

Legal Issues in Local Police Enforcement of Federal Immigration Law

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Introduction

The question of whether and to what extent local police should be involved in the enforcement of federal immigration law has sparked considerable debate in the current political climate. Local police departments are no doubt fielding concerns from political leaders and residents about this issue and are struggling to determine how to respond. Some police departments may view civil violations of immigration law as being similar to violations of criminal laws, and thus consider immigration enforcement as inherent in their law enforcement role. They may also welcome a closer collaboration with federal authorities on these issues. At the same time, however, some police departments may view direct involvement in federal immigration law enforcement as being in tension with their traditional models of policing. Local enforcement of immigration law also does not mesh well with public safety models of policing, since immigrants commit criminal offenses at lower rates than their citizen neighbors¹ and local police are already charged with the task of arresting individuals who do violate criminal laws. In addition, local enforcement of immigration law does not appear to fit neatly into community-based models of policing. As many police departments and community advocates have observed, fear of deportation undermines the ability of police to garner trust in immigrant communities and dissuades residents from contacting the police to report crime or otherwise engage in problem-solving partnerships.²

Despite these disconnects, some localities have chosen to get involved in the direct enforcement of immigration law, either by asserting that they have the inherent authority to enforce federal immigration law or by entering into agreements with federal agencies. They have revised their policing model to focus on the enforcement of an entirely different set of laws. In doing so, however, some localities have not fully considered the legal challenges inherent in federal immigration law enforcement and the very real possibility that their actions may violate the rights of the residents in their communities.

This paper seeks to address these issues by delving into the legal complexities of local enforcement of immigration law and their implications for local liability. Who is directly affected by the local enforcement of immigration laws and what rights do they have? What legal issues do local police face if they become involved in enforcing immigration law on the street, in people's homes and workplaces, and in local jails? How is immigration enforcement different from criminal law enforcement? What kind of liability do localities expose themselves to by taking on immigration enforcement duties? To what degree can police count on other institutions to provide checks and balances that will mitigate these potential liabilities?

As this paper will show, immigration enforcement is a complex business. The nuances of immigration law and the changing demographics of American communities create an environment ripe for violation of the myriad rights of both immigrants of any status as well as citizens. The

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arrest, detention, and/or transfer of custody of citizens and residents with lawful immigration status, the use of racial profiling to target immigrants without status, and the unlawful arrests, stops, and searches of immigrants in their homes and communities all raise real risks of liability for localities. The role of enforcing federal immigration law essentially requires localities to become familiar with a completely different set of rules of engagement by officers, thereby blurring lines about permissible police action and leading to the violation of the rights of the residents of the communities they seek to protect and serve.

The ultimate choice of any locality on its role in immigration enforcement will involve a wide range of factors. As part of the calculus, localities should weigh the complexity of the immigration law enforcement task, the real risk that their actions will violate the rights of people in the community, and the resulting potential exposure to liability.

I. Rights, Status, and the Changing Demographics of Immigrants in the United States

Popular discussions of immigration enforcement tend to make three false assumptions about the people who will be affected by local enforcement of immigration law. First, they assume that noncitizens have little or no rights under local, state, and federal law. Second, they assume that the precise immigration status of individuals in the community will be easy to identify. Third, they assume that if enforcement does target an individual who has violated immigration law, only that individual will be affected by the enforcement action. Because of these false assumptions, the debate over local enforcement of immigration law fails to consider significant potential of liability for violations of the rights of community residents. This section of the paper clarifies the underlying misconceptions that frame the debate.

A. *The Rights of Immigrants in the United States*

Regardless of status in the United States, immigrants have numerous rights protected under the U.S. Constitution and local, state, and federal laws. Some people mistakenly believe that noncitizens have no rights under the U.S. Constitution because they lack citizenship. This is incorrect. Provisions under the U.S. Constitution that refer to “persons” rather than “citizens” apply to individuals regardless of immigration status. As the Supreme Court has explained, “[t]hese provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.”³ Immigrants in the U.S. are considered “persons” within the territorial jurisdiction for purposes of constitutional protections regardless of how they entered the U.S. or whether they have lawful immigration status.⁴ Under this reasoning, the Supreme Court has had occasion to uphold noncitizens’ rights under a variety of provisions for over a century, including but not limited to the Fourth Amendment,⁵ the Fifth and Sixth Amendments,⁶ and the Due Process and Equal Protection clauses of the Fourteenth Amendment.⁷

Some of the misconceptions over the constitutional rights of noncitizens may be due to a much more narrow debate over how the Fourth Amendment applies in immigration courts. For example, a split Supreme Court addressed the degree to which suppression rules would be re-

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laxed in the immigration court context.⁸ The majority denied suppression in the specific case, but went on to say that it did “not condone any violations of the Fourth Amendment that may have occurred” and explained that its “conclusions concerning the exclusionary rule’s value [in immigration court] might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.”⁹ It further noted that there had been no assertion that officers had violated the agency’s internal regulations or that there were any egregious violations of the Fourth Amendment or other rights involved in that particular case. Thus, as immigration enforcement has changed since this 1984 opinion, immigration practitioners still bring motions to suppress in immigration court, addressing the issues outlined by the Supreme Court. In any event, the decision was limited to the issue of suppression in immigration court. Nothing in the opinion addressed application of the Fourth Amendment to damage actions, and recent lawsuits have raised claims under the Fourth Amendment and other rights in the U.S. Constitution.

In addition to the rights under the U.S. Constitution, numerous rights and obligations also flow from federal statutes, from civil rights legislation such as the Civil Rights Act of 1964¹⁰ to immigrant-specific legislation such as discrete provisions within the Immigration and Nationality Act that specify rights and/or provide limits on government authority.¹¹ Federal regulations under these laws also provide immigrants with specific protections. At the state level, many states have constitutional provisions that may be more expansive than U.S. constitutional rights.¹² In addition, many states and localities have enacted laws to protect their residents that do not distinguish on the basis of immigration status. Local ordinances and regulations may also provide strict guidelines delineating permissible actions towards residents and their rights to redress violations.

Thus, local police departments will have to account for a plethora of constitutional provisions and laws that govern both the rights of immigrants and the obligations of law enforcement officials if they seek to expand their enforcement goals into the realm of immigration. To say that immigration enforcement is somehow made easier by differences in the rights of immigrants and citizens is extremely misleading. In many ways, law enforcement officers will have to contend with a more complex set of laws and regulations governing immigration enforcement and permissible state action than they usually contend with in their traditional criminal law enforcement activities.

B. Status and the Changing Demographics of Immigrants in the United States

Another common misconception that has framed the debate over local enforcement of federal immigration law is the idea that the changing demographic Americans are witnessing in their communities involves only immigrants without status and thus such individuals will be easy to target through police efforts. This idea is flawed for two interrelated reasons. First, most new immigrants in the U.S. have some form of legal status. Second, the status of each specific individual is not easily discernable.

Contrary to popular belief, much of the changing demographic that Americans have witnessed in recent years deals primarily with legal immigration to the United States. While the percent-

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age of foreign-born individuals in the United States has risen dramatically in the last thirty years, the vast majority of these individuals have lawful immigration status or citizenship. The percentage of foreign born in the United States population reached an historic low of 4.7 percent in 1970; today that share has climbed to approximately 12.5 percent of the population, or 38 million persons residing in the U.S.¹³ The U.S. Department of Homeland Security (DHS), which administers the programs that provide immigration status and citizenship to the foreign born, does not maintain statistics about the size of the different components of this population.¹⁴ However, reliable estimates place the percentage of citizens or lawful permanent residents at approximately 70 percent of the foreign born.¹⁵ The remaining 30 percent are unauthorized immigrants who overstayed their visas or those who entered the United States without permission. But even within this group, there are substantial numbers who have a form of lawful status or are on the verge of obtaining lawful status. About 300,000 have or will soon have Temporary Protected Status, a form of status that allows the person to work legally in the United States and that precludes detention.¹⁶ An additional 617,000 have completed every step of the legal immigration process, have official permission to work, and are on the verge of being provided with lawful permanent resident status.¹⁷ Thus, even among those who are labeled as “undocumented” or “illegal,” many have important intermediate forms of status.

These numbers call into question whether a community is correctly characterizing the new immigrants that are residing in or passing through their neighborhoods. Legal immigration continues at historically high levels. Each year, there are approximately one million new lawful permanent residents in the U.S.¹⁸ Added to these are 320,000 temporary workers and dependents on a path to legal residence.¹⁹ Over 72 percent of new immigrants each year have lawful status.²⁰ On top of these numbers of permanent residents, there are millions of foreign born who come to the United States on temporary visas, such as student visas, business visas, and tourist visas. Approximately 1.1 million students study each year on student visas.²¹ Tourism varies by the time of the year, but the latest statistics are a reminder of how many foreign born visit each year. In February 2008, hardly the top tourist month of the year, there were 3.3 million international visitors to the United States, a 15 percent increase over the previous year.²²

There is no doubt that in some parts of the country the demographic shifts from immigration are striking, and residents are grappling with these demographic changes²³. However, the changes may not reflect unauthorized immigration. In Virginia, for example, the fiscal years 2005 through 2007 brought in almost one hundred thousand new lawful permanent residents.²⁴ That number constitutes 1.2 percent of the entire population of the state of Virginia.²⁵ But these numbers are of lawful immigrants. While local residents might attribute changes in their environment to popular press discussions of illegal immigration, much of what they observe is legal immigration.

Moreover, there are no readily discernable factors that accurately indicate a person’s immigration status. Some people may believe that foreign language use, or a lack of English skills, is necessarily a sign of unauthorized immigration. However, foreign language use is high across the foreign-born population. The vast majority of the foreign born use a language other than Eng-

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lish in the home.²⁶ In addition, foreign language use is high among citizens. Nine percent of the native-born population over the age of five—twenty-three million Americans—speaks a language other than English at home.²⁷ Of these native-born citizens, most speak English. But 4.7 million report that they do not speak English “very well.”²⁸ Thus, use of a foreign language or lack of English skills does not necessarily mean that a person is likely to lack immigration status. Similarly, a person’s surname is also not an accurate indicator of unauthorized immigration. For example, while some localities particularly along the southern border might assume that a Spanish surname is an indicator of unauthorized immigration, such an assumption is baseless—nearly 15 percent of the U.S. population is of Hispanic origin and the majority of Hispanic residents are native-born U.S. citizens.²⁹

In summary, the categories of lawful immigration status are complex and commonly used indicators to determine which individuals fall into which categories will often prove false. Treading into the local enforcement of federal immigration law will therefore entail a significant risk of targeting residents with lawful status, including U.S. citizens, and may be motivated by false assumptions about the demographic changes in the community.

C. Mixed-Status Families and the Ripple Effect of Immigration Enforcement

Another common misconception related to the debate over local immigration enforcement is that the purported targets of these efforts are somehow isolated from the rest of the community by their lack of immigration status. There is no clear dividing line between citizens and noncitizens within most communities, however. Nearly one in ten U.S. families with children is a “mixed-status” family, i.e., a family with at least one noncitizen parent and at least one citizen child.³⁰ One in ten children living in the U.S. is a part of a mixed-status family.³¹ Approximately 85 percent of immigrant families (families with one noncitizen parent) are mixed-status families.³²

Thus, the arrest and detention of an immigrant may very well affect a citizen spouse or child. Recent studies and reports have noted the harms that U.S. citizen children have experienced when a parent is arrested and detained during a home raid or workplace raid.³³ The immediate harms may include unlawfully detaining U.S. citizen children³⁴ or leaving children unsupervised while their primary caregivers are detained.³⁵ Longer term effects for children and families may include socioeconomic hardship, school disruptions, and emotional trauma.³⁶

As a matter of liability, mixed-status families present local officials engaged in immigration enforcement with two kinds of problems. First, they may improperly detain citizens or lawful residents in the course of seeking a person without proper status. If they do so, they will be held accountable for treading on these residents’ right to liberty. Second, they may leave minors unsupervised as they detain their parents and thereby violate their general responsibility for the care and well-being of the children residing in the community. Simply put, immigration enforcement cannot proceed on the assumption that these U.S. citizen children will not be affected by their attempts to enforce immigration law.

Thus, immigration enforcement is made infinitely more complex by misconceptions about the well-ingrained legal rights of immigrants, the changing demographics of the immigrant pop-

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ulation, and the intertwined nature of immigrants and citizens in local communities. The complexities of immigration law make it very difficult for even the most experienced and well-trained federal immigration officers to follow the letter of the law. These underlying complexities are important for localities to consider when evaluating the legal risks of undertaking immigration enforcement.

II. Liability Issues in Local Police Enforcement of Immigration Laws

In the past year, as both the federal government and local authorities have stepped up immigration arrests, the methods for identifying, arresting, and detaining those charged with violations of the immigration laws have sparked significant litigation. These lawsuits range from class actions that challenge methods for arresting people in their homes or workplaces, to actions focused on the wrongful detention or deportation of a specific individual. Some of these actions involve police action outside of a correctional institution. Some involve sheriffs or wardens who are identifying or detaining suspected immigration law violators in the local jail.

This section of the paper serves to unpack the potential liability of state and local officials. First, it addresses the interplay between local and federal liability and how agreements between localities and the federal government affect local liability. Second, it takes a closer look at the specific liability risks inherent in the local enforcement of federal immigration law and describes some of the lawsuits that community members and their advocates have initiated to challenge unlawful actions in the recent raids, arrests, detentions, and deportations.

A. *The Interplay Between Local and Federal Liability*

Police departments that engage in the enforcement of federal immigration law face potential damages, actions, and other lawsuits similar to those faced by federal authorities. A person who feels that a local law enforcement officer or police department violated his or her rights may sue to address those violations. The plethora of laws that may be at issue in a lawsuit may include but are not limited to numerous local and state laws, state constitutional provisions, Title VI of the Civil Rights Act of 1964, and various provisions of the U.S. Constitution, including the Fourth, Fifth, and Fourteenth Amendments. The exact contours of liability may depend both on the nature of the violations and the scope of the relationship between local and federal authorities.

States and localities that act on their “inherent authority” to enforce immigration law, i.e., independent immigrant enforcement efforts without a formal agreement with federal immigration authorities, also risk challenges to the underlying validity of their actions. Although this issue continues to be debated, there is substantial support for the view that localities are simply not permitted to engage in most forms of immigration law enforcement in the absence of a specific agreement with federal immigration authorities.³⁷ There are two interrelated bases for this view.

The first is the argument that states and localities have inherent authority to enforce federal law only as it pertains to criminal violations. Under this reasoning, states do not have inherent authority to enforce most immigration law because most immigration violations are civil, not criminal.³⁸ The second argument is focused on the issue of federal preemption. Given that the federal government has a comprehensive scheme for enforcing immigration law, there is a strong

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argument that direct local enforcement of the immigration law is preempted by federal law.³⁹ The only forms of federal criminal enforcement that states and localities are arguably authorized to engage in under this scheme are for specific federal crimes related to smuggling, transporting or harboring,⁴⁰ and illegal presence following reentry after a deportation order.⁴¹ But notably, even in these areas, Congress has imposed limitations. With respect to reentry, Congress included specific limitations on the reentry arrests, requiring that state and local officials first “obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into federal custody for purposes of deporting or removing the alien from the United States.”⁴² Indeed, the legislative history shows that Congress was careful not to provide broader state and local authority to enforce immigration laws.⁴³ As to smuggling, harboring, and transporting, there are arguments that these provisions are meant to be interpreted narrowly to reach classic smuggling operations and the harboring and transportation related to these operations. Localities that seek to enforce federal immigration law through their “inherent authority” risk making arrests that fall outside the scope of their actual legal authority.

For these reasons and others, some states and localities seek to establish an agreement with federal immigration authorities in an effort to prevent challenges to their authority. Section 287(g) of the Immigration and Nationality Act, a provision that Congress enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act, authorizes the federal government to enter into written memoranda of agreement (MOAs) with states and localities to provide for the local enforcement of federal immigration law.⁴⁴ These “287(g) agreements” permit “an officer or employee of the State or subdivision” to carry out the “function[s] of an immigration officer in relation to the investigation, apprehension, or detention of aliens”⁴⁵ An officer or employee “acting under color of authority” of a 287(g) agreement may be treated as federal employees for purposes of litigation under the Federal Tort Claims Act (FTCA), which provides for the United States to assume tort liability for actions taken by federal employees under the scope of their employment.⁴⁶

At first blush, these 287(g) agreements seem to provide some measure of protection for state and local resources if facing suit over unlawful acts stemming from federal immigration law enforcement. However, the devil is in the details. The FTCA does not cover claims that are brought directly under constitutional guarantees distinct from torts under state law.⁴⁷ In addition, FTCA protections do not extend to “discretionary functions” or actions taken outside the scope of the officer’s employment.⁴⁸

Thus, lawsuits challenging a locality’s actions will inevitably focus on activities that lie outside the 287(g) agreement. The DHS Bureau of Immigration and Customs Enforcement (ICE) has specified that the “287(g) program is not designed to allow state and local agencies to perform random street operations” and “is not designed to impact issues such as excessive occupancy and day labor activities.”⁴⁹ ICE guidelines have clarified that “[p]olice cannot randomly ask for a person’s immigration status or conduct raids” and may not use traffic offenses as a pretext for questioning individuals about their immigration status.⁵⁰ Furthermore, 287(g) agree-

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ments do not cover conduct that constitutes racial profiling.⁵¹ State officers operating under a 287(g) agreement will not be treated as federal officers for purposes of the FTCA if they fail to follow these guidelines.

Thus, as a whole, 287(g) provides very limited protection to localities and their officers, and may even introduce new dangers in liability. Section 287(g) provides that states and localities may carry out its functions only “at the expense of the State or political subdivision” and only “to the extent consistent with State and local law.”⁵² At the same time, however, the officer or employee taking on this role will be “subject to the direction” of the Attorney General.⁵³ If federal officers, untrained in state and local law, direct a state or locality to participate in an operation or series of arrests in a way that is inconsistent with state and local law, there are no protections under 287(g). Thus, regardless of federal officials’ involvement, states and localities must assure that their practices comport with local and state laws, including state court rulings on state constitutional analogs to the Fourth and Fifth amendments, as well as other requirements under federal guidelines, federal statutes, and the U.S. Constitution.

B. Liability Risks: An Overview of Recent Lawsuits Challenging Immigration Enforcement Actions

As the overview above describes, the local enforcement of federal immigration law involves a minefield of potential litigation and liability for police departments and localities. The Lawyers Committee in San Francisco alone reports that it has settled eight cases over the last ten years for a total of \$642,500.⁵⁴ This section of the paper describes some of the most recent public lawsuits in varying locales that have exposed unlawful actions by states and localities, often in cooperation with or under direction of the federal government, when engaging in immigration law enforcement whether on the street, in people’s homes or workplaces, or in the local jail.

1. Liability Stemming from the Arrest and Detention of U.S. Citizens and Other U.S. Residents

Several localities have been sued in recent years due to the arrest and detention of U.S. citizens, lawful permanent residents, and other immigrants with lawful status. As explained above, immigration law is incredibly complex. Officers who make immigration arrests or detain individuals on the street, workplace, home, or jail will rarely have firsthand evidence of the status of a person. Instead, assuming there is a lawful basis for a stop or other questioning, they will be making judgments about whether the person is a citizen, an immigrant with some other form of lawful status, or an individual who lacks status altogether. These are not easy judgments and erroneous determinations create a risk of liability.

The first danger is of targeting U.S. citizens. This occurs when law enforcement officers improperly arrest and detain U.S. citizens for immigration violations or misidentify U.S. citizens in the local jail as noncitizens, holding and transferring them into immigration custody. While shocking, such occurrences are not uncommon. Citizenship law is complicated. Many persons born abroad are citizens as a result of the status of their parents or grandparents.⁵⁵ They may not know the details of their citizenship, or even that they are citizens. Other citizens do not carry or possess any proof of their status. As many as 13 million Americans do not have ready access

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to proof of citizenship (such as a birth certificate, U.S. passport, or naturalization certificate).⁵⁶ The problem is more pronounced for various segments of the population. Citizens with incomes under \$25,000 are twice as likely to lack citizenship documents as citizens with incomes above \$25,000.⁵⁷ Twenty-five percent of African Americans lack any form of government-issued photo identification.⁵⁸ As many as 32 million American women who have married do not have citizenship documents reflecting their current name.⁵⁹ Thus, lack of documentation does not necessarily mean that an individual is not a U.S. citizen. When a question about citizenship arises, however, there is no national database of citizens to resolve those questions. DHS can only answer questions about people who have been processed by that agency. Most citizens, however, have never had a file with DHS. DHS itself has reportedly detained and even deported U.S. citizens despite its own purported expertise in this area of law.⁶⁰ Similarly, local jails that attempt to engage in screening make the predictable error of issuing detainers on some citizens, improperly holding them for transfer into immigration custody instead of releasing them.⁶¹

A second danger is of arresting, detaining, holding, and transferring into immigration custody some immigrants with lawful immigration status who are not subject to removal. Immigrants who have been granted lawful permanent residence, for example, maintain that status regardless of whether their permanent resident card (or “green card”) itself is expired; only a final removal order can terminate lawful permanent residence status.⁶² Thus, many individuals with expired lawful permanent resident cards have diligently applied for and are still awaiting their replacement cards due to the government’s delay, as described in a recent lawsuit challenging DHS’s failure to provide cards in a timely manner for certain individuals.⁶³ In any event, such individuals still have lawful status and any false arrest and unlawful detention would be grounds for a lawsuit.

Similarly, individuals without lawful permanent residence status may nonetheless have other forms of immigration status that would make their arrest and detention on immigration grounds unlawful. For example, many individuals have been granted Temporary Protected Status (TPS), which is granted to persons who are from countries that are suffering from natural disasters or ongoing armed conflict or other extraordinary conditions.⁶⁴ It is available to persons who crossed the border without inspection and even to those with outstanding removal orders if they otherwise meet eligibility requirements.⁶⁵ The documentation for TPS, however, is chronically out of date. Each year, applicants must apply to renew their status.⁶⁶ The government does not process their applications in time, however, for them to have a new document before their current documents expire. Nonetheless, their status is considered valid and the government posts a notice in the federal register stating that employment authorization is automatically extended beyond the date on their existing cards.⁶⁷ Individuals with TPS are statutorily prohibited from being detained based on status.⁶⁸

Given the serious violations inherent in the arrest and detention of U.S. citizens and residents with lawful immigration status in the name of immigration enforcement, such actions carry serious liability risks. Recent lawsuits that have been made public chronicle outrageous cases of botched federal and local enforcement of immigration law against U.S. citizens and other resi-

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dents. In one recent case, federal and local Los Angeles officials, including the sheriff, were sued for improperly causing the detention and deportation of Pedro Guzman, a cognitively impaired United States citizen.⁶⁹ Mr. Guzman was serving time for a misdemeanor charge in a local jail when local criminal justice officials, through a special pilot project established through an MOA with DHS, misidentified Mr. Guzman as a noncitizen, placing an immigration detainer on him in the local jail and then transferring him to ICE, which eventually deported him—despite the fact that Mr. Guzman was born in the U.S.⁷⁰ Pedro Guzman’s case was a major news story since it took months for Mr. Guzman to be located and returned to his family.⁷¹ The particular facts of his case have yet to be fully developed, but it is possible that his cognitive impairment played some role in his deportation. If so, it would follow a reported pattern in which the cognitively impaired or mentally ill are misidentified as noncitizens.⁷²

In addition to actions resulting in unlawful deportation, unlawful stops, searches, questioning, arrests, and detention of U.S. citizens and residents also carry serious liability risks. In one recent case, filed as a class action against Maricopa County, Arizona, Maricopa County Sheriff’s Office, and Maricopa County Sheriff Joe Arpaio, four U.S. citizens and one individual with lawful status at the time of his arrest describe having been unlawfully stopped, detained, and questioned by Maricopa County Sheriff’s Office officials based on their efforts to enforce immigration laws through a 287(g) agreement.⁷³ In New Jersey, several U.S. citizens, lawful permanent residents, and an individual with TPS joined other immigrants challenging home raids conducted by ICE and the Penns Grove Police Department, describing the raids, questioning, seizure of documents, and/or arrests in their homes despite their lawful status.⁷⁴

These are only a few public examples of the myriad cases involving lawsuits against localities attempting to enforce complex immigration law. They add to the already long list of lawsuits against ICE practices that ensnare people with lawful status, including highly publicized lawsuits such as a damages action following the wrongful arrest and detention of a nine-year-old U.S. citizen⁷⁵ and a damages action with 114 administrative complaints challenging a workplace raid that involved the detention and search of scores of U.S. citizens and lawful permanent residents.⁷⁶ Police departments that engage in federal immigration law enforcement can hardly expect to be better at identifying individuals without lawful immigration status than federal immigration agents, and open themselves up to liability for violating the rights of community residents.

2. Liability Stemming from the Use of Racial Profiling as a Method of Enforcing Federal Immigration Law

Racial and ethnic profiling is a real risk in state and local immigration enforcement of federal immigration law. Enforcement without profiling requires some individualized suspicion related to the individual who is stopped and questioned or otherwise investigated. But what will constitute individualized suspicion? As explained above, immigration status is a complex legal issue. Local officers will not be able to “observe” an immigration violation the way they might observe a violation of criminal law. Under such circumstances, there is a serious risk that the grounds for suspicion will in fact be nothing more than a series of assumptions that begin with a profile

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about people who speak another language or have a particular racial or ethnic profile. Indeed, the federal government has long been criticized for using racial profiling in its efforts to enforce immigration law.⁷⁷ A statistical study of data gathered through the Freedom of Information Act found substantial evidence of profiling in the New York office of the Immigration and Naturalization Service, the precursor agency to DHS.⁷⁸ Such tactics may well be ingrained in certain federal immigration enforcement efforts.

Despite its ubiquitous nature, racial profiling is unlawful and has subjected law enforcement officers to liability.⁷⁹ Even localities engaged in racial profiling under the direction of federal immigration agents will not escape liability for these actions. Under 287(g) agreements, localities have no protection from claims that they have engaged in racial profiling. The 287(g) agreements have specifically provided that officers exercising authority under the MOA are bound by all federal civil rights statutes and regulations, explicitly including the U.S. Department of Justice 2003 guidance, “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies.”⁸⁰ As the federal guidance states: “Reliance upon generalized stereotypes is absolutely forbidden. Rather, use of race or ethnicity is permitted only when the officer is pursuing a specific lead concerning the identifying characteristics of persons involved in an identified criminal activity.”⁸¹

In the lawsuit against Maricopa County, its Sheriff’s Office, and Sheriff Arpaio, allegations of racial profiling are front and center. The plaintiffs allege that the defendants have engaged in a pattern and practice of racial profiling that includes the use of sweeps involving “pretextual and unfounded stops, racially motivated questioning, searches and other mistreatment, and often baseless arrests” as well as “widespread, day-to-day targeting and mistreatment of persons who appear to be Latino.”⁸² The named plaintiffs in the complaint detail several disturbing incidents where police officers targeted individuals with Latino appearance during sweeps and arrests.⁸³ The plaintiffs allege that these actions violate the civil and constitutional rights of the class, citing violations of constitutional rights including the right to equal protection and the prohibition against unreasonable search and seizure; violations of the prohibition against racial discrimination by federally funded programs in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d and its implementing regulations; and violations of the Arizona State Constitution Art. II, § 8, which provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”⁸⁴

Similarly, several immigrant plaintiffs brought a lawsuit against ICE agents and the mayor, police chief, and individual police officers in Danbury, Connecticut, raising claims under state and federal law.⁸⁵ The lawsuit challenges the “discriminatory and unauthorized enforcement of federal immigration laws against Latino residents” and alleges that the police “have repeatedly and knowingly made illegal civil immigration arrests, engaged in impermissibly discriminatory law enforcement, and retaliated against residents for expressive activities secured by the First Amendment.”⁸⁶ The lawsuit challenges the city’s discriminatory targeting of a group of day laborers as well as its use of racial profiling and pretextual stops to enforce civil immigration law, particularly in terms of the use of civil immigration violations found in the National Crime In-

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formation Center database to make unauthorized civil immigration arrests.⁸⁷ Because Danbury has taken on these actions without engaging in any 287(g) agreement with federal immigration officials, the lawsuit raises federal preemption arguments in addition to the other legal claims.⁸⁸

Racial profiling is also the focus of a lawsuit against Sonoma County and the Sonoma County Sheriff's Department in Sonoma County, California. The lawsuit, brought by several individuals and the Committee for Immigrant Rights of Sonoma County, alleges that sheriff's deputies, both with and without assistance from DHS immigration agents, "use race as a motivating factor in traffic stops and other detentions," unlawfully targeting, interrogating, and detaining Latino residents of Sonoma County for purposes of immigration enforcement.⁸⁹ The lawsuit challenges the authority of the county to engage in this immigration enforcement as well as the county's denial of the constitutional, statutory, and regulatory rights of immigrants once held in the county jail for immigration purposes.⁹⁰

Allegations of racial profiling and bias have also been raised in the context of identifying—and misidentifying—individuals as deportable immigrants while in criminal custody in local jails. The lawsuit against the Los Angeles County Sheriff's Department for the deportation of a U.S. citizen alleges that the plaintiff, Mr. Guzman, "was selected for interview [by the local law enforcement officer who works with DHS] based solely on his perceived race, ethnicity and national origin" and that the Los Angeles County Sheriff's Department thus "unconstitutionally discriminated against plaintiff Guzman on the basis of his race and ethnicity...by causing or participating in the illegal deportation of Mr. Guzman."⁹¹ The lawsuit also alleges inadequate training of the local law enforcement officials.⁹²

Given the complexities of immigration law, it may not be uncommon for federal immigration agents and local police officers alike to fall back on racial profiling tactics to identify people who may be in violation of civil immigration law. Once such tactics are used, the violations may be widespread, as the plaintiffs in these lawsuits attest. Thus, states and localities that are considering whether to engage in federal immigration law enforcement must question how their officers will be able to conduct these activities and identify individuals who have violated immigration law without engaging in racial profiling.

3. Liability Stemming from Unlawful Arrests, Searches, and Seizures and Other Common Immigration Enforcement Tactics

In addition to the problems described above, local police also face a substantial risk of liability in performing immigration tasks due to the differing rules of engagement between traditional police work and immigration law enforcement. As police departments are well aware, the laws of criminal enforcement are complex and regular training is essential to ensure that rights are respected and evidence is admissible in any subsequent prosecution. Adding immigration enforcement into this mix, which differs in substantial ways from what is considered permissible police conduct in the criminal investigation context, changes the rules of engagement. Violating these complex rules could lead to significant liability for localities.

A key area of confusion for local police who have been involved in home raids and arrests involves the scope of the arrest warrant. In the criminal sphere, an arrest warrant is issued by a

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judge upon a showing of probable cause.⁹³ The underlying information for the warrant is likely to be supplied by an affidavit of an officer who has investigated the case and can provide sworn testimony about the probable cause for believing that the target has committed a crime.⁹⁴ The arresting officer may go to the home to execute the warrant and is expected to follow a knock and announce procedure.⁹⁵ If the suspect does not open the door, the officer may force open the premises and arrest the individual named in the warrant.⁹⁶ Once arrested, the individual is provided with a right to counsel and will be arraigned within a short time.⁹⁷ If there is a major mistake in the original ground for the arrest, it may well be discovered by the prosecutor and defense lawyer, and lead to a dismissal of the charges.

Consider the contrasting rules and institutional structure for an immigration arrest. An administrative warrant is issued by one of a wide array of immigration officers, often on the basis of limited paper information. There is no process for a sworn statement reviewed by a neutral judge or other officer. The warrant may be based on data that is old and out of date.⁹⁸ Once the warrant is prepared, the officers may go to the place believed to be the home of the person named in the warrant. They do not have the right, however, to enter the home without consent.⁹⁹ Once they arrest the individual on civil immigration grounds, they may detain the person and there is no right to an attorney at government expense.¹⁰⁰ As a result, it is very possible that a mistake will go undetected and that an individual who was not in fact subject to arrest will remain detained.

Because officers do not have the right on an administrative warrant to enter a home without consent, the key to the execution of an immigration home arrest focuses on the issue of consent. When an individual sees a police officer at her door, however, she may assume that she has no choice in the matter. A person who consents believing that the police would otherwise be authorized to gain entry forcibly cannot be said to have consented. Police officers may face similar confusions, not understanding the limitations of an administrative warrant. When the target of a warrant does not answer the door, for example, local police might presume that they are free to force their way into a home. Similarly, they may presume that the warrant bears the safeguards and relative reliability of the criminal law system and may be surprised to find that the person specified in the administrative warrant is not the person they find in the targeted home. Simply put, the “warrant” for an immigration arrest—a defining instrument of police authority under other regimes—is a highly misleading document for police who are accustomed to enforcing criminal laws.

Thus, it comes as no surprise that home raids have sparked litigation over the tactics in executing administrative immigration warrants or otherwise attempting to enter homes and arrest individuals without a valid warrant. In Minnesota, a group of U.S citizens, lawful permanent residents, and other immigrants filed a lawsuit challenging the legality of methods used by ICE and several local law enforcement officials as part of “Operation Crosscheck.”¹⁰¹ Through this operation, an officer with Kandiyohi County Probation Service “collected information regarding persons under her supervision who, in her determination, had been ‘born in foreign countries’ and concluded were ‘here illegally.’”¹⁰² She contacted ICE officials in Minnesota with a “‘dossier of foreigners’ for their inspection.”¹⁰³ ICE and local law enforcement officers from several area

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police departments used this information to engage in warrantless home raids that resulted in the unlawful arrest and detention of numerous individuals, including children.¹⁰⁴ The lawsuit asserts that ICE and the local law enforcement officers violated the plaintiffs' constitutional and statutory rights through these warrantless arrests, searches, and seizures and other unlawful practices during the raids.¹⁰⁵

Similar lawsuits have also arisen in response to home raids as part of "Operation Return to Sender," a "fugitive" enforcement action that targets immigrants who have been ordered deported but have not left the country. In New Jersey, for example, a group of U.S. citizens, immigrants with lawful status, and other immigrants filed a lawsuit challenging the legality of methods used by ICE and local police in carrying out "Operation Return to Sender."¹⁰⁶ According to the lawsuit, the operation was carried out unlawfully and in fact did not target these alleged absconders. The complaint alleges that the agents used deceptive tactics or force to gain entry into the home and proceeded to interrogate everyone in the home without any individualized suspicion.¹⁰⁷ The complaint further alleges that these operations are conducted without adequate prior investigation, thereby leading to the harassment of people without reasonable cause to expect a "fugitive" to be in the relevant location.¹⁰⁸ Many of the individuals were wrongly arrested despite having valid status and/or otherwise treated harshly while detained.¹⁰⁹ For these violations of their rights, the plaintiffs are seeking compensatory and punitive damages as well as injunctive relief under federal and state constitutional law.

A similar lawsuit was filed in New York as a class action, also challenging ICE's tactics against residents under "Operation Return to Sender."¹¹⁰ The complaint alleges that the agents used deceptive tactics—including announcing themselves as "police"—during predawn raids in people's homes.¹¹¹ The complaint further notes the lack of consent in ICE's entry as well as the agents' questioning and rough treatment of residents who were not listed as "fugitives."¹¹² Notably, the complaint cites the statements of public officials within Nassau County government expressing their frustration with ICE. In a public letter to the local Agent-In-Charge of ICE, Nassau County Commissioner of Police Lawrence W. Mulvey stated that ICE had misled the Nassau County Police about the nature of the raids and that the people arrested were not the purported targets of the raids.¹¹³ Noting that the ICE agents acted with a "cowboy mentality," Police Commissioner Mulvey criticized the inaccurate information they used for the investigation, including their use of incorrect addresses for the targeted homes and, in one instance, their attempt to look for a 28-year-old suspect using a photograph of the suspect when he was seven years old.¹¹⁴

The inaccuracies that plagued these home raids described in these lawsuits are not isolated. A study by the DHS Inspector General has observed that the data relied upon by ICE's fugitive teams is inaccurate in up to 50 percent of cases.¹¹⁵ Community groups have struggled to educate residents about their rights under the varying laws, but as the lawsuits demonstrate, many individuals are afraid and feel coerced when confronted with predawn operations at their homes. Local police departments may seek to consider whether to get involved in any such operations given the inaccurate and incomplete information and unlawful practices that are often involved.

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4. Other Areas of Local Involvement in Potential Litigation

While many of the most recent lawsuits have focused on the problems described above, the local enforcement of federal immigration law may lead to numerous other types of unforeseen areas of liability and increased involvement in litigation. These include but are not limited to litigation over the conditions of confinement, the treatment of minors, the release of information about the policies and practices of the police department, and increasing involvement in immigration court litigation.

First, localities face considerable litigation concerning the conditions of confinement in local area jails that hold immigrant detainees. While localities may enter into formal agreements with the federal government to hold immigrant detainees, the federal government has pointedly argued that the states and localities that agree to hold detainees are solely responsible for the quality of their care under applicable intergovernmental service agreements and contracts.¹¹⁶ They argue that these state and local facilities are “independent contractors” and are therefore not within the scope of the FTCA.¹¹⁷

Second, localities must face the real and pressing question of how children will be treated if and when police conduct arrests and raids. ICE has been highly criticized for detaining sole caregivers and children present during raids. For example, during a workplace raid in New Bedford, Massachusetts, community residents complained that ICE had given little notice to social welfare agencies and a significant number of children were left unsupervised while their parents were detained and even transferred out of state.¹¹⁸ In another example involving a highly publicized home raid that resulted in a lawsuit, ICE agents arrested and detained a nine-year-old U.S. citizen for twelve hours, after his father showed the agents the child’s U.S. passport and asked to arrange for someone to watch him.¹¹⁹ In the Minnesota lawsuit challenging “Operation Cross-check,” sixteen children are included as plaintiffs challenging warrantless home raids in which the children themselves were arrested and detained.¹²⁰ These types of acts have instigated lawsuits and will no doubt result in liability risks for states and localities that engage in similar practices.

Third, many localities have been drawn into “freedom of information” litigation. In the Danbury lawsuit, for example, the immigrants’ lawyers filed a state freedom of information law request to obtain documents related to the arrest of a group of day workers.¹²¹ The hearing on the request involved testimony by the city police chief, the chief of detectives, the mayor’s chief of staff, and the deputy corporation counsel.¹²² In some of these freedom of information cases, the state may not be free to defend the action as it sees fit. In one case, the federal government appeared in the state freedom of information action to present the position of the United States in opposition to release of the records that the sheriff used to place an immigration detainer on an individual who had a “hit” on the NCIC database.¹²³ Ultimately the state was ordered to make the disclosure.¹²⁴ But in the meantime, the litigation was prolonged by the federal position against release of information.

Fourth, localities may find themselves being drawn increasingly into immigration court. Immigration proceedings differ significantly from criminal proceedings. In most cases, the court

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decides a binary question—whether to deport or not deport. There is no opportunity to plead to reduced charges or otherwise achieve compromise. That means that in cases where the immigration law offers no relief if the case goes forward, there is a premium on proving that the arresting officers violated applicable regulations or otherwise made a wrongful arrest. Police errors are therefore more likely to be at the center of attention. This issue may arise in two different ways. First, an individual may move to terminate the proceedings based on an argument that the officer violated applicable regulations.¹²⁵ This kind of claim necessarily involves questions about what happened in connection with the arrest. It is therefore standard procedure in these kinds of cases to subpoena the officer to testify about the arrest. Secondly, immigration cases, like criminal cases, may involve motions to suppress evidence, such as statements made by the person arrested or documents obtained through the arrest.¹²⁶ These motions also involve subpoenas of the arresting officers to inquire into the circumstances surrounding the particular arrest but may also involve an inquiry into the general practices of the arresting agency. Thus localities may find the actions of their officers and their general practices and policies increasingly at issue in immigration court.

Conclusion

Many of the issues surrounding state and local liability for immigration enforcement have yet to be resolved. Indeed, some of these issues may not be resolved for many years as immigration enforcement practices change and as cases work their way through the courts. But the risks for states and localities are very real. These risks must be considered as states and localities decide whether to take on enforcement of immigration law.

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Endnotes

¹ See Kristin F. Butcher & Anne Morrison Piehl, *Crime, Corrections, and California: What Does Immigration Have to Do With It?* CALIFORNIA COUNTS: POPULATION TRENDS AND PROFILES (Feb. 2008), available at http://www.ppic.org/content/pubs/cacounts/CC_208KBCC.pdf (last visited July 25, 2008); Kristin F. Butcher & Anne Morrison Piehl, *Why Are Immigrants' Incarceration Rates So Low? Evidence on Selective Immigration, Deterrence, and Deportation* (Nat'l Bureau of Econ. Research, Working Paper No. 13229, 2007); Daniel Mears, *Immigration and Crime: What's the Connection?* 14 Fed. Sent. Rep. 284 (2002).

² APPLESEED, FORCING OUR BLUES INTO GREY AREAS: LOCAL POLICE AND FEDERAL IMMIGRATION ENFORCEMENT 10 (2008), available at http://www.appleseednetwork.org/Portals/0/Reports/Forcing_Our_Blues_Into_Gray_Areas_2008.pdf (last visited July 25, 2008).

³ *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

⁴ See *Plyer v. Doe*, 457 U.S. 202, 210-212 (1982).

⁵ See, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

⁶ See, e.g., *Wong Wing v. United States*, 163 U.S. 228, 237 (1896).

⁷ See, e.g., *Plyer*, 457 U.S. at 202-230; *Graham v. Richardson*, 403 U.S. 365, 370 (1971); *Yick Wo*, 118 U.S. at 369.

⁸ *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984).

⁹ *Id.*

¹⁰ See *Lau v. Nichols*, 414 U.S. 563 (1974).

¹¹ See *Zadvydas v. Davis*, 533 U.S. 678 (2001).

¹² See Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 Miss. L. J. 417 (2007) (identifying differences between federal and state search and seizure law).

¹³ AARON TERRAZAS, JEANNE BATALOVA, & VELMA FAN, MIGRATION POLICY INSTITUTE, FREQUENTLY REQUESTED STATISTICS ON IMMIGRANTS IN THE UNITED STATES (Oct. 2007), available at <http://www.migrationinformation.org/USfocus/display.cfm?id=649#1>.

¹⁴ NANCY F. RYTINA, U.S. DEPT. OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF LEGAL PERMANENT RESIDENT POPULATION AND POPULATION ELIGIBLE TO NATURALIZE IN 2004, 1 (Feb. 2006), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/LPRest2004.pdf> (last visited July 25, 2008).

¹⁵ See TERRAZAS ET AL., *supra* note 13.

¹⁶ See DAVID A. MARTIN, MIGRATION POLICY INSTITUTE, TWILIGHT STATUSES: A CLOSER EXAMINATION OF THE UNAUTHORIZED POPULATION (June 2005) at 7-8, available at http://www.migrationpolicy.org/pubs/MPI_PB_6.05.pdf (last visited July 25, 2008).

¹⁷ See *id.* at 6.

¹⁸ MIGRATION POLICY INSTITUTE, ANNUAL IMMIGRATION TO THE UNITED STATES: THE REAL NUMBERS (May 2007) at 1, available at http://www.migrationpolicy.org/pubs/FS16_USImmigration_051807.pdf (last visited July 25, 2008).

¹⁹ *Id.*

²⁰ *Id.*

²¹ U.S. DEPT. OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS: 2006, TEMPORARY ADMISSIONS TABLE 32, available at <http://www.dhs.gov/ximgtn/statistics/publications/YrBk06NI.shtm> (last visited July 25, 2008).

²² U.S. DEPT. OF COMMERCE, OFFICE OF TRAVEL & TOURISM INDUSTRIES, INTERNATIONAL VISITATION UP 15 PERCENT IN FEBRUARY 2008 (May 20, 2008), available at <http://tinet.ita.doc.gov/tinews/archive/tinews2008/20080520.html> (last visited July 25, 2008).

²³ See Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 593-595 (2008).

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²⁴ KELLY JEFFERYS & RANDALL MONGER, U.S. DEPT. OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, US LEGAL PERMANENT RESIDENTS: 2007 (Mar. 2008), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/LPR_FR_2007.pdf

²⁵ U.S. CENSUS BUREAU, STATE & COUNTY QUICK FACTS, VIRGINIA (2006), available at <http://quickfacts.census.gov/qfd/states/51000.html> (last visited July 25, 2008).

²⁶ U.S. CENSUS BUREAU, 2006 AMERICAN COMMUNITY SURVEY, TABLE B16005, NATIVITY BY LANGUAGE SPOKEN AT HOME BY ABILITY TO SPEAK ENGLISH FOR THE POPULATION 5 YEARS AND OLDER (2006), available at <http://factfinder.census.gov/http://factfinder.census.gov/home/saff/main.html?lang=en> (last visited July 25, 2008) (reporting that 84.4 percent of the foreign born speak a language other than English at home).

²⁷ *Id.* (reporting that 23.4 million Americans over the age of five speak a language other than English at home).

²⁸ *Id.*

²⁹ PEW HISPANIC CENTER, STATISTICAL PORTRAIT OF HISPANICS IN THE UNITED STATES, 2006 (January 23, 2008), available at <http://pewhispanic.org/factsheets/factsheet.php?FactsheetID=35> (last visited July 25, 2008).

³⁰ MICHAEL E. FIX & WENDY ZIMMERMAN, ALL UNDER ONE ROOF: MIXED-STATUS FAMILIES IN AN ERA OF REFORM I (Oct. 6, 1999), available at <http://www.urban.org/UploadedPDF/409100.pdf> (last visited July 25, 2008).

³¹ *Id.* at 2.

³² *Id.*

³³ See, e.g., David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391, 403-406 (2008); RANDY CAPPS, ROSA MARIA CASTAÑEDA, AJAY CHAUDRY, & ROBERT SANTOS, NAT'L COUNCIL OF LA RAZA & THE URBAN INST., PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN (2007), available at http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf (last visited July 25, 2008).

³⁴ See, e.g., *Reyes v. Alcantar*, No. 4:07-cv-022771 (N.D. Cal., filed Nov. 19, 2007) (damage action involving the unlawful detention of a U.S. citizen child when his father was arrested during a home raid).

³⁵ See CAPPS ET AL., *supra* note 33, at 37-38 (describing cases in which children were left unsupervised when their parents were detained during raids).

³⁶ See *id.* at 43-54 (describing the long-term effects of immigration enforcement on children and families); Thronson, *supra* note 33, at 403-418 (same).

³⁷ For further discussion of the legality of state and local enforcement in the absence of a specific agreement under INA 287(g), see LISA M. SEGNETTI, STEPHEN R. VINA, & KARMA ESTER, CONGRESSIONAL RESEARCH SERVICE, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL ENFORCEMENT (August 14, 2006), available at <http://www.ilw.com/immigdaily/news/2006,0912-crs.pdf> (last visited July 25, 2008); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PENN. J. CONST. L. 1084 (2004).

³⁸ See APPLESEED, *supra* note 2, 13-16.

³⁹ See, e.g., CRISTINA RODRÍGUEZ, MUZAFFAR CHISHTI, & KIMBERLY NORTMAN, MIGRATION POLICY INSTITUTE, TESTING THE LIMITS: A FRAMEWORK FOR ASSESSING THE LEGALITY OF STATE AND LOCAL IMMIGRATION MEASURES 32-37 (2007); Wishnie, *supra* note 37.

⁴⁰ 8 U.S.C. § 1324(c). But note that it is debatable whether this provision extends to state and local officers since the provision does not mention state and local officers and could be read as reaching federal officers other than immigration agents.

⁴¹ 8 U.S.C. § 1252c(a).

⁴² *Id.*

⁴³ See Wishnie, *supra* note 37, at 1092-93.

⁴⁴ 8 U.S.C. § 1357(g)(1).

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⁴⁵ *Id.*

⁴⁶ *Id.* § 1357(g)(7).

⁴⁷ See Jeremy Travis, *Rethinking Sovereign Immunity After Bivens*, 57 N.Y.U.L. REV. 597, 650-51 (1982).

⁴⁸ 28 U.S.C. § 2680(a); see also Travis, *supra* note 47, at 650-51.

⁴⁹ *Ortega et al. v. Arpaio et al.*, No. CV 07-02513-PHX-MHM (D. Ariz., filed July 16, 2008) (quoting U.S. DEPT. OF HOMELAND SECURITY, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, FACT SHEET: SECTION 287G OF THE IMMIGRATION AND NATIONALITY ACT (September 24, 2007)).

⁵⁰ *Id.*

⁵¹ *Id.*; see also section B.2 *infra*.

⁵² 8 U.S.C. § 1357(g)(2).

⁵³ *Id.* § 1357(g)(3).

⁵⁴ Stephanie Ward, *Illegal Aliens on I.C.E: Tougher Immigration Enforcement Tactics Spur Challenges*, ABA JOURNAL (June 2008), available at http://www.abajournal.com/magazine/illegal_aliens_on_ice/ (last visited July 25, 2008).

⁵⁵ SungJee Lee, *The Parent/Child Relationship: Derivative Citizenship Through Parents*, 16 J. CONTEMP. LEGAL ISSUES 43 (2007).

⁵⁶ THE BRENNAN CENTER FOR JUSTICE, *CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 2* (Nov. 2006), available at http://www.brennancenter.org/page/-/d/download_file_39242.pdf (last visited July 25, 2008).

⁵⁷ *Id.*

⁵⁸ *Id.* at 3.

⁵⁹ *Id.* at 2.

⁶⁰ See Anna Gorman, *Immigration officials held U.S. citizen for two weeks*, LA TIMES (Oct. 28 2008), available at <http://www.latimes.com/news/printedition/california/la-me-deport28-2008oct28,0,4273833.story> (last visited November 19, 2008); Sandra Hernandez, *Detainee Tries To Prove He Is a U.S. Citizen; Birth Certificate Isn't Enough to Win Man's Release* (Nov. 4, 2008), at http://www.ijbblog.org/2008/11/_detainee_tries_to_prove_he_is.html; Darryl Fears, *Immigration Is Snaring U.S. Citizens In Its Raids*, WASHINGTON POST (Aug. 16 2008), available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/15/AR2008081503208.html>; Jacqueline Stevens, *Thin ICE*, THE NATION (June 5, 2008), available at <http://www.thenation.com/doc/20080623/stevens> (last visited July 25, 2008) (chronicling specific instances of U.S. citizens being detained and/or deported and estimating that “since 2004 ICE has held between 3,500 and 10,000 US citizens in detention facilities and deported about half”); see also NORTHWEST IMMIGRANT RIGHTS PROJECT, *U.S. CITIZEN AND ARMY VETERAN SPENDS NINE MONTHS IN DETENTION WHILE U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT DENIES DETAINING CITIZENS* (July 21, 2008) (describing the experience of Rennison Castillo, a U.S. citizen and veteran who was detained in a local detention facility, and noting that the Northwest Immigrant Rights Project has seen fourteen cases of U.S. citizens being detained by federal immigration officials in that local detention center alone since 2005); Marisa Taylor, *Feds admit mistakenly jailing citizens as illegal immigrants*, HOUSTON CHRONICLE (Feb. 14, 2008).

⁶¹ See, e.g., Rucks Russell, *American citizen held in county jail as illegal immigrant*, KHOU-TV (Oct. 17, 2008), at http://www.khou.com/topstories/stories/khou081017_mp-american-held-as-immigrant.121b56a52.html (last visited November 18, 2008); Paloma Esquivel, *Suit filed over disabled U.S. citizen's deportation ordeal*, LA TIMES (Feb. 28, 2008), available at <http://articles.latimes.com/2008/feb/28/local/me-guzman28>.

⁶² See *Matter of Lok*, 18 I&N Dec. 101 (BIA 1981), *aff'd*, *Lok v. INS*, 681 F.2d 107 (2d Cir. 1982).

⁶³ See *Pantoja-Castillo et al. v. Sanchez et al.*, No. 07-204 (S.D. Tex., filed Aug. 2, 2007).

⁶⁴ 8 U.S.C. § 1254a.

⁶⁵ *Id.*; 8 C.F.R. §§ 244.2, 244.3.

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⁶⁶ 8 U.S.C. § 1254a.

⁶⁷ For example, in the recent extension of TPS for Somalis, the U.S. Citizenship and Immigration Service posted a notice in the Federal Register stating: “Given the timeframes involved with processing TPS re-registration applications, the Department of Homeland Security (DHS) recognizes the possibility that re-registrants may not receive a new EAD until after their current EAD expires on March 17, 2008. Accordingly, this Notice automatically extends the validity of EADs issued under the TPS designation of Somalia for 6 months, through September 17, 2008 and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended.” 73 Fed. Reg 13245-01 (Mar. 12, 2008).

⁶⁸ 8 U.S.C. § 1254a(d)(4) (providing that a person with TPS “shall not be detained on the basis of the alien’s immigration status”).

⁶⁹ *Guzman v. Chertoff et al.*, No. 2:08-cv-01327-GHK-SS (C.D. Cal., filed Feb. 27, 2008).

⁷⁰ *Id.*

⁷¹ See Randal C. Archibold, *Deported in Error, Missing and Months Later Home*, N.Y. TIMES (Aug. 8, 2007); Stevens, *supra* note 60.

⁷² See Stevens, *supra* note 60 (reporting that the author identified thirty-one cases of citizens charged with removal, fourteen of whom were deported, and describing a case of a mentally ill woman who claimed to have been born in Paris); see also TESTIMONY OF KARA HARTZLER, FLORENCE IMMIGRANT AND REFUGEE PROJECT, U.S. HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON IMMIGRATION 14 (Feb. 13, 2008) (reporting that her office sees 40 to 50 detainees a month with possible citizenship claims).

⁷³ *Ortega et al. v. Arpaio et al.*, No. CV 07-02513-PHX-MHM (D. Ariz., filed July 16, 2008).

⁷⁴ *Argueta v. ICE*, No. 2:08-cv-01652-PGS-ES (D. N.J., filed May 22, 2008).

⁷⁵ *Reyes v. Alcantar*, No. 4:07-cv-022771 (N.D. Cal., filed Nov. 19, 2007).

⁷⁶ *United Food and Commercial Workers International Union v. DHS*, No. 2:07-cv-00188 (N.C.D. Tex., filed Sept. 12, 2007).

⁷⁷ See, e.g., Wishnie, *supra* note 37, at 1102-1113; Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Muslims and Arabs*, 58 N.Y.U. ANN. SURV. AM. L. 295, 316-355 (2002) (describing the targeting of Arabs and Muslims in immigration enforcement); Kevin R. Johnson, “The Case Against Race Profiling in Immigration Enforcement,” 78 WASH. U. L.Q. 675, 697-705 (2000) (describing the racial profiling of Mexicans and Central Americans in immigration enforcement)

⁷⁸ Wishnie, *supra* note 37, at 1109-1113.

⁷⁹ Michele Waslin, *Immigration Enforcement by Local Police: The Impact on the Civil Rights of Latinos*, NAT’L COUNCIL OF LA RAZA ISSUE BR. NO. 9 (Feb. 2003), available at <http://www.nclr.org/content/publications/detail/1390/> (last visited July 25, 2008) (outlining incidents of racial profiling by federal and local officials and listing successful lawsuits filed on behalf of the targets of racial profiling).

⁸⁰ See *Ortega et al. v. Arpaio et al.*, No. CV 07-02513-PHX-MHM (D. Ariz., filed July 16, 2008); see also U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (June 2003), available at www.usdoj.gov/crt/split/documents/guidance_on_race.pdf (last visited July 25, 2008) [hereinafter “GUIDANCE”].

⁸¹ See GUIDANCE, *supra* note 80, at 5.

⁸² See *Ortega et al. v. Arpaio et al.*, No. CV 07-02513-PHX-MHM (D. Ariz., filed July 16, 2008).

⁸³ See *id.*

⁸⁴ *Id.*

⁸⁵ *Barrera v. Boughton*, No. 3:07-cv-01436-RNC (D. Conn., filed Sept. 26, 2007).

⁸⁶ *Id.*

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⁸⁷ *Id.* Data indicate that police are on particularly shaky ground when relying on National Crime Information Center data in order to make an arrest. See HANNAH GLADSTEIN, ANNIE LAI, JENNIFER WAGNER, & MICHAEL J. WISHNIE, *BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE, 2002-2004*, 3 (Dec. 2005) (concluding that “[f]orty-two percent of all [National Crime Information Center] immigration hits in response to a police query were ‘false positives,’ where DHS was unable to confirm that the individual was an actual immigration violator”).

⁸⁸ *Id.*

⁸⁹ *Committee for Immigrant Rights of Sonoma County et al. v. County of Sonoma et al.*, No. 08-CV-4220-PJH (N.D. Cal., filed Sept. 5, 2008).

⁹⁰ *Id.*

⁹¹ *Guzman v. Chertoff et al.*, No. 2:08-cv-01327-GHK-SS (C.D. Cal., filed Feb. 27, 2008).

⁹² *Id.*

⁹³ See 1-2 CRIM. CONST. L. § 2.05.

⁹⁴ See *id.*

⁹⁵ See *id.* § 2.08

⁹⁶ See *id.*

⁹⁷ See 3-13 CRIM. CONST. L. § 13.03.

⁹⁸ See Raquel Aldana, *Of Katz and “Aliens”: Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1111-1113 (2008) (describing the inaccuracies in immigration records that often form the basis for administrative warrants, including those based on records of individuals with old deportation orders entered into the National Crime Information Center database); GLADSTEIN ET AL., *supra* note 87, at 3 (noting inaccuracies in information found on immigration violators in the National Crime Information Center database).

⁹⁹ See Letter of Michael Chertoff to Senator Christopher J. Dodd (June 14, 2007) (on file with author) (“[A] warrant of removal is administrative in nature and does not grant the same authority to enter dwellings as a judicially approved search or arrest warrant.”)

¹⁰⁰ See 8 U.S.C. §§ 1226 (providing Attorney General with authority to arrest and detain immigrants pending a decision on removal), 1362 (providing a statutory right to counsel “at no expense to the government”).

¹⁰¹ *Arias v. ICE*, No. 07-cv-01959-ADM-JSM (D. Minn., filed July 27, 2007).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Argueta v. ICE*, No. 2:08-cv-01652-PGS-ES (D. N.J., filed May 22, 2008)

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Aguilar v. ICE*, No. 07-cv-8224 (S.D.N.Y., filed Sept. 20, 2007).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

APPENDIX B

Legal Issues in Local Police Enforcement of Federal Immigration Law

¹¹⁵ See U.S. DEPT. OF HOMELAND SECURITY, OFFICE OF THE INSPECTOR GENERAL, ASSESSMENT OF UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT'S FUGITIVE OPERATIONS TEAMS 15 (Mar. 2007), available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-34_Mar07.pdf (last visited on July 25, 2008).

¹¹⁶ See *Barrera v. Boughton*, No. 3:07-cv-01436-RNC, Federal Defendants' Memorandum in Support of Motion to Dismiss (Feb. 1, 2008).

¹¹⁷ *Id.*

¹¹⁸ See Thronson, *supra* note 33, at 405-406.

¹¹⁹ *Reyes v. Alcantar*, No. 4:07-cv-022771 (N.D. Cal., filed Nov. 19, 2007).

¹²⁰ *Arias v. ICE*, No. 07-cv-01959-ADM-JSM (D. Minn., filed July 27, 2007).

¹²¹ See *Junta for Progressive Action et al. v. Danaher*, No. FIC 2007-416 (Conn. Freedom of Information Comm., filed Aug. 2, 2007) (on file with author).

¹²² Conversation with Michael J. Wishnie, June 16, 2008.

¹²³ Letter of Victoria Shin, Assistant United States Attorney to Mary E. Schwind, Freedom of Information Commission, re Dkt. No. FIC2007-136 (July 18, 2007).

¹²⁴ *El Badrawi v. Commission, State of Connecticut, Department of Correction*, (Freedom of Information Comm'n of the State of Connecticut, Dkt FIC 2007-136, Jan. 9, 2008) (on file with author).

¹²⁵ See, e.g., *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1994)

¹²⁶ See, e.g., *Almeida-Amaral v. Gonzales*, 461 F.3d 231 (2d Cir. 2006).