



ST. MARY'S
UNIVERSITY

The Scholar: St. Mary's Law Review on Race
and Social Justice

Volume 10 | Number 3

Article 2

5-1-2008

Sanctuary's Demise: The Unintended Effects of State and Local Enforcement of Immigration Law.

Jennifer M. Hansen

Follow this and additional works at: <https://commons.stmarytx.edu/thescholar>



Part of the [Law Commons](#)

Recommended Citation

Jennifer M. Hansen, *Sanctuary's Demise: The Unintended Effects of State and Local Enforcement of Immigration Law.*, 10 THE SCHOLAR (2008).

Available at: <https://commons.stmarytx.edu/thescholar/vol10/iss3/2>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in The Scholar: St. Mary's Law Review on Race and Social Justice by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

COMMENT

SANCTUARY'S DEMISE: THE UNINTENDED EFFECTS OF STATE AND LOCAL ENFORCEMENT OF IMMIGRATION LAW

JENNIFER M. HANSEN*

I. Introduction.....	290
A. Criminal vs. Civil Enforcement.....	292
B. Authority	293
C. Currently Proposed Legislation.....	296
D. Effect of Proposed Legislation	297
II. Legal Background.....	298
A. Precedent	300
B. The Department of Justice Memos	301
C. Statutes (the 1996 Laws)	302
1. Illegal Immigration Reform and Immigrant Responsibility Act of 1996	303
a. Memorandums of Understanding Under 287(g).....	304
2. Anti-Terrorism and Effective Death Penalty Act of 1996.....	306
D. Back Door Policing: Proposed Legislation, Then and Now	306
1. Criminal Alien Removal Act and the Homeland Security Enhancement Act of 2003 and 2005	306

* St. Mary's University School of Law, Candidate for J.D., May 2009; Liberty University, M.B.A., May 2006, University of the Incarnate Word, B.A. Political Science. First, I would like to thank my best friends and parents, David and Eneida Hansen, for your inspiration, support, encouragement and unfaltering faith in me. Thank you to my brother David for always challenging me to see both sides of every issue, including this one. I am also grateful to *The Scholar* Editorial Board for their guidance and meaningful contributions to this comment.

2.	The Reemergence of the CLEAR Act and Other Currently Proposed Legislation.....	308
III.	Legal Analysis	312
A.	Public Safety and Community Policing	316
1.	National Security.....	317
2.	Victims of Crime	318
B.	The Ramifications of Unequipped Police	320
C.	Understaffed Public Agencies	321
D.	Resources and Lack of Enforcement Funding	322
E.	Civil Rights and Legalizing Racial Profiling	324
F.	State and Local Enforcement of Civil Immigration Law Will Not Reduce Crime	327
IV.	Conclusion	328

*“Give me your tired, your poor,
 Your huddled masses yearning to breathe free,
 The wretched refuse of your teeming shore.
 Send these, the homeless, tempest-tost to me,
 I lift my lamp beside the golden door!”¹*

– Statue of Liberty inscription

I. INTRODUCTION

In the wake of recent execution-style slayings of three college students in Newark, New Jersey by an undocumented immigrant, the focus on state and local roles in immigration enforcement is once again in the forefront of the immigration debate.² One of the six suspects, Jose Carranza, was an undocumented immigrant from Peru living in Newark.³ Carranza, previously charged with thirty-one counts of aggravated sexual assault, was out on bail for those charges when the murders occurred.⁴ Now, presidential candidates and citizens blame the state, and believe this incident occurred because Newark was a “sanctuary city”⁵ at the time.⁶ Crit-

1. Emma Lazarus, *The New Colossus*, in *THE POETRY OF FREEDOM* 431 (William R. Benet & Norman Cousins eds., 1945) (1883).

2. See Kareem Fahim, *Presidential Candidate Blames Killings on Newark Sanctuary Policy*, N.Y. TIMES, Aug. 21, 2007, available at <http://www.nytimes.com/2007/08/21/us/politics/21newark.html?ex=1345348800&en=9064c14939f5334e&ei=5088&partner=rssnyt&emc=rs>.

3. See Mike Derer, *Third Suspect Charged in Newark Killings*, USA TODAY, Aug. 10, 2007, available at http://www.usatoday.com/news/nation/2007-08-10-newark_N.htm?csp=34 (recognizing that the issue of illegal immigrant identification must be addressed by our criminal justice system).

4. See *id.*

5. See Alex Koppelman, *Congress to New York (and Chicago and L.A.): Drop Dead*, SALON.COM, Oct. 4, 2007, http://www.salon.com/news/feature/2007/10/04/sanctuary/index_

ics of illegal immigration argue that the local authorities should have contacted Immigration and Customs Enforcement (ICE), a branch of the Department of Homeland Security, immediately after Carranza made bail the first time. New Jersey authorities allege that his status as an undocumented immigrant was not verified until this recent case.⁷ However, under New Jersey law, authorities were not required to check the immigration status of those they arrested.⁸ In fact, at the time of Carranza's first offense, ICE officials were not notified until after a person was convicted of a crime, in order to safeguard the presumption of innocence.⁹

In response to this incident, an increasing number of state and local law enforcement agencies are seeking to undertake regulate immigration,¹⁰ while federal legislators are attempting to coerce non-cooperating, sanctuary-type states and localities into taking on these responsibilities as

np.html ("There is no single definition of a 'sanctuary city,' but in essence it is one that takes a 'don't ask, don't tell' stance toward the immigration status of its residents.").

6. See Kareem Fahim, *Presidential Candidate Blames Killings on Newark Sanctuary Policy*, N.Y. TIMES, Aug. 21, 2007, available at [http://www.nytimes.com/2007/08/21/us/politics/21new-](http://www.nytimes.com/2007/08/21/us/politics/21new-ark.html?ex=1345348800&en=9064c14939f5334e&ei=5088&partner=rssnyt&emc=rs)

ark.html?ex=1345348800&en=9064c14939f5334e&ei=5088&partner=rssnyt&emc=rs (describing one presidential candidate that is using the lack of state and local enforcement of immigration law as a platform for an aggressive attack on illegal immigration).

7. See *Lou Dobbs Tonight: Illegal Alien Charged with Killing 3 College Students* (CNN television broadcast Aug. 10, 2007), available at <http://transcripts.cnn.com/TRANSCRIPTS/0708/10/ldt.01.html> ("We determined that this person was an undocumented alien as we were conducting the homicide investigation. We are going to leave it at that. The procedure is complex," stated Tom McTide, Lead Assistant Prosecutor.).

8. See David Porter, *In Wake of Triple Murders, Immigration Reforms Having an Effect*. PRESS OF ATLANTIC CITY, Nov. 6, 2007, available at <http://www.pressofatlanticcity.com/news/newjersey/story/7514742p-7413614c.html> ("At the time, while some departments did check whether a person was a legal immigrant, they weren't required by the state to check the immigration status of someone they arrested."); but see Elizabeth Lorente, *N.J. Law Enforcement Puts Immigration on Speed Dial*, NORTHJERSEY.COM, Oct. 27, 2007, <http://iaco.us/immi-news.asp?id=230> (detailing New Jersey's new directive on immigration issued after these killings in August by the attorney general mandating state and local agencies to contact ICE when an undocumented immigrants are apprehended for indictable offenses or drunken driving).

9. See *Lou Dobbs Tonight: Illegal Alien Charged with Killing 3 College Students* (CNN television broadcast Aug. 10, 2007), available at <http://transcripts.cnn.com/TRANSCRIPTS/0708/10/ldt.01.html> (explaining that in New Jersey, ICE is only contacted once the individual is convicted, and here Carranza was only awaiting trial).

10. NAT'L CONF. OF STATE LEGISLATURES, 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION 1 (Aug. 5, 2007), available at <http://www.stateimmigrationlaws.com/NR/rdonlyres/e3vt3hizdnk3usjpdz5gwvxtlatke2r5uoakihvvi7xba5ehpl3rtb2cguw45ufsyhmubfi2lroemakz4ycn2pcb5ff/071129ncslreport.pdf> ("In the continued absence of a comprehensive federal reform of the United States' challenged immigration system, states have displayed an unprecedented level of activity – and have developed a variety of their own approaches and solutions.").

well.¹¹ Because most police agencies have routinely enforced federal immigration law concerning crime, it is unclear whether these officers can also enforce civil offenses (i.e., simply being in the country without appropriate documentation).¹² Legislators are now attempting to broaden state and local agency responsibility by enforcing federal immigration laws concerning civil violations, even though this may be devastating to local communities, regardless of the violator's status.¹³

A. *Criminal vs. Civil Enforcement*

Violations of immigration law can be either civil or criminal.¹⁴ Civil violations include illegal presence or failing to depart once a temporary visa expires.¹⁵ Therefore, if an individual becomes undocumented due to an expired visa or student status change, they are in violation of a civil offense and will go through civil deportation proceedings.¹⁶ Criminal violations are typically felonies or misdemeanors governed under the federal

11. Emily Bazar, *Lawmakers Seek 'Sanctuary Cities' Crackdown*, USA TODAY, Oct. 25, 2007, available at www.usatoday.com/news/nation/2007-10-24-nosanctuary_N.htm ("State and federal lawmakers are calling for tough action against "sanctuary cities," reflecting a backlash against communities that they say break the law and encourage illegal immigration.").

12. See Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 182 (2005).

It has long been widely recognized that state and local police possess the inherent authority to arrest aliens who have violated criminal provisions of the INA Confusion existed, however, on the question of whether the same authority extends to arresting aliens who have violated civil provisions of the INA that render an alien deportable. *Id.*

13. See MAJOR CITIES CHIEFS, M.C.C. IMMIGRATION COMMITTEE: RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES 4 (2006), available at http://www.houstontx.gov/police/pdfs/mcc_position.pdf ("Many other[] [local law enforcement officers] recognize the obstacles, pitfalls, dangers and negative consequences to local policing that would be caused by immigration enforcement at the local level.").

14. See Lisa M. Seghetti, Stephen R. Vina & Karma Esther, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* 1 (Cong. Research Serv., CRS Report for Congress, Order Code RL32270, Aug. 14, 2006), available at <http://www.ilw.com/immidaily/news/2006,0912-crs.pdf> (explaining that state and localities do have the primary responsibility to define, prosecute and enforce state and local laws, but also have the authority to enforce federal laws, particularly criminal ones).

15. See NAT'L IMMIGR. FORUM, IMMIGRATION LAW ENFORCEMENT BY STATE AND LOCAL POLICE 1 (2007), available at <http://www.immigrationforum.org/documents/TheDebate/EnforcementLocalPolice/Background-Under-StateLocalEnforcement.pdf>.

16. See Lisa M. Seghetti, Stephen R. Vina & Karma Esther, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* 1 (Cong. Research Serv., CRS Report for Congress, Order Code RL32270, Aug. 14, 2006), available at <http://www.ilw.com/immidaily/news/2006,0912-crs.pdf> ("Immigration law provides for both *criminal* punishments (e.g., alien smuggling, which is prosecuted in the courts) and *civil* violations (e.g.,

courts.¹⁷ These include more grievous violations, such as entering the United States illegally, re-entering the United States subsequent to deportation, or willfully failing to depart after a removal order.¹⁸ Although it is unclear whether states can enforce civil violations, historically it has been viewed that states and localities have the authority to enforce criminal violations of immigration law, while apprehension and removal of undocumented immigrants, and other such civil provisions, are exclusively federal matters.¹⁹

The distinction between civil and criminal law enforcement, and where the boundary is drawn between state and local law enforcement and federal enforcement, raises many difficult and important questions.

B. Authority

The uncertainty surrounding the enforcement of civil immigration law is the result of confusing and contradicting efforts by the courts, the Department of Justice (DOJ), and the legislative branch to clarify whether state and local law enforcement agencies have the authority to enforce it.

This confusion began in the 1980s when the circuit courts split on this issue. The Ninth Circuit in *Gonzalez v. City of Peoria*, authorized police officers to arrest undocumented immigrants in violation of criminal provisions of the Immigration and Nationality Act (INA).²⁰ In *Gonzalez*, however, the court concluded that states do not have the inherent authority to enforce civil enforcement measures of the INA not specifically

lack of legal status, which may lead to removal through a separate administrative system.”) (emphasis in original).

17. See *id.*; see also Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 220–21 (2005) (listing all criminal offenses in immigration law).

18. NAT'L IMMIGR. FORUM, IMMIGRATION LAW ENFORCEMENT BY STATE AND LOCAL POLICE 1 (2007), available at <http://www.immigrationforum.org/documents/TheDebate/EnforcementLocalPolice/Background-Under-StateLocalEnforcement.pdf> (emphasizing that the individual must fail to “willfully” depart and not merely be unaware that a removal order has been entered against them).

19. See Lisa M. Seghetti, Stephen R. Vina & Karma Esther, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* Summary 6–7 (Cong. Research Serv., CRS Report for Congress, Order Code RL32270, Aug. 14, 2006), available at <http://www.ilw.com/immigdaily/news/2006,0912-crs.pdf>.

From the states' point of view, the federal government's exclusive power over immigration does not preempt every state activity affecting aliens. And it generally has been assumed that state and local officers may enforce the *criminal* provisions of the INA if state law permits them to do so but are precluded from directly enforcing the INA's *civil* provisions. This view may be changing, however. *Id.* (emphasis in original).

20. See *Gonzalez v. City of Peoria*, 722 F.2d 468, 472 (9th Cir. 1983), *overruled in part on other grounds by* *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999)

granted by Congress.²¹ Conversely, the Tenth Circuit in *United States v. Salinas-Calderon*, decided that state authorities had inherent authority over civil as well as criminal violations.²²

In addition to the circuit split, states and localities were left to interpret confounded messages from the DOJ. In 1996, the Office of the Legal Counsel at the Justice Department issued a memo stating that local authorities only had jurisdiction over federal immigration criminal violations; however, in 2002, the same office issued an unreleased memo stating that the same authorities did in fact have jurisdiction over civil infractions as well.²³

Around the same time the first DOJ memorandum was drafted, Congress passed two statutes, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), in an attempt to clarify what states and localities were authorized and prohibited from doing with regard to immigration law.²⁴ The AEDPA permits state and local police to enforce criminal violations by arresting and detaining previously deported immigrants who have *also* been convicted of a felony.²⁵ The IIRIRA allows

21. See *Gonzalez*, 722 F.2d at 468.

We therefore conclude that state law authorizes Peora police to enforce the criminal provisions of the Immigration and Naturalization Act. We firmly emphasize, however, that this authorization is *limited to criminal violations*. Many of the problems arising from implementation of the City's written policies have derived from a failure to distinguish between civil and criminal violations of the act. *Id.* (emphasis added).

22. See *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 (10th Cir. 1984) ("A state trooper has general investigatory authority to inquire into possible immigration violations.").

23. NAT'L IMMIGR. FORUM, IMMIGRATION LAW ENFORCEMENT BY STATE AND LOCAL POLICE 1 (2007), available at <http://www.immigrationforum.org/documents/TheDebate/EnforcementLocalPolice/Backgrounder-StateLocalEnforcement.pdf> (outlining various mixed signals at the federal level that have led to confusion regarding whether state and local law authorities can enforce of civil immigration violations); see also Matthew Parlow, *Immigration: Both Sides of the Fence: A Localist's Case for Decentralizing Immigration Policy*, 84 DENV. U.L. REV. 1061, 1069 (2007) (discussing the DOJ's reversal, concluding that state and local governments, as sovereigns, have the inherent authority to enforce federal law).

24. See NAT'L IMMIGR. FORUM, IMMIGRATION LAW ENFORCEMENT BY STATE AND LOCAL POLICE 3 (2007), available at <http://www.immigrationforum.org/documents/TheDebate/EnforcementLocalPolice/Backgrounder-StateLocalEnforcement.pdf> (summarizing the legal provisions included in the IIRIRA and AEDPA, involving civil immigration enforcement); see also Jeff Lewis et al., *Authority of State and Local Officers to Arrest Aliens Suspected of Civil Infractions of Federal Immigration Law*, 7 BENDER'S IMMIGR. BULL. No. 15, 944 (Aug. 1, 2002), available at <http://www.migrationpolicy.org/files/authority.pdf> ("AEDPA and IIRIRA increased the permissible scope of state and local enforcement activity, but only under narrowly and carefully defined circumstances.").

25. See NAT'L IMMIGR. FORUM, IMMIGRATION LAW ENFORCEMENT BY STATE AND LOCAL POLICE 1 (2007), available at <http://www.immigrationforum.org/documents/TheDe>

state and local police to enforce civil violations only when “there is a ‘mass influx’ of foreign nationals; the situation requires an immediate response from the federal government; and federal officials obtain consent of the state or local supervising department.”²⁶

Of particular importance to state and local immigration enforcement are two provisions of the IIRIRA, both of which have initiated much of the political controversy we see today. The first IIRIRA provision, known as the “287(g)”, allows state and local police to act on behalf of federal immigration officers, provided they have (1) undergone the appropriate training, and (2) a formal Memorandum of Agreement (MOA) between the police department and the DOJ.²⁷ This agreement allows state and local authorities to voluntarily participate in certain federal immigration enforcement duties only after passing through the requisite training program.²⁸

Secondly, IIRIRA specifies that state public employees cannot be prohibited from reporting individual-specific information to the Immigration and Naturalization Service (INS);²⁹ thereby, preempting state and local disclosure laws, which are generally found in sanctuary cities with confidentiality policies.³⁰ This provision has been the subject of much contro-

bate/EnforcementLocalPolice/Background-Under-StateLocalEnforcement.pdf (emphasizing that the individual must have re-entered the United States *and* been previously convicted of a felony).

26. *Id.* (noting that under the IIRIRA civil violations can *only* be enforced in two very specific circumstances).

27. *See id.* at 3 (“The [memorandum of agreement] process (specified in section 287(g) of the INA) includes safeguards designed to ensure the integrity of local enforcement of federal civil laws and specifies that such arrangements are possible only when they do not supersede state or local laws that prohibit such arrangements.”).

28. *See id.*

29. *See id.* at 1 (recognizing that the provision of the IIRIRA stating that public offices cannot prohibit their employees from reporting immigration information to federal authorities does preempt all state and local mandates that bar these types of disclosures).

30. *See* 8 U.S.C. § 1373 (2000).

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

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

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

versy as many states are refusing to comply without penalty.³¹ Over the years, numerous pieces of legislation have been introduced, without successfully being passed, that have attempted to sanction cities that enact these “non-cooperation” laws.³² Placing sanctions on these laws thus changes the authority of states to voluntarily assist the federal government enforce federal immigration law, into required—and even coerced—action by the state.

C. *Currently Proposed Legislation*

In the midst of such uncertainty, and the repeated failure of comprehensive immigration reform, politicians are hastily attempting to define the duties and broaden the boundaries between federal and state immigration duties. States are now stepping up and either standing fast in light of the federal mandate against sanctuary cities,³³ or they are entering into optional MOAs under 287(g) with ICE.³⁴ In response, members of Congress are proposing legislation in both the House and the Senate to penalize cities that disobey the mandate and reward others that enter into MOAs.³⁵ In June of 2007, U.S. Rep. Tom Tancredo proposed House

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

(c) Obligation to respond to inquiries. The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information. *Id.*

31. See Joseph F. Murphy, Jr., Comment, *Maryland's Sanctuary Policies Isolate Federal Law and the Constitution While Undermining Criminal Justice*, 36 U. BALT. L.F. 149, 149 (2006) (recognizing that localities ignore the law notwithstanding Congress's prohibition against sanctuary policies in 8 U.S.C. § 1373).

32. See Matthew Parlow, *Immigration: Both Sides of the Fence: A Localist's Case for Decentralizing Immigration Policy*, 84 DENV. U.L. REV. 1061, 1068 (2007) (discussing the failure of the CLEAR Act and HSEA to pass Congress).

33. See Nat'l Immigr. L. Ctr., *Laws, Resolutions and Policies Instituted Across the U.S. Limiting Enforcement of Immigration Laws by State and Local Authorities*, Oct. 11, 2007, available at http://www.nilc.org/immlawpolicy/LocalLaw/locallaw_limiting_tbl_2007-10-11.pdf (identifying eighty-four states and localities that have limited, instead of broadening, the role of state and local law enforcement in federal immigration law).

34. See Eleanor Stables, *State and Local Police Slowly Warming to Immigration Enforcement*, CQ POLITICS, Nov. 7, 2007, available at <http://cqpolitics.com/wmspage.cfm?docID=hsnews-000002623700> (recognizing thirty-four state or local enforcement agencies that have decided to assist the federal government enforce immigration law).

35. See Charlie Norwood CLEAR Act of 2007, H.R. 3494, 110th Cong. (2007), available at <http://www.govtrack.us/data/us/bills.text/110/h/h3494.pdf>; see also Accountability in Enforcing Immigration Laws Act of 2007, H.R. 3531, 110th Cong. (2007), available at <http://www.govtrack.us/data/us/bills.text/110/h/h3531.pdf>.

Amendment 294 to the Department of Homeland Security Appropriations Act, in an attempt to withhold funding from non-cooperating cities, and the House of Representatives passed U.S. Rep. Tancredo's amendment.³⁶ In other efforts to silence sanctuary cities, the CLEAR Act of 2007 and the Accountability in Enforcing Immigration Laws Act of 2007 have been proposed to financially reward cities that cooperate with federal immigration authorities, while fining those that do not.³⁷

D. *Effect of Proposed Legislation*

Neither of the two bills discussed above have passed in either chamber of Congress at the time this Comment was published, however, the implications of these proposed policies are alarming and will reverberate throughout many communities. The outcome will not only affect the civil rights of immigrants,³⁸ but also adversely impact entire communities. States and localities that are deemed "uncooperative" will lose precious Department of Homeland Security (DHS) funding.³⁹ Local communities that volunteer to enter into the "287(g)" program will experience similar consequences felt by those communities who have already entered into these agreements. Local law enforcement agencies will be overburdened as they fight crime and regulate immigration while limited resources are used to partially fund a federal policy.⁴⁰ Most harrowing, relationships

36. See generally Dep't of Homeland Security Appropriations Act of 2008, H.R. 2638, 110th Cong. (2007), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HZ294>.

37. See Charlie Norwood CLEAR Act of 2007, H.R. 3494, 110th Cong. (2007), available at <http://www.govtrack.us/data/us/bills.text/110/h/h3494.pdf>.

38. See Lisa M. Seghetti, Stephen R. Vina & Karma Esther, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* 28 (Cong. Research Serv., CRS Report for Congress, Order Code RL32270, Aug. 14, 2006), available at <http://www.ilw.com/immigdaily/news/2006,0912-crs.pdf> (stressing that violations of civil rights is an overriding concern that has already received public attention in the past).

39. See Alex Koppelman, *Congress to New York (and Chicago and L.A.): Drop Dead*, SALON.COM, Oct. 4, 2007, http://www.salon.com/news/feature/2007/10/04/sanctuary/index_np.html ("[T]he proposals involve depriving the nation's biggest and most vulnerable cities of their anti-terror funding.").

40. See NAT'L IMMIGR. FORUM, IMMIGRATION LAW ENFORCEMENT BY STATE AND LOCAL POLICE 5-6 (2007), available at <http://www.immigrationforum.org/documents/TheDebate/EnforcementLocalPolice/Backgrounder-StateLocalEnforcement.pdf> ("[A]gencies are wasting time and resources holding persons for civil violations of immigration laws—many of whom are being held simply because there is an inaccurate or out-of-date record in the [National Crime Information Center].").

between the police and community residents will deteriorate,⁴¹ resulting in more unsolved crimes and placing citizens at greater risk of danger.⁴²

Part II of this Comment will discuss the history of state and local immigration enforcement, while highlighting the ambiguity and confusion that has led to currently proposed legislation. Part II will also detail the legal authority in which state and localities can enforce immigration law. Part III will analyze the consequences of presently proposed legislation as well as *any* state and local participation in civil immigration law.

II. LEGAL BACKGROUND

Adding to the confusing nature of state and local enforcement of federal civil immigration law are the differing views that states and localities have taken on the issue.⁴³ While some state and local authorities permit their officers to enforce immigration law, others will prohibit it. These localities are known as sanctuary cities.⁴⁴ Whether or not states have the authority to enforce federal civil immigration laws (and whether the federal government has the right to demand assistance) is relevant to determine whether these state and local entities can refuse to cooperate with the federal government.

Sanctuary cities, which employ non-cooperating policies, confidential-ity policies, or “don’t ask, don’t tell” policies, are those that do not require law enforcement officers to report undocumented aliens to the

41. *See id.* at 2 (detailing the history and success of community oriented policing and how state and local authorities’ involvement in federal immigration matters will destroy the trust needed to keep crime rates down under community policing).

42. *See* Lisa M. Seghetti, Stephen R. Vina & Karma Esther, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* 30 (Cong. Research Serv., CRS Report for Congress, Order Code RL32270, Aug. 14, 2006), *available at* <http://www.ilw.com/immigdaily/news/2006,0912-crs.pdf> (“Opponents argue that such a policy would undermine public safety and could force many undocumented aliens to go underground, thus making it more difficult to solicit their cooperation in terrorist-related and criminal investigations.”).

43. *See* Jeff Lewis et al., *Authority of State and Local Officers to Arrest Aliens Suspected of Civil Infractions of Federal Immigration Law*, 7 BENDER’S IMMIGR. BULL. No. 15, 944 (Aug. 1, 2002), *available at* <http://www.migrationpolicy.org/files/authority.pdf> (“As a matter of state law, most of the states with significant immigrant populations do not permit their law enforcement officers to make arrests for civil immigration violations.”).

44. NAT’L IMMIGR. FORUM, IMMIGRATION LAW ENFORCEMENT BY STATE AND LOCAL POLICE 1 (2007), *available at* <http://www.immigrationforum.org/documents/TheDebate/EnforcementLocalPolice/Backgrounder-StateLocalEnforcement.pdf> (“[M]ore complication is added with the overlay of state and localities authorize the enforcement of immigration laws, others do not authorize it, and some *prohibit* their police agencies from enforcing immigration laws.”).

federal authorities.⁴⁵ Sanctuary policies are usually only applicable when determining the status of an individual seeking municipal benefits and services, and not extended to those who have committed a crime.⁴⁶ Thirty-two self-proclaimed sanctuary cities, many individual police departments and the entire states of Alaska and Oregon, have non-cooperation laws.⁴⁷ Others, such as New York City, have sanctuary-type policies in place even though they refuse to be identified with the sanctuary title.⁴⁸ “More than 68 municipal and state governments in the United States have enacted policies, resolutions or ordinances rejecting the expansion of local law enforcement duties to include federal immigration laws.”⁴⁹ Sanctuary policies are active across the nation in large cities, such as San Francisco, Austin, Houston and Seattle, where communities have chosen to protect undocumented immigrants.⁵⁰ Although most legislation is based on the premise that municipal sanctuary cities hinder the federal government’s enforcement of immigration law, such a claim bears no merit.⁵¹ ICE spokesperson, Pat Reilly, stated, “[Sanctuary policies] do

45. See INT’L ASS’N OF CHIEFS OF POLICE, POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES 14 (July 2007), available at <http://theiacp.org/documents/pdfs/Publications/PoliceChiefsGuidetoImmigration%2Epdf> (“[M]any cities have adopted ‘don’t-ask-don’t tell’ policies that do not require government/city employees including law enforcement to report to federal officials on illegal immigrants who may be living or working in their jurisdictions.”).

46. See Lisa Anderson, ‘Sanctuary Cities’ Draw Fire, *No Light*, CHICAGO TRIB., Dec. 13, 2007, available at <http://www.chicagotribune.com/news/nationworld/chi-sanctuarydec12,1,2198712.story> (explaining that there is rarely agreement as to what the true definition of a sanctuary city is or whether such a thing even exists).

47. See Lisa M. Seghetti, Stephen R. Vina & Karma Esther, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* 26 (Cong. Research Serv., CRS Report for Congress, Order Code RL32270, Aug. 14, 2006), available at <http://www.ilw.com/immigdaily/news/2006,0912-crs.pdf>; see also Lisa Anderson, ‘Sanctuary Cities’ Draw Fire, *No Light*, CHICAGO TRIB., Dec. 13, 2007, available at <http://www.chicagotribune.com/news/nationworld/chi-sanctuarydec12,1,2198712.story> (suggesting that sanctuary cities are not just compassionate and positive, but also cost-efficient).

48. See David Lightman, *Giuliani, Romney Trade Attacks Over Immigration*, KAN. CITY STAR, Nov. 23, 2007, available at <http://www.kansascity.com/news/nation/story/374366.html> (taking criticism for welcoming undocumented immigrants, Giuliani insists that New York City was never a sanctuary city).

49. Luis E. Cotto & Peter Goselin, Commentary, *The Wrong Arm of the Law*, COURANT, Nov. 18, 2007, available at <http://www.courant.com/news/opinion/commentary/hc-commentarycotto1118.artnov18,0,3277121.story>.

50. See Dave Montgomery, *States May Take up Immigration Fight*, PITT. POST-GAZETTE, June 30, 2007, available at <http://www.post-gazette.com/pg/07181/798324-84.stm> (describing the dramatic increase in immigration laws, ranging from punitive to protective, being implemented by state legislatures across the nation).

51. See Lisa Anderson, ‘Sanctuary Cities’ Draw Fire, *No Light*, CHICAGO TRIB., Dec. 13, 2007, available at <http://www.chicagotribune.com/news/nationworld/chi-sanctuarydec12,1,2198712.story> (“[M]unicipal sanctuary policies don’t hinder the work of ICE.”).

not prevent us from applying the law, wherever it is necessary, to protect national security and public health and safety.”⁵² Similarly, when questioned about sanctuary cities, DHS Secretary Michael Chertoff stated, “I’m not aware of any city, although I may be wrong, that actually interferes with our ability to enforce the law.”⁵³

A. *Precedent*

Much of the confusion surrounding the authority of state and local authorities to enforce civil immigration laws began with a circuit split in the early 1980s. *Gonzalez v. City of Peoria*, a Ninth Circuit case, involved persons of Mexican descent stopped and questioned by law enforcement agents who were acting in compliance with a city provision that allowed state authorities to enforce federal violations.⁵⁴ The appellants argued that immigration was a matter of federal enforcement, and that preemption had precluded any local police involvement.⁵⁵ The court held that “federal law does not preclude local enforcement of the *criminal* provisions of the [Immigration and Naturalization] Act,”⁵⁶ and that state law authorized the police department to enforce federal criminal immigration laws.⁵⁷ The court noted, “[t]here is nothing inherent in that specific enforcement activity that conflicts with federal regulatory interests,” insinuating that federal law may preempt state authority.⁵⁸

52. *Id.* See U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN. AUDIT DIV., COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE U.S., viii (2007), available at <http://www.usdoj.gov/oig/reports/OJP/a0707/final.pdf> (opining that the sanctuary policies reviewed did not prevent ICE from doing their job). The audit stated, “in each instance the local policy either did not preclude cooperation with ICE or else included a statement to the effect that those agencies and officers will assist ICE or share information with ICE as required by federal law.” *Id.*

53. See Alex Koppelman, *Congress to New York (and Chicago and L.A.): Drop Dead*, SALON.COM, Oct. 4, 2007, http://www.salon.com/news/feature/2007/10/04/sanctuary/index_np.html.

54. See *Gonzalez*, 722 F.2d at 472.

55. See *id.* at 474.

56. *Id.* at 475 (emphasis added). “Arrest of a person for illegal presence would exceed the authority granted Peoria’s police.” *Id.* at 476.

57. See *id.* at 476 (“We therefore conclude that state law authorizes Peoria police to enforce the criminal provisions of the Immigration and Naturalization Act. We firmly emphasize, however, that this authorization is limited to criminal violations of the Act.”); see also *Gates v. Superior Court*, 193 Cal. App.3d 205, 213, 238 Cal. Rptr. 592 (1987) (“The civil provisions of the INA constitute a pervasive regulatory scheme such as to grant exclusive federal jurisdiction over immigration, thereby preempting state enforcement.”).

58. See *Gonzalez*, 722 F.2d at 474–75 (“We assume that the civil provisions of the Act regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration.”).

One year later, a Tenth Circuit case, *United States v. Salinas Calderon*, took a different view. Defendant Salinas was stopped for a routine traffic violation when the officer noticed multiple persons in the back of his truck under an aluminum camper shell.⁵⁹ The officer proceeded to question the individuals about their immigration status and “green cards.”⁶⁰ Salinas argued that the police officer did not have the right to question him based on a “mere hunch” and did not have the authority to detain them while inquiring into federal immigration matters.⁶¹ The court rejected this argument and decided “[a] state trooper has general investigatory authority to inquire into possible immigration violations.”⁶²

B. *The Department of Justice Memos*

More than a decade after this circuit split, the confusion nevertheless existed, and the DOJ has failed to clarify the matter. In 1996, the Justice Department Office of Legal Counsel issued a memorandum opinion making it very clear that state and local government did not have the authority to enforce civil immigration law.⁶³ Specifically, the memorandum stated:

Subject to the provisions of state law, state and local police may constitutionally detain or arrest aliens who have violated the criminal provisions of the Immigration and Naturalization Act (INA). State police lack recognized legal authority to arrest or detain aliens solely for purposes of *civil* deportation proceedings, as opposed to criminal prosecution.⁶⁴

In 2005, however, a 2002 memorandum was released opining that state and local government had the authority to enforce both criminal and civil

59. See *United States v. Salinas-Calderon*, 728 F.2d 1298, 1299 (10th Cir. 1984).

60. See *id.*

61. See *id.* at 1301.

62. *Id.*; see *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1302 (10th Cir. 1999) (opining that 8 U.S.C. § 1252c, which authorizes state and local police to arrest undocumented immigrants, “does not limit or displace the preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration law”).

63. Memorandum from Dep’t of Justice on Assistance By State and Local Police in Apprehending Illegal Aliens to the U.S. Attorney S. Dist. of Cal. (Feb. 5, 1996) available at <http://www.usdoj.gov/olc/immstopo1a.htm>.

64. *Id.* (referencing back to a 1989 DOJ legal opinion that also concluded that state and local authorities do not have the authority to enforce federal immigration law based on 8 U.S.C. § 1251, which establishes that “the mere existence of a warrant of deportation does not enable all state and local law enforcement officers to arrest the violator of those civil provisions”).

immigration law.⁶⁵ As important as this 2002 memorandum was, it was only publicly released three years after its drafting following a Freedom of Information Act lawsuit.⁶⁶ The 2002 memorandum stated “the authority to arrest for violation of federal law inheres in the States, subject only to preemption by federal law,”⁶⁷ and found that Congress had not preempted state and local enforcement of civil immigration laws.⁶⁸ Critics argue that the memorandum failed to cite any cases that upheld a violation of a civil or federal statute, nor did it distinguish between criminal and non-criminal violations in the cases it did use.⁶⁹

C. *Statutes (the 1996 Laws)*

The same year that the first DOJ opinion was issued, stating that local authorities did *not* have civil enforcement authority, two statutes were enacted in an attempt to resolve the issue by giving the states authority to enforce in very specific instances. Although the DOJ's opinion changed in the 2002 opinion, these statutes are still in existence.

1. Illegal Immigration Reform and Immigrant Responsibility Act of 1996

Title 8 U.S.C § 1373 of the IIRIRA expressly bars all state and local governments from preventing law enforcement agencies from exchanging

65. See Memorandum from Dep't of Justice on Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations to the Attorney General 13 (July 22, 2005), *available at* <http://www.aclu.org/FilesPDFs/ACF27D8.pdf> (“[The U.S. Department of Justice’s] 1996 advice that federal law precludes state police from arresting aliens on the basis of civil deportability was mistaken.”).

66. See Federation for Am. Immigr. Reform, *Immigration Law Enforcement by Local Agencies*, *available at* http://www.fairus.org/site/PageServer?pagename=iic_immigrationis-suecenters0342 (last visited on Feb. 3, 2008) (asserting that although Attorney General John Ashcroft did announce the conclusion of the 2002 memo, the full opinion was not made public until after a Freedom of Information Act lawsuit).

67. Memorandum from Dep't of Justice on Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations to the Attorney General 1 (July 22, 2005), *available at* <http://www.aclu.org/FilesPDFs/ACF27D8.pdf> (concluding that their 1996 memo was mistaken).

68. *Id.*

69. See Am. Civil Liberties Union, *Immigrant’s Rights Project*, Sept. 6, 2005, *available at* <http://www.aclu.org/FilesPDFs/ACF3189.pdf> (condemning the 2002 OLC memo for ignoring legislative history, failing to mention statutes that do provide state and local police with civil immigration enforcement authority, and failing to explain why 8 U.S.C § 1252(c) (whose purpose is to “[a]uthoriz[e] state and local law enforcement officials to arrest and detain certain illegal aliens”) was drafted, if state and local police can enforce immigration laws even without § 1252). The ACLU states: “The OLC’s selective and misleading survey of the law results in an opinion that is much more of a political document than neutral and reliable legal advice.” *Id.*

information pertaining to an alien's status to federal immigration authorities.⁷⁰ Simply put, this prohibits sanctuary policies, but it is an edict not supported by all law enforcement agencies or local governments. A July 2007 guide issued by the International Association of Chiefs of Police, an organization of police executives with over 20,000 members, advises, "[l]aw enforcement executives must operate within the policies established by state or local governing bodies, and may have to deal with these policies *even though they run afoul of federal law and policy.*"⁷¹ It should be noted that this legislation prohibits local agencies from setting policies that discourage or prohibit the disclosure of an immigrant's status to ICE officials; however, it could be construed to also mean that officers *can* be prohibited from inquiring into the immigration status of individual's *altogether*.⁷²

The IIRIRA goes on to provide two specific instances in which state and local governments can enforce civil immigration laws. Local authorities can enforce these laws when (1) there is a "mass influx" of aliens, (2) requiring immediate action by the federal government, and (3) the state or local supervising department consent to such assistance.⁷³ State and local authorities can also act on behalf of the federal government if they enter into a memorandum of agreement with the DOJ, but the state and local governments are required to cover the expenses.⁷⁴

70. See 8 U.S.C. § 1373 (2000).

71. INT'L ASS'N OF CHIEFS OF POLICE, POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES 43 (July 2007), available at <http://theiacp.org/documents/pdfs/Publications/PoliceChiefsGuidetoImmigration%2Epdf> (emphasis added) (encouraging state and local police departments to adhere to sanctuary policies until national immigration reform is enacted by Congress).

72. See NAT'L IMMIGR. FORUM, IMMIGRATION LAW ENFORCEMENT BY STATE AND LOCAL POLICE 3-4 (2007), available at <http://www.immigrationforum.org/documents/TheDebate/EnforcementLocalPolice/Backgrounder-StateLocalEnforcement.pdf> (noting that the IIRIRA does not address whether state and local authorities can be barred from inquiring into an individual's status).

73. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 372, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.) available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_public_laws&docid=f:publ208.104.pdf.

(8) In the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents 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 the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon officers or employees of the Service. *Id.*

74. See *id.* (amending section 287(g) of the Immigration and Nationality Act).

a. Memorandums of Understanding Under 287(g)

Since 1996, nearly 597 officers from around the country have passed the 287(g) training.⁷⁵ Although the first agency did not join until 2001,⁷⁶ five years after the programs inception, there are now thirty-four municipal, county or state law enforcement agencies taking part and eighty more are on the waiting list.⁷⁷ These agencies, rushing for a “quick fix” may find themselves doing more harm than good because this program is not compatible everywhere. One ICE official, Bruce Foucart, stated, “the [287(g)] program may or may not work for some communities,” and goes on to explain that communities with criminal activity, such as gang violence and human smuggling, are good candidates for the program.⁷⁸ With

(g)(1) Notwithstanding section 1342 of title 31, United States Code, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law. *Id.*

See also U.S. Immigr. & Customs Enforcement, Fact Sheet: Section 287(g), Immigration and Nationality Act, June 22, 2007, <http://www.ice.gov/pi/news/factsheets/070622factsheet287gprogoover.htm> (last visited on Feb. 10, 2008).

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), effective September 30, 1996, added Section 287(g), performance of immigration officer functions by state officers and employees, to the Immigration and Nationality Act (INA). This authorizes the secretary of the U.S. Department of Homeland Security (DHS) to enter into agreements with state and local law enforcement agencies, permitting designated officers to perform immigration law enforcement functions, pursuant to a Memorandum of Agreement (MOA), provided that the local law enforcement officers receive appropriate training and function under the supervision of sworn U.S. Immigration and Customs Enforcement (ICE) officers. *Id.*

75. See Eleanor Stables, *State and Local Police Slowly Warming to Immigration Enforcement*, CQ POLITICS, Nov. 7, 2007, <http://cqpolitics.com/wmspage.cfm?docID=hsnews-000002623700>.

76. See Tara Burghart, *Waukegan Immigrants Wary of City Effort to Enforce Federal Law*, NWT.COM, Nov. 19, 2007, available at <http://nwitimes.com/articles/2007/11/19/news/illiana/doce3c750fe68d6cc76862573980005baf7.txt>.

77. See Eleanor Stables, *State and Local Police Slowly Warming to Immigration Enforcement*, CQ POLITICS, Nov. 7, 2007, available at <http://cqpolitics.com/wmspage.cfm?docID=hsnews-000002623700> (contending that although hesitant to use the program in its first five years, state and local authorities are now using the 287(g) MOA program as a tool to fight illegal immigration until Congress passes a comprehensive immigration reform plan).

78. Liz Mineo, *Framingham Police Officers Receive Immigration Training*, METRO WEST DAILY NEWS, Nov. 11, 2007, available at <http://www.metrowestdailynews.com/homepage/x2088123480> (demonstrating that police chiefs and ICE agents alike agree that the drawbacks of the 287(g) program may not outweigh its benefits in some cities).

this training, officers can then enforce civil immigration law, such as pulling over or questioning any individual they merely suspect of being an alien.⁷⁹

During the program, local officers receive four or five weeks of training under the supervision of an ICE officer.⁸⁰ There they learn “immigration and criminal law, document examinations, alien status, ICE operations and removal charges.”⁸¹

After the program, local authorities are granted many of the duties of a federal immigration officer.⁸² The process begins when an officer suspects the individual of being in the country illegally. The individual is then turned over to an officer who has been trained in the 287(g) program.⁸³ This officer then enacts to determine the status of the undocumented immigrant via access to a federal database that allows the officer to search fingerprints, photos, and prior criminal history, as well as the validity of any documents the immigrant may have in their possession.⁸⁴ Before this program, local agencies would place a call to ICE to determine the individual’s status, but now deputies have access to a database in which they can determine the status themselves.⁸⁵ These authorities can then, at their discretion, go on to place holds, detainers, or release the person in custody.⁸⁶ A detainer allows the government to keep the indi-

79. See Jim Brooks, *State Lags in Checks of Illegals*, NW. ARK. NEWS, Oct. 28, 2007, available at <http://www.nwanews.com/adg/News/205841> (quoting one sheriff as stating “If I’m driving down the street and I see a guy I suspect of being an illegal alien, I can pull him over and I can call ICE and they will eventually show up.”).

80. Liz Mineo, *Framingham Police Officers Receive Immigration Training*, METRO W. DAILY NEWS, Nov. 11, 2007, available at <http://www.metrowestdailynews.com/homepage/x2088123480>.

81. Liz Mineo, *Framingham Police Officers Receive Immigration Training*, METRO W. DAILY NEWS, Nov. 11, 2007, available at <http://www.metrowestdailynews.com/homepage/x2088123480> (describing the 287(g) program and how it gives state and local police the authority to detain and question undocumented immigrants who threaten public safety).

82. Kevin Canfield, *Deputies Unfazed by New Law*, TULSA WORLD, Nov. 13, 2007, at A1, available at http://www.tulsaworld.com/news/article.aspx?subjectID=14&articleID=071113_1_A1_hLitt05508 (explaining the pre-287(g) procedures, in which local authorities contacted ICE agents to ascertain an individual’s status. Now graduates of the 287(g) course have access to these databases).

83. See *id.*

84. See Tara Burghhart, *Waukegan Immigrants Wary of City Effort to Enforce Federal Law*, NWI.COM, Nov. 19, 2007, <http://nwitimes.com/articles/2007/11/19/news/illiana/doce3c750fe68d6cc76862573980005baf7.txt> (acknowledging that critics believe these types of procedures all already in place through ICE, and giving this authority to state and local police officers will only lead to racial profiling and distrust).

85. See Kevin Canfield, *Deputies Unfazed by New Law*, TULSA WORLD, Nov. 13, 2007, at A1, available at http://www.tulsaworld.com/news/article.aspx?subjectID=14&articleID=071113_1_A1_hLitt05508.

86. See *id.*

vidual in custody without the opportunity of bonding out until they can determine the suspect's status.⁸⁷

2. Anti-Terrorism and Effective Death Penalty Act of 1996

The other statute relevant to state and local law enforcement is the AEDPA, which authorizes state and local enforcement agencies to enforce civil immigration laws only if aliens are present in United States unlawfully and had been previously convicted of a felony.⁸⁸ In effect, these individuals are arrested and detained for a civil immigration law violation (being unlawfully present) *based on a criminal* violation, therefore creating a required nexus between criminal and civil violations before state and local police can act.⁸⁹

D. *Back Door Policing: Proposed Legislation, Then and Now*

1. Criminal Alien Removal Act and the Homeland Security Enhancement Act of 2003 and 2005

In 2003, and again in 2005, the Clear Law Enforcement for Criminal Alien Removal Act (CLEAR Act) and its Senate counterpart, the Homeland Security Enhancement Act (HSEA), both failed to pass Congress.⁹⁰ The 2003 version of the CLEAR Act was based on the condition that states would have to enact legislation expressly authorizing the enforcement of civil immigration laws, while the 2005 version conditioned the

87. *See id.* ("Detainers are placed on individuals found to be in violation of immigration laws or on individuals whose immigration status requires further investigation.")

88. *See* Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 439, 110 Stat. 1214 (codified as amended at 8 U.S.C. § 1252c (2000)).

In General.—Notwithstanding any other provision 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

(1) is an alien illegally present in the United States; and
 (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction, but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States. *Id.*

89. *See* Nat'l Immigr. Forum, Background: Immigration Law Enforcement by State and Local Police, <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=572> (last visited on Mar. 19, 2008) (stressing the limited and specific ways in which state and local police are authorized to enforce civil immigration violations under statute).

90. *See* Clear Law Enforcement Act of 2003, H.R. 2671, 108th Cong. (2003); *see also* Clear Law Enforcement Act of 2005, H.R. 3137, 109th Cong. (2005); *see also* Homeland Security Enhancement Act of 2003, S. 1906, 108th Cong. (2003); *see also* Homeland Security Enhancement Act of 2005, S. 1362, 109th Cong. (2005).

funding on states not having any type of guidelines preventing officers from enforcing these laws (as seen in sanctuary cities).⁹¹

While speaking before the Subcommittee on Immigration, Border Security, and Claims, one member of Congress warned, "I believe the CLEAR Act is perhaps one of the most dangerous and potentially damaging bills that this Subcommittee has considered. The CLEAR Act is detrimental to our police departments, the safety of our immigrants and nonimmigrant communities, and to our national security."⁹² Unfortunately, most currently proposed legislation in Congress is modeled after the CLEAR Act.⁹³

91. Daniel Booth, *Federalism on Ice: State and Local Enforcement of Federal Immigration Law*, 29 HARV. J.L. & PUB. POL'Y 1063, 1064 (2006) ("The CLEAR Act of 2005 propose[d] making the distribution of federal funds to local authorities dependent on whether local authorities assist in or stymie the enforcement of immigration laws.").

92. *Clear Law Enforcement for Criminal Alien Removal Act of 2003: Hearing on H.R. 2671 Before the Subcomm. on Immigration, Border Security, and Claims*, 108th Cong. 7 (2003) (statement of U.S. Rep. Linda Sanchez, of the House Judiciary Committee).

93. *Compare* Clear Law Enforcement Act of 2003, H.R. 2671, 108th Cong. (2003) (authorizing state and local law enforcement to investigate, apprehend and remove of undocumented aliens while cutting federal incarceration assistance to any state or locality that does not assist in the enforcement of federal immigration law), *and* Clear Law Enforcement Act of 2005, H.R. 3137, 109th Cong. (2005) (authorizing state and local law enforcement to investigate, apprehend and remove of undocumented aliens while cutting federal incarceration funds and allows the DHS to award grants to cooperating state and localities), *and* Homeland Security Enhancement Act of 2003, S. 1906, 108th Cong. (2003) (authorizing state and local law enforcement to investigate, apprehend and remove of undocumented aliens while cutting federal incarceration assistance to any state or locality that does not assist in the enforcement of federal immigration law), *and* Homeland Security Enhancement Act of 2005, S. 1362, 109th Cong. (2005) (authorizing state and local law enforcement to investigate, apprehend and remove of undocumented aliens while cutting federal incarceration funds), *with* Charlie Norwood Clear Act of 2007, H.R. 3494, 110th Cong. (2007), *available at* <http://www.govtrack.us/data/us/bills.text/110/h/h3494.pdf> (authorizing state and local law enforcement to investigate, apprehend and remove of undocumented aliens while asserting that all state and localities that prohibit state employees from cooperating with federal immigration officers will forfeit all funding otherwise available to them under the Immigration and Nationality Act, and also allowing DHS to provide grants to cooperating cities), *and* Accountability in Enforcing Immigration Laws Act of 2007, H.R. 3531, 110th Cong. (2007), *available at* <http://www.govtrack.us/data/us/bills.text/110/h/h3531.pdf> (authorizing state and local law enforcement to investigate, apprehend and remove of undocumented aliens while revoking twenty-five percent of Homeland Security funds as well as an additional fifty percent at the secretary of Homeland Security's discretion to those that are deemed non-cooperating, while providing financial assistance to those that do), *and* Dep't of Homeland Security Appropriations Act of 2008, H.R. 2638, 110th Cong. (2007), *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HZ294>: (prohibiting all sanctuary cities from receiving any Homeland Security funding), *and* Dep't of Commerce and Justice, Science, and Related Agencies Appropriations Act of 2008, H.R. 3093, 110th Cong. (2007), *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HZ676> (prohibiting all sanctuary cities from receiving any funding from this bill),

2. The Reemergence of the CLEAR Act and Other Currently Proposed Legislation

Although the CLEAR Act of 2003 and 2005 were disappointments, U.S. Rep. Marsha Blackburn introduced the Charlie Norwood CLEAR Act of 2007 (CLEAR Act of 2007) (which is not to be confused with the previous CLEAR Acts) during the current Congress.⁹⁴ This bill was introduced to end the uncertainty surrounding civil enforcement authority and dissolve sanctuary cities.⁹⁵ In essence, the CLEAR Act of 2007 gives state and local authorities the inherent right to enforce immigration law while setting a time limit of two years for sanctuary type cities to eliminate confidentiality policies or risk forfeiting federal assistance.⁹⁶ The bill seeks to “encourage” states and localities to assist DHS in apprehending undocumented aliens and offers grants for those that do.⁹⁷ The CLEAR Act of 2007 goes on to provide state and local authorities enforcing immigration law with personal liability immunity and civil rights immunity for monetary damages.⁹⁸

On September 14, 2007, U.S. Rep. Ginny Brown-Waite introduced the Accountability in Enforcing Immigration Laws Act of 2007, which is noticeably similar to the CLEAR Act of 2007.⁹⁹ The Brown-Waite bill proposes to authorize a state to enforce civil immigration laws by allowing them “to investigate, identify, arrest, detain, or transfer to Federal custody aliens in the United States.”¹⁰⁰ It also proposes to abolish all state and local sanctuary policies by withholding twenty-five percent of the state’s DHS funding, as well as an additional twenty-five percent at the

and No Sanctuary for Illegals Act of 2007, H.R. 3549, 110th Cong. (2007), *available at* <http://www.govtrack.us/data/us/bills.text/110/h/h3549.pdf> (cutting all federal funding to sanctuary cities).

94. *See* Charlie Norwood CLEAR Act of 2007, H.R. 3494, 110th Cong. (2007), *available at* <http://www.govtrack.us/data/us/bills.text/110/h/h3494.pdf>.

Effective two years after the date of the enactment of this Act, a State, or a political subdivision of a State, that has in effect a statute, policy, or practice that prohibits law enforcement officers of the State, or of a political subdivision of the State, from assisting or cooperating with Federal immigration law enforcement in the course of carrying out the officers’ routine law enforcement duties shall not receive any of the funds that would otherwise be allocated to the State under section 241(i) of the Immigration and Nationality Act (8 U.S.C. 1231(i)). *Id.*

95. *See id.* at 9.

96. *See id.*

97. *See id.* at 2 (“State authorization for assistance in the enforcement of immigration laws encouraged.”).

98. *See id.* at 19.

99. *See generally* Accountability in Enforcing Immigration Laws Act of 2007, H.R. 3531, 110th Cong. (2007), *available at* <http://www.govtrack.us/data/us/bills.text/110/h/h3531.pdf>.

100. *Id.* § 201.

Homeland Security secretary's discretion.¹⁰¹ Unlike proposed legislation of this kind in the past, this bill would set aside \$1 billion to reimburse states and localities for the costs of incarcerating aliens on state or local criminal charges and convictions.¹⁰² Fortunately, both of these Acts discourage the reporting of victim or witness identities.¹⁰³

U.S. Rep. Tom Tancredo proposed an amendment to H.R. 2638, the DHS Appropriations Act of 2008 which would prevent all anti-terror federal funding from the DHS budget to state and local governments that disobeyed 8 U.S.C. § 1373 by prohibiting employees from sending or receiving information of the individual's citizenship or status to the INS.¹⁰⁴ H.R. 2638 passed the House by a surprising 234 to 189 vote on June 15, 2007,¹⁰⁵ as an amendment to a spending bill which also passed.¹⁰⁶ U.S. Rep. Thelma Drake proposed an amendment to the Commerce, Justice, Science and Related Agencies Appropriations Act, which would also prohibit any funding to sanctuary cities.¹⁰⁷ This amendment, and the larger bill, both passed the House and are awaiting Senate approval.¹⁰⁸ Yet another bill, No Sanctuary for Illegals Act, was introduced by U.S. Rep. Dan Burton on September 17, 2007.¹⁰⁹ The Burton bill would cut all federal funding to sanctuary cities, or those deemed to be so by the secretary of Homeland Security.¹¹⁰

101. *See id.* § 206.

102. *See id.*

103. *See id.*; *see also* Charlie Norwood CLEAR Act of 2007, H.R. 3494, 110th Cong. 9 (2007), available at <http://www.govtrack.us/data/us/bills.text/110/h/h3494.pdf>.

104. *See* Dep't of Homeland Security Appropriations Act of 2008, H.R. 2638, 110th Cong. (2007), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HZ294>.

105. *See id.*

106. *See* Alex Koppelman, *Congress to New York (and Chicago and L.A.): Drop Dead*, SALON.COM, Oct. 4, 2007, http://www.salon.com/news/feature/2007/10/04/sanctuary/index_np.html (noting that Tancredo's own spokesperson has stated the chances of this amendment being added to the bill are "slim").

107. *See* Dep't of Commerce and Justice, Science, and Related Agencies Appropriations Act of 2008, H.R. 3093, 110th Cong. (2007), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HZ676> ("An amendment to prohibit the use of funds to be used in contravention of section 642(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.").

108. *See id.*; *see also* Alex Koppelman, *Congress to New York (and Chicago and L.A.): Drop Dead*, SALON.COM, Oct. 4, 2007, http://www.salon.com/news/feature/2007/10/04/sanctuary/index_np.html.

109. *See* No Sanctuary for Illegals Act of 2007, H.R. 3549, 110th Cong. (2007), available at <http://www.govtrack.us/data/us/bills.text/110/h/h3549.pdf>.

110. *See id.*

(a) In General - No officer or employee of the Federal Government may provide Federal funds to any State, or political subdivision of a State, that is determined by the Secretary of Homeland Security to be interfering with efforts to enforce Federal immigration laws.

E. *Constitutionality*

If this proposed legislation passes, critics of the legislation will argue that it is unconstitutional on several grounds. Opponents believe that enforcement of immigration is obviously the responsibility of the federal government,¹¹¹ and that under *Printz v. United States* the federal government is prohibited from commanding state law enforcement to act on their behalf.¹¹² They also argue that the states have a sovereignty right under the Tenth Amendment to refuse participation in federal enforcement of immigration law.¹¹³ “The essence of this principle is that states and the federal government co-exist as dual sovereigns, and any attempt by Congress to treat states as mere political subdivisions of the federal government is commandeering that violates the Tenth Amendment.”¹¹⁴

(b) Termination of Funding Prohibition - Subsection (a) shall cease to be effective with respect to a State or political subdivision denied funds under such subsection when the Secretary of Homeland Security certifies that the State or political subdivision has entered into an agreement with the Secretary of Homeland Security to cease such interference. *Id.*

See also Press Release, Office of Congressman Dan Burton, Congressman Dan Burton Introduces the “No Sanctuary for Illegals Act” (Sept. 17, 2007), http://www.house.gov/apps/list/press/in05_burton/070917_illegals_act.html (“The bill . . . would prohibit Federal funds from going to any State or other local government that the Secretary of Homeland Security determines is interfering with efforts to enforce Federal immigration laws.”).

111. See HOUSE RESEARCH ORG., THE ROLE OF STATES IN IMMIGRATION ENFORCEMENT 1 (Feb. 24, 2007), available at <http://www.hro.house.state.tx.us/focus/immigration79-12.pdf> (“The enforcement of civil provisions, which include the apprehension and removal of deportable aliens, has been viewed by many as an exclusively federal responsibility, according to the Congressional Research Service.”).

112. See *Printz v. United States*, 521 U.S. 898, 933 (1997) (“The Federal Government may not compel the States to enact or administer a federal regulatory program.”); see also Jeff Lewis et al., *Authority of State and Local Officers to Arrest Aliens Suspected of Civil Infractions of Federal Immigration Law*, 7 BENDER’S IMMIGR. BULL. NO. 15, 944 (Aug. 1, 2002), available at <http://www.migrationpolicy.org/files/authority.pdf>.

Even if states had general authority to arrest non-citizens for suspected violations of civil immigration provisions, the officer making the arrest would require an affirmative grant of authority under state law to do so. Put another way, while the federal government may *allow* the states to enforce the civil provisions of the INA, it cannot *require* them to do so by commandeering state officers. *Id.* (emphasis in original).

113. See Joseph F. Murphy, Jr., Comment, *Maryland’s Sanctuary Policies Isolate Federal Law and the Constitution While Undermining Criminal Justice*, 36 U. BALT. L.F. 149, 153 (2006) (“Proponents of sanctuary laws generally assert that the local authority for enacting these directives is grounded in the states’ Tenth Amendment sovereignty right, and on the view that the ‘power to regulate immigration is unquestionably exclusively a federal power.’”).

114. Huyen Pham, *The Constitutional Right to Not Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1405 (2006) (concluding that current Tenth Amendment jurisprudence does not allow state and local governments to refuse cooperation because the federal government is seen as using its preemption power

Others believe that states have an obligation to regulate the health, safety and welfare of its citizens, and that policies seeking local law enforcement participation in federal immigration law undermine the trust and confidence in communities thus leading to fewer arrests and more crime felt by all citizens.¹¹⁵ Politicians undermine the trust of their constituents when they cannot effectively voice their views, whether in support, or opposition, of undocumented immigrants.¹¹⁶ Alternatively, proponents of this type of legislation believe that the federal government can require states to abolish sanctuary-type policies,¹¹⁷ as well as request states and localities to enforce federal immigration law.¹¹⁸ These advocates look to the Supremacy Clause and argue there is no congressional preemption while also arguing that sanctuary cities violate federal law under the previously discussed IIRIRA provision, 8 U.S.C § 1373.¹¹⁹

Some scholars also believe that the CLEAR Act and HSEA would have been challenged on constitutional grounds, and that the denial of funding could constitute coercion, which would fail the *Dole* test, a condi-

and not commandeering local governments). However, the author suggests that, “compelling federalism interests may justify local non-cooperation with federal enforcement schemes. Because federal cooperation laws significantly boost federal power at the expense of local sovereignty interests, they may harm the underlying federalism values of promoting democracy, preventing tyranny, and encouraging innovation among local governments.” *Id.* at 1413–14.

115. *Id.* at 1398; see also Matthew Parlow, *Immigration: Both Sides of the Fence: A Localist's Case for Decentralizing Immigration Policy*, 84 DENV. U.L. REV. 1061, 1070–71 (2007) (acknowledging states' rights under the Tenth Amendment to regulate the health, safety and welfare of their citizens).

116. See Matthew Parlow, *Immigration: Both Sides of the Fence: A Localist's Case for Decentralizing Immigration Policy*, 84 DENV. U.L. REV. 1061, 1070 (2007) (“[L]ocal governments are more in touch with their constituents and are thus able to be more responsive to the needs of their communities— whether friendly or hostile to undocumented immigrants.”).

117. See Joseph F. Murphy, Jr., Comment, *Maryland's Sanctuary Policies Isolate Federal Law and the Constitution While Undermining Criminal Justice*, 36 U. BALT. L.F. 149, 152 (2006) (“Sanctuary policy critics, however, maintain that local non-cooperation ordinances violate federal law and the Constitution as they are preempted by the 1996 statutes under the Supremacy Clause.”).

118. See Lisa M. Seghetti, Stephen R. Vina & Karma Esther, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* 14 (Cong. Research Serv., CRS Report for Congress, Order Code RL32270, Aug. 14, 2006), available at <http://www.ilw.com/immigdaily/news/2006,0912-crs.pdf> (“Clearly preemption does not bar state and local immigration enforcement where Congress has evidenced intent to authorize such enforcement. In exercising its power to regulate immigration, Congress is free to delegate to the states, among other things, the activities of arresting, holding and transporting aliens.”).

119. See generally Joseph F. Murphy, Jr., Comment, *Maryland's Sanctuary Policies Isolate Federal Law and the Constitution While Undermining Criminal Justice*, 36 U. BALT. L.F. 149, 153 (2006) (finding Maryland's sanctuary ordinances to be unconstitutional and violative of federal law).

tional funding test used to determine constitutionality.¹²⁰ Given that the current legislation reflects many of the provisions of the CLEAR Act and HSEA it is probable that they will also be constitutionally challenged if enacted.

III. LEGAL ANALYSIS

Many of the current proposed legislation model the CLEAR Act of 2003 and 2005 and its House counterpart, the HSEA. Although these bills did not pass because of their many consequences and deficiencies, legislators are attempting to revive similar provisions in an effort to look tough on immigration in the eyes of their electorate.¹²¹ In fact, U.S. Rep. Brown-Waite compares her bill to the newly proposed CLEAR Act of 2007 and states, “[o]ur bills have very similar language [to the Blackburn CLEAR Act] on dealing with sanctuary cities, given that we used former [the late-U.S. Rep. Charlie Norwood’s] work on this issue as a model.”¹²² The congresswoman explained the differences, proving that this is not merely a public interest bill, but a threat on how governments run their jurisdictions.¹²³ Brown-Waite stated, “[m]y solution was to bring these localities into compliance quickly by threatening them.”¹²⁴

120. See Daniel Booth, *Federalism on Ice: State and Local Enforcement of Federal Immigration Law*, 29 HARV. J.L. & PUB. POL’Y 1063, 1082 (2006).

Under the Dole Test “congressional use of the spending power must meet the following conditions: (a) be in the pursuit of the general welfare; (b) be unambiguous in its conditions; (c) be not ‘unrelated to the federal interest in particular national projects or programs’; (d) impose no unconstitutional conditions; and (e) be non-coercive. *Id.* at 1078. See generally Tiffany W. Kleinert, Comment, *Local and State Enforcement of Immigration Law: An Equal Protection Analysis*, 55 DEPAUL L. REV. 1103, 1104 (2006) (opining that the CLEAR Act and HSEA would have been unconstitutional).

121. See Javier Erik Olvera, *Immigration: Presidential Candidates Walk Fine Line*, MERCURY NEWS, Dec. 21, 2007, available at http://www.mercurynews.com/elections/ci_7776766 (“Republicans are taking an aggressive approach by, among other things, proposing to deny federal funds to cities that do not enforce immigration laws. Democrats, meanwhile, are trying to appear neither too soft nor too harsh, proposing plans to secure borders while creating paths toward citizenship.”); see also *Immigration Issue More Important than Ever for U.S. Presidential Race*, CHINA VIEW, Dec. 22, 2007, available at http://news.xinhuanet.com/english/2007-12/22/content_7291043.htm (“The immigration policy reform has become more important for the current U.S. presidential race than ever, as candidates from both parties are trying to strike the right balance on the controversial and sensitive issue, political analysts said.”).

122. U.S. Congresswoman Ginny Brown-Waite, Rep-Brown-Waite Accountability in Enforcing Immigration Laws Act of 2007, available at <http://brown-waite.house.gov/UploadedFiles/HR%203531%20-%20Sanctuary%20City%20FAQ.pdf>.

123. *Id.*

124. *Id.*

Although these acts do not specifically outlaw sanctuary cities, or directly require state and local participation in civil law immigration enforcement, it certainly is coercive.¹²⁵ Under both the CLEAR Act of 2007 and the Accountability in Enforcing Immigration Laws Act of 2007, state and local authorities will receive additional funding to help with costs if they choose to assist the federal government in enforcing immigration laws. The CLEAR Act of 2007 allows grants to be made to cooperating states and localities while reallocating funds forfeited by states and localities that continue to “don’t ask, don’t tell” policies to those that choose to comply.¹²⁶ According to the latest Congressional Research Service report on the matter, there are thirty-two localities and two states, Alaska and Oregon, which have acted under the title of a “sanctuary city,”¹²⁷ although there are other local governments that act without such a title.¹²⁸ A list compiled by the National Immigration Law Center (NILC) includes seventy jurisdictions that have sanctuary polices, without including many other jurisdictions considered sanctuary cities by anti-illegal immigration activists.¹²⁹ The NILC also published a list of eighty-two laws, resolutions and policies across the United States that limit state and local enforcement of immigration laws.¹³⁰ Looking at the nation as a whole, these jurisdictions encompass twenty-five million people, which is

125. See Daniel Booth, *Federalism on Ice: State and Local Enforcement of Federal Immigration Law*, 29 HARV. J.L. & PUB. POL’Y 1063, 1064 (2006) (explaining that previous bills of this sort may be unconstitutional under the *South Dakota v. Dole* test because they are coercive).

126. Charlie Norwood CLEAR Act of 2007, H.R. 3494, 110th Cong. 4, 9 (2007), available at <http://www.govtrack.us/data/us/bills.text/110/h/h3494.pdf>.

127. See Alex Koppelman, *Congress to New York (and Chicago and L.A.): Drop Dead*, SALON.COM, Oct. 4, 2007, http://www.salon.com/news/feature/2007/10/04/sanctuary/index_np.html (explaining that “[p]opular proposals to choke off federal support to immigrant-friendly ‘sanctuary cities’ would also dry up anti-terror funding for the cities most at risk”).

128. See *New Immigration Policy Draws Criticism*, CLICK2HOUSTON.COM, Oct. 6, 2006, <http://www.click2houston.com/news/9985488/detail.html> (revealing Houston’s adamant denial of being a sanctuary city, although acting as one); see also Alex Koppelman, *Congress to New York (and Chicago and L.A.): Drop Dead*, SALON.COM, Oct. 4, 2007, http://www.salon.com/news/feature/2007/10/04/sanctuary/index_np.html (revealing New York’s adamant denial of being a sanctuary city, although acting as one).

129. See Alex Koppelman, *Congress to New York (and Chicago and L.A.): Drop Dead*, SALON.COM, Oct. 4, 2007, http://www.salon.com/news/feature/2007/10/04/sanctuary/index_np.html (admitting that most lists of sanctuary cities are not definitive).

130. See generally Nat’l Immigr. L. Ctr., *Laws, Resolutions and Policies Instituted Across the U.S. Limiting Enforcement of Immigration Laws by State and Local Authorities*, Oct. 11, 2007, available at http://www.nilc.org/immlawpolicy/LocalLaw/locallaw_limiting_tbl_2007-10-11.pdf (detailing the laws, resolutions and policies of each jurisdictions considered to be similar to sanctuary laws, by limiting state and local enforcement of federal immigration laws in some way).

more than eight percent of the United States population.¹³¹ Although these cities believe state and local law enforcement to be the priority, few, if any, have failed to cooperate with ICE.¹³² In fact, when U.S. Rep. David Price challenged U.S. Rep. Tom Tancredo, who has proposed an anti-sanctuary amendment, to give an example of any city that had policies in place that contravene 8 U.S.C. § 1373, the provision that prohibits sanctuary policies, Tancredo could not produce an example.¹³³

In this effort to look tough on illegal immigration and sanctuary cities, politicians are failing to see the long-term effects of their legislation and the predicament in which they are placing the states. State and local governments are obliged to do what is best for the welfare of their community,¹³⁴ and are usually only able to do so with adequate funding. Giving these governments an ultimatum undermines their ability to act freely and at the discretion of their constituents.¹³⁵ Instead, they are left with a Hobson's Choice: either act against the will and benefit of the people by succumbing to this law, or act against the will and benefit of the people by failing to make the community a safer place with Homeland Security or other forfeited funding.¹³⁶ "What a horrible penalty for innocent municipi-

131. See Alex Koppelman, *Congress to New York (and Chicago and L.A.): Drop Dead*, SALON.COM, Oct. 4, 2007, http://www.salon.com/news/feature/2007/10/04/sanctuary/index_np.html (criticizing the current Congressional Research Service Report for not including many large cities such as Chicago, Boston and Washington, Miami and Denver in its list of sanctuary cities, which would encompass an even larger percentage of the United States population).

132. See *id.*

133. See *id.* ("Because sanctuary-city opponents imagine the problem of non-cooperation as much bigger than it is, they may have inadvertently written their countermeasures so they apply to very few cities, if they apply to any at all."); see also 8 U.S.C. § 1373 (2000).

134. See *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949) ("The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community.").

135. Huyen Pham, *The Constitutional Right to Not Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1398 (2006).

Federal preemption of the non-cooperation laws would intrude significantly on local police powers and upend decisions made by local governments. The result would be federally directed policies that do not reflect local preferences or values. Federal preemption would also, in this case, confuse the lines of political accountability, resulting in further harm to democratic rule. *Id.*

136. See Charlie Norwood CLEAR Act of 2007, H.R. 3494, 110th Cong. (2007), available at <http://www.govtrack.us/data/us/bills.text/110/h/h3494.pdf> (asserting that all state and localities that prohibit state employees from cooperating with federal immigration officers will forfeit all funding otherwise available to them under the Immigration and Nationality Act); see also Accountability in Enforcing Immigration Laws Act of 2007, H.R. 3531, 110th Cong. (2007), available at <http://www.govtrack.us/data/us/bills.text/110/h/h3531.pdf> (revoking twenty-five percent of Homeland Security funds as well as an additional fifty percent at

palities who are trying to do the very best with the meager resources and responsibilities they have.”¹³⁷

In order to exemplify many of the potential consequences of currently proposed legislation, one must only look to similar concerns surrounding the 287(g) program in which states or localities agree to enforce federal immigration law.¹³⁸ State and local authorities have had the ability to enter into memorandums of agreement with federal immigration authorities in order to receive training and assist in federal immigration law enforcement under the IIRIRA since 1996.¹³⁹ In the last five years, approximately thirty-three agencies have made agreements with ICE.¹⁴⁰

A. *Public Safety and Community Policing*

Public safety does not always stem from government budget and funding. In many cases, public safety is a result of community atmospheres. Often called “community policing,” police agencies depend on the rela-

the DHS secretary’s discretion); *see also* Dep’t of Homeland Security Appropriations Act of 2008, H.R. 2638, 110th Cong. (2007), *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HZ294>; (prohibiting all sanctuary cities from receiving any Homeland Security funding); *see also* Dep’t of Commerce and Justice, Science, and Related Agencies Appropriations Act of 2008, H.R. 3093, 110th Cong. (2007) *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HZ676> (prohibiting all sanctuary cities from receiving any funding from this bill); *see also* No Sanctuary for Illegals Act of 2007, H.R. 3549, 110th Cong. (2007), *available at* <http://www.govtrack.us/data/us/bills.text/110/h/h3549.pdf> (cutting all funding to sanctuary cities).

137. *Clear Law Enforcement for Criminal Alien Removal Act of 2003: Hearing on H.R. 2671 Before the Subcomm. on Immigration, Border Security, and Claims*, 108th Cong. 4 (2003) (statement of U.S. Rep. Sheila Jackson Lee) (speaking of how CLEAR Act would stop federal reimbursements for jailing undocumented immigrants, an attempt similar to today’s proposed legislation to coerce cities into cooperating).

138. *See* Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 141 (2007) (discussing Florida’s and Alabama’s current MOAs and concluding that, “[T]he price to civil rights and community policing efforts may be too high. Several localities, including the Commonwealth of Virginia, which originally expressed interest in the MOA program, ultimately abandoned it because of concerns about racial policing and the effect of community policing.”).

139. *See* Eleanor Stables, *State and Local Police Slowly Warming to Immigration Enforcement*, CQ POLITICS, Nov. 7, 2007, *available at* <http://cqpolitics.com/wmspage.cfm?docID=hsnews-000002623700>; *see also* Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 142 (2007) (suggesting that states were very slow to utilize the MOA program due to cautious concerns).

140. *See* Roxana Hegeman, *Study: Checks into Immigration on the Rise*, TOPEKA CAPITAL-J., Oct. 26, 2007, *available at* http://www.cjonline.com/stories/102607/kan_212157852.shtml.

tionship of trust they establish with undocumented aliens.¹⁴¹ According to John Feinblatt, the criminal justice coordinator for the City of New York, the city is the country's safest large urban area because of the city's policy of prohibiting law enforcement from inquiring into a person's immigration status unless there is illegal activity, or from looking into crime victim's and witness's immigration status.¹⁴² Feinblatt stated, "[w]e are a city of immigrants, and what we want to do is encourage people to come forward so that we can use their information to continue fighting crime."¹⁴³ In major urban areas where immigrant communities comprise over half of the population, it is easy to see why law enforcement agencies need their support.¹⁴⁴ These law enforcement agencies are charged with the duty to protect, serve and police all undocumented immigrants within their jurisdictions, which leads to a conflict of interest.¹⁴⁵ "The Supreme Court has held that equal protection applies to those individuals present in the United States without permission. By deputizing local state officers to enforce federal immigration law . . . [it] creates conflicting goals for local police officers."¹⁴⁶

1. National Security

Susan Ginsburg, a 9/11 Commission staffer and co-author of the commission staff report entitled "9/11 and Terrorist Travel," stated "[i]t would be counterproductive to obstruct state and local terrorism programs in

141. See Ramon Ramirez, *Collaboration with Feds Hurts Community Policing*, STATESMAN J., Nov. 8, 2007, <http://community.statesmanjournal.com/tools/pdf/pdfarticle.php?artid=711080324>.

Community policing' is a reciprocal policing strategy in which residents and local law enforcement each assume a role in promoting the safety of their communities. The success of community policing hinges upon a relationship of trust between community residents and law enforcement officials, a relationship that is broken down when immigrants fear immigration-related consequences for approaching state or local police. *Id.*

142. See Alex Koppelman, *Congress to New York (and Chicago and L.A.): Drop Dead*, SALON.COM, Oct. 4, 2007, http://www.salon.com/news/feature/2007/10/04/sanctuary/index_np.html (noting that Feinblatt, like many New York officials, does not categorize New York as a sanctuary city, even though the city does incorporate many of the same characteristics of one).

143. *Id.*

144. See MAJOR CITIES CHIEFS, M.C.C. IMMIGRATION COMMITTEE: RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES 5 (2006), available at http://www.houstontx.gov/police/pdfs/mcc_position.pdf.

145. See *id.*

146. Tiffany W. Kleinert, Comment, *Local and State Enforcement of Immigration Law: An Equal Protection Analysis*, 55 DEPAUL L. REV. 1103, 1104 (2006).

order to pressure them regarding immigration policy.”¹⁴⁷ In 2004, U.S. Sen. Edward Kennedy spoke before the Senate Subcommittee on Immigration, Border Security and Citizenship and stated:

Since 9/11, security experts have repeatedly stated that good intelligence is the key to national security. Helpful information comes from all sources, including immigrants. Local communication shuts down. Immigrants are afraid to approach law enforcement officials. We will forfeit important information and jeopardize the security of our Nation. At this critical time, we must keep all lines of communication open.¹⁴⁸

It has been shown in cities such as Lackawanna, New York and Toledo, Ohio, that vital intelligence has been contributed by members of the Middle Eastern, Muslim and Arab communities, both of documented and undocumented status.¹⁴⁹ The former head of counter-terrorism at the Central Intelligence Agency once argued that the detention of Middle Eastern and South Asian nationals “alien[ated] the very people on whom law enforcement depends for leads.”¹⁵⁰ This alienation will also be evident if states and localities become involved in immigration law because these immigrants will fear detention or deportation of themselves or family members.¹⁵¹

147. Alex Koppelman, *Congress to New York (and Chicago and L.A.): Drop Dead*, SALON.COM, Oct. 4, 2007, http://www.salon.com/news/feature/2007/10/04/sanctuary/index_np.html; see generally THOMAS ELDRIDGE ET AL., STAFF REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES: 9/11 AND TERRORIST TRAVEL 100–01, available at http://www.9-11commission.gov/staff_statements/911_TerrT-rav_Monograph.pdf (identifying the role state and local enforcement agencies had pre-9/11 in relation to counterterrorism).

148. *State and Local Authority to Enforce Immigration Law: Evaluating a Unified Approach for Stopping Terrorists: Hearing Before the Subcomm. on Immigration, Border Security, and Citizenship*, 108th Cong. 3 (2004) (statement of U.S. Sen. Edward M. Kennedy) (warning that a plan to have state and local police enforce federal immigration law would cost \$9 billion over a five year period, even when law enforcement and national security experts believe the policy will jeopardize the national security of the nation).

149. See David Harris, *Avoidable Disaster: Police Enforcing U.S. Immigration Law*, JURIST, Oct. 18, 2006, available at <http://jurist.law.pitt.edu/forumy/2006/10/avoidable-disaster-police-enforcing-us.php> (predicting six negative consequences if state and local police enforce immigration law: (1) increased crime; (2) racial profiling; (3) lawsuits against state and local police agencies; (4) more prisons will be needed as the incarcerated population multiplies; (5) draining of law enforcement resources; and (6) a decrease in crucial intelligence needed for national security).

150. Donald Kerwin, *National Security and Immigrant Rights*, NATION, Dec. 19, 2002, available at <http://www.thenation.com/doc/20030106/kerwin> (stressing the crucial need of immigrant cooperation to protect homeland security).

151. See *id.* (“Undocumented immigrants will not cooperate with the police if it might result in deportation.”).

2. Victims of Crime

State and local enforcement of immigration law jeopardizes community policing which indiscriminately puts people's lives at risk. "[L]ocal police have found that fear of being deported prevents many immigrants from reporting crimes, even in the face of grave danger."¹⁵² "Working with these [immigrant] communities is critical in preventing and investigating crimes," writes the International Association of Chiefs of Police.¹⁵³

In areas where state or local agencies have chosen to assist in federal immigration, police departments are noticing that only a portion of crime on immigrant victims is being reported.¹⁵⁴ Criminals, whether they are American citizens or immigrants, know they can now commit crime without penalty and target non-citizens because they know it will never be reported.¹⁵⁵ Coercing state and local agencies to assist in federal immigration will allow for child abuse, rape, and domestic violence to go uninvestigated.¹⁵⁶ These victims are usually immigrant women who are more vulnerable and less likely to report abuse for fear of deportation of themselves or family members.¹⁵⁷ "Perpetrators of domestic abuse will often use their partner's immigration status, fear of law enforcement and misinformation about the U.S. legal system as tools to exert power and coerce the partner into staying in the situation."¹⁵⁸ This is where commu-

152. *Clear Law Enforcement for Criminal Alien Removal Act of 2003: Hearing on H.R. 2671 Before the Subcomm. on Immigration, Border Security, and Claims, 108th Cong. 6 (2003)* (statement of U.S. Rep. Sheila Jackson Lee) (echoing the importance of community policing which prevents immigrants from being the victims of crime merely because they are afraid to report crimes, and aggressors, for fear of their own deportation).

153. INT'L ASS'N OF CHIEFS OF POLICE, POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES 43 (July 2007), available at <http://theiacp.org/documents/pdfs/Publications/PoliceChiefsGuidetoImmigration%2Epdf>.

154. See Bryan Dean, *New Law has Hispanics Fearing Cops*, NEWSOK, Oct. 27, 2007, <http://newsok.com/article/3157959/1193461329> (evidencing the fear of reporting crime). Oklahoma City Police Chief, Billy Cutty, stated, "[W]e've had a series of armed robberies where Hispanics have been targeted. We think we are just getting a portion of it. We think they've been targeted because the suspects know they are less likely to report the crimes at this point." *Id.*

155. See *id.* (citing Oklahoma City police chief who believes criminals have the upper hand now that immigrants are fearful of their state and local police who are now enforcing federal immigration law).

156. See *id.*

157. See INT'L ASS'N OF CHIEFS OF POLICE, POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES 43 (July 2007), available at <http://theiacp.org/documents/pdfs/Publications/PoliceChiefsGuidetoImmigration%2Epdf> ("Immigrant women may be less likely to report abuse than nonimmigrant women due to language barriers, cultural differences, varying perceptions of law enforcement response, and a fear of deportation if they are not legally documented to live within the United States.").

158. *Id.*

nity law enforcement relations may save lives, instead of allowing human beings, whatever their status, to live in fear and violence.

The threat against victims is not limited to criminals in the normal sense of the word. Giving police officers the power to act as federal agents also comes with dangers. In 2003, U.S. Rep. John Conyers voiced this concern while testifying before the House of Representatives's Subcommittee on Immigration, Border Security, and Claims.¹⁵⁹ He urged that requiring local agencies to report individuals to the INS give local officials "immense power to coerce, bribe or otherwise victimize immigrants as some renegade Los Angeles police did in the Rampart scandal several years ago."¹⁶⁰ Even as recently as September 17, 2007, an ICE agent allegedly sexually assaulted a Jamaican immigrant en route to a transition center to await deportation.¹⁶¹

B. *The Ramifications of Unequipped Police*

Often analogized to the tax code, federal immigration law is very complex, and constantly changing.¹⁶² Because of the complexity, it requires special training, which, until now, has been limited to specialized personnel in federal agencies.¹⁶³ In order for local police officers to achieve effective training, they would have to endure lengthy preparation, which would require an extraordinary commitment of both officers and re-

159. *New York City's 'Sanctuary Policy and the Effect of Such Policies on Public Safety, Law Enforcement, and Immigration: Hearing Before the Subcomm. Immigration, Border Security, and Claims, 108th Cong. 68-69 (2003)* (statement of U.S. Rep. John Conyers, Ranking Member, House Judiciary Comm.), available at <http://judiciary.house.gov/media/pdfs/printers/108th/85287.pdf>.

160. *New York City's 'Sanctuary Policy and the Effect of Such Policies on Public Safety, Law Enforcement, and Immigration: Hearing Before the Subcomm. Immigration, Border Security, and Claims, 108th Cong. 68-69 (2003)* (statement of U.S. Rep. John Conyers, Ranking Member, House Judiciary Comm.), available at <http://judiciary.house.gov/media/pdfs/printers/108th/85287.pdf> (evidencing the potential coercive power local officials with a scandal involving seventy police officers of the LAPD Rampart Division, in which officers planted evidence and framed suspects).

161. See Press Release, U.S. Attorney's Office S. Dist. of Fla., Former ICE Enforcement Agent Arrested for Aggravated Sexual Abuse of Detainee (Nov. 19, 2007), available at <http://www.usdoj.gov/usao/fls/PressReleases/071119-01.html>.

162. See NAT'L IMMIGR. FORUM, IMMIGRATION LAW ENFORCEMENT BY STATE AND LOCAL POLICE 1 (2007), available at <http://www.immigrationforum.org/documents/TheDebate/EnforcementLocalPolice/Background-er-StateLocalEnforcement.pdf>.

163. See *Comprehensive Immigration Reform: Examining the Need for a Guest Worker Program: Field Hearing Before S. Comm. on the Judiciary, 109th Cong. (2006)* (statement of Sylvester M. Johnson, police commissioner, Philadelphia Police Department), available at http://www.senate.gov/comm/judiciary/general/testimony.cfm?id=1983&wit_id=5494 (explaining the many problems that arise when state and local agencies enforce federal law and how the City of Philadelphia is committed to protecting all individuals within it, regardless of status).

sources.¹⁶⁴ The International Association of Chiefs of Police recently published a guide on immigration issues that states:

Immigration law does not lend itself to short “roll call” training videos or short-term orientation training. Officers simply cannot comprehend the complex immigration categories, legal provisions and sanctions without intensive training. If officers are to become involved in immigration enforcement, law enforcement administrators must accept the fact that significant time and effort in training—lasting weeks rather than hours or days—will likely be required to assure their officers are equipped with the basics to perform the task assigned to them.¹⁶⁵

Whether the training they receive is adequate is also another concern. “Failure to comprehend immigration law can result in mistakes being made by officers attempting to enforce immigration provisions.”¹⁶⁶ Mistakes can then lead to detention or arrest of legal immigrants or native-born citizens; thus, leading to a negative perception of law enforcement and possible lawsuits.¹⁶⁷ In 1994, eighty individuals were detained by the Katy Police Department in Texas, only to be identified as citizens or properly documented immigrants.¹⁶⁸ Many individuals sued the police department, which was later forced to settle their claims for the mistake.¹⁶⁹ Similarly, in 1997, 432 Hispanics were detained in the “Chandler Roundup,” a joint task force of state and local officers teamed up with federal officers to investigate immigration violations.¹⁷⁰ The Arizona attorney general’s office found that many of the stops were made only to

164. See INT’L ASS’N OF CHIEFS OF POLICE, POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES 43–44 (July 2007), available at <http://theiacp.org/documents/pdfs/Publications/PoliceChiefsGuidetoImmigration%2Epdf>.

165. *Id.* at 43.

166. *Id.*

167. *See id.*

Cities such as Chandler, Arizona and Katy, Texas have been sued when their local officers became involved in immigration “sweeps” that resulted in United States citizens and legal immigrants being taken into custody under the belief they were present in the country illegally. Given the complexity of immigration law, it is likely that state and local officers could make a mistaken assessment of one’s immigration status, with the predictable lawsuits following on the heels of the actions. *Id.*

168. See MAJOR CITIES CHIEFS, M.C.C. IMMIGRATION COMMITTEE: RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES 8 (2006), available at http://www.houstontx.gov/police/pdfs/mcc_position.pdf (warning local law enforcement agencies of the risk of civil liability when enforcing immigration law).

169. *See id.*

170. See Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 122–23 (2007).

investigate persons of apparent Mexican descent.¹⁷¹ The City of Chandler, Arizona paid \$400,000 in the settlement of these lawsuits.¹⁷²

Unfortunately, this policy also involves a great deal of discretion on the part of each individual officer. With little to no guidelines on how to identify undocumented immigrants, the officers will reflect the society and climate in which they live.¹⁷³ “Whenever you have a policy that allows for discretion, people will use the discretion in many different ways The use of that discretion will reflect their own personal and professional standpoints,” explains one criminologist of having state and local law enforcement officials enforce immigration law.¹⁷⁴

C. Understaffed Public Agencies

“More than 76% of all U.S. police agencies have 25 or fewer sworn officers serving populations up to 25,000. [International Association of Chiefs of Police] research revealed that federal funding for local law enforcement has been significantly cut since 2002. *The impact on local law enforcement has been devastating.*”¹⁷⁵ Under the proposed legislation, or if cities volunteer under the 287(g) program, many police agencies will be expected to adequately protect their communities with this insufficient funding and personnel, *as well as* take on federal immigration responsibilities.

Police agencies are not the only ones that will feel the pressure though. Increasing criticism of ICE is heard as more and more agencies choose to enter into 287(g) memorandums of agreement with ICE. Local authorities complain that ICE is not prepared for the increasing number of immigration referrals and potential prosecutions.¹⁷⁶ This adds to the

171. *See id.*

172. *See id.* at 120–21 (“Chandler Police records indicate that officers conducted state and national records checks, mostly on individuals with Spanish surnames, to determine whether suspects were wanted for law violations, yet in many of their reports, the officers stated no reason for the record checks.”).

173. *See* Brady McCombs, *Cops Getting Squeeze From Both Sides on Immigration*, ARIZ. DAILY STAR, Nov. 11, 2007, <http://www.azstarnet.com/sn/politics/211058>.

174. *Id.* (acknowledging that this type of discretion is problematic in the mist of anti-immigrant political climate).

175. INT’L ASS’N OF CHIEFS OF POLICE, POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES 43 (July 2007), available at <http://theiacp.org/documents/pdfs/Publications/PoliceChiefsGuidetoImmigration%2Epdf> (emphasis added) (stressing that the growth of immigrant populations has outpaced police funding and resources, therefore affecting police operations).

176. *See* Editorial, *New Jersey Immigration Order*, PHILA. INQUIRER, Aug. 25, 2007, http://www.philly.com/inquirer/opinion/20070825_Editorial__New_Jersey_Immigration_Order.html.

burden on local agencies and county prisons.¹⁷⁷ One Kansas state trooper stated, “[t]he response from immigration is slow, and sometimes they don’t respond at all Most of the time they won’t even come and get them.”¹⁷⁸

D. *Resources and Lack of Enforcement Funding*

Once taken into custody immigrants are processed through the local enforcement system as any other suspect, rather than to federal immigration officials, and are only turned over to the federal government after their sentences are completed and upon the agreement of ICE.¹⁷⁹ At this point the federal government begins the deportation process and only then do they begin to bear the cost, while the states are left to foot the bill for the initial investigation, detainment, and subsequent prosecuting and incarcerating the individual.¹⁸⁰ Under the Immigration Reform and Control Act of 1986, the federal government is authorized to help in these costs, but *only* for immigrants convicted of non-immigration-related offenses.¹⁸¹ The DOJ also started the State Criminal Alien Assistance Program (SCAAP) in 1994, in which states apply for funding based on the length of stay, and salaries of correctional officers used.¹⁸² According to a recent Congressional Budget Office immigration paper, “those funds

177. *See id.* (“The *Star-Ledger* reported that state judges were warned in April that ICE was not set up to receive ‘large-scale’ immigration referrals from local authorities. That could put an added burden on county prisons.”).

178. Roxana Hegeman, *Study: Checks Into Immigration on the Rise*, TOPEKA CAPITAL-J., Oct. 26, 2007, available at http://www.cjonline.com/stories/102607/kan_212157852.shtml.

179. Kevin Canfield, *Deputies Unfazed by New Law*, TULSA WORLD, Nov. 13, 2007, available at http://www.tulsaworld.com/news/article.aspx?subjectID=14&articleID=071113_1_A1_hLitt05508.

Detainers allow the federal government to keep the inmate in custody until his or her status can be determined. If the inmate is found to be in the country illegally, the detainer stays with the inmate through local or state criminal proceedings – including any sentence served. When the state is finished with a prisoner with a detainer, the prisoner is turned over to federal immigration officials. *Id.*

180. *See* CONG. BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 9 (2007), available at <http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf>.

181. *See id.* at 12 (“The Immigration Reform and Control Act of 1986 authorized the federal government to help state and local governments pay for some of the costs of incarcerating unauthorized immigrants who were convicted of committing crimes other than immigration-related offenses.”).

182. *See id.*

have offset only a portion of the amounts that state and local governments spent to incarcerate those criminals.”¹⁸³

Even if states and localities are “reimbursed” for their efforts, many times it is simply not enough. In a 2006 House of Representatives Committee of Government Reform hearing, U.S. Rep. Xavier Becerra, testified with the following:

I know that there are some programs that the Federal Government has that try to reimburse you for the services and activities you undertake that are really—should be federally borne, whether it’s the incarceration of an immigrant who doesn’t have the right to be in this country or whether it’s the provision of a health care service to an immigrant who doesn’t have the right to be in this country. But I think every study, every indicator, every witness we’ve ever heard from has always said it’s never been enough to fully compensate the local governments for the costs that were incurred.¹⁸⁴

In the same hearing, the chairman of the San Diego Board of Supervisors testified that “just in the county of San Diego to incarcerate the prisoners [the sheriff has] in Otay Mesa that are not legally here in the country but happen to be locked up in our legal jail, it’s about \$50 million a year. You gave us \$2 million last year.”¹⁸⁵

In addition to the taxes that states and localities are already spending, additional costs to enforce federal immigration law will need to be financed. For example, according to the International Association of the Chiefs of Police, funding will be needed to: (1) recruit bilingual officers and language proficient civilian personnel, (2) hire interpreters for police and the courts, (3) provide cultural competence training (“[i]n most instances, signs that detect deception in current interview training do not apply to other cultures”), (4) provide access to ICE/Homeland Security services, (5) conduct training on how to recognize acceptable ID cards, (6) disburse information and rules on contacting foreign consulates, (7)

183. *See id.* (providing various reasons as to why state costs exceeds federal payments including: (1) unauthorized individuals must be incarcerated at least four days for felonies or multiple misdemeanor offenses to receive funding; (2) formula used only takes into account correction officers’ salaries; and (3) the program does not include costs for medical care, meals, or housing).

184. *Porous Borders and Downstream Costs: The Cost of Illegal Immigration on State, County and Local Governments: Hearing Before the House Comm. on Gov’t Reform*, 109th Cong. 67–68 (2006) (statement of U.S. Rep. Xavier Becerra), available at http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.181&filename=30527.pdf&directory=/diska/wais/data/109_house_hearings.

185. *Id.* (statement of Bill Horn, chairman, San Diego Board of Supervisors).

develop and install translation devices, and (8) establish information and intelligence sharing between agencies.¹⁸⁶

“Congress appropriated \$5 million for the 287(g) program in fiscal [year] 2006 and \$5.4 million in fiscal [year] 2007, not including a supplemental appropriation in late fiscal [year] 2006 of \$10.1 million, available through the end of fiscal [year] 2007.”¹⁸⁷ Since these numbers did not cover the bulk of 287(g) expenses, states and localities that have entered into these MOAs are already feeling the pressure of these extra costs in their budget.¹⁸⁸ The federal government has also overlooked the salaries for each officer needed to replace another who has gone to training¹⁸⁹ or who has completed the program and is working with an ICE task force, as many do.¹⁹⁰

E. *Civil Rights and Legalizing Racial Profiling*

Yet another concern surrounding state and local immigration enforcement involves the civil rights of minority groups and the potential use of racial profiling. “Determining immigration status is not an easy task,” warns the International Association of Chiefs of Police.¹⁹¹ In order to enforce immigration law, police officers would need to be trained on how to determine whether the persons they come in contact with are in fact illegal.¹⁹² This training however, would do little to stop possible civil rights violations.¹⁹³

186. See INT’L ASS’N OF CHIEFS OF POLICE, POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES 23–24 (July 2007), available at <http://theiacp.org/documents/pdfs/Publications/PoliceChiefsGuidetoImmigration%2Epdf>.

187. Eleanor Stables, *State and Local Police Slowly Warming to Immigration Enforcement*, CQ POLITICS, Nov. 7, 2007, available at <http://cqpolitics.com/wmspage.cfm?docID=hsnews-000002623700> (noting that for the 2008 fiscal year, the president has requested \$25.3 million for the 287(g) program to train 250 more officers, and add 350 detention beds).

188. See Valerie West, *Immigration Law Puts Squeeze on Police Departments*, DAILY O’COLLEGIAN, Oct. 3, 2007, available at <http://ocolly.com/2007/10/03/immigration-law-puts-squeeze-on-police-departments/> (recognizing that the Oklahoma state statute could cost departments \$100,000).

189. See *id.* (“‘It’s an unfunded mandate,’ Stillwater Police Chief Norman McNickle said. ‘The training is free, but we have to pay these people.’”).

190. See *id.* (recognizing that many officers that complete the training are no longer under the local agency’s jurisdiction and instead are placed under ICE supervisors).

191. INT’L ASS’N OF CHIEFS OF POLICE, POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES 43 (July 2007), available at <http://theiacp.org/documents/pdfs/Publications/PoliceChiefsGuidetoImmigration%2Epdf>.

192. See *id.* at 44 (“Specialized training is required to equip state and local officers with the basic ability to determine whether persons they have encountered are legal or illegal immigrants.”).

193. See Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 134

[S]ince federal immigration officers are permitted to consider race, it seems unlikely that federal training would deter racial profiling. Therefore state and local MOA officers are not any less likely to use racial profiling in immigration enforcement than state and local officers who are not trained in the MOA program.¹⁹⁴

Every person, whatever their status, is guaranteed certain protections on American soil.¹⁹⁵ Under the Fifth Amendment of the U.S. Constitution, “no person shall . . . be deprived of life liberty, or property, without due process of law . . .,”¹⁹⁶ and the Fourteenth Amendment prohibits any state from denying “any person within its jurisdiction the equal protection of the laws.”¹⁹⁷ Congress has statutorily prohibited discrimination and provided remedies to the victim through the Civil Rights Act of 1964, prohibiting “‘discrimination under federal assisted programs on the grounds of race,’ which includes federal and state law enforcement entities.”¹⁹⁸ Monetary damages are provided to the discriminated through 42 U.S.C. § 1983, for harm caused by any state or local official that causes the deprivation of any federal constitutional rights.¹⁹⁹ Similarly, the De-

(2007) (concluding that abuse of the reasonable suspicion standard will lead to racial profiling). “[T]he Supreme Court has admitted that ‘the concept of reasonable suspicion is somewhat abstract’ and that it is an ‘elusive concept.’ Since reasonable suspicion is such an elusive concept, it can be used to disguise unspoken assumptions by law enforcement officers.” *Id.*

194. *Id.* at 141 (concluding that state and local law enforcement officers, even those trained in the 287(g) program, will likely use racial profiling).

195. See Tiffany W. Kleinert, Comment, *Local and State Enforcement of Immigration Law: An Equal Protection Analysis*, 55 DEPAUL L. REV. 1103, 1136 (2006) (discussing a Supreme Court ruling in *Plyer v. Doe*, in which the Court concluded that undocumented immigrants are protected by the Equal Protection Clause); see also *Plyer v. Doe*, 457 U.S. 202, 212 (1982) (holding that any person domiciled within the United States is protected by the Fifth, Sixth, and Fourteenth Amendments).

196. U.S. CONST. amend. V.

197. U.S. CONST. amend. XIV, § 1; see Lisa M. Seghetti, Stephen R. Vina & Karma Esther, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* 28 (Cong. Research Serv., CRS Report for Congress, Order Code RL32270, Aug. 14, 2006), available at <http://www.ilw.com/immigdaily/news/2006,0912-crs.pdf>.

198. Lisa M. Seghetti, Stephen R. Vina & Karma Esther, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* 28 (Cong. Research Serv., CRS Report for Congress, Order Code RL32270, Aug. 14, 2006), available at <http://www.ilw.com/immigdaily/news/2006,0912-crs.pdf>.

199. See Civil Rights Act of 1964, 42 U.S.C. § 1983 (2000).

Every person who . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress *Id.*

See also Lisa M. Seghetti, Stephen R. Vina & Karma Esther, *Enforcing Immigration Law:*

partment of Justice can also bring civil actions “against any police agency engaged in unconstitutional ‘patterns of practices.’”²⁰⁰

The possibility of such outcomes has many police agencies, and minorities alike, concerned.²⁰¹ Referencing the police departments’ susceptibility to potential civil litigation as a result of civil rights violations, the Philadelphia police commissioner told the Senate Judiciary Committee, “we will not break the law to enforce the law.”²⁰² Naturally, most would agree that we should check the status of those that break our laws, but for many there is no distinction between being in the country illegally (a civil violation) and committing a real crime. This point of view leads to racial profiling of the worst kind, the kind in which officers are patrolling areas popular to undocumented immigrants, including churches.²⁰³

State and local enforcement of civil immigration law will encourage the investigation of persons who do not fit the American stereotype.²⁰⁴ Most unauthorized aliens are members of visually distinct minority groups, thus making it extremely difficult to identify those who are undocu-

The Role of State and Local Law Enforcement 28 (Cong. Research Serv., CRS Report for Congress, Order Code RL32270, Aug. 14, 2006), available at <http://www.ilw.com/immigdaily/news/2006,0912-crs.pdf>.

200. Lisa M. Seghetti, Stephen R. Vina & Karma Esther, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* 28 (Cong. Research Serv., CRS Report for Congress, Order Code RL32270, Aug. 14, 2006), available at <http://www.ilw.com/immigdaily/news/2006,0912-crs.pdf>.

201. See Maria Sacchetti, *U.S. Extends Immigrant Database to Police*, BOSTON GLOBE, Dec. 12, 2007, available at http://www.boston.com/news/local/articles/2007/12/12/us_extends_immigrant_database_to_police/ (“The line is getting very, very blurry between local law enforcement and immigration enforcement, and if it is up to the individual officer of when he or she can or cannot call ICE, the opportunities for abuse and profiling are extreme.”).

202. *Comprehensive Immigration Reform: Examining the Need for a Guest Worker Program: Field Hearing Before S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Sylvester M. Johnson, police commissioner, Philadelphia Police Department), available at http://www.senate.gov/comm/judiciary/general/testimony.cfm?id=1983&wit_id=5494 (“With questionable federal law authority to enforce such immigration laws, and with a precedent of local police being sued for assisting in the enforcement of immigration law, the probability of civil suits against local departments as primary enforcers is a major concern.”).

203. See Marisa Taylor, *Local Police Split over Immigration Enforcement*, McCLATCHY NEWS, Dec. 7, 2007, <http://www.mcclatchydc.com/homepage/story/22668.html> (referencing Maricopa County, Arizona Sheriff Joe Arpaio’s encouraging of his deputies to patrol areas popular to illegal immigrants, even churches).

204. See Jim Cross & Bob McClay, *Cop Shooting Stirs More Immigration Debate*, KTAR.COM, Oct. 16, 2007, <http://ktar.com/?nid=6&sid=621420> (“[Politicians] are fueling the racist flames by encouraging the investigation into a person’s immigration status, simply because he or she looks Hispanic.”).

mented without discriminating, or at least giving the perception of discrimination, based on race or ethnicity.²⁰⁵

F. *State and Local Enforcement of Civil Immigration Law Will Not Reduce Crime*

In an attempt to look tough on crime and immigration, many legislators believe that having officers enforce federal civil immigration laws will prevent future crime and our communities will be safer.²⁰⁶ This, however, is simply not a valid reason.

A recent December 2007 Congressional Budget Office report cited a Rutgers University study that found native-born citizens to be more likely to be incarcerated than immigrants.²⁰⁷ Harvard sociologist, Robert J. Sampson, recognizes that non-citizens choose to come into this country to get ahead, so they work hard and stay out of trouble.²⁰⁸ These ambitious immigrants actually reinvigorate minority communities thus *reducing* crime.²⁰⁹

IV. CONCLUSION

Attempts to encourage, and in some instances coerce, state and local governments to enforce federal immigration are not novel. Repeatedly, legislators have endeavored to pawn federal responsibility onto unwelcoming states and localities, but these proposals have never passed. The CLEAR Act of 2003 and 2005, along with the HSEA, were opposed

205. See Lisa M. Seghetti, Stephen R. Vina & Karma Esther, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* 28 (Cong. Research Serv., CRS Report for Congress, Order Code RL32270, Aug. 14, 2006), available at <http://www.ilw.com/immigdaily/news/2006,0912-crs.pdf> (“Because unauthorized aliens are likely to be members of minority groups, complications may arise in enforcing immigration law due to the difficulty in identifying illegal aliens while at the same time avoiding the appearance of discrimination based on ethnicity or alienage.”).

206. See Daniel Booth, *Federalism on Ice: State and Local Enforcement of Federal Immigration Law*, 29 HARV. J.L. & PUB. POL’Y 1063, 1064 (2006) (“Some suggest that more stringent immigration policies, including relying on state and local officials to enforce federal immigration laws, would promote national security and prevent crime.”).

207. See CONG. BUDGET OFFICE, *THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS* 9 (2007), available at <http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf>.

208. See *Homicides Soar in East Coast Cities: Lack of Immigrants, Shift to Anti-Terrorism Cited as Possible Explanations*, MSNBC, June 29, 2007, <http://www.msnbc.msn.com/id/19513374/> (identifying reasons for the increase in crime, other than undocumented immigrants, such as the availability of weapons, not adopting innovative and successful programs used in other cities, and an emphasis on homeland security instead of street crime).

209. See *id.* (acknowledging that this theory runs counter to the publicly held assumption of immigrants).

for many of the same reasons that should concern Congress today. Current legislation does attempt to remedy some of the weaknesses present in previous bills, but it is still not enough. According to a joint letter to the Senate written by the National Conference of State Legislatures, Council of State Governments, National Association of Counties, and National League of Cities in March of 2007, “existing programs aimed at assisting state and local governments, such as the State Criminal Alien Assistance Program, have been woefully underfunded. Our associations are therefore concerned that this legislation will not provide sufficient funds to implement new responsibilities given the current appropriations limitations.”²¹⁰ Although current legislation does assist in funding 287(g) program volunteers, it is too early to tell whether it will be enough, but irrespective of who foots the bill the many other consequences should be enough to trouble legislators and their constituents.

The Major Cities Chiefs, comprised of police chiefs of the nation’s sixty-four largest police departments, issued a 2006 position paper stating, “[t]he decision to enter this area of enforcement should be left to the local government and not mandated or forced upon them by the federal government through the threat of sanctions or the withholding of existing police assistance funding.”²¹¹ Nationwide, 1,562 pieces of state legislation have been proposed in 2007,²¹² 165 of which dealt with local law enforcement,²¹³ evidencing the will of individual states, and their desire to voice the will of their people, whether entering into these agreements or not.

210. Letter from the Nat’l Conf. of State Legislatures, Council of State Gov’ts, Nat’l Ass’n of Counties, and Nat’l League of Cities to U.S. Senate (Mar. 9, 2007), *available at* <http://www.ncsl.org/standcomm/sclaw/LawEnforcementltr0307.htm> (requesting that the Senate “oppose Senate Amendments 304 and 305 to S. 4, the ‘Improving America’s Security Act of 2007,’ which shifts the obligation of enforcing civil immigration law to state and local governments”).

211. MAJOR CITIES CHIEFS, M.C.C. IMMIGRATION COMMITTEE: RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES 9 (2006), *available at* http://www.houstontx.gov/police/pdfs/mcc_position.pdf (outlining nine major position points of fifty-seven chief officers of police departments which comprise a population of over 1.5 million, and employ over 1000 officers).

212. *See* Dianne Solis, *Absent Federal Reform, States Increasingly Tackling Immigration*, DALLAS MORNING NEWS, Nov. 30, 2007, *available at* http://www.dallasnews.com/sharedcontent/dws/news/nation/stories/DN-legislation_30nat.ART.State.Edition1.372236a.html; *see also* Dave Montgomery, *States May Take up Immigration Fight*, PITT. POST-GAZETTE, June 30, 2007, <http://www.post-gazette.com/pg/07181/798324-84.stm> (“Frustrated over what they perceive as federal foot-dragging, state and local governments already have been stepping up with remedies that range from punitive to protective, a trend that is almost certain to escalate in the void that Congress left.”).

213. *See Record No. of Immigration Laws Passed in 2007*, JUDICIAL WATCH, Dec. 28, 2007, <http://www.judicialwatch.org/blog/record-no-immigration-laws-passed-2007> (announcing the record increase in immigration laws this year).

Although it got off to a slow start, since 1996, 597 officers have participated in the 287(g) program, hailing from thirty-four state and local enforcement agencies around the nation.²¹⁴ Twenty-six of those agencies joined the program this year alone, and eighty more agencies are currently seeking admittance.²¹⁵

To many critics it is worrisome that these states are choosing to take on federal responsibility in light of the many consequences,²¹⁶ but at least these states can better identify the needs and wants of their citizenry while weighing these negative repercussions free of any federal influence.²¹⁷ Leaving the decision to states and localities allows them to experiment with the effects of enforcing federal immigration law in an attempt to ascertain many of the debated immigration debates such as whether crime rates drop, more crime goes unreported, or whether the it harms the local economy.²¹⁸ Alternatively, the state or local government may find that its community benefits by designating itself a sanctuary city.²¹⁹

214. See Eleanor Stables, *State and Local Police Slowly Warming to Immigration Enforcement*, CQ POLITICS, Nov. 7, 2007, available at <http://cqpolitics.com/wm-spape.cfm?docID=hsnews-000002623700> (including a list of all thirty-four state and local enforcement agencies participating in the 287(g) program).

215. See *id.* (noting that not all applicants will qualify to join the program).

216. See John Martin, *Lawyer: Police Traffic Stops Become Immigration Checks*, PRESS OF ATLANTIC CITY, Oct. 28, 2007, available at http://www.pressofatlanticcity.com/top_three/story/7512648p-7411134c.html (quoting one ICE field director as fearing state and local authorities will pick up undocumented immigrant for minor infractions and then dismiss the charges but still turn the individual over to federal authorities).

217. See Matthew Parlow, *Immigration: Both Sides of the Fence*, 84 DENV. U.L. REV. 1061, 1073 (2007).

[L]ocal governments are much more in touch with their constituents and are thus able to be more responsive to the needs of their communities – whether friendly or hostile to undocumented immigrants. This, of course, is consistent with the Tenth Amendment, which charges state and local governments with police power to regulate health, safety and general welfare of its citizens. *Id.* at 1070–71.

218. See *id.* at 1073.

Cities provide opportunities to test out many of the claims made by both sides of the illegal immigration debate. A locality could adopt these illegal immigration ordinances and/or enforce federal criminal and civil immigration laws to see if expelling undocumented immigrants from their jurisdiction actually improved crime rates or stopped the perceived depletion of government social service resources. Or the local government might find that such measures hurt the local economy through lost tax dollars and workforce. In contrast, a city could designate itself a sanctuary city to see if maintaining its undocumented immigrant population helps maintain a strong local economy. . .Such possibilities to test the rhetoric on both sides on a local level – and thus inform federal decision-makers – through these innovative local efforts are currently largely precluded because of preemption. *Id.*

219. See *id.*

Whether trying to eliminate sanctuary cities, or actually trying to combat potential crime committed by undocumented aliens, federal legislators are doing more harm than good. Instead of applying a broad band-aid, affecting the basic rights of all immigrants, and compromising public safety, they should ensure that dangerous criminals are effectively identified and apprehended.²²⁰ Instead of giving local authorities the designation of federal immigration officers after only a few weeks of training, they should provide their own agency, ICE, with the necessary resources and manpower to do what they have been trained and hired to do. Instead of sanctioning whole cities in an effort to make them conform to federal mandate, Congress should be seeking ways to compromise with governments and citizens who believe in the stance they have taken. Instead of enticing governments to go against the will of the people in order to claim reward funding, Congress should be encouraging them to act in the interest of the very citizens they represent.

The federal government has failed to update our outdated immigration policies, and now state and local governments are forced to compensate for Congress's inadequate attempts at immigration reform.²²¹ Unfortunately, the federal government fails to recognize the consequences of state and local enforcement of federal immigration civil law that are already prevalent in states and localities that have volunteered for the 287(g) programs. Communities will see diminished public safety through both a rise in both national security threats and crime committed on immigrant victims due to the chilling effect.²²² Unequipped police, with insufficient tools and knowledge to act as federal immigration officers, will violate civil rights and could make costly mistakes,²²³ which will lead to

220. See Megan Nerz & Patrick McIlmoyle, *Proper Limits on an Illegal-Immigration Crackdown*, NEWS & OBSERVER, Oct. 26, 2007, at A13.

221. See Nat'l Immigr. Forum, *Backgrounder: Immigration Law Enforcement by State and Local Police*, <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=572> (last visited on Mar. 19, 2008) (“[S]tate and local police should not be made to compensate for the federal government’s failure to update outdated immigration admissions policies.”).

222. See INT’L ASS’N OF CHIEFS OF POLICE, *POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES* 21, 28–29, (July 2007), available at <http://theiACP.org/documents/pdfs/Publications/PoliceChiefsGuidetoImmigration%2Epdf>; see also Lisa M. Seghetti, Stephen R. Vina & Karma Esther, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* 29–30 (Cong. Research Serv., CRS REPORT FOR CONGRESS, Order Code RL32270, Aug. 14, 2006), available at <http://www.ilw.com/immigdaily/news/2006,0912-crs.pdf>.

223. See Lisa M. Seghetti, Stephen R. Vina & Karma Esther, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* 28 (Cong. Research Serv., CRS Report for Congress, Order Code RL32270, Aug. 14, 2006), available at <http://www.ilw.com/immigdaily/news/2006,0912-crs.pdf> (“[A] high risk for civil rights violations may occur if state and local police do not obtain the requisite knowledge, training, and experience in dealing with the enforcement of immigration.”).

lawsuits.²²⁴ This proposed legislation, as well as 287(g) MOAs, will also affect the already understaffed public agencies such as ICE, and the police departments themselves, leading local agencies to deviate from their crime-fighting mission. Impacting these areas the most though, lack of adequate resources and funding will mean local citizens will fund a federal responsibility.

“Experience has shown that enforcement measures alone are wholly unsuccessful at controlling who enters and remains in the United States.”²²⁵ Coercing state governments and burdening local enforcement agencies to perform the task of the federal government is not an adequate remedy.²²⁶ Comprehensive immigration reform focusing on border control and security is needed. Using local officers to enforce civil federal immigration law by rounding-up and deporting undocumented immigrants, guilty of nothing more than being present in our country, is neither practical nor realistic.

224. See INT’L ASS’N OF CHIEFS OF POLICE, POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES 44 (July 2007), available at <http://theiacp.org/documents/pdfs/Publications/PoliceChiefsGuidetoImmigration%2Epdf> (recognizing that racial profiling mistakes “will almost always result in lawsuits.”); see also NAT’L COUNCIL OF LA RAZA, STATE AND LOCAL POLICE ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 2 (March 2006). “Attempting to enforce immigration laws makes local police vulnerable to lawsuits stemming from liability, particularly when they arrest the wrong person or use racial profiling to determine who to scrutinize.” *Id.*

225. Tiffany W. Kleinert, Comment, *Local and State Enforcement of Immigration Law: An Equal Protection Analysis*, 55 DEPAUL L. REV. 1103, 1136 (2006).

226. See *id.* (speaking of CLEAR Act and HSEA “Congress should refrain from enacting such damaging legislation and focus on creating broader immigration reform that will allow the United States to control its borders, provide for its security, and protect the constitutional rights of all its residents, both citizens and noncitizens.”).