

## THE DECENTRALIZATION OF IMMIGRATION LAW: THE MISCHIEF OF § 287(g)

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### I. INTRODUCTION

On September 4, 2007, Geraldo Carlos, a photographer for the Newark, New Jersey newspaper the *Brazilian Voice*, discovered a dead body in the Ironbound district of the city.<sup>1</sup> After photographing the body, he notified Roberto Lima, the editor of the publication, who contacted the Newark Police Department.<sup>2</sup> When Samuel Demaio, Chief of the Newark Police Department, arrived at the scene of the crime, he immediately questioned Carlos's immigration status by asking, "Are you legal," and "Do you have a green card?"<sup>3</sup> The police chief's questioning came less than one month after former New Jersey Attorney General Anne Milgrim issued a Law Enforcement Directive as to when and how state, county, and local police officers should question individuals on their immigration status.<sup>4</sup> The

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<sup>1</sup> Brian Donahue, 'Are You Legal?' Is Bringing Fear to Immigrants, THE STAR LEDGER, Sept. 18, 2007, at 1.

<sup>2</sup> Complaint at 4-5, Lima v. Newark Police Dep't., No. 08-0426 (D.N.J. Jan. 23, 2008).

<sup>3</sup> *Id.* at 5.

<sup>4</sup> ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE, NO. 2007-3 (2007), available at [http://www.state.nj.us/oag/dcj/agguide/directives/dir-le\\_dir-2007-3.pdf](http://www.state.nj.us/oag/dcj/agguide/directives/dir-le_dir-2007-3.pdf) [hereinafter ATTORNEY GENERAL DIRECTIVE]. Milgrim issued the directive soon after three college students were murdered in Newark; one of the suspected murderers was an illegal immigrant at the time the killings occurred. *Morning Edition: Newark Fights to Reclaim Bloodied Streets* (NPR radio broadcast Sept. 3, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=14136210>. The directive also reinforced a 2005 directive of the New Jersey Attorney General that renounced racial profiling and racially-influenced policing, and declared that "using race or ethnicity as a basis for initiating an investigation" is against State policy. ATTORNEY GENERAL DIRECTIVE, *supra* note 4. Milgrim's directive instructs officers, when making an arrest for an indictable crime or for driving while intoxicated, to inquire about the arrestee's citizenship, nationality, and immigration status. *Id.* If officers have

directive stated that “[s]tate, county, and local law enforcement agencies necessarily and appropriately should inquire about a person’s immigration status . . . after an individual has been arrested for a serious violation of State criminal law.”<sup>5</sup> The directive mandated, however, that only suspects of crimes—and specifically not witnesses—should be so questioned.<sup>6</sup> Demaio’s behavior clearly violated the Attorney General’s directive, and thus gave rise to *Lima v. Newark Police Department*.<sup>7</sup> Lima brought a civil rights suit against the Department, which alleged violations of both the U.S. Constitution and the New Jersey Constitution, and included Demaio as a named defendant.<sup>8</sup> Separately, Milgrim found that Demaio had indeed violated the Directive and ordered the Newark Police Department to discipline him appropriately.<sup>9</sup>

Milgrim’s mandate and the *Lima* case are illustrative of a larger national trend toward—and the problems that arise from—placing enforcement of immigration law in the hands of state and local agencies.<sup>10</sup> Historically, immigration enforcement was the exclusive domain of the federal government.<sup>11</sup> In the past several decades, however, Congress has decentralized enforcement and recruited state and private actors into the immigration-enforcement scheme.<sup>12</sup> But as the *Lima* case illustrates, a decentralized system has proven problematic. Local law-enforcement agencies are ill equipped to investigate immigration violations and run afoul of the Fourth Amendment in so doing. Furthermore, localized immigration enforcement jeopardizes the ability of state and local agencies to effectively police.

Perhaps the most controversial piece of federal legislation that gives immigration law-enforcement authority to state and local

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reason to believe that the arrestee is in the country unlawfully, the directive instructs them to notify Immigration and Customs Enforcement (ICE). *Id.*

<sup>5</sup> ATTORNEY GENERAL DIRECTIVE, *supra* note 4.

<sup>6</sup> *Id.*

<sup>7</sup> See Complaint, *Lima v. Newark Police Dep’t.*, No. 08-0426 (D.N.J. Jan. 23, 2008).

<sup>8</sup> *Id.* at 9–12.

<sup>9</sup> *Id.* at 6.

<sup>10</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-109, REPORT TO CONG. REQUESTERS, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (2009) [hereinafter GAO-09-109].

<sup>11</sup> See *Henderson v. Mayor of New York*, 92 U.S. 259, 274 (1876).

<sup>12</sup> See GAO-09-109, *supra* note 10.

agencies is § 287(g) of the Immigration and Nationality Act (INA).<sup>13</sup> Passed into law in 1996, § 287(g) grants immigration-enforcement power to state and local law enforcement.<sup>14</sup>

This Comment argues against § 287(g) and a decentralized immigration law-enforcement system because they increase incidents of egregious violations of the Fourth Amendment to the U.S. Constitution. The Fourth Amendment guarantees the right to be free from unreasonable searches and seizures.<sup>15</sup> Generally, the exclusionary rule precludes evidence obtained in violation of the Fourth Amendment from use in criminal proceedings against the party whose rights the government violated.<sup>16</sup> But the exclusionary rule does not apply in immigration hearings<sup>17</sup> unless law enforcement seized the evidence in such an egregious manner that it transgresses fundamental fairness and “undermine[s] the probative value of the evidence obtained”—a very high burden.<sup>18</sup>

Part II of this Comment outlines the history of immigration law in the U.S. leading up to the implementation of § 287(g). Part III discusses previous instances of decentralized immigration enforcement, explores the damage such systems cause, and highlights, in particular, employer sanctions and non-federal immigrant-detention facilities. Part IV elaborates on the subsequent mischief of § 287(g) and the unconstitutionality of a decentralized immigration system. Part V urges Congress to repeal § 287(g)—or to heavily restrict its ambit—and to re-centralize the enforcement of immigration law.

## II. THE HISTORICAL FOUNDATION OF IMMIGRATION LAW IN THE U.S.

*Henderson v. Mayor of New York* declared that the federal government has exclusive power over immigration.<sup>19</sup> In *Henderson*, the plaintiff challenged the constitutionality of a New York statute that required vessel owners to pay tax for transporting foreign passengers into New York.<sup>20</sup> The plaintiff argued that the statute interfered with Congress’s power to regulate commerce with foreign

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<sup>13</sup> 8 U.S.C. § 1357(g) (2006).

<sup>14</sup> *Id.*

<sup>15</sup> U.S. CONST. amend. IV.

<sup>16</sup> *See generally* *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1050–51.

<sup>19</sup> 92 U.S. 259 (1876).

<sup>20</sup> *Id.* at 267.

nations.<sup>21</sup> The Supreme Court agreed and held that immigration control had been “confided to Congress by the Constitution; that Congress [could] more appropriately and with more acceptance exercise it than any other body known to our law.”<sup>22</sup> The Court stated that the New York law was invalid because it regulated a field over which Congress had exclusive control—the right to regulate commerce with foreign nations.<sup>23</sup> Along with its companion case, *Chy Lung v. Freeman*,<sup>24</sup> *Henderson* firmly established the “exclusive character of federal power over immigration”<sup>25</sup> and gave way to enormous growth of federal immigration regulation. Until recently, the federal government maintained exclusive control.<sup>26</sup>

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA),<sup>27</sup> which amended the INA<sup>28</sup> in various respects. One particular IIRAIRA provision—commonly known as § 287(g)—enabled “the Attorney General [to] enter into a written agreement with a State, or any political subdivision of a State” to perform immigration-law enforcement functions.<sup>29</sup> States and localities could thus become participating § 287(g) agencies by entering into a Memorandum of Agreement (MOA) with Immigration and Customs Enforcement (ICE), the supervising agency of § 287(g) programs and a subdivision of the Department of Justice (DOJ).<sup>30</sup> In an effort to combat immigration challenges in

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<sup>21</sup> *Id.* at 270.

<sup>22</sup> *Id.* at 274.

<sup>23</sup> *Id.* at 270.

<sup>24</sup> 92 U.S. 275 (1876).

<sup>25</sup> Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1886–87 (1993).

<sup>26</sup> See 8 U.S.C. § 1357(g) (2006).

<sup>27</sup> See *id.*

<sup>28</sup> The Immigration and Nationality Act of 1952 (also called The McCarran-Walter Act) came as a byproduct of the Cold War mentality in the U.S. after World War II. *The McCarran-Walter Act: A Contradictory Legacy on Race, Quotas, and Ideology*, IMMIGRATION POLICY CTR., <http://www.immigrationpolicy.org/special-reports/mccarran-walter-ada-contradictory-legacy-race-quotas-and-ideology> (last visited Feb. 12, 2010). It was a bill of nearly 300 pages that proposed new quota laws, ending discrimination in immigration law (namely race and sex discrimination), reinforcing deportation procedures, and various other immigration and naturalization provisions. EDWARD PRINCE HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965, 303 (Univ. of Pa. Press 1981).

<sup>29</sup> § 1357(g).

<sup>30</sup> See § 1357(g)(1). ICE, the largest investigative agency in the Department of Homeland Security (DHS), came into existence in 2003. *About U.S. Immigration and Customs Enforcement (ICE)*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/index.htm> (last visited Apr. 16, 2010). Its mission is to

local communities, both ICE and local law-enforcement agencies assumed that they could benefit from the program.<sup>31</sup>

The legislative intent behind § 287(g) was to amend the INA and give state and local law-enforcement agencies the authority to enforce criminal-immigration laws, not civil regulations.<sup>32</sup> Unlawful presence in the country is a civil-immigration violation, whereas unlawful entry, aiding an immigrant with unlawful entry into the country, and employing an illegal immigrant are all criminal violations.<sup>33</sup> Congress specifically sought to prevent local law-enforcement officers from making arrests solely on the basis of suspected deportability under their § 287(g) authority.<sup>34</sup>

Section 287(g) gives state and local law-enforcement agencies the ability to enter into agreements with the DOJ so that they have the authority to enforce immigration law against criminal immigrants who are already subject to a deportation order.<sup>35</sup> As of 2009, approximately twelve million illegal immigrants were present in the U.S., but the number of those who commit crimes remains unknown.<sup>36</sup> Thus, ICE sought to enlist states and localities to aid in criminal investigations of violent crimes, human trafficking, gang activity, organized crime, sexual offenses, drug-related offenses, and money laundering.<sup>37</sup> ICE explicitly indicated that the program was not meant to give state and local agencies the authority to perform

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protect homeland security by enforcing federal immigration and customs laws. *Id.* It has over 400 offices worldwide. *Id.*

<sup>31</sup> *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/287g/> (last visited Oct. 30, 2010).

<sup>32</sup> DEP'T OF HOMELAND SECURITY, OFFICE OF THE INSPECTOR GEN., OIG-10-63, THE PERFORMANCE OF 287(G) AGREEMENTS 2, 8 (2010) [hereinafter OIG-10-63].

<sup>33</sup> See DAVID CARLINER, LUCAS GUTTENTAG, ARTHUR C. HELTON & WADE J. HENDERSON, THE RIGHTS OF ALIENS AND REFUGEES: THE BASIC ACLU GUIDE TO ALIEN AND REFUGEE RIGHTS 165–66 (Norman Dorsen ed., S. Ill. Univ. Press 1990) (1977) [hereinafter CARLINER et al.].

<sup>34</sup> April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149, 1152 (2004) (citing Assistance by State and Local Police in Apprehending Illegal Aliens, Op. O.L.C., I.B. (1996), available at <http://www.justice.gov/olc/immstopola.htm>).

<sup>35</sup> 142 CONG. REC. H2475-01 (1996) (statement of Rep. Latham).

<sup>36</sup> *Immigration Enforcement: Controls over Program Authorizing State and Local Enforcement of Federal Immigration Laws Should Be Strengthened: Hearing Before the H. Comm. on Homeland Sec.*, 111th Cong. (2009) (statement of Richard M. Stana, Homeland Sec. and Justice, U.S. Gov't. Accountability Office) [hereinafter Stana].

<sup>37</sup> *Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law: Hearing Before the H. Comm. on Homeland Sec.*, 111th Cong. 5 (2009) (statement of Muzaffar A. Chishti, Director, Migration Policy Institute's Office at New York University School of Law) [hereinafter Chishti].

“random street operations” by targeting excessive-occupancy dwellings or day-laborer activities.<sup>38</sup>

Salt Lake City, Utah nearly initiated a § 287(g) program in 1998 because of a shortage of federal immigration officers in the area.<sup>39</sup> The sole purpose of the Salt Lake City agreement would have been to give local law-enforcement officers “the authority to assist the INS in transporting [aliens] across state lines to an INS holding facility in Denver or Las Vegas . . . [not to] cross-deputiz[e local officers] so they can enforce the INS laws.”<sup>40</sup> The city council abandoned the agreement, however, because of pervasive concerns of racial profiling.<sup>41</sup> Despite then-Police Chief Ruben Ortega’s insistence that Latinos would not be targeted by the program and his claim that eighty percent of felony-drug arrests were illegal immigrants, the city council refused to implement the § 287(g) program.<sup>42</sup> Salt Lake City’s resistance to the program was an early indication of national concerns that would later surface.

After the September 11 attacks, the legislation began to take shape as a tool to fight terrorism and protect public safety.<sup>43</sup> Florida signed the first § 287(g) MOA in 2002.<sup>44</sup> Under the agreement, trained officers became members of Regional Domestic Security Task Forces, a coalition created to combat terrorism.<sup>45</sup> ICE officials still maintained that § 287(g) programs were meant to target criminal organizations and individuals who threatened border security but “not the landscape architect that had the broken headlight.”<sup>46</sup> ICE officials additionally emphasized the significance of maintaining “a very focused approach.”<sup>47</sup>

In 2003, Alabama was the next state to enter into an MOA to improve problems of fraudulent documentation use for procurement

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<sup>38</sup> *Id.*

<sup>39</sup> Shawn Foster, *SLC Council Says No to Cross-Deputization; Members Vote 4–3 Against Agreement that Would Let 20 City Police Officers Enforce Immigration Law, Council Votes Against Cross-Deputization*, SALT LAKE CITY TRIB., Sept. 2, 1998, at C1.

<sup>40</sup> *Problems Related to Criminal Aliens in the State of Utah: Before the H. Comm. on the Judiciary, Subcomm. on Immigration and Claims*, 105th Cong. 14–15 (1998) (statement of Aaron Kennard, Salt Lake County Sherriff).

<sup>41</sup> See Foster, *supra* note 39.

<sup>42</sup> *Id.*

<sup>43</sup> Chishti, *supra* note 37, at 2.

<sup>44</sup> *Id.* at 3.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

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of drivers' licenses.<sup>48</sup> While Alabama's use of the § 287(g) program reflected a desire to combat criminal behavior, this mission was not within the initial purposes of the program—to apprehend illegal immigrants who posed grave threats to national safety.<sup>49</sup>

As of March 2009, sixty-seven local governments had entered into MOAs with ICE.<sup>50</sup> Consequently, § 287(g) is taking on the character of a general immigration-enforcement tool used to target not only criminal aliens, but as many unlawfully present immigrants as possible.<sup>51</sup> Yet Congress's purpose in enacting the § 287(g) program was to apprehend more easily illegal immigrants who had committed serious crimes or posed a grave threat to public safety.<sup>52</sup> Some agencies operating in such a broadened manner have justified their actions on the grounds that unlawfully present immigrants are "more likely to commit crimes."<sup>53</sup> Furthermore, although ICE reports indicate that state and local police forces participating in § 287(g) have made 79,000 arrests on suspicion of violations of immigration law, the percentage of those arrested who were actually found to pose a threat to national security or public safety remains unknown.<sup>54</sup> As of March 4, 2009, ICE had released only the raw number of arrests made.<sup>55</sup> Additionally, throughout the first two years of the Florida and Alabama MOAs, enforcement agencies made approximately five and ten arrests per month, respectively.<sup>56</sup> In contrast, both Florida and Alabama § 287(g) arrests have risen to approximately 100 per month in the last three years, indicating "a shift in emphasis from high-priority targets to volume of arrests."<sup>57</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> See Chishti, *supra* note 37, at 7.

<sup>50</sup> Stana, *supra* note 36, at 1.

<sup>51</sup> See Chishti, *supra* note 37, at 4.

<sup>52</sup> OIG-10-63, *supra* note 32, at 8.

<sup>53</sup> *Contra* Ana Gorman, *Crime Rates Higher for Deportees*, L.A. TIMES, Sept. 8, 2008 at A2, available at [www.article.latimes.com/2008/sep/08/local/me-jail8](http://www.article.latimes.com/2008/sep/08/local/me-jail8) (stating that illegal immigrants who have been deported at least once from the U.S. are more likely to commit crimes than other immigrants, but illegal immigrants overall are not a greater crime risk).

<sup>54</sup> Chishti, *supra* note 37, at 5.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

## III. THE DAMAGES OF A DECENTRALIZED IMMIGRATION SYSTEM

A. *The IRCA Legislation of 1986*

Until recently, state exclusion from immigration law enforcement remained unchallenged.<sup>58</sup> Section 287(g) demonstrates a departure from federal exclusivity, but it was not the first program to override that precedent. Ten years earlier, Congress enacted the Immigration Reform and Control Act (IRCA).<sup>59</sup> This legislation granted amnesty and a path toward legalization for millions of undocumented immigrants.<sup>60</sup> To obtain support for the legislation, however, the drafters of the IRCA agreed to toughen immigration-enforcement standards.<sup>61</sup> In particular, the IRCA created an employer-verification program that required employers to verify the legality of their employees' immigration status.<sup>62</sup> The statute prohibits employers from "knowingly [hiring] for employment at least 10 individuals with actual knowledge that the individuals are aliens."<sup>63</sup> Further, employers risk sanctions or imprisonment for failing to follow this law.<sup>64</sup> Thus, the IRCA charged private actors with enforcing federal immigration law by assigning employers an obligation to verify the immigration status of their employees through mandatory Employment Eligibility Verification Forms for all employees, which federal immigration and labor agencies became authorized to review.<sup>65</sup>

Although the IRCA's mission was to stop illegal immigrant labor, the Act produced perverse consequences. Specifically, immigrant exploitation<sup>66</sup> and employment discrimination surged.<sup>67</sup> Despite national policy to discourage employers from hiring illegal immigrants, the IRCA instead fostered a "silent compact" between

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<sup>58</sup> Neuman, *supra* note 25, at 1886, 1892; *see supra* Part II.

<sup>59</sup> 8 U.S.C. § 1324 (2006).

<sup>60</sup> *See id.* § 1255a.

<sup>61</sup> Michael J. Wishnie, *Immigration Law and Policy: Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 196 (2007).

<sup>62</sup> *See* § 1324.

<sup>63</sup> § 1324(3)(A).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*; U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-62, REPORT TO CONG. REQUESTERS, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 2 (1990) [hereinafter GAO/GGD-90-62], available at <http://www.gao.gov/docdb/lite/summary.php?rptno=GGD-90-62>.

<sup>66</sup> Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417, 417 (2005).

<sup>67</sup> GAO/GGD-90-62, *supra* note 65, at 2.

employers and illegal employees: “in exchange for corporate indifference to their exact legal status, workers [did] not make a fuss about conditions or compensation.”<sup>68</sup> Furthermore, the IRCA deterred immigrants from reporting unlawful activity—as both witnesses and victims—to labor and employment agencies.<sup>69</sup> Such exploitation not only impacted undocumented immigrant workers, but also their families (who may or may not be undocumented), their coworkers, the general work environment, and the community-at-large.<sup>70</sup> The IRCA demonstrates that a decentralized immigration system causes damage when control mechanisms depart from the federal level.

### B. *Immigrant Detention*

In the 1990s, immigrant detention became a growing trend in response to rising undocumented immigration.<sup>71</sup> One provision of the IIRAIRA,<sup>72</sup> enacted in 1996, called for mandatory detention of noncitizens convicted of crimes.<sup>73</sup> But the law’s reach became over-inclusive; as a result of mandatory-detention laws, “[g]rowing numbers of noncitizens, including legal immigrants, [were] held unnecessarily and transferred [from facility to facility] heedlessly.”<sup>74</sup> In fact, only twenty-seven percent of immigrant detainees between October 2008 and September 2009 had a criminal record.<sup>75</sup> Moreover, only a small percentage of those who qualified as “criminal aliens” had committed serious crimes, and the majority were convicted of minor violations.<sup>76</sup>

As a result of the surge in immigrant detention, the need for detention facilities across the country rose significantly.<sup>77</sup> While

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<sup>68</sup> Fine, *supra* note 66, at 417.

<sup>69</sup> Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 673–79 (2003).

<sup>70</sup> Wishnie, *supra* note 61, at 213.

<sup>71</sup> Amy Lagenfeld, *Living in Limbo: Mandatory Detention of Immigrants Under the Illegal Immigration Reform and Responsibility Act of 1996*, 31 ARIZ. ST. L.J. 1041 (1999).

<sup>72</sup> Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.).

<sup>73</sup> 8 U.S.C. § 1226(c)(1) (2006).

<sup>74</sup> Nina Bernstein, *Immigration Detention System Lapses Detailed*, N.Y. TIMES, Dec. 3, 2009, at A25.

<sup>75</sup> Suzanne Gamboa, *ICE Non-Criminal Detentions Fell for Three Months*, ABC NEWS, Feb. 12, 2010, <http://abcnews.go.com/politics/wireStory?id=9823216>.

<sup>76</sup> *Id.*

<sup>77</sup> THE AM. CIVIL LIBERTIES UNION OF N.J., BEHIND BARS, THE FAILURE OF THE DEPARTMENT OF HOMELAND SECURITY TO ENSURE ADEQUATE TREATMENT OF

Immigration and Naturalization Services (INS)<sup>78</sup> provided some detention facilities for immigrants, the need for space was so great that non-INS correctional facilities also became immigrant-detention sites.<sup>79</sup> As of 2008, there were 33,000 immigrant detainees in the U.S. on any given day, approximately half of whom were housed in federal facilities.<sup>80</sup>

Despite the congressional mandate to place these individuals in detention, and its over-expansive effects, minimal federal regulations govern detention conditions.<sup>81</sup> For example, while the law requires immigrant detainees in non-INS correctional facilities to be housed separately, they are often housed with criminal inmates.<sup>82</sup> Furthermore, while conditions in non-INS facilities vary, poor treatment is common;<sup>83</sup> immigrant detainees notoriously endure medical neglect and are rarely, if ever, allowed outdoors.<sup>84</sup> Often the amount of time that an individual is left in detention is egregious unto itself.<sup>85</sup> Only about ten percent have an attorney because free legal representation is not guaranteed to immigrant detainees.<sup>86</sup> Communication with family is limited and transfers to other facilities often occur without notice.<sup>87</sup> Furthermore, transfers occur when it would be more logical to keep the detainee in one place; detainees

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IMMIGRATION DETAINEES IN NEW JERSEY 2 (2007) [hereinafter AM. CIVIL LIBERTIES UNION].

<sup>78</sup> The INS was formerly part of the Department of Justice. *History: Who Became Part of the Department?*, DEP'T OF HOMELAND SEC., [http://www.dhs.gov/about/history/editorial\\_0133.shtm](http://www.dhs.gov/about/history/editorial_0133.shtm) (last visited Sept. 15, 2010). It ceased to exist in 2003, and its functions were delegated to ICE, Customs and Border Protection, and Citizen and Immigration Services within Department of Homeland Security (DHS). *See id.*

<sup>79</sup> Lagenfeld, *supra* note 71, at 1050.

<sup>80</sup> Dana Priest & Amy Goldstein, *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, the Detainees in Their Care Often Pay a Heavy Cost*, WASH. POST, May 11, 2008, at A1.

<sup>81</sup> AM. CIVIL LIBERTIES UNION, *supra* note 77.

<sup>82</sup> *See generally* Lagenfeld, *supra* note 71, at 1050. Under the law, criminal incarceration and immigrant detention are separate systems despite the public tendency to view them as comparable, if not equal; immigration proceedings are within the civil system while criminal proceedings are not. DR. DORA SCHIRO, HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 4 (2009). “[I]mmigrant detention is *not* punishment.” *Id.* at 4 n.2 (emphasis added) (citing *Zaydvas v. Davis*, 533 U.S. 678, 609 (2001)).

<sup>83</sup> Lagenfeld, *supra* note 71, at 1050.

<sup>84</sup> Priest & Goldstein, *supra* note 80.

<sup>85</sup> Lagenfeld, *supra* note 71 at 1052.

<sup>86</sup> Priest & Goldstein, *supra* note 80.

<sup>87</sup> Lagenfeld, *supra* note 71, at 1051.

have been transferred to new facilities despite a high likelihood of release and when pending prosecutions or warrants exist in the original transferee jurisdiction.<sup>88</sup> Human Rights Watch reported that 1.4 million detainee transfers occurred from 1999 until 2008, the majority of which have occurred since 2006.<sup>89</sup> The frequency with which detainees are transferred causes inadequate access to legal counsel and evidence relevant to the detainee's case, excessive time in detention, and undue burdens on the detainees themselves as well as their families and legal representatives.<sup>90</sup> As accountability measures for non-federal facilities are sparse, immigrant-detention conditions have remained unacceptable for too long.

The ambit of immigrant detention was meant to target criminal violators, but civil-immigration violators, immigrants merely seeking asylum, and even lawfully present immigrants, are consequently subject to criminally punishable treatment.<sup>91</sup> The overextension of this federal scheme is troubling.<sup>92</sup> By delegating immigrant detention to local authorities, the federal government again decentralized immigration control. This surge in immigrant detention and the resulting need for non-federal facilities to house detainees is evidence of a decentralized system that causes rampant violations of individual rights.

#### IV. THE MISCHIEF OF § 287(g)

Much like the IRCA legislation and the mandatory detention policies of IIRAIRA, the implementation of § 287(g) has had perverse consequences.<sup>93</sup> The program lacks adequate measures to address accountability, implement proper training, and maintain oversight.<sup>94</sup> As a result, egregious violations of the Fourth Amendment occur with frequency.<sup>95</sup> Additionally, the costs associated with § 287(g) programs are tremendous and cause excessive arrests to run rampant.<sup>96</sup> Furthermore, § 287(g) causes law-enforcement officers to engage in racial profiling, which has incited a backlash to the program among

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<sup>88</sup> Bernstein, *supra* note 74.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See Lagenfeld, *supra* note 71, at 1050–51.

<sup>92</sup> *See id.*

<sup>93</sup> See generally Chishti, *supra* note 37.

<sup>94</sup> See Stana, *supra* note 36, at 2–3.

<sup>95</sup> See, e.g., *In re Pineda Morales*, No. A-97-535-404 (E.O.I.R.N.Y., May 13, 2008) (unpublished opinion on file with author).

<sup>96</sup> Chishti, *supra* note 37, at 6.

local communities and law-enforcement agencies.<sup>97</sup> Section 287(g) also impedes effective policing because it causes communities to grow wary of cooperating with law enforcement.<sup>98</sup> Moreover, § 287(g) raises grave constitutional concerns.<sup>99</sup> The mischief that has resulted from § 287(g) calls for congressional reexamination of the legislation.

A. *Lack of Accountability, Training, and Oversight*

Section 287(g) does not contain adequate accountability, training, or oversight provisions. For example, the statutory language of § 287(g) does not require procedures to record or review local programs.<sup>100</sup> Consequently, participating agencies are not accountable for their actions. No information is available regarding what aspects of the program participating agencies must record or how ICE must review those agencies' records.<sup>101</sup> To illustrate, ICE did not include any instructions or requirements to track or record data in any MOAs that went into effect before 2007.<sup>102</sup> Starting in 2007, MOAs began to require participating agencies to track and report data, but gave no details as to what data the agencies should track and how they should record it.<sup>103</sup> The Government Performance and Results Act requires law-enforcement agencies to "clearly define their missions, measure their performance against the goals they have set, and report on how well they are doing in attaining those goals;" yet the resulting lack of data inhibits an accurate evaluation of the program.<sup>104</sup>

One consequence of inadequate accountability measures in § 287(g) programs is an equal dearth of detailed arrest statistics.<sup>105</sup> There is no data available regarding what percentage of § 287(g) arrests are for criminal activity as opposed to unlawful presence,<sup>106</sup>

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<sup>97</sup> Stana, *supra* note 36, at 7.

<sup>98</sup> Chishti, *supra* note 37, at 7–8.

<sup>99</sup> See discussion *infra* Part IV.E.

<sup>100</sup> 8 U.S.C. § 1357(g) (2006).

<sup>101</sup> Stana, *supra* note 36, at 6; Chishti, *supra* note 37, at 8–9.

<sup>102</sup> Stana, *supra* note 36, at 5.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 5–6 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-96-118, COMPTROLLER GEN. OF THE UNITED STATES, EXECUTIVE GUIDE: EFFECTIVELY IMPLEMENTING THE GOVERNMENT PERFORMANCE AND RESULTS ACT (1996)).

<sup>105</sup> Chishti, *supra* note 37, at 5.

<sup>106</sup> See *id.*

which is not a criminal violation.<sup>107</sup> Further, ICE does not set forth “priority categories” in the MOAs, and the statistics merely indicate that § 287(g) “has departed from the earlier risk-based approach to immigration enforcement articulated by the Department of Homeland Security.”<sup>108</sup> Nothing beyond the numbers of arrests made is available to reveal how the program is functioning.<sup>109</sup> ICE should require participating localities to provide arrest statistics to assess general progress of the programs and to determine if officers are making proper arrests within the intended purposes of § 287(g).

Moreover, ICE does not provide § 287(g) agencies or officers with adequate immigration training.<sup>110</sup> Whereas ICE agents receive five months of immigration-enforcement training, § 287(g) officers receive four weeks.<sup>111</sup> To compound this deficiency, local officers have other law-enforcement responsibilities in addition to immigration enforcement. Thus, it takes longer for local officers to accumulate experience in immigration enforcement than it does for an ICE officer. Because of the complex and unique nature of immigration law, the International Association of Chiefs of Police (IACP), which consists of 20,000 police executives from nearly ninety countries,<sup>112</sup> has warned that § 287(g) programs may cause more Fourth Amendment violations.<sup>113</sup>

ICE states that “[t]he MOA defines the scope and limitations of the authority to be designated [and] . . . establishes the supervisory structure for the officers working under the cross-designation.”<sup>114</sup> ICE also maintains that it will supervise all participating agencies when

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<sup>107</sup> See CARLINER et al., *supra* note 33, at 166 (noting that “[s]imply being in the United States is not a crime”).

<sup>108</sup> Chishti, *supra* note 37, at 5.

<sup>109</sup> See *id.*

<sup>110</sup> See Stana, *supra* note 36, at 3.

<sup>111</sup> *Id.*; Chishti, *supra* note 37, at 7.

<sup>112</sup> About IACP, INT’L ASS’N OF CHIEFS OF POLICE, <http://theiacp.org/About/tabid/57/Default.aspx> (last visited Apr. 16, 2010); About U.S. Immigration and Customs Enforcement (ICE), U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/index.htm> (last visited Apr. 16, 2010).

<sup>113</sup> *Police Chiefs Guide to Immigration Issues*, INT’L ASS’N OF CHIEFS OF POLICE, July 2007, at 13, available at <http://www.theiacp.org/Portals/0/pdfs/Publications/PoliceChiefsGuidetoImmigration.pdf> [hereinafter INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE]; see CARLINER et al., *supra* note 33, at 123 (“Once aliens have entered the U.S., they are covered by the [F]ourth [A]mendment’s protection against unlawful searches and seizures.”).

<sup>114</sup> *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/287g/> (last visited Oct. 30, 2010).

acting in their § 287(g) capacities.<sup>115</sup> But ICE has failed to provide § 287(g) agencies with adequate direction or supervision.<sup>116</sup> Section 287(g) mandates that all details pertaining to powers, duties, duration of authority, supervision, and direction “shall be set forth in a written agreement between the Attorney General and the State or political subdivision.”<sup>117</sup> Beyond this general grant of authority, however, there is no directive of how and when the agencies should exercise their authority.<sup>118</sup> Additionally, there is no statement of program objectives other than to enforce the law against immigration violations.<sup>119</sup> Consequently, “some participating agencies are using their 287(g) authority to process for removal aliens who have committed minor offenses, such as speeding, carrying an open container of alcohol, and urinating in public.”<sup>120</sup> But none of these violations constitute serious criminal conduct that Congress intended the statute to combat.<sup>121</sup> Additionally, participating agencies must incorporate a complaint process into their immigration-enforcement schemes, thus allowing individuals who believe the program has wronged them to address their grievances.<sup>122</sup> Because of unclear guidelines and the conflict of interest entailed in processing a complaint, this provision has been ineffective in many participating localities.<sup>123</sup>

The vagueness of the statute and MOAs permits agencies to employ the program as they see fit without considering broader national objectives.<sup>124</sup> Although ICE officials have stated that § 287(g) is meant to combat serious criminal immigrant activity, there is no documentation of such an objective in materials that participating agencies receive.<sup>125</sup> Further, while there is no explicit grant of power for local law-enforcement agencies to regulate civil-immigration

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<sup>115</sup> *Id.*

<sup>116</sup> See Stana, *supra* note 36, at 3–4.

<sup>117</sup> 8 U.S.C. § 1357(g)(5) (2006).

<sup>118</sup> Stana, *supra* note 36, at 3–4; see also § 1357(g).

<sup>119</sup> Stana, *supra* note 36, at 3.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> AM. CIVIL LIBERTIES UNION OF N.C. LEGAL FOUND., IMMIGRATION & HUMAN RIGHTS POLICY CLINIC, UNIV. OF N.C. AT CHAPEL HILL, THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(G) PROGRAM IN NORTH CAROLINA, Feb. 2009, at 3–4, available at <http://www.law.unc.edu/documents/clinicalprograms/287gexecutivesummary.pdf>.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

violations, there is no prohibitive language either.<sup>126</sup> This ambiguity has produced grave unintended consequences.<sup>127</sup> Rather than reacting to suspected violent criminals, local authorities have begun instead to initiate hostile interactions with individuals on the suspicion that they may be illegal immigrants.

The statute also requires the Attorney General to supervise all participating agencies.<sup>128</sup> Yet there is no available information regarding these supervisory requirements.<sup>129</sup> Again, this lack of specificity inevitably leads to “wide variation in the perception of the nature and extent of supervisory responsibility among ICE field officials and officials from . . . participating agencies,”<sup>130</sup> which in turn leads to unclear program objectives and disparate implementation of the program.<sup>131</sup>

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> 8 U.S.C. § 1357(g) (2006).

<sup>129</sup> Stana, *supra* note 36, at 4.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* Recent § 287(g) agreements, however, have attempted to resolve this issue. *See, e.g., FOIA Reading Room*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/foia/readingroom.htm> (follow 287(g) - Memorandums of Agreement/Understanding hyperlink, then follow NEW JERSEY | Hudson County Department of Corrections | Jail and Task Force | 10/15/2009 hyperlink) (last visited Oct. 24, 2010). In New Jersey, the Hudson County Department of Corrections recently entered into an MOA with ICE that details with some specificity the level of supervision required. *Id.* It states

Immigration enforcement activities conducted by the participating HUDSON COUNTY DEPARTMENT OF CORRECTIONS personnel will be supervised and directed by ICE supervisory officers or designated ICE team leaders. Participating HUDSON COUNTY DEPARTMENT OF CORRECTIONS personnel are not authorized to perform immigration officer functions except when working under the supervision or guidance of ICE. . . .

Participating HUDSON COUNTY DEPARTMENT OF CORRECTIONS personnel shall give timely notice to ICE supervisory officials within 24 hours of any detainer issued under the authorities set forth in this MOA. The actions of participating HUDSON COUNTY DEPARTMENT OF CORRECTIONS personnel will be reviewed by ICE supervisory officers on an ongoing basis to ensure compliance with the requirements of the immigration laws and procedures and to assess the need for individual training or guidance. . . .

In the absence of a written agreement to the contrary, the policies and procedures to be utilized by the participating HUDSON COUNTY DEPARTMENT OF CORRECTIONS personnel in exercising these authorities shall be DHS and ICE policies and procedures. . . .

*Id.* at 7. It is further worth noting that the Hudson County MOA is an agreement between ICE and the county’s Department of Corrections, not the county police department. *Id.* The Department of Corrections serves a more ministerial capacity under its § 287(g) authority than many state and local police departments; suspected

As a result of inadequate training, accountability, and oversight measures in the § 287(g) program, warrantless entry into the home has become a major source of egregious Fourth Amendment violations in recent immigration enforcement.<sup>132</sup> The Fourth Amendment and subsequent case law establish high levels of protection over privacy of the home.<sup>133</sup> The Supreme Court has declared that “physical entry of a home is the chief evil against which the wording of the Fourth Amendment is directed.”<sup>134</sup> A Fourth Amendment violation is presumed to occur if officers enter or search a home without consent from an adult resident of the home, a judicial warrant from an impartial magistrate judge, or exigent circumstances.<sup>135</sup> Thus, warrantless entry—no matter if probable cause is present or not—constitutes a Fourth Amendment violation in the context of both criminal and civil-immigration enforcement.<sup>136</sup> Despite constitutional requirements, numerous stories have surfaced that agents are unlawfully entering the homes of suspected immigrants.<sup>137</sup>

In *re Pineda Morales* is one such story.<sup>138</sup> This case involved only ICE agents because no § 287(g) MOA existed in the relevant locality.<sup>139</sup> In April 2007, New York City Fugitive Operations Unit

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immigration violators are already in custody when the Department of Corrections may exercise its authority, and its principal role is to process them. Thus, many concerns that this Comment addresses are not present in an MOA between ICE and a state or local department of corrections, as opposed to a state or local police department.

<sup>132</sup> See, e.g., *In re Pineda Morales*, No. A-97-535-404, at \*1 (E.O.I.R.N.Y., May 13, 2008) (unpublished opinion on file with author) (holding that evidence procured from a warrantless entry constituted a Fourth Amendment violation).

<sup>133</sup> U.S. CONST. amend. IV.

<sup>134</sup> *United States v. U.S. District Court*, 407 U.S. 297, 312 (1972).

<sup>135</sup> BESS CHIU, LYNLY EGYES, PETER L. MARKOWITZ & JAYA VASANDANI, CARDOZO IMMIGRATION JUSTICE CLINIC, *CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAIDS* 6 (2009). Whereas outside the home, probable cause is sufficient to make an arrest—even without a warrant—a higher standard is required to enter the home. *Id.*

<sup>136</sup> *Id.* In fact, ICE agents are required to gain informed consent from occupants, as they are not issued warrants from impartial magistrates, before making entry into a dwelling. *Id.* ICE officers are trained—and required—to “knock-and-talk” before entering a home, and only upon obtaining consent from an occupant may ICE agents enter the home. *Id.*

<sup>137</sup> See *Pineda Morales*, No. A-97-535-404 at \*1–3; see also CTR. FOR SOCIAL JUSTICE, SETON HALL UNIV. SCH. OF LAW, *KNOW YOUR RIGHTS: HOW TO PREPARE FOR AN IMMIGRATION RAID OR ENCOUNTER WITH IMMIGRATION AGENTS OR POLICE IN NEW JERSEY* 1 (2009).

<sup>138</sup> See *Pineda Morales*, No. A-97-535-404 at \*1–3.

<sup>139</sup> See *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT,

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entered a home at approximately 3:00 in the morning.<sup>140</sup> The officers arrested Respondent Pineda Morales and took him for processing at a Department of Homeland Security location.<sup>141</sup> He had given identification documents to the arresting officials before they brought him in for processing. Despite alleged requests to speak with an attorney, officers interrogated Pineda Morales and placed him in a holding cell.<sup>142</sup> Based on the documents he relinquished, ICE was able to establish the respondent's birthplace as Guatemala, thus proving his alienage.<sup>143</sup> The court stated "there is no dispute that it was as a result of the Government's obtaining the passport and driver's license of the respondent that it was able to obtain this 'independent piece of evidence.'"<sup>144</sup>

Pineda Morales moved to suppress this evidence and terminate the proceeding.<sup>145</sup> In reaching the conclusion that the officers were able to procure all evidence against Pineda Morales as the result of a home invasion that violated the Fourth Amendment, the court stated that:

INA Section 287(a) sets forth the power of Immigration officers and employees without a warrant. None of these powers includes entering a home without a warrant. . . .

I think the Fourth Amendment is clear in this country that in order to enter sanctified area of one's home the police need a warrant. . . . I suppress [the evidence] because I find that . . . all evidence the Government seized about the individual before me, Victor Leonel Pineda Morales, was improperly seized as an egregious violation of the Fourth Amendment.<sup>146</sup>

Because the officers did not have a warrant and did not obtain consent to enter the home, the court held that Pineda Morales's Fourth Amendment rights had been violated.<sup>147</sup> *Pineda Morales* illustrates that although ICE mandates strict procedures and extensive training to its agents, egregious violations nonetheless occur.<sup>148</sup> Section 287(g) procedures set forth in MOAs are vague and

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<http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Oct. 30, 2010) (listing all states and localities that participate in 287(g)).

<sup>140</sup> *Pineda Morales*, No. A-97-535-404 at \*1-2.

<sup>141</sup> *Id.* at \*2.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at \*2-3.

<sup>144</sup> *Id.* at \*3.

<sup>145</sup> *Id.* at \*1.

<sup>146</sup> *Pineda Morales*, No. A-97-535-404 at \*6-7, \*9-10.

<sup>147</sup> *Id.* at \*9.

<sup>148</sup> *Chiu et. al.*, *supra* note 135, at 8.

boilerplate, and participating agents are given minimal training in comparison to ICE agents.<sup>149</sup> In light of egregious violations caused by ICE officers themselves, we can only expect more numerous violations to occur as a result of state and local enforcement of immigration law under § 287(g).

*B. Cost*

The costs associated with § 287(g) are excessive and unnecessary, and ICE financially motivates states and localities to make as many arrests as possible under the § 287(g) program. The Frederick County Sheriff's Office of Maryland, for instance, entered into a § 287(g) MOA that guaranteed the county a reimbursement of eighty-three dollars per day for detaining an immigrant, which, according to Frederick officials, costs only seven dollars per day.<sup>150</sup> Excessive arrests are an inherent risk and a likely product of such an agreement.

Furthermore, the overall cost of the § 287(g) program is enormous. DHS officials have stated that the first year of implementation of an MOA costs approximately \$17.5 million.<sup>151</sup> The sixty-seven current MOAs have expended a total of \$1 billion in the first year of each program.<sup>152</sup> Expenditures come from the federal, state, and local levels; from 2006 through 2008, ICE provided \$60 million in training and resources to participating agencies, while localities provided for various expenses that ICE did not reimburse.<sup>153</sup>

Such over-enforcement is unsustainable; the expanding use of § 287(g) has overwhelmed ICE and its resources. The more that local police discover civil-immigration violators, the more inundated ICE becomes.<sup>154</sup> The sheriff of Mecklenburg County, North Carolina reported that his county's MOA had authorized agents to identify civil-immigration violators.<sup>155</sup> This, in turn, took a large toll on the

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<sup>149</sup> See Stana, *supra* note 36, at 3–4.

<sup>150</sup> Chishti, *supra* note 37, at 6 (citing Nicholas C. Stern, *Sheriff Updates County on ICE Action*, FREDERICK NEWS-POST, Oct. 17, 2008, at 1).

<sup>151</sup> Chishti, *supra* note 37, at 7.

<sup>152</sup> *Id.* at 7.

<sup>153</sup> Stana, *supra* note 36, at 6.

<sup>154</sup> Chishti, *supra* note 37, at 4.

<sup>155</sup> *Id.* (citing *Empowering Local Law Enforcement to Combat Illegal Immigration, Hearing Before the Subcomm. On Criminal Justice, Drug Policy, and Human Resources of the H. Comm. On Gov't Reform*, 109th Cong. (2006) (statement of Jim Pendergraph, Sheriff of Mecklenburg County, North Carolina); see also Stana, *supra* note 36, at 4 (“[A] potential consequence of not having documented program objectives is misuse of authority.”)).

ICE facility to which his agents reported civil-immigration violators.<sup>156</sup> Seven other North Carolina counties have since entered into MOAs with ICE that mirror the language used in Mecklenburg County's MOA, and sixteen more agreements are pending in the state as of 2009.<sup>157</sup> In fact, nearly every MOA nationwide is based on the same template.<sup>158</sup> Thus, over-enforcement widely diverts resources from the program's original objective—to target dangerous criminal immigrants.

That participating agencies are burdening ICE facilities to an unmanageable extreme indicates that § 287(g) is overly utilized. If all participating agencies made as many arrests as the Mecklenburg County police force did, ICE's strategic plan—to use all available detention facilities “for those aliens that pose the greatest threat to the public”<sup>159</sup>—would be compromised.

### C. Racial Profiling

Section 287(g) promotes racial profiling—“the law enforcement technique of singling out a person for a stop, interrogation, arrest, or other investigation because of race or ethnic appearance”<sup>160</sup>—by encouraging state and local law-enforcement officers to screen individuals based on physical appearance.<sup>161</sup> While using race as part of a specific suspect's description is permissible, predicting that members of a certain group are more likely to commit a crime is not.<sup>162</sup> Many communities are wary to encourage such behavior by their local police, hence Utah's decision not to enter into an MOA in 1998.<sup>163</sup> Furthermore, over fifty percent of participating agencies that the Government Accountability Office (GAO)<sup>164</sup> interviewed reported

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<sup>156</sup> Chishti, *supra* note 37, at 4.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 6.

<sup>159</sup> Stana, *supra* note 36, at 3.

<sup>160</sup> Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Law*, 49 ARIZ. L. REV. 113, 116–17 (2007).

<sup>161</sup> *Id.* at 123.

<sup>162</sup> *Id.* at 117.

<sup>163</sup> Chishti, *supra* note 37, at 8. Section 287(g) additionally leads to the promotion of negative stereotypes. *Id.* The difference between immigrants who are unlawfully present in the country and those who are convicted of serious crimes is easily blurred when both are equally punishable under § 287(g)'s vague guidelines. *Id.* This is a questionable message to send to the public. *Id.*

<sup>164</sup> The GAO is the audit, evaluation, and investigative agency of Congress. Stana, *supra* note 36, at 10. It assists Congress to achieve its constitutional obligations by improving accountability and performance of the federal government and its agencies. *Id.*

that community members' concerns about § 287(g) focused on racial profiling.<sup>165</sup> Such police conduct invariably leads to tension between immigrant communities and local law enforcement agencies.

The case of *Melendres v. Arpaio* exemplifies how § 287(g) generates a system of racial profiling.<sup>166</sup> *Arpaio* consisted of several claims against Joseph M. Arpaio, Sheriff of Maricopa County, Arizona, for profiling, targeting, stopping, and detaining persons based on race.<sup>167</sup> The plaintiffs alleged that police officers, pursuant to their § 287(g) powers, were violating the Fourth Amendment.<sup>168</sup> First, officers pulled over a vehicle in which Manuel de Jesus Ortega Melendres was a passenger. He presented them with a valid U.S. visa, but the officers subjected him to a pat down, handcuffed him, and detained him in a holding cell.<sup>169</sup> In addition, on a separate occasion, police pulled over David and Jessica Rodriguez along with several other vehicles, yet they were the only motorists asked to produce documentation—including a social security card—while other motorists were allowed to pass.<sup>170</sup> Lastly, police officers yelled at Velia Meraz and Manuel Nieto, Jr., both U.S. citizens, to leave a gas station for “disturbing the peace” when they were singing to music in their car.<sup>171</sup> Police followed Meraz and Nieto as they left, pulled them over in Nieto’s family business’s parking lot, pulled Nieto out of the car, and violently handcuffed him.<sup>172</sup>

The court conceded that ICE, state, and local law-enforcement agents have an unquestionable right to investigate and potentially arrest individuals unlawfully present in the country, but that officers’ actions are “always circumscribed by the Fourth Amendment.”<sup>173</sup> In denying Sheriff Arpaio’s motion to dismiss, the court stated that race alone is not an adequate reason to assess reasonable suspicion.<sup>174</sup> Further, it quoted the Ninth Circuit in declaring that “Hispanic appearance is of little or no use in determining which particular

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<sup>165</sup> *Id.*

<sup>166</sup> 598 F. Supp. 2d 1025 (9th Cir. 2009).

<sup>167</sup> *Id.* at 1033 (quoting *United States v. Montero-Camargo*, 208 F.3d 1122, 1129–30 (9th Cir. 2000)).

<sup>168</sup> *Id.* at 1029.

<sup>169</sup> *Id.* at 1030.

<sup>170</sup> *Id.* at 1031.

<sup>171</sup> *Id.*

<sup>172</sup> *Arpaio*, 598 F. Supp. 2d at 1030–32.

<sup>173</sup> *Id.* at 1033 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–87 (1975)).

<sup>174</sup> *Id.* at 1033–34.

individuals among the vast Hispanic populace should be stopped by law enforcement officials on the lookout for illegal aliens.”<sup>175</sup> Thus, law enforcement officers must make “permissible deductions” based on objective, logical evidence regarding criminal activity rather than use race or appearance as the predominant reason for investigation.<sup>176</sup> *Arpaio* illustrates the problems that have arisen from increasing the number of officers entitled to interrogate individuals on their immigration status—and by not affording those officers adequate training, direction, or supervision. Racial profiling is thus a severe consequence of § 287(g) that produces egregious Fourth Amendment violations.

*D. Community Distrust in Police*

Section 287(g) causes community distrust in police and hinders effective policing. In the absence of a § 287(g) MOA, law-enforcement officers may contact ICE to obtain information on the immigration status of immigrants suspected of crimes as well as those who have been arrested or convicted.<sup>177</sup> But state and local agencies are able to interrogate directly criminal suspects, arrestees, or convicts when delegated the § 287(g) power.<sup>178</sup>

All local law-enforcement agencies depend on cooperation from local communities to effectively protect public health, safety, and welfare.<sup>179</sup> Section 287(g) compromises this mission because immigrant communities consequently become hesitant to communicate and cooperate with police.<sup>180</sup> IACP officials believe that local law-enforcement of immigration has a “chilling effect on both legal and illegal aliens reporting criminal activity or assisting police in criminal investigations . . . [and] diminish[es] the ability of law enforcement agencies to effectively police their communities and protect the public they serve.”<sup>181</sup>

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<sup>175</sup> *Id.* at 1034 (quoting *United States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc)).

<sup>176</sup> *Id.* at 1034 (quoting *United States v. Berber-Tinoco*, 510 F.3d 1083, 1088 (9th Cir. 2007)).

<sup>177</sup> Stana, *supra* note 36, at 4 n.6.

<sup>178</sup> *Id.*

<sup>179</sup> See INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, *supra* note 113, at 13.

<sup>180</sup> Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1095 (2004).

<sup>181</sup> Chishti, *supra* note 37, at 8.

There are dangerous consequences if communities do not trust their local law enforcement agencies.<sup>182</sup> If immigrants are less trusting of local police, they will be less likely to report when they are victims of crime and will thus become more vulnerable.<sup>183</sup> The same is true for victims of domestic violence and witnesses of crime and violence.<sup>184</sup> Allowing all residents to feel safe in coming forward and cooperating with police is essential to the maintenance of community safety.<sup>185</sup>

Furthermore, the police forces of major American cities—including New York, San Francisco, Los Angeles, Denver, and Chicago—all oppose implementing § 287(g) programs.<sup>186</sup> Police chiefs in those cities believe that to maintain effective partnerships with their communities, officers cannot be charged with detaining or arresting individuals solely on immigration grounds.<sup>187</sup> “[I]t would be virtually impossible to [combat crime] effectively if witnesses and victims, no matter what their residency status, had some reluctance to come forward for fear of being deported.”<sup>188</sup>

*Lima* and Milgrim’s directive further illustrate how state and local immigration enforcement fosters community distrust in police.<sup>189</sup> Milgrim’s directive reads:

State, county, and local law enforcement agencies necessarily and appropriately should inquire about a person’s immigration status under certain circumstances. Specifically, after an individual has been arrested for a *serious violation of State criminal law*, the individual’s immigration status is relevant to his or her ties to the community, the likelihood that he or she will appear at a future court proceeding to answer State or local charges, and the interest of the federal government in considering immigration enforcement proceedings. . . . When there is reason to believe that the arrestee may be an undocumented immigrant, the

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> McKenzie, *supra* note 34, at 1160.

<sup>187</sup> *Id.* (quoting Nat’l Immigration Forum, *From Community Policing to Community Profiling: The Justice Department’s Proposal to Have Local Police Enforce Immigration Laws*, IMMIGRATION FORUM, May 28, 2002).

<sup>188</sup> *Id.*

<sup>189</sup> See Complaint, *Lima v. Newark Police Dep’t.*, No. 08-0426 (D.N.J. Jan. 23, 2008); ATTORNEY GENERAL DIRECTIVE, *supra* note 4, at 2.

arresting agency is responsible for alerting federal immigration officials . . . .<sup>190</sup>

The Directive specifically addresses local law-enforcement agencies that participate in the § 287(g) program apart from those that do not. It states that § 287(g) officers “may not exercise federal law enforcement authority [on immigration matters] unless and until the officer has arrested an individual for violation of an indictable offense, or for driving while intoxicated under state law.”<sup>191</sup> It then provides detailed protocol for recording data and to whom it should be reported. Thus, the New Jersey Directive purports to require recordkeeping and transparency, neither of which § 287(g) requires of participating agencies. But even with accountability measures in place, the *Lima* case illustrates that even more structure is required to prevent violations of the Directive from occurring.

The *Lima* case further demonstrates that the Directive’s express language is not effective, as less than one month after Milgrim declared the State’s position, the events in question occurred.<sup>192</sup> Despite clear instructions of when and when not to interrogate for immigration purposes, officers still violated the Directive—in this case, the Police Chief of Newark.<sup>193</sup> Remarkably, § 287(g) MOAs are even less decipherable than Milgrim’s directive.

*E. The Unconstitutionality of Decentralized Immigration Law*

Section 287(g) raises constitutional concerns. The Supremacy Clause in Article IV of the U.S. Constitution states that the Constitution, and any law or treaty made pursuant to it, are “the supreme law of the land.”<sup>194</sup> If a conflict arises between state and federal law, the federal law thus invalidates the state law.<sup>195</sup> Even if preemption is not expressly stated, where there is a “clear congressional intent that federal law should exclusively occupy a field,” then “field” preemption exists.<sup>196</sup> The Supreme Court has stated that if no express preemptive language exists, preemption may still “be found from a scheme of federal regulation so pervasive as to

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<sup>190</sup> ATTORNEY GENERAL DIRECTIVE, *supra* note 4, at 1 (emphasis added).

<sup>191</sup> *Id.* at 5.

<sup>192</sup> Complaint, *Lima v. Newark Police Dep’t.*, No. 08-0426 (D.N.J. Jan. 23, 2008).

<sup>193</sup> *See id.*

<sup>194</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 392 (3d ed. 2006).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 401–02.

make reasonable the inference that Congress left no room for the States to supplement it.”<sup>197</sup>

The Supreme Court has stated that the “power to regulate immigration is unquestionably exclusively a federal power,” is “incapable of transfer,” and “cannot be granted away.”<sup>198</sup> The enforcement of immigration law also has been traditionally exclusive to the federal domain, and the DOJ long recognized—before the implementation of § 287(g)—that state and local law-enforcement agencies had no authority over immigration enforcement.<sup>199</sup> Thus, according to the preemption doctrine, any efforts of states to regulate immigration are preempted.

Furthermore, the nondelegation doctrine stands for the principle that Congress may not grant away the legislative power.<sup>200</sup> The Supreme Court has stated that “Congress is not permitted to abdicate or to transfer to others the essential legislative function with which it is thus vested.”<sup>201</sup> The manner in which § 287(g) delegates enforcement power to states and localities is an example. Although § 287(g) claims to give participating states and localities the authority to strictly enforce immigration law, the lack of specificity in MOAs allows states and localities to self-regulate immigration. Thus, § 287(g) in its current state violates the doctrines of both federal preemption and nondelegation.

Recent litigation in Arizona supports the proposition that § 287(g) permits unconstitutional state regulation of immigration.<sup>202</sup> In

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<sup>197</sup> *Id.* (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

<sup>198</sup> *De Canas v. Bica*, 424 U.S. 351, 354 (1976). In *De Canas*, however, the Supreme Court found that there was no federal preemption of a California law that barred illegal immigrant labor if such employment would negatively affect resident laborers. *Id.*; see also *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889).

<sup>199</sup> Wishnie, *supra* note 180, at 1090. After the inception of 287(g), however, the DOJ asserted that states and localities possess the “inherent authority” to enforce federal criminal and civil immigration laws. *Id.* (quoting Cheryl W. Thompson, *INS Role for Police Considered; U.S. Eyes State, Local Help in Enforcing Immigration Laws*, WASH. POST, Apr. 4, 2002, at A15). Wishnie points out that congressional grants of immigration enforcement authority to state and local governments in the INA prove that the federal government preempts states and localities in this respect; if states and localities could inherently enforce immigration, the language in the INA would be redundant. *Id.* at 1095. He also contends that to argue that states possess the “inherent authority” to enforce federal immigration law contradicts “well-settled canons of statutory interpretation,” the legislative history of the INA, and the understanding, since 1875, that immigration is exclusively a federal power. *Id.*

<sup>200</sup> CHEMERINSKY, *supra* note 194, at 327–28.

<sup>201</sup> *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935).

<sup>202</sup> See *United States v. Arizona*, 703 F. Supp. 2d 980, 985 (D. Ariz. July 28, 2010) (order granting preliminary injunction).

*United States v. Arizona*, the federal government challenged an Arizona law, Senate Bill 1070 or the “Support Our Law Enforcement and Safe Neighborhoods Act” (S.B. 1070), which created new state regulations governing immigration-law enforcement.<sup>203</sup> The federal government argued that certain aspects of S.B. 1070 were preempted by federal immigration law and thus unconstitutional.<sup>204</sup> Regarding the provisions of the Arizona law that sought to regulate immigration-status determinations, the United States stated that preemption occurs when a state law “impose[s] a burden on a federal agency’s resources that impede[s] the agency’s function.”<sup>205</sup> The District Court agreed that such state regulation of immigration enforcement would “impermissibly burden federal resources and redirect federal agencies away from the priorities they have established.”<sup>206</sup>

The United States also argued that S.B. 1070 “imposes substantial burdens on lawful immigrants in a way that frustrates the concerns of Congress for nationally-uniform rules governing the treatment of aliens . . . [that are] designed to ensure ‘our traditional policy of not treating aliens as a thing apart.’”<sup>207</sup> In *Hines v. Davidowitz*, the Court first declared that immigration regulation must protect the rights of legal and law-abiding aliens and ensure their freedom from “inquisitorial practices and police surveillance.”<sup>208</sup> The District Court agreed with the federal government that the provisions of S.B. 1070 attempting to regulate immigration status checks violated *Hines* and restricted the liberties of lawful aliens, particularly due to the increase in status determinations that S.B. 1070 sought to implement.<sup>209</sup>

The findings of the District Court for the District of Arizona in issuing an injunction against several provisions of S.B. 1070 discredits § 287(g) and leads to the conclusion that it, also, is unconstitutional as impermissible state regulation of the exclusively federal domain. Although § 287(g) appears in the form of a federal law solely enforced at the state level, it actually creates a state-by-state system of

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<sup>203</sup> *See id.*

<sup>204</sup> *Id.* at 986.

<sup>205</sup> *Id.* at 995.

<sup>206</sup> *Id.* at 996.

<sup>207</sup> *Id.* at 994 (quoting *Hines v. Davidowitz*, 312 U.S. 53, 73 (1941)).

<sup>208</sup> 312 U.S. 53, 74 (1941).

<sup>209</sup> *See United States v. Arizona*, 703 F. Supp. 2d at 994. Specifically, S.B. 1070 attempts to require immigration status determinations during lawful stops, detentions, and arrests where the officer on the scene has a reasonable suspicion that the individual is an illegal alien. *Id.* at 996.

immigration regulation. Like S.B. 1070, § 287(g) imposes substantial burdens on legal aliens and impedes the mission of ICE to apprehend dangerous criminal immigrants. The recent District Court injunction against Arizona's S.B. 1070 affirms the invalidity of § 287(g).

V. A CALL TO CONGRESS TO REPEAL § 287(g) OR TO HEAVILY RESTRICT ITS AMBIT

The initiation of state and local law-enforcement of immigration through the § 287(g) program has furthered a decentralized system. Various trends in immigration enforcement demonstrate that local involvement gives rise to egregious violations of the Fourth Amendment. To protect the rights of immigrants and racial minorities who may be mistaken for immigrants, Congress must repeal § 287(g) and re-centralize the enforcement of immigration.

Immigration enforcement priorities must be set at the federal level. Only from a national perspective can all of the relevant factors and resource levels be taken into account. This permits a much more efficient allocation of resources on a system-wide basis and avoids expending a great deal of federal resources on individuals who pose neither a threat to public safety nor national security.<sup>210</sup>

While ICE has proven that it, too, is capable of egregious Fourth Amendment violations, eliminating localized enforcement will cause the frequency of such violations to drop immensely. Furthermore, local police will be able to work more effectively with the trust of minority and immigrant communities who are made more vulnerable by § 287(g).

Alternatively, Congress must, at the very least, heavily restrict the ambit of § 287(g). If § 287(g) programs continue, Congress must require ICE to take various steps that would regulate the nature of § 287(g) programs. This Comment raises concerns with five aspects of § 287(g)—lack of accountability, training, and oversight; cost; racial profiling; community distrust in police; and unconstitutionality. Congress must address each of these matters in restricting the ambit of § 287(g).

First, ICE must ensure that MOAs provide specific direction to state and local law-enforcement agencies. Specifically, the MOAs must mandate that state and local agencies are to seek apprehension only of criminal-immigration violators who pose a threat to national

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<sup>210</sup> Wishnie, *supra* note 180, at 1095.

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security or public safety. In order to effectively achieve that goal, ICE must properly and adequately train state and local agents, maintain proper oversight, and implement accountability measures. For instance, ICE must require state and local police forces to keep detailed records of their arrests. ICE must further evaluate participating agencies and their data on a regular basis to assess the progress of localized-immigration programs and to ensure compliance with the details of the MOAs. Such measures would allow for stricter regulation of state and participating agencies and would prevent egregious Fourth Amendment violations, such as warrantless entry into the home.

Additionally, ICE must seek to reduce the cost of § 287(g) programs. Most crucially, ICE must no longer financially incentivize participating agencies to make arrests. Aside from increasing the costs associated with § 287(g), promoting excessive arrests leads to egregious Fourth Amendment violations and promotes community distrust in law enforcement. If ICE mandates that participating agencies are only to target high-risk criminal immigrants, not only will the cost of the program drop, but it will also become a more effective means to achieve program objectives.

ICE must furthermore ensure that participating law-enforcement agencies do not continue to racially profile. Rather than targeting individuals who may appear to be immigrants based on their race, § 287(g) officers should be trained to focus on criminal suspects and to target those high-risk individuals only. Racial profiling hinders the principal objectives of § 287(g) by diverting resources from criminals who pose threats to national security and public safety. Moreover, it causes community distrust in police and creates an adversarial system in which individuals fear cooperating with law-enforcement agents.

Congress must require ICE to take precautions in drafting § 287(g) agreements that will enable law-enforcement agencies to effectively police. The creation of accountability measures, more specified training, and more detailed oversight; the reduction in cost and elimination of financial incentives to make arrests; and a no-racial profiling policy would all create a § 287(g) system in which communities would be more likely to cooperate with police.

Furthermore, placing stronger regulation on § 287(g) programs would bring the legislation into compliance with the U.S. Constitution. No longer would the federal government delegate away so much enforcement authority that causes § 287(g) programs to rise to the level of impermissible state regulation. Rather, the § 287(g)

program could function as a valid exercise of the federal government's delegation power, and it would cease to violate the doctrine of non-delegable duties.

While undocumented immigration is most certainly a problem unto itself and in need of substantial reform, it does not justify unregulated and unconstitutional conduct that not only broadly targets undocumented immigrants, but also reaches well beyond the undocumented population. If Congress does not force ICE to change its approach to state and local enforcement of immigration, egregious violations of the Fourth Amendment are sure to continue. In light of the number and nature of egregious violations that continue to occur in immigration-law enforcement, major legislative reform is necessary.

#### VI. CONCLUSION

Since 1986, decentralization has pervaded immigration enforcement, most recently through § 287(g) of the INA. Earlier measures to decentralize enforcement—including employer verification programs and privatized immigrant-detention facilities—proved problematic. Section 287(g) has again demonstrated that decentralizing immigration enforcement leads to quite troubling results. Specifically, giving state and local law-enforcement agencies the authority to enforce immigration law leads to egregious violations of the Fourth Amendment. Furthermore, the legislation and regulations are so vaguely crafted that the program has gone far adrift from its intended purpose—to target unlawfully present criminals—and has become a generalized and unregulated immigration-enforcement tool. Consequently, racial profiling and community distrust in local police have gravely increased. Congress must repeal § 287(g) or heavily restrict its ambit in order to remedy the constitutional violations and grave policy concerns that the program continues to promote.