A NATION OF IMMIGRANTS OR A NATION OF SUSPECTS? STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS SINCE 9/11

I. INTRODUCTION

Illegal immigration sparked nationwide debate in the 1990s, particularly on the local level. Many states were concerned about the financial burden imposed on them because of the lack of enforcement of federal immigration laws. The states demanded financial aid to offset the costs of social services provided, as well as requested overall immigration reform. One particular issue concerning this immigration reform was the authority for state and local officers to enforce federal immigration regulations. States reasoned that if the federal government did not have the capability to enforce these regulations, the states could provide the additional manpower, and thus relieve the financial burden that illegal immigration was having on them. This tension ignited the debate concerning the authority state and local law enforcement possessed to enforce these regulations.[1]

The debate has recently resurged, but this time it was initiated by the federal government. On September 11, 2001, the United States of America was attacked by terrorists on its home soil, changing immigration forever. On that day, America went from being a nation of immigrants to a nation of suspects. The federal government immediately took steps to combat this overwhelming threat of terrorism, focusing primarily on immigration.[2] First, negotiations between Mexico and the United States to legalize the over three million undocumented[3] Mexican workers within the U.S. were immediately ceased.[4] Congressional interest was then targeted at security-related issues in immigration, such as admissions, border control, and alien tracking.[5] The USA PATRIOT Act,[6] the Enhanced Border Security and Visa

1. Jay Jorgensen, Comment, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 BYU L. REV. 899, 899-901.

2. *See U.S. Borders: Safe or Sieve?, Hearing Before the Senate Committee on Finance*, 108th Cong. (2003) (statement of Johnny N. Williams, Executive Associate Commissioner for Field Operations, U.S. Immigration and Naturalization Services) (discussing measures taken at ports-of-entry and within the United States toward immigration enforcement).

3. For purposes of this Comment, I will use the term "undocumented" to describe immigrants that are illegal, out-of-status, or unlawfully present.

4. Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 351 (2002).

5. *See Immigration Legislation and Issues in the 107th Congress*, CRS Issue Brief, May 28, 2002, *available at* http://www.fpc.state.gov/documents/organization/10897.pdf.

6. Pub. L. No. 107-56 (2001). The PATRIOT ACT broadened the inadmissibility provisions for

Entry Reform Act,[7] and the Homeland Security Act[8] were all legislation directed at reforming immigration in response to this tragic event.[9] One of the most visible changes was the creation of the Department of Homeland Security (DHS), which, as of March 1, 2003, has become the new home for the former Department of Immigration and Naturalization Services (INS).[10] The former INS responsibilities have now been divided among three different bureaus within DHS. United States Citizenship and Immigration Services (USCIS) is responsible for providing most of the immigration services and benefits.[11] The enforcement component of immigration has been transferred to the Bureau of Immigration and Customs Enforcement (ICE).[12] Finally, the Bureau of Customs and Border Protection (CBP) is responsible for protecting United States' borders.[13]

One of the biggest concerns since September 11th, however, has simply been the lack of manpower within ICE. With an estimated eight million undocumented aliens and only 2000 immigration field agents,[14] real reform seems almost impossible. As a result, the Department of Justice (DOJ) has expressed interest in reexamining a 1996 DOJ Opinion limiting state and local enforcement of federal immigration laws to criminal violations. Instead, the DOJ is considering expanding the role local law enforcement play in the immigration field.

This Comment will examine the legal implications of local and state enforcement of federal immigration laws. Part II will look at the role local law enforcement played in the field of immigration prior to September 11th. Part III will explore how this role has been re-evaluated since the tragic events of September 11th as the federal government cries out for reinforcements in the name of homeland security. Finally, Part IV examines the potential implications of recruiting local law enforcement to perform immigration duties.

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terrorism as well as gives United States Citizenship and Immigration Services (USCIS), the Bureau of Immigration and Customs Enforcement (ICE), and the Department of State access to the FBI's criminal databases. *Id.*

7. Pub. L. No. 107-173 (2002). Important components of this bill include a workable entry-exit control system and changes in the Foreign Student Monitoring Program. *Id.*

8. Pub. L. No. 107-296 (2002).

9. *See generally supra* note 5.

10. Immigration and Borders, United States Department of Homeland Security, *at* http://www.dhs.gov/dhspublic/theme_home4.jsp (last visited Feb. 20, 2004).

11. *Id.*

12. *Id.*

13. *Id.*

14. *See infra* note 59.

II. STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS PRIOR TO SEPTEMBER 11, 2001

A. Federal Preemption Analysis

It has long been understood that the power to regulate immigration is exclusively vested in the federal government.[15] Article I, Section 8 of the Constitution specifically grants Congress the power to establish a "uniform Rule of Naturalization."[16] Therefore, only Congress may enact laws pertaining to admission into the United States. As a response to this express power, Congress enacted the Immigration and Naturalization Act (INA),[17] which serves as the "federal statutory scheme for regulation of immigration and naturalization."[18] Thus, the question arises whether state law empowering local police officers to make arrests for federal immigration violations is preempted by the INA under the Supremacy Clause, art. VI, cl. 2, of the Constitution. The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[19]

Although the power to regulate immigration is exclusively federal, there is a general presumption against federal preemption of state and local enforcement activity of federal regulatory programs, so long as federal regulatory interests are not impaired.[20] "Federal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[21]

Congressional intent is an essential element of preemption analysis.[22] First, it must be determined if Congress has expressly preempted state enforcement of a federal regulatory program.[23] If it is not expressly preempted in the federal regulatory scheme, it must be determined whether implied preemption exists.[24] There are two types of implied preemption: field preemption and conflict preemption.[25] Field preemption exists when "the federal regulatory scheme is so pervasive as to create the inference that Con-

15. Decanas v. Bica, 424 U.S. 351, 354 (1976); *see also* Henderson v. Mayor of New York, 92 U.S. 259, 270 (1875); Chy Lung v. Freeman, 92 U.S. 275, 280 (1875).

16. U.S. CONST. art. I, § 8, cl. 4.

17. 8 U.S.C. §1101 (2002). The INA was first codified in 1952 and has been amended many times since. *Id.*

18. *DeCanas*, 424 U.S. at 353.

19. U.S. CONST., art. VI, cl.2.

20. United States v. Haskin, 228 F.3d 151, 153-54 (2d Cir. 2000).

21. *Decanas*, 424 U.S. at 356 (citing Fla. Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963)). "Although the regulation of immigration is unquestionably an exclusive federal power, it is clear that this power does not preempt every state activity affecting aliens." Gonzales v. City of Peoria, 722 F.2d 468, 474 (9th Cir. 1983), *overruled on other grounds by* Hodgers-Durgin v. De LaVina, 199 F.3d 1037 (9th Cir. 1999).

22. United States v. Vasquez-Alvarez, 176 F.3d 1294, 1297 (10th Cir. 1999).

23. *See id.* at 1297.

24. *See id.*

25. *Id.*

gress meant to leave no room for the states to supplement it."[26] Conflict preemption occurs when "compliance with both state and federal law is impossible"[27] and state law hinders the objectives of Congress.

Therefore, when determining if state and local police have enforcement authority for federal immigration laws, courts should be reluctant to infer preemption. Although the regulation of immigration, such as creating standards for admission into the country, is exclusively federal, state officers have the authority to arrest for violations of federal law as long as authorized by state law. Congress has not expressly prohibited states from this enforcement activity. In fact, there are many sections of the INA in which state enforcement activity is specifically addressed.[28] However, local enforcement is not authorized even when there is express congressional intent if that enforcement is constitutionally prohibited. The Supreme Court has determined that local activity involving setting regulations on who can enter the country and the conditions for which they can stay falls within this constitutionally prohibited zone.[29] Therefore, Congress may explicitly authorize enforcement of any provision of the INA.

B. Criminal Versus Civil Immigration Regulations

Local police are not precluded from enforcing federal statutes as long as this enforcement does not impair federal regulatory interests.[30] Therefore, as long as Congress does not expressly prohibit enforcement or the nature of the federal regulatory scheme does not imply preclusion, local enforcement of federal statutes is permitted.[31] In the field of immigration, Congress has not expressly precluded state enforcement of federal immigration laws. In fact, the Supreme Court has concluded that Congress has not occupied the field of immigration with intentions of completely excluding state activity.[32] However, this enforcement is limited to the criminal immigration laws outlined in the INA. Civil regulations are limited to federal government enforcement. Thus, local law enforcement is precluded from arrests based solely on suspicion of deportability.[33]

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26. *Id.* at 1297 n.3.

27. *Id.*

28. *Id.* at 1296 (discussing 8 U.S.C. §1252c, which authorizes state and local law enforcement to arrest illegal aliens if (1) the arrest is permitted by local law, (2) the alien had been previously deported for a felony conviction, and (3) appropriate confirmation about the alien's status was obtained prior to the arrest). *See also* 8 U.S.C. §§ 1103(a), 1357 (explicitly authorizing state and local enforcement of federal immigration laws under a specific agreement between the state and the Director of Homeland Security and during emergency situations).

29. DeCanas v. Bica, 424 U.S. 351, 355 (1976).

30. Gonzales v. City of Peoria, 722 F.2d 468, 468 (9th Cir. 1983).

31. *Id.* at 474.

32. *DeCanas*, 424 U.S. at 359-63.

33. DEP'T OF JUST., OPINION OF OFF. OF LEGAL COUNSEL, ASSISTANCE BY STATE AND LOCAL POLICE IN APPREHENDING ILLEGAL ALIENS, OP. OFF. LEGAL COUNSEL, II.B. (Feb. 5, 1996) [hereinafter 1996 DOJ OPINION], *at* http://www.justice.gov/olc/immstopo1a.htm. In 2002, the Office of Legal Counsel actually withdrew the advice given in Part II.B. of the 1996 DOJ Opinion discussing civil enforcement and deportable aliens. *See infra* text Part III.A., and accompanying notes.

The civil provisions of the INA regulating "authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme" that federal preemption over state enforcement is implied.[34] However, there is evidence within the legislative history of the INA that Congress actually intended for state and local enforcement of the penal provisions of the Act.[35] Therefore, federal law does not preclude local enforcement of the criminal regulations within the INA. However, because of the complexity surrounding civil regulations, state governments are preempted from enforcing civil violations of the INA. Thus, when making immigration arrests, local and state law enforcement must be able to distinguish between criminal and civil violations.[36]

C. *A Split in the Circuits:* Gonzales *and* Santana-Garcia *Examine the States' Legislative Role*

State and local police may not enforce federal immigration laws when state law specifically prohibits it.[37] However, the circuits are split with regard to whether states have to affirmatively grant local police the power to enforce penal provisions of the INA. In *Gonzales v. Peoria,* the Ninth Circuit examined the issue of local enforcement of federal immigration laws in an influential two-part decision. The case arose in reaction to alleged policies practiced by the Peoria, California, local police. The plaintiffs, of Mexican decent, brought this action against the City of Peoria claiming that the Peoria police were in the practice of arresting individuals for violations of federal immigration laws. However, the plaintiffs asserted that the local police did not have authority to make such arrests. The *Gonzales* court responded first by claiming "[t]he general rule is that local police are not precluded from enforcing federal statutes."[38] As previously discussed in II.B. of this Comment, local and state governments are not precluded from enforcing penal regulations of the INA. However, this was only part of their analysis. They went on to consider whether state law *affirmatively* grants the Peoria police the authority to enforce these regulations.[39] They concluded that state law did authorize this enforcement.[40]

The second part of the analysis is where the Tenth Circuit has distinguished itself from the Ninth Circuit's decision in *Gonzales. Gonzales* suggests that "state law must affirmatively grant local authorities the power to arrest for a federal immigration law violation."[41] The Ninth Circuit held that

34. *Gonzales,* 722 F.2d at 475.
35. *See id.* (citing People v. Barajas, 147 Cal. Rptr. 195, 198-99 (Cal. Ct. App. 1978)).
36. *Gonzales,* 722 F.2d at 477.
37. *E.g.,* OR. REV. STAT. § 181.850(1) (1997) (amended 2003) (prohibiting any Oregon law enforcement agency from inquiring or arresting persons whose only violation of law pertains to federal immigration laws).
38. *Gonzales,* 722 F.2d at 474.
39. *Id.* at 475.
40. *Id.* at 476.
41. United States v. Santana-Garcia, 264 F.3d 1188, 1194 (10th Cir. 2001) (citing *Gonzales,* 722

even when Congress has given authorization to enforce these immigration provisions, the state must explicitly grant authority for this type of enforcement. In the Tenth Circuit's most recent case addressing this matter, *United States v. Santana-Garcia,*[42] the court clarified that it has never held that state law must "affirmatively" authorize an officer to make an arrest for violation of a federal immigration law.[43] To the contrary, the Tenth Circuit declared that this authority for state enforcement of federal law has always been "implicit," with no need for affirmative authorization.[44] However, this is "presum[ing] no state or local law to the contrary."[45]

The Tenth Circuit relies heavily on its decision in *United States v. Salinas-Calderon,*[46] where the court asserts that "a state trooper has general investigatory authority to inquire into possible immigration violations."[47] This suggests that state and local law enforcement have general authority to investigate immigration issues.[48]

D. The States' Right to Choose

The above sections have described the judicial history behind state and local enforcement of federal immigration laws. Ultimately, the states are authorized to enforce the criminal provisions of the INA. However, they are not ever *required* to enforce these provisions. An important component of the Tenth Amendment is the principle that Congress "may not 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[49] The federal government simply has the powers granted to it by the Constitution.[50] Congress may never compel the states to enact a federal regulatory program.[51]

However, this does not stop the federal government from offering incentives for the states to enact a federal regulatory scheme. A clear choice must exist, though.[52] Monetary and access incentives are permissible if they

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F.2d at 475).

42. *Santana-Garcia,* 264 F.3d at 1188.

43. *Id.* at 1194.

44. *Id.*

45. *Id.*

46. 728 F.2d 1298 (10th Cir. 1984).

47. United States v. Salinas-Calderon, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984).

48. Sylvia R. Lazos Vargas, *Missouri, the "War on Terrorism," and Immigrants: Legal Challenges Post 9/11,* 67 MO. L. REV. 775, 784 (2002).

49. Koog v. United States, 79 F.3d 452, 453 (5th Cir. 1996) (citing New York v. United States, 505 U.S. 144, 176 (1992)). The Tenth Amendment specifically states "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

50. *Koog,* 79 F.3d at 455.

51. *Id.* In *Koog,* the interim provision of the Brady Act required Chief Law Enforcement Officers (CLEOs) to perform background checks on persons wishing to purchase a gun until a national automated system was established. This provision of the Act was struck down by the Fifth Circuit because it compelled state governments to administer provisions of a federal regulatory program in violation of *New York v. United States,* 505 U.S. 144 (1992), and the Tenth Amendment. *Koog,* 79 F.3d. at 454-55.

52. In *Koog,* the United States asserted that this federal statutory scheme was an example of "cooperative federalism," and that the Framers of the Constitution intended for the federal government to use

preserve the autonomy of the states. States must never be coerced into action.[53] Whether impermissible coercion exists is determined by whether the states have an opportunity to reject the federal scheme.[54] This type of action will not be tolerated because it strips states of their sovereignty and "blurs political accountability."[55] State governments would improperly be held accountable for programs devised by federal officials.

Congress may never compel the states to enforce federal immigration laws. "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate . . . . Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."[56] However, as security concerns continue to grow and the number of ICE agents remains relatively small, the federal government has begun turning to the states for help.

III. STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS AFTER SEPTEMBER 11, 2001: A CRY FOR REINFORCEMENTS

A. Attorney General John Ashcroft Requests Help

In 1996, the Department of Justice issued an official opinion reinforcing previous statements, declaring "state and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability."[57] However, press releases issued by the Department of Justice in April 2002 hinted that the DOJ was about to issue a new opinion changing this long standing legal principle.[58] This is an effort to crack down on immigration violations in a response to terrorist threats. There are currently an estimated eight million undocumented immigrants in the United States.[59] Ashcroft has asked for local police to voluntarily partake in the enforcement of federal immigration laws. In particular, he asks states to arrest for violations of criminal provisions of the INA or for civil violations that make an alien deportable and are listed on the FBI National Crime Information Center 2000 (NCIC). Ashcroft asserts that this is within the "inherent authority"

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the states in certain matters. *Id.* at 462. The Court rejected the Brady Act as an example of cooperative federalism and stated, "Intuitively, it seems to us that there can be no cooperative federalism where one party prefers not to cooperate." *Id.*

53. *Id.* at 455-56.

54. *Id.* at 457.

55. *Id.*

56. *Id.* at 461 (citing *New York*, 505 U.S. at 178).

57. 1996 DOJ OPINION, *supra* note 33.

58. Vargas, *supra* note 48, at 782-83. In fact, Part II.B., of the 1996 DOJ Opinion discussing civil enforcement was withdrawn in a 2002 Editor's Note. 1996 DOJ OPINION, *supra* note 33.

59. Michael Riley, *Immigration Bill Has Police Uneasy—Officials Say They're Unprepared to Add INS Cases*, THE DENVER POST, Apr. 22, 2002, at A-01. The 2000 census reported 8,835,450 unauthorized immigrants currently in the United States. *See* J. Gregory Robinson, ESCAP II: Demographic Analysis Results, B3-B5 (U.S. Bureau of the Census, Oct. 13, 2001), *available at* http://www.census.gov/dmd/www/pdf/Report1.PDF.

of the states,[60] which is inconsistent with the previous opinion from the Department of Justice published in 1996, which limited the right to enforce only criminal immigration violations based on case law.[61] However, even though Ashcroft has invited states to participate in enforcement of immigration laws, they may only completely do so through formal agreement as outlined in INA 287(g).[62]

B. An Old Code in a New Era: INA 287(g) is implemented in Florida

INA 287(g) provides:

> The [Director of Homeland Security] may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the [Director of Homeland Security] to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States.[63]

This section of the INA was enacted with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[64] However, almost six years passed before any state took advantage of this provision. The reasons for the delay in action can be contributed to possible concerns with local enforcement of federal immigration laws discussed in *infra* text IV.[65]

What is significant about 287(g) is that it gives state and local law enforcement the authority to enforce both criminal *and* civil immigration violations, contingent on state law authorizing the enforcement. This enforcement is not constitutionally prohibited because it does not pertain to the regulation of conditions of entry and residence within the United States,

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60. Vargas, *supra* note 48, at 782-83 n.33 (citing Department of Justice Opinion that is not yet published).

61. 1996 DOJ OPINION, *supra* note 33.

62. 8 U.S.C. § 1357(g) (2000); *see* Vargas, *supra* note 48, at 788-90 (asserting that this statute should be interpreted narrowly to require states to contract with the Attorney General (now Director of Homeland Security) and properly train local officials in immigration before they can enforce these regulations).

63. 8 U.S.C. § 1357(g)(1) (2000). Because immigration functions have moved from the DOJ to the Department of Homeland Security, states must now contract with the Director of Homeland Security rather than the Attorney General.

64. Immigrants' Rights Update, *Justice Department Contemplates Extending Immigration Enforcement Responsibilities to State and Local Agencies* (Apr. 12, 2002), *available at* http://www.nilc.org/immlawpolicy/arrestdet/ad049.htm.

65. Some possible reasons for resistance to this provision were outlined in a June 1999 Immigration Briefing. These include: underreporting of crime because of the image of local police as immigration officers, racial profiling, and potential for inconsistent enforcement between states with these agreements and states without them. D. L. Hawley, *The Powers of Local Law Enforcement to Enforce Immigration Laws*, 99-06 IMMIGR. BRIEFINGS 1, 13 (June 1999). In addition, more potential concerns are discussed in *infra* text IV.

which has been expressly deemed a power of Congress.[66] This enforcement is not federally preempted either because Congress has expressly authorized local enforcement under the conditions of this section.[67]

1. Civil Immigration Regulations Enforced Locally

Florida is the first state to respond to Attorney General John Ashcroft's request for help. In 2002, the United States Department of Justice (DOJ) and the State of Florida entered into a Memorandum of Understanding (MOU),[68] which was effective until September 2003, but then renewed again in December 2003.[69] Florida is the first state in the nation to take advantage of INA 287(g) as a method encouraged by the federal government to fight terrorism. Although local officials could already detain immigrants for criminal violations of the INA, they are now able to enforce civil sections of this federal regulatory scheme.[70] The intent of this pilot program is "to address the counter-terrorism and domestic security needs of the nation and the State of Florida" by authorizing select local law enforcement to perform certain duties previously limited to federal immigration officers.[71] However, they would not be enforcing routine immigration cases.[72]

As part of this MOU, thirty-five Florida law enforcement officers went through six weeks of training and testing monitored by the former INS.[73] Training included sessions on cross-cultural communications, document examination, civil rights, anti-terrorism initiatives, statutory components of immigration law, and other relevant subjects.[74] After five and a half weeks of INS sponsored training, the officers were required to pass INS administered examinations.[75] The former INS provided training personnel, materials, and supervision.[76] However, the State of Florida was responsible for all other costs associated with the training, as well as costs associated with carrying out these designated functions.[77] The pilot program was subject to evaluation after nine months of implementation.[78] A formal complaint procedure was established in the MOU, so the public may assert complaints

66. Decanas v. Bica, 424 U.S. 351, 354-55 (1976).
67. *See supra* text II.A., B..
68. Memorandum of Understanding Between the United States Department of Justice and the State of Florida (July 2, 2002) (on file with the author) [hereinafter Memorandum of Understanding].
69. *See* Mike Branom, *35 Police Officers Receive Immigration Enforcement Powers in Florida*, S. FLA. SUN-SENTINEL, Aug. 16, 2002, *at* http://www.usbc.org/info/everything2002/0802policeofficers.htm.
70. *See id.*
71. Memorandum of Understanding, *supra* note 68.
72. Branom, *supra* note 69.
73. *Id.*
74. Immigration Officer Academy, 287(g) Officer Training (on file with the author).
75. *Id.*
76. *Id.*
77. Memorandum of Understanding, *supra* note 68, at 5.
78. *Id.* at 8.

against participating state and local officers relating to their immigration duties.[79]

Thus far the State of Florida has deemed this program a success. Since ICE is spread quite thinly across the country, Florida was able to use its ICE-trained officers to help supplement the Department of Homeland Security in its counter-terrorism efforts.[80] To date, they have made a couple hundred arrests and followed up on 400-500 leads.[81] The pilot program was subject to a formal evaluation in June 2003, where it was decided that it would be continued.[82] In fact, Florida is currently considering training more state officers to perform these immigration enforcement duties.[83]

Although the MOU established a formal complaint procedure, no official complaints have been filed yet. Jim Sewell, Deputy Commissioner of the Florida Department of Law Enforcement (FDLE), attributes this to the high profile nature of the program and the excessive amount of time spent in immigrant communities prior to its implementation.[84] The FDLE was concerned with how the immigrant communities might react to this program.[85] They did not want to hurt their ties with these communities.[86] Therefore, they went into these communities personally and through local media to explain that the function of this program was solely to counter terrorism.[87] These ICE-trained officers would not partake in everyday immigration functions and have no future plans to do so. As a result, the FDLE pilot program worked quite well, and they plan to continue with it in the future.[88]

2. *Other States Looking to Follow Florida's Lead*

Although Florida has taken the lead in using its local law enforcement to enforce federal immigration laws, other states are beginning to follow. On February 20, 2003, the State of Alabama announced that it was working with ICE to have state troopers trained to make arrests for immigration violations.[89] Twenty-one Alabama state troopers went through five and a half weeks of ICE-sponsored training, comparable to the training that Florida Law Enforcement Officers experienced.[90] As of October 3, 2003, these

79. *Id.* at app.B.
80. Telephone Interview with Jim Sewell, Deputy Commissioner, Florida Department of Law Enforcement (Apr. 16, 2003) [hereinafter April 2003 Telephone Interview with Sewell].
81. *Id.*
82. Telephone Interview with Jim Sewell, Deputy Commissioner, Florida Department of Law Enforcement (Jan. 7, 2004).
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. April 2003 Telephone Interview with Sewell, *supra* note 80.
89. Bill Barrow & Brendan Kirby, *Troopers and INS Announce Joint Effort on Illegal Aliens*, MOBILE REG., Feb. 21, 2003, at 1B; *State, INS May Unite Against Illegal Aliens*, THE MONTGOMERY ADVERTISER, Feb. 21, 2003, at 3B; Anthony McCartney, *State Law Officers Allowed to Arrest Illegals*, THE HUNTSVILLE TIMES, Feb. 20, 2003, at B3.
90. *See* J. Wes Yoder, *CDP Certifies 21 Troopers to Enforce Immigration Law*, ANNISTON STAR,

twenty-one officers are authorized to make arrests for any violation of federal immigration law.[91] Unlike Florida, however, Alabama's reasoning for training its officers to make arrests for immigration violations was sparked by more than just the events of September 11, 2001.[92] Immigration enforcement has been an issue of particular importance among Alabama's coast because of the large number of undocumented workers within the coastal tourism segment.[93] In addition, a large number of Mexican and Central American families have moved off the coast to work in agriculture, poultry, and construction in Alabama.[94]

What is different about Alabama's plan is that state law enforcement that receive this ICE training are not limited to counter-terrorism immigration enforcement. United States Senator Jeff Sessions of Alabama concedes that Alabama will enforce all areas of immigration law. "There are many immigrants in Alabama who are here legally, and they deserve protection. This law is simply designed to say 'if your time is up, then it's time to go home, and if you are here illegally in the first place, you must pay the penalty.'"[95] Therefore, ICE-trained Alabama law enforcement officers will make arrests for any immigration violation. However, unlike Florida, they will only make these arrests if there was probable cause under state law to initially stop and detain these immigrants.[96]

Unlike Florida troopers, ICE-trained Alabama law enforcement will only be able to arrest illegal aliens when they come across them in their normal patrolling or investigatory work.[97] For example, thirteen undocumented aliens were arrested in Tuscaloosa County, Alabama, when an ICE-trained officer pulled over a van for speeding. These undocumented aliens were all passengers in this speeding van. In Chilton County, Alabama, a man was stopped for suspicion of driving under the influence, and it was subsequently discovered that he was using forged immigration documents.[98] An ICE-trained officer recognized the documents to be fake and made the arrest.

To date, Alabama's ICE-trained officers have made only about six arrests for immigration violations and no formal complaints have been filed.[99] Alabama has every intention to continue enforcing federal immigration laws while the program remains under continuous review. However, this broad application of INA 287(g) to enforcement of all areas of the INA raises concerns discussed more fully in *infra* section IV of this comment.

Oct. 4, 2003, at 3A.

91. *See id.*

92. Telephone Interview with Martha Earnhardt, State of Alabama Director of Public Information (Jan. 6, 2004).

93. Barrow & Kirby, *supra* note 89, at 1B.

94. *Id.* at 3B.

95. *Id.* at 3B.

96. Telephone interview with Martha Earnhardt, *supra* note 92.

97. *Id.*

98. *Id.*

99. *Id.*

IV. THE IMPLICATIONS OF BROAD INA 287(G) IMPLEMENTATION: ARE WE REALLY MORE SECURE?

A. Local Police Cry Out in Opposition

Since the DOJ expressed interest in enforcing federal immigration laws locally, many major cities have stood strongly in opposition to this policy, including New York, Los Angeles, San Francisco, Denver, and Chicago. On April 10, 2002, the California Police Chiefs Association sent a letter to the Attorney General stating that "in order for local and state law enforcement organizations to continue to be effective partners with their communities, it is imperative that they not be placed in the role of detaining and arresting individuals based solely on a change in their immigration status."[100] A Chicago police spokesperson added to this sentiment by stating, "[i]t would be virtually impossible to [solve crime] effectively if witnesses and victims, no matter what their residency status, had some reluctance to come forward for fear of being deported."[101] Particularly, these local police departments are concerned with how immigration enforcement will affect their community-based policing efforts as well as deplete already scarce resources.[102]

Community-based policing is a powerful resource for local law enforcement. By creating strong ties within immigrant communities, local police can access valuable information to help fight crime. In particular, community-based policing has been used to curb gang violence, reduce crime rates in neighborhoods, and keep kids off drugs. There is concern that this important tool will be jeopardized if local police begin broadly enforcing federal immigration laws, as an INA 287(g) contract will allow them to do.[103] Many immigrants already fear police, stemming often from their home country. If local police begin enforcing immigration regulations, immigrants might be unwilling to report crimes or offer helpful tips for fear of possible deportation.[104] Many local police fear losing the trust that they have established in these communities.[105] In addition, if local police departments are asked to enforce federal immigration regulations, it can drain these units of already limited funds and resources.[106]

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100. *From Community Policing to Community Profiling*, National Immigration Forum (May 28, 2002), *available at* http://www.ilw.com/lawyers/articles/2002,0528-NIF.sthm.

101. *Id.*

102. *Id.*

103. *DOJ Opinion on State and Local Police Enforcing Immigration Laws Bodes Ill for Law Enforcement and Communities*, (Apr. 9, 2002) [hereinafter *DOJ Opinion on State and Local Police*] *at* http://www.aila.org/contentViewer.aspx?bc=9,594,1003,626.

104. *Id.*

105. *Id.* "Communication is big in inner-city neighborhoods and the underpinning of that is trust . . . if a victim thinks they're going to be a suspect (in an immigration violation), they're not going to call us, and that's just going to separate us even further." Riley, *supra* note 59 (quoting Denver Police Chief Gerry Whitman).

106. *DOJ Opinion on State and Local Police, supra* note 103.

B. *Improper Training and Fourth Amendment*[107] *Concerns*

The INA comprises hundreds of pages of complicated regulations concerning different ways people can be lawfully present in the United States. This raises concern over whether local officials will have the proper training and expertise required to enforce federal immigration regulations.[108] Although training is required when states contract with the Director of Homeland Security to enforce immigration laws, the amount and type of training is not specified.[109] Even if state and local police had authority to arrest for immigration violations, the Fourth Amendment search and seizure requirements are still applicable. Thus, a person may not be detained without probable cause.

Currently, a person may be detained for reasonable suspicion of a criminal immigration law violation. "Objective . . . articulable facts" serve as the criteria for detention, not stereotypical generalities, assumptions, or profiles.[110] Any civil violation, such as a warrant for deportability, does not serve as probable cause for a local law enforcement officer to make an arrest under the criminal provisions of the INA.[111] In addition, substantial restrictions exist even for federal immigration officers when making warrantless arrests for civil deportation.[112] Therefore, when a state contracts with the Director of Homeland Security under INA 287(g), the officers should receive extensive training concerning proper arrest procedures for civil immigration violations.

For example, the INA designates failure of an alien to carry his alien registration documentation as a misdemeanor.[113] This provision of the INA would seem to provide a basis of "reasonable suspicion" that an alien is committing a crime. However, the Ninth Circuit in *Gonzales* questioned whether lack of documentation provided reasonable suspicion for a warrantless misdemeanor arrest.[114] Although lack of documentation might provide some indication of illegal entry, it does not establish probable cause for a warrantless arrest under 8 U.S.C. § 1325 for illegal entry into the United

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107. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend IV. Individual freedom is implicit in the Fourth Amendment. Ker v. California, 374 U.S. 23, 32-33 (1963).

108. *DOJ Opinion on State and Local Police*, *supra* note 103.

109. Hawley, *supra* note 65, at 5.

110. 1996 DOJ OPINION, *supra* note 33, at II.C.1.a.

111. *Id.* at II.B. "[T]he mere existence of a warrant of deportation does not enable all state and local law enforcement officers to arrest the violator of those civil provisions." *Id. See also supra* Part III.A. and accompanying notes (discussing changes made to this DOJ Opinion in 2002).

112. *See* 8 U.S.C. § 1357(a)(2) (2000) (requiring reasonable belief by the arresting officer that the alien is illegally in the United States and likely to escape before a warrant can be obtained for the alien's arrest).

113. 8 U.S.C. § 1304(e) (2000).

114. Gonzales v. City of Peoria, 722 F.2d 468, 476-77 (9th Cir. 1983).

States.[115] Additionally, the Ninth Circuit held that a violation of section 1325 for illegal entry was not a continuing offense.[116] This is important for states that only authorize officers to make warrantless arrests for offenses occurring in the officer's presence.[117]

In the absence of a 287(g) contract, state and local police must be able to distinguish between civil and criminal violations and the relevant evidence pertaining to each. However, even when local officers are granted authority to make arrests for civil violations under INA 287(g), they must understand the judicial precedent and Fourth Amendment concerns pertaining to immigration violations. Thus, there are true concerns whether state and local law enforcement will have adequate training to enforce all areas of the INA authorized by 287(g). These concerns serve as the basis for why Florida has limited its local enforcement of federal immigration regulations to counter-terrorism and domestic security efforts.

C. Equal Protection and Racial Profiling

There is also strong opposition to local enforcement of federal immigration laws because of fear of civil rights violations due to racial profiling. Specifically, many are worried that persons will be stopped solely because they look Arabic or Hispanic and then questioned about their current immigrant status.[118] Racial profiling is a violation of the Fourth Amendment.[119] Stopping a driver solely on the basis of his Arabic or any other ethnic descent is unconstitutional. State law enforcement must first have "reasonable suspicion" that a person is an illegal alien to make a stop.[120] They may not arbitrarily stop all persons of Hispanic, Arabic, or any ethnic descent based solely on their appearance.[121] "There can be no question that a seizure based

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115. *Id.*

116. United States v. Rincon-Jiminez, 595 F.2d 1192, 1194 (9th Cir. 1979).

117. *See Gonzales*, 722 F.2d at 475-76.

118. *See* Vargas, *supra* note 48, at 796 (describing situation in Chandler, Arizona, in 1997 where the city settled a suit for $400,000 as a result of improper investigation by local police officers relating to immigration).

119. Actually, there is some authority supporting some forms of racial profiling. In *Brown v. City of Oneonta*, 221 F.3d 329, 334 (2d Cir. 2000), police were allowed to question over two hundred African-American students about a burglary and assault without once questioning a white person. Since the victim had identified the assailant as a young, African-American male with a cut on his hand, this "old-fashioned dragnet" police technique was held to not violate the Equal Protection Clause in this particular instance. Akram & Johnson, *supra* note 4, at 335-36. Therefore, there is some authority that a dragnet technique such as this can be used to search for terrorists linked to 9/11. We know that they were surely Muslims, so it can be argued that *Brown* provides authority for racial profiling. However, to target an entire minority group across the entire country would be obviously over-inclusive. *Brown* focused on an isolated event within the city of Oneonta. If *Brown* were used to provide legal support for the racial profiling of Arabs and Muslims that *might* be linked with the terrorist events surrounding September 11, 2001, over one million people of Arab ancestry in the United States would immediately feel threatened. *Id.*

120. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968).

121. 1996 DOJ OPINION, *supra* note 33 at II.C.1.b. (citing United States v. Brignoni-Ponce, 422 U.S. 873 (1975)).

solely on race or ethnicity can never be reasonable."[122] If an officer makes a stop based exclusively on someone's race, the Equal Protection Clause of the Constitution has been violated.[123]

There is fear, however, that local police will use the fact that a person looks Arabic as grounds for "reasonable suspicion." "The zeal to enforce immigration laws could lead unwittingly to racial profiling."[124] Ultimately, the fear is that if local officers are given blanket approval to arrest for immigration violations, then "every traffic stop would become an immigration-papers stop, leading to potential civil rights violations against members of ethnic groups."[125]

However, even if racial profiling is used correctly, it is often criticized as a poor law enforcement technique. It often alienates minority communities who often are the most helpful to law enforcement. Therefore, those of Arab and Muslim descent who could be most useful in investigating these terrorist events are being discouraged from assisting law enforcement for fear of deportation or arrest.[126] Ultimately, we are treating those of Arab or Muslim ancestry as not complete and full members of the United States of America.[127]

D. Are We Attacking the Wrong People? Undocumented Workers vs. the Terrorists

The request for local law enforcement to help enforce federal immigration laws is a direct response to the tragedy of September 11, 2001. If local police had been able to stop and detain aliens for immigration law violations, only three out of the nineteen hijackers would have possibly been arrested. The other sixteen had proper documentation.[128] Terrorists who intend on committing acts like America witnessed on September 11th often have the resources and intelligence to maintain proper immigration status. Instead, this policy is targeting the restaurant worker, orange grove farmer, hotel bellhop, or otherwise law-abiding undocumented alien.

Undocumented workers comprise about four percent of the workforce, but are mainly concentrated in a few particular industries, including construction, hospitality, textiles, meatpacking, and agriculture.[129] These workers often provide services that have benefited American citizens. This includes cheap food, as a result of undocumented agricultural workers, and affordable hotel service.[130] Arguably, these workers greatly impact our

122. Farm Labor Org. Comm. v. Ohio State Highway Patrol, 991 F. Supp. 895, 901 (N.D. Ohio 1997).
123. *Id.* at 902 (citing United States v. Avery, 128 F.3d 974, 985 (6th Cir. 1997)).
124. Vargas, *supra* note 48, at 821.
125. Hawley, *supra* note 65, at 6.
126. Akram & Johnson, *supra* note 4, at 340-41.
127. *Id.* at 341.
128. *From Community Policing to Community Profiling*, *supra* note 100.
129. Vargas, *supra* note 48, at 780.
130. *See id.*

economy. If we target these employees, who will take their jobs? Thus, there is valid concern that the use of local law enforcement to enforce immigration laws is targeting the wrong group of people in our efforts to strengthen domestic security. Instead, we should target terrorists before they enter the country through resources such as the CIA. Due process and civil liberty violations are more likely to occur if we target aliens that are already in this country.

V. CONCLUSION

> *"Immigration is not a problem to be solved. It is the sign of a confident and successful nation. And people who seek to make America their home should be met in that spirit by representatives of our government. New arrivals should be greeted not with suspicion and resentment, but with openness and courtesy."*[131]
>
> President George W. Bush
> July 10, 2001
> Ellis Island, New York

America's philosophy on immigration changed drastically just a few months after President Bush spoke these words. September 11, 2001, marked the day when America changed from a nation of immigrants to a nation of suspects. As America has scrambled to strengthen homeland security, immigration has seen significant changes. And rightly so. The individuals who crashed into the Twin Towers and the Pentagon killing thousands of people were not American citizens, but foreign aliens. Thus, as the U.S. attempts to strengthen domestic security, improving immigration enforcement has become an important concern.

Particularly, the federal government has turned to state and local law enforcement for help in enforcing federal immigration regulations. ICE is severely understaffed and simply lacks the manpower for proper immigration enforcement. Therefore, it was only logical for the federal government to turn to the states for help. Although states are federally preempted from enforcing civil regulations of the INA, due to the complexity of its nature, INA 287(g) has provided a mechanism for states to contract with the federal government to enforce all areas of the INA. Although Florida and Alabama have been the only states to take advantage of this provision, it appears that many states might follow if it proves to be successful.

However, there are concerns that come with state and local law enforcement of federal immigration laws. There are questions of whether community policing efforts will be jeopardized. In addition, there is doubt

131. Statement by George W. Bush, July 10, 2001, *available at* http://www.immigrationforum.org/press/articles/062702_htm.

whether these local officers can receive adequate training in the details of the INA to prevent Fourth Amendment violations. Finally, many question whether local enforcement is targeting the wrong group of aliens—the undocumented, yet law-abiding aliens, working in various industries in the United States. Targeting these individuals does nothing to strengthen homeland security.

Homeland security is an important concern in today's tumultuous environment. However, immigration is a national interest as well. Therefore, states must consider carefully whether they want to begin enforcing federal immigration regulations. Although ICE desperately needs manpower, it might come at too great of a cost. So far it appears as though Florida has taken an appropriate approach by not trying to make arrests for all immigration violations but only those that directly relate to counter-terrorism. Alabama's broader approach raises more concerns; however, only time will truly tell. Ultimately, we must not compromise freedoms in our desire to enhance security. "Immigration is not a problem to be solved."[132] Immigration is our heritage.

April McKenzie

132. *Id.*