Missing in Action: Practice, Paralegality, and the Nature of Immigration Enforcement

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Abstract

U.S. immigration control is typically understood in terms of enforcement practices undertaken by federal officers guided by legislation and court decisions. While legislation and court opinions are important components of the immigration control apparatus, they do not adequately account for immigration control 'on the ground.' To explore this problem, we advance the concept of paralegality, the practices and operations that constitute a dynamic system of actions and relationships that are not simply linear applications of legislation or judicial decisions but may in fact extend or counter these texts. We illustrate the importance of paralegality by reconstructing the evolution of the §287(g) and Secure Communities programs, both of which have shape-shifted dramatically since their inception. Our account of immigration control highlights the problem practice poses for law, proposes a theoretical alternative to textual-law-centric research on immigration and law enforcement, and contributes to scholarship on everyday citizenship.

Keywords: immigration, law, enforcement practice, §287(g), Secure Communities

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Police is the permanent *coup d'État*

Michel Foucault (2007a, 441)

In this paper we explore the centrality of practice to the U.S. immigration control apparatus and re-theorize immigration control as something other than sanctioned acts of police power that follow from legal texts such as the Immigration and Nationality Act (INA). The idea that immigration enforcement is a simple product of legal edicts is an assumption rooted in an ideological commitment to the liberal system of law in the U.S.: properly viewed, it is an untested empirical claim. Instead, we argue that the terrain of enforcement, and specifically immigration enforcement, emerges from a realm of practice in which a range of forces – concerning the production of legal text, executive decision-making, and federal and local frontline enforcement – interact, clash, contradict, and build on each other. No doubt, legal text, whether in the form of legislation, court decisions, or administrative regulation, is important. But these aspects of the law do not adequately explain or account for what we see as the more complex set of practices that constitute the terrain of immigration law and enforcement.

Our empirical focus in this paper is on the §287(g) and Secure Communities programs which, as we outline below, allow local and state police to facilitate immigration status investigations against suspected immigration violators during routine policing by law enforcement officers not formally part of the federal immigration bureaucracy. At the time of writing nearly 3 million U.S. residents have been identified as deportable and/or inadmissible as a result of contact with local and state law enforcement agencies enrolled in these programs – 400,000 through the §287(g) program, and 2.4 million through Secure Communities (U.S. Immigration and Customs Enforcement 2015, 2016). The way these programs have come, in

short order, to intertwine civil immigration enforcement and criminal law enforcement is without historical precedent in the U.S. Indeed, the programs have been identified by a former Immigration and Naturalization Service commissioner as 'a profound change that constitutes a potent new pillar of the immigration enforcement system' (Meissner et al. 2012, 92).

But if potent, exactly how §287(g) and Secure Communities (S-Comm) are working on the ground is very much in dispute. Department of Homeland Security (DHS) officials, as well as law enforcement agencies participating in the programs, typically characterize §287(g) and S-Comm as focused on serious offenders and individuals who pose a threat to national security. This is in contrast to a large body of research which shows that the §287(g) and S-Comm programs routinely result in the deportation of individuals without criminal records or those charged with minor offenses, and moreover that the programs do not decrease criminal activity in immigrant communities (Provine and Varsanyi 2012; Treyger, Chalfin, and Loeffler 2014; Martinez and Iwama 2014; Kubrin 2014; Armenta 2016; Coleman and Kocher 2011; Rosenfeld 2014; Walker and Leitner 2011; Stuesse and Coleman 2014). Much of this research wades into a now longstanding debate among immigration law scholars about the nature of immigration enforcement, and asks whether §287(g) and S-Comm constitute an expansive executive authority with significant operational leeway and minimal legal checks, or a power grounded in statute and subject to stronger legal standards and robust operational expectations (Motomura 1990; Schuck 1984; Kanstroom 2005; Legomsky 1984). In what follows we lean towards the former interpretation by drawing attention to the centrality of discretion to §287(g) and S-Comm enforcement, and how implementation on the ground regularly contradicts official statements about how the programs work.

Unlike most critics, however, we don't see the sometimes freewheeling character of §287(g) and S-Comm as evidence that the programs have run amok. Nor do we believe that reform through legislation or court litigation will correct this situation. This is because the gap between immigration enforcement as outlined in the text of the law and by high-ranking immigration officials, and how immigration enforcement is taken up in specific contexts, is precisely how we understand the 'normal' U.S. immigration control apparatus to function. In other words, experimentation and contestation are a central and constitutive factor to immigration control, especially in the age of the administrative state, where so few laws are meaningfully vetted through the courts or even the legislature. As such we argue against the idea that there is a hierarchical relationship between what gets legislated and what happens 'on the street', and that the latter can be remedied or fixed by making it hew to the former.

Our central argument in this article, then, is that an adequately critical account of the U.S. immigration control apparatus requires moving beyond an analysis of legislative and judicial text and their implementation. Below we unpack this argument in terms of practice, by which we mean *both* legislative acts *and* a wide array of 'paralegal' actions – a term we expand on below – by the executive, the administrative bureaucracy enforcement units, and civil society. We are particularly interested in how executive decision-making and everyday enforcement work in ways that do not directly extend or implement legal text but which contradict legislation, inaugurate new procedures, and/or challenge other actors. We believe that this field of practice has been largely overlooked in the prevailing framing of U.S. immigration control, which tends to give prime importance to the codified or textual origins of the power over immigration.

We first develop the claims introduced above by clarifying our approach to practice and by defining our concept of 'paralegality'. Here we engage with a range of scholars working on

citizenship, scale, and immigration enforcement to which we are indebted. Then, ground our theoretical argument in an exploration of the evolution and mechanics of §287(g) and S-Comm. Here our goal is to push back against a tendency to see these programs as coherent or to see the gap between legal text and implementation as simply reflecting questions of resources or ideology at the local level (Chand and Schreckhise 2015; Jaeger forthcoming). We emphasize instead how these programs came piecemeal into being and how they underwent radical change without explicit legislative intervention or codification. In our conclusion, we return to the importance of practice and—within it—paralegality, and argue that a practice-based approach to immigration enforcement allows for a more granular and yet comprehensive, material understanding of policing (on policing as practice, see Akbar 2012).

Practice and the paralegal

Since the late 1970s, critical legal scholars have approached the law as drawing from and reconstituting social relations, but also as a site of ongoing social struggle embedded in power relations beyond the law *qua* text and its formal interpretation (Unger 1983; Frug 1985; Boyle 1985; Gordon 1987; de Sousa Santos 1977; Hunt 1987). This scholarship, especially as developed through critical race theory and feminist legal scholarship (Crenshaw 1995; MacKinnon 1989), engaged broadly with social theory on state power and violence. Echoing Foucault's claims about the law as 'born of real battles, victories, massacres, and conquests' (2003, 50), these scholars conceptualized the law as a place-embedded and contested realm of legal practice – a cacophony of grounded interests, sometimes poorly articulated, but which nonetheless gel to produce raced, classed, sexualized, and gendered outcomes (Blomley, Delaney, and Ford 2001; Blomley 1987; Delaney 2010; Sarat, Douglas, and Umphrey 2003). Blomley, for example, argued forcefully that legal scholars could not defensibly 'close' the law

as ‘an autonomous, self-sufficient field that can be marked off … from the vagaries of social and political life’ (1994, 7).

If thanks to these interventions the imagery of battle is now mainstream in much social science-based work on the law (Butler 2009), this insight has only partially taken hold in the literature on U.S. immigration law and enforcement. Indeed, even as key immigration law scholars have emphasized that immigration control in the U.S. ‘is made in the field’ rather than legislated (Motomura 2014, 121; see also Chacón 2015, for the importance of discretion to immigration enforcement), the implicit assumption in much of the social sciences-based immigration enforcement literature is that immigration control is what happens when immigration law, as text, is enacted or brought to bear in the world. From this standpoint, immigration law occupies a privileged status as the origin of immigration enforcement, which in turn is seen largely as derivative (for exceptions see Heyman 2009; Pratt 1999; Sampaio 2015). So while immigration law itself has been thoroughly demystified and roundly criticized as a raced, gendered, sexualized, and classed attempt to make and discipline immigrant populations (Calavita 1989; Tichenor 2002; Ngai 2004; Kanstroom 2012), the law itself has still mostly been allowed a sovereign authority outside, or at least before, its enactment or enforcement.

This only partial decentering of the law holds even for scholars who have championed the centrality of practice to immigration control. For example, in his pioneering work on the production of illegality in the U.S., De Genova explores immigration law as a generative site of punitive legal meanings, and struggle over those meanings, rather than a stable set of instructions or categories that guide the federal immigration bureaucracy (De Genova 2010, 2002, 2004). In particular, De Genova’s careful scrutiny of the legal category ‘illegal alien’ thoroughly debunks immigration law as a neutral and natural set of legal boundaries, categories, and personages. De

Genova's approach to illegal alienage instead underscores immigration law as a dynamic field of actively constructed spaces, meanings, and categories – and as such highlights the law as 'practice, as undetermined struggle' (De Genova, 2004. 167). Yet De Genova's consideration of the law as a social project or struggle which creates categories of illegality takes its cues from mostly landmark legislative events: major immigration bills are determinative signposts in the production of immigrant illegality. It is 'the law' which produces illegality, and which makes migrants vulnerable and deportable. Indeed, in our own work on U.S. immigration law and enforcement we too have situated legal text at the center of the U.S. immigration control apparatus (Coleman 2008, 2012a; King and Valdez 2011). The difficulty with this approach is that immigration control is too easily understood as a top-down implementation and interpretation of text and – however productive it may be – is seen to follow primarily from the superior status of legislative and judicial directives.

But is immigration enforcement an enactment of constitutive legislative and legal texts? We do not believe so. Although the social construction of law approach usefully unpacks the discursive basis of immigration law, it does not exhaust the problem of how law works and to what effects. We think in particular that it is crucial to highlight law enforcement's everyday materialities beyond legislation and legal decision-making. Here we take inspiration from recent scholarship on scale and citizenship which emphasizes the importance of thinking contextually and generatively about citizenship, and especially about the everyday practices that undergird citizenship as an abstract, legal principle (Wells 2004; Bauböck 2003; Varsanyi 2006; Desforges, Jones, and Woods 2005; Bauder 2013; Smith and Guarnizo 2009). At the core of this research is an effort to differentiate between 'bodies politic,' i.e., state-territorial rights and spaces, and 'bodies social,' i.e., the 'multiple loyalties, attachments' that activate citizenship, assembled

across sites and as a consequence of localized struggles of social groups (Isin 2007, 224; see also 2002, 1-51; 2005). In this vein, Staeheli et al. conceptualize the problem of citizenship and bodies social as one of 'ordinary citizenship' built from the intersection of formal legal structures and everyday institutions, such that the 'spatiality of citizenship involves more than its location in a particular (national) territory' (2012, 638). Staeheli et al.'s focus on the ordinariness of citizenship struggles reflects more than a decade of grounded, case study-driven scholarship focused on immigrant communities in the U.S. and Europe (Nagel 2002, 2009; Nagel and Staeheli 2008; Ehrkamp and Leitner 2003; Ehrkamp and Leitner 2006; Staeheli and Nagel 2006, 2008; Ehrkamp and Nagel 2012, 2014; Nagel 2013; Ehrkamp and Leitner 2013), but the term is not empirical as such. Rather, the notion of ordinary citizenship is a significant theoretical reformulation which suggests that legally abstract definitions of citizenship, written by lawmakers, judges and officials, cannot account for central aspects of citizenship that cannot be separated from "the geographies of communities and the networks and relationships that link them," including their attendant inequalities, imperfections, and opportunities (Staeheli et al. 2012, 641). In this sense, ordinary citizenship works as a grounded, embodied corrective to much of the citizenship and immigration literature, where an abstract methodological nationalism is (still) dominant (Ellis 2005; Isin 2007). This correction does not essentialize "community;" instead, it sees it as the ground on which citizenship is theorized and/or negotiated, in process in which the meaning of both citizenship and community is struggled over in an unsettled terrain of constant change and turmoil (Staeheli 2008; Staeheli, Mitchell, and Nagel 2009).

In what we intend as a complementary move, but focusing on the administrative system of enforcement that citizens face, we point to a realm of practices in U.S. immigration control that include, but are not reducible to, legislation and litigation. Our goal is to decenter

immigration law proper as the starting point (or even the primary reference point) for a critical analysis of the ways in which immigration control takes place. Our focus is on what we might call 'actually existing' immigration control in the U.S., which we see not as the outcome of a sovereign legal text but as the product of a number of sometimes clashing, sometimes complementary, practices that include legislation and court cases (the legal), but also executive-level directives, administrative decisions, frontline actions by immigration enforcement officers and non-federal law enforcement officers, political wrangling at the state level, and pronouncements by the powerful union of Immigration and Customs Enforcement (ICE) (the paralegal).

To the extent that we hope to bring insights from the literature on scale and citizenship to bear on the problem of immigration enforcement, we are also drawing on a small group of immigration scholars who have built productively on Foucault's basic starting point that the state is a problem of 'how' power is organized (Foucault 1980, 78-108, 94-228; see also Mitchell 1991; Ferguson and Gupta 2002). We have been particularly influenced by Bigo's approach to immigration-related statecraft which highlights the everyday and discretionary aspects of state power and which suggests that contradiction, struggle and discrepancy constitute state power 'all the way down' (see especially Bigo's theorization of practice in Bigo 2011; Bigo and Madsen 2011). Mountz's (2010) work on the bureaucratically negotiated lives of immigration policy is another important signpost for us in terms of grounding immigration law and enforcement in the problem of practice (see also Heyman 2004, 2010).

For us one of the more important aspects of Bigo and Mountz's studies is their complication of how critical social scientists might think about state power and practice. In the social sciences, the concept of practice is frequently used to refer to the realm of everyday

bureaucratic power, such as in Lipsky's celebrated analysis of street-level bureaucracy (Lipsky 1980). Although Bigo and Mountz do not directly engage with Lipsky, they offer something quite different. Lipsky's interest in street-level decision-making by low-ranking bureaucrats is set primarily in terms of the larger problem of resource constraints. His work shows, for example, how resource shortages or scarcities drive *ad hoc* practices which in turn contribute to a gap between sanctioned 'policy as written' and unsanctioned 'policy as performed' (Lipsky 2010, xvii; see also Ellermann 2009; Chand and Schreckhise 2015; Jaeger forthcoming, for an extension of Lipsky's resource argument to explain the in situ qualities of immigration policy). Bigo and Mountz argue differently that street-level decision-making is endemic to the modern state, and indeed that the exercise of state power would still be a convoluted project in a resource rich environment or absent resource scarcities and constraints. Bigo is especially critical of the distinction between sanctioned and unsanctioned aspects of statecraft. For example, he suggests that any unitary understanding of state-based immigration policy – for example, used to benchmark how state power in practice deviates from state policy – is itself an effect of multiple, ongoing struggles among professionals of statecraft competing incessantly to define citizenship and threats to it (see 2008, for his problematization of social scientists' view of the state as homogeneous in). In short, whereas Lipsky's work creatively broaches the problem of discretion, there remains in his approach a fundamental distinction between law and what bureaucrats do as part of their everyday work. In contrast, Bigo and Mountz highlight the horizontality of state power and in this way overlap productively with the citizenship literature surveyed above in that they are focused on the *inescapably* everyday terrain of citizenship policy.

To contribute to the work that Bigo and Mountz have started, but to focus specifically on the relationship between immigration law and immigration enforcement, we are focused on a specific realm of practice that we are calling the 'paralegal'. By the term paralegal we mean the messy everyday terrain of lawmaking which is not officially captured in, nor necessarily guided by, legislative documents and/or legal text. Paralegality refers to actions undertaken by someone (or a collective) charged with implementing the law, but who is not charged with writing law, whether court decisions or legislative text. As such, the term designates an activity that is operates alongside the law, sometimes in contradiction of it, and sometimes in ways that end up being constitutive of future iterations of the law, as we explore in our case study below—but which circulates without a precise or settled textual legal anchor and/or author. We find the term useful because it highlights the existence of paralegal practices that rule realms of enforcement alongside the law as text (which is of course also a practice), but which do not necessarily follow from the law and whose existence and material effects do not depend on being derived from legislation or an official authority.

Our conceptualization of the paralegal derives in large part from Derrida's focus on the legally generative nature of police work (Derrida 1989; see also Benjamin 1986). Derrida's basic point is that policing is not simply a conservative enforcement of legal text, but rather that it continuously founds and re-founds what counts as law. Derrida emphasizes that law in its formal, textual form typically plays catch up with a bureaucratic field of experimentation rule-making conducted by state-based, corporate, non-governmental, and professional practitioners. In short, Derrida shows that legal experimentation exceeds and shapes legal text.

We hope that the term paralegality will be useful in terms of helping immigration scholars conceptualize, and better understand, the constantly transformative character of

immigration enforcement in ways that counter or act in parallel to legislation, and which the latter may struggle to codify after the fact. The 'unlegislated' (or pre-legislative) extra-textual aspects of immigration law and enforcement are, in our opinion, largely 'missing in action' in critical research on law enforcement. But there is more at stake here than simply a new lexicon. As we hope the case studies below show, the problem of paralegality manifests itself as substantial transformations in programs such as §287(g) and S-Comm – such that transformation is perhaps one of their most enduring characteristics. It is this dynamic, contested, augmentative and contradictory process of encounter between the law and different actors at different levels of the immigration bureaucracy and (non-federal) law enforcement, which we see as constitutive of the character of immigration.

This is not to say that the debates that lawmakers engage in around immigration, and the legislation that they authorize, are unimportant (Andreas 2010; Nevins 2010). Nor is what gets decided in courts insignificant. But a larger, messier reality exists that does not conform to what lawmakers and the judicial review of immigration cases say. This reality requires extending scholarly attention beyond 'the law' to the ways in which law is preempted, shaped and affected by a multitude of agencies, actors and bureaucracies involved in immigration control. In other words, we argue that assuming a vertical, top-down, binary relation between immigration law and immigration enforcement is misleading. In this we agree with Anna Pratt, who calls for abandoning the binary between law and discretion, acknowledging that there is no clear distinction between the two (Pratt 1999). Instead, we should understand this relationship as a fluid set of interactions between law and enforcement in a horizontal arena. The result is a 'slantwise' account of immigration law and enforcement which emphasizes its mediation, its contradictions, its negotiations, and its emergent properties (Campbell and Heyman 2007).

Immigration enforcement in practice

In the fifteen years since the 9/11 attacks the U.S. has deported more than 4 million individuals, which is substantially more than the roughly 2½ million people who were physically removed from the country during the twentieth century (U.S. Department of Homeland Security 2016, Table 39). Accordingly, the Bush administration inaugurated, and the Obama administration expanded, an historically unprecedented detention and deportation boom. In what follows we examine §287(g) and Secure Communities, two administrative programs that illustrate growing connections between state and local police to federal immigration authorities. The development of these programs shows the importance of the paralegal aspects of immigration control as an ever-moving practice.

The complex evolution of §287(g)

After 9/11, §287(g) took many practical twists and turns in ways that extended it beyond what lawmakers arguably intended in the 1996 law, in which it was introduced. The expansion and shifting shape of this program following 9/11 is a story of decisions made by federal immigration bureaucrats and state and local law enforcement, absent clear guidance from federal lawmakers and without firm direction from the courts.

The discussion of §287(g) must be contextualized in the debate about the role of state and local law enforcement agencies in immigration control, which has been particularly heated in the past fifteen years. For much of the 20th century, however, it was accepted that the federal immigration bureaucracy had exclusive authority to enforce civil INA violations, and that state and local police could be involved in immigration enforcement only when their successful prosecution of criminal offenses could trigger deportation proceedings in specific cases. This division of labor was signaled in a 1983 Ninth Circuit Court ruling, *Gonzales v. City of Peoria*.

The case was initiated by Arizona residents of Mexican descent who were stopped and detained by city police as suspected immigration violators. The majority in *Peoria* ruled that state and local police could not enforce violations of federal immigration law; civil infractions listed in the INA were exclusively the purview of the Immigration and Naturalization Service (INS) (Keblawi 2004, 831-2). In 1989, the Department of Justice's Office of Legal Counsel (OLC) reinforced this position: the OLC advised that immigration-related data could not be entered into national 'wanted person' databases because state and local police could not hold individuals on the basis of civil immigration charges (U.S. Department of Justice 1989). In 1996, the Office of Legal Counsel confirmed again that state and local police did not have the authority to stop and detain individuals solely on civil immigration grounds and lacked 'recognized legal authority to arrest or detain aliens solely for purposes of civil deportation proceedings' (U.S. Department of Justice 1996).

The 1996 passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) included new language, under §287(g), about the federal delegation of non-federal law enforcement agencies to enforce federal immigration law. §287(g) was a delegated—rather than inherent—power that allowed police, sheriffs, and state law enforcement agents to investigate immigration violations, make immigration arrests, jail suspected immigration violators on behalf of federal immigration authorities, transport immigration detainees, and assemble immigration cases for prosecution in the immigration courts. In its first six years of its existence, guidelines for §287(g) were never established, and the few local requests to participate in the program were declined by the INS as well as defeated at the local level (Coleman, 2009). However, this changed significantly after 9/11. Responses to the 9/11 attacks encouraged an expansive reading of the ways that state, local, and federal law enforcement agencies could work together, as

reflected in the October 2001 PATRIOT Act. These moves have had lasting effects on the nature of immigration enforcement, and policing and surveillance more generally.

A series of policing operations at major U.S. transportation and energy hubs, in late 2001 and early 2002 put teams of immigration and local law enforcement officials on the ground, to take individuals into custody on the basis of the INA's inadmissibility and/or deportability grounds. For example, Operation Tarmac, inaugurated in Salt Lake City in December 2001, focused on checking airport workers for various immigration violations, for fear that undocumented workers were a weak link in the country's air transport infrastructure (Tallman 2005, 877-8). Despite its national security coding, this raid and others like it—Operation Fly Trap, Plane View, and Safe Sky, among others – targeted food service workers and other low-end service economy employees (Sampaio 2014, 203). Most of these raids were not carried out formally under §287(g). The first §287(g) Memorandum of Agreement (MOA) was signed only in July of 2002 with Florida's Regional Domestic Security Task Forces, which were created post-9/11 to 'prevent, preempt, or disrupt' terrorist attacks. These units were then presented to INS as candidates for a §287(g) program in December of 2001 (the second MOA would be signed with Alabama in September of 2003) (Andrews 2005; Dubina 2005).

Consistent with the Bush administration's expansive approach to post-9/11 law enforcement, in 2002 Attorney General John Ashcroft explored an alternative to §287(g), which he referred to as 'inherent authority.' In his public remarks on a new U.S. border entry-exit database, Ashcroft suggested broadly that state, local, and federal police alike possessed the power to question individuals about their immigration status (Ashcroft 2002). What exactly Ashcroft meant by inherent authority became clearer in mid-2005, when a secret 2002 OLC memo was released publicly. The memo broke with the 1989 and 1996 OLC memos on the

power of state and local police to enforce immigration law. Remarkably, the memo did not mention §287(g). Rather the memo argued that no affirmative authorization by federal authorities was needed for states or localities to enforce federal immigration law, because states are sovereign entities and 'the power to make [immigration] arrests inheres in the ability of one sovereign to accommodate the interests of another sovereign' (U.S. Department of Justice 2002). This reading rendered §287(g)'s explicit delegation superfluous. Arguing that the 1996 opinion erred in its conclusion that state and local police could not enforce civil deportability, the memo drew on less well-known 10th Circuit Court rulings that states and localities have a 'general arrest authority to inquire into possible immigration violations' (see *U.S. v. Salinas-Calderon* 1984, 728 F.2d 1301; the memo also referenced *U.S. v. Vasquez-Alvarez* 1999, 176 F.3d 1295 on 'the preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration laws'). The 2002 OLC memo concluded that the federal monopoly over immigration enforcement did not apply if state and local police were helping to enforce federal law; that the monopoly meant only that state and local police could not act in a way that contradicted federal law.

Ultimately, DHS did not embrace the position that state and local police possess inherent authority to enforce civil immigration law, in large measure due to resistance by both immigrant rights groups and police organizations nationwide. Moreover, states and localities were prohibited by courts from taking up immigration enforcement by virtue of inherent authority, as in Hazelton, Pennsylvania, where a federal court of appeals voided a local law which granted city workers the power to scrutinize city residents on immigration grounds (on the proliferation of local law enforcement in this period see Gilbert 2009; Walker and Leitner 2011). Nonetheless, Ashcroft's championing of inherent authority polarized the debate over state and local

enforcement of immigration, and thereby contributed to the widespread normalization of §287(g) as a more modest expression of state and local police power. In contrast to inherent authority, §287(g) involved a legislative delegation of authority that required a MOA drafted by DHS and signed by state and local police, which in principle provided for training, checks and balances, and public scrutiny. Indeed, §287(g) enjoyed a resurgence when the 2002 memo was made public, driven by local interest in the program—most prominently by sheriffs (Coleman 2012b; Armenta 2012) and predominantly in jurisdictions where demographic change was an important political issue (Wong 2012; Walker and Leitner 2011; Walker 2014). This resurgence was aided by its championing by groups such as the Washington D.C.-based anti-immigrant Center for Immigration Studies as a hassle-free counter-terrorism tool that could be readily extended to state and local police without invoking inherent authority. Kris Kobach, who worked for Ashcroft, was instrumental in publicizing the merits of an expanded §287(g) program in a series of popular (Kobach 2004; see also Vaughn and Edwards 2009) and academic publications (Kobach 2005, 2008).

By late 2007, there were more than seventy §287(g) programs in effect across the country, and documents leaked by civil rights groups suggested that at least as many more were in the works (Coleman 2009). Many were in the South where 'new destination' Latino migration was significant (Winders 2007). Ultimately, however, the expansionary phase of §287(g) was short-lived because of unease about the way that the program shaped policing in immigrant communities. For example, many of the signed §287(g) agreements detailed the delegation of 'task force' operations to state and local police, meaning that agents could ask about immigration status during the course of routine policing, and without having to first make a criminal stop or arrest using probable cause or reasonable suspicion (Capps et al. 2011). Immigrant rights groups

across the country charged that municipal police and county sheriffs were using this expanded authority for traffic stops and pedestrian encounters, on the basis of racial profiles, to essentially 'fish' for status. The most infamous case was that of Sheriff Arpaio, in Maricopa County AZ, whose use of §287(g) authority was the subject of a comprehensive federal investigation and several civil suits (U.S. Department of Justice Civil Rights Division 2011). In December 2012, amidst the Arpaio investigation and in response to significant mobilization by immigrant rights groups, DHS phased out the remaining task force §287(g) agreements – as well as so-called 'hybrid' agreements, which combined task force operations with so-called 'jail model' agreements where individuals booked into custody are more systematically queried on immigration grounds. They were replaced with a strict jail model agreement which required that state and local police make an arrest on explicit criminal grounds, without asking about immigration status, before conducting an immigration check (U.S. Immigration and Customs Enforcement 2012; Waslin 2012), which DHS championed as a corrective to Maricopa County's use of §287(g) (see map in Coleman 2009, 908 for an early accounting of the mix of task force and jail model agreements). Importantly, the elimination of the task force component of the §287(g) program was an executive, discretionary matter – largely in anticipation of a formal ruling by the courts on the program in Maricopa County – rather than the outcome of a formal legal decision or initiative.

DHS had championed the termination of the task force agreements as a corrective to Maricopa County's use of §287(g). But the singling out of task force agreements by lawmakers, the media, and the public—and the disproportionate focus on Maricopa— was arguably misplaced. Reports from major cities, for example, have demonstrated that jail agreements do not guarantee a check on Maricopa County-style task force abuses because the broad range of

behavior subject to criminal regulation makes it relatively easy for police to create probable cause and/or reasonable suspicion during the course of routine policing so as to book an individual into custody—and then check status (ACLU Tennessee 2012; ACLU Georgia 2012; ACLU North Carolina 2009; Stuesse and Coleman 2014). Indeed, immigrant rights groups across the country have pointed out that the jail agreements have effectively created an additional set of incentives for police to racially profile. Ultimately, the formality of checking status at the time of booking—rather than on the street—did not fundamentally alter the post-9/11 combination of police and immigration powers.

While far from comprehensive, this account of §287(g)'s development signposts its complex and non-linear evolution, which too much of the literature on §287(g) skips over. Most of the scholarship focuses primarily on the program's impact on undocumented communities and 'black boxes' the program as an engineered post-9/11 securitization of immigration enforcement. This is not to say that §287(g) has been inconsequential. Researchers and affected communities have argued that the program criminalizes undocumented labor, alienates communities from law enforcement, endangers communities' labor and social reproduction, and as such is a punitive police power that racializes and classes law enforcement (Sampaio 2014; Thompson and Cohen 2014; ACLU 2008, 2004; Inda 2008; Valdez 2016). But the program's devastating impacts in undocumented and Latino communities across the U.S. should not be mistaken as straightforward evidence of its legislative coherence or design.

From Secure Communities to Priority Enforcement

S-Comm was launched in 2008, coinciding with the decline of §287(g). While this program originated administratively (Immigration and Customs Enforcement 2009), we argue that the program substantially modified existing legislative mandates of information-sharing in a

way that radically expanded the resulting reach of surveillance. As a consequence, any effort to make sense of the shape of this program must attend to the practices by immigration enforcement officers and their interaction with DHS, the ICE Union, and beyond.

ICE has argued that the creation of S-Comm followed from the congressional mandate to 'modernize' enforcement and deportation—in other words, to deploy technology in service of, and to automate, immigration enforcement (Immigration and Customs Enforcement 2010, ii). According to ICE, congressional appropriations, the US PATRIOT Act, and the Enhanced Border Security and Visa Entry Reform Act mandate information-sharing between databases containing information about criminal and immigration background. While the PATRIOT Act instructs that visa-granting agencies have access to FBI databases to check applicants' criminal records, the Border Security Act requires that 'any federal official responsible for determining an alien's admissibility and deportability' have access to 'an interoperable law enforcement and intelligence data system' (Richards 2012, 3). The report by the Task Force on S-Comm by the DHS Advisory Council cites yet another mandate, the FY2010 DHS congressional appropriations bill, which requires ICE to devote at least $1.5 billion 'to identify aliens convicted of a crime who may be deportable, and to remove them from the United States once they are judged deportable … [and to] prioritize the identification and removal of aliens convicted of a crime by the severity of that crime' (Wexler 2011, 5).

While ICE claims that these bills provide legitimacy to S-Comm, the program's implementation expands rather than tracking these mandates. In practice, under this program, when state and local police arrest individuals and send fingerprints to the FBI for criminal background checks, those prints are *automatically* checked against immigration databases and

shared with DHS. ICE may then decide to take further action based on its own priorities (Wexler 2011, 4).

Thus S-Comm, by radically expanding the reach of this program, inaugurates practices not contained in the law and turns the mandate on its head: instead of checking visa applicants or individuals encountered by federal enforcement against criminal databases, or determining the deportability of aliens convicted of crimes, S-Comm establishes data terminals in law enforcement agencies that automatically check for immigration status the universe of individuals arrested—not necessarily charged—by local law enforcement. If the database reveals irregular immigration status ICE is notified and may issue a detainer requesting the local law enforcement agency to hold the immigrant and facilitate a transfer to federal immigration custody. Thus the program takes the restricted population that lawmakers intended to cross-check (visa applicants, individuals encountered by federal officials who must determine admissibility, and/or aliens convicted of a crime) and makes the subject population altogether different, i.e., the entire universe of individuals arrested by state and local police.

The breadth of the program was not a forgone conclusion, but resulted from pronounced clashes between ICE and other actors. In rolling out S-Comm, ICE made clear that implementation required an MOA with the State Identification Bureau (SIB), as well as a signed agreement with the participating local or county booking agency; and that the agreements could be terminated at any time by either party (Aguilasocho, Rodwin, and Ashar 2012; Venturella 2009). S-Comm began to spread around the country, both through MOAs and ICE activations at the county and local level with and without the requisite signed agreements (American-Arab Anti-Discrimination Committee et al 2010). Opposition to the program intensified as a result; immigrant communities organized against state and local participation in S-Comm, arguing the

program would further undermine the ability of immigrant communities to rely on police for protection, and pointing to the majority of S-Comm deportations of individuals with no serious criminal records (McKinley 2009). In turn, states and localities complained about the program echoing the same concerns (Gavett 2011). Soon, states and localities attempted to opt out of the program, an option laid out by DHS in September 2010 guidelines (Aguilasocho, Rodwin, and Ashar 2012; Napolitano 2010).

DHS reversed course in October 2010: the agency removed the opt out options from the ICE website, and the then-Secretary Janet Napolitano announced that states and localities could not opt out once their state had signed an MOA: 'we do not view this as an opt-in, opt-out program' (Aguilasocho, Rodwin, and Ashar 2012, 5). Then, in August 2011, after California, New York and Massachusetts refused to sign an MOA or tried to terminate one, ICE terminated all 40 MOAs and asserted that S-Comm was a mandatory program, rendering the MOAs and SIBs redundant (Aguilasocho, Rodwin, and Ashar 2012; Morton 2011c; Semple and Preston 2011).

To put it plainly, not only S-Comm emerged administratively and took a shape that radically extended the legally mandated range of surveillance, but its shape also radically shifted after its inception in several significant ways, with no change in law, and no court opinion. The agency launched S-Comm as an optional program only to later declare that there was no going back after opting in, before ultimately rendering the program mandatory, and reneging entirely on its original formal architecture. Despite apparent congressional concern with immigrants with criminal records, in practice S-Comm facilitated the targeting of all those individuals with encounters with state and local police, and further incentivized state and local policing of immigrant communities coded in raced terms. This overreach unsurprisingly resulted in the

program's focus on, detention, and deportation of a massive volume and proportion of black and brown immigrants without a criminal background.

In response to growing criticism of the record deportation numbers in the Obama administration and its targeting of immigrants without a criminal background, in March 2011, ICE Director John Morton issued a memorandum naming as an enforcement priority the detection and removal of '[a]liens who pose a danger to national security or risk to public safety' (Morton 2011a, 1-2). This memo categorizes three levels of priorities, and deprioritizes migrants not falling in the first level, which includes aliens who were convicted of crimes, participated in criminal gangs, have outstanding criminal warrants or otherwise pose a 'serious risk to public safety.' At this point, the DHS also leveraged its authority at another stage of the deportation procedure: immigration courts, where they ordered a massive caseload review with the goal of halting deportations of immigrants without criminal convictions (Preston 2011b; Vincent 2011). In May 2011, ICE announced that the Office of the Inspector General of the DHS would investigate allegations of racial profiling and selective enforcement in Secure Communities (Wexler 2011).

The ICE Union publicly resisted and rejected this reform, refusing to authorize its 7,000 members to attend a training course the measures mandated, thus leading to little change on the ground (Preston 2012; Alonzo et al. 2011; Preston 2011a; ICE Union 2011; Guzzardi 2012). Due to the contested status of this measure, a series of clarificatory memos followed the first with further detail on the use of discretion in cases of administrative violations and domestic violence victims, and the recommendation to review all pending and incoming cases to filter out non-violent offenders (Morton 2011d, 2011b). Several investigations by the DHS Advisory Council and the DHS Office of the Inspector General (OIG) focused in particular on S-Comm and issued

recommendations to focus on 'criminal aliens' and better document ICE officers' actions (Morton 2012b). Despite all this, in March of 2012 only 1% of pending deportation proceedings had been tabled under the guidelines (Le 2012).

State and local resistance against S-Comm continued, mostly in the form of sherriffs and jails refusing to honor ICE detainers on immigrants they had no probable cause to hold based on their criminal enforcement powers (American Immigration Council 2013). By December 2012 John Morton issued a new set of guidelines for the handling of detainers by ICE officers (Morton 2012a). By March 2014—in the context of the spike of arrivals of unaccompanied minors from Central America—the ICE union was still resisting the application of discretionary guidelines, giving Director John Morton a vote of non-confidence and publicly denouncing his policies as an attempt to prevent ICE officers from following the law (The Blaze 2014). According to our framework, we see these memoranda less as an assertion of executive power than as evidence of the active field of paralegal action, which the executive attempted to appease through these measures.

Refined guidelines on prosecutorial discretion were issued in November 2014 (Johnson 2014), effectively moving immigrants with misdemeanors and non-violent crimes from first to second and third priority. At this time, DHS also announced the end of Secure Communities 'as we know it' and its replacement with the Priority Enforcement Program (PEP), which will endeavor to only seek the transfer of migrants who have committed a set of specifically enumerated crimes (Johnson 2014b, 1). Despite the change in terminology, the shape of the program remains much the same. Formally, under PEP ICE no longer issues detainers, and instead requests 'notification' when migrants are about to be released. The PEP memo also assures the public that 'enforcement actions through the new program will only be taken against

aliens who are convicted of specifically enumerated crimes' (Johnson 2014b, 2). However, the ultimate effect of the transition from S-Comm to PEP will depend on the particular configuration of actors and agendas that constitute the realm of the paralegal. Indeed, the memorandum itself anticipates this by claiming that '[n]othing in this memorandum shall prevent ICE from seeking the transfer of an alien … when ICE has otherwise determined that the alien is a priority under the November 2014' policies (Johnson 2014b, 3).

Those 'priorities' refer to the new enforcement guidelines that direct PEP to exempt migrants without criminal background who arrived to the country before the cut-point date (January 1st of 2014) it includes within the priorities migrants with misdemeanors and all migrants who arrived after the cut-point, thus creating a growing sample of immigrants without criminal background that can be fairly targeted by the new program (Johnson 2014a; Valdez 2015). Unsurprisingly, a recent report by the Transactional Records Access Clearinghouse claims that the phasing out of detainers had little impact on the proportion of migrants without criminal record targeted for transfer by ICE, which stood at fifty percent of all requests in the first half of FY 2016 (2016). The report further reveals that eighty percent of individuals in local custody are still detained beyond the normal period, pending transfer to ICE.

PEP is the latest episode in a long list of adjustments, re-configurations, and re-framings of federal programs designed to deploy state and local policing and jail apparatus in service of immigration enforcement. Short of eliminating the data-based connection between state and local police and DHS, the shape of this enforcement program provides significant space for creative action by enforcement officers in interaction with alternative actors with a stake on the question. As a consequence, any reform of existing enforcement practices needs to be designed and assessed by taking into consideration the dynamics of practice described in this paper.

Conclusion

The §287(g) and Secure Communities case studies suggest the importance of not-yet legally codified, experimental, and contingent practice to the U.S. immigration control apparatus. The way that §287(g) and Secure Communities emerged as constitutive elements of the contemporary U.S. immigration enforcement regime has very little to do with formal lawmaking and court decision-making, and a lot to do with incremental adjustments and re-framing on the terrain of frontline immigration bureaucrats and professionals, which result from contentious encounters between differently located actors including the courts, DHS leadership, ICE rank-and-file, and civil society actors. §287(g) and Secure Communities show clearly that the law does not straightforwardly determine the shape of immigration enforcement, as if it were a textually 'downloaded' form of authority. The focus on the creative character of enforcement gives us a different perspective on immigration organizers' complaints about the 'deviation' from the stated objective of the program. Deviation is not an aberration or something to be corrected but—given the nature of practice—the sign that policing is taking place.

To put it in more concrete terms, one of our key arguments is that U.S. immigration control, as with policing or state power more broadly, cannot be understood solely through the prism of legislation and/or judicial decision-making. Although both lawmaking and court decisions regarding deportation and/or inadmissibility are important components, the bulk of immigration control is prosaic (Painter 2006). There are important linkages here with recent research on the re-scaling of citizenship, as we suggested at the outset. For example, if citizenship takes place at the scale of everyday life, as per Staeheli et al.'s notion of 'ordinary citizenship,' and is not simply the product of an abstract legal framework which outlines the laws, obligations, and expectations governing citizenship, then it stands that the enforcement of

citizenship and immigration laws too are 'assembled in daily life' (Staeheli et al. 2012, 635). Thus any attempt to account for immigration control by reading state power directly from legal text, legislative or judicial, cannot capture the daily, experimental reality of decisions made by thousands of law enforcement officials, not to mention by prosecutors, law enforcement unions, and myriad other actors that play a role in the deportation and admission process in the U.S. Indeed, just because courts and lawmakers produce and reproduce the legal fiction that the various executive bodies charged with immigration enforcement are controlled or directed by law does not mean that this is actually how immigration enforcement works. Lawmakers and courts are implicitly tasked with reproducing their own authority in exactly this way, at the same time as they are frequently struggling to stay abreast of the tactics that constitute immigration control on the ground.

But our point is not simply to argue for attention to the 'actually existing' worlds of immigration control which escape legislation and/or court adjudication in a formal sense, however important this dynamic is. Rather, we hope to provoke a materialist intervention into the critical immigration control scholarship which too often repeats the law as the locus of immigration control, for example via discursive or textual studies of what the law authorizes and why. This approach can be useful, in unpacking the 'social construction' of the law. But it also has the unfortunate effect of repeating the fiction of the law as supreme, and as such erases the experimental characteristics of 'law' beyond what is codified in legal text. To return to Derrida's work on policing, we emphasize the legally generative aspects of policing to the U.S. immigration control apparatus, as well as the fact that the immigration lawmakers and courts are frequently playing catch-up with the frontline officers charged with the task of immigration control. This has important implications for the research on the everyday coordinates of

citizenship. If we are to attend to the everyday as a privileged site for the constitution of citizenship through the practices of residents and their involvement in contentious politics, then we must be able to also identify the institutional structure that communities marginalized on account of their membership status face which, we argue, emerges from the contentious encounter between law and the paralegal.

Part of the problem, as we see it, is the dominance of a particular version of Foucault's insight about the imbrication of power and knowledge in the immigration literature. Overall, immigration scholars have sought to read power via discourse (as text), at the expense of exploring the ways in which representation and practice cohere or collide when interacting on the ground, which indeed we see as closer to Foucault's discussion of power as a *dispositif*, or apparatus (Foucault 1980 [1977], 2007b; see also Valdez 2016). In the critical immigration control scholarship the productivity of law has been investigated (i.e., its capacity not to simply legislate but in fact construct the very subject that it targets, the 'illegal'), but far less attention has been given to the operation of immigration control on the ground, despite the fact that this is certainly the most consequential dimension of the apparatus for the millions of immigrants residing today in the U.S. This constitutes the material dimension of power/knowledge.

Through this exploration, we do not mean to discourage activist and scholarly expectations that progressive legislation can redress the injustices of practice. Legislation is a part of practice. However, our argument suggests that we should pay more attention to how paralegal elements of practice shape the law and may limit its progressive potential. An exclusive focus on legislation presumes that the problem is exclusively technical and can be 'fixed' through better law-making rather than considering the way in which deep-seated power relations embedded in institutions may resist or subvert the letter of the law. Yet an implication

of our framework for organizers and scholars alike is to move away from the current consensus on 'comprehensive immigration reform,' which includes a *quid pro quo* that exchanges regularization for increased resources and prerogatives for border and domestic enforcement. Our framework suggests that empowering enforcement actors will likely have the effect of enhancing the reach of policing and encouraging the expansion of the interconnected networks of enforcement that are behind the record deportation numbers of the last decade.

Our examination of practice illuminates other potential areas of intervention that could target practice more directly. These forms may include resorting to the law to restrict the reach of enforcement (as the 4th amendment-based objections to S-Comm did) but may also target practices directly by working to delink local law enforcement from immigration enforcement (as sanctuary measures do), and/or transfer the tasks of racial profiling training away from law enforcement and ICE and toward community groups, and/or to take on powerful police unions. Organizing that intervenes directly at the level of enforcement—a person detained, incarcerated, killed—upsets the limited visibility of these expressions of state power to those in dominant social positions. This sheds light on why DREAM and #Not1More organizers in the realm of immigration—and Black Lives Matter organizers in the realm of policing—upset the legitimacy of enforcement as 'procedurally sound' as most often rendered by text and court opinion.

Moreover, our exploration shows that the real 'force multiplier' is racialized policing at the state and local level. That is to say, it is through the action of state and local police in communities of color that hundreds of thousands of immigrants come into contact with the immigration enforcement apparatus and how individuals without criminal background are checked against immigration databases. Ultimately, this suggests that immigration activism may

gain from relocating its efforts one level below ICE and joining forces with communities of color protesting racialized policing nationwide.

Studying the realm of practice is also central to examine the ways in which race, gender, and class emerge in and are reconstructed by policing. These questions about material realities rarely emerge on the face of formal, liberal law, which performs its legitimacy through neutrality. Critical race theorists often account for racialization in immigration enforcement by relying on narratives of threat prevalent in the public and Congressional debates, and reconstruct court opinions and legislative debates in order to assert the racialized realities of lawmaking. These important moves do not sufficiently account for the way police actually interact with people, which is the level at which racialization becomes material. The paralegal is essential to understand how race, gender, and class filter state practice and result in the kind of policing that is beyond the sight of law as text, but material and consequential for those with whom the police interact.

Considering the interplay between levels of practice and the paralegal seems particularly important now, as President Elect Donald J. Trump considers alternative immigration plans. Trump has vowed to deport between two and three million "criminal" immigrants, to expand §287(g), restore Secure Communities, and to establish a registry and/or an "extreme vetting" process for Muslim immigrants from countries in conflict (Laughland 2016; Lind 2016; Zezima 2016). Judging from the administration's public pronouncements so far, the tension between the executive's priorities and resistance by ICE rank-and-file and its union—which endorsed the president elect—that we describe in this paper is likely to dissolve, giving way to a freer reign of on-the-ground enforcement. In the face of this, it is urgent to consider ways to curtail the power of federal immigration enforcement through other means, including sanctuary provisions and

state and local resistance to federal law enforcement. While legal contestation of enforcement (including the precarious legal ground of Secure Communities detailed in this paper) and organizing to advance legislation to guarantee legal status *without* giving ground to tougher enforcement is necessary, a concern with the well-being of the millions of immigrants in our communities may require first refocusing on acting, protesting, and blocking enforcement action at the level of the paralegal.

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