

STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAWS

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Federal law enforcement agencies responded to the attacks of September 11, 2001, with forceful initiatives directed at noncitizens and their communities. Several of these measures raise grave civil rights concerns. Quite apart from investigations prompted by individualized leads, officials have singled out Arab, Muslim, and South Asian immigrants for “voluntary” interviews,¹ fingerprint registration,² arrest, and deportation,³ based merely on these individuals’ membership in certain racial, ethnic, religious, or gender groups. Federal

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¹ See *DOJ Orders Incentives, ‘Voluntary’ Interviews of Aliens To Obtain Info on Terrorists*, 78 INTERPRETER RELEASES 1816, 1818 (2001) (discussing interview guidelines); Gary Fields et al., *U.S. Draws Up List of over 5,000 Men It Wants Interviewed in Terrorism Probe*, WALL ST. J., Nov. 14, 2001, at A6 (describing planned interview program). The program was expanded in spring 2002. See *New Round of Interviews Planned with Foreigners*, WALL ST. J., Mar. 21, 2002, at A8 (noting a second round of terrorism-related interviews). In addition to civil rights criticisms of the interview program, law enforcement officials attacked its effectiveness. See, e.g., Jim McGee, *Ex-FBI Officials Criticize Tactics on Terrorism*, WASH. POST, Nov. 28, 2001, at A1 (quoting a former FBI assistant director who stated that the voluntary interview program was from “the Perry Mason School of Law Enforcement, where you get them in there and they confess. Well, it just doesn’t work that way. It is ridiculous. You say, ‘Tell me everything you know,’ and they give you the recipe to Mom’s chicken soup.”).

² See MUZAFFAR CHISHTI ET AL., *AMERICA’S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11*, at 42–45 (Migration Policy Institute 2003) (describing the National Security Entry Exit Registration System (“NSEERS”) program and its implementation). In late 2003, the government partially suspended some aspects of the NSEERS program. See *Suspending the 30-Day and Annual Interview Requirements from the Special Registration Process for Certain Nonimmigrants*, 68 Fed. Reg. 67,578 (Dec. 2, 2003) (to be codified at 8 C.F.R. pt. 264) [hereinafter *Suspending the 30-day and Annual Interview Requirements*] (amending Department of Homeland Security regulations for registration and monitoring of certain noncitizens).

³ See Memorandum from Larry D. Thompson, Deputy Attorney General, to the Commissioner of the INS, the Director of the FBI, the Director of the U.S. Marshals Service and the U.S. Attorney’s Office (Jan. 25, 2002) [hereinafter *Absconder Apprehension Memo*] (describing the Absconder Apprehension Initiative that targets Arab and Muslim immigrants) (copy on file with author). For an excellent overall analysis of these programs and others targeting noncitizens since September 11, see DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003) (arguing that these measures may be politically easy but are constitutionally suspect).

officials have subjected many arrestees to secret or prolonged detention, without access to counsel, witnesses, or family members, sometimes without charge or for extended periods beyond the conclusion of deportation proceedings.⁴

In the nearly three years since the September 11 attacks, some of these initiatives have waned,⁵ but one that may come to rank among the most dangerous and enduring has seemingly gathered steam: the determination of the U.S. Department of Justice ("DOJ"), as well as some members of Congress,⁶ to enlist state and local police in the routine enforcement of federal immigration laws, criminal and civil alike.

Over the past century, individual police departments have occasionally participated in federal immigration enforcement,⁷ but the strategy rapidly became central to the DOJ's post-September 11 "war on terror." First, in early 2002, the media reported that the DOJ had abandoned its long-standing view that Congress has preempted state and local police from enforcing civil immigration laws, concluding instead that these law enforcement officials have the "inherent authority" to enforce federal immigration law,⁸ and senior

⁴ See OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 37-90 (Apr. 2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf> (describing extended detention without charge or subsequent to entry of deportation order); *id.* at 130-41 (describing "communications blackout" and denial of detainee access to attorneys, family members, and consular officials).

⁵ The government has not held a third round of "voluntary" interviews, for instance, and the FBI and Department of Justice have reformed some of the practices that led to extended detention of noncitizens in the first six months after the attacks. See OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, ANALYSIS OF THE RESPONSE BY THE FEDERAL BUREAU OF PRISONS TO RECOMMENDATIONS IN THE OIG'S DECEMBER 2003 REPORT ON THE ABUSE OF SEPTEMBER 11 DETAINEES AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK (Mar. 2004), available at <http://www.usdoj.gov/oig/special/0312/response.pdf> (acknowledging improved procedures for detention of noncitizens in some areas and noting continuing deficiencies). The Justice Department also suspended some of the NSEERS registration requirements, while continuing others in force. See *Suspending the 30-day and Annual Interview Requirements*, *supra* note 2 (outlining the suspension of the previous program).

⁶ In July 2003, Representative Charles Norwood (R-Ga.) introduced the Clear Law Enforcement for Criminal Alien Removal Act ("CLEAR"), H.R. 2671, 108th Cong. (2003), which had more than 100 co-sponsors in the House by December 2003. A bipartisan companion was introduced in the Senate in December 2003, Homeland Security Enhancement Act, S. 1906, 108th Cong. (2003). The House version of the CLEAR Act would, among other things, establish a new federal misdemeanor for unlawful presence—thereby instantly criminalizing approximately four million persons who have overstayed temporary visas—and condition receipt of certain federal funds on the agreement of state and local police to enforce immigration laws. H.R. 2671, § 102(a), 103.

⁷ See *infra* note 28 and accompanying text.

⁸ See, e.g., Marcus Stern & Mark Arner, *Police May Gain Power To Enforce Immigration: Plan Has Local Officers, Rights Groups on Edge*, SAN DIEGO UNION-TRIB., Apr. 3, 2002, at A1, available at 2002 WL 4594382 (reporting on new conclusion of U.S. DOJ Office of Legal Counsel); Cheryl

administration officials soon confirmed the reports.⁹ When asked to release to the public this secret new policy, the DOJ refused.¹⁰

Second, in late 2001, the INS Commissioner testified before Congress that INS would begin entering certain categories of civil immigration information into the FBI's main criminal database, the National Crime Information Center ("NCIC"), which is accessed millions of times each day by state or local police.¹¹ Such a move would enable the FBI to advise state and local police, via the NCIC database, to make immigration arrests when stopping or questioning persons they might encounter. Subsequently, the Attorney General announced that further categories of administrative immigration information would be entered into the NCIC and disseminated to state

W. Thompson, *INS Role for Police Considered; U.S. Eyes State, Local Help in Enforcing Immigration Laws*, WASH. POST, Apr. 4, 2002, at A15 (same). The previous policy of the DOJ was set forth in an Office of Legal Counsel ("OLC") memorandum. Memorandum from Seth Waxman, Associate Deputy Attorney, to the U.S. Attorney for the Southern District of California (Feb. 5, 1996), at www.usdoj.gov/olc/immstop01a.htm (last visited May 6, 2004) [hereinafter 1996 OLC Memo]. Apparently, in November 2001, the DOJ's Office of Legal Counsel had reviewed and reaffirmed the 1996 OLC memo's determination that state and local police lack authority under federal law to enforce civil immigration law. See Eric Schmitt, *Administration Split on Local Role in Terror Fight*, N.Y. TIMES, Apr. 29, 2002, at A1 (reporting that the November 2001 draft of the revised OLC opinion "supported [the] conclusion" of the 1996 OLC memo regarding limitations on local police authority to make civil immigration arrests).

⁹ See Attorney General John Ashcroft, Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002) (transcript at <http://www.usdoj.gov/ag/speeches/2002/060502agpreparedremarks.htm>) [hereinafter Ashcroft, NSEERS Remarks] (revealing the OLC had concluded state and local police possess "inherent authority" to enforce immigration laws); see also Letter from John Ashcroft, Attorney General, to William Casey, Deputy Superintendent, Boston Police Department (May 13, 2003) [hereinafter Casey Letter] (same) (copy on file with author); Letter from Alberto R. Gonzales, Counsel to the President, to Demetrios G. Papademetriou, Migration Policy Institute (June 24, 2002) (same) (copy on file with author).

¹⁰ That refusal is the subject of litigation under the Freedom of Information Act. See Complaint, Nat'l Council of La Raza v. Dep't of Justice, No. 03 Civ. 2559 (S.D.N.Y.), at <http://www.aclu.org/SafeandFree/safeandfree.cfm?ID=12357&c=206> (last visited May 6, 2004). So are some of the substantive policies examined in Parts I and II, *infra*. See Complaint, Nat'l Council of La Raza v. Ashcroft, No. 03 Civ. 6324 (E.D.N.Y.), at <http://www.aclu.org/Files/OpenFile.cfm?ID=14599> (last visited May 6, 2004) (challenging illegal DOJ use of federal criminal database to cause local police to make routine immigration arrests that Congress has prohibited police from undertaking). I serve as co-counsel for plaintiffs in both lawsuits.

¹¹ See Statement of James W. Ziglar, Commissioner, Immigration and Naturalization Service, before the House Committee on Government Reform, Subcommittee on Criminal Justice, Drug Policy and Human Resources, (Dec. 5, 2001), at http://uscis.gov/graphics/aboutus/congress/testimonies/2001/ziglar_120501.pdf (last visited May 6, 2004) (testifying regarding plan to enter immigration "absconder" records into NCIC); see also Unified Agenda: Statement of Regulatory Priorities, 67 Fed. Reg. 74,158, 74,159 (Dec. 9, 2002) [hereinafter DOJ Regulatory Priorities] ("In the AAI [Absconder Apprehension Initiative], the Service has begun reviewing the files of absconders to enter appropriate records into the National Crime Information Center (NCIC) database . . ."); Chris Adams, *INS To Put in Federal Criminal Databases the Names of People Ordered Deported*, WALL ST. J., Dec. 6, 2001, at A22 (reporting statement of Commissioner and agency spokesperson that INS will start data entry "immediately," but task will take six to twelve months).

and local police upon inquiry.¹² In December 2003, government officials announced plans to add still further categories of immigration data to the NCIC, including student visa violators.¹³ Relying on the information in the NCIC database, local police around the nation have begun to make immigration arrests of persons encountered in routine traffic stops and other ordinary police-civilian encounters.¹⁴

Finally, through various means, senior DOJ officials have encouraged reluctant state and local police departments to make immigration enforcement a local priority. The Attorney General has urged police officials to make immigration arrests,¹⁵ and his senior staff have attended meetings of state and local law enforcement officials to press them to enforce federal immigration laws in the course of ordinary policing.¹⁶

Together, these initiatives mark a sea change in the traditional understanding that federal immigration laws are enforced exclusively by federal agents, with local policing priorities set principally by local officials. The federal effort to enlist, or even conscript,¹⁷ state and local police in routine immigration enforcement has also prompted numerous policy criticisms. Law enforcement officials have objected that such a program will deter crime reporting by noncitizens, is an unfunded mandate, will divert resources from local policing priorities, and may expose local police to liability for wrongful ar-

¹² See Ashcroft, NSEER Remarks, *supra* note 9, at *3 (announcing new regulations requiring registration by many immigrants and stating, “[w]hen aliens violate these rules, we will place their photographs, fingerprints, and information in the National Crime Information Center (or NCIC) system”).

¹³ Minutes from the Criminal Justice Information Services Division, Advisory Policy Board Meeting 28-29 (Dec. 3-4, 2003) (copy on file with author). The Department of Homeland Security (“DHS”) subsequently retreated from its announcement that additional immigration records would be added to the NCIC. See Letter from F. Franklin Amanat, Assistant United States Attorney, to Michael J. Wishnie and Mayra Peters-Quintero (Feb. 27, 2004) (copy on file with author) [hereinafter Amanat Letter] (stating FBI and DHS averment that “they do not presently have the intention” to add two further categories of immigration records to the NCIC).

¹⁴ See Nina Bernstein, *Crime Database Misused for Civil Issues, Suit Says*, N.Y. TIMES, Dec. 17, 2003, at A10 (reporting on arrests in New York, Los Angeles, Boston, and other cities); see also Cam Simpson et al., *Immigration Crackdown Shatters Muslims' Lives*, CHI. TRIB., Nov. 16, 2003, at A1 (reporting on arrest of Amir Shah, car wash supervisor found sleeping in car waiting for business to open, by Schaumburg, Illinois, police officers, on basis of Shah's old deportation order).

¹⁵ See, e.g., Casey Letter, *supra* note 9 (encouraging police enforcement of federal immigration law's pursuant to OLC determination that state and local police possess “inherent authority” to do so).

¹⁶ See, e.g., Minutes from the Criminal Justice Information Services Division, Advisory Policy Board Meeting 45-48 (June 4-5, 2003) (noting statements made by Kris Kobach, Office of the Attorney General, urging state and local police officials in audience to make immigration arrests in course of ordinary policing activities).

¹⁷ The CLEAR Act now pending in Congress would mandate state and local police enforcement of immigration laws as a condition of receipt of certain federal funds. See Criminal Alien Removal Act, H.R. 2671, 108th Cong. (2003).

rest.¹⁸ Civil rights and immigration policy organizations have condemned the effort as likely to increase racial profiling by state and local police,¹⁹ and as undermining social unity by discouraging noncitizens from accessing the police, fire, hospital, school, and a myriad of other local services.²⁰

In this Article, I first consider the validity and implications of the administration's determination that state and local police possess the "inherent authority" under federal law to make immigration arrests. Part II examines the lawfulness of a chief FBI method adopted to encourage such arrests, namely the use of its NCIC database to disseminate immigration status information to state and local police. In Part III, I consider some of the implications of state and local immigration enforcement for racial profiling and selective enforcement.

I. VALIDITY OF LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS

In the early years of the nation, there was little federal regulation of immigration, in large part because disagreements over slavery prevented the development of national legislation.²¹ From nearly the moment Congress began to develop federal immigration policies during the Reconstruction Era, however, it has been widely understood and accepted that the federal government possesses a plenary and exclusive power to regulate immigration, and that the national government's exercise of this power has wholly ousted any state role in regulating "entrance and abode," the classic scope of immigration law.²²

The Supreme Court has repeatedly recognized these principles over the course of more than a century, emphasizing that the power to regulate immigration "belongs to Congress, and not to the states."²³ More recently, the Supreme Court has explained that the "[p]ower to

¹⁸ Craig E. Ferrell, Jr., *The War on Terror's 'Absconder Initiative,'* POLICE CHIEF, Oct. 2002, at 12.

¹⁹ See, e.g., Michele Waslin, *Immigration Enforcement by Local Police: The Impact on the Civil Rights of Latinos*, ISSUE BRIEF, Feb. 2003, at 2, available at http://www.nclr.org/policy/briefs/immig_enforce_policy_03.pdf.

²⁰ See, e.g., CHISHTI, *supra* note 2, at 80.

²¹ See GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 51 (1996) ("The uncoupling of migration from slavery as a result of the Civil War made federal regulation possible . . .").

²² See generally Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (analyzing exclusive nature of the federal government's immigration powers).

²³ *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (invalidating state inspection and bond requirements for arriving noncitizens); see also *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1876) (invalidating state tax and bond rules for arriving noncitizens); *The Passenger Cases*, 48 U.S. (7 How.) 282 (1849) (invalidating state taxes on arriving immigrants).

regulate immigration is unquestionably exclusively a federal power.”²⁴ In a case involving a rare state effort to engage in direct immigration regulation, the Court easily found the state scheme preempted by the exclusive federal power.²⁵ The preemptive force of the federal immigration power is so great that it can bar even state social or economic legislation discriminating against immigrants.²⁶ Nor may this constitutional power to regulate immigration be devolved by statute or executive decree to state or local authorities, because the federal immigration power is “incapable of transfer” and “cannot be granted away.”²⁷

Beyond immigration policy making, the settled principle that immigration regulation is exclusively a federal concern has long guided congressional enactments regarding state or local *enforcement* of federal immigration laws. Thus, although individual police officials have occasionally directed their departments to enforce immigration laws,²⁸ on the whole, enforcement of the immigration statutes has traditionally been the province of federal immigration officials. Congress’s extensive regulation of immigration enforcement has preempted, directly or by implication, state and local arrest authority. This is true for both the civil provisions of the immigration statutes, governing deportation and exclusion proceedings (now jointly referred to as “removal” proceedings),²⁹ and the numerous criminal provisions of the immigration laws, such as those establishing criminal liability for entry without inspection,³⁰ aiding or assisting an-

²⁴ *De Canas v. Bica*, 424 U.S. 351, 354 (1976); *see also* *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (“[T]he authority to control immigration is . . . vested solely in the Federal Government, rather than the States . . .”).

²⁵ *See* *Hines v. Davidowitz*, 312 U.S. 52, 73–74 (1941) (holding that a state registration system for noncitizens was preempted by federal law).

²⁶ *See, e.g.,* *Toll v. Moreno*, 458 U.S. 1, 17 (1982) (holding the state denial of student financial aid to certain visa holders was preempted); *Graham v. Richardson*, 403 U.S. 365, 376–80 (1971) (holding state welfare discrimination against legal permanent residents was preempted); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948) (holding a state alienage restriction on commercial fishing licenses was preempted).

²⁷ *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889); *see also* *Wishnie*, *supra* note 22, at 509–11 (discussing the federal government’s power to regulate its borders).

²⁸ *See* William F. McDonald, *Changing Boundaries of Law Enforcement: State and Local Law Enforcement, Illegal Immigration and Transnational Crime Control*, Final Report 6.1–.114 (1999) (unpublished manuscript for the National Institute of Justice, U.S. Department of Justice, available at <http://www.ncjrs.org/pdffiles1/nij/grants/188877.pdf>) (reviewing history of occasional immigration enforcement by individual police departments).

²⁹ *See, e.g.,* 8 U.S.C. §§ 1229–1229a (1997) (governing initiation and conduct of removal proceedings). There are also immigration provisions that establish civil fines for certain misconduct. *See, e.g., id.* § 1324a(e)(4), (5) (imposing civil fines for knowingly hiring or employing an unauthorized immigrant); *id.* § 1324b(g) (imposing civil fines for discrimination in employment based on citizenship status or national origin).

³⁰ 8 U.S.C. § 1325 (1997).

other's illegal entry,³¹ or engaging in a pattern or practice of knowingly hiring or employing unauthorized workers.³²

Indeed, for many years the DOJ was of the view that state and local police were not empowered to enforce civil immigration laws.³³ Commentators endorsed the conclusion that state and local police lacked authority to enforce civil immigration laws.³⁴ Further, even before the 1996 amendments clarified Congress's intent to preempt state and local immigration enforcement except as expressly provided in statute, some scholars concluded that police were preempted from enforcing most *criminal* immigration laws.³⁵

The courts have had few occasions to address the scope of state or local authority to enforce federal immigration laws, and have not yet examined the question in any detail. In an early brush with these issues, the Ninth Circuit in *Gonzales v. City of Peoria* rejected a preemption challenge to an Arizona city police policy of making arrests for criminal violations of the immigration laws, reasoning that Congress had not "occupied the field of *criminal* immigration enforcement."³⁶ By contrast, the Ninth Circuit "assume[d] that the *civil* provisions" of federal immigration law implicitly preempt any state or local

³¹ *Id.* § 1327.

³² *Id.* § 1324a(f). Other criminal immigration provisions include penalties for willful failure to depart after entry of a removal order, *id.* § 1253; willful failure to comply with immigrant registration requirements, *id.* § 1306(a); willful failure to disclose that one has, on behalf of any person and for a fee or other compensation, assisted in preparing a false or fraudulent immigration application, *id.* § 1324c(e); and importation of a noncitizen for immoral purpose, *id.* § 1328.

³³ 1996 OLC Memo, *supra* note 8; see also Linda Reyna Yañez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 HISP. L.J. 9, 36 (1994) (quoting a 1978 DOJ press release indicating that "local police should refrain from detaining 'any person not suspected of a crime, solely on the ground that they may be deportable aliens'").

³⁴ See, e.g., Robert S. Chapman & Robert F. Kane, *Illegal Aliens and Enforcement: Present Practices and Proposed Legislation*, 8 U.C. DAVIS L. REV. 127 (1975) (explaining that states are preempted from enforcing civil immigration laws and lack authority to do so even if not preempted); Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 975-79 (1995) (same); Yañez & Soto, *supra* note 33, at 39 (arguing that states are preempted from enforcing civil immigration laws).

³⁵ See Manheim, *supra* note 34, at 981. He noted:

Unsupervised enforcement by local police not only undermines the constitutional and pragmatic requirements for "uniform" immigration laws, it runs the risk of complicating the nation's diplomatic relations. "Effectuation of federal immigration policy is not a matter that can be left to the vagaries of state arrest and detention law nor to the discretion of the local police officer."

Id. (quoting *People v. Barajas*, 147 Cal. Rptr. 195, 205 (Cal. Ct. App. 1978) (Reynoso, J., dissenting)) (footnotes omitted); Cecilia Renn, Comment, *State and Local Enforcement of the Criminal Immigration Statutes and the Preemption Doctrine*, 41 U. MIAMI L. REV. 999, 1002 (1987) (arguing that "state and local arrests for criminal immigration violations are likely to thwart critical federal interests in the immigration context" and further that "immigration regulation must be uniform").

³⁶ 722 F.2d 468, 475 (9th Cir. 1983) (emphasis added); see also *Barajas*, 147 Cal. Rptr. at 199 (upholding criminal immigration arrest by local police officers).

authority.³⁷ A year after the *Gonzales* decision, the Tenth Circuit concluded in a brief opinion that a state trooper had the authority to make an arrest for a criminal immigration violation.³⁸ In the years since 1996, when Congress clarified its scheme for local immigration enforcement, the Tenth Circuit has adhered to the view that police possess broad authority to enforce criminal immigration provisions,³⁹ albeit with dicta that seemingly recognizes an authority to enforce civil immigration laws as well.⁴⁰ By contrast, in the years after the 1996 amendments two other courts of appeals have described state and local police authority to enforce immigration laws as “doubtful,” “questionable,”⁴¹ and, at best, “uncertain [].”⁴²

Nevertheless, in 2002, the Department of Justice concluded that state and local police possess the “inherent authority” to enforce federal immigration laws, criminal and civil.⁴³ In subsequent public statements, the Attorney General, White House counsel, and other senior government officials have confirmed that in their view state and local police may arrest any immigration violator—civil or criminal—listed in the NCIC database.⁴⁴ Although the Department of Justice has refused to disclose the scope or analysis of the OLC opinion

³⁷ *Gonzales*, 722 F.2d at 474–75 (emphasis added); see also Jeff Lewis, et al., *Authority of State and Local Officers To Arrest Aliens Suspected of Civil Infractions of Federal Immigration Law*, 7 BENDER'S IMMIGR. BULL. 944 (2002) (arguing that Congress preempted civil arrest authority by state and local police).

³⁸ *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 & n.3 (10th Cir. 1984) (holding that a state trooper had probable cause to make arrest for violation of 8 U.S.C. § 1324(a)(2) prohibiting transportation of illegal immigrants).

³⁹ *United States v. Santana-Garcia*, 264 F.3d 1188 (10th Cir. 2001) (following *Vasquez-Alvarez*); *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1297–1300 (10th Cir. 1999) (rejecting arguments that 1996 amendments to federal immigration laws clarify congressional intent to preempt state and local enforcement).

⁴⁰ See, for example, *Vasquez-Alvarez*, 176 F.3d at 1296, where the Tenth Circuit commented that “state law-enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws,” without distinguishing between criminal and civil enforcement. The language is plainly dicta, since *Vasquez-Alvarez* and *Santana-Garcia*, like the earlier Tenth Circuit decision in *Salinas-Calderon*, involved criminal prosecutions only. Questions of state and local authority to enforce *civil* immigration provisions were not before these courts.

⁴¹ *Mena v. City of Simi Valley*, 332 F.3d 1255, 1265 n.15 (9th Cir. 2003).

⁴² See *Carrasca v. Pomeroy*, 313 F.3d 828, 837 (3d Cir. 2002) (vacating summary judgment in § 1983 action challenging immigration arrest by New Jersey park ranger and stating “[t]here is too much uncertainty on this record of the state of the law with respect to state rangers’ authority to detain immigrants . . . to affirm the District Court’s holding of qualified immunity on that ground”).

⁴³ 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.

⁴⁴ See *supranotes* 11–16 and accompanying text (discussing INS congressional testimony, press releases, and DOJ encouragement of local police arresting violators of national immigration laws).

that yielded this conclusion,⁴⁵ in public speeches and congressional testimony, officials have elaborated on the analysis underlying the agency's new conclusion. This analysis has depended on dicta in the Tenth Circuit opinions and, more fundamentally, on an interpretation of the legislative scheme for state and local immigration enforcement.⁴⁶

Upon examination of this legislative scheme, however, it is evident that Congress's extensive regulation of immigration law and enforcement impliedly preempts any state or local enforcement. This is clear from the several statutory provisions enacted explicitly to *permit* state and local immigration enforcement in narrowly circumscribed areas. For instance, Congress has expressly authorized direct enforcement of two criminal immigration provisions. Section 274 of the Immigration and Nationality Act ("INA") prohibits the smuggling, transporting, or harboring of illegal immigrants.⁴⁷ Subsection (c) of 8 U.S.C. § 1324, entitled "Authority to Arrest," empowers INS agents "and *all other officers whose duty it is to enforce criminal laws*" to make arrests for violations of § 274 of the INA.⁴⁸ The plain language of this provision makes readily apparent Congress's intent that all those authorized to enforce criminal laws be empowered to make arrests for smuggling, transporting, and harboring offenses.⁴⁹

The legislative history of the provision confirms its plain meaning. When first drafted, the provision empowered criminal law enforcement officers "*of the United States*" to arrest alleged smugglers. Congress's elimination of the limiting phrase "of the United States" confirms its intent that all criminal law enforcement officers, federal or otherwise, be authorized to make arrests for violations of INA § 274.⁵⁰

⁴⁵ See Complaint, Nat'l Council of La Raza v. Ashcroft, No. 03 Civ. 6324 (E.D.N.Y.) (seeking disclosure, based on the Freedom of Information Act, of OLC opinion regarding scope of state and local police enforcement authority), at <http://www.aclu.org/File/OpenFilecfm?ID=14599> (last visited May 6, 2004).

⁴⁶ See, e.g., Testimony of Kris W. Kobach, former Counsel to the Attorney General, before the House Immigration Subcommittee (Oct. 1, 2003), available at <http://www.house.gov/judiciary/Kobach100103.htm> (arguing that state and local police possess "inherent authority" to enforce immigration laws based principally on Tenth Circuit decisions, analysis of 8 U.S.C. §§ 1252c, 1357(g) and legislative history).

⁴⁷ 8 U.S.C. § 1324a(a)(1)(A)(i) to (iii) (2000) ("prohibiting smuggling, transporting, or harboring noncitizens").

⁴⁸ 8 U.S.C. § 1324(c) (emphasis added).

⁴⁹ See, e.g., *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983) (noting that section 1324(c) "expressly authorizes local police to enforce the prohibitions against transporting and harboring certain aliens").

⁵⁰ See H.R. CONF. REP. NO. 82-1505, at 1361 (1952), reprinted in 1952 U.S.C.A.N. 1360, 1361 (noting conference agreement to a House amendment striking out "of the United States" so that "other officers whose duty it is to enforce criminal laws, would have authority to make an arrest for a violation of a provision of the act"); see also Chapman & Kane, *supra* note 34, at 145-46 (discussing the legislative history of INA §§ 274 and 275 and concluding "[s]ince both of these sections deal with illegal entry into the United States and since both were considered by

A California appellate court concluded that the history of INA § 274 did not demonstrate a legislative intent that other criminal immigration provisions be enforced only by federal immigration officers,⁵¹ and a few years later in *Gonzales*, the Ninth Circuit adopted the state court's analysis.⁵² But more recently, the Ninth Circuit has acknowledged that the 1996 INA amendments undermine its prior *Gonzales* preemption analysis, leaving state and local arrest authority "doubtful."⁵³

More recently, Congress enacted amendments authorizing state and local police to arrest a second set of immigration violators. In 1996, as part of a broad reform of immigration laws, Congress empowered state and local police to make arrests for violations of INA § 276, which establishes criminal penalties for illegal reentry following deportation.⁵⁴ The 1996 measure expressly provided that "state and local law enforcement officials are authorized to arrest and detain an individual who (1) is an alien illegally present in the United States, and (2) has previously been convicted of a felony" and ordered deported.⁵⁵

Moreover, the legislative history of this new authorization demonstrates that Congress well understands it has preempted all state and local power to make immigration arrests except where specifically authorized. Representative Doolittle offered a floor amendment that became 8 U.S.C. § 1252c. In justifying his proposal, Doolittle described the problem: "the Federal Government has tied the hands of our State and local law enforcement officials,"⁵⁶ given that "current Federal law prohibits State and local law enforcement officials from arresting and detaining criminal aliens whom they encounter[] through their routine duties."⁵⁷ His amendment, he explained,

the same Congress, the legislators apparently intended [INA § 274] to be enforced by all enforcement officials and [INA § 275] to be enforced only by the INS").

⁵¹ See *People v. Barajas*, 147 Cal. Rptr. 195, 198 (Cal. Ct. App. 1978) (rejecting Chapman and Kane's analysis of legislative history).

⁵² *Gonzales*, 722 F.2d at 475 (following the *Barajas* analysis of legislative history of INA § 274).

⁵³ *Mena v. City of Simi Valley*, 332 F.3d 1255, 1265 n.15 (9th Cir. 2003). The *Gonzales* court's reasoning is further weakened by its reliance on the scarcity and simplicity of criminal immigration provisions in effect at that time, which is no longer the case today. Compare *Gonzales*, 722 F.2d at 472-75 (stating that in contrast to civil immigration provisions, statutes relating to "the regulation of criminal immigration activity by aliens" are "few in number and relatively simple in their terms"), with 8 U.S.C. § 1324a(f) (2000) (assessing criminal penalties for the employment of unauthorized immigrants, enacted 1986), and § 1324c(e) (assessing criminal penalties for immigration document fraud, enacted 1996).

⁵⁴ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 439 (codified as 8 U.S.C. § 1252c(a) (2000)).

⁵⁵ *Id.* The provision further obligates state and local police to obtain confirmation from the INS of the individual's immigration history before making the arrest. *Id.*

⁵⁶ 142 CONG. REC. H2191 (daily ed. Mar. 13, 1996) (remarks of Rep. Doolittle).

⁵⁷ *Id.*

would “untie the hands of those we ask to protect us,”⁵⁸ at least with respect to previously deported felons who have illegally reentered the country.⁵⁹ The House approved Doolittle’s amendment, which became part of the final legislation signed into law; in so doing, the House confirmed that *without* express statutory authority, state and local police are preempted from enforcing federal immigration laws.⁶⁰

Two other provisions in the INA confirm that Congress has preempted any state or local police authority to make federal immigration arrests. Section 103(a)(8) of the INA confers emergency powers on the Attorney General to authorize “any State or local law enforcement officer” to enforce federal immigration laws in the event the Attorney General certifies that there exists “an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border.”⁶¹ Elsewhere in the INA, Congress has established *nonemergency* procedures for the authorization of state and local jurisdictions to enforce federal immigration laws. These procedures require training, execution of a “written agreement” with, and supervision by the Attorney General.⁶² These nonemergency procedures are not burdensome, and at least two jurisdictions have already entered into precisely the sort of arrangement envisioned by Congress.⁶³ More importantly, these twin procedures—the emergency

⁵⁸ *Id.*

⁵⁹ *See id.* (“[L]aw enforcement officials would no longer be required to release known dangerous felons back into our communities.”).

⁶⁰ The legislative history of 8 U.S.C. § 1252c is also recounted in *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1298–99 & nn.4–5 (10th Cir. 1999). Although the Tenth Circuit did not discern from section 1252c and its history a legislative intent to preempt state and local immigration enforcement authority, the court failed to explain how its interpretation would render section 1252c anything but surplusage, and another court of appeals questioned the *Vasquez-Alvarez* analysis. *See Mena v. City of Simi Valley*, 332 F.3d 1255, 1266 n.15 (9th Cir. 2003) (noting *Vasquez-Alvarez* but stating authority under federal law of local police officer to question or detain noncitizen for immigration violation is “doubtful” and “questionable” unless done on suspicion of crime of illegal reentry, per section 1252c, or pursuant to agreement under INA § 287(g)); *see also Carrasca v. Pomeroy*, 313 F.3d 828, 837 (3d Cir. 2002) (noting “uncertainty” regarding state and local police authority to make immigration arrests).

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

⁶² INA § 287(g), 8 U.S.C. § 1357(g). Congress established these procedures in 1996 upon enactment of the Illegal Immigration Reform and Immigrant Responsibility Act. *See also* INA § 103(c), 8 U.S.C. § 1103(c) (2000) (authorizing INS Commissioner to “enter into cooperative agreements with State and local law enforcement agencies for the purpose of assisting in the enforcement of the immigration laws”).

⁶³ *See* Memorandum of Understanding Between United States Department of Justice and State of Florida 2 (July 2002) (on file with author) (“Only participating state and local officers who are selected, trained, authorized and supervised as set out herein have authority pursuant to this [memorandum] to conduct the immigration-officer functions enumerated in this [memorandum].”). Alabama has reportedly negotiated a second such agreement. *See* Bernstein, *supra* note 14, at A34 (“Congress has resisted involving local police officials in immigra-

“mass influx” procedures and the ordinary “written agreement” process—reflect a legislative determination that immigration laws should be enforced by state and local police only pursuant to a detailed congressional scheme, guaranteeing federal training, supervision, and oversight.

Were the Attorney General and OLC correct that state and local police possess the “inherent authority” to enforce all federal immigration laws, then the numerous statutory provisions outlined above would be superfluous. Congress need not have bothered to authorize direct state and local arrests of immigrant smugglers or felons who had illegally reentered the country (as it did in INA § 274(c) and 8 U.S.C. § 1252c(a), respectively), nor have created emergency and nonemergency procedures for the Attorney General to authorize state and local immigration enforcement (as it did in INA § 103(a)(8) and § 287(g)).

The Attorney General’s conclusion makes little sense, and contradicts not only well-settled canons of statutory interpretation,⁶⁴ but also the specific legislative history of these provisions.⁶⁵ In addition, the DOJ’s conclusion contradicts the century-old understanding that regulating immigration is an exclusively federal function, and enforcing federal immigration rules is reserved for federal officials. More fundamentally, conscription of state and local police as immigration agents threatens severe damage to the social fabric of communities across the nation. Police, fire, school, and other local officials depend on the cooperation of all residents for the performance of their duties. If those same local officials are charged with enforcing immigration laws as well, millions of persons across the United States will fear to communicate or interact with them, in turn undermining public safety, health, and the welfare of all who reside in this country.

II. ILLEGAL USE OF THE NCIC DATABASE TO ENFORCE FEDERAL IMMIGRATION LAWS

The Attorney General’s campaign to encourage state and local police to incorporate immigration enforcement into their regular duties has not been limited to reason and persuasion. Perhaps prompted by the opposition of some state and local police, the Attorney General directed that the Department of Homeland Security (“DHS”) and the

tion law, although a 1996 law allowed them to enter special agreements to do so with training and supervision. Only Florida and Alabama signed up for the program.”)

⁶⁴ See, e.g., *Walters v. Metro. Educ. Enter., Inc.*, 519 U.S. 202, 219 (1997) (holding that a significant conflict between a federal policy or interest and a state law must be shown before federal power can be found to displace state laws).

⁶⁵ See *supra* notes 47–53 and accompanying text (describing legislative history of 8 U.S.C. § 1252c and INA § 274(c)).

FBI begin entering certain categories of civil immigration information into the FBI's powerful NCIC database, a computer database accessed millions of times each day by state and local law enforcement officials upon encountering a motorist, pedestrian, or other individual.⁶⁶ The inevitable result of this directive has been to induce individual police officers who submit an inquiry to the NCIC to arrest suspected immigration violators. This use of the NCIC database to disseminate civil immigration information is unprecedented in the seventy-year history of the database. As it turns out, it is also unlawful—a point powerfully demonstrated by the current effort in Congress to amend the NCIC statute to authorize the entry and dissemination of immigration information.⁶⁷

The text of the statute establishing and governing the NCIC appears at 28 U.S.C. § 534. It enumerates several categories of information that may be entered and disseminated via the database: "identification, criminal identification, crime, and other records,"⁶⁸ records that would assist in the "identification of any deceased individual" or "missing person,"⁶⁹ and "orders for the protection of persons from stalking or domestic violence."⁷⁰ In addition, a separate statutory provision authorizes the entry and dissemination of information regarding persons with a felony conviction who have previously been deported.⁷¹

The categories of civil immigration that the DOJ has begun to enter and disseminate through the NCIC include information regarding individuals (1) with an outstanding removal order⁷² and (2) who have been determined by the DHS, pursuant to a process yet undisclosed, to be in violation of the new fingerprint and registration requirements of the National Security Entry-Exit Registration System ("NSEERS").⁷³ Importantly, a removal order is an administrative determination, not an adjudication of criminal culpability. Similarly, a determination by DHS that a person is subject to, but not in compliance with, NSEERS is merely an administrative conclusion. In

⁶⁶ For more information on the NCIC Database, see <http://www.fbi.gov/hq/cjis/ncic.htm>.

⁶⁷ See H.R. 2671 § 104, 108th Cong. (1st Sess. 2003) (proposing an amendment of 28 U.S.C. § 534(a) to allow entry and dissemination of "records of violations of the immigration laws of the United States" via the NCIC database); see also Homeland Security Enhancement Act, S. 1906, 108th Cong. (2003) (same).

⁶⁸ 28 U.S.C. § 534(a)(1) (2000).

⁶⁹ *Id.* § 534(a)(2), (3).

⁷⁰ *Id.* § 534(e)(2)(B). "[P]rotection orders" are defined to include "temporary and final orders issued by civil or criminal courts." *Id.* § 534(e)(3)(B).

⁷¹ 8 U.S.C. § 1252c(b) (2000).

⁷² See STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 3 (3d ed. 2002) (IIRIRA replaced both exclusion and deportation with the single word 'removal.').

⁷³ See Ashcroft, NSEERS Remarks, *supra* note 9 (describing the NSEERS program and entry of information regarding alleged NSEERS violators into the NCIC).

addition, in December 2003, officials from DHS announced that two additional categories of immigration data—foreign student visa violators and persons deported with misdemeanor convictions—would be entered into the NCIC and disseminated to local police on inquiry.⁷⁴

The only statutory categories that would arguably permit entry of this information into the NCIC are those providing for entry and dissemination of “identification, criminal identification, crime, and other records.”⁷⁵ The plain language of these terms, however, does not authorize the entry of civil immigration information. Neither removal orders nor determinations of NSEERS violations are a “criminal identification” or “crime” record. Nor are these “identification” records in the ordinary meaning of that term.⁷⁶ Finally, the category “other records,” construed under ordinary canons of statutory interpretation, necessarily means others similar to those previously listed.⁷⁷

The case law interpreting the NCIC statute confirms the plain meaning of its terms. In *Menard v. Saxbe*,⁷⁸ the United States Court of Appeals for the District of Columbia held that an arrest by the Los Angeles Police Department of a man sleeping in a park, later classified as a “detention” under California law, was not a “criminal identification” or “crime” record within the meanings of those terms as used in the NCIC statute.⁷⁹ Because this “detention,” which itself was not challenged as improper, was not within the statutory terms permitting entry and dissemination of data via the NCIC, the court held that the FBI was obligated to expunge Menard’s arrest and detention from the database.⁸⁰ In a later decision, the court reaffirmed the validity of *Menard’s* narrow construction of 28 U.S.C. § 534(a)(1).⁸¹

⁷⁴ See Bernstein, *supra* note 14, at A10 (discussing a lawsuit challenging “the addition of civil information about thousands of noncitizens to the National Criminal Information Center database”); Dan Eggen, *U.S. Considers Expanding FBI Database: Names of Noncriminal Deportees and Student Visa Violators Would Be Added*, WASH. POST, Dec. 17, 2003, at A12 (discussing the possible expansion of the FBI database to include the names of noncriminal deportees and student visa violators).

⁷⁵ 28 U.S.C. § 534(a)(1) (2000).

⁷⁶ Indeed, the FBI’s long-standing regulation defining the term “identification” record speaks of rap sheets. 28 C.F.R. § 16.31 (1991); see also CHISHTI, *supra* note 2, at 84 (“The term ‘identification records’ [in 28 U.S.C. § 534] does not contemplate full civil immigration data.”).

⁷⁷ See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (applying canon of *eiusdem generis*, “[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words” (quoting 2A NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47.17 (1991))).

⁷⁸ 498 F.2d 1017 (D.C. Cir. 1974).

⁷⁹ *Id.* at 1030 n. 53.

⁸⁰ *Id.* at 1028–29.

⁸¹ See *Tarlton v. Saxbe*, 507 F.2d 1116 (D.C. Cir. 1974) (holding that the FBI has a duty of reasonable care to assure the accuracy of records in the NCIC, even where those records are provided by other law enforcement agencies and merely entered into NCIC).

The structure of the NCIC statutory provisions confirms that Congress has not authorized the entry of civil immigration information, even where the civil information may be in some way associated with possible criminal liability. For instance, the language of section 534(e), authorizing the entry of protection orders issued by civil courts, demonstrates that when Congress intended for civil information to be entered into NCIC, it said so explicitly. Violation of a civil order of protection may involve criminal liability,⁸² just as willful failure to depart the country when ordered may indicate criminal liability.⁸³ Yet if the terms “identification, criminal identification, crime, or other records” allowed the entry of civil orders of protection, the violation of which may state criminal liability, then Congress’s enactment of section 534(e) in 1994 was superfluous.

Similarly, the language of 8 U.S.C. § 1252c, adopted in 1996, authorizes the entry of information regarding deported felons into the NCIC. In section 1252c(a), Congress authorized state and local officials to arrest deported felons who have illegally reentered the country. In section 1252c(b), Congress directed the Attorney General to “assure” that “information in the control of the Attorney General, including information in the NCIC,” is “made available” to “assist State and local law enforcement officials in carrying out duties under subsection (a) of this section.”⁸⁴ At least until the creation of the DHS in 2003,⁸⁵ information regarding the deportation of persons with felony convictions was in the control of the Attorney General.⁸⁶ Section 1252c(b) thus provided statutory authority to the DOJ to enter information regarding deported felons into the NCIC and disseminate it to state and local officials. This provision further demonstrates that when Congress meant to authorize the entry of civil information, indeed civil immigration information, into the NCIC, it explicitly stated as much in statutory language. Moreover, in 1996, Congress appears to have recognized that the existing authorizations of 28 U.S.C. § 534(a)—“identification, criminal identification, crime, or other records”—did not permit entry of deported felon information into the NCIC.⁸⁷ Any other reading of § 534(a) would render a part of 8 U.S.C. § 1252c(b) superfluous.

⁸² See, e.g., N.Y. PENAL LAW § 215.50-52 (McKinney 2004) (imposing criminal contempt penalties for violation of civil order of protection).

⁸³ 8 U.S.C. § 1253(a) (2000).

⁸⁴ 8 U.S.C. § 1252c(b) (2000).

⁸⁵ See Homeland Security Act, Pub. L. No. 107-296, § 101(a), 116 Stat. 2142 (2002) (“There is established a Department of Homeland Security, as an executive department of the United States within the meaning of title 5, United States Code.”).

⁸⁶ See 8 U.S.C. § 1103(a)(2) (1996) (giving the Attorney General “control . . . of all the files and records of the [INS]”).

⁸⁷ 28 U.S.C. § 534(a) (2003).

The legislative history of the NCIC statute also demonstrates that the enumerated categories of information that may be entered and disseminated via this uniquely powerful database do not authorize the entry and dissemination of civil immigration information, such as absconder, NSEERS, and foreign student violator information. In 1929, Attorney General Sargent wrote George Graham, Chair of the House Judiciary Committee, seeking legislative authority for the collection and maintenance of criminal records.⁸⁸ Graham obliged by introducing a bill to establish a Bureau of Investigation, responsible for “acquiring, collecting, classifying, and preserving *criminal identification records* . . . and the exchanging of said *criminal identification records* with the duly authorized officials of government agencies, of States, cities, and penal institutions.”⁸⁹ In committee, Graham’s bill was expanded to authorize the collection of “criminal identification and other records.”⁹⁰

This amendment prompted an important floor debate, as Representative Cochran objected to the increased Justice Department authority to include in the database “other records,” explaining, “If you are going to confine the division solely to criminal records, then I have no objection, but here you put in ‘and other records.’”⁹¹ Graham responded by carefully distinguishing between *criminal records*, which were to be collected for dissemination to state and local police, and general *investigatory* information, which was not:

There are two classes of information that is gathered. One is criminal records, and another is the information that is gathered about criminals that is not a matter of record. That they do not give out, but the criminal records they do give out. That information is gathered for the department itself and its agents, in order that they more effectually do their work.⁹²

Representative LaGuardia then offered a floor amendment to insert the word “criminal” after “other,” so that the authority to collect and exchange records would be restricted to the collection and exchange only of “criminal identification and other *criminal records*.”⁹³ Graham agreed to LaGuardia’s amendment, and the bill was enacted without further change.⁹⁴

⁸⁸ Letter from Jno. G. Sargent, Attorney General, to Rep. Graham, Chair, Committee on the Judiciary (April 2, 1928), *reprinted in* H.R. Rep. No. 2431 (1929) (“[T]he identification division is in existence and operation, but . . . there is no legislative authority for it other than that which appears in the appropriation bill and it is desired, for this reason, that [authorizing legislation] be enacted.”).

⁸⁹ Act of June 11, 1930, ch. 455, 46 Stat. 554 (1930) (emphasis added).

⁹⁰ H.R. Rep. No. 71-85, at 1 (1929) (emphasis added).

⁹¹ 72 CONG. REC. 1989 (1930) (remarks of Rep. Cochran).

⁹² *Id.* (remarks of Rep. Graham).

⁹³ *Id.* (remarks of Rep. LaGuardia).

⁹⁴ Act of June 11, 1930, ch. 455, Pub. L. No. 71-337, 46 Stat. 554.

The appropriations bills supplying funds for the Justice Department's new database had an important life of their own, however. The original 1928 appropriations bill had provided for the collection and exchange of "criminal identification records."⁹⁵ The 1930 appropriations bill was enacted after the House Judiciary Committee had approved H.R. 977 (with the language, "and other records"), but before LaGuardia's floor amendment had narrowed H.R. 977 to authorize the collection and exchange of "other *criminal* records"; not surprisingly, therefore, the 1930 appropriations bill tracked the then-approved Committee language.⁹⁶ In 1932, the appropriations language became simply "identification and other records," eliminating any mention of "crime" or "criminal,"⁹⁷ and apparently remained unchanged in appropriations bills through 1964.⁹⁸

In 1966, Congress created the modern 28 U.S.C. § 534 in a statutory reorganization and recodification,⁹⁹ intended to "restate, without substantive change, the laws replaced."¹⁰⁰ Confusingly, however, the 1966 statutory reorganization combined the language of the 1930 statute—"criminal identification and other criminal records"—with the language of the most recent appropriations bill—"identification and other records"—to yield the four categories authorized by the modern 28 U.S.C. § 534(a)(1)—"identification, criminal identification, crime, and other records."¹⁰¹

The best interpretation of the effect of the 1966 recodification is that, as the 1966 law stated, Congress made no substantive change to the preceding law, and thus the DOJ's authorization to disseminate records remains limited, as it was in 1930, to criminal records. This is the interpretation of the effect of the 1966 recodification adopted by the D.C. Circuit in *Menard*.¹⁰² In addition, subsequent legislative history confirms that the 1966 recodification did not expand the NCIC statute to authorize dissemination of civil records. As noted above, in 1994 Congress amended section 534 to authorize the inclusion of protection orders, including those issued by a civil court, confirming that Congress understood that the existing NCIC categories did not

⁹⁵ Act of Feb. 15, 1928, ch. 57, Pub. L. No. 70-32, 45 Stat. 64, 78.

⁹⁶ Act of Apr. 18, 1930, ch. 184, H.R. 4899, Pub. L. No. 71-142, 46 Stat. 173, 187.

⁹⁷ H.R. 9349, 72d Cong. (1st Sess. 1932).

⁹⁸ See Act of Aug. 31, 1964, Pub. L. No. 88-527, 78 Stat. 711, 717-18 (in a section entitled "Federal Bureau of Investigation: Salaries and Expenses" the Act allocates funds "[f]or expenses necessary for the detection and prosecution of crimes against the United States," specifically appropriating funds for collection and exchange of "*identification and other records*" (emphasis added)).

⁹⁹ Act of Sept. 6, 1966, Pub. L. No. 89-554, sec. 4(c), 80 Stat. 616.

¹⁰⁰ *Id.* at sec. 7(a), 80 Stat. at 631.

¹⁰¹ *Id.*

¹⁰² *Menard v. Saxbe*, 498 F.2d 1017, 1029 n.42 (D.C. Cir. 1974) (analyzing the 1930 House floor debate and the 1966 recodification).

embrace such records.¹⁰³ And in 1996, Congress enacted 8 U.S.C. § 1252c, which referred to the NCIC by name and specifically authorized the Attorney General to disseminate information regarding previously-deported felons to state and local officials.

Finally, it is noteworthy that in December 2002, when the FBI's own data systems advisory body, composed primarily of state and local police officials, considered the plans to enter and disseminate NSEERS violator records via the NCIC, the advisory committee voted against the proposal—at least until clear legislative authority for the initiative was identified.¹⁰⁴ When DHS officials returned to the FBI's advisory body in December 2003 to announce its plans to add two further categories of immigration data to the NCIC, alleged student visa violators and deported persons with nonfelony convictions, the advisory body again objected.¹⁰⁵

Congress, the courts, and even the FBI's own advisory body have acknowledged that the NCIC statute authorizes the entry and dissemination only of criminal records and enumerated civil records, specifically civil orders of protection and immigration records related to previously deported felons. Even civil records whose violation may state criminal liability—such as orders of protection or deportation—may be entered into the database only where Congress has specified. Nowhere has Congress approved the blanket entry of administrative immigration orders, such as deportation orders (other than for previously removed felons) or alleged NSEERS violators. Moreover, members of Congress have introduced legislation to amend the NCIC statute to *allow* entry of immigration information, which confirms that, as currently written, the statute does not permit the practice.¹⁰⁶

In short, the DOJ's announced policy of entering and disseminating hundreds of thousands of deportation NSEERS violator records, and its proposal, withdrawn for now, to add records regarding alleged student visa violators and others, is unauthorized by Congress and contrary to law.

¹⁰³ 28 U.S.C. § 534(e) (2003).

¹⁰⁴ Minutes from the Criminal Justice Information Services Division, Advisory Policy Board Meeting 69–70 (Dec. 4–5, 2002) (copy on file with author) (adopting motion against entry of NSEERS violator data into NCIC).

¹⁰⁵ Minutes from the Criminal Justice Information Services Division, Advisory Policy Board Meeting 28–29 (Dec. 3–4, 2003) (copy on file with author) (adopting motion against entry of additional immigration data into NCIC).

¹⁰⁶ H.R. 2671, 108th Cong. § 104 (2003); S. 1906, 108th Cong. § 104 (2003).

III. THE EFFECT OF LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS ON STATE RACIAL PROFILING POLICIES

A third set of issues raised by the federal effort to induce state and local police to enforce routine immigration laws concerns the likelihood that the enforcement requested will lead police to violate state and local laws prohibiting racial profiling.¹⁰⁷ In addition to the prospect of increased unlawful profiling, the immigration enforcement currently sought by the Department of Justice would compel police to engage in selective enforcement of the laws, in violation of equal protection norms in federal and state constitutions. This is most evident in federal attempts to induce police to arrest alleged NSEERS violators. Only men of a certain age and national origin—essentially men born in predominantly Arab or Muslim countries—were required to comply with NSEERS call-in registration. The universe of potential NSEERS violators is therefore overwhelmingly Arab and Muslim men,¹⁰⁸ and so a request that local police arrest “NSEERS violators” is tantamount to a request to arrest Arab and Muslim men.

Courts, however, have analyzed discriminatory immigration enforcement based on race or ethnicity differently from discriminatory criminal law enforcement. A generation ago, the Supreme Court held that the Fourth Amendment applies to INS searches at locations other than the border,¹⁰⁹ and that INS agents may not stop persons based on ethnic appearance alone.¹¹⁰ The Court did hold, however, that ethnicity may be “a relevant factor” among others in satisfying the constitutional standard for an INS stop.¹¹¹ More recently, the Court has questioned whether noncitizens are even among “the people” protected by the Fourth Amendment’s prohibition on unreasonable searches and seizures.¹¹² The Supreme Court has also deter-

¹⁰⁷ See, e.g., CAL. PENAL CODE § 13519.4 (Deering 2000) (prohibiting racial profiling); COLO. REV. STAT. § 24-31-309 (1988) (same); R.I. GEN. LAWS § 31.21.1-2 (2002) (same); TEX. CRIM. PROC. CODE ANN. art. 2.131 (Vernon 1977) (same); see also R.I. GEN. LAWS § 31.21.1-5 (2002) (mandating that local police departments have written policies prohibiting racial profiling).

¹⁰⁸ Of the twenty-five countries whose nationals were subject to call-in registration, all but one—North Korea—were predominantly Arab or Muslim. Of course, some persons born in such countries are neither Arab nor Muslim, and some alleged NSEERS violators may be persons from other nations who are referred for registration at the border, but there is little question that as a factual matter nearly all alleged NSEERS violators are persons born in predominantly Arab or Muslim countries. See CHISHTI, *supra* note 2, at 42–45.

¹⁰⁹ See *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (holding that a warrantless search of a Mexican citizen with a valid work permit violated the Fourth Amendment despite the fact that border patrol search occurred twenty-five miles north of the border).

¹¹⁰ *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (permitting roving INS patrols to stop vehicles only upon “reasonable suspicion”).

¹¹¹ *Id.* at 887 (deeming “Mexican appearance” a “relevant factor”).

¹¹² *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265–66 (1990); see also *United States v. Esparza-Mendoza*, 265 F. Supp. 2d 1254 (D. Utah 2003) (deeming previously deported un-

mined that two important rules of criminal procedure do not generally apply in immigration proceedings: the exclusionary rule¹¹³ and the prohibition on selective prosecution.¹¹⁴ Importantly, however, in *Reno v. American-Arab Anti-Discrimination Committee* the Supreme Court reserved the question whether a claim of selective prosecution may exist in a case involving “outrageous” discrimination.¹¹⁵

In the American legal tradition, no discrimination is more outrageous than that based on race or ethnicity, and there is a significant literature condemning reliance on race or ethnicity in the domestic enforcement of immigration laws.¹¹⁶ The twentieth century included

documented immigrants not among “the people” protected by the Fourth Amendment who may bring motion to suppress in criminal prosecution). For a historical rebuttal of the *Verdugo-Urquidez* Court’s reliance on an originalist analysis, see Michael J. Wishnie, *Immigrants and the Right To Petition*, 78 N.Y.U. L. REV. 667 (2003).

¹¹³ *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (holding that the exclusionary rule does not generally apply in deportation proceedings).

¹¹⁴ See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (holding defense of selective enforcement does not generally exist in immigration proceedings).

¹¹⁵ 525 U.S. at 491–92. In its decision holding that the exclusionary rule does not generally apply in immigration proceedings, the Supreme Court had similarly reserved the possibility that “egregious violations of Fourth Amendment or other liberties” might warrant suppression in deportation cases. *Lopez-Mendoza*, 468 U.S. at 1050–51. Lower federal courts have since interpreted this reservation to permit suppression of evidence obtained based on INS racial or ethnic discrimination. See *Ruckbi v. INS*, 285 F.3d 120, 125 (1st Cir. 2002) (acknowledging authority under *Lopez-Mendoza* to suppress for egregious violation of the Fourth Amendment); *Martinez-Camargo v. INS*, 282 F.3d 487, 492 (7th Cir. 2002) (same); *Westover v. Reno*, 202 F.3d 475, 479 (1st Cir. 2000) (same); *Orhorhaghe v. INS*, 38 F.3d 488, 503 (9th Cir. 1994) (suppressing evidence in arrest and investigation based on Nigerian-sounding name); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1443, 1452 (9th Cir. 1994) (suppressing evidence from stop based on Latino appearance); *Arguelles-Vasquez v. INS*, 786 F.2d 1433, 1436 (9th Cir. 1986) (same), *vacated as moot*, 844 F.2d 700 (9th Cir. 1988).

¹¹⁶ See COLE, *supra* note 3, at 2; Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Muslims and Arabs*, 58 ANN. SURV. AM. L. 295 (2002) (describing race-based targeting of Arabs and Muslims in name of counterterrorism post-September 11); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000) (arguing equal protection principles should preclude reliance on race as factor in immigration enforcement); Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289 (2000) (characterizing “racial classifications enacted by Congress in the immigration laws” as “de jure racial discrimination”); Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DEPAUL L. REV. 871 (2003) (criticizing the use of “citizenship and race as a proxies for loyalty” in the “current context . . . of Muslim and Arab immigrants post-September 11”); Victor C. Romero, *Racial Profiling: Driving While Mexican and Affirmative Action*, 6 MICH. J. RACE & L. 195 (2000) (applying critical race theory to question of relevance of race to immigration enforcement); Robert Alan Culp, Note, *The Immigration and Naturalization Service and Racially Motivated Questioning: Does Equal Protection Pick Up Where the Fourth Amendment Left Off?*, 86 COLUM. L. REV. 800 (1986) (arguing that reliance on race in immigration enforcement is inconsistent with equal protection principles and that immigration stops should require reasonable, individualized suspicion); Jonathan L. Hafetz, Note and Comment, *The Rule of Egregiousness: INS v. Lopez-Mendoza Reconsidered*, 19 WHITTIER L. REV. 843 (1998) (arguing that all immigration enforcement is egregiously race-based and thus Fourth Amendment exclusionary rule should apply in deportation proceedings).

several notorious instances of discriminatory targeting of immigrants by ethnicity or national origin, particularly during times of national crisis, real or perceived: the registration, arrest, detention without charge, and deportation of thousands of German immigrants during World War I;¹¹⁷ the Palmer Raids in the interwar years, resulting in the arrest, detention, and deportation without charges of thousands of alleged communists, principally Russian and East European immigrants;¹¹⁸ the internment of 120,000 Japanese and Japanese-Americans during World War II,¹¹⁹ as well as smaller numbers of Germans and Italians;¹²⁰ and the targeting of young Iranians after the seizure of the U.S. Embassy in Tehran in 1979.¹²¹ The discriminatory post-September 11 programs¹²² are but the latest manifestation of this taste for discrimination against immigrants in times of national crisis, real or perceived.

However, the permanent involvement of state and local police in routine immigration enforcement raises the further risk of racial profiling and selective immigration enforcement beyond moments of real or perceived national threat. In the pages that follow, I present data regarding discrimination in routine immigration enforcement in the years immediately preceding September 2001. This data demonstrates that even before the September 11 attacks, INS regularly engaged in racial profiling and selective enforcement based on ethnic appearance.¹²³ In addition, the data from a previously unpublished case study of arrests in the INS's New York District strongly suggests that when the INS makes arrests during one important category of immigration enforcement, worksite raids, federal agents single out worksites for enforcement actions based on the presence of "Spanish music" or workers of "Hispanic appearance," and target individual Latinos—from amidst ethnically diverse workforces—for questioning, arrest, and prosecution.¹²⁴

The evidence that even federal immigration officials, trained in the arcania of immigration law and (presumably) the risks of improper reliance on profiling, frequently resorted to stereotypes and

¹¹⁷ See generally Harlan Grant Cohen, Note, *The (Un)favorable Judgment of History: Deportation Hearings, the Palmer Raids, and the Meaning of History*, 78 N.Y.U. L. REV. 1431 (2003) (describing the history of U.S. deportation and incarceration of immigrants during times of war, especially World War II).

¹¹⁸ *Id.* at 1457–61.

¹¹⁹ WHAT DID THE INTERNMENT OF JAPANESE AMERICANS MEAN? 5 (Alice Yang Murray ed., 2000).

¹²⁰ See, e.g., TIMOTHY J. HOLIAN, *THE GERMAN-AMERICANS AND WORLD WAR II* 89–127 (1996).

¹²¹ See *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979) (rejecting equal protection and others challenges to registration requirement for Iranian students).

¹²² See *supra* notes 1–4 and accompanying text.

¹²³ INS JFK Report *infra* note 139.

¹²⁴ See *infra* Part III.B.2 (analyzing the data).

discrimination, confirms that the move to enlist or conscript state and local police in ordinary immigration enforcement is fraught with risk. Because the behavior of those police are frequently constrained by state or local rules against racial profiling, the federal government's current drive to enlist police in immigration enforcement creates a very real prospect of expanded, and unlawful, profiling.

Section A presents data supplied by INS in response to presidential and congressional requests. Section B presents the results of a study of INS enforcement practices in the New York District, the product of Freedom of Information Act litigation against the INS.

A. *Immigration Enforcement Generally*

Enforcement of immigration laws at and away from the border has long been a priority,¹²⁵ and remains so after September 11. Previously, INS "interior enforcement" was dedicated largely to four areas: removal of immigrants with criminal convictions, worksite enforcement strategies, antifraud, and anti-smuggling operations.¹²⁶ These remain central priorities of DHS's post-September 11 internal enforcement agenda.¹²⁷

1. *Interior Enforcement—National Data, 2000*

Data regarding immigration enforcement operations in the year before the September 11 attacks are contained in the *2000 Statistical Yearbook of the Immigration and Naturalization Service*.¹²⁸ In fiscal year 2000, INS made 1,814,729 arrests of noncitizens, of which 1,676,438 (92%) were made by INS Border Patrol agents, nearly all (98%) on the southwest border.¹²⁹ Of all persons arrested by the INS in 2000, 1,744,304 (96%) were from Mexico.¹³⁰

¹²⁵ See, e.g., DOJ, INS, INTERIOR ENFORCEMENT STRATEGY (Mar. 29, 1999) (announcing revised INS Interior Enforcement Strategy and identifying worksite enforcement as one of five priorities), at <http://uscis.gov/graphics/publicaffairs/backgrounds/InEnfBGR2.htm> (last modified Feb. 2, 2003).

¹²⁶ *Id.*

¹²⁷ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, IMMIGRATION: INTERIOR ENFORCEMENT ("The interior enforcement strategy covers the detention and removal of criminal aliens, dismantling and diminishing smuggling or trafficking of aliens, build partnerships to solve local problems, minimize immigration benefit and document fraud and block and remove employers' access to undocumented workers."), at http://www.ice.gov/graphics/enforce/imm/imm_ie.htm (last visited May 5, 2004).

¹²⁸ U.S. IMMIGRATION AND NATURALIZATION SERV., 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE (2002).

¹²⁹ *Id.* at 237 tbl.58; *id.* at 242 tbl.60.

¹³⁰ *Id.* at 240 tbl.59.

Focusing on INS interior enforcement strategies, criminal cases accounted for 91% of the closed cases in 2000.¹³¹ In that year, INS closed 1966 worksite cases and made 953 worksite arrests, dramatically lower figures than the peak year of 1997, when INS closed 7537 worksite cases and made 17,552 worksite arrests.¹³² INS also arrested 46,001 persons in 2000 classified as “smuggled aliens.”¹³³ Of the 184,775 persons removed by INS in 2000, 150,068 (81%) were removed to Mexico.¹³⁴

2. *Data Collection Pilot Program at John F. Kennedy Airport, 2000*

In June 1999, President Bill Clinton signed a memorandum entitled *Fairness in Law Enforcement: Collection of Data*, directing federal agencies to “collect and report statistics relating to race, ethnicity, and gender for law enforcement activities in [their] department.”¹³⁵ In response, in October 1999, the DOJ noted a range of difficulties in securing INS compliance, chief among them that the U.S. Customs Service operates the data systems used by INS and that INS conducts “more than 450 million primary inspections” at ports of entry each year, rendering data collection “impractical.”¹³⁶ Nevertheless, INS committed to implementing a field test of a data collection system at three airports, creating certain roving patrols and fixed inspection points, and reviewing its worksite enforcement files “to determine at which point in the process race, ethnicity, or gender becomes known and whether that knowledge has an impact on how cases are handled by INS.”¹³⁷ One of the three airports at which INS agreed to implement its field test was John F. Kennedy International Airport (“JFK”) in New York.¹³⁸

Although INS has apparently not made public the results, if any, from the field tests it promised to conduct in November 1999,

¹³¹ *Id.* at 244 tbl.62 (calculating percentage based on 90,519 criminal investigations completed, 1966 worksite investigations completed, 3733 fraud investigations and 3309 smuggling investigations completed).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 252, 254 tbl.66.

¹³⁵ 35 WEEKLY COMP. PRES. DOC. 1067 (June 9, 1999). The presidential memorandum specifically required each agency to: (1) develop a proposal within 120 days for a system of data collection; (2) implement a field test of that system within 60 days of finalizing each agency’s proposal; (3) collect data “that is sufficiently detailed to permit an analysis of actions relevant to the activities of the included law enforcement agencies by race, ethnicity, or gender”; and (4) provide the Attorney General with a summary of the information collected. *Id.*

¹³⁶ DOJ, DEPARTMENT OF JUSTICE PROPOSAL RESPONDING TO THE EXECUTIVE MEMORANDUM ON FAIRNESS IN LAW ENFORCEMENT 4 (Oct. 8, 1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/remfle.pdf> (last visited May 5, 2004).

¹³⁷ *Id.* at 4–5; see also *id.* at attachment 1 (detailing INS proposal).

¹³⁸ *Id.* at 5 (proposing ports of entry for field tests).

Congress added a provision to the F.Y. 2000 Omnibus Consolidated Appropriations Act directing that the INS “conduct a pilot program to collect data on the race, ethnicity, and nationality of persons referred to secondary inspection at J.F. Kennedy airport in New York.”¹³⁹

In response to the congressional directive, and in partial compliance with the presidential memorandum, INS collected data on its operations at JFK during a six-month period in 2000 and delivered a summary to the House Appropriations Subcommittee on September 21, 2001.¹⁴⁰ The INS pilot program focused on inspections at JFK.¹⁴¹ In recent years, INS has conducted more than 9 million “primary inspections” annually at JFK, each done very quickly, sometimes in a matter of seconds.¹⁴² Those persons whom INS agents determine may be inadmissible or whose inspection requires additional time are referred to “secondary inspection.”¹⁴³ Of the more than 9,000,000 annual primary inspections at JFK, approximately 150,000 result in a referral for secondary inspection.¹⁴⁴ Some number of those persons referred to secondary inspection become the subject of adverse INS action, such as placement in ordinary or expedited removal proceedings.¹⁴⁵

INS’s report to the House Appropriations Subcommittee analyzes by race and ethnicity the rate of referral (a) from primary to secondary inspection and (b) from secondary inspection to adverse action. In the sample period at JFK, INS conducted more than 5,000,000 primary inspections, referred 99,837 to secondary inspection, and took adverse action against 2648 of those.¹⁴⁶ Although noting limitations of its data collection and baseline figures, INS conceded to Congress that “the data do reflect higher rates of referrals of Asians, Blacks, and Hispanics for secondary inspection than their representation in the baseline.”¹⁴⁷ The INS data evidencing these findings is set forth in Table 1.

¹³⁹ Letter from Janis A. Sposato, Acting Assistant Attorney General for Administration, to Rep. Wolf, Chair, Subcommittee on the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies, Committee on Appropriations (Sept. 21, 2001) (on file with author) [hereinafter INS JFK Report] (quoting Fiscal Year 2000 Omnibus Consolidated Appropriations Act, Pub. L. No. 106-113, 113 Stat. 1501 (1999)).

¹⁴⁰ *Id.*

¹⁴¹ 8 U.S.C. § 1225(a)(3) (1997) (“All aliens (including alien crewman) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.”).

¹⁴² See INS JFK Report, *supra* note 139, at 1.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See *id.* at 1–2.

¹⁴⁶ *Id.* at 6.

¹⁴⁷ *Id.* at 8.

TABLE 1

JOHN F. KENNEDY AIRPORT PILOT PROGRAM, 2000¹⁴⁸

Race	Percentage of Baseline Population	Percentage of Discretionary Referrals¹⁴⁹	Rate of Discretionary Referral
Asian	14.9	20.6	0.0538
Black or African American	12.5	21.4	0.0668
White	69.5	54.9	0.0309
Ethnicity			
Hispanic	14.7	19.7	0.0524
Non-Hispanic	85.3	80.3	0.0368

As the data demonstrates, and INS acknowledged, before the September 11 attacks, Asian, Black, and Hispanic persons arriving at JFK were substantially more likely than Whites and non-Hispanics to be subjected to a discretionary referral to secondary inspection. Analyzed by race, the data indicates that the rate of discretionary referrals of Blacks in the sample period was more than twice (2.16 times) that of Whites, and Asians were referred at a rate 1.74 times that of Whites. Analyzed by ethnicity, Hispanics were subjected to discretionary referrals at a rate 1.42 times that of non-Hispanics.

¹⁴⁸ *Id.* at 7, 10.

¹⁴⁹ INS collected data on the reason given by an agent for referral to secondary inspection and omitted grounds for referral that it classified as administrative or nondiscretionary. *Id.* at 7.

3. *Bush Administration Data Collection*

In February 2001, President Bush issued a brief memorandum to the Attorney General directing him to examine racial profiling by federal law enforcement agencies,¹⁵⁰ and the Attorney General promptly announced a four-point plan to carry out this instruction, including a program of data collection.¹⁵¹ I am not aware that this data have been released to the public.

*B. Interior Enforcement—INS New York District Office*¹⁵²

In settlement of Freedom of Information Act (“FOIA”) litigation brought against the INS District for New York, the agency released data and documents related to its worksite raids in the thirty month period from January 1, 1997 to June 30, 1999.¹⁵³ The first set of data concerned the numbers of persons arrested by the INS on worksite raids in the sample period, sorted by country of origin. The second set of data consisted of a randomly selected 20%¹⁵⁴ of the 184 closed INS investigations files from the same period.

1. *INS-NY Arrest Data*

The raw data provided by INS in settlement of the *UNITE v. INS* litigation is reproduced in Table 2.¹⁵⁵

¹⁵⁰ Memorandum from George W. Bush, President, to John Ashcroft, Attorney General (Feb. 28, 2001), reprinted in 37 WEEKLY COMP. PRES. DOC. 357 (Mar. 5, 2001), available at <http://usinfo.state.gov/usa/civilrights/bush0228.htm>.

¹⁵¹ Attorney General John Ashcroft, Attorney General News Conference (Mar. 1, 2001) (transcript available at <http://www.usdoj.gov/ag/speeches/2001/030101racialprofconf.htm>).

¹⁵² Much of this data was obtained in settlement of *Union of Needletrades, Industrial and Textile Employees v. INS*, No. 99 Civ. 1884 (S.D.N.Y.) (“*UNITE v. INS*”). Letter from Edward Scarvalone, Assistant U.S. Attorney, to Michael J. Wishnie, Washington Square Legal Services, Inc. (June 6, 2000) (on file with author) [hereinafter *UNITE v. INS* Letter] (providing information pursuant to settlement stipulation). The case was litigated on behalf of *UNITE* by Nina Zuckerman, Nana Takla, Aramis Rios, and Diana Kasdan, all students of the Immigrant Rights Clinic of New York University School of Law, under my supervision. Diana Kasdan and Jonathan Trutt assisted in the review of the individual records produced by INS.

¹⁵³ See *id.*; see also Susan Sachs, *Files Suggest Profiling of Latinos Led to Immigration Raids*, N.Y. TIMES, May 1, 2001, at B1 (reporting on results of FOIA litigation).

¹⁵⁴ This study included 37 closed raid files (n=37). See *UNITE v. INS* Letter, *supra* note 152.

¹⁵⁵ *Id.* at enclosure B.

TABLE 2

INS-NY ARRESTS BY COUNTRY OF ORIGIN, 1997-99

Country of Origin	Persons Arrested (n = 2907)
Mexico	1567
Ecuador	795
El Salvador	181
Honduras	86
Guatemala	74
Peru	26
Trinidad-Tobago	18
Colombia	17
Pakistan	16
Sri Lanka	14
Poland	13
Dominican Republic	12
Czech Republic	9
Japan	8
Russia	7
Chile	6
Jamaica, Malaysia, and South Korea	5
China (PRC) and India	4
Hungary and Nicaragua	3
Bangladesh, Bolivia, Guinea, Guyana, Slovak Republic, and Ukraine	2
Argentina, Brazil, Congo, Costa Rica, Egypt, France, Grenada, Haiti, Indonesia, Israel, Nepal, Nigeria, Romania, Senegal, Suriname, Thailand, and Venezuela	1

Table 3 aggregates the INS-NY arrest statistics by geographic region and compares it to baseline estimates of the undocumented population. Highly accurate data are not available for the baseline undocumented population in the geographic area corresponding to the INS New York District and the sample period for the arrest data, 1997–99. For obvious reasons, there is little reliable data on undocumented persons generally, and no data matching precisely the geographic and temporal determinants of the INS-NY arrest data. Nevertheless, I have used as a baseline an estimate of the country of origin of the New York state undocumented population in 1995 contained in a 1998 Urban Institute study by Jeffrey Passel and Rebecca Clark, which is generally regarded by demographers as the most reliable estimate of its kind.¹⁵⁶

TABLE 3

INS-NY ARRESTS BY REGION OF ORIGIN

Region of Origin	INS Arrests	Percentage of All Arrests	Urban Institute Percentage of Undocumented Population ¹⁵⁷	INS Percentage of Undocumented Population ¹⁵⁸
Europe ¹⁵⁹	38	1.31	9.91	14.07
Africa ¹⁶⁰	5	0.17	0.22	5.93

¹⁵⁶ See JEFFREY S. PASSEL & REBECCA CLARK, *IMMIGRANTS IN NEW YORK: THEIR LEGAL STATUS, INCOMES, AND TAXES 1* (1998) (reporting “essential demographic and economic information on legal immigrants residing in New York state”).

¹⁵⁷ PASSEL & CLARK, *supra* note 156, at 80 tbl.2 (presenting data entitled, “Estimated Foreign-Born Population, by Legal Status and Country of Birth, New York: 1995”).

¹⁵⁸ Figures are for New York state. See Robert Warren, *Estimates of the Undocumented Population Residing in the United States: October 1996* (1997) (unpublished report on file with author), available at <http://uscis.gov/graphics/shared/aboutus/statistics/illegalalien/illegal.pdf>. INS has not updated its estimates of undocumented populations by state and country of origin since its October 1996 calculations. See, e.g., U.S. IMMIGRATION AND NATURALIZATION SERVICE, 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 271 tbl.N (2002) (estimating undocumented population by state and country of origin as of October 1996). Percentages do not total 100% because of rounding and because INS estimates for Canada (1.85%) and “Other & Unknown” (4.07%) are not shown.

¹⁵⁹ Including Russia, Ukraine, Poland, Romania, France, Hungary, Czech Republic, and the Slovak Republic. See PASSEL & CLARK, *supra* note 156, at 34 tbl.K (listing country groups sometimes used for immigration estimates).

¹⁶⁰ *Id.* (including Congo, Senegal, Nigeria, and Guinea).

Region of Origin	INS Arrests	Percentage of All Arrests	Urban Institute Percentage of Undocumented Population ¹⁵⁷	INS Percentage of Undocumented Population ¹⁵⁸
Mexico, Central and S. America ¹⁶¹	2764	95.08	35.35	28.15
(Mexico)	(1567)	(53.90)	(3.66)	(4.07)
Caribbean ¹⁶²	37	1.27	24.35	26.48
Middle East ¹⁶³	2	0.07	0.65	3.70
South and East Asia ¹⁶⁴	61	2.10	26.08	15.56

The data demonstrate that in the 1997–99 sample period, INS arrests in New York were overwhelmingly of immigrants from Mexico, Central, and South America. In fact, the INS determined that more than 95% of arrests were of people from these regions. While not all individuals from these countries would self-identify as ethnically Latino, a majority of the populations in these countries are Latino. Moreover, any discounting would likely be offset by increases reflecting arrests of ethnic Latinos from other regions; for instance, one-third of the thirty-seven INS arrests from Caribbean countries were of citizens of the Dominican Republic, a heavily Latino country.¹⁶⁵

The high concentration of INS arrests of presumptively Latino individuals is also disproportional to the baseline figures. The INS and Urban Institute baseline estimates both reflect New York's ethnic diversity, agreeing that 65–70% of New York's undocumented population is from regions other than Latin America.¹⁶⁶ Yet the arrest data demonstrate that the INS arrested almost no one *but* individuals from

¹⁶¹ *Id.* (including Mexico, Guatemala, El Salvador, Nicaragua, Honduras, Colombia, Peru, Ecuador, Guyana, Suriname, Bolivia, Argentina, Venezuela, Brazil, and Costa Rica).

¹⁶² *Id.* (including Jamaica, Haiti, Trinidad/Tobago, Grenada, and the Dominican Republic).

¹⁶³ *Id.* (including Egypt and Israel).

¹⁶⁴ *Id.* (including South Korea, Bangladesh, Thailand, India, Pakistan, Sri Lanka, Malaysia, Nepal, Indonesia, China (PRC) and Japan).

¹⁶⁵ *Id.* tbl.1.

¹⁶⁶ PASSEL & CLARK, *supra* note 156, at 80 tbl.2; UNITE v. INS Letter, *supra* note 152, at enclosure B.

Latin American countries during the 1997–99 sample period.¹⁶⁷ Mexicans in particular were disproportionately subject to INS arrest; while both INS and the Urban Institute estimate that about 4% of New York’s undocumented population is from Mexico,¹⁶⁸ Mexicans alone accounted for 54% of INS arrests in the sample period.¹⁶⁹

By contrast, the arrest statistics from some of New York’s better-known *non-Latino* undocumented communities are startling: in thirty months there were 2907 INS arrests, of which seven of those arrested were from China (0.14%); seven were from Russia (0.24%); and thirteen were from Poland (0.45%).¹⁷⁰

2. INS-NY INVESTIGATIONS FILES

In the same thirty-month sample period, from January 1, 1997 to June 30, 1999, the INS New York District Office reported that it closed 184 worksite raid cases. It provided the investigation files from a randomly selected 20% of these closed cases, or a total of thirty-seven files.¹⁷¹ In each of these cases, INS received a tip, conducted surveillance of the worksite, and based on its surveillance, initiated a worksite raid. Yet a review of the investigation files reveals that in thirty-five of the thirty-seven cases (95%), INS agents relied on explicit ethnic criteria in justifying their request for authorization of a raid. In their surveillance reports, the INS would regularly record such factors as hearing “Spanish language” or “Spanish music,” or observing “Hispanic appearance” or clothing “not typical of North America.”¹⁷²

Together, this data suggests that before the September 11 attacks, INS personnel engaged in a significant amount of racial and ethnic profiling and selective enforcement of the immigration laws. This conclusion has several important implications for immigration law and policy.

First, such practices are unlawful under the equal protection component of the Fifth Amendment, and warrant suppression of evidence and termination of individual proceedings under the “egregious violations” and “outrageous discrimination” exceptions

¹⁶⁷ See *supra* note 127 and accompanying text.

¹⁶⁸ PASSEL & CLARK, *supra* note 156, at 80 tbl.2.

¹⁶⁹ UNITE v. INS Letter, *supra* note 152, at enclosure B.

¹⁷⁰ *Id.*

¹⁷¹ INS released these files in settlement of the *UNITE v. INS* litigation. *Id.* The data in the accompanying text were derived from an analysis of those files conducted by the author, Diana Kasdan, and Jonathan Trutt. The files are referenced in UNITE v. INS Letter. *Id.*

¹⁷² *Id.*

recognized by the Supreme Court in *Lopez-Mendoza* and *American-Arab Anti-Discrimination Committee*, respectively.¹⁷³

Second, this data may compel reconsideration of these twin opinions. In *Lopez-Mendoza*, a five-to-four decision, the Court applied a cost-benefit analysis to determine whether the exclusionary rule should be applied in civil deportation proceedings.¹⁷⁴ Explicit in its analysis was the Court's determination, in 1984, that INS training, supervision, arrest regulations, and "procedure for investigating and punishing immigration officers who commit Fourth Amendment violations"¹⁷⁵ were together sufficient to guard against civil rights abuses, including the ethnic profiling and discriminatory enforcement of concern to the *Lopez-Mendoza* respondents.¹⁷⁶

Yet the *Lopez-Mendoza* majority cautioned that "[o]ur conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread."¹⁷⁷ The late-1990s data related above indicate that there is just such "good reason to believe" that even trained immigration officers routinely resort to impermissible discrimination in immigration enforcement, thus compelling a reweighing of the costs and benefits outlined nearly twenty years ago in *Lopez-Mendoza*. Moreover, in a post-September 11 world in which the current administration has summoned state and local police untrained in the complexities of immigration law to the task of immigration enforcement, there is strong reason to expect that Fourth Amendment violations by police will become "widespread." Under the logic of *Lopez-Mendoza* itself, the exclusionary rule may now be appropriate in immigration proceedings.

Finally, the above data caution against the large-scale, ad hoc incitement to state and local police to add routine immigration enforcement to their already substantial duties. It suggests that even law enforcement agents trained in immigration matters—and, by the late 1990s, more socialized to public condemnation of racial profiling than their counterparts in the *Lopez-Mendoza* era—frequently resort to stereotypes and discriminatory enforcement practices. Given the proliferation of state and local ordinances barring racial and ethnic profiling, the devolution of immigration enforcement threatens to

¹⁷³ See *supra* notes 113–15 and accompanying text.

¹⁷⁴ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1042 (1984) (applying a "balancing test to the benefits and costs of excluding concededly reliable evidence from a deportation proceeding").

¹⁷⁵ *Id.* at 1045. The Court also noted that "the INS has developed rules restricting stop, interrogation, and arrest practices." *Id.* at 1044.

¹⁷⁶ *Id.* at 1045 (noting respondents' argument that "retention of the exclusionary rule is necessary to safeguard the Fourth Amendment rights of ethnic Americans, particularly the Hispanic-Americans lawfully in this country").

¹⁷⁷ *Id.* at 1050.

expose police to civil liability for wrongful arrests and to erode the objectives of those very ordinances. For these further reasons, the nation should vigorously resist the federal government's call to enhanced state and local police enforcement of immigration laws.

CONCLUSION

When undocumented immigrants "are victimized by crime, they are afraid to call the police, or seek recourse in the legal system."¹⁷⁸ This terrible reality, familiar to local police and immigrant communities alike, was proffered by President Bush as one of several justifications for his January 2004 proposal to overhaul the nation's immigration laws.¹⁷⁹ But several of the Bush administration's major post-September 11 law enforcement measures have the inevitable effect of discouraging immigrants from communicating with police and other local officials, and therefore of denying local police the community cooperation on which the law enforcement officials depend.

The repeated federal calls for expanded police enforcement of routine immigration laws, and the determination of some in Congress to compel such enforcement, will have enormously adverse consequences for public safety and civil rights. The DOJ's conclusion that state and local police possess the "inherent authority" under federal law to enforce all immigration laws is wrong as a matter of law, and the administration's entry and dissemination of civil immigration data via the FBI's NCIC database is unauthorized by statute. Together, these measures seem likely to expose local police to liability for wrongful arrest and in some instances for violations of state or local anti-profiling ordinances. The wiser and lawful course is to allow police to concentrate their scarce resources on local policing priorities and, when requested by federal authorities, on the investigation and apprehension of specific individuals actually suspected of involvement in terrorism.

¹⁷⁸ President George W. Bush, New Temporary Worker Program: Remarks on Immigration Policy (Jan. 7, 2004) (transcript available at <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>).

¹⁷⁹ See also *id.* (noting that immigrants in President's proposed temporary worker status "will be able to talk openly to authorities, to report crimes when they are harmed, without the fear of being deported").