

Making Civil Liberties Matter in Local Immigration Enforcement

BY RAQUEL ALDANA

Every month, the United States Immigration and Customs Enforcement (ICE) Law Enforcement Support Center (LESC) responds to over 60,000 queries from local law enforcement about foreign nationals they encounter in the course of their daily duties.¹ In fiscal year 2005 alone, LESC responded to 676,502 such immigration queries,² representing an exponential increase from only 4,000 queries nearly a decade earlier.³ This trend coincides with the “force multiplier” that has resulted from the involvement of local law enforcement in enforcing federal immigration laws, particularly post 9/11.⁴ Thousands of local police, state troopers, correctional facilities staff, and other law enforcement personnel assist ICE to detect, arrest, detain, and turn over foreign nationals who are present in the United States in violation of civil or criminal immigration laws. To do so, local law enforcement agencies either rely on express statutory authority or claim inherent powers to enforce federal immigration laws. The claimed source of power to enforce immigration laws is relevant to assess local law enforcement’s legality and scope of authority to enforce federal immigration laws. In this paper, therefore, I first address the issue of source and scope of local powers to enforce federal immigration laws, as this is also pertinent to the discussion of civil liberties that belong to immigrants and citizens alike who encounter these practices. Next, I explain the civil liberties concerns that arise from local law enforcement’s involvement in immigration enforcement and offer recommendations for ensuring greater civil rights compliance by law enforcement agencies if they choose to enforce immigration laws. Finally, I explain immigrants’ rights during these police encounters.

I. The Source and Scope of Local Law Enforcement Agencies’ Power to Enforce Federal Immigration Law

Congress cannot compel local law enforcement to enforce immigration laws, but it can and has conferred express authority to permit federal local law enforcement officers to voluntarily enforce certain provisions of the Immigration and Nationality Act (INA). To date, Congress has chosen to confer this power only with respect to a limited number of criminal provisions in the INA (*see* subpart A below). In addition, in 1996, Congress authorized cooperation agreements between federal immigration and state law enforcement agencies, which have in some cases significantly expanded the scope of local immigration enforcement authority (*see* subpart C below). The newness of these cooperation agreements and the limited resources for their implementation are the reasons why most local law enforcement agencies still rely on claims of inherent authority to make arrests for violations of most federal immigration laws. This claimed inherent local law enforcement power to enforce federal immigration laws minimally is plagued with lack of clarity and, worse, its legality *per se* is still in question (*see* subpart B below).

In understanding this debate, therefore, it is important to understand the legality—and consequently the implicated civil rights of immigrants in relation to local law enforcement—of immigration laws. Finally, not all localities have heeded the call to enforce immigration laws for various policy reasons, including limited resources and concerns over hurting local police community relations with immi-

Raquel Aldana is a Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas.

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grant communities. Some of these cities, thus, have opted instead to enact so-called “sanctuary laws” to forbid all or certain types of local police collaboration with ICE. Since 1996, however, federal law bans state laws that seek to forbid state employees from reporting immigration violations to ICE (see subpart D below). The issue therefore becomes the need for local law enforcement to resolve these seeming conflicts between state and federal law.

A. Congressional Delegation of Authority to Local Law Enforcement to Enforce Specific Immigration Violations

Most provisions of the INA codifying immigration violations do not delineate which law enforcement officers have the authority to enforce them. A few sections, however, expressly assert that state and local officers have the authority to enforce them. These sections are:

- INA § 274: Arrest authority to enforce prohibitions against transporting and harboring certain aliens.⁵
- INA § 276: Authority to arrest and detain re-entry offenders; that is, previously deported immigrants with a felony conviction who are found present in the United States.⁶
- INA § 103(a)(8): Confers emergency powers on the Secretary of Homeland Security (DHS) to authorize “any State or local law enforcement officer” to enforce federal immigration laws in the event the Secretary certifies that “an actual or imminent mass influx of aliens arriving off the coast of the United States or near a land border” exists.⁷
- INA § 287(g): Authorizes immigration enforcement agreements between the Immigration and Customs Enforcement (ICE) and local law enforcement agencies (see subpart C below).

In addition to these provisions delegating specific immigration enforcement powers to local law enforcement, Congress has provided some resources to defer costs and for information sharing to facilitate cooperation between local and federal agencies. In 1994, Congress appropriated funds for the creation of the LESC to serve as the point of contact between police who apprehended possible noncitizen felons and ICE.⁸ In 1996, Congress authorized the Attorney General (now the Secretary of DHS) to make payments to the states for the detention of undocumented immigrants in nonfederal facilities.⁹ Then in 1998, Congress established Quick Response Teams (QRTs), used by INS and then ICE to respond to immigration arrests made by state and local police.¹⁰ Eventually, ICE discontinued QRTs, as such, and now offers states and localities enforcement assistance through various programs.

The selective nature of congressional delegation of immigration enforcement powers strongly suggests that Congress did not intend for local law enforcement to possess broader authority than that expressly provided. If such broader authority exists, then the express delegation would be superfluous.¹¹ The issue of whether states possess inherent authority to enforce immigration laws other than the authority expressly delegated by Congress is not settled, however. As the next section explains, the lack of clarity in this area of the law has led states and localities to reach contradictory conclusions on the issue.

B. Local Law Enforcement’s Inherent Authority to Enforce Immigration Law?

The question on inherent authority asks whether states have the power to make arrests for violations to either criminal or civil federal immigration law or both without express congressional

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authorization. To date, there is fierce disagreement on the legal response. While some defend states' inherent right to make both civil and criminal immigration arrests,¹² others conclude that no such state inherent power exists because the enforcement of immigration law is an exclusive federal power that must be enforced uniformly by one sovereign in light of immigration laws' implications on foreign policy.¹³ At a minimum, these scholars maintain that states can enforce federal immigration laws only to the degree that express congressional delegation authorizes.¹⁴

In practice, the legal resolution regarding the scope and nature of inherent local immigration enforcement authority does not apply to every encounter between noncitizens and local law enforcement. Much of local immigration enforcement occurs in the course of ordinary local policing work; e.g., during traffic stops or in the course of community policing functions or other criminal investigations. Thus, local law enforcement officers possess an independent state ground, even if pretextual, for detaining or even arresting the immigrant. As such, local law enforcement need not rely on any inherent immigration law enforcement authority to effectuate the detention or arrest. Moreover, almost always courts will treat inquiries, including by local law enforcement agents, into the detainees' immigration status as consensual encounters. Therefore, such inquiries do not constitute a separate immigration-related seizure, at least not under the Fourth Amendment. (*see* Part II.) Thus, in cases in which the immigrant is detained or arrested pursuant to independent state grounds, local law enforcement officers need not rely on the inherent authority doctrine at all to collaborate with ICE. Pretextual challenges to these types of encounters, moreover, are unlikely to succeed, at least under the Fourth Amendment (*see* Part II.) There may be other challenges to these types of encounters, such as the legality of including civil immigration violations in the NCIC databases, or racial profiling challenges under federal civil rights statutes (*see* Part II).

Still, generally, the relevance of inherent authority to enforce immigration law violations arises only when local law enforcement officers detain or arrest a person solely on the basis of an immigration violation. Such would be the case, for example, when police encounter passengers in a car during a routine traffic stop and detain or arrest the passengers, in addition to the driver, for immigration violations unrelated to the traffic stop. In such cases, neither Congress nor the courts, nor immigration federal agencies for that matter, have provided clear guidance to states on the issue of inherent authority.¹⁵

Congress's delegation of some immigration enforcement powers to states, without more, does not put to rest whether states are able to act beyond those delegated powers. The Supreme Court¹⁶ and several federal appellate courts, including the Second,¹⁷ Fifth,¹⁸ and Seventh Circuits,¹⁹ have long recognized that state law controls the validity of state law warrantless arrests for federal crimes, even when Congress has not directly authorized it. In the immigration context, however, only three federal circuit courts, the Ninth, the Tenth, and the Fifth, have weighed on the specific question of whether local law enforcement possesses inherent authority to make arrests for immigration offenses which have not been preempted by federal law.²⁰ A circuit split exists between the Ninth Circuit recognizing an inherent, nonpreempted local law enforcement power to make such arrests, but restricting it to violations of federal criminal immigration laws²¹ and the Fifth²² and Tenth Circuits²³ subsequently concluding similarly on the preemption issue, but without drawing the same distinction between civil and criminal offenses. In addition, the Third

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Circuit has recently upheld the legality of a warrantless arrest executed by local law enforcement for an immigration criminal violation without expressly addressing local law enforcement's authority to engage in that type of law enforcement in the first place.²⁴

The uncertainty of states' authority to make arrests for immigration violations has been made worse by conflicting opinions issued by the Office of Legal Counsel (OLC) on the issue. In 1996, after the Ninth and Fifth, but before the Tenth Circuit, opinions, the OLC accepted the Ninth Circuit limits and concluded that state and local police may constitutionally detain or arrest persons who have violated criminal provisions of the Immigration and Nationality Act (INA), subject to state law, but may not do so solely for civil violations.²⁵ After the September 11 attacks on the World Trade Center and the Pentagon, however, the OLC issued a new 2002 opinion retracting its earlier position and concluding that state and local police possess inherent authority to make arrests for both criminal and civil violations that would render that person removable.²⁶ The 2002 OLC opinion remained unpublished until July 2005 when it was released after the Second Circuit granted a FOIA request,²⁷ although allowing some redactions to the opinion.²⁸

Given this lack of clarity in the law, it should not be surprising that state attorneys general continue to receive requests for advisory opinions on the nature and scope of states' inherent powers to enforce immigration laws. Nor should the varied responses be a surprise. In 2007, for example, the Virginia attorney general responded to an inquiry by two state legislators as follows:

It is my opinion that Virginia law-enforcement officers have authority to detain and arrest individuals who have committed violations of the laws of the United States and other states, subject to federal and state limitations. It further is my opinion that such authority extends to violations of federal criminal immigration law. Finally, because the federal appellate courts are ambiguous regarding state's authority to arrest individuals for civil violations of federal immigration law, until the law is clarified, it would not be advisable to enforce such violations outside of the scope of an agreement with federal authorities.²⁹

In addition, some attorneys general are turning to state statutes to decide the issue, given that state law controls on the question of when it is legal for states to arrest for federal offenses.³⁰ In 2007, for example, the attorney general of Ohio concluded that a county sheriff may arrest and detain persons suspected of violating a criminal provision of federal immigration law but may not do so if the violation is purely civil, given that state statutes define the general powers and duties of a county sheriff as "preserving the peace," a phrase that pertains only to criminal enforcement.³¹ South Carolina's attorney general went even further and concluded that since South Carolina statutes only authorize state and local officers to enforce state criminal laws, no inherent authority to enforce federal immigration law exists in the state.³² In an earlier opinion, in fact, the South Carolina attorney general had concluded that "any authority to empower state and local law enforcement officers to arrest and detain individuals for violation of the criminal provisions of federal immigration law would have to be provided by enactment of the General Assembly."³³

Another layer of complexity is the relationship between a state's arrest warrant requirement and the inherent authority of local law enforcement to enforce immigration laws. The issue is that

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since some state statutes authorize warrantless arrests for misdemeanors solely when the crime is committed in the presence of the arresting officer, then warrantless arrests of noncitizens for federal immigration violations, whether for civil or minor crimes, violate this law.³⁴ When presented with the question, the New York attorney general, for example, concluded that the power to make warrantless arrests for federal immigration crimes more likely would be upheld, but subject to the requirements of state arrest requirements such that “offenses” would need to be committed in the presence of the officer and no arrest authority would exist for purely civil violations.³⁵

Warrantless arrests that do not comply with state law requirements have been challenged in motions to suppress in federal criminal cases when defendants have been arrested by local law enforcement based solely on immigration violations. At least the Third Circuit, however, has denied remedy, even after it recognized that a violation to the state law has occurred. That case involved a member of the Marine Unit of the Virgin Islands Police Department (VIPD), who arrested the defendants and turned them over to ICE to be tried for alien smuggling offenses.³⁶ The Third Circuit affirmed the district court’s finding that the arrest was illegal under state law because it was for a misdemeanor, which required the crime to be committed in the presence of the officer to justify a warrantless arrest.³⁷ Nevertheless, the Third Circuit reversed the initial grant of a motion to suppress on the basis that “an arrest that is unlawful under state or local law is [not] unreasonable *per se* under the Fourth Amendment.”³⁸ As part of its rationale, the Third Circuit noted that a different holding would lead to the anomaly that the same arrest would be legal so long as local police conduct it jointly with ICE, given that ICE must not comply with the same presence requirement under federal law.³⁹ This type of potential watering down of state criminal procedural requirements as a result of local law enforcement of immigration laws is a civil rights concern I highlight in Part II.

C. INA § 287(g) Agreements

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) added Section 287(g) to the INA. This provision authorizes the Secretary of DHS to enter into an agreement, known as a Memorandum of Agreement (MOA), with a state or local law enforcement agency and to permit trained officers to perform immigration enforcement functions under the supervision of ICE officers, at the expense of the state or political subdivision and to the extent consistent with state and local law.⁴⁰ As of June 2008, 55 local law enforcement agencies, 765 officers in all, in 18 states have entered into such agreements, with approximately 80 more with pending requests.⁴¹ ICE credits the program with identifying more than 60,000 persons since January of 2006, mostly in jails, who are suspected of being in the country without authorization.⁴²

I have reviewed thirty-four of the fifty-five MOA agreements to date, which are available online after the Yale Law School Clinic filed a FOIA request with ICE.⁴³ ICE has entered into these MOAs directly with police departments, departments for public safety or state patrol, sheriff’s offices, jails or correctional facilities, or with the city, the county, or the state. These MOAs reveal that Section 287(g) allows ICE to confer on local law enforcement nearly all of its enforcement powers under the INA. There are essentially eight types of immigration law enforcement

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functions that have been delegated to local law enforcement through these MOAs:

1. The power and authority to interrogate any person believed to be an alien as to his right to be or remain in the United States (INA § 287(a)(1) and 8 C.F.R. § 287.5(a)(1)) and to process for immigration violations those individuals who are convicted of state and federal felony offenses;
2. The power to arrest without warrant any alien entering or attempting to unlawfully enter the United States, or any alien in the United States, if the officer has reason to believe that the alien to be arrested is in the United States in violation of the law and is likely to escape before warrant can be obtained. INA § 287(a)(2) and 8 C.F.R. 287.5(c)(1);
3. The power and authority to arrest without warrant for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens, if there are reasons to believe that the person so arrested has committed such felony and if there is likelihood of the person escaping before a warrant can be obtained. INA § 287(a)(4) and 8 C.F.R. § 287.5(c)(2). Notification of such arrest must be made to ICE within twenty-four (24) hours;
4. The power and authority to serve warrants of arrest for immigration violations pursuant to 8 C.F.R. § 287.5(e)(3);
5. The power and authority to administer oath and to take and consider evidence (INA § 287(b) and 8 C.F.R. § 287(a)(2)), to complete required criminal alien processing, including fingerprinting, photographing, and interviewing of aliens, as well as the preparation of affidavits and the taking of sworn statements for ICE supervisory review;
6. The power and authority to prepare charging documents (INA Section 239, 8 C.F.R. § 239.1; INA Section 238; 8 C.F.R. § 238.1; INA Section 241(a)(5), 8 C.F.R. § 241. INA Section 235 (b)(1), 8 C.F.R. § 235.3), including the preparation of a Notice to Appear (NTA), application or other charging document, as appropriate, for the signature of an ICE officer for aliens in categories established by ICE supervisors;
7. The power and authority to issue immigration detainers (8 C.F.R. § 287.7) and I-213 Record of Deportable/Inadmissible Alien, for processing aliens in categories established by ICE supervisors; and
8. The power and authority to detain and transport (8 C.F.R. § 287.5(c)(6)) arrested aliens to ICE-approved detention facilities.⁴⁴

The MOAs greatly differ in terms of their nature and scope. The broadest of them take on all of the eight powers/functions to allow trained local law enforcement officers to enforce both civil and criminal immigration laws.⁴⁵ Others also pertain to all types of immigration violations but may exclude certain of the delegated powers, usually the power to serve immigration warrants or the power to conduct warrantless arrests.⁴⁶ One MOA, that of Mecklenburg County, North Carolina, stands out because while it deals with all immigration violations, it includes only five of the eight powers (to interrogate; to administer oaths; to issue detainers; to prepare charging documents; and to transport aliens).⁴⁷ Most MOAs, however, restrict the cooperation agreement to assist ICE with

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criminal investigations in general; to certain types of criminal investigations, such as human trafficking, gangs, drugs, to identity theft; to capture “criminal aliens;” or to address counterterrorism and domestic security needs.⁴⁸ Florida, which opted not to include the power to serve warrants, is an exception to all other MOAs that include all power/functions.⁴⁹ There were also quite a few agreements with detention facilities, most of which did not include arrest powers in the MOAs as their purpose was to identify and process immigration violators already in detention.⁵⁰

Thus, the MOA itself defines the scope and limitations of the authority to be designated to the local law enforcement agency, as well as the number of local officers trained and authorized to enforce federal immigration laws. Some MOAs are quite broad and grant all available powers to the local officers, while others are restricted to specific types of enforcement and adopt only some or a few of the enforcement powers. No one is monitoring how these agreements are actually being implemented, however, which raises concern over potential enforcement of immigration laws beyond those expressly spelled out in the agreement.⁵¹

Another issue is whether state law permits localities and/or local law enforcement agencies to enter into MOAs with ICE. Responses by the states attorneys general on the issue have varied among the states. In Ohio, for example, the attorney general concluded that a county sheriff lacked state statutory authority to enter into agreements with ICE for the enforcement of civil provisions of federal immigration law.⁵² In contrast, Virginia’s attorney general concluded that current Virginia law already authorized localities to enter into an agreement with ICE under the terms prescribed by INA § 287(g).⁵³

The distinction between civil and criminal immigration enforcement continues to be relevant not only to the question of inherent local authority to enforce federal immigration laws but also to the permissible and/or actual scope of MOAs under INA § 287(g). However, in many instances this dichotomy under federal immigration law is unworkable as increasingly what were once treated as purely civil immigration violations now also result in criminal penalties, subject to the discretion of ICE. In fact, there are at least forty-seven criminal provisions in the sections of federal immigration law.⁵⁴ In addition, increasingly, ICE is relying on federal identity theft or fraud statutes to charge noncitizens for the possession or use of false or a third party’s immigration documents or social security numbers.⁵⁵ Thus, while ICE is likely to simply institute removal proceedings against most persons apprehended through collaboration with local law enforcement, the potential applicability of a federal crime to any or most actions by the noncitizen is likely to conflate civil and criminal immigration enforcement to such degree as to make the distinction untenable. The conflation of civil and criminal immigration violations also has implications for civil liberties concerns, which I explore in Part II.

D. Conflict with State Law: “Sanctuary Cities”

At the same time that localities and/or local law enforcement agencies are engaging in the enforcement of immigration laws, other local entities, including state and city governments, have adopted “sanctuary policies” restricting local law enforcement collaboration with ICE on the detection and detention of unauthorized immigrants. Most of the largest cities in the United States today have some variation of such sanctuary policies.⁵⁶ In all, about forty-nine cities and towns and about three states have some type of sanctuary law.⁵⁷ Such sanctuary policies are gen-

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erally of three types: (1) they limit inquiries into a person's immigration status (don't ask); (2) they limit arrests or detention for violation of immigration law (don't enforce); and (3) they limit provision to federal authorities of immigration status information (don't tell).⁵⁸ Localities promulgate these policies through various means, including by adopting city council resolutions, municipal ordinances, mayoral executive orders, and police chief memoranda.⁵⁹ The issues that arise with sanctuary policies are whether they are preempted by federal immigration law, as well as whether they are invalidated or made moot by conflicting local policies that seek greater local enforcement of immigration laws, including through adoption of INA § 287(g) agreements.

Several potential conflicts exist between sanctuary policies and federal law. Some suggest, for example, that sanctuary policies violate the federal anti-harboring provision.⁶⁰ The resolution is likely to depend on the federal court that decides the issue given that circuit courts interpret the harboring provision quite differently.⁶¹ The issue might turn on whether courts view "sanctuary policies" as active concealment, as has been required by the Sixth Circuit, as opposed to most other circuits (the Second, the Fifth, the Eighth, and the Ninth) that include in the definition of harboring the provision of services and the mere omission to report that person to immigration authorities.⁶² From a political perspective, however, such challenge is unlikely.⁶³

Congress, however, passed two laws in 1996 explicitly to counter local sanctuary policies.⁶⁴ The first, Section 1373, mandates that "a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [ICE] information regarding the citizenship or immigration status, lawful or unlawful, of any individual."⁶⁵ Section 1644 includes much of the same language as Section 1373, and states that "no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States."⁶⁶ Essentially, the broader provision, Section 1373, prohibits a government entity or official from restricting disclosure of immigration status to ICE. Section 1644 only prohibits the proscription as applied to government entities. In 1999, the Second Circuit decided the only case to date that assesses the application of these provisions to sanctuary policies (*City of New York v. United States*).⁶⁷ In that case, the Giuliani administration sought to enjoin the 1996 laws, arguing that these laws violated the Tenth Amendment because they forced New York City to collaborate with federal immigration enforcement and the Guarantee Clause of the Constitution by interfering with the city's chosen form of government.⁶⁸ The Second Circuit disagreed and found that the federal provisions preempted the city's sanctuary policy, which proscribed voluntary cooperation with ICE by local police in immigration enforcement.

Essentially, "don't tell" sanctuary policies are vulnerable to preemption challenges in light of the Second Circuit opinion.⁶⁹ In contrast, "don't ask" and "don't enforce" sanctuary policies are not vulnerable to preemption.⁷⁰ Federal prohibition of such sanctuary policies, moreover, would run afoul of the anti-commandeering doctrine, under which the federal government could not require that state and local officials engage in immigration law enforcement.⁷¹

Local protection against immigration enforcement by local police responds to the strong policy objective of building trust and cooperation between immigrant communities and police.⁷² Unfortunately, the effectiveness of the so-called sanctuary policies is weak for several reasons,

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including that violations of these policies by local police are not enforced, and that the policies do not prevent removal of individual immigrants once they have been turned over to ICE.⁷³

II. The Civil Liberties Pitfalls of Localized Immigration Enforcement

Localizing immigration enforcement also means that local law enforcement agencies assume immigration enforcement powers generally available only to ICE under the INA. Indeed, in some localities this is already happening. Local law enforcement officers are not only asking all persons detained and/or arrested during their routine police work for their immigration status,⁷⁴ but they are, alone or in collaboration with ICE, executing immigration raids,⁷⁵ or conducting raids,⁷⁶ road blocks,⁷⁷ street sweeps, or other investigations that target noncitizens for violations of the federal immigration laws.⁷⁸ Moreover, this localized policing work is being conducted with increasingly greater access to immigration databases and immigration information, either directly or through requests to the LESC. As a result, the very same civil liberties concerns over trends in federal immigration enforcement by federal agents are simply transferred to local agents who essentially take on the role of ICE. In other words, the more local police act like ICE agents, the more the same civil liberties concerns will plague local immigration enforcement. These civil liberties concerns include: the transference of immigration enforcement's Fourth Amendment exceptionalism and flexible administrative enforcement tools to local law enforcement; the increased criminalization of immigration law in the context of few privacy protections; and racial profiling.

A. Fourth Amendment Exceptionalism in Immigration Enforcement

The extremely limited application of the exclusionary remedy and the flexible application of the consent doctrine to immigration enforcement practices risk creating a culture of aggressive local law enforcement where abuses of power occur without judicial oversight. Essentially, the deterrence rationale behind the exclusionary remedy is almost absent from immigration law enforcement, given its nonapplication to nearly all immigration encounters, even when Fourth Amendment violations have occurred. For this reason, ICE is criticized for committing many civil rights violations in the course of immigration enforcement. Recently, ICE has been the subject of much litigation, particularly in the way it has executed raids.⁷⁹ Complaints against ICE, for example, have included the dragnet-like and intimidating execution of warrants in people's homes and in the workplace, which have devastating effects on families and communities.⁸⁰ In other cases, ICE has been accused of conducting forcible warrantless raids in people's homes, claiming they were police and aggressively interrogating all residents about their immigration status.⁸¹ Still, more abuses include the racially charged nature in which these raids are being executed, mostly against Latinos.

Since 1984, the United States Supreme Court precluded the Fourth Amendment's exclusionary remedy in immigration proceedings, except within the narrow "egregious violations" exception.⁸² Also, the exclusionary remedy does not apply to suppress the identity of the person arrested even in criminal trials, which has allowed ICE to successfully convict immigrants for certain immigration crimes, such as re-entry. In these cases, exclusion of any unlawfully seized evidence does not remedy the Fourth Amendment violation because the defendant's identity is

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never suppressible as the fruit of an unlawful arrest and because the government can prove its case simply by providing proof of a prior removal order and the defendant's renewed presence in the United States.⁸³

Moreover, the application of the consent doctrine in immigration enforcement under the most coercive circumstances increasingly defies the premise that reasonable people feel free to walk away from law enforcement encounters. In immigration enforcement, the Fourth Amendment doctrine assumes that a reasonable person is free to refuse questions of immigration agents at immigration checkpoints.⁸⁴ The same assumption applies during unannounced workplace raids conducted by dozens of armed immigration agents, some of whom question workers while other agents guard the exits.⁸⁵

At the local level, the assumption has often applied when local police question drivers and passengers about their immigration status during traffic stops⁸⁶ or roadblocks⁸⁷ even when, for instance, the encounter is prolonged when police seek information or direct assistance from ICE on the scene. The assumption has even applied during the execution of warrants in person's home when the person who has been handcuffed and detained for more than two hours was asked, by local law enforcement this time, about her immigration status.⁸⁸

As a result, immigrants targeted for immigration enforcement have had almost no protection under the Fourth Amendment, either because the exclusionary rule has no application in removal proceedings or because it is limited in certain criminal trials. Moreover, even when the exclusionary rule does apply in removal proceedings, no Fourth Amendment protection is offered because most encounters are deemed nonseizures and nonsearches.

A related concern involves the transfer of ICE's broad regulatory and enforcement powers to local law enforcement, particularly through INA § 287(g) agreements. These transferred powers could have substantial adverse effects on privacy, especially through the increased use by local police of immigration databases and civil warrants to conduct law enforcement. ICE's regulatory arm reaches into employer hiring practices, university requirements (for foreign students), the government's distribution of public benefits, and driver's licenses, among other areas.

The regulatory function, in turn, has caused the proliferation of databases that, in most cases, grant ICE easy access to information about a person's immigration status as a worker, student, or driver. With easy access to these databases, ICE can arm itself with civil warrants even where no particularized probable cause exists to conduct raids in private or quasi-private spaces. Similarly, the proliferation of local ordinances that, for example, make it illegal for undocumented immigrants to loiter in public spaces, occupy housing, procure employment, or conduct business transactions,⁸⁹ is possibly expanding the administrative policing arm of local law enforcement against noncitizens and could lead to the creation of immigrant databases and to the issuance of civil warrants similar to those already available to ICE and some local law enforcement through INA §287(g) agreements.

The immigration warrants currently available to ICE are not that different from the general warrants that originally inspired the Fourth Amendment. The infamous general search warrants in early United States history were issued by executives and legislators, without judicial intervention, with neither a probable cause requirement or oath, nor a description of the particular places to be searched and persons or things to be seized.⁹⁰ Courts have upheld the constitu-

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tionality of immigration administratively issued warrants that lack particularized suspicion, such as workplace warrants based on general reasonable belief that unauthorized workers may be present, without having to name any particular worker.⁹¹ This is a very low threshold given that ICE can establish a generalized reasonable suspicion of the presence of unauthorized persons in many contexts given the spread of immigration databases. Today, immigration laws authorize the compelled collection of information in ever-expanding databases over which persons retain no expectation of privacy and which become the basis for the issuance of warrants. Moreover, these databases, which were not intended to have a law enforcement purpose, often contain flawed information such that warrants are issued with significant errors, which are also shielded from any exclusionary remedy based on the “good faith” exception.⁹²

One prominent example of immigration databases that provide easy access to immigration warrants are the databases established pursuant to the Immigration Reform and Control Act of 1986 (“IRCA”)⁹³ to permit employer verification of immigration documents provided to employers by their employees at the time of hiring. In 1996, Congress created the Basic Pilot Employment Eligibility Verification Program (Basic Pilot), an electronic employment eligibility verification program which permits employers to match employee provided immigration information against the United States Citizenship and Immigration Services (CIS) and the Social Security Administration (SSA) databases for verification.⁹⁴ Basic Pilot is today known as E-Verify and contains over 444 million records in the SSA database and more than sixty million records in the DHS immigration databases.⁹⁵ Today, more than 69,000 employers are enrolled in E-Verify, with over four million queries executed so far in fiscal year 2008.⁹⁶

IRCA data collection, along with E-verify, provide ICE with readily accessible information to procure warrants to execute immigration raids. In some cases, to avoid IRCA liability, employers voluntarily report to ICE discrepancies in their employee records when checked against the CIS and SSA databases.⁹⁷ As well, IRCA authorized DHS access to examine evidence of any person or entity under investigation for immigration violations and to compel such participation by subpoena.⁹⁸ Essentially, ICE can compel an employer to turn over all of its IRCA-mandated employee records, which ICE then runs through the databases. Any mismatch becomes a ground for an administrative warrant. Both the immigration and SSA databases are notoriously inaccurate, however. A 2004 report commissioned by DHS, for example, noted that the SSA databases are able to verify employment eligibility in less than 50 percent of the work-authorized noncitizens.⁹⁹ The SSA itself estimates that 17.8 million of its records contain discrepancies related to name, date of birth, or citizenship status.¹⁰⁰ SSA further notes that 4.8 million of the approximately 46.5 million noncitizen records contained in the SSA’s database contain discrepancies.¹⁰¹ Also, a government report reviewing immigration agencies’ records (the then INS and the Executive Office of Immigration Review) found name, nationality, and case file number discrepancies, as well as cases missing from electronic files.¹⁰²

Yet another database created to facilitate the execution of immigration warrants is based on ICE’s implementation of its absconder initiatives in 2002 to arrest persons with a removal order who are still in the country.¹⁰³ The implementation of the absconder initiatives involved several preliminary steps. First, the government prepared the cases of immigration absconders, also called fugitives, for entry into the National Crime Information Center (NCIC) database,¹⁰⁴ an

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FBI-operated federal criminal database containing individuals' criminal histories. In 1996, Congress authorized the inclusion of deported "felons" records in the NCIC database to help authorities identify and prosecute persons for illegal re-entry.¹⁰⁵ Until then, the long-standing policy had been to keep immigration law enforcement information separate from that of criminal law enforcement. Since 2001, the then INS also began including absconders' names and information, of whom there are more than 465,000, into the NCIC system.¹⁰⁶

Now the NCIC database contains records of persons with civil immigration removal orders, regardless whether they also have a criminal history. The database contains around 247,500 immigration warrants, more than half of which are for people with old removal orders, while the rest are records of persons removed for the commission of crimes.¹⁰⁷ The presence of these names in the NCIC database gives local police the necessary information to make immigration arrests during the course of routine traffic stops since most police vehicles are equipped with laptop computers connected to the NCIC system.¹⁰⁸

Unfortunately, much of the information that forms the basis for these fugitive warrants is unreliable. Immigration agencies have been notorious for atrocious record-keeping and faulty databases, including errors in removal order files.¹⁰⁹ A 2003 study of immigration removal records revealed that discrepancies in the identity and address information occurred in 7 percent of the 308 cases of immigrant files with final orders reviewed, and 11 percent of the 470 cases of aliens from countries believed to sponsor terrorism.¹¹⁰

Absconder warrants are also served in people's homes, relying on the final address recorded in immigration files. Several other factors, however, contribute to incorrect records. First, many of the removal orders date back for years,¹¹¹ which increases the probability that persons other than the person subject to the removal order live at the address when the warrant is finally executed. Second, DHS relies on the addresses provided by noncomplying immigrants, who often move to avoid immigration authorities. Third, address changes reported to immigration agencies often are not recorded in the databases.¹¹² As a result of these factors, the administrative warrants are often issued on the basis of incorrect information about a person's place of residence.

Reliance on faulty databases to issue immigration warrants could become a ground for a Fourth Amendment challenge, when a motion to suppress is available. Courts, however, have not required foolproof evidentiary reliability to substantiate probable cause and may tolerate some degree of database inaccuracy. In fact, challenges to the NCIC database have been upheld, despite their noted inaccuracies.¹¹³ In addition, the good-faith exception could very well provide an exception to the exclusionary rule.¹¹⁴ Finally, recent challenges by civil rights groups to the inclusion of immigration information in the NCIC databases have been dismissed for lack of standing.¹¹⁵

An additional concern over immigration warrants pertains to their indiscriminate and dragnet-like execution. The problem with general workplace immigration warrants, for example, is precisely their undefined scope. Thus, what constitutes a reasonable execution of these warrants remains vague but is likely to lie somewhere between consensual encounters and indiscriminate seizures.

Consider workplace raids, during which it is not uncommon for ICE to interrogate all workers about their immigration status. The *INS v. Delgado* precedent involving consensual encounters during workplace raids already offers ICE significant flexibility to question the workers

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and, through the questioning, to acquire reasonable suspicion of unlawful presence.¹¹⁶ In *Delgado*, the INS moved systematically through a garment factory, asked employees to identify themselves, and asked the employees one to three questions about their citizenship.¹¹⁷ During the interrogations, armed INS agents were stationed near the exits while other agents moved throughout the factory and questioned workers at their work areas.¹¹⁸ The agents showed badges, had walkie-talkies, and carried arms, though they never drew their weapons.¹¹⁹ Despite all these facts, the court still considered the encounter consensual.

Usually, courts have drawn the line into nonconsensual encounters when immigration agents specifically have targeted Latinos or persons who simply looked “foreign” for more than brief questioning.¹²⁰ With absconder warrants executed in people’s homes, ICE strategic practice has been to send several armed ICE agents to people’s homes at the crack of dawn and aggressively interrogate everyone present about their immigration status and arrest those unable to provide it.¹²¹

B. The Criminalization of Immigration Law

A significant explanation for the Fourth Amendment exceptionalism in immigration enforcement is early treatment by courts of immigration law as civil as opposed to criminal enforcement.¹²² The characterization of immigration enforcement as administrative, which has allowed more flexible law enforcement practices, however, is becoming increasingly difficult to justify. In the last twenty years, immigration control has increasingly adopted the practices and priorities of the criminal justice system.¹²³ Yet, the criminal justice parallels in immigration enforcement have not resulted in correspondingly greater constitutional protections for immigrants, at least not in those protections that traditionally apply to criminal investigations and trials.

Professor Stephen H. Legomsky has called this trend “the asymmetric importation of the criminal justice norms into immigration law.”¹²⁴ In other words, the enforcement aspects of criminal justice have been imported but without the bundle of procedural and substantive rights recognized in criminal cases.¹²⁵ The danger therefore is that law enforcement agencies are left without a legal obligation to balance immigrants’ interests against the government’s interest to control immigration, despite the large liberty stakes involved for immigrants.

Increasingly, what were once solely civil immigration violations have been criminalized, resulting in an unprecedented cooperation between criminal and immigration law enforcement agencies. Congress has created a host of new immigration crimes, ranging from illegal re-entry to the most recent attempt to criminalize mere immigration presence.¹²⁶ Further, criminal prosecution for immigration violations has increased rapidly. A recent study by Syracuse University’s Transactional Records Access Clearinghouse documented that in March 2008, of 16,298 federal criminal prosecutions recorded, more than half (9,350) were for immigration violations.¹²⁷ The increase is part of DHS Operation Streamline, which seeks to deter undocumented migration through harsher criminal sanctions.¹²⁸

Moreover, ICE is increasingly targeting for criminal prosecution persons who use false documents or documents belonging to third parties to procure work. An increasing number of persons arrested during workplace raids are being criminally prosecuted and face felony charges with a real threat of jail time for violating immigration or other United States laws related to identity theft. In 2006, for example, the number of those criminally charged was 716 (or 16 percent of the

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total number), up from only twenty-five (or 5 percent) in 2002.¹²⁹ Then, in July 2008, in an unprecedented move, ICE criminally charged over 90 percent of the nearly 400 workers during the largest single-site workplace raid in the history of the United States at Postville, Iowa.¹³⁰ Also, at the local level, states are increasingly legislating to criminalize the aliens and those who associate with them. States are adopting laws, for example, that duplicate federal crimes, including in areas of human trafficking and document fraud.¹³¹ States have also passed ordinances that impose criminal penalties on landlords who rent to undocumented immigrants or on employers who hire undocumented workers.¹³²

Civil immigration enforcement, moreover, has become more punitive and difficult to distinguish from criminal enforcement. Mandatory immigration detention, previously reserved for the most dangerous persons, is now broadly applied in almost all removal cases.¹³³ Indeed, immigration detainees are currently the fastest growing segment of the jail population in the United States.¹³⁴ Most persons picked up in the latest wave of immigration raids have been detained, for example. Only a few are released for humanitarian reasons or because they were eligible for some other type of immigration relief. Those charged with any immigration crime or those with a criminal history are not eligible, however, for bond or any other avenue of relief from detention.¹³⁵

Further, even when immigrants are criminally charged rather than placed in removal proceedings, the Fourth Amendment exceptionalism that characterizes immigration enforcement still applies. Pretextual doctrines permit prosecutors to rely on the significantly more relaxed immigration-related Fourth Amendment doctrines to justify reasonableness of searches and arrests. Consider, for example, the workplace raids. ICE has made the detection of identity theft during these raids a priority, such that most who are arrested are being criminally charged, rather than put in removal proceedings.¹³⁶ Still, ICE is conducting these raids, relying on its broad administrative law enforcement powers. The pretextual Fourth Amendment doctrine will likely preclude a motion to suppress remedy even in the limited cases where it is available, however. In parallel cases, where the argument has been that the administrative function is only a pretext for criminal law enforcement, motions to suppress have not succeeded.¹³⁷

In *Whren v. United States*, the United States Supreme Court refused to consider whether the true motives of police officers who detained a group of young men for a traffic infraction were to investigate them for drug possession.¹³⁸ The Court's position instead was to avoid guessing the intent or motivation of the law enforcement officers when acting and to approve the action as long as the officers had "objective" Fourth Amendment grounds.¹³⁹ Thus, even when many of the workers are being criminally charged, despite the evidence that DHS is shifting policy to criminalize the undocumented worker, the motion to suppress, when available, will likely fail, so long as removal proceedings are plausible when instituted.

Pretextual claims have been successful only when the government's stated primary purpose cannot be justified as administrative. For example, in *City of Indianapolis v. Edmond*, which involved random stops at a checkpoint to investigate drug crimes, police conceded that the checkpoint was primarily for the detection of drugs, which the Court considered primarily a criminal law enforcement purpose.¹⁴⁰ Immigration enforcement, however, in the majority of cases carries both civil and criminal penalties, and it is unclear whether that fact alone would trigger a different holding from the courts on the continued use of the administrative function to con-

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duct criminal immigration enforcement.

Some of the factors that a court may consider to distinguish *Whren* are that, unlike traffic enforcement, which is predominantly civil, the transformation of immigration enforcement to a dual civil/criminal system argues for a different result. Consider the absconder initiative, for example, which has a clear criminal law enforcement purpose. Absconders are not solely immigration violators but also criminals *per se*, as they could face up to four years of incarceration for failure to depart after a removal order.¹⁴¹ The entry of absconders' names into the NCIC database, moreover, indicates immigration agencies' shift to treat absconders as criminal, rather than solely civil immigration violators. This interrelatedness of civil/criminal sanctions in the absconder initiative could distinguish *Whren*. Until that happens, however, *Whren* is controlling in immigration enforcement and is likely to shield against motions to suppress with regard to the enforcement of immigration law during traffic stops, in the context of home raids, or in other types of investigative practices, whether conducted by ICE or by local law enforcement.

C. Racial Profiling

Another looming civil liberties concern of immigration law enforcement has been its racially charged execution. Racial profiling in immigration enforcement in the form of the disproportionate targeting of Latinos occurs in several contexts. ICE is commonly accused of racial profiling in the execution of raids, for example. Consider the absconder initiative. When initially implemented, the then INS specifically targeted "priority absconders," a category that included persons with removal orders from countries with an al Qaeda presence, namely Muslims and Arabs. As such, the national origin discrimination was explicit.¹⁴² The program then included persons with a criminal history and ultimately, in May 2006, DHS launched Operation Return to Sender, which casts a wider net and targets all persons with preexisting removal orders.¹⁴³ As such, the program now is at least facially neutral. Its disparate targeting of Latino immigrants, however, is documented in nearly all media stories detailing the raids.¹⁴⁴ The disparate targeting of Latino workers is also evident in workplace raids, which primarily occur in segregated workspaces occupied primarily by brown or Latino workers.¹⁴⁵ Allegations of racial profiling, moreover, are also present in the "driving while brown" phenomena, insofar as immigration enforcement occurs in the context of routine traffic stops disproportionately against Latinos.¹⁴⁶

Sheriff Joe Arpaio's street raids in Arizona cities have also been heavily criticized for their racially charged execution. Similar street raids conducted in Arizona by local police jointly with immigration agents in the 1990's, known as the "Chandler Roundup," cost the city \$400,000 as part of a settlement of lawsuits in which plaintiffs alleged they were stopped and questioned based exclusively on their apparent Mexican descent.¹⁴⁷ Not surprisingly, Sheriff Arpaio faces today similar lawsuits.¹⁴⁸ Indeed, in that litigation, allegations include Arpaio's reliance on citizen "tips" to single out alleged undocumented immigrants, which are often placed with biased and racialized stereotypes of who is or is not legally in the U.S.¹⁴⁹ The complaint also documents indiscriminate street sweeps that target "Latinos," and the use of private volunteers to execute the raids.¹⁵⁰ Finally, even consensual encounters that fall beyond the scope of Fourth Amendment seizures do not escape racial targeting to the extent that Latinos are disproportionately targeted for questioning about their immigration status.

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In racial profiling, too, few remedies are available, however. Courts are unlikely to consider these challenges, at least in the context of Fourth Amendment motions to suppress. First, the Court has directed parallel cases that have raised disproportionate law enforcement practices—such as in the “driving while black” phenomena away from Fourth Amendment challenges and into civil rights lawsuits.¹⁵¹ Yet, a civil rights remedy for selective immigration enforcement is unlikely to be available under equal protection grounds, absent a clear showing of intentionality, which evidentially is nearly impossible to establish.¹⁵²

Second, the United States Supreme Court has tolerated racial targeting in immigration enforcement, at least at immigration checkpoints and as a factor in the determination of reasonable suspicion in traffic enforcement.¹⁵³ The Court has justified a degree of ethnic profiling flexibility in immigration enforcement based partly on the questionable premise that civil immigration enforcement is less intrusive of liberty interests than in the criminal context.¹⁵⁴

In addition, *in dictum* the Court noted that reliance on “Mexican appearance” as a factor for immigration law enforcement makes sense given that numerically it is largely Latinos, and primarily Mexican, who comprise the undocumented population.¹⁵⁵ The problem with this approach is twofold. First, ICE’s enforcement statistics reveal that there is a notable disproportionate over-enforcement of immigration laws against Mexicans and other Latinos, even taking into account the large number of undocumented persons from these countries.¹⁵⁶ Second, the number of Latinos in the United States who are either citizens (by birth or naturalization) or possess immigration authorization to be in the United States is much larger than the number of unauthorized Latinos. A May 2008 press release by the United States Census Bureau puts the population of Hispanic origin at 45 million, a group still constituting the largest minority in the nation and totaling more than four times the number of unauthorized (and uncounted) persons of Hispanic origin.¹⁵⁷

At least the Ninth Circuit in 2000 rejected the Court’s dictum that Mexican appearance can be a factor to establish reasonable suspicion and reasoned that the much higher Latino percentage of the local population now makes demographic links between Latino ethnicity and unlawful status unreliable and that racial profiling unfairly stigmatizes.¹⁵⁸ In addition, the Ninth and the Third Circuits have found that stopping someone solely or partly because the driver is of Latino appearance constitutes “egregious” conduct, such that a motion to suppress is permitted in removal proceedings.¹⁵⁹

D. Civil Liberties Recommendations for Local Immigration Law Enforcement

In light of the foregoing, I offer the following recommendations to states to improve civil liberties in immigration law enforcement:

- States should exercise immigration enforcement powers only with express legislative approval, preferably by Congress. The lack of clarity regarding inherent authority to enforce immigration laws contributes to confusion and chaos about the nature and scope of this authority, such that it is best if the political branches of the government make the determinations. The legislative process also has the potential of providing adequate airing into the public and public participation about the policy reasons for and against authorizing local immigration enforcement.

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- Legislative authority should be clearly defined and monitored. As is the case of INA § 287(g) agreements, their nature and scope vary widely, with some containing a greater degree of specificity and outlining clear priorities. Localities and law enforcement agencies that choose to enter into such agreements for collaboration with ICE should aim to be as specific as possible regarding priorities and should detail as much as possible the scope and types of enforcement authorized. Ideally, localities should weigh the civil liberties implications of authorizing flexible immigration enforcement functions too broadly. For example, localities may wish to avoid local law enforcement collaborations in raids given the heightened civil liberties concerns that have been raised regarding their execution by ICE. Moreover, states should monitor and assure that the execution of the 287(g) agreements does not exceed the scope of their terms and establish complaint mechanisms through which civil rights groups may direct their concerns.
- Localities and/or agencies who enter into law enforcement collaboration agreements with ICE should also adopt policies to improve civil liberties in their execution, particularly taking into account the Fourth Amendment exceptionalism that characterizes immigration law enforcement and the particular civil liberties concerns that are implicated with such enforcement. In other words, localities cannot rely on federal courts to offer the civil liberties protections they may find desirable but can prevent violations to civil liberties by adopting good practice policies to preempt concerns. Some of these policies could include:
 - Restrict the enforcement of immigration warrants in the NCIC database, particularly given the database inaccuracies. Localities might, for example, prioritize enforcing cases involving only persons with a felony criminal record.
 - Disallow questioning of persons regarding their immigration status without reasonable suspicion. So-called consensual encounters involving immigration inquiries into a person's immigration status raise a host of civil liberties concerns that include judicial acquiescence into their voluntary nature under coercive circumstances and racial profiling.
 - Do not authorize the enforcement of immigration civil warrants. These immigration warrants are plagued with too many privacy violations, beginning from faulty databases, to their generalized character, and relatedly to their undefined scope of enforcement.
 - Disallow local enforcement participation in certain types of immigration enforcement, including raids, when such practices have been implicated in civil rights litigation.

III. Immigrants' Rights During Immigration Encounters

Pro-immigrant groups, when devising strategies for immigrants on what to do to protect their civil liberties during immigration encounters, whether with ICE or local law enforcement, are aware of the following two circumstances: (1) too many immigrants “waive” their constitutional rights by “voluntarily” even if unwittingly cooperating with law enforcement during consensual encounters; and (2) even if a violation occurs, there is almost never an effective remedy that could offer relief for the damage caused. As a result, civil rights groups follow two principal strategies, both of which are focused on prevention. The first is to seek to enjoin law enforcement

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from certain practices that raise civil liberties concerns through civil rights litigation. The second is to train individual immigrants to assert their rights better during personal encounters with law enforcement. Below, I detail the list of rights that immigrants do possess when confronting law enforcement on immigration matters.

A. The Right to Refuse Cooperation

1. During Consensual Encounters or Nonconsensual Encounters Unrelated to Immigration Enforcement

Immigrants should assume that most encounters, irrespective of how coercive, are consensual and should always seek clarification about (1) whether they are being detained and (2) if so, why they are being detained. If they are not being detained or if the detention is unrelated to an immigration matter, then it is very likely that police are asking about their immigration status without reasonable suspicion. For this reason, as a general rule, civil rights groups advise immigrants to remain silent during all law enforcement encounters, under the assumption that these are consensual or that the inquiry into a person's immigration status exceeds the reasonable scope of the seizure.

Importantly, then, immigrants have a right not to cooperate with law enforcement by divulging their immigration status or providing identification in the absence of reasonable suspicion. Some have suggested that foreign nationals must produce immigration documents when requested in the course of consensual encounters and in the absence of individualized suspicion.¹⁶⁰ This argument is based on the fact that all foreign nationals over the age of 14, except temporary immigrants, must register with immigration agencies and be fingerprinted if they have been in the country more than 30 days.¹⁶¹ Failure to register constitutes a misdemeanor offense, punishable by a \$100 fine, 30 days maximum jail time, or both.¹⁶² Yet, in the absence of individualized suspicion, compelling identification would violate Fourth Amendment principles. In *Hiibel v. Sixth Judicial District Court of Nevada*,¹⁶³ the United States Supreme Court upheld a Nevada statute that compelled having to identify oneself to the police but only when the police had reasonable suspicion for the stop. In contrast, consensual encounters have always presumed voluntariness, and, in fact, refusal to cooperate cannot then become the basis for reasonable suspicion.¹⁶⁴

2. During Nonconsensual Encounters Related to Immigration Enforcement

a. Workplace Raids

If ICE is executing a generalized immigration warrant and the person encountered or seized is not named in the warrant, then that person too has a right to remain silent and to refuse to cooperate. Here, too, refusal to cooperate cannot become the basis for reasonable suspicion, and persons over whom no legal justification to detain them exists should be allowed to leave. Moreover, it is not entirely clear that law enforcement can compel disclosure of identity under the warrant of persons not named in the warrant for purposes of locating the persons actually named in the warrant. Law enforcement could argue that finding the workers named in the warrant requires engagement of all workers in brief questioning and that such questioning could potentially be permitted if done in an indiscriminate fashion. The legality of such approach, provided the validity of the warrant is upheld, is still being decided in current litigation against ICE.

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b. Home Raids

Often, immigration raids in people's homes are under the absconder program. As such, the immigration warrant being executed is against a person or persons with prior removal orders. Immigrants have a right to see a copy of the warrant before opening the door to their homes and to refuse to answer the door if the person/s listed in the warrant does not live in the house or is not present at the time. Several questions arise here. The first question involves the constitutional "know and announce" requirement before the execution of warrants.¹⁶⁵ With criminal warrants, the knock-and-announce requirement only requires law enforcement to wait a reasonable time for occupants to respond to their knock, after which law enforcement may enter by force.¹⁶⁶ In contrast, ICE's administrative warrants do not require immigrants to answer the door or allow entry.¹⁶⁷

If the person named in the warrant is present in the home, then during the execution of the warrant immigrants who are not named in the warrant, like the workers during a workplace raid, have a right to refuse cooperation. Again, it is unclear, however, if ICE can compel that those present disclose their identity unless it is necessary to identify the person named in the warrant. Once that person has been identified, law enforcement's justification for compelling the identity and/or immigration status of the rest of the persons present is questionable.

B. The Right against Self-Incrimination and to an Attorney While in Custody

The *Miranda* warnings required in criminal proceedings are not required in removal proceedings, and the absence of a warning does not preclude use of the statement in removal proceedings.¹⁶⁸ However, immigration regulations provide that a foreign national shall be advised of the reason for his arrest, informed of his right to be represented by counsel of his own choice at no expense to the government, provided with a list of available free legal services, and advised that any statement he makes may be used against him.¹⁶⁹ Thus, unlike defendants in a criminal trial, immigrants in removal proceedings or facing civil immigration charges do not have a right to an attorney provided by the state, but they do possess a statutory right to counsel at their own expense.¹⁷⁰ By requesting an attorney, foreign nationals in custody foreclose further questioning by law enforcement and law enforcement should offer the foreign national the opportunity to call his or her attorney.¹⁷¹

Motions to suppress are also available to immigrants when law enforcement has procured the statements illegally through coercion.¹⁷² In such a case, quite apart from the benefit of deterring official lawlessness, the statement will be suppressed simply because of the dubiousness of its probative value.

IV. Conclusion

The civil rights costs of local immigration enforcement can be high and localities should duly weigh these costs when deciding how and whether to enforce federal immigration laws.

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Endnotes

¹ 287(g) Program: *Ensuring the Integrity of America's Border Security System Through Federal-State Partnerships: Before the House Committee on Homeland Security Committee on Management, Integration, and Oversight*, July 27, 2005, at 5 (statement of Paul M. Kilcoyne, Deputy Assistant Director of Investigative Serv. Div., USCIS), <http://www.ice.gov/doclib/pi/news/testimonies/050727kilcoyne.pdf>.

² ICE, Partners, Law Enforcement Support Center, www.ice.gov/partners/lesc/.

³ ICE Law Enforcement Support Center, Fact Sheet, <http://www.ice.gov/pi/news/factsheets/081204lesc.htm>.

⁴ See Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005).

⁵ The statute reads in pertinent part:

No officer of person shall have the authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, *and all other officers whose duty it is to enforce criminal laws.*

8 U.S.C. § 1324 (2000) (emphasis added).

⁶ Congress enacted amendment to grant local law enforcement authority to make arrests under INA § 276 as part of the 1996 broad immigration reform laws. The relevant provision reads:

In general

Notwithstanding any other provisions of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who:

is an alien illegal present in the United States; and (2) has previously been convicted of a felony in the United States and deported or left in the United States after such conviction, but only after the States or local law enforcement officials obtain appropriate confirmation from [ICE] 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.

The Attorney General shall cooperate with the States to assure that information in the control of the Attorney General, including information in the National Crime Information Center, that would assist the State and local law enforcement officials in carrying duties under subsection (a) of this section is made available to such officials.

8 U.S.C. 1256(c) (2000), *amended by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 372(3), 110 Stat. 3009.

⁷Said provision reads:

In the event that the Attorney General determines that an actual or imminent mass influx of aliens arriving off the United States or near a land border present urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency or establishment under whose jurisdiction of the individual is serving, to perform or exercise any of the power, privileges or duties conferred or imposed by the Act or regulations issued thereunder upon officers or employees of the service.

8 U.S.C. § 1103(a)(8) (2000), *amended by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 372(3), 110 Stat. 3009.

⁸See *Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1997: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 104th Cong. 1140 (1996) (testimony of Doris Meissner, INS Comm'r).

⁹ 8 U.S.C. § 1103(a)(9) (2000).

¹⁰ *INS and the Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 107th Cong. 10 (2001) (prepared statement of Kevin D. Rooney, Acting INS Comm'r).

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¹¹ Michael J. Wishnie, *State and Local Police Enforcement of Immigration Law*, 6 U. PA. J. CONST. L. 1084, 1095 (2004). *But see* Kobach, *supra*, note at 4, 202-08 (listing other congressional actions as evincing an intent to preserve inherent state arrest authority, including the establishment in 1994 of the Law Enforcement Support Center (LESC) to respond to local police who make immigration arrests or the establishment in 1998 of QRTs for the express purpose of responding to immigration arrests made by state and local police).

¹² *See, e.g.*, Kobach, *supra* note 4.

¹³ *See, e.g.*, Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 978-1000 (2004). *See also* Wishnie, *supra* note 11, at 1092-95.

¹⁴ Wishnie, *supra* note 11, at 1092-95.

¹⁵ *See, e.g.*, U.S. Senator Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL'Y REV. 323 (2005).

¹⁶ *U.S. v. Di Re*, 332 U.S. 581, 591 (1948) (“No act of Congress lays down a general federal rule for arrest without a warrant for federal offenses. None purports to supersede state law. And none applies to this arrest which, while for a federal offense, was made by a state officer accompanied by federal officers who had the power to arrest. Therefore the New York statute provides the standard by which this arrest must stand or fall.”). *See also* *Miller v. U.S.*, 357 U.S. 301, 305 (1958) (in the circumstance of an arrest for violation of federal law by state peace officers, “...the lawfulness of the arrest without warrant is to be determined by reference to state law”)

¹⁷ *U.S. v. Haskins*, 228 F.3d 151, 152 (2d Cir. 2000), *cert denied*, 531 U.S. 1175 (2001).

¹⁸ *U.S. v. Bowdach*, 561 F.2d 1160, 1168 (5th Cir. 1977).

¹⁹ *U.S. v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983).

²⁰ Sessions and Hayden, *supra* note 15, at 332-336.

²¹ *Gonzalez v. City of Peoria*, 722 F.2d 468, 475-77 (9th Cir. 1983). The Ninth Circuit held, for example, that the enforcement authority must distinguish illegal entry, which is a criminal immigration violation, from illegal presence, such as overstaying a visa, which is only a civil violation. *Id.* at 477.

²² *Lynch v. Cannatella*, 810 F.2d 1363, 1366, 1371 (5th Cir. 1987).

²³ *See* *U.S. v. Vasquez-Alvarez*, 176 F.2d 1294, 1295-1300 (10th Cir. 1999); *U.S. v. Santana-Garcia*, 264 F.3d 1188, 1190-1194 (10th Cir. 2001).

²⁴ *U.S. v. Laville*, 480 F.3d 187 (2007). *See infra* notes 35-36 and accompanying case for a discussing of the case.

²⁵ Theresa Wynn Roseborough, Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, *Assistance by State and Local Police in Apprehending Illegal Aliens* (memorandum opinion for U.S. Attorney, S.D. Cal.) (Feb. 5, 1996), <http://www.usdoj.gov/olc/immstpopla.htm>.

²⁶ Sessions and Hayden, *supra* note 15, at 337.

²⁷ *Nat’l Council of La Raza v. Dep’t of Justice*, 411 F.3d 350 (2nd Cir. 2005).

²⁸ Dep’t of Justice, Office of Legal Counsel, *Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest for Immigration Violations* (Apr. 3, 2002), available at www.aclu.org/FilesPDFs/ACF27DA.pdf.

²⁹ Op. Va. Att’y Gen. No. 07-086 (2007), 2007 *1 WL 3120673 (Va. A.G.).

³⁰ *See supra* note 6 and accompanying text.

³¹ Op. Ohio Att’y Gen. No. 2007-018 (2007), 2007 WL 1953424 * 2 (Ohio A.G.).

³² Op. S.C. Att’y Gen. (2003), 2003 WL 21471506 (S.C. A.G.).

³³ Op. S.C. Att’y Gen. (2002), 2002 WL 399643 *1 (S.C. A.G.).

³⁴ *See, e.g.*, Cecilia Renn, *State and Local Enforcement of the Criminal Immigration Statutes and The Preemption Doctrine*, 41 U. MIAMI L. REV. 999, 1005 (1987).

³⁵ Informal Op. N.Y. Att’y Gen. No. 2000-1 2(000), 2000 WL 420372 (N.Y. A.G.).

³⁶ *U.S. v. Laville*, 480 F.3d 187 (3rd Cir. 2007).

³⁷ *Id.* at 191.

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³⁸ *Id.* Other courts grappling with the same issue have simply given the “presence” requirement an extremely broad interpretation, such that an officer who acts quickly in response to an alert to arrest a noncitizen for a misdemeanor immigration violation still meets the “presence” requirement. *See, e.g., U.S. v. Daigle*, No. CRIM. 05-29-B-W, 2005 WL 1692648 (D. Me. Jul. 19, 2005).

³⁹ *Laville*, 480 F.3d at 193.

⁴⁰ 8 U.S.C § 1357(g) (2000).

⁴¹ ICE, Partners, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, April 18, 2008, www.ice.gov/partners/287g/Section287_g.htm.

⁴² *Id.*

⁴³ Worker & Immigrant Rights Clinic, Yale Law School, http://islandia.law.yale.edu/wirc/287g_foia.html.

⁴⁴ *See, e.g., Memorandum of Agreement between the ICE and the Arizona Department of Public Safety*, at 2-3, *available at* http://islandia.law.yale.edu/wirc/287g_foia.html.

⁴⁵ These include MOAs with the Arizona Department of Public Safety; with the Washington County, Arkansas, Sheriff’s Office; with the Tulsa County, Oklahoma, Sheriff’s Office; with the Springdale, Arkansas, Police Department.

⁴⁶ These include, for example, those MOAs signed by the State of Alabama (no serving warrants, but power arrest without a warrant); or the Sheriff’s Office of Alamance County, North Carolina (no warrantless arrests).

⁴⁷ Memorandum of Agreement between the ICE and the Mecklenburg County, North Carolina, at 2-3, *available at* http://islandia.law.yale.edu/wirc/287g_foia.html.

⁴⁸ These include MOAs with the State of Florida (counterterrorism and domestic security); the Town of Herndon, Virginia, and the Herndon Police Department (be assigned and/or collocated as task force officers to assist ICE agents with criminal investigations); the Colorado Department of Public Safety/Colorado State Patrol (assigned or collocated as task force officers to assist ICE with criminal investigations, specifically human smuggling, human trafficking, and the exploitation of all persons); the State of Georgia Department of Public Safety (assigned or collocated as task force officers to assist ICE agents with criminal investigations, specifically transport of contraband, such as narcotics or proceeds from illegal activities, and identity theft and document fraud, especially involving state driver’s licenses); the Hudson Police Department in New Hampshire (assigned and/or collocated as task force officers to assist ICE agents with criminal investigations, specifically assisting local authorities in urban areas who have requested assistance due to pervasive criminal activity occurring in hot spots within their communities); Benton County, Arkansas, Sheriff’s Office (to identify and remove criminal aliens from Benton County); Shenandoah County, Virginia, Sheriff’s Office (assigned and/or collocated as task force officers to assist ICE agents with criminal investigations, in particular illegal trafficking in narcotics investigations and gang investigations, or general criminal investigations of persons who are not authorized to be in the U.S.); the Collier County, Florida, Sheriff’s Office (assigned and/or collocated as task force officers to assist ICE agents with criminal investigations, in particular identifying high-risk felons wanted for crimes or offenses that represent a significant threat to public safety, illegal trafficking of narcotics, gang activity, identifying enterprises and other forms of criminal activity, arresting and prosecuting all subjects involved in criminal activity, and investigating identity theft and fraudulent use of Florida driver’s licenses or identification cards); Maricopa County, in Arizona (assigned and/or collocated as task force officers to assist ICE agents with criminal investigations, in particular with identifying high-risk felons wanted for crimes that represent a significant threat to public safety, criminal enterprises and other types of organized crimes, gangs, illegal trafficking in narcotics, and assisting local authorities in urban areas who have requested assistance due to pervasive criminal activity); the Framingham, Massachusetts, Police Department (assigned and/or collocated as task force officers to assist ICE agents with criminal investigations); and the Rockingham County, Virginia, Sheriff’s Office (assigned or collocated as task force officers to assist ICE with criminal investigations, in particular gangs and illegal trafficking in narcotics).

⁴⁹ Memorandum of Agreement between ICE and the State of Florida, at 2-3, *available at* http://islandia.law.yale.edu/wirc/287g_foia.html.

⁵⁰ These include MOAs with the Jail Board of the Prince William-Manassas Regional Adult Detention Center (Virginia); the Cabarrus County (North Carolina) Sheriff’s Office jail/correctional facilities; the Barnstable County (Massachusetts) Sheriff’s Office correctional facilities; the Arizona Department of Corrections; the Cobb County (Georgia) Board of Commissioners and the Cobb County Sheriff jail/correctional facilities; the York County (South Carolina) Sheriff’s Office detention facilities; the Massachusetts Department of Corrections; El Paso County (Colorado) Sheriff’s Office

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detention facilities; the Gaston County (North Carolina) Sheriff's Office jail facilities; State of New Mexico Corrections Department; the Davidson County (Tennessee) Sheriff's Office jail and correctional facilities; the Los Angeles County (California) jail facilities; San Bernardino County (California) Board of Supervisors county jail facilities; County of Orange (California) jail facilities; and Riverside County (California) jail facilities.

⁵¹ American Immigration Lawyers Association, Fact Sheet – “287(g)” Agreements, *available at* [http://www.aila.org/search/default.aspx?searchterm=fact%20sheet%20287\(g\)](http://www.aila.org/search/default.aspx?searchterm=fact%20sheet%20287(g)).

⁵² Op. Ohio Att’y Gen. No. 2007-029 (2007), 2007 WL 2700588 (Ohio A.G.).

⁵³ Op. Va. Att’y Gen. No. 07-016 (2007), 2007 WL 1456159 (Va. A.G.).

⁵⁴ Kobach, *supra* note 4, at 220, Table 1.

⁵⁵ Press Release, U.S. Immigration and Customs Enforcement, Fact Sheet: Frequently Asked Questions About Worksite Enforcement (Oct. 15, 2007), <http://www.ice.gov/pi/news/factsheets/worksite.htm>.

⁵⁶ These include: Baltimore, Chicago, Denver, Detroit, Houston, Los Angeles, Minneapolis, New York City, Philadelphia, San Francisco, Seattle, and Washington, D.C. Orde F. Kittrie, *Federalism, Deportation, and Crime: Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1466-74 (2006).

⁵⁷ Nat’l Immigration Law Ctr., Annotated Chart of Laws, Resolutions, and Policies, Instituted Across the U.S. Protecting Residents from Local Enforcement of Immigration Laws (2004).

⁵⁸ Kittrie, *supra* note 56, at 1455. *See also* Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1388-91 (2006) (describing the characteristics of sanctuary policies as follows: no discrimination; no enforcement of civil immigration laws; no inquiry into citizenship status; and no notifying federal immigration authorities).

⁵⁹ *Id.* at 1474.

⁶⁰ This provision imposes criminal penalties on “[a]ny person who...knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation.” 8 U.S.C. § 1324(a)(1)(A)(iii) (2000).

⁶¹ Kittrie, *supra* note 56, at 1493-95.

⁶² *See id.*

⁶³ *Id.* at 1495.

⁶⁴ Pham, *supra* note 58, at 1384-85.

⁶⁵ 8 U.S.C. § 1373 (2000).

⁶⁶ 8 U.S.C. § 1644 (2000).

⁶⁷ 179 F.3d 29 (2nd Cir. 1999).

⁶⁸ *Id.* at 33.

⁶⁹ Kittrie, *supra* note 56, at 1498. *See also* Pham, *supra* note 58, at 1391-95.

⁷⁰ Kittrie, *supra* note 56, at 1499.

⁷¹ *Id.* at 1487-93, 1499-1500.

⁷² *Id.* at 1475-80.

⁷³ *Id.* at 1480-84.

⁷⁴ *See, e.g., Muehler v. Mena*, 544 U.S. 93 (2005) (involving the questioning of detainee about her immigration status during the execution of a gang-related warrant in a home); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 991 F. Supp. 85 (N.D. Ohio 1997) (involving asking occupants in a car during a traffic stop about their immigration status); *U.S. v. Esparza-Mendoza*, 386 F.3d 953 (10th Cir. 2004) (involving the discovery of an outstanding immigration warrant during a community care-function encounter).

⁷⁵ *See, e.g., Flores v. Walla Walla Police*, No. CV-06-166-MWL., 2006 WL 2850010 (E.D. Wash. Oct. 2, 2006) (involving local police arrest based on a federal immigration warrant).

⁷⁶ *See, e.g., U.S. v. Vite-Espinoza*, 342 F.3d 462, 464 (6th Cir. 2003) (involving the execution of a home raid with a fed-

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eral immigration search warrant during a joint federal, state, and local police task force investigating the counterfeiting of immigration and identification documents).

⁷⁷ See, e.g., *State v. Bolton*, 301 P.2d 98 (N.M. App. 1990) (involving participation of ICE agents in state road block).

⁷⁸ *U.S. v. Perez-Sosa*, 164 F.3d 1082 (8th Cir. 1998) (involving state trooper's consensual encounter that lead to probable cause based on report that person was transporting undocumented persons).

⁷⁹ See, e.g., *Arias, et. al., v. ICE*, Civ. No. 07-1959 ADM/JSM, 2008 WL 1827604 (D. Minn. Apr. 23, 2008). See also Original Complaint—Class Action Request for Injunctive Relief and Declaratory Relief and Damages, at 8-10, 12-14, *United Food & Commercial Workers Int'l Union v. Chertoff*, No. 07-000188 (N.D. Tex. Sept. 12, 2007), available at <http://www.aifl.org/lac/chdocs/UFood-Complaint.pdf>.

⁸⁰ See, e.g., Randolph Capps, et. al., *Paying the Price: The Impact of Immigration Raids on America's Children*, URBAN INSTITUTE, 2007, available at <http://www.urban.org/url.cfm?ID=411566&renderforprint=1>.

⁸¹ See, e.g., *Arias*, 2008 WL 1827604 at 3. See also Complaint for Violations of the Fourth and Fifth Amendments to the United States Constitution, *Reyes v. Alcantar*, No. 07-02271 (N.D. Cal. Apr. 26, 2007), available at <http://www.aifl.org/lac/chdocs/Reyes-Complaint.pdf>.

⁸² *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984). See also Joseph J. Migas, *Exclusionary Remedy Available in Civil Deportation Proceedings for Egregious Fourth Amendment Violations*, 9 GEO. IMMIGR. L. J. 207, 209 (1995).

⁸³ Daniel P. Blank, Note, *Suppressing Defendant's Identity and Other Strategies for Defending Against a Charge of Illegal Reentry After Deportation*, 50 STAN. L. REV. 139, 140-41 (1997).

⁸⁴ *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976).

⁸⁵ *INS v. Delgado*, 466 U.S. 210, 218 (1984).

⁸⁶ See, e.g., *U.S. v. Urrieta*, 520 F.3d 569 (6th Cir. 2008); *U.S. v. Pasillas-Castanon*, No. 06-CR-175-HDC, 2007 WL 43391 (N.D. Okla. Feb. 2, 2007); *U.S. v. Villanueva-Madriz*, No. 05-CR-60073-HO, 2006 WL 278160 (D. Or. Feb. 3, 2006); *U.S. v. Santana-Garcia*, 264 F.3d 1188 (10th Cir. 2001); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, et al., 991 F. Supp. 895 (N.D. Ohio 1997).

⁸⁷ See, e.g., *New Mexico v. Bolton*, 801 P.2d 98 (N.M. App. 1990).

⁸⁸ *Muehler v. Mena*, 544 U.S. 93, 100-01 (2005).

⁸⁹ See Raquel Aldana, *On Rights, Federal Citizenship, and the "Alien,"* 46 WASHBURN L. J. 263, 284 (2007).

⁹⁰ Geoffrey G. Hemphill, *The Administrative Search Doctrine: Isn't This Exactly What the Framers Were Trying to Avoid?*, 5 REGENT U. L. REV. 215, 128-220 (1995).

⁹¹ See, e.g., *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1213 (D.C. Cir. 1981). See also *Int'l Molder's & Allied Worker's Local Union No. 164 v. Nelson*, 799 F.2d 547, 553 (9th Cir. 1986).

⁹² *U.S. v. De Leon-Reyna*, 930 F.2d 396 (5th Cir. 1991).

⁹³ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, 3359 (1986) (codified as amended 8 U.S.C. § 1324a (2000 & Supp. V 2005)).

⁹⁴ Nat'l Immigration Law Ctr., Basic Information Brief: DHS Basic Pilot Program 3 (rev. Mar. 2008), available at http://www.nilc.org/immsemplymnt/ircaempverif/e-verify_infobrief_2008-03-13.pdf.

⁹⁵ DHS, E-Verify, available at www.dhs.gov/xprevprot/programs/gc_1185221678150.shtm.

⁹⁶ *Id.*

⁹⁷ Raquel Aldana, *Of Katz and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1098-99 (2008) (describing the IMAGE program under which employers voluntarily agree to annual audits and to report any violations or deficiencies of employee records to ICE and employer response to SSA so-called No-Match letters, which notifies employers of SSN discrepancies).

⁹⁸ 8 U.S.C. § 1324a(e)(2)(C) (2000).

⁹⁹ U.S. Citizenship & Immigration Servs., Report to Congress on the Basic Pilot Programs 4-5 (2004), available at http://www.nilc.org/immsemplymnt/ircaempverif/basicpilot_uscis_rpirt_to_congress_2004-06.pdf.

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¹⁰⁰ Office of the Inspector Gen. Soc. Sec. Admin., Congressional Response Report: Accuracy of the Social Security Administration's Numident File, at ii (2006) available at <http://www.ssa.gov/oig/ADOBEPDF/audittxt/A-08-06-26100.htm>.

¹⁰¹ *Id.* at 11.

¹⁰² *Id.*

¹⁰³ See Aldana, *supra* note 97, at 1109 for a description of ICE's absconder initiative.

¹⁰⁴ Memorandum from Larry Thompson, Deputy Att'y Gen., to the INS Comm'r, FBI Dir. U.S. Marshall Serv. Dir., and U.S. Att'ys, § A, at 1 (Jan. 25, 2002), available at <http://f1.findlaw.com/news.findlaw.com/hdocs/docs/doj/abscondr012502mem.pdf>.

¹⁰⁵ 8 U.S.C. §§ 1326(a), (b) (2000).

¹⁰⁶ Seventh Public Hearing of the National Comm'n on Terrorist Attacks Upon the United States, Jan. 26, 2004, http://govinfo.library.unt.edu/911/hearings/hearing7/witness_ziglar.htm (statement of James W. Ziglar, INS Commissioner).

¹⁰⁷ Ernesto Londoño, *Database is Tool in Deporting Fugitives: Police Officers Find Illegal Immigrants in Warrant Searches*, WASH. POST., June 12, 2003, at A1.

¹⁰⁸ Kobach, *supra* note 4, at 188-192.

¹⁰⁹ Memorandum from Glenn A. Fine, Inspector Gen., U.S. Dep't of Justice, Review of the Immigration and Nationalization Service's Removal of Aliens Issued Final Orders I-2003-004 (Feb. 25, 2003), available at <http://www.usdoj.gov/oig/reports/INS/e0304/memo.pdf>.

¹¹⁰ Office of the Inspector Gen., U.S. Dep't of Justice, Report No. I-2003-004, The Immigration and Naturalization Services' Removal of Aliens Issued Final Orders 14 (2003) available at http://www.npr.org/documents/2005/mar/doj_alien_removal.pdf.

¹¹¹ See Ruth Morris, *U.S. Adding Fugitive Squads that Target Immigrants Who Ignore Expulsion Orders*, S. FLA SUN SENTINEL, Feb. 26, 2007, available at http://oneoldvet.com/?page_id=281#12.

¹¹² Michelle Wucker, *The Top Ten Ways America Gets Immigration Wrong*, AM. IMMIGRATION L. FOUND., June 19, 2006, available at <http://www.visalaw.com/06oct2/12oct206.html>.

¹¹³ *U.S. v. Hines*, 564 F.2d 925, 928 (10th Cir. 1977) (finding that reliance upon NCIC to substantiate probable cause for arrest was acceptable. See also *U.S. v. Davis*, 568 F.2d 514, 515 (6th Cir. 1978).

¹¹⁴ *Arizona v. Evans*, 514 U.S. 1, 16-17 (upholding use of evidence obtained from false arrest records that was the product of clerical errors).

¹¹⁵ *Nat'l Council of La Raza v. Mukasey*, No. 07-0816-cv, 2008 WL 2630729 (2nd Cir. Jul. 3, 2008) and *Nat'l Council of La Raza v. Gonzales*, 468 F. Supp. 2d 429 (E.D. N.Y. 2007).

¹¹⁶ 466 U.S. 210, 218 (1984).

¹¹⁷ *Id.* at 212.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 643 F. Supp. 884, 893-95 (N.D. Cal. 1986); *Ill. Migrant Council v. Pilliod*, 51 F. Supp. 1011, 1020-21 (N.D. Ill. 1982).

¹²¹ See Aldana, *supra* note 97, at 1114-1115 (documenting several complaints on ICE execution of home warrants).

¹²² See Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1894 (2000).

¹²³ See, e.g., Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crimes, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); Teresa A. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIG. L. J. 611 (2003).

¹²⁴ Legomsky, *supra* note 123, at 521.

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¹²⁵ *Id.* at 472.

¹²⁶ In 2005, the House of Representatives passed a bill that would have created several additional crimes, including criminalizing the presence of the undocumented. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

¹²⁷ Nicole Gaouette, *Federal Prosecution of Illegal Immigrants Soars*, L.A. TIMES, June 18, 2008, at A-8, available at <http://articles.latimes.com/2008/jun/18/nation/na-immig18>.

¹²⁸ *Id.*

¹²⁹ U.S. Immigration and Customs Enforcement, Fact Sheets: Frequently Asked Questions about Worksite Enforcement (last updated Aug. 12, 2008), <http://www.ice.gov/pi/news/factsheets/worksite.htm>.

¹³⁰ Stephen Lendman, *Civil Wrongs: Targeting Immigrants - The Largest Ever US ICE Raid*, BALTIMORE CHRONICLE & SENTINEL, available at <http://baltimorechronicle.com/2008/081108Lendman.shtml>.

¹³¹ See, e.g., Overview of State Legislation Related to Immigrants and Immigration, January-March 2008, National Conference of State Legislatures, Immigrant Policy Project, April 24, 2008, available at <http://www.ncsl.org/print/immig/immigreportapril2008.pdf> (reporting that in the first three months of 2008 alone, 24 bills on human trafficking and 198 bills on law enforcement were introduced).

¹³² *Id.*

¹³³ Miller, *supra* note 123, at 614-15; Stumpf, *supra* note 123, at 391.

¹³⁴ Miller, *supra* note 123, at 648-49.

¹³⁵ *Id.* at 635-36.

¹³⁶ Consider, for example, DHS Secretary Michael Chertoff's remarks in defense of worksite raids:

[Document fraud] is a serious problem not only with respect to illegal immigration, but with respect to national security. And that's precisely the point made by the 9/11 Commission a couple of years ago, because illegal documents are not only used by illegal migrants, but they are used by terrorists who want to get on airplanes, or criminals who want to prey on our citizens. And so, as part of this overall strategy of worksite enforcement, we've gotten very focused on the question of those who exploit illegal documents and identity theft in order to pursue illegal acts. So yesterday's enforcement action [the Swift and Co. raids] demonstrate another step in this worksite enforcement strategy. A tough stance against worksites that employ illegal aliens and against individuals and organizations that commit or facilitate identity theft or fraud.

Press Release, Dep't of Homeland Security, Remarks by Secretary of Homeland Security Michael Chertoff, Immigration and Customs Enforcement Assistant Secretary Julie Myers, and Federal Trade Commission Chairman Deborah Platt Majoras at a Press Conference on Operation Wagon Train (Dec. 13, 2006), available at http://www.dhs.gov/xnews/releases/pr_1166047951514.shtm.

¹³⁷ See Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 MISS. L. J. 339, 340 (2006).

¹³⁸ *Whren v. United States*, 517 U.S. 806, 811 (1996) (holding that ulterior motives need not invalidate police conduct that is otherwise justified by reasonable belief that a violation of law has occurred).

¹³⁹ *Id.*

¹⁴⁰ 531 U.S. 32, 50-51 (2000).

¹⁴¹ Immigration and Nationality Act (INA) of 1990, 8 U.S.C. § 1253 (2000).

¹⁴² See Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative*, 29 N.Y.U. REV. L. & SOC. CHANGE 573, 574 (2005).

¹⁴³ ICE Press Release, ICE Apprehends More Than 2,100 Criminal Aliens, Gang Members, Fugitives and Other Immigration Violators in Nationwide Interior Enforcement Operation, Jun. 14, 2006, available at http://www.dhs.gov/xnews/releases/press_release_0926.shtm.

¹⁴⁴ See Andrew Ryan, *Agency Nabs Illegal Immigrants Across U.S.*, WASH. POST, Jun. 14, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/14/AR2006061401245.html>.

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¹⁴⁵ See Leticia M. Saucedo, *The Employer Preference for the Subservient Workers and the Making of the Brown Collar Workplace*, 67 OHIO ST. L. J. 961, 965-66 (2006).

¹⁴⁶ See Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1, 3 (2005)

¹⁴⁷ Carrie L. Arnold, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 119-120 (2007) (discussing the “Chandler Roundup” operation which lasted five days and resulted in the arrest and deportation of 432 undocumented immigrants).

¹⁴⁸ ACLU Press Release, Sheriff Arpaio Sued over Racial Profiling of Latinos in Maricopa County, July, 7, 2008, available at www.aclu.org/immigrants/gen/36011prs20080716.html. A copy of the complaint is available at [http://www.aclu.org/pdfs/immigrants/filedfirstamdc071608\(2\).pdf](http://www.aclu.org/pdfs/immigrants/filedfirstamdc071608(2).pdf).

¹⁴⁹ *Manuel de Jesus Ortega Melendres, et al., v. Arpaio*, First Amended Complaint, Class Actions, No. CV -07-02513-PHX-MHM, ¶ 16 available at <http://www.aclu.org/immigrants/gen/35998lgl20080716.html>.

¹⁵⁰ *Id.* at ¶¶ 3, 30-48.

¹⁵¹ See David Harris, “Driving While Black” and Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 550-51 (1997).

¹⁵² See DAVID COLE, ENEMY ALIEN: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 204 (2003) (discussing the Court’s tolerance of ethnically selective targeting).

¹⁵³ See Alfredo Mirande, *Is There a “Mexican Exception” to the Fourth Amendment?*, 55 FLA. L. REV. 365, 372-74 (2003).

¹⁵⁴ See, e.g., *U.S. v. Brignoni-Pince*, 422 U.S. 873, 885-87 (1975).

¹⁵⁵ *Id.* A Pew Hispanic Center estimate of the size and characteristics of the undocumented population concluded that as of March 2004, of the 10.3 million estimated undocumented persons, 57 percent or 5.9 million were from Mexico, while 24 percent were from other Latin American nations. Jeffrey S. Passel, *Estimates of the Size and Characteristics of the Undocumented Population*, Report, Mar. 21, 2005, at 8 available at <http://pewhispanic.org/files/reports/44.pdf>.

¹⁵⁶ Consider, for example, ICE’s enforcement statistics for 2006. ICE apprehended more than 1,206,000 foreign nationals that year, nearly 88 percent of whom were natives of Mexico. Moreover, of the 272,389 foreign nationals removed from the U.S., the leading countries of origin represented were: Mexico (67 percent); Honduras (10 percent); and Guatemala (7 percent). This record of removal does not consider the ethnic origin of the more than 1 million persons who accepted voluntary departure without a removal order. Office of Immigration Statistics, *Immigration Enforcement Actions: 2006, Annual Report*, May 2008, available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_06.pdf.

¹⁵⁷ U.S. Census Bureau News, U.S. Department of Commerce, U.S. Hispanic Population Surpasses 45 Million Now 15 Percent of Total, available at <http://www.census.gov/Press-Release/www/releases/archives/population/011910.html>.

¹⁵⁸ *U.S. v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000).

¹⁵⁹ *Arguelles-Vasquez v. INS*, 786 F.2d 1433 (9th Cir. 1986); *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994). See also *Orhordaghe v. INS*, 38 F.3d 488 (9th Cir. 1994) (holding that the INS’s investigation of an individual based solely on his or her “foreign-sounding” name is also egregious).

¹⁶⁰ Rebecca Chiao, *Fourth Amendment Limits on Immigration Law Enforcement*, 93-02 IMMIGR. BRIEF. 1 (1993).

¹⁶¹ 8 U.S.C. § 1302 (2000).

¹⁶² *Id.*

¹⁶³ 542 U.S. 177 (2004).

¹⁶⁴ *Florida v. Royer*, 460 U.S. 491 (1983) (refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure). *But see Illinois v. Wardlow*, 525 U.S. 119 (2000) (rejecting that unprovoked flight upon sight of police per se offers ground for reasonable suspicion but allowing it as a factor to find reasonable suspicion).

¹⁶⁵ See *Wilson v. Arkansas*, 514 U.S. 927 (1995).

¹⁶⁶ WILLIAM E. RINGEL, EXECUTION OF WARRANTS, SEARCHES AND SEIZURES, ARRESTS, AND CONFESSIONS § 6:10 (2007).

APPENDIX C

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¹⁶⁷ Nina Bernstein, *Hunts for “Fugitive Aliens” Leads to Collateral Arrests*, N.Y. TIMES, July 23, 2007, at B1 (reporting on DHS Secretary Chertoff’s explanation that civil immigration warrants do not permit ICE to force entry); Jerry Seper, *Outnumbered in a Hunt for Aliens: Force of 200 Charged with Tracking 400,000 Criminals, “Absconders,”* WASH. TIMES, July 20, 2004, at A1 (describing same practice).

¹⁶⁸ *Matter of Baltazar*, 16 I & N Dec. 108, 1977 WL 39227 (B.I.A. 1977); *U.S. v. Valdez*, 917 F.2d 466 (10th Cir. 1990) (in conviction for re-entry after deportation, no right to or prejudice in absence of Miranda warnings).

¹⁶⁹ 8 C.F.R. §§ 1240.10, 1240.48.

¹⁷⁰ 8 C.F.R. §§ 1240.10(a)(1); 1240.48(a).

¹⁷¹ Chiao, *supra* note 160, at 1 (describing requirements of lawsuit settlement (expired in 1995) against INS to allow foreign nationals access to counsel during post-arrest questioning).

¹⁷² *Bustos-Torres v. INS*, 898 F.2d 1053, 1057 (5th Cir. 1990); *Matter of Garcia*, 17 I & N Dec. 319, 321 (B.I.A. 1980).