

ENFORCING IMMIGRATION RULES: MAKING THE RIGHT CHOICES

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It is estimated that close to twelve million undocumented immigrants currently reside in the United States.¹ Given the scale of the phenomenon, various enforcement strategies are being employed or considered to control illegal immigration. This paper focuses on two of these strategies in the current policy debate: Part I examines the electronic employment verification system to screen workers' eligibility to work lawfully in the United States, and Part II examines the engagement of state and local authorities in the enforcement of federal immigration laws.

I.

EMPLOYMENT VERIFICATION SYSTEM

There is a growing consensus among policy makers that an electronic verification system that allows employers to determine the work eligibility of its workers is necessary to reduce illegal immigration. It is suggested that unless employers face meaningful sanctions for hiring unauthorized workers, the flow of illegal immigration will not be reversed. Supporters of an electronic verification system further argue that employers cannot be penalized for hiring unauthorized workers unless there is a credible system they can depend on for screening out those not authorized to work.

However, a deep-rooted skepticism still exists towards the policy of penalizing employers for hiring unauthorized workers ("employer sanctions") and the use of an electronic verification system.

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1. JEFFREY S. PASSEL, PEW HISPANIC CTR., *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.* 2 (2006).

A. *Experience with Employer Sanctions*

In 1952, Congress imposed sanctions on those harboring or abetting unauthorized immigrants,² but an amendment popularly called the “Texas Proviso” exempted employment from being treated as “harboring.”³ Employment of unauthorized workers remained lawful until the enactment of the Immigration Reform and Control Act of 1986 (IRCA).⁴

The “employer sanctions” provisions were a critical element of the long-debated IRCA legislation. They came with the compelling dual promise that they would reduce illegal immigration and improve the wages and working conditions of U.S. workers.⁵ Twenty years of experience with employer sanctions suggests that the promise has not been met.

The number of illegal immigrants living in the United States has grown almost threefold since 1986.⁶ It has grown dramatically in the last five years, with over half a million immigrants added every year.⁷ Furthermore, wages and working conditions in the low-wage sector of the labor market have shown no signs of improvement. In 2004, for example, 7.8 million U.S. workers were classified as “working poor,” i.e., working or looking for work for at least half of the year, but earning below the federal poverty level.⁸ Government studies have found that one hundred percent of poultry industry employers,⁹ sixty percent of nursing homes,¹⁰ and between twenty-five and forty-eight percent of employers in the garment industry (depending on the geographical

2. Immigration and Nationality Act (INA) of 1952, Pub. L. No. 82-414, § 274(a), 66 Stat. 163, 228–29 (current version at 8 U.S.C. § 1324a).

3. See INA § 274(a)(4) (specifically excluding employment from the “harboring” prohibition); 8 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, *IMMIGRATION LAW AND PROCEDURE* § 111.08(2)(a)(iv) (rev. ed. 2006) (labeling the employment exception as the “Texas Proviso”).

4. Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603 § 274A(a), 100 Stat. 3359, 3360–74 (codified as amended in 8 U.S.C. § 1324a).

5. H.R. REP. NO. 99-682, pt. 1, at 46–49 (1986), as reprinted in 1986 U.S.C.A.N. 5649, 5650–53; see also Dennise A. Calderon-Barrera, Hoffman v. NLRB: *Leaving Undocumented Workers Unprotected Under United States Labor Laws?*, 6 HARV. LATINO L. REV. 119, 120 (2003).

6. PASSEL, *supra* note 1, at 3 fig.2.

7. *Id.* at 2.

8. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, *A PROFILE OF THE WORKING POOR*, 2004 1 (2006), available at <http://www.bls.gov/cps/cpswp2004.pdf>.

9. EMPLOYMENT STANDARDS ADMIN., U.S. DEP’T OF LABOR, *FY 2000 ANNUAL PERFORMANCE REPORT SUMMARY* app. B-1 (2001), available at <http://www.dol.gov/esa/aboutesa/str-plan/esa00rpt.pdf>.

10. WAGE & HOUR DIV., U.S. DEP’T OF LABOR, *NURSING HOME 2000 COMPLIANCE SURVEY FACT SHEET*, http://www.dol.gov/esa/healthcare/surveys/printpage_nursing2000.htm.

location) were in violation of basic minimum wage and overtime protections.¹¹

Not only have employer sanctions failed to fulfill their promise of reducing illegal immigration and improving wages and working conditions, they have also raised some important collateral concerns. Foremost among these concerns is discrimination in the workplace. A congressionally-mandated study by the General Accounting Office (GAO)¹² concluded that employer sanctions have resulted in discrimination against “foreign appearing” or “foreign sounding” workers.¹³ Concerned about possible penalties, some employers have used national origin and ethnic background as a proxy for unlawful status,¹⁴ or have implemented “citizens only” hiring policies.¹⁵ The GAO report found that the “widespread pattern of discrimination” was attributable “solely” to the IRCA sanctions provision.¹⁶ This was a strong claim to make, but one for which the GAO found substantial evidence: nineteen percent of U.S. employers began national origin or citizenship discrimination after the ICRA’s implementation, with higher numbers in areas with significant Hispanic and Asian populations.¹⁷

Another collateral concern is the growth industry of fraudulent documents. IRCA requires employers to fill out and retain an I-9 form for each worker they hire.¹⁸ On the I-9 form, employers attest that they have examined documents that establish the worker’s identity and eligibility to work lawfully.¹⁹ However, there is no requirement that the employers verify the authenticity of the documents presented.²⁰ Without verification, employers find it easy to comply with the letter of the law, and unauthorized workers procure the documents they need to be hired. Thus, there is a high degree of compliance on paper

11. WAGE & HOUR DIV., U.S. DEP’T OF LABOR, U.S. DEPARTMENT OF LABOR 2001 NEW YORK CITY GARMENT COMPLIANCE SURVEY (2002), http://www.dol.gov/Opa/Media/Press/Opa/NewYork_Survey.htm; WAGE & HOUR DIV., U.S. DEP’T OF LABOR, U.S. DEPARTMENT OF LABOR 2001 SAN FRANCISCO GARMENT COMPLIANCE SURVEY (2002), http://www.dol.gov/Opa/Media/Press/Opa/SanFrancisco_Survey.htm.

12. The General Accounting Office is now called the Government Accountability Office and is still abbreviated as the GAO.

13. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-62, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 3 (1990).

14. *See id.* at 38–44.

15. *Id.*

16. *Id.* at 71.

17. *Id.* at 38.

18. IRCA § 274A(b)(1)(A), (b)(3) (codified as amended at 8 U.S.C. § 1324a(b)(1)(A), (b)(3) (2000)).

19. *Id.* at § 274A(b)(1)(A).

20. *Id.* (employers may accept a document if it “reasonably appears on its face to be genuine”).

alongside rampant use of fraudulent documents. The highly publicized recent raids by Immigration and Customs Enforcement (ICE) at various Swift & Company meatpacking plants targeting use of fraudulent documents have brought attention to the prevalence of these documents.²¹

Lastly, some employers have used employer sanctions as an effective tool to retaliate against workers who assert their rights under various labor protection statutes.²² Often employers choose to verify a worker's status only when the worker asserts rights such as those related to wage, hour, health and safety standards or joining a union.²³

In this regard, the Supreme Court's decision in 2002 represents an important reversal in the ability of undocumented workers to pursue claims against their employers. In *Hoffman Plastic Compounds, Inc. v. NLRB*, the Court held that a worker unlawfully terminated in retaliation for his labor organizing activities is not eligible for back pay under the National Labor Relations Act.²⁴ The Supreme Court ruled that the employer sanctions provisions of the immigration law prevail over a conflicting labor protection statute like the National Labor Relations Act.²⁵ Thus, certain labor protections—historically guaranteed to all workers in the United States—do not apply to unauthorized workers because of the employer sanctions provisions of ICRA. Although the *Hoffman* case related to eligibility for back pay, the decision has been cited to justify denial of other worker benefits like workers' compensation.²⁶ If not pre-*Hoffman*, certainly post-*Hoffman*, employers have a new, perverse incentive to hire undocumented workers.

The ineffectiveness (and low priority to the federal government) of employer sanctions is also reflected in federal spending and caseload patterns. Immigration enforcement spending in general in-

21. See Julia Preston, *U.S. Raids 6 Meat Plants in ID Case*, N.Y. TIMES, Dec. 13, 2006, at A24.

22. See Muzaffar Chishti, *Employer Sanctions Against Immigrant Workers*, WORKING USA, Mar.–Apr. 2000, at 71, 75.

23. *Id.*

24. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148–52 (2002).

25. See *id.* at 148–51.

26. See, e.g., Anne Marie O'Donovan, *Immigrant Workers and Workers' Compensation after Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 30 N.Y.U. REV. L. & SOC. CHANGE 299, 300 (2006). While the majority of challenges to undocumented workers' rights post-*Hoffman* have failed, two state courts have relied on *Hoffman* to justify the suspension of wage-loss benefits for undocumented immigrants under workers compensation laws. *Id.* at 300 & n.14 (citing *Reinforced Earth Co. v. Workers' Comp. Appeal Bd.*, 810 A.2d 99 (Pa. 2002); *Sanchez v. Eagle Allow Inc.*, 658 N.W.2d 510 (Mich. Ct. App. 2003), *cert. granted*, 671 N.W.2d 874 (Mich. 2003), *cert. grant vacated*, 684 N.W.2d 342 (Mich. 2004)).

creased fivefold from 1985 to 2002, from one billion dollars to almost five billion dollars.²⁷ Less than ten percent of that amount, however, flowed to employer enforcement activity.²⁸ Additionally, the number of worksite enforcement cases has decreased significantly. In 1991, about 7400 employer enforcement cases were completed by the Immigration and Naturalization Service (INS), representing nine percent of interior enforcement activity.²⁹ By 2003, however, the number of cases the INS and ICE completed had fallen to fewer than 2200 annually, or less than three percent of the enforcement activity.³⁰ Only three notices of intent to fine were issued against employers in fiscal year 2004.³¹

In sum, the employer sanctions policy has yielded few benefits and extracted significant costs. It has been ineffective in reducing undocumented immigration, but has helped encourage widespread use of fraudulent documents and undermined some important rules of the workplace.

B. *Experience with Verification System*

The proponents of employer sanctions have argued that a major reason for the failure of sanctions is the plethora of documents that the workers can use to establish their eligibility to work and the ease with which such documents can be fraudulently obtained. In response, Congress created an electronic employment eligibility pilot program as part of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).³² The program, known as the Basic Pilot, allows employers to input and match employee information against the Social Security and immigration databases to verify the employment eligibility of a worker.³³ If the eligibility of the worker is not verified, the employer receives a secondary verification response, and the worker is given eight days to verify his or her eligibility with the Social Security

27. DAVID DIXON & JULIA GELATT, MIGRATION POLICY INST., TASK FORCE IMMIGRATION FACT SHEET NO. 10, IMMIGRATION ENFORCEMENT SPENDING SINCE IRCA 1 (2005), available at http://www.migrationpolicy.org/ITFIAF/FactSheet_Spending.pdf.

28. *Id.* at 4.

29. *Id.* at 6 fig.6a.

30. *Id.*

31. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-813, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 34 (2005).

32. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 401, 110 Stat. 3009-546, 3009-655 (reprinted in 8 U.S.C. § 1324a note).

33. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 31, at 10.

Administration (SSA) or Citizenship and Immigration Services (CIS).³⁴ If the agencies are unable to verify the worker's employment eligibility, the employer must terminate the worker.³⁵

In 1997, the Basic Pilot started operating in five states,³⁶ and in 2003, Congress extended it to all fifty states.³⁷ The pilot program is primarily voluntary, although some employers found to have violated immigration laws may be required to participate in the program.³⁸ Approximately fifteen thousand employers have registered to use the pilot program, though not all registered employers actively use the system.³⁹

As part of a congressionally mandated study, the Institute of Survey Research at Temple University and Westat evaluated the Basic Pilot.⁴⁰ Their 2002 evaluation report found critical problems with the program, mostly related to database inaccuracies and misuse of the system by participating employers.⁴¹

The evaluators found that the Basic Pilot generates a high level of "tentative nonconfirmation" notices, i.e., notices that fail to verify an authorized worker's eligibility to work.⁴² Although both the SSA and the CIS databases suffer from inaccuracies, the CIS database is less

34. *Id.* at 13.

35. 8 U.S.C. § 1324a(a)(2); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 31, at 13.

36. Those states are California, Florida, Illinois, New York, and Texas. *Id.* at 9 n. 17.

37. Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156 § 3(a), 117 Stat. 1944, 1944.

38. IIRIRA §§ 402(a), (e)(2) (reprinted in 8 U.S.C. § 1324a note).

39. *Immigration Reform and the Temporary Worker Program: Hearing Before the Subcomm. on Homeland Security of the H. Comm. on Appropriations*, 110th Cong. 9 (2007) (statement of Emilio T. Gonzalez, Director, U.S. Citizenship and Immigration Servs. (USCIS), U.S. Dep't of Homeland Security), available at <http://www.uscis.gov/files/pressrelease/27mar07.pdf> [hereinafter USCIS Testimony]; see also DORIS MEISSNER, ET AL., MIGRATION POLICY INST., IMMIGRATION AND AMERICA'S FUTURE: A NEW CHAPTER, REPORT OF THE INDEPENDENT TASK FORCE ON IMMIGRATION AND AMERICA'S FUTURE 48 (2006) (citing information obtained from the INS Office of Policy & Strategy that active users are approximately half of those registered, totaling less than one percent of all U.S. employers in 2006).

40. WESTAT & INSTITUTE FOR SURVEY RESEARCH, TEMPLE UNIVERSITY, INS BASIC PILOT EVALUATION SUMMARY REPORT, at v (2002) [hereinafter BASIC PILOT EVALUATION].

41. *Id.* at 199–202.

42. See *id.* at 82 ex.V-1A (finding a total of 57,524 tentative nonconfirmations out of 364,987 verification attempts using the SSA database). A "tentative nonconfirmation" is "the initial electronic response returned by the pilot system when an employee's work authorization cannot be immediately confirmed." U.S. CITIZENSHIP AND IMMIGRATION SERVICES, DEP'T OF HOMELAND SECURITY, REPORT TO CONGRESS ON THE BASIC PILOT PROGRAM 3 n.4 (2004) [hereinafter USCIS REPORT].

reliable because it fails to efficiently update the information on immigrants' status.⁴³ Thus, non-citizens are more likely to be affected by data inaccuracies than citizens. Twenty percent of non-citizens and thirteen percent of citizens are not verified for employment at the initial stage.⁴⁴ They can only be verified if they contact the SSA or CIS offices to resolve discrepancies in their information, which needs to be done manually by the agencies.⁴⁵ Ninety percent of tentatively non-confirmed applicants fail to pursue their cases.⁴⁶ However, the 2002 evaluation study found that of those applicants verified by the system, less than one-tenth of one percent were ultimately determined to be unauthorized for employment.⁴⁷

More recent examinations of the Basic Pilot continue to suggest that the data inaccuracies remain unresolved. In 2004, the Department of Homeland Security (DHS) found the Basic Pilot program to generate unacceptably high tentative nonconfirmation rates for work-eligible non-citizens.⁴⁸ A 2005 GAO report identified delays in the entry of information into the worker authorization databases accessed by the Basic Pilot.⁴⁹

In addition to the issue of data accuracy, evaluations of the Basic Pilot have identified a disturbing trend of unlawful practices engaged in by a number of participating employers. For instance, some employers screen applicants for their employment eligibility before making an offer of employment.⁵⁰ Such practices not only deny the worker a job, but also the opportunity to contest database inaccuracies. Additionally, the independent evaluation in 2002 reported that about forty-five percent of workers who contested a tentative nonconfirmation were subject to pay cuts and other forms of employer retaliation.⁵¹

Because of the serious problems that they identified in the Basic Pilot, the 2002 evaluation concluded that that the pilot was "not ready for a larger scale implementation."⁵² The GAO in 2005 also cautioned against the expansion of the program.⁵³

43. *Id.* at 199–200.

44. MEISSNER ET AL., *supra* note 39, at 49.

45. *Id.*

46. *Id.*

47. BASIC PILOT EVALUATION, *supra* note 40, at 81.

48. USCIS REPORT, *supra* note 42, at 3.

49. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 31, at 23–25.

50. BASIC PILOT EVALUATION, *supra* note 40, at 29.

51. *Id.* at 19.

52. *Id.* at vii.

53. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 31, at 6.

Despite these notes of caution, recent immigration reform bills that passed the House and the Senate in the 109th Congress both mandate the use of the Basic Pilot for all employers. The House bill, the Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005 (H.R. 4437), called for employers to use an expanded Basic Pilot system to verify the eligibility of all employees working for the government or in locations containing critical infrastructure within three years of the bill's enactment and to verify the eligibility of all other workers within six years.⁵⁴ The Senate bill, the Comprehensive Immigration Reform Act of 2006 (S. 2611), called for electronic verification of new hires within eighteen months after an appropriation of \$400 million to upgrade the Basic Pilot database.⁵⁵ The House and Senate bills were not reconciled, and thus did not become law.

A massive expansion of the verification system that mandates all U.S. employers to participate is a major undertaking. As noted above, the current Basic Pilot has only fifteen thousand participating employers—less than one percent of all U.S. employers.⁵⁶ A universal verification system will need to include more than 8 million employers and 144 million workers and process more than 50 million hiring decisions each year.⁵⁷ This can only be achieved with a qualitatively different commitment on the part of the government, employers, and representatives of workers.

C. *Outline of a Workable Verification System*

Despite the problems associated with the Basic Pilot, the time for an electronic employment verification system has arrived. The legislation passed by both the House and the Senate reflect the political reality that such a system currently has strong political support. Even members of Congress who have historically opposed employer sanctions now endorse a verification system.⁵⁸ The organized business community now supports a verification system that offers employers predictability and access to a legal workforce.⁵⁹ Changes in technol-

54. H.R. 4437, 109th Cong. § 703(b) (2005).

55. S. 2611, 109th Cong. § 274A(d)(2) (2006).

56. See USCIS Testimony, *supra* note 39 and accompanying text.

57. MEISSNER ET AL., *supra* note 39, at 48.

58. For example, Senator Edward Kennedy (D-MA), who opposed employer sanctions in 1986, is the principal author of the comprehensive immigration reform bill that passed the Senate in 2006. See Press Release, Senator Edward Kennedy, Kennedy Discusses Plan for Comprehensive Immigration Reform (June 9, 2006), available at http://kenedy.senate.gov/newsroom/press_release.cfm?id=6BCA76F1-B454-4E73-B7C7-58DDADA840EC.

59. *Immigrant Employment Verification and Small Business: Hearing Before the Subcomm. on Workforce, Empowerment, and Gov't Programs of the H. Comm. on*

ogy have made more people accustomed to accessing information electronically for many day-to-day chores. Additionally, the alarming increase in illegal immigration has convinced many that new measures need to be tested. There is concern that hiring unauthorized workers has become the new norm and an acceptable business practice. In the absence of too many other viable alternatives, key constituencies are prepared to work with government agencies and Congress to build in appropriate safeguards instead of opposing verification measures as a matter of principle.⁶⁰

While the current immigration debate has acknowledged the need for a new employer verification system, the recently enacted House and the Senate bills do not provide the right framework for a successful system. The following key elements must be met for a universal, mandatory verification system to be effective.

1. Improvements to Verification Database

Legislation that does not address and correct the flaws identified in the Basic Pilot program will fail. The first task is to dramatically improve the accuracy and completeness of the databases used to verify worker eligibility. The CIS immigration database needs special attention. It should reflect changes in a person's immigration status without delay. The system should allow individuals to access and correct recorded information such as the spelling of their names, changes in their married names, or the word order of foreign or uncommon names. In addition, it would be helpful to integrate all visa issuance and admission databases with the existing databases in the Basic Pilot to achieve a more complete database.

Sufficient and sustained resources must be afforded to the CIS and SSA to upgrade their databases and improve the linkages among them. In particular, the Verification Division in the Citizenship and Immigration Services, charged with overseeing the verification program on the CIS's end, must be fully staffed.

Small Business, 109th Cong. 19–21 (2006) (statement of Angelo Amador, Director of Immigration Policy, U.S. Chamber of Commerce, testifying also on behalf of the Essential Worker Coalition, a business coalition working on comprehensive immigration reform).

60. See, e.g., *Immigration Enforcement at the Workplace: Learning from the Mistakes of 1986: Hearing Before the Subcomm. on Immigration, Border Security, and Citizenship of the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Cecilia Muñoz, Vice President Office of Research, Advocacy and Legislation, National Council of La Raza), available at http://judiciary.senate.gov/print_testimony.cfm?id=1949&wit_id=5429.

2. *Worker Protection Provisions*

The statute and the implementing regulations should include worker protection provisions to prevent the abuses identified in the Basic Pilot program. For example, there should be meaningful penalties against employers who violate the security and privacy of workers or discriminate against them on the basis of race, national origin or citizenship. Similarly, employers who submit an applicant's name for verification prior to an offer of employment, submit a worker's name to the verification system in response to a union organizing campaign or terminate a worker on the basis of unresolved nonconfirmations should be penalized. An administrative and judicial review process should be established by which a worker can appeal an adverse finding of eligibility. If agency error is found to be the cause of the adverse finding, the government should compensate the worker for any lost wages.

3. *Stakeholder Engagement*

The DHS should create a new Workplace Enforcement Advisory Board to respond to the political and policy challenges that accompany a universal electronic verification system. The advisory body should be comprised of representatives of the key constituencies whose cooperation, expertise, and support are vital to the system to succeed. It should include representatives from executive branch agencies, state governments, business, labor, and immigrant communities, as well as civil liberties, security, and privacy interests. Given the history of workplace enforcement and the reach of a universal, mandatory verification system, the new initiative will require the active engagement and long-term commitment of these important constituencies.

4. *A Realistic Timeline*

Addressing the flaws of the Basic Pilot program and extending it to the full universe of U.S. employers will require an extraordinary amount of preparation. It is unrealistic to implement a program in the timelines prescribed in the legislation passed by the last Congress.⁶¹ A rush to appear "tough" on workplace enforcement will harm innocent workers, disrupt hiring practices and productivity, encourage non-compliance, and further undermine the legitimacy of immigration enforcement.

61. See *supra* notes 54 and 55 and accompanying text for timelines established by House and Senate bills.

The new verification program should be phased-in over a period of at least three years. In the first year, resources and staffing should be directed at improving the databases to be used in the program. Staff should be trained for implementing the program, including its evaluation and oversight. In addition, the Workplace Enforcement Advisory Board should be created.

In the second year, regulations should be issued to protect workers against employer and government agency abuses identified earlier in this paper.⁶² An aggressive outreach and education program regarding these rules and their enforcement should be launched. Upgrades of the databases and their coordination should continue.

In the third year, groups of employers should be designated for participation in a pilot akin to the Basic Pilot. The size and scope of the groups initially designated for mandatory participation should be decided by the Secretary of DHS, in consultation with the Workplace Enforcement Advisory Board. The program should start with industries of particular sensitivity to terrorism concerns, such as chemical plants and transportation facilities. It should be extended to a larger group of employers based on an analysis of the system's error rates in the upgraded databases and the effectiveness of the privacy and worker protection provisions in the re-designed system. Wider participation should be phased-in gradually only upon the determination by the Secretary of DHS and the Advisory Board that mandatory participation has not imposed undue burdens on employers or authorized workers or led to serious violations of worker protections.

5. *Employer Compliance with the System*

However well designed the electronic verification system is, its ultimate success requires a sustained and labor-intensive commitment to enforcement. An electronic verification system will be a useful tool to employers who are committed to hiring only authorized workers. It is ineffective against employers who actively seek unauthorized workers because they are exploitable. Such employers will simply hire these workers "off the books," without accessing the verification system. This would be particularly true in the informal sector of the labor market. The only way to discipline such employers is by physically inspecting the workplaces on a sustained basis. Such strict and intensive enforcement requires significantly more manpower than has been committed in the past.

62. See *supra* Part I.B.

6. *Comprehensive Immigration Reform*

Finally, a mandatory employment verification system will be successful only if it is a part of a comprehensive immigration reform package. The critical elements of the reform package must be a broad legalization program for the current pool of undocumented workers and a new expanded employment-based immigration stream that allows workers in the future to migrate to the United States through legal channels. These two measures will significantly decrease the number of unauthorized workers in the U.S. labor market and are thus a necessary foundation for a successful immigration enforcement effort at the workplace.

II.

STATES AND LOCALITIES REGULATING IMMIGRANTS

A. *The Devolution Trend*

In the enforcement of immigration rules, the increased role played by state and local authorities is a relatively recent and unappreciated phenomenon.⁶³ This development should be understood in the context of a slowly evolving recent trend to devolve immigration decision making from the federal to state and local governments.

The enactment and enforcement of immigration laws has historically been the province of the federal government.⁶⁴ For over a century, states were virtually allowed no role in regulating policies affecting immigrants.⁶⁵

This practice was fundamentally altered in 1996 when Congress enacted three separate laws. These laws—popularly called the Welfare Law, the Anti-Terrorism Act, and the Immigration Act of 1996⁶⁶—had a profound impact on the lives of immigrants and the

63. See, e.g., Michael Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1085, 1087–88 (2004); Miriam Jordan, *States and Towns Attempt to Draw the Line on Illegal Immigration*, WALL ST. J., July 12, 2006, at A1.

64. See, e.g., Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 131 (2002–2003); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990).

65. Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121, 134 (1994).

66. These laws are formally titled the Personal Responsibility and Work Opportunity Reconciliation Act (PRA) of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8, 42 U.S.C.); the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 18 U.S.C.); and the Illegal Immigration Reform

role of states in regulating them. The Welfare Law authorized states to determine the eligibility for most public benefit programs⁶⁷ and therefore allowed states to inquire into the immigration status of applicants and required them to share that information with the federal government.⁶⁸ The combined effect of the Anti-Terrorism and Immigration Acts was to vastly expand the categories of immigrants subject to mandatory detention and deportation for state criminal offenses.⁶⁹ This resulted in a large increase in immigration detainees held in non-federal correctional facilities.⁷⁰ In addition, the 1996 laws encouraged and created opportunity for local and state law enforcement officials to work together in the enforcement of federal immigration laws.⁷¹

The September 11, 2001, terrorist attacks further intensified the trend toward local and state involvement in immigration enforcement. After the attacks, the U.S. Department of Justice reversed its longstanding position by proclaiming that local law enforcement officials had “inherent authority” to make arrests for civil immigration violations.⁷² The federal government has since pursued a number of strategies to increase the involvement of state and local police in immigration related homeland security measures.⁷³

B. *The New Surge in State and Local Activism*

Building on the recent actions of the federal government, state and local governments have become more active in regulating immigrants. A number of factors are responsible for this activism. First, as the focus on undocumented immigrants has grown and immigration legislation has stalled in a divided Congress, many states and towns have pursued a range of measures aimed at “cracking down on illegal immigration.”⁷⁴ Second, the demographic shift in the immigrant pop-

and Immigrant Responsibility (IIRIRA) Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 42 U.S.C.).

67. PRA § 402(b)(1), 8 U.S.C. § 1612(b)(1).

68. *Id.* § 434, 8 U.S.C. § 1644.

69. See AEDPA § 439, 8 U.S.C. § 1252c; IIRIRA § 321, 8 U.S.C. § 1101(a)(43)(F); see also LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND & AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION, AMERICAN JUSTICE THROUGH IMMIGRANTS' EYES 23-32 (2004), available at <http://www.abanet.org/publicserv/immigration/americanjusticethroughimmigeyes.pdf>.

70. Michael J. Wishnie, *Introduction: Immigration and Federalism*, 58 N.Y.U. ANN. SURV. AM. L. 283, 287-288 (2001-2003).

71. Wishnie, *supra* note 70, at 287.

72. See 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.

73. See *infra* discussion at Part II.C.

74. See Jordan, *supra* note 63, at A1.

ulation has played an important role. In the last fifteen years, more and more immigrants have settled beyond the traditional gateway states.⁷⁵ Additionally, a majority of immigrants in metropolitan areas now live in suburbs as opposed to the traditional gateway urban centers.⁷⁶ Thus, states and localities that have had little or no experience with immigration suddenly find themselves confronted with an unfamiliar phenomenon. In the absence of a comprehensive federal policy, immigration for them has become a local policy challenge. Finally, there is political motivation to highlight illegal immigration, especially in election seasons, when populist themes gain currency. Scapegoating immigrants can easily become the “political strategy of the day.”

1. State Legislation

Whatever the combination of motivations, the rush to legislate is evident and state legislatures have led the trend. The National Conference of State Legislatures estimates that in 2006 alone, “570 pieces of legislation” concerning immigrants were introduced in state legislatures.⁷⁷ While the state initiatives in Georgia and Colorado have received most attention,⁷⁸ all fifty states have introduced some form of immigrant-related legislation.⁷⁹ More importantly, 90 of the 570 measures introduced in 2006 were passed by the legislatures, and 84 were signed into law in 32 states—from Arizona to Wyoming.⁸⁰ This represents a dramatic shift from earlier waves of state initiatives when measures, introduced for symbolic significance, would never become law. The pace of the enactments is also remarkable. By the end of

75. ROB PARAL, AM. IMMIGR. LAW FOUND., THE GROWTH AND REACH OF IMMIGRATION: NEW CENSUS BUREAU DATA UNDERSCORE THE IMPORTANCE OF IMMIGRANTS IN THE U.S. LABOR FORCE (Aug. 16, 2006), http://www.aif.org/ipc/policybrief/policybrief_2006_81606.shtml. The states of New York, California, Texas, and Florida have traditionally been identified as “gateway states.” *Id.*

76. AUDREY SINGER, BROOKINGS INST., THE RISE OF NEW IMMIGRANT GATEWAYS 10 (2004), available at http://www.brookings.edu/dybdocroot/urban/pubs/20040301_gateways.pdf (noting that within the larger gateway metropolitan areas, 54% of immigrants resided in suburban areas).

77. Nat’l Conference of State Legislatures, 2006 State Legislation Related to Immigration: Enacted and Vetoed (Oct. 31, 2006), <http://www.ncsl.org/programs/immig/6ImmigEnactedLegis3.htm> [hereinafter NCSL 2006].

78. See, e.g., Rick Lyman, *In Georgia Law, a Wide-Angle View of Immigration*, N.Y. TIMES, May 12, 2006, at A1; Katie Kelley, *A Deal in Colorado on Benefits for Illegal Immigrants*, N.Y. TIMES, July 12, 2006, at A18.

79. Nat’l Conference of State Legislatures, Overview of State Legislation Related to Immigration and Immigrants in 2007 (Apr. 18, 2007), <http://www.ncsl.org/programs/immig/2007StateLegislationImmigration.htm>.

80. NSCL 2006, *supra* note 77.

May of 2006, thirty-six pieces of legislation had been enacted in states.⁸¹ Thus, a majority were enacted in the three months of the summer of 2006, just preceding the November 2006 elections.

Recent state bills enacted cover a range of subjects from employment, public benefits, education, identification, voting rights, law enforcement, trafficking and legal services.⁸² Legislative proposals include barring immigrants who cannot prove legal status from obtaining public benefits, in-state tuition rates, unemployment assistance, workers' compensation; enforcing sanctions against employers who hire unauthorized workers; and giving authority of local and state police agencies to enforce federal immigration law.⁸³

2. *Local Ordinances*

To the chorus of state actions on immigration, a new voice has been added: local ordinances. Like most of the state bills, these local initiatives are attempts to regulate illegal immigration.⁸⁴ Almost nonexistent a year ago, they are fast attracting fans—and attention—around the country. The recent wave started in San Bernardino, California when a group called “Save Our State” attempted to place a number of anti-immigrant ordinances on a ballot initiative.⁸⁵ The attempt failed for lack of sufficient signatures.⁸⁶ However, the San Bernardino initiative became the template for the current wave of local ordinances⁸⁷ after getting significant play on talk radio and political blogs. The first and most notorious to enact an ordinance was Hazleton, Pennsylvania,⁸⁸ which has been challenged in federal district

81. *Id.*

82. *Id.* See also TANYA BRODER, NAT'L IMMIGRATION LAW CTR., MOST STATE PROPOSALS TO RESTRICT BENEFITS FOR IMMIGRANTS FAILED IN 2005 1 (2005), available at http://www.nilc.org/immspbs/sf_benefits/2005_anti-imm_proposals_article_112105.pdf.

83. See NCSL 2006, *supra* note 77.

84. See Fair Immigration Reform Movement, Database of Recent Local Ordinances on Immigration (Mar. 10, 2007), <http://www.fairimmigration.org/learn/immigration-reform-and-immigrants/local-level/> (follow “Database of Local Immigration Ordinances”) [hereinafter FIRM Database].

85. See Initiative Measure Proposing Requirements and Sanctions on Businesses and Individuals Regarding Day Labor Agencies, the Solicitation of Day Laborers, Aiding and Abetting Illegal Immigration and Prohibiting Persons or Entities from Renting or Leasing Property to Illegal Aliens, San Bernardino, Cal. (on file with the New York University Journal of Legislation and Public Policy); Jordan, *supra* note 63.

86. Jordan, *supra* note 63.

87. *Id.*

88. See Daniel Patrick Sheehan, *Pa. Town Moves to Stem Growth of Immigrants*, PITT. POST-GAZETTE, July 15, 2006, at A10; Milan Simonich, *Hazleton Draws a Hard Line Ordinance Aimed at Illegal Immigrants Puts Mayor Center Stage*, PITT. POST-

court.⁸⁹ Municipalities introduced similar ordinances in Avon Park, Florida, Riverside, New Jersey, and Shenandoah, Pennsylvania.⁹⁰

The post-Hazleton momentum has continued. At least twenty-eight anti-immigrant local ordinances have been enacted by towns and municipalities in many states, with a large number in Pennsylvania.⁹¹ Eleven anti-immigrant measures have failed, and over forty are pending consideration.⁹² Even a city in the state of Texas (which had gained a distinction for being free of anti-immigrant measures) has enacted legislation: the township of Farmer's Branch passed three separate such ordinances in November 2006.⁹³ While the actual provisions of the local ordinances do somewhat vary, they typically cover areas including employment, housing, licensing, local law enforcement, and use of English language.⁹⁴

C. *State and Local Police Enforcement of Immigration Laws*

While the increasing role of state and local authorities in other areas of policy do raise very important concerns, engagement of local police in immigration enforcement is the most contentious area of federal devolution and deserves special attention. This engagement takes place through different routes.

First, the U.S. Department of Justice (DOJ) encourages the increased role of state and local law enforcement. For several decades,

GAZETTE, Aug. 27, 2006, at A1; Michael Mancini, Current Developments, *Immigrant Housing Laws Meet With Judicial Resistance*, 21 GEO. IMMIGR. L.J. 159, 159–60 (2006).

89. Since the writing of this article, the judge, following a trial, invalidated the Hazleton ordinances on constitutional grounds and issued a permanent injunction preventing their enforcement. *Lozano v. City of Hazleton*, No. 3:06cv1586, slip op. at 186 (M.D. Pa. July 26, 2007), available at <http://coop.pamd.uscourts.gov/06v1586.pdf>.

90. See Abby Goodnough, *A Florida Mayor Turns to an Immigration Curb to Fix a Fading City*, N.Y. TIMES, July 6, 2006, at A11 (noting introduction of Avon Park ordinance based on Hazleton law); Carol Comegno & Jim Walsh, *Riverside's Immigration Law Opposed*, COURIER-POST (Cherry Hill, N.J.), July 25, 2006, at 1G (discussing protests around recently introduced Riverside, New Jersey ordinance); Steve Mocarisky, TIMES LEADER (Wilkes-Barre, Pa.), July 31, 2006 (reporting on legislation drafted in Shenandoah based on Hazleton ordinance).

91. FIRM Database, *supra* note 84.

92. *Id.*

93. See Ralph Blumenthal, *Texas Lawmakers Put New Focus on Illegal Immigration*, N.Y. TIMES, Nov. 16, 2006, at A22 (reporting on the new support for anti-immigration legislation in Texas after the first such measures were passed in November 2006).

94. See *Riverside, N.J., Illegal Immigration Relief Act, Ordinance 2006-16* (July 26, 2006), available at http://www.aclu.org/pdfs/immigrants/riverside_firstordinance.pdf.

the DOJ's Office of Legal Counsel recognized an important distinction between civil and criminal violations of immigration law, concluding that state and local police were authorized under federal law to make arrests for criminal immigration offenses but could not make arrests for civil immigration violations.⁹⁵ In the aftermath of the September 11th attacks, contrary to its earlier position, the DOJ has maintained that local police possess "inherent authority" to make arrests for all immigration offenses, civil or criminal.⁹⁶

Second, since the September 11th attacks, the DOJ and DHS have entered thousands of civil, administrative immigration records (like outstanding deportation orders) into the FBI's principal criminal law database, the National Crime Information Center (NCIC).⁹⁷ The NCIC is accessed millions of times each day by state and local police when they stop or question motorists, pedestrians, or other persons whom they encounter in the course of law enforcement activities.⁹⁸ If an immigrant listed in the NCIC database is encountered by the local police, the NCIC screen directs police to contact DHS, and DHS in turn requests the officer to arrest the non-citizen based on the administrative warrant.⁹⁹ Thus, since 2002, police across the nation have arrested thousands of immigrants for civil immigration violations.¹⁰⁰

Third, Congress in 1996 established a statutory procedure by which a state or local jurisdiction could obtain certain immigration enforcement powers. By this process, a jurisdiction would enter into a written agreement with the Attorney General, pursuant to which federal immigration authorities would supervise local law enforcement officials in the enforcement of immigration laws.¹⁰¹ Police would

95. 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. 944, 944 (2002).

96. See 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 (referencing a draft opinion by the DOJ's Office of Legal Counsel).

97. HANNAH GLADSTEIN, ANNIE LAI, JENNIFER WAGNER, & MICHAEL WISHNIE, MIGRATION POLICY INST., *BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE, 2002-2004* 3, 7 (2005) available at http://www.migrationpolicy.org/pubs/MPI_report_Blurring_the_Lines_120805.pdf.

98. *Id.* at 6.

99. See *id.* at 12.

100. See Nina Bernstein, *Crime Database Misused for Civil Issues, Suit Says*, N.Y. TIMES, Dec. 17, 2003, at A34.

101. 8 U.S.C. § 1357(g) (2000). Although not specifically required by statute, the written agreements executed also provide for the DHS to train local law enforcement officials. See LISA M. SEGHELLI ET AL., CONG. RESEARCH SERV., *ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT*, ORDER CODE RL 32270 17-19 (2004).

thereafter be deputized to assist the federal government with certain aspects of immigration enforcement, as determined by the terms of the agreement.¹⁰² Although adopted in 1996, the provision has been used only after the September 11th attacks.¹⁰³ Florida, Alabama, Arizona, and five counties in California and North Carolina have each entered into deputization agreements with DOJ covering some of their police and corrections officials.¹⁰⁴ Massachusetts had also entered into such an agreement, but the agreement was recently rescinded by the state's newly elected governor.¹⁰⁵ Other jurisdictions have considered and rejected proposals to deputize their law enforcement officials.¹⁰⁶

Finally, in a number of post-September 11th initiatives, the DOJ and DHS have enlisted the participation of local police in various joint operations. These operations include the Absconder Apprehension Initiative, in which local police have teamed up with federal authorities to locate and arrest immigrants with outstanding removal orders.¹⁰⁷ There have also been a number of cases where local police have worked with federal immigration officials to arrest or investigate unauthorized immigrants.¹⁰⁸ These collaborative actions result in the presence of state and local police officers along the side of federal agents in a law enforcement action.

The response of law enforcement authorities towards this growing entanglement in federal immigration enforcement has varied. Representing one extreme are the states and counties which have pursued formal, albeit limited, authority to enforce immigration laws via deputization agreements.¹⁰⁹ At the other extreme, the Houston Police

102. *Id.* at 14.

103. *See id.* at 16–18 (the first two agreements, entered into by Florida and Alabama, were signed in 2002 and 2003, respectively).

104. Katie Zezima, *Massachusetts Rescinds Deal on Policing Immigration*, N.Y. TIMES, Jan. 12, 2007, at A17.

105. *Id.*

106. Salt Lake City, for example, rejected a proposal to deputize their police officers before the 2002 Winter Olympics. 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*, SALT LAKE TRIBUNE, Sept. 2, 1998, at C1.

107. *See* MUZAFFAR A. CHISHTI ET AL., MIGRATION POLICY INST., AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11 40 (2003) for a description of the initiative. For more reporting on the involvement of local police in such initiatives, *see* Bernstein, *supra* note 100.

108. For instance, federal and city officials worked together on Operation Predator, a program to arrest immigrants convicted of sex crimes. *See* Anthony Ramirez, *Immigration Net Snags 64 Sex Crime Convicts*, N.Y. TIMES, Aug. 19, 2004, at B3. As part of another effort, called Operation Tarmac, federal and state officials arrested immigrant workers employed at airports. *See* Jennifer Oldham et al., *Dozens Held in Crackdown on Airport Access*, L.A. TIMES, Aug. 23, 2002, at B8.

109. *See* Zezima, *supra* note 104 and accompanying text.

Department has instructed its officers *not* to make NCIC immigration arrests.¹¹⁰ Most jurisdictions fall in between.

A more recent trend is the passage of state legislation to ensure local police engage in the enforcement of immigration law. Several state laws enacted in 2006 require that local agencies assist federal authorities in enforcing civil immigration violations.¹¹¹ Other laws forbid local governments from enacting legislation that impedes law enforcement agencies from cooperating or communicating with federal officials concerning the arrests of suspected unauthorized immigrants.¹¹²

D. Policy Considerations

Many legal experts believe that state and local police do not have the authority to enforce civil immigration laws and that federal statutes preempt local police from making immigration arrests.¹¹³ It is argued that since Congress expressly authorized local police to enforce criminal provisions of immigration law and established a statutory procedure for deputizing local police for non-criminal provisions of immigration law, any broader involvement is illegal.¹¹⁴ A lawsuit brought on these grounds was recently dismissed due to lack of standing,¹¹⁵ and the legality of expanded state and local civil enforcement remains an open question.

Apart from the legal challenges, the involvement of state and local police in immigration enforcement has some profound policy implications. This has been recognized, most importantly, by some leading voices in the law enforcement community. In an unusually strong set of recommendations adopted in June of 2006, the police chiefs of major cities in the United States (Major City Chiefs) put

110. See Craig E. Ferrell, Jr., *The War on Terror's 'Absconder Initiative,'* 69 POLICE CHIEF 10 (2003), available at http://www.iacp.org/documents/index.cfm?fuseaction=document&document_type_id=2&document_id=359&subtype_id. While the Houston policy changed since Ferrell's article—the Houston Police Department now asks those arrested whether they are U.S. citizens and processes them through the NCIS database—local officials do not make arrests based on civil immigration violations. See Mike Glenn, *HPD Turns Over 3 to Immigration Officials*, HOUS. CHRON., Oct. 20, 2006, at 3.

111. NCSL 2006, *supra* note 77.

112. *Id.*

113. See, e.g., Wishnie, *supra* note 63, at 1088–1101; Lewis et al., *supra* note 95.

114. E.g., Wishnie, *supra* note 63, at 1088–95.

115. See *National Council of La Raza v. Gonzales*, 468 F. Supp. 2d 429, 432, 445 (E.D.N.Y. 2007).

forth several reasons against the entanglement of local police in the enforcement of immigration laws.¹¹⁶

First, as the police chiefs rightly argue, involvement in immigration enforcement undercuts the trust that police departments have built with immigrant communities and threatens to weaken other law enforcement efforts and intelligence gathering. Trust with immigrant communities is especially important in the post September 11th environment when their cooperation in intelligence gathering is critical. Further, the police chiefs agree with immigrant advocates and social service providers that police enforcement of immigration laws has a chilling effect on reporting of crimes by immigrant victims and witnesses.¹¹⁷

Second, local police have neither the training nor resources to effectively enforce the nation's complex and frequently changing federal immigration statutes. Except under the specific deputization contracts, local police are not trained in determining whether a person is in the country in violation of immigration laws. As the Major City Chiefs point out, "[a]t this time, local police agencies are ill equipped in terms of training, experience and resources to delve into the complicated area of immigration enforcement."¹¹⁸ If untrained officers are asked to make immigration arrests, it is likely that they will resort to racial and ethnic profiling. They will inevitably make wrongful arrests if they resort to such profiling, giving rise to a risk of civil liability.¹¹⁹

Lastly, as the police chiefs suggest, taking on the additional responsibility of enforcing federal laws will only divert the already over-stretched resources of many police departments.¹²⁰

116. Major City Chiefs, M.C.C. Immigration Committee Recommendations for Enforcement of Immigration Laws by Local Police Agencies (June 2006), available at http://www.houston.tx.gov/police/pdfs/mcc_position.pdf [hereinafter MCC Recommendations].

117. Victims of crime and witnesses who are undocumented are reluctant to approach police officers if they believe that the police can arrest them for immigration violations. See Kareem Fahim, *Should Immigration Be a Police Issue?*, N.Y. TIMES, Apr. 29, 2007, at 14NJ.1. See also *Comprehensive Immigration Reform: Examining the Need for a Guest Worker Program: Hearing Before the Comm. on the Judiciary*, 109th Cong. 28–29 (2006) (statement of Rev. Luis Cortes, Jr., President and CEO, Esperanza USA) (testifying that local enforcement of immigration laws negatively impacts cooperative relationship between immigrant communities and the police).

118. MCC Recommendations, *supra* note 116, at 7.

119. See Wishnie, *supra* note 63, at 1115. Police departments have faced such suits in the past and eventually settled claims out of court. MCC Recommendations, *supra* note 116, at 8.

120. See MCC Recommendations, *supra* note 116, at 6–7; Zezima, *supra* note 103 (reporting that the Governor of Massachusetts rescinded a deputization agreement

There is clearly a role for local law enforcement in the policing of immigrants. Their targets should be people who are suspected of criminal activity or who are of national security interest. Local police even have a role in enforcing immigration law. However, that role is best confined to enforcement of criminal provisions of immigration law. Extending its role to civil immigration violations will extract a significant cost—in individual rights, in social unity and in public safety.

with the federal government so that state troopers could “maintain a focus on gun-, drug-, and gang-related crime”).

