial aid provided by the state.
- D. The provisions of this Section shall not impose any additional

conditions to maintain resident tuition status at a Louisiana public postsecondary education institution who was enrolled in a degree program and first received such resident tuition status at that institution prior to the 2010-2011 school year.

PART VIII. GOVERNMENTAL ENTITIES

§1322. Memorandum of understanding; local ordinance prohibited; right of action

- A. The attorney general is authorized and directed to negotiate the terms of a Memorandum of Understanding between the state of Louisiana and the United States Department of Justice or the United States Department of Homeland Security, as provided by Section 1357(g) of Title 8 of the United States Code, concerning the enforcement of federal immigration and customs laws, detention and removals, and investigations in the state of Louisiana.
- B. The Memorandum of Understanding negotiated pursuant to Subsection A of this Section shall be signed on behalf of this state by the attorney general and the governor or as otherwise required by the appropriate federal agency.
- C. No local government, whether acting through its governing body or by an initiative, referendum, or any other process, shall enact any ordinance or policy that limits or prohibits a law enforcement officer, local official, or local government employee from communicating or cooperating with federal officials with regard to the immigration status of any person within this state.
- D. Notwithstanding any other provision of law, no government entity or official within the State of Louisiana may prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the United States Department of Homeland Security, information regarding the citizenship or immigration status, lawful or unlawful, of any individual.
- E. Notwithstanding any other provision of law, no person or agency may prohibit, or in any way restrict, a public employee from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
 - (1) Sending such information to, or requesting or receiving such information from, the United States Department of

Homeland Security;

- (2) Maintaining such information; or
 - (3) Exchanging such information with any other federal, state, or local government entity.
- F. The provisions of this Section shall allow for a private right of action by any natural or legal person lawfully domiciled in this state to file for a writ of mandamus to compel any non cooperating local or state governmental agency to comply with such reporting laws.

PART IX. FRAUDULENT DOCUMENTS IDENTIFICATION UNIT

§1323. Fraudulent documents identification

Subject to the availability of funding, the Department of Public Safety shall establish a Fraudulent Documents Identification (FDI) Unit for the primary purpose of investigating and apprehending persons or entities that participate in the sale or distribution of fraudulent documents used for identification purposes. The unit shall additionally specialize in fraudulent identification documents created and prepared for persons who are unlawfully residing within the state of Louisiana. The department shall employ sufficient employees to investigate and implement an FDI Unit.

Section 2. This Act shall become effective July 1, 2010.