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Proposition 187 and the Legacy of Its Law Enforcement Provisions

Huyen Pham*

Passed by a wide margin of California voters in 1994, Prop. 187 is primarily remembered as a law that tried to deny state-funded health care and education to unauthorized immigrants. Far less attention has been paid to Section Four in Prop. 187 that required all law enforcement agencies (LEAs) in California to “fully cooperate” with federal immigration authorities. Specifically, these provisions required LEAs to verify the legal status of any arrestee “suspected” of being in the U.S. unlawfully, notify the arrestee of his/her unlawful status, and report the arrestee to state and federal immigration authorities.

Though never enforced, Section Four played an extremely important role in introducing the concept of LEA enforcement into our immigration policy debates. Prior to the passage of Section Four, the idea that LEAs should be involved in immigration enforcement on a regularized and mandatory basis simply did not exist. The intense publicity around Prop. 187 and subsequent efforts to enact Prop. 187-type laws in other states nationalized the immigration enforcement debate. At the federal level, the result was the creation of the voluntary 287(g) program and the passage of a federal “anti-sanctuary” law. At the state level, states enacted laws that mirrored the mandatory nature of Prop. 187 more closely, requiring LEAs within the states to check the immigration status of people arrested for other offenses. This article explores the influence of Section Four on LEA enforcement of immigration laws.

* Copyright © 2020 Huyen Pham. Professor of Law, Texas A&M University School of Law; A.B., Harvard College; J.D., Harvard Law School. I'd like to thank Professor Leticia Saucedo and the UC Davis Law Review for the invitation to participate in this significant and enlightening symposium. I would also like to thank Rachel Schiff and the Law Review staff for their very helpful editorial assistance, which has improved this Article. And finally, I would like to thank my wonderful research assistants, Claire Brown and Molly Parlin, for their hard work and good humor, which helped immeasurably.

TABLE OF CONTENTS

INTRODUCTION 1959

I. LAW ENFORCEMENT COOPERATION PROVISIONS IN CONTEXT 1961

 A. *SOS Committee: "Legislative" Intent*..... 1962

 B. *Reporting Requirements for All Service Providers* 1965

 C. *The Will of the Voters*..... 1966

II. THE LANDSCAPE FOR LEA COOPERATION IN THE 1990S 1966

 A. *The Norm of Nonenforcement* 1967

 B. *Limited Enforcement and the Resulting Legal Challenges*. 1969

III. INFLUENCE ON SUBFEDERAL IMMIGRATION COOPERATION..... 1971

CONCLUSION..... 1980

INTRODUCTION

Passed by California voters in 1994, Proposition 187 (“Prop. 187”) is known primarily as a law that tried to deny publicly-funded health care and educational services to immigrants without legal immigration status.¹ Proponents framed the proposition as “strik[ing] a blow for the taxpayer” — emphasizing the financial costs of providing public services to unauthorized immigrants and the financial savings in tax revenues if those services were cut off.² In written arguments submitted in support of Prop. 187, its authors wrote: “It has been estimated that ILLEGAL ALIENS are costing taxpayers in excess of 5 billion dollars a year. While our own citizens and legal residents go wanting, those who choose to enter our country ILLEGALLY get royal treatment at the expense of the California taxpayer.”³

The debate about Prop. 187 has focused largely on the legal and policy implications of its service denial provisions.⁴ Far less attention has been paid to provisions in Prop. 187 that required all law enforcement agencies in California to “fully cooperate” with federal immigration authorities.⁵ Section Four of Prop. 187, entitled “Law Enforcement Cooperation with INS” provides in full:

Section 834b is added to the Penal Code, to read:

834b. (a) Every law enforcement agency in California shall fully cooperate with the United States Immigration and Naturalization Service regarding any person who is arrested if he or she is suspected of being present in the United States in violation of federal immigration laws.

(b) With respect to any such person who is arrested, and suspected of being present in the United States in violation of federal

¹ Immediately after passage, challengers filed lawsuits, and the proposition’s provisions were enjoined; the lawsuit was eventually settled through mediation, with the result that the provisions were never implemented. *See infra* notes 68–72.

² Proposition 187: Illegal Aliens. Ineligibility for Public Services. Verification and Reporting (1994), at 54, *available at* http://repository.uchastings.edu/ca_ballot_props/1104 [<https://perma.cc/LNP8-9XEM>] [hereinafter Proposition 187].

³ *Id.* (capitalization in original).

⁴ *See, e.g.*, Suzanne Gamboa, *How an Anti-Immigrant Initiative Mobilized Latinos — and Turned California Blue*, NBC NEWS (Nov. 8, 2019, 3:41 AM), <https://www.nbcnews.com/news/latino/how-anti-immigrant-ballot-initiative-mobilized-latinos-turned-california-blue-n1078361> [<https://perma.cc/GP3H-8KJW>] (describing Prop. 187 as “den[ying] health care, education and other services to anyone believed to be illegally in the country” and analyzing its impact on Latino political participation).

⁵ Proposition 187, *supra* note 2, at 91.

immigration laws, every law enforcement agency shall do the following:

(1) Attempt to verify the legal status of such person as a citizen of the United States, an alien lawfully admitted as a permanent resident, an alien lawfully admitted for a temporary period of time or as an alien who is present in the United States in violation of immigration laws. The verification process may include, but shall not be limited to, questioning the person regarding his or her date and place of birth, and entry into the United States, and demanding documentation to indicate his or her legal status.

(2) Notify the person of his or her apparent status as an alien who is present in the United States in violation of federal immigration laws and inform him or her that, apart from any criminal justice proceedings, he or she must either obtain legal status or leave the United States.

(3) Notify the Attorney General of California and the United States Immigration and Naturalization Service of the apparent illegal status and provide any additional information that may be requested by any other public entity.

(c) Any legislative, administrative, or other action by a city, county, or other legally authorized local governmental entity with jurisdictional boundaries, or by a law enforcement agency, to prevent or limit the cooperation required by subdivision (a) is expressly prohibited.⁶

The main import of these provisions — that law enforcement agencies (“LEAs”) are required to cooperate with federal immigration authorities — is a concept firmly embedded in today’s legal landscape. At the state level, Arizona, South Carolina, and other states require their LEAs to check immigration status of arrestees; at the federal level, there are programs that either encourage LEA participation in immigration enforcement (like the voluntary 287(g) program) or try to coerce that participation through threats to cut federal funding.⁷ Yet in 1994, as the provisions of Prop. 187 were being debated, these programs and laws

⁶ *Id.*

⁷ See 8 U.S.C. § 1357(g) (2019) (creating the 287(g) program); S.B. 1070, 49th Leg., 2nd Reg. Sess. (Ariz. 2010); H. 4919, 2009–2010 Gen. Assemb., 118th Sess. (S.C. 2010); Martin Kaste, *Trump Threatens ‘Sanctuary’ Cities with Loss of Federal Funds*, NPR (Jan. 26, 2017, 11:06 PM), <https://www.npr.org/sections/thetwo-way/2017/01/26/511899896/trumps-threatens-sanctuary-cities-with-loss-of-federal-funds> [<https://perma.cc/FVV6-J6DN>].

did not yet exist. Indeed, Prop. 187 played an extremely important role in introducing the concept of LEA immigration enforcement into immigration policy debates. The intense publicity around Prop. 187 and subsequent efforts to enact Prop. 187-type laws in other states nationalized these debates.⁸ At the federal level, the result was the codification of LEA immigration enforcement through the creation of the voluntary 287(g) program and the passage of a federal “anti-sanctuary” law that prohibits local governments from hindering communication between LEAs and federal immigration authorities.⁹ At the state level, states enacted laws that mirrored the mandatory nature of Prop. 187, requiring LEAs within the states to check the immigration status of people arrested for other offenses.¹⁰

This Article explores the development and influence of these law enforcement cooperation provisions within Prop. 187. Part I gives context to these provisions: what were the goals of Prop. 187’s authors, both in drafting the proposition generally and in including these specific provisions? Did voters perceive these same goals? Part II analyzes the legal and policy landscape that existed in 1994, in relation to LEA enforcement of immigration laws. Looking at case law, policies of different law enforcement agencies across the country, and a sanctuary movement that was motivated by concerns largely unrelated to LEA enforcement of immigration laws, I conclude that the issue, with all of its attendant controversies, was simply not of high enough importance to immigration debates of the time. Finally, having established the uniqueness of the law enforcement cooperation provisions in Prop. 187, I explore their influence on both federal and state laws in Part III.

I. LAW ENFORCEMENT COOPERATION PROVISIONS IN CONTEXT

On November 8, 1994, California voters approved Prop. 187 by a substantial margin, 58.8% for and 41.2% against.¹¹ Polling done by the *Los Angeles Times* in October 1994 showed that the proposition enjoyed wide support among likely voters, 59% for to 33% against, a lead that

⁸ See Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339, 1375-76 (2013).

⁹ See 8 U.S.C. § 1357(g); 8 U.S.C. § 1373 (2019); 8 U.S.C. § 1644 (2019) (prohibiting restrictions on communications between local governments and federal immigration authorities).

¹⁰ See, e.g., S.B. 1070, 49th Leg., 2nd Reg. Sess. (Ariz. 2010).

¹¹ Proposition 187, *supra* note 2, at 54.

shrank to 51% to 41% two weeks before the election.¹² The demographics of voters who supported the measure provide interesting insights into the state's politics at that time: support for Prop. 187 was strongest among white non-Hispanic voters (64% for, 36% against), while Latinos voted overwhelmingly against Prop. 187 (27% for, 73% against). Strong Latino opposition to Prop. 187, however, was diluted by weak voter turnout in this group: only 9% of voters in the 1994 election were Latino, even though the group made up 15% of citizen eligible voters and 24% of all adults in California at that time.¹³ The passage of Prop. 187 amidst evidence of low Latino voter turnout is often credited for mobilizing Latino political participation and turning California solidly Democratic.¹⁴

A. SOS Committee: "Legislative" Intent

Prop. 187 was written and placed on the ballot through the efforts of the "Save Our State" committee ("SOS"), a collection of political novices, seasoned operatives, and one former head of the Immigration and Naturalization Service ("INS"), Alan C. Nelson.¹⁵ Because Prop. 187 was a voter initiative, it lacks the committee reports, floor debates, and other traditional sources of legislative history.¹⁶ This dearth of information makes it difficult to trace the origin of the law enforcement cooperation provisions specifically.

But by analyzing interviews and written statements of SOS members, SOS's primary focus becomes evident: to deny benefits to unauthorized immigrants. Law enforcement cooperation provisions were viewed as just one component of that larger campaign. From its campaign

¹² See Paul Feldman & Patrick J. McDonnell, *Prop. 187 Backers Elated — Challenges Imminent*, L.A. TIMES (Nov. 9, 1994, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1994-11-09-mn-60571-story.html> [<https://perma.cc/U2T5-7JUT>].

¹³ See FIELD INST., A SUMMARY ANALYSIS OF VOTING IN THE 1994 GENERAL ELECTION 2 (1995), <https://web.archive.org/web/20101020160337/http://field.com/fieldpollonline/subscribers/COI-94-95-Jan-Election.pdf> [<https://perma.cc/R9R4-3TG4>].

¹⁴ See Alex Nowrasteh, *Proposition 187 Turned California Blue*, CATO INST. (July 20, 2016, 3:13 PM), <https://www.cato.org/blog/proposition-187-turned-california-blue> [<https://perma.cc/E4FD-TZ27>].

¹⁵ See Gebe Martinez & Doreen Carvajal, *Creators of Prop. 187 Largely Escape Spotlight: Ballot: From Secret O.C. Location, Political Novices and Veterans Spawn Strong Drive Against Illegal Immigration*, L.A. TIMES (Sept. 4, 1994, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1994-09-04-mn-34888-story.html> [<https://perma.cc/XDP2-LD7G>].

¹⁶ See AIMEE DUDOVITZ, HETHER C. MACFARLANE & SUZANNE E. ROWE, CALIFORNIA LEGAL RESEARCH 100-01 (3d ed. 2016) (describing the initiative and referendum process in California and suggesting research methods).

headquarters in Orange County, the SOS committee pitched the initiative as a way to “Save Our State” from “economic and social bankruptcy” by denying public benefits to unauthorized immigrants.¹⁷ The law enforcement cooperation provisions are rarely mentioned in SOS materials, and when they are mentioned, the reference is cursory. For example, in its written arguments to support Prop. 187, SOS asked these (rhetorical) questions:

- Should those ILLEGALLY here receive taxpayer subsidized education including college?
- Should our children’s classrooms be over-crowded by those ILLEGALLY in our country?
- Should our Senior Citizens be denied full service under Medi-Cal to subsidize the cost of ILLEGAL ALIENS?
- Should those ILLEGALLY here be able to buy and sell forged documents without penalty?
- Should tax-paid bureaucrats be able to give sanctuary to those ILLEGALLY in our country?¹⁸

The last two questions hint at the substance of the law enforcement cooperation provisions but only with oblique references to identity fraud and sanctuary. These questions lack any reference to the rationale that we now associate with modern day cooperation statutes, i.e., that the massive enforcement power of LEAs should be harnessed to help remove unauthorized and presumably dangerous immigrants from the country.¹⁹ Of course, imposing cooperation requirements on LEAs is entirely consistent with the goal of reducing public spending on government services (on the theory that more LEA cooperation would presumably lead to the removal of more unauthorized immigrants and thus save the state money by providing fewer services). The crucial takeaway is that Prop. 187’s organizers did not appear to view the removal of unauthorized immigrants as an end in itself but rather, as one of many possible means to reduce state spending on social services. The primacy of this financial argument is made clearer in the conclusion of SOS’s written arguments, where the committee made yet another

¹⁷ Proposition 187, *supra* note 2, at 54.

¹⁸ *Id.* (capitalization in the original).

¹⁹ See *Brewer Signs SB 1070 - Illegal Immigration Bill*, AZ GOVERNOR: EYE ON THE 9TH FLOOR BLOG (Apr. 23, 2010, 3:28 PM), <https://azgovernor.blogspot.com/2010/04/brewer-signs-sb-1070-illegal.html>. [<https://perma.cc/B5AX-YX6S>].

reference to the negative financial impact of providing services to unauthorized immigrants:

We were outraged when our State Legislature voted on July 5th to remove dental care as a medical option and force the increase of the cost of prescription drugs for Senior Citizens. Then, as a final slap in the face, they voted to continue free pre-natal care for ILLEGAL ALIENS!²⁰

The benefits focus is also apparent in an op-ed written by Ron Prince, chairman of the SOS committee.²¹ An accountant by training, Prince played a particularly important role in the passage of Prop. 187. In an initial gathering of the people who would later form the SOS Committee, he came up with the strategy of a statewide initiative to end publicly-funded services to unauthorized immigrants.²² Writing in the *Los Angeles Times*, Prince framed the merits of Prop. 187 as a fiscally sound way “to deal with those [unauthorized immigrants] already here.” He referenced the law enforcement cooperation provisions, but, again, framed them as part of a bigger plan to save money for California taxpayers.

Once illegal aliens arrive in California, the burden falls on the state, not the federal government. Proposition 187 would lighten that burden by ending public benefits paid for health, education and welfare for illegal aliens. It would require law-enforcement agencies to cooperate with the Immigration and Naturalization Service and report all those under arrest for other crimes and subsequently suspected of being here illegally. . . . *Rather than support and harbor illegal aliens, California will report them to the INS.*²³

According to Prince, Section Four’s reporting requirements (like the reporting requirements imposed on schools and medical care providers) provided an alternative to “support[ing] and harbor[ing] illegal aliens.” Presumably, Section Four would save state funding by either reporting unauthorized immigrants for removal or discouraging their presence in California in the first place. But based on the materials generated by its

²⁰ Proposition 187, *supra* note 2, at 54 (capitalization in the original).

²¹ See Ron Prince, *Americans Want Illegal Immigrants Out: The Cost of Tending to Them and Their Children Has Overwhelmed the State. Why not Draw the Line at the School Door?*, L.A. TIMES (Sept. 6, 1994, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1994-09-06-me-35169-story.html> [<https://perma.cc/2AW2-CWQY>].

²² See Martinez & Carvajal, *supra* note 15.

²³ See Prince, *supra* note 21 (emphasis added).

authors, the “legislative” intent of Prop. 187 was squarely focused on the denial of state benefits and the presumed savings of state funds.²⁴

B. Reporting Requirements for All Service Providers

The secondary importance of the law enforcement cooperation provisions is also apparent from the structure of Prop. 187. The initiative placed affirmative obligations on LEAs to ascertain the immigration status of arrestees who are “suspected” of unauthorized status and then to report those unauthorized immigrants to both the California Attorney General and to INS;²⁵ standing alone, these obligations are substantial and echo the obligations placed on LEAs through Arizona’s SB1070 and similar laws.²⁶ But Prop. 187 placed the same obligations on providers of publicly-funded social services, health care, and education (both K-12 and post-secondary).²⁷ Against this context of universal reporting obligations, the reporting obligations placed on LEAs specifically take on secondary importance: Instead of an enforcement scheme where LEAs play the central role in checking immigration status and then reporting unauthorized immigrants for possible removal (like the scheme envisioned by SB 1070 and similar laws), Prop. 187 created a structure where an LEA was just one among many service providers with these reporting obligations.

Similarly, opponents of Prop. 187 paid little attention to Section Four, focusing their firepower instead on the initiative provisions that denied services to unauthorized immigrants. In a written opposition statement, the sheriff of Los Angeles County and the presidents of the California Teachers Association and the California Medical Association emphasized the fiscal costs of Prop. 187. Those costs included the federal funding that would be lost because of conflicts between Prop. 187’s requirements and those of federal programs. Furthermore, schools would be required to divert educational spending as they would be forced to turn their time and energy toward checking immigration status. These opponents also emphasized the public health implications of denying medical care to unauthorized immigrants who picked the

²⁴ In an interview published in the *Los Angeles Times*, Robert Kiley, a member of the SOS Committee, said “I believe in this issue.” Referring to tax money that he says is being wasted on unauthorized immigrants, he commented, “As a tax-paying citizen, I’m feeling pinches like everyone else.” Martinez & Carvajal, *supra* note 15.

²⁵ Proposition 187, *supra* note 2, at 91.

²⁶ See, e.g., S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

²⁷ See Proposition 187, *supra* note 2, at 91-92.

state's crops and worked in the state's restaurants.²⁸ They briefly addressed policing and crime but rejected the idea that Prop. 187 would lead to increased deportations:

An estimated 400,000 KIDS would be kicked out of school, but Proposition 187 WON'T result in their deportation. Just what we need — 400,000 kids hanging out on street corners. We all know what happens to kids who don't finish school. Is this supposed to reduce CRIME and GRAFFITI? PROPOSITION 187 CREATES A POLICE STATE MENTALITY.²⁹

Like the proponents of Prop. 187, the opponents did not focus on Section Four. In fact, the opponents even argued that implementing Prop. 187 would not increase deportations.

C. *The Will of the Voters*

Finally, for voters who supported Prop. 187, neither Section Four nor the potential deportation of more unauthorized immigrants was a motivating factor. Rather, these voters were more focused on the symbolic effects of the initiative, as well as the fiscal savings that the initiative promised. According to *Los Angeles Times* exit polling, 78% of those who voted for Prop. 187 did so because it sent a message to politicians.³⁰ Other popular reasons cited by polled voters for supporting Prop. 187: forcing the federal government to face the issue (51%), stopping immigrants from using state services (33%), and saving the state money (32%).³¹ So voters, like members of the SOS Committee and opponents of Prop. 187, viewed the initiative's importance primarily in fiscal and symbolic terms.

II. THE LANDSCAPE FOR LEA COOPERATION IN THE 1990S

This Part explores the legal and policy landscape that existed regarding LEA cooperation in the early 1990s, as the law enforcement cooperation provisions of Prop. 187 were being formulated. As noted in Part I, the origins and inspiration for the provisions are not clear, due to the lack of traditional legislative history for voter initiatives like Prop. 187. Part II emphasizes the unique nature of those provisions. As

²⁸ See *id.* at 55.

²⁹ *Id.* (capitalization in original).

³⁰ See Elliott R. Barkan, *Return of the Nativists? California Public Opinion and Immigration in the 1980s and 1990s*, 27 Soc. Sci. Hist. 229, 264 (2003).

³¹ See *id.*

explored in more detail in Part III, the uniqueness of Prop. 187's law enforcement cooperation provisions magnified their influence on subsequent federal and state legislation related to LEA immigration enforcement.

A. *The Norm of Nonenforcement*

In the early 1990s, as the provisions of Prop. 187 were being formulated, few LEAs were involved in enforcing immigration laws. LEA enforcement of federal immigration laws was simply not a significant issue in that time.³² Most LEAs that chose not to participate did so quietly, without issuing policies or procedures.³³ Some non-participating LEAs did issue formal policies.³⁴ For example, in 1992, the Houston Police Department ("HPD") outlined procedures limiting the authority of their officers to enforce federal immigration laws.³⁵ (1) An officer in the HPD was not authorized to arrest or detain a person solely based on the officer's belief that the person lacks lawful immigration status.³⁶ (2) If the officer did stop someone for a nonimmigration violation, the officer was prohibited from asking about the person's immigration status.³⁷ (3) For arrestees, the officer was only allowed to contact INS if the person was arrested on a criminal charge more serious than a Class C misdemeanor and the officer knows that the person lacks legal immigration status.³⁸

What motivated LEAs to issue these policies? For the Houston Police Department, its policy was enacted to preserve its relationship of trust with immigrant communities, enabling it to better protect public

³² In a separate research project, the author and Professor Pham Hoang Van of Baylor University created the Immigrant Climate Index ("ICI"), a unique measure of the immigration climate created by subfederal immigration regulations. The ICI starts measuring in 2005, the first year of significant subfederal immigration activity. See Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125, 131-45 (2019) (describing the authors' ICI project).

³³ See Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 968-69 (2004) (describing the norm of LEA nonenforcement in 2004).

³⁴ See General Order from Sam Nuchia, Chief of Police, Hous. Police Dep't, to the Hous. Police Dep't (June 25, 1992) (on file with author).

³⁵ See *id.*

³⁶ See *id.*

³⁷ See *id.*

³⁸ See *id.*

safety.³⁹ “Without the assurances they will not be deported, many illegal immigrants with critical information would not come forward,” said Craig Ferrell, deputy director and administrative general counsel for the HPD Chief’s Command Legal Services.⁴⁰ Ferrell further noted that, “[p]olice depend on the cooperation of immigrant communities to help them solve all sorts of crimes and to maintain public order.”⁴¹ As the HPD order states, “we must rely upon the cooperation of all persons, including citizens, documented aliens, and undocumented aliens, in our effort to maintain public order and combat crime.”⁴²

Some LEAs with noncooperation policies were located in cities that had declared themselves to be “sanctuaries.”⁴³ The original sanctuary movement of the 1980s started with churches, which protested the refusal of the U.S. government to fairly consider the asylum claims of those fleeing civil war in Central America.⁴⁴ Mostly located along the United States-Mexico border, these churches set up a network to provide transportation and shelter to fleeing Central Americans.⁴⁵ Some cities embraced the political message of the movement, declaring themselves sanctuaries against federal immigration enforcement.⁴⁶ One of the earliest cities to join the sanctuary movement was Cambridge, Mass.⁴⁷ In its 1985 policy, Cambridge opposed federal policies that denied asylum and sought deportation of Central Americans from El Salvador and Guatemala.⁴⁸ And in a precursor of the sanctuary policies that are commonplace today, Cambridge declared that:

- “no department or employee of the City of Cambridge will violate established or future sanctuaries by officially assisting or voluntarily cooperating with investigations or arrest procedures, public or clandestine, relating to alleged violations of

³⁹ See Peggy O’Hare, *Houston Police’s Policy on Immigrants: Hands Off*, HOUS. CHRON. (Mar. 3, 2003, 6:30 AM), <https://www.chron.com/news/houston-texas/article/Houston-police-s-policy-on-immigrants-hands-off-2109308.php> [<https://perma.cc/D4TY-YYWQ>].

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² General Order from Sam Nuchia to Hous. Police Dep’t, *supra* note 34.

⁴³ See, e.g., CAMBRIDGE, MASS., CITY COUNCIL ORDER no. 4 (1985).

⁴⁴ See Kristina M. Campbell, *Operation Sojourner: The Government Infiltration of the Sanctuary Movement in the 1980s and Its Legacy on the Modern Central American Refugee Crisis*, 13 U. ST. THOMAS L.J. 474, 475-77 (2017).

⁴⁵ See *id.* at 478.

⁴⁶ See, e.g., CAMBRIDGE, MASS., CITY COUNCIL ORDER no. 4 (1985).

⁴⁷ See *id.*

⁴⁸ See *id.*

immigration law by refugees from El Salvador, Guatemala or Haiti, or by those offering sanctuary . . .

- “no city employee or department, to the extent legally possible, will request information about or otherwise assist in the investigation of the citizenship status of any City resident, will disseminate information regarding the citizenship of a City resident, or condition the provision of City of Cambridge services or benefits on matters related to citizenship . . .”⁴⁹

By 1994, some cities in California had adopted similar sanctuary policies; those cities included Los Angeles, San Francisco, Sacramento, Oakland, and Berkeley.⁵⁰ The presence of these sanctuary cities in California and the critical political attention they received may have inspired the anti-sanctuary provision in Prop. 187.⁵¹

B. *Limited Enforcement and the Resulting Legal Challenges*

At the other end of the spectrum, some LEAs did engage in immigration law enforcement by making arrests for immigration offenses.⁵² The instances of enforcement become apparent when we analyze the legal challenges to them and the resulting judicial opinions.⁵³ The question that courts wrestled with was essentially the same in all these cases: did the participating LEA have the authority to engage in immigration law enforcement?

The most widely cited decision is *Gonzales v. City of Peoria*, a 1983 decision from the Ninth Circuit.⁵⁴ In that case, the eleven plaintiffs alleged that the Peoria Police Department (Ariz.) (“PPD”) unconstitutionally stopped and arrested persons of Mexican descent

⁴⁹ *Id.*

⁵⁰ See Ronald J. Ostrow, *Big Cities Criticized for Failing to Cooperate with INS: Policy: Sen. Roth Says Many, Like Los Angeles, are ‘Hypocritical’ for Complaining of Influx of Illegal Immigrants While Refusing to Help Prosecute*, L.A. TIMES (Nov. 11, 1993, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1993-11-11-mn-55561-story.html> [<https://perma.cc/6WQS-YEMP>].

⁵¹ See, e.g., *id.* (describing criticism of sanctuary policies of large cities from a federal Congressman). Prop. 187’s anti-sanctuary provision states: “Any legislative, administrative, or other action by a city, county, or other legally authorized local governmental entity with jurisdictional boundaries, or by a law enforcement agency, to prevent or limit the cooperation required by subdivision (a) is expressly prohibited.” Proposition 187, *supra* note 2 at 91.

⁵² See, e.g., *Gonzales v. City of Peoria*, 722 F.2d 468, 472 (9th Cir. 1983).

⁵³ See, e.g., *id.*

⁵⁴ See *id.*

without reasonable suspicion or probable cause, and based only on their race and appearance.⁵⁵ In the course of everyday activities, the plaintiffs (some of whom were citizens or legal permanent residents) had been questioned about their immigration status. If they could not produce proof of legal status, they were arrested and held for Border Patrol pickup.⁵⁶ The Ninth Circuit concluded that PPD officers had authority under federal law to make arrests for criminal immigration violations (including the crimes of unauthorized entry and reentry after a previous deportation but excluding mere illegal presence, which is a civil violation).⁵⁷ By 1994, other courts issued decisions agreeing with the *Gonzalez* distinction between civil and criminal immigration laws.⁵⁸

In another line of cases during this time period, some courts interpreted the authority of LEAs to enforce immigration laws more expansively. In *United States v. Salinas-Calderon*, the Tenth Circuit upheld the defendant's conviction for violating 8 U.S.C. §1324, a criminal immigration offense.⁵⁹ In the case, a highway state trooper stopped the defendant for erratic driving and by questioning the defendant's wife, discovered that the passengers in the defendant's car lacked lawful immigration status.⁶⁰ Without any analysis of the trooper's authority to make an arrest for an immigration violation (or any related distinction between civil and criminal laws), the court summarily concluded that the trooper had probable cause to make the arrest and dismissed the defendant's claims.⁶¹ Though the Tenth Circuit based its decision entirely on criminal procedural grounds, *Salinas-Calderon* was cited by other courts for the broad proposition that LEAs can inquire about immigration status, even during routine traffic stops.⁶²

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *See id.* at 476. Because the individually named officers were not implicated in the specific instances cited by the plaintiffs and because the city and other institutional actors acted in good faith, the Ninth Circuit dismissed the plaintiffs' claims for damages. *See id.* at 479-80.

⁵⁸ *See, e.g.,* *Gates v. L.A. Superior Court*, 193 Cal. App. 3d 205, 214-15 (Ct. App. 1987) (holding that the INS has exclusive authority to enforce civil provisions of the INA).

⁵⁹ The offense penalizes "[b]ringing in and harboring certain aliens." 8 U.S.C. § 1324 (2019). *See United States v. Salinas-Calderon*, 728 F.2d 1298, 1300-02 (10th Cir. 1984).

⁶⁰ *Salinas-Calderon*, 728 F.2d at 1299-1300.

⁶¹ *See id.* at 1302.

⁶² *See, e.g.,* *Gomez v. State*, 517 So. 2d 110, 111 (Fla. Dist. Ct. App. 1987) (upholding state officer's authority to inquire about defendant's immigration status after routine traffic stop).

Against this background of limited enforcement, Section Four's provisions were unique. Instead of requiring California LEAs to make arrests for immigration offenses (like the officers in *City of Peoria* and *Salinas-Calderon* did), Section Four's mandates operated more indirectly. Under Section Four, an LEA officer's immigration duties were only activated after the officer made an arrest for a non-immigration offense, as part of his or her usual law enforcement duties.⁶³ Once that arrest was made, the officer was obligated to check the immigration status of the arrestee, notify the arrestee of any unlawful status, and report that information to state and federal authorities.⁶⁴ California officers were not required to make arrests for immigration offenses, civil or criminal.⁶⁵

The law enforcement provisions were also unique in that they mandated cooperation at the state level, rather than allowing individual LEAs to formulate their own policies and procedures.⁶⁶ Though state-mandated immigration cooperation or prohibition procedures are firmly embedded in today's legal landscape, there were no such laws in 1994.⁶⁷ As explained in more detail in Part III, the uniqueness of the law enforcement cooperation provisions in Prop. 187, combined with the intense publicity surrounding the initiative's passage, set the stage for the broad influence of these provisions.

III. INFLUENCE ON SUBFEDERAL IMMIGRATION COOPERATION

As even casual students of its history know, Prop. 187 was never enforced. After it was approved by California voters, public interest groups and individual state residents brought lawsuits, challenging its constitutionality.⁶⁸ Consolidating the lawsuits, federal district court Judge Mariana Pfaelzer enjoined most of its provisions, finding that

⁶³ Though the language of Prop. 187 was not entirely clear, the triggering arrest was presumably independent of the immigration enforcement duties; that is, an LEA officer was not supposed to arrest someone solely because the officer "suspected" that the person lacked lawful immigration status. If Prop. 187 had mandated that LEA officers make arrests for immigration offenses, the initiative likely would have required the LEA to hold the arrestees for pickup by federal immigration authorities. Instead, as noted above, Prop. 187 only required LEAs to verify immigration status of the arrestee, notify the arrestee of any unlawful status, and report that status to state and federal authorities.

⁶⁴ See Proposition 187, *supra* note 2, at 91.

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ See *infra* Part III.

⁶⁸ See Gustavo Arellano, *Prop. 187 Timeline: The Rise and Fall of California's Anti-Immigrant Law*, L.A. TIMES (Oct. 29, 2019, 3:00 AM), <https://www.latimes.com/california/story/2019-10-06/proposition-187-timeline> [<https://perma.cc/7C24-PAKG>].

those provisions were preempted as unconstitutional immigration regulations.⁶⁹ Specifically, she found that all the verification, notification, and reporting requirements in Prop. 187 had a “direct and substantial impact on immigration” and were thus preempted by federal law.⁷⁰ She allowed the provisions within Prop. 187 that denied benefits to unauthorized immigrants to proceed, on the grounds that the mere denial of benefits was not an impermissible regulation of immigration, as long as the state law used federal definitions of immigrant eligibility.⁷¹ But the law enforcement cooperation provisions were enjoined in their entirety because “[t]he sole stated purpose and the sole effect of Section Four is to impermissibly regulate immigration.”⁷²

For a law that was never enforced, Prop. 187 had a broad and deeply profound impact. Its provisions denying government-funded benefits to unauthorized immigrants percolated up to the federal level, when Congress in 1996 enacted the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) that denied federal welfare benefits to most unauthorized and authorized noncitizens.⁷³ The initiative’s general promotion of tough immigration enforcement influenced key provisions in the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), a federal statute enacted in 1996 that greatly expanded the grounds for deportation and limited avenues for deportation relief.⁷⁴ And the passage of the initiative is also credited for mobilizing Latinx political participation, both as voters and

⁶⁹ See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 769-71 (C.D. Cal. 1995).

⁷⁰ *Id.*

⁷¹ See *id.* at 770-71. These provisions were later permanently enjoined by the same district court in 1997, after the enactment of PRA. See *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1254 (C.D. Cal. 1997).

⁷² *League of United Latin Am. Citizens*, 908 F. Supp. at 771; see also Lolita K. Buckner Inniss, *California’s Proposition 187 — Does It Mean What It Says? Does It Say What It Means? A Textual and Constitutional Analysis*, 10 *GEO. IMMIGR. L.J.* 577, 611 (1996) (analyzing the constitutionality of Prop. 187).

⁷³ See Raquel Aldana, *On Rights, Federal Citizenship, and the “Alien,”* 46 *WASHBURN L.J.* 263, 273 (2007) (“California’s Proposition 187, which sought to deny benefits to the noncitizen, including access to public schools, became the impetus for the 1996 anti-immigrant welfare reforms. Peter Spiro, in particular, describes Proposition 187 as having the ‘steam valve’ effect of pressuring up local anti-immigrant politics into the national landscape.”)

⁷⁴ See Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 *CONN. L. REV.* 1627, 1632-33 (1997) (drawing the connection between Prop. 187 and IIRIRA).

as political candidates, and for turning California into a state clearly dominated by the Democratic party.⁷⁵

Like the other provisions of Prop. 187, the Section Four provisions influenced legislation at both the federal and subfederal levels.⁷⁶ That influence resulted in large part from the initiative's success at the ballot; politicians who may have been reluctant to discuss immigration policy, with all of its complicated issues and alliances, could no longer ignore populist anger directed at federal immigration policies that were criticized as ineffectual.⁷⁷ The influence of Prop. 187 was magnified further by campaigns to enact similar laws in other states; after the success of Prop. 187 in California, similar laws were proposed in Florida, Arizona, Oregon, Texas, New York, and Massachusetts.⁷⁸ Though none of these laws were passed, the public debate generated by their consideration created more momentum for enforcement-focused immigration reform.⁷⁹

Section Four's impact on federal legislation came more quickly; in 1996, Congress enacted two laws that prohibited restrictions on the ability of any governmental entity to communicate with the INS regarding any person's immigration status.⁸⁰ Section Four of the PRWORA provided that:

Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or

⁷⁵ See Roxana Kopetman, *Politics, Activism, Families: How Prop. 187 Is Still Being Felt 20 Years Later*, ORANGE COUNTY REG. (Oct. 31, 2014, 1:20 PM), <https://www.ocregister.com/2014/10/31/politics-activism-families-how-prop-187-is-still-being-felt-20-years-later/> [<https://perma.cc/96B2-TURK>].

⁷⁶ "Subfederal" legislation refers to legislation enacted at the state, county, or city level.

⁷⁷ See Su, *supra* note 8, at 1376 (describing how the authors of Prop. 187 were able to leverage the initiative "into a national controversy that made federal reforms much more likely").

⁷⁸ See Maria Puente, *States Setting Stage for Their Own Prop. 187s*, USA TODAY, Nov. 18, 1994, at 3A (discussing the campaigns to enact similar laws in Arizona, Texas, Florida, and New York); Patrick J. McDonnell, *Despite Legal Snags, Prop. 187 Reverberates*, L.A. TIMES (Nov. 8, 1995, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1995-11-08-mn-767-story.html> [<https://perma.cc/3ERN-XL3M>] (noting the emergence of support for Prop. 187 laws in other states, including Oregon and Massachusetts).

⁷⁹ See, e.g., Patrick J. McDonnell, *Anti-Illegal Immigration Proposition Fails to Qualify for Arizona Ballot*, L.A. TIMES (July 15, 1996, 12:00 AM), http://articles.latimes.com/print/1996-07-15/news/mn-24427_1_illegal-immigrants [<https://perma.cc/XY4B-NSPG>] (describing the failure of Prop. 187-type laws to make it onto the ballot in Arizona and Florida).

⁸⁰ See 8 U.S.C. §§ 1373, 1644 (2019).

in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.⁸¹

Section 642 of the IIRIRA placed more extensive prohibitions on communications with INS:

(a) In general

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

Maintaining such information.

Exchanging such information with any Federal, State, or local government entity.

(c) Obligation to respond to inquiries

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration.⁸²

Comparing these federal laws with Prop. 187, the difference in positions becomes apparent. The federal laws were written from the position of *federal* legislators trying to prevent subfederal entities from

⁸¹ Codified at § 1644. In a challenge to the Trump administration's policy to withhold federal funds from cities that the administration alleged were "sanctuary cities," this particular provision was declared unconstitutional, as a violation of the Tenth Amendment's anti-commandeering doctrine. *City of Chi. v. Barr*, 405 F. Supp. 3d 748, 762-63 (N.D. Ill. 2019).

⁸² Codified at 8 U.S.C. § 1373 (2019).

restricting INS communications. Prop. 187 was written from the position of *state* legislators trying to prevent local entities from imposing restrictions, after imposing on those local entities the obligation to cooperate in the first place. But the essence of Prop. 187 Section Four(c) is clearly contained in the federal laws: prohibiting other governmental entities from enacting laws or policies that would restrict communication with the then-INS.⁸³ The legislative history of both federal laws indicate that Congress intended to nullify the policies enacted by cities and states as part of the sanctuary movement of the 1980s and 1990s discussed above.⁸⁴ Section Four(c) provided Congress with the anti-sanctuary legislative tool to assert itself into that debate.

The more consequential impact of Prop. 187's law enforcement cooperation provisions, however, was to plant the idea that subfederal governmental entities could play an important role in immigration law enforcement. Section Four of Prop. 187 created a role for LEAs in the immigration enforcement scheme by mandating that they verify the immigration status of arrestees, notify the arrestees of any unlawful status, and then report that unauthorized status to state and federal authorities.⁸⁵ The third step of reporting was designed to compel federal immigration authorities to step up enforcement of federal immigration laws that were criticized as ineffectual.⁸⁶

For a Congress with a get-tough-on-immigration mindset, the possibility of recruiting state and local police to help enforce immigration laws proved to be enticing. So as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress created the 287(g) program, through which a state or other political subdivision could become deputized to enforce federal immigration laws.⁸⁷ Section 287(g) authorizes the Attorney General

⁸³ Prop. 187 Section Four(c) provides as follows: (c) Any legislative, administrative, or other action by a city, county, or other legally authorized local governmental entity with jurisdictional boundaries, or by a law enforcement agency, to prevent or limit the cooperation required by subdivision (a) is expressly prohibited. Proposition 187, *supra* note 2, at 91.

⁸⁴ For example, the legislative history of Section Four acknowledged that "various localities have enacted laws preventing local officials from disclosing the immigration status of individuals to INS" and stated that Section Four was designed to "prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS." H.R. REP. NO. 104-725, at 383 (1996) (Conf. Rep.), as reprinted in 1996 U.S.C.C.A.N. 2649, 2771.

⁸⁵ Proposition 187, *supra* note 2, at 91.

⁸⁶ *See id.*

⁸⁷ *See* 8 U.S.C. § 1357(g) (2019).

(now the Secretary of Homeland Security) to enter into agreements with a state or political subdivision “to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers)”⁸⁸ The Department of Homeland Security and the state or political subdivision are to negotiate the specifics of any delegated immigration functions, and that agreement will be memorialized in a written agreement.⁸⁹

Though there is very little legislative history specific to the 287(g) program,⁹⁰ we can see the influence of Prop. 187’s Section Four in the very idea that the 287(g) program puts forward — that LEAs could and should be involved in immigration law enforcement. As noted in Part II, when Prop. 187 was being formulated, the concept that LEAs should have a regular role in immigration law enforcement just did not exist. Rather, the norm among LEAs was one of nonenforcement; any forays by LEAs into immigration enforcement were sporadic, with enforcement decisions made by individual LEAs scattered across the United States.⁹¹ Against that context, Prop. 187 was groundbreaking for mandating LEA participation in immigration enforcement on a statewide basis. And two years after Prop. 187 was approved by California voters, Congress created a program built around the same idea of regularized LEA involvement in immigration enforcement, providing strong evidence of Prop. 187’s influence.⁹²

⁸⁸ *Id.*

⁸⁹ *See id.* § 1357(g)(5).

⁹⁰ *See* Huyen Pham, *287(g) Agreements in the Trump Era*, 75 WASH. & LEE L. REV. 1253, 1257 (2018) (noting the lack of legislative history regarding the origins of the 287(g) program).

⁹¹ *See supra* notes 32–51.

⁹² Of course, the 287(g) program differs in significant ways from the enforcement scheme envisioned by the authors of Prop. 187: the 287(g) program is a voluntary program, requiring the voluntary participation of any signatory LEA and the approval of the federal government. Moreover, the 287(g) program deputizes LEA officers to directly enforce immigration laws under federal direction (e.g., by serving a Notice to Appear that starts removal proceedings), while Prop. 187 anticipated that officers would only report unauthorized immigrants to federal authorities (who would then decide whether to pursue enforcement). As the creator of the 287(g) program, Congress has the authority to delegate immigration enforcement power, which the state of California obviously didn’t. However, because of the anti-commandeering doctrine of the Tenth Amendment, Congress could not require LEAs to enforce immigration laws, while California presumably could impose enforcement requirements on political subdivisions within the state. *See generally* 8 U.S.C. § 1357; Proposition 187, *supra* note 2, at 55.

An examination of Prop. 187's influence on subfederal immigration enforcement must necessarily account for the impact of the 9/11 terrorist attacks. Those 2001 attacks forever changed the trajectory of U.S. immigration policy generally and the path of subfederal immigration enforcement more specifically. After the attacks by nineteen foreign terrorists, all of whom had entered the U.S. legally on tourist, business, or student visas, U.S. immigration policy became increasingly viewed through the lens of national security.⁹³ Citing national security concerns, restrictionists pushed for laws that made it more difficult to immigrate legally and for laws that increased the penalties for those who immigrated illegally.⁹⁴ Gradually the security justifications expanded from concerns focused on foreign terrorists to broader concerns about dangerous criminal immigrants more generally.⁹⁵

The emergence of subfederal immigration enforcement as an issue of national concern is due, in large part, to the 9/11 attacks.⁹⁶ Shortly after those attacks, Attorney General John Ashcroft invited state and local police to join federal authorities in enforcing both civil and criminal immigration laws. States, the Department of Justice concluded, had "inherent authority" to enforce immigration laws.⁹⁷ Though he limited this invitation to "our narrow anti-terrorism mission," his announcement signaled a substantial shift in the federal government's legal position on this issue⁹⁸ and a new federal willingness to embrace subfederal activity in immigration enforcement. Troubled by the 9/11 attacks and encouraged by the federal government, Florida in 2002

⁹³ See Robert Farley, *9/11 Hijackers and Student Visas*, FACTCHECK.ORG (Nov. 24, 2015), <https://www.factcheck.org/2013/05/911-hijackers-and-student-visas/> [<https://perma.cc/Q3QW-CLNX>].

⁹⁴ See Walter A. Ewing, *Beyond Border Enforcement: Enhancing National Security Through Immigration Reform*, 5 GEO. J.L. & PUB. POL'Y 427 (2007) (describing the national security focus of immigration reform).

⁹⁵ See *id.* (describing the national security focus of immigration reform).

⁹⁶ See Press Release, U.S. Dep't of Justice, Attorney General Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), *available at* <https://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm> [<https://perma.cc/GH5V-27HX>] (encouraging local law enforcement authorities to join in enforcing federal immigration laws).

⁹⁷ *Id.*

⁹⁸ *Id.*; see Deputy Assistant Attorney Gen., Office of Legal Counsel, to U.S. Attorney, S. Dist. Of Cal., Memorandum Opinion from Teresa Wynn Roseborough, Assistance by State and Local Police in Apprehending Illegal Aliens II.B (Feb. 5, 1996), *available at* https://www.justice.gov/sites/default/files/olc/opinions/1996/02/31/op-olc-v020-p0026_0.pdf [<https://perma.cc/Z2KL-E758>] (opining that local police have authority to enforce criminal, but not civil, provisions of the INA).

became the first subfederal entity to sign a 287(g) agreement, a full six years after the 287(g) program was created.⁹⁹

In addition to participating in federal programs, subfederal governments in the post 9/11 era also passed laws that imposed independent enforcement duties on their LEAs, and it's in these laws that we see Prop. 187's strongest state-level influence. In 2010, Arizona enacted SB 1070, an omnibus bill that, among other provisions, requires all LEAs in Arizona to check the immigration status of all persons whom LEA officers encounter in lawful stops if there is "reasonable suspicion" that the person lacks lawful immigration status.¹⁰⁰ Five other states — Alabama, Georgia, Indiana, South Carolina, and Utah — passed similarly restrictive laws.¹⁰¹

⁹⁹ See Memorandum of Understanding Between the U.S. Dep't of Justice and the State of Fla. (July 29, 2002), *reprinted in* 79 INTERPRETER RELEASES 1138, app. II at 1140 (2002). These officers were trained by the INS and then placed in Florida's seven Regional Domestic Security Task Forces. *See id.* at 1140-41.

¹⁰⁰ S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

¹⁰¹ See Melissa Keaney & Alvaro M. Huerta, *Restrictionist States Rebuked: How Arizona v. United States Reins in States on Immigration*, 3 WAKE FOREST J.L. & POL'Y 249, 256 (2013).

Table 1

Prop. 187	<u>Ariz.</u> <u>SB 1070</u> ¹⁰²	<u>Ala.</u> <u>HB 56</u> ¹⁰³	<u>Ga.</u> <u>HB 87</u> ¹⁰⁴	<u>Ind.</u> <u>SB 590</u> ¹⁰⁵	<u>S.C.</u> <u>SB 20</u> ¹⁰⁶	<u>Utah</u> <u>HB 497</u> ¹⁰⁷
Anti-sanctuary	Yes	Yes	Yes	Yes	Yes	Yes
Check status	Yes	Yes	Yes	Yes	Yes	Yes
Notify “alien”	X	X	X	X	X	X
Report to INS/ICE	Yes	Yes	Yes	Yes	Yes	Yes

Table 1 above compares the substantive provisions of these laws. There are a few differences worth noting. None of the later laws required LEAs to inform arrestees of their unlawful status or of their obligation to obtain lawful status, perhaps because the enforcement efficacy of that requirement is suspect. Moreover, the later laws appear to have learned from the legal problems that plagued Prop. 187. Section Four was enjoined by the district court in part because it required LEA officers to try to determine by themselves who lacked lawful immigration status, a determination that may or may not align with federal standards, and was thus preempted as an impermissible immigration regulation.¹⁰⁸ In contrast, SB 1070 and similar laws require LEAs to verify lawful immigration status by directly communicating with ICE. In implementing these laws then, LEAs are necessarily applying federal standards regarding immigration status.¹⁰⁹

And while the immigrant burden cited to justify Prop. 187 was primarily financial (through the provision of state services), the burden cited to justify SB 1070 and related laws was primarily the perceived threats presented by criminal immigrants. When signing SB 1070 into law, the governor of Arizona described in vivid detail the alleged criminal threats posed by unauthorized immigrants: “There is no higher priority than protecting the citizens of Arizona. We cannot sacrifice our safety to the murderous greed of drug cartels. We cannot stand idly by

¹⁰² Ariz. S.B. 1070.

¹⁰³ H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011).

¹⁰⁴ H.B. 87, 2011-2012 Gen. Assemb., Reg. Sess. (Ga. 2011).

¹⁰⁵ S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

¹⁰⁶ S.B. 20, 2011-2012 Gen. Assemb., 119th Sess. (S.C. 2011).

¹⁰⁷ H.B. 497, 2011 Leg., Gen. Sess. (Utah 2011).

¹⁰⁸ See *supra* notes 65–66.

¹⁰⁹ See, e.g., S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (noting that the Arizona legislature recognizes an interest in enforcing federal immigration laws in Arizona).

as drop houses, kidnappings and violence compromise our quality of life.”¹¹⁰

As shown in Table 1 above, however, the similarities among these state laws outweigh their differences. The later laws incorporated most of the substance of Prop. 187 Section Four.¹¹¹ The basic enforcement scheme envisioned by Prop. 187 in 1994 — a mandate to LEA officers requiring them to verify and report unauthorized immigrants to federal immigration authorities — has been incorporated into SB 1070 and its progeny. Similarly, the mandated enforcement provided for in all of these laws set up the state as the savior against unauthorized immigration. As noted in Part I, the authors of Prop. 187 pitched the initiative as necessary to send a message to a federal government that was unwilling to enforce immigration laws;¹¹² similarly, SB 1070 and the later laws also faulted the federal government for inaction and characterized the State as the only capable actor in the crisis.¹¹³ When Governor Brewer signed SB 1070 into law, she made repeated references to federal government inaction:

- “Senate Bill 1070 . . . represents another tool for our state to use as we work to solve a crisis we did not create and the federal government has refused to fix.”
- “We in Arizona have been more than patient waiting for Washington to act. But decades of federal inaction and misguided policy have created a dangerous and unacceptable situation.”¹¹⁴

The similarities in both substance and structure between Prop. 187, passed in 1994, and the SB 1070 line of laws enacted over sixteen years later speaks to the pervasive and long lasting influence of Prop. 187’s Section Four.

CONCLUSION

As we contemplate the legacy of Prop. 187, we need to pay particular attention to Section Four, the law enforcement cooperation provisions. Section Four is often overlooked as commentators focus on the service

¹¹⁰ *Brewer Signs SB 1070 - Illegal Immigration Bill*, *supra* note 19.

¹¹¹ See H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011); H.B. 87, 2011-2012 Gen. Assemb., Reg. Sess. (Ga. 2011); S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011); S.C. S.B. 20, 119th Sess. (S.C. 2011); Utah H.B. 497, 2011 Leg., Gen. Sess. (Utah 2011).

¹¹² See *supra* note 30 and accompanying text.

¹¹³ See *Brewer Signs SB 1070 - Illegal Immigration Bill*, *supra* note 19.

¹¹⁴ *Id.*

denial provisions of the initiative. But Section Four — by mandating that local enforcement agencies in California verify the immigration status of all arrestees “suspected” of unlawful status and then report any unlawful status to state and federal authorities — laid the foundation for regularizing the role of LEAs in immigration law enforcement.¹¹⁵

The wide-ranging influence of Section Four on later legislation is apparent at both the federal and state levels. At the federal level, Congress created the 287(g) program, allowing for voluntary cooperation between ICE and subfederal LEAs, and enacted a federal anti-sanctuary law, to prevent subfederal restrictions on communication between LEAs and ICE. At the state level, states like Arizona have enacted laws that mandate LEA participation in immigration law enforcement, with provisions that strongly echo what Section Four of Prop. 187 proposed to do. The combined policy effects of these state and federal efforts — the increased deportations, the heightened risks of racial profiling, and the widening distrust between immigrant communities and LEAs — are perhaps the most powerful and troubling legacies of Prop. 187’s Section Four provisions.

¹¹⁵ See *supra* Part III.