REINFORCING THE RULE OF LAW: WHAT STATES CAN AND SHOULD DO TO REDUCE ILLEGAL IMMIGRATION

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In the 2007 state legislative session, something truly extraordinary happened. For the first time ever, legislators in all fifty states introduced bills dealing with illegal immigration. A whopping 1,562 illegal immigration bills were submitted, up from 570 in 2006.[1] Of the bills submitted, 240 were enacted into law, up from 84 in 2006.[2] The vast majority were designed to discourage illegal immigration in one way or another.

It has been often said, but seldom demonstrated so clearly: every state is a border state now. It is undeniable that the urge to reduce illegal immigration has become a powerful force in state legislatures across the country. In the following analysis, I ask and answer two questions about this phenomenon. First, why are they doing it? Second, what legislation can states (or cities) enact in the immigration arena without being preempted by federal law?

I. FORCES PUSHING THE STATES TO ACT

Without question, the single largest factor motivating state governments to enact legislation discouraging illegal immigration is the fiscal burden that it imposes upon the

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[1] National Conference of State Legislators, IMMIGRANT POLICY PROJECT, *2007 Enacted State Legislation Related to Immigrants and Immigration* 1 (2008) *available at* http://www.ncsl.org/programs/immig/2007immigrationfinal.htm.

[2] *Id*. *See also* Julia Preston, "In Reversal, Courts Uphold Local Immigration Laws," N.Y. TIMES, Feb. 10, 2008, at A16.

states. As the Nobel-prize winning economist Milton Friedman once famously observed, "It's just obvious you can't have free immigration and a welfare state."[3] The states have seen Friedman's principle confirmed, with crushing consequences for taxpayers. Although the state expenditures driven by illegal immigration do not all fit into the category of "welfare" expenditures—the consequences are the same. A massive influx of individuals who either pay very little in income taxes or evade income taxes entirely, but consume public services at a relatively high rate, is costly for any receiving state. Consequently, as the number of illegal aliens in a state increases, the financial burden becomes more and more difficult for taxpayers to bear.[4]

In 2007, economist Robert Rector conducted the most rigorous study to date on the *net* fiscal cost of illegal immigration (including any tax payments from illegal aliens). He concluded that the net fiscal cost imposed on all levels of government by illegal aliens was $89.1 billion a year.[5] The government expenditures attributable to illegal immigration range from law enforcement costs to public expenditures for emergency medical care. However, the biggest ticket item is the cost of providing K-12 education to

[3] Robert Rector, *Look to Milton*, NATIONAL REVIEW, June 20, 2007.

[4] I use the term "illegal alien" because it is a legally-accurate term used repeatedly in the immigration laws of the United States. *See, e.g.*, 8 U.S.C. § 1356(r)(3)(ii) (West 2008) ("expenses associated with the detention of illegal aliens"); 8 U.S.C. § 1366(1) (West 2008) ("the number of illegal aliens incarcerated in Federal and State prisons"). Another phrase that is used throughout the immigration laws of the United States is "alien not lawfully present in the United States." *See, e.g.*, 8 U.S.C. § 1229a(c)(2) (West 2008) ("the alien has the burden of establishing . . . by clear and convincing evidence, that the alien is lawfully present in the United States"); 8 U.S.C. § 1357(g)(10) (West 2008) ("for any officer or employee of a State or political subdivision of a State . . . otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."). This term, however, is a bit too cumbersome for a writing of this nature. A third term, "unauthorized alien," is found in federal immigration laws, but is limited to the employment context. *See, e.g.*, 8 U.S.C. § 1324a(a) (West 2008) ("[m]aking employment of unauthorized aliens unlawful"); 8 U.S.C. § 1324b(a)(1) (West 2008) ("other than an unauthorized alien**,** as defined in section 1324a(h)(3) of this title"). In contrast, the ambiguous terms "undocumented immigrant" and "undocumented alien" do not appear anywhere in the immigration laws of the United States. *See* 8 U.S.C. § 1101, *et seq.* (2000). Accordingly, I will use the shorter of the two appropriate terms recognized by federal statute, namely "illegal alien."

[5] Robert Rector, "The Fiscal Cost of Low-Skill Immigrants to State and Local Taxpayers," Heritage Foundation Study, (testimony before the Subcommittee on Immigration Committee on the Judiciary, U.S. House of Rep., May 17, 2007), at 10, *available at* judiciary.house.gov/media/pdfs/rector070517.pdf.

the children in illegal alien-headed households.[6] And that burden falls predominantly on the shoulders of the fifty state governments. For example, in Arizona, the total cost of providing public services to the state's estimated 475,000 illegal aliens is approximately $1.3 billion a year.[7] Of that total cost, approximately $748.3 million goes to providing free primary and secondary school education.[8] Because the numerous fiscal burdens associated with illegal immigration are so significant, there has been an extraordinary amount of activity at the state level to discourage illegal immigration. Although the fiscal burden at the federal level is significant—more than $10 billion annually—the lion's share hits state budgets.[9]

Similar forces have pushed dozens of municipalities to act. The burden on local communities is extremely high, particularly with respect to law enforcement costs resulting from crimes committed by illegal aliens and municipal services consumed by illegal aliens. The facts surrounding the case of Hazleton, Pennsylvania, which in 2006 enacted ordinances barring the employment of unauthorized aliens and the harboring of illegal aliens, illustrate the financial burden.[10] Hazleton's population exploded from approximately 22,000 in the 2000 census to 30,000-33,000 in the space of five years,[11] but the earned income tax receipts on which the city relied for its revenues stayed flat.

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[6] *Id*. at 3. States have been required to provide free public K-12 education to all children, regardless of immigration status, since the decision of the United States Supreme Court in Plyler v. Doe, 457 U.S. 202 (1982).

[7] Arizona: Illegal Aliens, Federation for American Immigration Reform Report (2007), *available at* http://www.fairus.org/site/PageServer?pagename=research_research82b2.

[8] The $748.3 million figure is from the year 2005. Jack Martin, *Breaking the Piggy Bank: How Illegal Immigration is Sending Schools into the Red*, Federation for American Immigration Reform Report (2007).

[9] The net cost of illegal immigration to the federal government is $10.4 billion per year. Steven A. Camarota, *The High Cost of Cheap Labor: Illegal Immigration and the Federal Budget*, Center for Immigration Studies Report, August 2004, at 5. The total cost is $26.3 billion, minus approximately $16 billion in federal taxes and social security contributions paid. *Id*.

[10] The author is the lead attorney representing Hazleton in the case before the Third Circuit U.S. Court of Appeals, Lozano v. Hazleton, Case No. 07-3531 (3rd Cir.), at the time of this writing. *See also* Lozano v. Hazleton, 496 F.Supp. 2d 477 (M.D. Pa. 2007).

[11] Lozano v. Hazleton, Case No. 07-3531 (3d Cir.), Appx. A2291-93.

This lack of additional revenues reflected the fact that much of the immigration was illegal, and the new arrivals were either working off the books or earning so little that they were paying little or nothing in taxes.[12] Meanwhile, expenditures for routine city services that reflect the size of the population, such as trash removal, increased by nearly 50%. Expenditures by the local school district for its English as a Second Language program skyrocketed from approximately $136,000 in 2002-03 school year to over $1.1 million in the 2006-07 school year.[13]

Other factors also impel local governments to act. Most notable among these factors are the overloading or closing of hospitals due to unpaid use of emergency rooms by illegal aliens, and crimes committed by illegal-alien dominated street gangs. Illegal immigration into a region often coincides with dramatic increases in patients visiting the emergency rooms of area hospitals, because the vast majority of illegal aliens do not possess health insurance, and federal law requires all hospitals to provide emergency medical care to all comers, regardless of immigration status and regardless of ability to pay.[14] Here again, Hazleton illustrates the problem. The Hazleton hospital's emergency room began losing millions of dollars annually, wait times in the emergency room increased to over five hours at times, and an expanded emergency room facility had to be built.[15] With respect to crimes, Hazleton witnessed a crime wave in narcotics and related violence due to the presence of gangs dominated by illegal aliens. Most noticeably, a

[12] *Id*. at A1647, A1399-1400, A2290-91.
[13] Stipulated Testimony of Sean Shamany, School Board Director of Hazleton Area School District, Lozano v. Hazleton, Case No. 3:06-CV-01586-JMM (M.D. Pa.), Doc. No. 219-2 (March 21, 2007), at 4.
[14] 42 U.S.C. § 1395dd (West 2008). *See also* Lozano v. Hazleton, Case No. 07-3531 (3d Cir.), Appx. A2296-98.
[15] Uncompensated emergency and urgent care cost the facility more than $8.7 million in 2006. Stipulated Testimony of James D. Edwards, President and Chief Executive Officer of the Greater Hazleton Health Alliance, Lozano v. Hazleton, Case No. 3:06-CV-01586-JMM (M.D. Pa.), Doc. No. 219-3 (Mar. 21, 2007), at 4.

small town that previously experienced murder once every seven or eight years saw a series of violent homicides involving illegal aliens in a two-year period.[16] In addition, members of the violent street gang Mara Salvatrucha-13 (MS-13), were arrested or identified in Hazleton.[17]

The criminal impact of illegal immigration has been noteworthy in other jurisdictions as well. I am referring to crimes over and above the numerous federal crimes that are part and parcel of simply residing and working unlawfully in the United States.[18] The concurrence of alien smuggling networks with drug smuggling networks often results in the same individuals engaging in various related criminal enterprises. In recent years, the emergence of MS-13 and related illegal-alien dominated gangs has resulted in unprecedented levels of gang violence in the more than 30 states in which MS-13 operates.[19] Approximately 90 percent of MS-13 gang members in the United States are illegal aliens.[20] While most MS-13 members join the gang prior to entering the United States illegally, other illegal alien gang members join after entering the United States. For example, the illegal-alien-dominated Latin Kings seek out and recruit young men who are unlawfully present in the United States, offering them social networks,

[16] *Id*. at A1382-83, A1674.
[17] *Id*. at A2482-83.
[18] For example, it is a federal crime to enter the United States without inspection, 8 U.S.C. § 1325(a) (West 2008); it is a crime to use a false immigration document, 18 U.S.C. § 1546(b) (West 2008); it is a crime to misuse or fabricate a social security number when seeking employment, 42 U.S.C. § 408(a)(7) (West 2008), it is a crime to open a bank account with false identity information, 18 U.S.C. § 1014 (West 2008), and it is a crime to present false identification documents to any federal, state, or local law enforcement official, 18 U.S.C. §§ 1001, 1512 (b)(3) (West 2008).
[19] Kris W. Kobach, Testimony before the U.S. House of Representatives, Judiciary Committee, Subcommittee on Immigration, Border Security, and claims, regarding H.R. 2933, June 28, 2005.
[20] Lozano v. Hazleton, Case No. 07-3531 (3d Cir.), Appx. at A2483-84.

money, and the illusion of security.[21] Not surprisingly, illegal aliens make up a disproportionate share of inmates in federal prisons.[22]

These latter two consequences of illegal immigration—health care costs and criminal costs—only exacerbate the fiscal burdens imposed by illegal immigration upon states and cities. And unlike the federal government, most states and cities must balance their budgets every year. Eventually, the overwhelming fiscal burdens resulting from illegal immigration force state and local legislators to act.

Legislators are not the only ones who have recognized the magnitude of the burden that illegal immigration imposes upon states and cities. Judges reviewing immigration-related state statutes have also observed this fact. As the U.S. District Court for the District of Arizona noted in 2008:

> If the authorized state and federal sanctions [of the Immigration Reform and Control Act of 1986] are disproportional in severity, that is because Congress recognized the disproportional harm to core state and federal responsibilities from unauthorized alien labor. The pervasive adverse effects of such employment fall directly on the states. *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976); *Plyler v. Doe*, 457 U.S. 202, 228 n.3 (1982). See also Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 79-80 (2007) ("The concentration of the undocumented in a small number of states . . . means that the adverse political and fiscal effects of these concentrations are disproportionate in these states."). Congress conspicuously did not take responsibility for those costs. In light of the disproportionate responsibilities and burdens on the states, Congress could reasonably conclude that states are better equipped than Congress to judge which licenses to sanction, and how much. It left the strong deterrence of licensing sanctions to individual states to implement in their own circumstances.[23]

[21] *Id.* at A2490-91.
[22] *See* Federal Bureau of Prison "Quick Facts," *available at* http://www.bop.gov/news/quick.jsp#1 (last visited Apr. 8, 2008) (showing that 26.3% of federal prisoners are not U.S. citizens). At the time of this writing, illegal aliens represent approximately 26.3% of federal prisoners, while they only comprise 4-5 % of the population of the United States.
[23] Ariz. Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036, at *35-*36 (D. Ariz. 2008).

This statement echoed observations made 32 years earlier by the U.S. Supreme Court in *De Canas v. Bica*, when it sustained a state law prohibiting the employment of unauthorized aliens in California—a state that was already experiencing the fiscal burdens of illegal immigration in 1976:

> These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico. In attempting to protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens, [the state law] focuses directly on these essentially local problems….[24]

Today the fiscal burdens imposed by illegal immigration are acute throughout the United States. As a result, many cities and states are for the first time exercising their authority to act.

II. AREAS OF PERMISSIBLE STATE LAWMAKING IN THE FIELD

It is clear from the fact that all fifty states have proposed bills affecting illegal immigration that there are ample forces pushing state legislators to stem the flow of illegal immigration into their respective jurisdictions. However, the will to act does not always coincide with the boundaries defined by Congress and the attendant principles of federal preemption doctrine. Not all of these state bills are permissible under federal law. Because immigration is a field in which the federal government enjoys plenary authority under Article I of the U.S. Constitution, state statutes must be carefully drafted to avoid federal preemption. And there are some things that states simply cannot do, no matter how well a statute is drafted. For example, a state may not create state-level criteria for

[24] DeCanas v. Bica, 424 U.S. 351, 357 (1976).

determining which aliens are allowed to reside in the United States.[25] Nor may a state impose criminal penalties on the employers of unauthorized aliens.[26] A state statute of either sort would be clearly preempted by federal law.

That said, there is wide latitude for states and municipalities to act without being preempted, provided the statutes are drafted correctly. As the Supreme Court declared in the landmark immigration preemption case of *De Canas v. Bica*, "standing alone, the fact that aliens are the subject of a state statute does not render it a [prohibited] regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[27] As the *De Canas* Court explained, states possess considerable authority to act in ways that affect immigration without being preempted by the Immigration and Nationality Act [INA]:

> Of course, even state regulation designed to protect vital state interests must give way to paramount federal legislation. But we will not presume that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship [concerning unauthorized aliens] in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was "the clear and manifest purpose of Congress" would justify that conclusion. Respondents have not made that demonstration. They fail to point out, and an independent review does not reveal, any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular.[28]

[25] *Id.* at 355.
[26] 8 U.S.C. § 1324a(h)(2) (West 2008) (stating that "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.").
[27] *De Canas*, 424 U.S. at 355.
[28] *Id*. at 357-58 (internal citations omitted).

The *De Canas* Court went on to point out that Congress has never occupied the field of immigration so as to displace state laws in the area. Provided that a state statute is not expressly barred by federal law, the state statute does not attempt to create state-level standards regarding which aliens may enter the United States, the state statute does not pose an obstacle to the accomplishment of the manifest objectives of Congress, and it is possible to simultaneously comply with state and federal law, preemption does not occur.

What follows is a summary of eight areas in which states or cities can constitutionally act in the field of immigration. Those eight areas are:

A. Denying public benefits to illegal aliens;

B. Denying resident tuition rates to illegal aliens;

C. Prohibiting the employment of unauthorized aliens;

D. Enacting state-level crimes that mirror federal immigration crimes;

E. Enacting state-level crimes against identity theft;

F. Providing state and local law enforcement assistance to ICE;

G. Presuming illegal aliens to be flight risks for bail purposes;

H. Denying driver licenses to illegal aliens.

In all of these areas, there are three important restrictions that must be built into any state statute if it is to conform to the requirements of federal law and avoid preemption: (1) the statute must not attempt to create any new categories of aliens not recognized by federal law; (2) the statute must use terms consistent with federal law; and (3) the statute must not attempt to authorize state or local officials to independently determine an alien's immigration status, without verification by the federal government.[29]

[29] It is essential that such ordinances be carefully drafted, in order to avoid federal preemption and satisfy the requirements that courts of the United States have applied in relevant preemption cases. Examples of

At the time of this writing, three states have enacted statutes that encompass all, or virtually all, of the eight areas listed above: Arizona, Oklahoma, and Missouri. Arizona did so through a series of legislative bills and voter initiatives enacted between 2004 and 2007.[30] Oklahoma and Missouri did so through omnibus immigration bills enacted in 2007 and 2008, respectively.[31] The majority of the remaining states have enacted narrower bills covering one or more of the eight areas. In addition, dozens of municipalities and counties across the country have acted in at least one of the eight areas.[32] The following analysis offers examples in each area, as well as an explanation of the legal authority supporting such state or local enactments.

A. Denying Public Benefits to Illegal Aliens

One of the easiest and most obvious things a state, county, or municipality can do is deny public benefits to illegal aliens. The most well-known example of this is Arizona's Proposition 200, a popular initiative which was enacted with 56 percent of the vote in 2004.[33] Colorado, Georgia, Oklahoma, and Missouri enacted similar statutes in

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well-drafted state and local statutes in these areas are posted by the Immigration Reform Law Institute and may be found at www.irli.org.

[30] Specifically, Arizona Proposition 200 (2004), Ariz. Rev. Stat. § 13-2319 (West 2008) (enacted 2005), Arizona Proposition 300 (2006),and Arizona H.B. 2779 (2007), described in detail in the relevant sections below.

[31] Oklahoma H.B. 1804 (2007); Missouri Conf. Comm. Subst. for H.B. 1549, 1771, 1395 and 2366 (2008). Both are described in detail in the relevant sections below.

[32] The authority of municipalities and counties to act is defined not only by the principles of federal preemption described in this Article, but also by the powers granted to such governments under the applicable state constitutions. Four of the eight areas have seen significant activity by municipal and county governments: providing law enforcement assistance to ICE, denying public benefits to illegal aliens, prohibiting the employment of unauthorized aliens, and enacting ordinances that reflect federal immigration crimes (e.g., ordinances prohibiting landlords from harboring illegal aliens).

[33] *See, e.g.*, Susan Carroll & Yvonne Wingett, "Immigration Federal Ruling / Prop. 200 Now Law In Arizona," ARIZONA REPUBLIC, Dec. 23, 2004, at 1A. The entire text of Proposition 200, officially named "Arizona Taxpayer & Citizen Protection Act," appears on the Arizona Secretary of State website, *available at* http://www.azsos.gov/election/2004/info/pubpamphlet/english/prop200.htm (last visited Apr. 8, 2008).

the years thereafter; and more states are likely to follow.[34] Such statutes deny the vast majority of public benefits to illegal aliens, including Medicare, Medicaid, unemployment insurance, housing benefits, food assistance, commercial licenses, and numerous other public benefits.

It is important to understand that these statutes do no more than is already required by federal law. Indeed, the states that have not yet enacted statutes barring the provision of public benefits to illegal aliens are likely violating of federal law, to the extent that any public benefits are currently flowing to illegal aliens. In 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996), relevant provisions of which are codified at 8 U.S.C. §§ 1601-1622. In that act, Congress included numerous provisions designed to ensure that illegal aliens do not receive public benefits at the federal state or local level. Those provisions are found at 8 U.S.C. § 1621. Specifically, Congress mandated that an illegal alien (who is not a "qualified" alien)[35] "is not eligible for any State or local public benefits."[36] Henceforth, states and localities were to deny the following broad array of benefits to illegal aliens:

> (A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and
> (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a

[34] Colorado enacted the Colorado Restrictions on Public Benefits Act in 2006; Colo. Rev. Stat. 24-76.5-103 (West 2008). Georgia enacted the Georgia Security and Immigration Compliance Act in 2006; O.G.C.A. 50-36-1 (West 2008). Oklahoma enacted the Oklahoma Taxpayer and Citizen Protection Act in 2007; 56 Okla. Stat. Ann. 71(West 2008). Missouri enacted Conf. Comm. Subst. for H.B. 1549, 1771, 1395 and 2366 in 2008; Rev. Stat. Mo. 208.009.
[35] Illegal aliens are generally not "qualified aliens," with a few exceptions. See 8 U.S.C. § 1641 (West 2008).
[36] 8 U.S.C. § 1621(a) (West 2008).

> State or local government or by appropriated funds of a State or local government.[37]

Exceptions are made for emergency medical assistance, emergency disaster relief, and immunizations.[38] In addition, since the 1982 decision of the U.S. Supreme Court in *Plyler v. Doe*, states have been required to provide free K-12 education to illegal alien children.[39]

These exceptions aside, states and municipalities are *required* by federal law to deny all public benefits to illegal aliens.[40] When enacting these provisions of federal law in 1996, Congress expressly spelled out its objectives. 8 U.S.C. § 1601(2) states: "It continues to be the immigration policy of the United States that (a) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and (b) the availability of public benefits not constitute an incentive for immigration to the United States." A few subsections later in the U.S. Code, Congress reiterated its purpose: "It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits."[41] Congress was determined to remove the magnetic effect of public benefits in the illegal immigration crisis.

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[37] 8 U.S.C. § 1621(c) (West 2008).
[38] 8 U.S.C. § 1621(b) (West 2008).
[39] Plyler v. Doe, 457 U.S. 202 (1982).
[40] There is a safe harbor provision in 8 U.S.C. § 1621, allowing a state to provide a public benefit to an alien unlawfully present in the United States by enacting a state law that "affirmatively provides for such eligibility." 8 U.S.C. § 1621(d) (West 2008). In order to meet the requirements of this safe harbor, the state must expressly indicate that illegal aliens are provided the public benefit in question, and must expressly refer to 8 U.S.C. § 1621. 104th Cong., 2d Sess., Conference Report No. 104-725 on H.R. 3734 (July 31, 1996), at 383.
[41] 8 U.S.C. 1601(6) (West 2008).

In order to implement these PRWORA provisions, the federal government expanded the Systematic Alien Verification for Entitlements (SAVE) Program, which was originally established in 1987, pursuant to the Immigration Reform and Control Act (IRCA). The SAVE Program utilizes a massive automated database that state and local government agencies can consult, via internet, to determine whether an alien is lawfully present in the United States and entitled to receive the benefits in question. Verification usually occurs in a matter of seconds. There are at least 205 participating government agencies across the country that are already using the SAVE program to verify aliens' immigration status.[42]

Congress was also careful to expressly pave the way for states to verify the status of aliens seeking public benefits. Congress gave the states explicit authorization to do so in 8 U.S.C. § 1625: "A State or political subdivision of a State is authorized to require an applicant for State and local public benefits … to provide proof of eligibility." Congress also provided that states would have a clear legal avenue for reporting to federal authorities illegal aliens who seek public benefits. Indeed, Congress prohibited states from concealing this information if they discover it. 8 U.S.C. § 1644 states that no government entity may be "in any way restricted, from sending to or receiving from [federal immigration officials] information regarding the immigration status, lawful or unlawful, of an alien in the United States."

The authority of a state to comply with the express requirements of federal law is beyond serious dispute. Nevertheless, legal challenges have been brought against such law; and two U.S. district courts have confirmed the authority of states to enact statutes

[42] Department of Homeland Security, *Privacy Impact Assessment for the Verification Information System Supporting Verification Programs*, Apr. 1, 2007, at 18.

that deny public benefits to illegal aliens. The most recent decision came out of the District of Arizona in the case of *Friendly House v. Napolitano* in 2005. In that case, the Court sustained Arizona's Proposition 200 against a preemption challenge. The Court concluded that Congress clearly intended that states should verify the status of aliens seeking public benefits and that Proposition 200 was not preempted by federal law.[43] Eight years earlier, in the case of *LULAC v. Wilson*, the District Court for the Central District of California had articulated the same principle. Although the Court struck down certain provisions of Proposition 187, which had been enacted via popular initiative in 1994, two years prior to PRWORA, the Court found that benefits denial provisions were not an impermissible regulation of immigration and therefore withstood scrutiny under the first *De Canas* test.[44] The Court also noted that "The benefits denial provisions of Proposition 187 may therefore be implemented without impermissibly regulating immigration if state agencies, in verifying for services and benefits, rely on federal determinations made by the INS and accessible through SAVE."[45] These judicial decisions confirmed what was already clear: states are on solid legal ground if they follow the requirements of federal law and deny public benefits to illegal aliens, using the SAVE program to verify with the federal government the legal status of any alien applicant. Numerous states, counties, and cities have already done so. This is perhaps

[43] Friendly House v. Napolitano, D.C. No. CV-04-00649-DCB (Dist. of AZ). This case ended in the Ninth Circuit, which held that the plaintiffs lacked standing to bring the suit in the first place. Accordingly, the Ninth Circuit vacated the decision on the merits by the Court below. Friendly House v. Napolitano, 419 F.3d 930 (9th Cir. 2005).
[44] League of United Latin American Citizens v. Wilson, 908 F.Supp. 755, 770 (C.D. Cal. 1995).
[45] *Id*. at 770. The appeal of the sections of the District Court decision in *LULAC* that struck down other aspects of Proposition 187 was dropped before the Ninth Circuit ruled on the case, largely due to the fact that California's new Governor, Gray Davis, was opposed to Proposition 187. *Proposition 187 Supporters Decry Settlement, Say They're Pondering Action*, METROPOLITAN NEWS ENTERPRISE, July 30, 1999, at 3.

the easiest step that can be taken to remove an incentive for continued unlawful presence and further illegal immigration.[46]

B. Denying Resident Tuition Rates to Illegal Aliens

One subset of public benefits that has received a great deal of attention with respect to illegal aliens is access to in-state tuition rates (or "resident" tuition rates).[47] In September 1996, Congress passed the landmark Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[48] Advocates for illegal aliens in some states—most notably California—had already raised the possibility of making in-state tuition rates available to illegal aliens who attend public universities.[49] Illegal aliens had been eligible for in-state tuition rates at the California State University System prior to the passage of Proposition 187 by California voters in 1994.[50] To prevent states from extending in-state tuition eligibility to illegal aliens, IIRIRA's sponsors inserted a section that prohibited any state from doing so, unless the state also provided the same discounted tuition to all U.S. citizens:

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.[51]

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[46] For an example of a well-drafted law that denies public benefits to illegal aliens, *see* 56 Okla. Stat. 71.
[47] For a comprehensive discussion of this issue, see Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 473 (2007).
[48] Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.).
[49] Linda Chavez, *What to Do about Immigration*, COMMENTARY, Mar. 1995, at 29.
[50] *Id*.
[51] 8 U.S.C. § 1623 (West 2008).

Congress's intent was clear. If a state wished to make in-state tuition rates available to any illegal aliens, it would have to make the benefit available to *all* nonresident U.S. citizens and nationals. Ten states have brazenly violated this provision of federal law, rewarding illegal aliens with the valuable benefit of a taxpayer-subsidized college education. Those ten states are California, Texas, New York, Illinois, Washington, Utah, Oklahoma, Kansas, New Mexico, and Nebraska.[52] Two of those states—California and Kansas—have seen their laws challenged in state or federal court.[53]

However, some states have taken action to make sure that they adhere to 8 U.S.C. § 1623. They have expressly barred their public universities from offering in-state tuition rates to illegal aliens. The most notable is Arizona, which did so with the passage of Proposition 300 in 2006. The Arizona Legislature approved a legislative resolution (S.C.R. 1031) that was placed on the November 7, 2006, election ballot.[54] Arizona voters approved Proposition 300 overwhelmingly, with 71.4% voting in favor.[55] Had the question been put to a popular vote in the ten states that offer in-state tuition rates to illegal aliens, it is not unreasonable to suggest that the outcome would have been similar.

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[52] *See* Cal. Educ. Code § 68130.5 (West 2008) (enacted 2002); 110 Ill. Comp. Stat. Ann. § 305/7e-5 (West 2008) (enacted 2003); Kan. Stat. Ann. § 76-731a (West 2008) (enacted 2004); Neb. Rev. Stat. § 85-502 (West 208) (enacted 2006); N.M. Stat. Ann. § 21-1-4.6 (West 2008) (enacted 2005); N.Y. Educ. Law § 6301.5 (West 2008) (enacted 2002); 70 Okl. Stat. Ann. 3242 (West 2008) (enacted 2003) (as amended by H.B. 1804, 51st Leg., 1st Sess. (Okl. 2007)); Tex. Educ. Code Ann. §§ 54.051–54.060 (West 2008) (enacted 2001); Utah Code Ann. § 53B-8-106 (West 2008) (enacted 2002); Wash. Rev. Code Ann. § 28B.15.012 (West 2008) (enacted 2003).

[53] *See* Day v. Bond, 500 F.3d 1127 (10th Cir. 2007) (decided solely on standing grounds, with no discussion of the merits); Martinez v. Regents of the Univ. of Calif., No. CV 05-2064 (Cal. Super. Ct. Oct. 4, 2006). Both cases are under appeal at the time of this writing. The author is lead attorney representing the U.S. citizen students challenging the state laws in each of these cases.

[54] Christian Palmer, *Arizona Voters OK 4 Immigration Measures*, ARIZ. CAPITOL TIMES, Nov. 7, 2006, at 1.

[55] Ariz. Sec'y of State, 2006 General Election – Ballot Measures, http://www.azsos.gov/results/2006/general/BM300.htm (last visited Apr. 8, 2008).

Scientific polls consistently show that overwhelming majorities of the public oppose making in-state tuition rates available to illegal aliens.[56]

Of course a state legislature need not place the issue on a referendum ballot in order to comply with federal law. A normal statute will suffice. South Carolina enacted such a statute in 2007.[57] Missouri did so in 2008.[58] Given the unequivocal congressional statement on the matter in 8 U.S.C. § 1623, it should come as no surprise that laws or policies denying in-state tuition rates to illegal aliens have also survived legal challenge. In 2004, the District Court for the Eastern District of Virginia found that a Virginia policy denying postsecondary education benefits to illegal aliens was permissible under federal law. Importantly the Virginia policy adopted federal standards for classifying aliens and deferred to federal determinations of alien status. It was therefore on secure constitutional ground.[59]

C. Prohibiting the Employment of Unauthorized Aliens

The employment of unauthorized aliens is one area in which states can make a huge difference. Indeed, if there is a silver bullet in addressing the problem of illegal immigration, this is it. Jobs are the primary magnet that draws illegal aliens to the United

[56] Seventy-one percent of Utah residents thought that the law offering resident tuition rates to illegal aliens should be repealed, according to a June 2006 poll of 625 Utah residents commissioned by the SALT LAKE TRIBUNE. Jennifer W. Sanchez, *Immigration Worries: A Cold Welcome*, SALT LAKE TRIB., June 22, 2006. The poll was performed by Mason-Dixon Polling & Research, Inc., and had a margin of error of 4 percentage points. *Id.* An October 2005 poll of New Mexico residents by Research & Polling, Inc., found that 72 percent opposed allowing some illegal alien students to pay in-state college tuition. Leslie Linthicum, *Immigration Divide*, ALBUQUERQUE J., Oct. 30, 2005, at A1.

[57] South Carolina enacted the following statutory provision in 2007. "No state or other appropriated funds authorized in this act or authorized in any state law may be used to provide illegal aliens tuition assistance, scholarships, or any form of reimbursement of student expenses for enrolling in or attending an institution of higher learning in this State." 117th Sess. H. 3620, § 5A.24 (2007).

[58] Missouri Conf. Comm. Subst. for H.B. 1549, 1771, 1395 and 2366 (2008); Rev. Stat. Mo. 208.009 (denying aliens unlawfully present in the United States any "postsecondary education … benefit under which … reduced rates or fees are provided.").

[59] Equal Access Education v. Merten, 305 F. Supp.2d 585, 603 (2004).

States. Removing this magnet can significantly reduce illegal immigration and can encourage many illegal aliens to leave the United States on their own. It has been a crime to knowingly employee an unauthorized alien since the passage of IRCA in 1986.[60] However, the federal government has found it difficult to keep illegal labor out of the workplace. Worksite enforcement of immigration laws has ebbed and flowed for more than two decades,[61] but the central flaw of the I-9 process described in IRCA has been the proliferation of false identification cards and other documents that suffice to fool employers who have no background or knowledge in the detection of counterfeit documents.

Nonetheless, states can transform worksite enforcement of federal immigration laws. In 2007, the Arizona legislature made it violation of state law to knowingly hire an unauthorized alien and made Arizona the first state in the country to require all employers to verify the employment authorization of newly-hired workers through the federal government's "E-Verify" system.[62] On January 1, 2008, the law went into effect. The internet-based E-Verify system is free of charge and easy to use. The employer simply enters the employee's name, date of birth, and social security number or other work authorization number. He gets an answer back from the federal government in seconds. Over 20,000 business across the country were already using E-Verify voluntarily before

[60] *See* 8 U.S.C. § 1324a (West 2008).
[61] The U.S. Bureau of Immigration and Customs Enforcement (ICE) brought criminal charges against 716 employers in Fiscal Year 2006 and had arrested 742 employers on criminal charges near the end of Fiscal Year 2007, a significant increase over prior years. *Secretaries Chertoff, Gutierrez Speak on Border Security, Administrative Immigration Reforms at Press Conference*, U.S. FED. NEWS, August 10, 2007. For a discussion of worksite enforcement actions over a longer period of time, see Richard Stana, Statement before the U.S. Senate Committee on the Judiciary, Subcommittee on Immigration, Border Security and Citizenship, June 19, 2006.
[62] Ariz. H.B. 2779 (2007), codified at Ariz. Rev. Stat. 23-212 to 214. E-Verify was formerly called the "Basic Pilot Program."

January 1, 2008.[63] Thereafter, Arizona's 145,000 were obliged to join their ranks. When employers verify every new employee with the federal government, it becomes very difficult to violate the law. Illegal aliens know that E-Verify makes it impossible for them to fabricate social security numbers or use counterfeit identity cards to obtain jobs. And when the jobs dry up, they leave.

Arizona's statute had immediate and profound effects. Newspapers in the state reported in January 2008 that illegal aliens were already *self*-deporting by the thousands.[64] Apartment complexes in Phoenix and Tucson confirmed that high numbers of alien tenants had departed their apartments.[65] The Arizona public school system immediately began to experience some relief, with a $48.6 million surplus suddenly appearing in FY 2008.[66] Although some illegal aliens undoubtedly moved to neighboring states, many returned across the border to Mexico. In January 2008, the leaders of the neighboring Mexican state of Sonora sent a delegation of nine state legislators from Sonora to Arizona to criticize the new law. Strangely, they complained that Sonora could not handle the burden that the influx of returning Mexican citizens was imposing on Sonoran schools and housing.[67] Evidently, they thought that Arizona's taxpayers were obligated to bear that burden.

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[63] Theo Milonopoulos, *Worker status checks' errors called 'severe'; E-Verify often wrongly flags foreign-born hires as illegal, a report says, raising fears the system could lead to bias*, L.A. TIMES, Nov. 28, 2007, at A21.

[64] *See, e.g.*, Daniel González, *Apartments Going Empty as Hiring Law Hits Migrants*, ARIZONA REPUBLIC, Jan. 31, 2008, at 1.

[65] *Id.*; *see also* Randal C. Archibold, *Arizona Seeing Signs of Flight By Immigrants*, N.Y. TIMES, Feb. 12, 2008, at A13.

[66] JLBC Monthly Fiscal Highlights: December 2007, at 2, available at http://www.azleg.gov/jlbc/mfh-dec-07.pdf. See also Jacques Billeaud, *Employer-Sanctions Law Forces Illegal Immigrants to Move On*, SIERRA VISTA HERALD, March 3, 2008, *available at* http://www.svherald.com/articles/2008/03/03/news/doc47cb9f7c14db5486886624.txt.

[67] Sheryl Kornman, *Sonoran Officials Slam Sanctions Law in Tucson Visit*, TUCSON CITIZEN, Jan. 16, 2008, at 4A.

Arizona's success offers empirical proof that attrition through enforcement works. The premise is a straightforward one—the way to solve America's illegal immigration problem is to make it more difficult for unauthorized aliens to work illegally in the United States, while incrementally stepping up the enforcement of other laws discouraging illegal immigration. The result is that many illegal aliens self-deport. Illegal aliens are rational decision makers. If the probability of successfully obtaining a job goes down, then at some point the only rational decision is to return one's country of origin.[68]

Others have followed Arizona's lead. In the 2008 legislative session, Mississippi enacted a similar law requiring all private employers to utilize the E-Verify system when hiring new employees. The requirements would be phased in gradually over a three year period, beginning in July 2008 with employers of more than 250 employees, and extending to all employers by July 2011.[69]

Municipalities have also acted in this area. Most notably, Hazleton, Pennsylvania, and Valley Park, Missouri, enacted similar ordinances prohibiting local employers from knowingly employing unauthorized aliens, and giving employers safe harbor if they used the E-Verify system to verify the work authorization of new employees. The only consequence imposed upon an employer that violates the ordinances is the suspension of the employer's business license. The same is true of Arizona's statute: the only consequence is suspension of a business license.

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[68] *See* Kris W. Kobach, *The Immigration Answer*, N.Y. POST, Feb. 13, 2008.

[69] Mississippi Employment Protection Act, S.B. 2988 (enacted Mar. 17, 2008). *See id*., Section 2(7) (stating that "State of Mississippi agencies and political subdivisions, public contractors and public subcontractors and private employers with two hundred fifty (250) or more employees shall meet verification requirements not later than July 1, 2008.").

The statutes were drafted this way because, when enacting IRCA in 1986, Congress expressly preempted states from imposing criminal penalties on the employers of unauthorized aliens, but expressly *allowed* states to impose the consequence of a suspension or loss of business license. The relevant federal law states:

> Preemption. The provisions of this section preempt any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.[70]

Accordingly, a state statute or local ordinance that only suspends the business license of an offending employer, and that relies on the federal government's determination of any alien's employment authorization, will not be preempted.

Statutes of this nature have already been tested and upheld in federal courts. In February 2008, the District of Arizona sustained against a preemption challenge Arizona's law requiring E-Verify participation and prohibiting the knowing employment of unauthorized aliens.[71] The Court found that the state was completely within its authority to require the use of E-Verify:

> Federal policy encourages the utmost use of E-Verify. The [state] Act effectively increases employer use of the system with no evidence of surpassing logistical limits, and it does so in the context of a licensing sanction law that is within the police power of the states as expressly recognized by IRCA.[72]

Similarly, the Eastern District of Missouri sustained the City of Valley Park's ordinance suspending the business licenses of employers who knowingly employ unauthorized

[70] 8 U.S.C. § 1324a(h)(2) (West 2008) (emphasis added).
[71] Ariz. Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036 (D. Ariz. 2008). The plaintiffs who lost before the District Court have appealed the decision to the Ninth Circuit of the U.S. Court of Appeals. The author is serving as counsel on the legal team defending the Arizona statute.
[72] *Id*. at *53.

aliens.[73] The Court was unequivocal in concluding that: "The plain meaning of the [federal] statute clearly provides for state and local governments to pass licensing laws which touch upon the subject of illegal immigration. The [local] statute at issue is such a licensing law, and therefore is not expressly preempted by federal law."[74] These decisions have paved the way for other states and cities to follow.[75]

Because it is possible to combine a requirement that employers use E-Verify, a process for the suspension of licenses held by employers of unauthorized aliens, and rules governing state income taxes, there are many approaches that a state or municipality can take in preventing the employment of unauthorized aliens. A state can:

(1) require all private employers in the state to participate in E-Verify;

(2) suspend the business licenses of employers who knowingly employ unauthorized aliens;

(3) require all government agencies to participate in E-Verify;

(4) require recipients of government contracts to participate in E-Verify;

(5) Prohibit employers from deducting wages paid to unauthorized aliens from their income, when paying state income taxes; and

(6) Create a private cause of action allowing any U.S. citizen who is fired by an employer who is knowingly employing unauthorized aliens to sue the employer for damages in state court.

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[73] Gray v. Valley Park, Case No. 4:07-cv-881-ERW, 2008 U.S. Dist. LEXIS 7238 (E.D. Mo. Jan. 31, 2008). The plaintiffs who lost before the District Court have appealed the decision to the Eighth Circuit of the U.S. Court of Appeals. The author is serving as lead counsel defending the city of Valley Park, Missouri.

[74] *Id*. slip op. at 21.

[75] The only federal court to reach a different holding in a final order is the U.S. District Court for the Middle District of Pennsylvania, which came to the strained conclusion that the same federal law that authorizes such licensing laws somehow prohibits such licensing laws. *Lozano*, 496 F.Supp. 2d 477, 519-20. The Middle District of Pennsylvania also set aside the binding Supreme Court precedent of *De Canas*. 496 F.Supp. 2d at 524. At the time of this writing, the case is on appeal before the Third Circuit of the U.S. Court of Appeals. The author is serving as lead counsel defending the City of Hazleton, Pennsylvania.

Numerous states have already enacted various combinations of these provisions. For example, Arizona, Oklahoma, and Missouri require governmental agencies to utilize the E-Verify system when hiring new employees, and require all recipients of public contracts to participate in the E-Verify program.[76] Arizona and Missouri prohibit employers from knowingly employing unauthorized aliens and provide for the suspension of business licenses held by those employers that violate the statutes.[77] Georgia and Missouri prohibit employers from deducting wages or other compensation paid to unauthorized alien employees from their income for tax purposes.[78] And Oklahoma, Mississippi, and Utah recognize a private cause of action against an employer for any U.S. citizen or lawful permanent resident alien who is discharged from employment while the employer is knowingly employing an unauthorized alien.[79] It is likely that the number of states taking some combination of the six actions listed above to discourage the employment of unauthorized aliens will only increase in the years ahead.[80]

D. Enacting State-Level Crimes that Mirror Federal Crimes

[76] Ariz. H.B. 2779 (2007), codified at Ariz. Rev. Stat. 23-212 to 214; Oklahoma H.B. 1804 (2007), codified at 25 Okla. Stat. 1313; Missouri Conf. Comm. Subst. for H.B. 1549, 1771, 1395 and 2366 (2008), codified at Rev. Stat. Mo. 285.530.

[77] Ariz. H.B. 2779 (2007), codified at Ariz. Rev. Stat. 23-212 to 214; Missouri Conf. Comm. Subst. for H.B. 1549, 1771, 1395 and 2366 (2008), codified at Rev. Stat. Mo. 285.530, 285.535.

[78] O.C.G.A. § 48-7-21.1 (2007); Missouri Conf. Comm. Subst. for H.B. 1549, 1771, 1395 and 2366 (2008), codified at Rev. Stat. Mo. 285.535.

[79] Oklahoma H.B. 1804 (2007), codified at 25 Okla. Stat. 1313; Mississippi S.B. 2988 (2008); Utah S.B. 81 (2008).

[80] For examples of well-drafted laws that discourage the employment of unauthorized aliens, see Arizona's H.B. 2779 (2007), which was sustained against a preemption challenge in *A*riz. Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036, and Valley Park, Missouri, Ordinance 1722, which was sustained against a preemption challenge in Gray v. Valley Park, Case No. 4:07-cv-00881-ERW, 2008 U.S. Dist. LEXIS 7238. Other examples of statutes that are well drafted to withstand legal challenge may be found at www.irli.org.

State governments possess the authority to criminalize particular conduct concerning illegal immigration, provided that they do so in a way that mirrors the terms of federal law. In this way, state governments can utilize state and local law enforcement agencies to enforce these state crimes, thereby reinforcing the efforts of federal law enforcement agencies. The federal crimes that are most suited to duplication at the state level are alien smuggling and alien harboring.

For example, in 2007, Oklahoma carefully duplicated federal law to prohibit the transportation or harboring of illegal aliens within the state. The Oklahoma statute applied the precise terms of federal law in the state context:

> A. It shall be unlawful for any person to transport, move, or attempt to transport in the State of Oklahoma any alien knowing or in reckless disregard of the fact that the alien has come to, 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. It shall be unlawful for any person to conceal, harbor, or shelter from detection any alien in any place within the State of Oklahoma, including any building or means of transportation, knowing or in reckless disregard of the fact that the alien has come to, entered, or remained in the United States in violation of law.[81]

Utah enacted similar language in 2008.[82] Such concurrent enforcement is clearly within a state's authority. As the Ninth Circuit has opined: "Where state enforcement activities do not impair federal regulatory interests *concurrent enforcement activity is authorized*."[83] Where "[f]ederal and local enforcement have identical purposes," preemption does not occur.[84] In the words of Judge Learned Hand, "it would be

[81] Oklahoma H.B. 1804 (2007), codified at 21 Okla. Stat. 446. These provisions mimic the terms of federal law found at 8 U.S.C. § 1324(a)(1)(A).
[82] Utah S.B. 81 (2008), codified at Utah Stat. Ann. 76-10-2701.
[83] Gonzales v. Peoria, 722 F.2d 468, 474 (9th Cir. 1983) (citing Florida Avocado Growers v. Paul, 373 U.S. 132, 142 (1963)) (emphasis added).
[84] *Id*.

unreasonable to suppose that [the federal government's] purpose was to deny itself any help that the states may allow."[85]

Recent examples of such state criminal statutes have already been tested and sustained in court. For example, the Arizona Human Smuggling Statute of 2005 created a state crime prohibiting the smuggling of illegal aliens.[86] The Arizona statute was upheld against a preemption challenge because it represented concurrent enforcement against substantially the same activity prohibited by federal immigration law:

> [C]oncurrent state and federal enforcement of illegal alien smuggling and conspiracy to smuggle illegal alien laws serves both federal and state law enforcement purposes and is highly compatible. In fact, concurrent enforcement enhances rather than impairs federal enforcement objectives. Thus, *because federal and State enforcement have compatible purposes, and Congress has not expressly preempted state prosecution of such conduct, preemption does not exist*.[87]

Georgia has established a similar state offense—that of trafficking a person for labor servitude.[88] As long as such state statutes mirror federal statutory language and defer to the federal government's determination of the legal status of any alien in question, they will be on secure constitutional footing.[89] It should be noted that since 1996, the federal government has been under a statutory obligation to respond to any inquiry from a state or local government about the immigration status of any alien.[90] Thus, the federal

[85] Marsh v. United States, 29 F.2d 172, 174 (2d Cir. 1928).
[86] Ariz. Rev. Stat. §13-2319 (West 2008).
[87] Arizona v. Salazar, C.R. 2006-005932-003DT, Slip Op. at 9 (Ariz. Super. Ct., June 9, 2006) (emphasis added) (quoting *Gonzales*, 722 F. 2d at 474).
[88] O.C.G.A. § 16-5-46 (West 2008).
[89] For examples of bills that are consistent with federal law and drafted in a manner to survive legal challenge, see www.irli.org.
[90] 8 U.S.C. § 1373(c) (West 2008).

government must provide an answer, whenever any state or local official acting under color of law inquires as to a particular alien's immigration status.[91]

One variation of this concept of concurrently prohibiting the same conduct at the federal level and the state or local level is seen in local ordinances that prevent landlords from harboring illegal aliens in apartments. Several federal courts have confirmed that the provision of an apartment or other housing to an illegal alien fits squarely within the federal crime harboring under 8 U.S.C. § 1324(a)(1)(A), or its precursor 8 U.S.C. § 1324(a)(3).[92] A city may therefore prohibit the harboring of an illegal alien, where the harboring individual acts knowing or in reckless disregard of the fact that the alien is unlawfully present in the United States.[93] Challenges to several local ordinances that prohibit the harboring of illegal aliens by landlords are being litigated at the time of this writing.[94] However, it is clear that the doctrine of concurrent enforcement allows state or local jurisdictions to act without being preempted.[95]

E. Enacting State Laws that Prohibit Identity Theft and the Use of False Documents in the Employment Context

Identity theft if is both a facilitator and a consequence of mass illegal immigration. As long as unauthorized aliens seek jobs in the United States, many will

[91] *Ariz. Contractors Ass'n*, 534 F. Supp. 1036, at *13 ("USCIS has an affirmative obligation to provide 'verification or status information' requested by state and local entities 'for any purpose authorized by law.' § 1373(c).").
[92] *See, e.g.*, United States v. Aguilar, 883 F.2d 662, 669-670 (9th Cir.1989) (providing apartment to illegal aliens found to constitute harboring). Courts have uniformly held that the term "harbor" need not entail "clandestine sheltering." United States v. Acosta de Evans, 531 F.2d 428, 430 (9th Cir. 1976), *cert. denied*, 429 U.S. 836 (1976); United States v. Balderas, 91 Fed. Appx. 354, 354-355 (5th Cir. 2004).
[93] Two variations of such local anti-harboring laws may be seen in the Illegal Immigration Relief Act Ordinance of Hazelton, Pennsylvania, at issue in *Lozano*, *supra*, and in Ordinance 2952, enacted by Farmers Branch, Texas, in January 2008. *See* Stephanie Sandoval, *Farmers Branch Bans Illegal Immigrants from Renting Houses*, DALLAS MORNING NEWS, Jan. 23, 2008.
[94] *See Lozano, supra* and litigation surrounding ordinances enacted by Farmers Branch, Texas.
[95] For examples of statutory language that can survive a legal challenge based on federal preemption, see www.irli.org.

attempt to do so by stealing or inventing a false identity. A 2002 General Accounting Office study reported that identity theft is an integral part of illegal entry by aliens through U.S. ports of entry, obtaining unauthorized employment in the United States, and concealing the commission of serious crimes by aliens, including narcotics trafficking.[96] The number of incidents of identity theft was estimated to be between one quarter of a million and three quarters of a million per year, and growing.[97] The study also noted that more than 8,000 state local government offices issue birth certificates, driver's licenses or other identity documents, virtually all of which may be counterfeited or used fraudulently by illegal aliens.[98]

Forty-eight of the fifty states already have some version of an identity theft offense on their statute books. However, those state crimes vary widely.[99] Recognizing the crucial role that identity theft plays in illegal immigration, some states have enacted new laws to broaden existing definitions of identity theft. For example, Arizona in 2007 defined the crime of "aggravated taking of identity of another person or entity" to include "taking the identity of another person or entity if the person knowingly takes, purchases, manufactures, records, possesses or uses any personal identifying information or entity identifying information of … another person, including a real or fictitious person, with the intent to obtain employment."[100]

Because the defining and prosecuting the crime of identity theft is clearly within a state's police powers, there is little dispute that a state may define that crime so as to

[96] U.S. Gen. Accounting Office, GAO-02-830T, *Identity Fraud: Prevalence and Links to Alien Illegal Activities* (2002) (statement of Richard M. Stana).
[97] *Id*. at 3-4.
[98] *Id*. at 6.
[99] Tara Alexandra Rainson, *Identity Theft Laws: State Penalties and Remedies and Pending Federal Bills*, CRS REPORT FOR CONGRESS, June 1, 2007, at 2-3, *available at* www.opencrs.com/rpts/RL34028_20070601.pdf.
[100] Ariz.Rev.Stat. §13-2009(A) (West 2008).

apply within the employment context. A preemption challenge to a state statute on this subject would be difficult, if not impossible, to mount successfully. Broadening the crime of identity theft offers yet another avenue for states that wish to discourage illegal aliens from residing, and to discourage unauthorized aliens from seeking employment, in the United States.

F. Providing State and Local Law Enforcement Assistance to ICE

In recent years, many states and cities have sought to maximize cooperation between their law enforcement agencies and the Bureau of Immigration and Customs Enforcement (ICE). There are three principal ways that states and cities have accomplished this objective: (1) by directing their law enforcement agencies to utilize their inherent arrest authority more frequently, (2) by entering into so-called "Section 287(g) agreements" with ICE so that their officers can exercise the delegated authority of federal immigration officers, and (3) by prohibiting sanctuary cities. It must be noted at the outset that inherent arrest authority and Section 287(g) authority are two very different authorities.[101] The inherent arrest authority of states and localities is simply the power to arrest an illegal alien who is removable, detain the alien temporarily, and then transfer the alien to the custody of the ICE. That authority has been recognized by numerous federal courts of appeals, as well as by the Office of Legal Counsel of the U.S. Department of Justice.[102]

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[101] For a comprehensive discussion of these two forms of local authority to make immigration arrests, *see* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALBANY L. REV. 179 (2005).

[102] United States v. Salinas-Calderon, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984); United States v. Vasquez-Alvarez, 176 F.3d 1294, 1295-96 (10th Cir. 1999); Lynch v. Cannatella, 810 F.2d 1363, 1367 (5th Cir.

In contrast, Section 287(g) delegates authority that is considerably broader than the power to merely arrest an alien and transfer him to ICE custody. Any state or municipality can enter into a formal Memorandum of Understanding (MOU) with ICE, which effectively deputizes officers of the state or local law enforcement agency to perform the "function[s] of an immigration officer," under Section 287(g) of the Immigration and Nationality Act (INA).[103] Section 287(g) encompasses the full spectrum of enforcement powers, including not only the power to arrest and transfer, but also the power to investigate immigration violations, the power to collect evidence and assemble an immigration case for prosecution or removal, the power to take custody of aliens on behalf of the federal government, and other general powers involved the routine enforcement of immigration laws.

The first two states that signed Section 287(g) agreements with the federal government were Florida and Alabama. The Florida MOU became effective on July 7, 2002. Under that agreement, 35 Florida law enforcement officers were trained for six weeks and were delegated specific immigration enforcement powers, including the power to interrogate, the power to collect evidence, and the power to conduct broad immigration investigations. The Alabama MOU was signed on September 10, 2003. Under the agreement, the first group of 21 Alabama state troopers undertook five weeks of immigration enforcement training, which they completed in October 2003. A second class of 25 troopers received training in October 2005. Since then, Colorado, Arizona,

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1987); United States v. Rodriguez-Arreola, 270 F.3d 611, 617, 619 (8th Cir. 2001); *see* Memorandum, Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations, from Jay S. Bybee, Ass't Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to U.S. Att'y Gen. 13 (Apr. 3, 2002) *available at* http://www.fairus.org/site/DocServer/OLC_Opinion_2002.pdf?docID=1041.

[103] 8 U.S.C. § 1357(g) (West 2008).

Georgia and numerous counties have entered into similar Section 287(g) agreements.[104] It should also be noted that at the end of 2005, the Federal Government appropriated $5 million to pay for the training and associated expenses of new states that enter into Section 287(g) agreements.[105]

In contrast to the formality, negotiation, and delays involved in entering into a 287(g) MOU with the federal government, inherent arrest authority can be maximized quickly if a jurisdiction chooses to do so. For example, in 2007, the Governor of Missouri issued an executive order directing Missouri State Troopers to verify with the federal government the immigration status of all aliens arrested.[106] Aliens found to be unlawfully present in the United States would be delivered to ICE custody. In 2008, the Missouri Legislature etched this policy into statute and extended it to all state and local law enforcement agencies, with respect to individuals charged with a crime and confined to jail.[107] The same year, the state of Utah enacted a law requiring all sheriffs to determine the immigration status of any alien arrested for a felony or for driving under the influence. Both states directed law enforcement officers to rely upon verifications of status given by the Law Enforcement Support Center—a 24/7 communications center located in Williston, Vermont, and operated by ICE.[108]

States may also enact legislation to ensure that their municipalities do not become so-called "sanctuary cities" which refuse to communicate any illegal alien's immigration

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[104] *State Immigration Law Training and Enforcement Programs Enhance Homeland Security and Public Safety*, STATES NEWS SERVICE, Dec. 7, 2007; Seth Blomeley, *Just Learned of Law on Aliens, Beebe Says Act Lets State Police Ad Federal Authorities*, ARKANSAS DEMOCRAT-GAZETTE, Sept. 20, 2007.
[105] Janice Francis-Smith, *U.S. Rep. Istook Questions Lengthy Process for ICE Application*, THE JOURNAL RECORD, Sept. 14, 2006.
[106] *Gov. Blunt Outlines Law Enforcement Directives to Fight Illegal Immigration*, STATES NEWS SERVICE, Oct. 30, 2007.
[107] Missouri Conf. Comm. Subst. for H.B. 1549, 1771, 1395 and 2366 (2008), codified at Rev. Stat. Mo. 577.900.
[108] *Id*.; Utah S.B. 81 (1988), codified at Utah Code Ann. 17-22-9.5 (West 2008).

status to the federal government. Despite the fact that Congress outlawed such sanctuary policies in 1996,[109] more than seventy municipalities have adopted such policies. In response, some states have passed enacted state legislation prohibiting their municipalities from adopting sanctuary policies. For example, Oklahoma did so in 2007.[110] Such statutes need only reiterate the terms of federal law, found at 8 U.S.C. §§ 1373(a)-(b) and 1644, and provide disincentives for municipalities to violate the state statutes. The most obvious disincentive is to make sanctuary cities ineligible to receive any state funding. That is precisely what the Missouri Legislature did in 2008, denying state funding to sanctuary cities and allowing any state legislator to request an attorney general's opinion as to whether a particular city has adopted a sanctuary policy.[111] In this way, the proliferation of sanctuary cities in a state can be brought to a stop; or a state can prevent sanctuary cities from emerging in the first place.

G. Presuming Illegal Aliens to be Flight Risks for Bail Purposes

Another law enforcement measure that is being adopted by some states concerns the presumption of flight risk for the purposes of setting bail and determining whether or not to release a defendant prior to trial. These statutes direct state courts to presume that an illegal alien is a flight risk when making bail determinations. For example, in 2008

[109] 8 U.S.C. § 1373(a)-(b) (West 2008); 8 U.S.C. § 1644 (West 2008).
[110] Oklahoma H.B. 1804 (2007), codified at 74 Okla. Stat. 20j (West 2008).
[111] Missouri Conf. Comm. Subst. for H.B. 1549, 1771, 1395 and 2366 (2008), codified at Rev. Stat. Mo. 67.307.

Utah and Missouri made it a rebuttal presumption in the grant or issuance of bond that such an individual is at risk of flight.[112]

Such statutes not only serve the purpose of reinforcing federal immigration law, they also serve the state's independent law enforcement objectives. It is a well-documented fact that an extraordinary number of illegal aliens either do not show up for their hearings before immigration courts or do not present themselves for removal upon the issuance of a removal order. As the Inspector General of the U.S. Department of Justice reported in 2003, a stunning 87% of those aliens who are not detained during removal proceedings become absconders—they fail to show up for their removal hearings or disappear once a removal order is issued.[113] At the time of this writing, there are an estimated 585,000 absconders at large in the United States.[114] The reality of such a high absconding rate drives up the probability that any given illegal alien charged with a state offense may flee. Regardless of whether the alien is convicted of the state offense, the state is likely to attempt to transfer him to ICE for removal, either immediately after trial if he is acquitted, or after he serves any prison sentence if he is convicted. By directing state judges to presume that illegal aliens pose a flight risk, the state can ensure that any illegal aliens charged with a crime are present for trial and can ensure that they are eventually transferred to ICE for removal.

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[112] Utah S.B. 81, codified at Utah Code Ann. 17-22-9.5 (West 2008); Missouri Conf. Comm. Subst. for H.B. 1549, 1771, 1395 and 2366 (2008), codified at Rev. Stat. Mo. 544.470.

[113] U.S. Department of Justice Office of the Inspector General, THE IMMIGRATION AND NATURALIZATION SERVICE'S REMOVAL OF ALIENS ISSUED FINAL ORDERS, Report Number I-2003-004 (February 2003), ii, *available at* http://www.usdoj.gov/oig/reports/INS/e0304/final.pdf.

[114] Bureau of Immigration and Customs Enforcement, Press Release, *Local ICE Fugitive Operations Team arrests 24 in 4-day operation*, Feb. 26, 2008, *available at* http://www.ice.gov/pi/news/newsreleases/articles/080226madison.htm.

H. Denying Driver Licenses to Illegal Aliens

The final area in which states possess clear authority to act concerns the issuance of driver's licenses to aliens. Because driver's licenses serve as de facto, all-purpose identification cards in the United States, and the possession of one greatly facilitates remaining in the country, both Congress and individual states have taken action to deny driver's licenses to illegal aliens. In particular, Congress in 2005 enacted the "REAL ID" Act, which denies the use of a state's driver's licenses for access to commercial airplanes and access to federal buildings, if that state issues its licenses to illegal aliens.[115] The REAL ID Act also encourages states to cause driver licenses that are issued to aliens lawfully present in the United States to expire when the aliens' authorized period of stay expires.[116]

Many states already had already enacted statutes denying driver's licenses to illegal aliens. Others did so after the passage of the REAL ID Act.[117] As of January 2008, 42 states denied driver's licenses to illegal aliens.[118] However, many more than the eight states that allow illegal aliens to obtain driver's licenses have yet to adjust their state laws to require that a license for a legal alien must expire on the date that the alien's authorized period of stay in the United States ends. In addition, some states that prohibit illegal aliens from receiving driver's licenses nevertheless do not require their agencies to verify an alien applicant's immigration status with the federal government through the

[115] REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (West 2008).
[116] *Id.* § 202(c)(2)(C).
[117] For example, Missouri in its omnibus illegal immigration statute of 2008 clarified that illegal aliens were ineligible to receive Missouri driver's licenses. Missouri Conf. Comm. Subst. for H.B. 1549, 1771, 1395 and 2366 (2008), codified at Rev. Stat. Mo. 302.063.
[118] Tom LoBianco, *O'Malley Says State Will Use Real ID*, WASH. TIMES, Jan. 16, 2008, at B1. The eight states are Hawaii, Maine, Maryland, Michigan, New Mexico, Oregon, Utah and Washington. Gregory Lopes, *New York Mulls Licenses for Illegals*, WASH. TIMES, Oct. 30, 2007.

SAVE program, prior to issuance of the license. As a result, those states may be inadvertently issuing driver's licenses to illegal aliens. Accordingly, in many states there is room to further tighten restrictions on the issuance of driver's licenses.

In addition to the federal statutory provisions of the REAL-ID Act that encourage states to deny driver licenses to illegal aliens, there is a more fundamental problem that occurs whenever a state's laws require a recipient of a driver's license to be a permanent or long-term resident of the state. If the state tacitly recognizes the "residence" of an illegal alien by granting him a driver's license, then the state impermissibly attempts to confer residency on the alien—something only the federal government can do. The Attorney General of Michigan recognized this conflict in a December 2007 opinion and correctly concluded that providing a driver's license to an illegal alien would conflict with federal law:

> Michigan law must be interpreted against that background of federal law when considering questions involving aliens. It would be inconsistent with that body of law to find that a person in this country illegally, who has not secured permanent alien status from the federal government, can be regarded as a permanent resident in Michigan.[119]

Thus, not only are there explicit inducements in federal law that encourage states to deny driver's licenses to illegal aliens, there are also implicit requirements in federal law that compel states to deny driver's licenses to illegal aliens, in states where issuance of a driver's license entails recognition of the holder's residency.

[119] Opinion of Michael Cox, Attorney General of Michigan, "Permanent Residency Requirement for Driver's Licenses," Dec. 27, 2007, *available at* http://www.ag.state.mi.us/opinion/datafiles/2000s/op10286.htm.

III. CONCLUSION

Whenever a state has taken a major step to restore the rule of law in immigration, there has been an immediate effect on the level of illegal immigration in that state. Arizona's 2007 employer verification law has had the most dramatic effect to date. Illegal aliens self-deported by the tens of thousands immediately before, and for months after, the law took effect on January 1, 2008.[120] A similar, but somewhat smaller, exodus of illegal aliens occurred when Oklahoma passed its omnibus immigration act in 2007.[121] These successful state laws have caused illegal aliens to self-deport to their countries of origin, as well as increased the burdens imposed by illegal immigration on neighboring states. It is therefore reasonable to expect that other states will follow suit and duplicate the most effective state laws in deterring illegal immigration.

This progression of state laws promises to be much more than simply an expression of competition between the states. Nor is it likely to be a temporary trend that fades as quickly as it emerged. It is a predictable and positive development in a federalist system in which the federal government has been unable to effectively curtail an unrelenting influx of illegal aliens for more than two decades. Those who claim that the states have no role in addressing the problem of illegal immigration are evidently unaware of the substantial body of legal authority that exists to the contrary, and blind to the financial burdens borne by the states. Those financial burdens translate into political realities. States will continue to exercise their authority to act in this field, absent a sweeping enactment by Congress to preempt such state laws and erase existing federal

[120] See Section II.C, *supra*.
[121] Devona Walker, *Immigration: Construction Industry Sees Fewer Undocumented Workers Applying for Jobs; Housing Decline Offsets Shortage*, THE OKLAHOMAN, Feb. 9, 2008, at 1A.

statutes that invite states to act. Such extraordinary congressional preemption is unlikely to occur.

Other opponents of state activity on the field of illegal immigration have warned that it will create a patchwork of divergent laws. This argument is voiced most loudly by organizations that profit from continued violations of federal immigration laws.[122] What this criticism fails to recognize is that the states are only permitted to act in ways that are in harmony with federal law and consistent with congressional objectives. Far from creating a patchwork quilt, the states are providing the fibers that strengthen the rule of law throughout the country and fill in the gaps created by inconsistent federal enforcement. Arizona, Oklahoma, and a growing number of other states have demonstrated that they are the best allies the federal government has in the battle to restore the rule of law in immigration.

[122] For example, an organization of employers and other associations calling itself the Human Resource Initiative for a Legal Workforce sent a letter in February 2008 to numerous state legislatures considering bills to discourage illegal immigration and urging them to reject such bills. *Human Resource Experts Urge Wisconsin Legislators to Reject 'No-Match' Employment Verification Penalties*, PR NEWSWIRE, Feb. 11, 2008. The letter reportedly stated: "Wisconsin would only add to a confusing and ineffective patchwork of federal and state laws that are proving impossible for employers to follow." *Id*.