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Spring 2009

Legal and Social Perspectives on Local Enforcement of Immigration Under the Section 287(g) Program

Hannah Gill

Mai Thi Nguyen

Katherine Lewis Parker

Deborah Weissman

University of North Carolina School of Law, weissman@email.unc.edu

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Publication: *Popular Government*

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These opening articles present different viewpoints on a controversial federal program that uses local law enforcement officials to help identify and deport suspected unauthorized immigrants. Edmond W. Caldwell Jr. describes the experience of several sheriffs and the support of the program by the North Carolina Sheriffs' Association. Hannah Gill, Mai Thi Nguyen, Katherine Lewis Parker, and Deborah Weissman express concerns and criticisms focusing on perceived legal and social effects of the program.

—The Editors

The North Carolina Sheriffs' Association's Perspective on the 287(g) Jail Enforcement Model

Edmond W. Caldwell Jr.

It is only a handful of short paragraphs in the federal statutes, but it is critically important to protecting the security of North Carolina and the nation. Named for its location in the Immigration and Nationality Act, the Section 287(g) program of U.S. Immigration and Customs Enforcement (ICE) allows local law enforcement agencies to assist ICE in removing from the coun-

The author is executive vice president and general counsel, North Carolina Sheriffs' Association. Contact him at ecaldwell@ncsheriffs.net.

try illegal aliens charged with crimes. The sheriffs in North Carolina whose counties participate in the jail enforcement model (JEM) of the program do not debate the broader issue of how the United States should handle illegal immigration. Their job is to enforce the law as it is written. For law enforcement authorities, 287(g) has made a big difference in the safety of seven counties in North Carolina and dozens more around the country.

“Regardless of your stance on immigration,” said Sheriff Rick Davis of Henderson County, whose office

Legal and Social Perspectives on Local Enforcement of Immigration under the 287(g) Program

Hannah Gill, Mai Thi Nguyen, Katherine Lewis Parker, and Deborah Weissman

Throughout this country's history, Americans have been internally conflicted about their views on immigration. Many recognize that the United States' prosperity and geopolitical dominance have been built on the backs of immigrants. They also may have pride in their immigrant ancestors. Yet these same people sometimes hold anti-

immigrant sentiments and are willing to pull up the drawbridge on those newly arriving to America's shores. Often they feel this way because the newer immigrants come from a different country, speak a different language, or are visibly different. Also, they blame new immigrants for taking away resources and creating competition in the labor market.

Gill is the assistant director of the Institute for the Study of the Americas and a research associate at the Center for Global Initiatives, UNC-Chapel Hill. Nguyen is an assistant professor in the Department of City and Regional Planning, UNC-Chapel Hill. Parker is the legal director of

the ACLU of North Carolina Legal Foundation. Weissman is Reef C. Ivey II Distinguished Professor of Law and director of clinical programs, UNC-Chapel Hill School of Law. Contact them at hgill@email.unc.edu, mai@unc.edu, aclunclp@nc.rr.com, and weissman@email.unc.edu.



Jerry Wolford / Greensboro News & Record

At the turn of the twentieth century, darker-skinned Europeans and Chinese immigrants experienced strong resentment from lighter-skinned Europeans arriving earlier. Today, Latinos are the target of much anti-immigrant sentiment.

Anti-immigration sentiments are not new to this country, but what sets this period apart in American history is the “devolution” of immigration regulation—that is, the surrender to local authorities of some federal powers to regulate immigration. Since America’s birth, the federal government has had sole authority to legislate on and regulate immigration. This exclusive authority was reinforced by the 1976 ruling in *DeCanas v. Bica*, in which Supreme Court Justice William J. Brennan wrote that the “[p]ower to regulate immigration is unquestionably exclusively a federal power.”¹

With the passage of Section 287(g) of the 1996 Immigration and Nationality Act, which allows local law enforcement agencies to detect, detain, and deport undocumented immigrants, local and state law enforcement agencies were

granted authority to police immigration violations.² Although few law enforcement agencies adopted the 287(g) program at the time of its passage, the program became wildly popular a decade later because of political and economic circumstances in the nation. This article seeks to raise awareness of the 287(g) program’s implementation in North Carolina, from both a legal and a social science standpoint. (For a description of other responsibilities of sheriff’s offices in their interactions with the state’s foreign-born population, see the sidebar on page 15.)

Background

Several pieces of legislation on immigration were circulated before the November 2006 congressional elections. Most notably, HR 4437 (or the Sensenbrenner bill), which contained a broad range of policies aimed at reforming immigration, sparked heated debate among politicians, the popular media, and the general public.³ During the congressional election

cycle, many candidates used immigration reform as a wedge issue to define their candidacies. With the economy spiraling downward, politicians blamed undocumented immigrants for the nation’s economic and social woes and vowed to stem the tide of illegal immigration.⁴

The elections came and went, and a new Congress with a majority of Democrats was seated, but still federal immigration policy did not change. Frustrated with the inability of national legislators to reform immigration policy, and growing increasingly resentful of rising rates of undocumented immigration, voters and local elected officials wanted immediate action, even if they had to take matters into their own hands.

The City of Hazleton, Pennsylvania, exemplified these sentiments when it adopted the Illegal Immigration Relief Act (IIRA) in fall 2006.⁵ In an attempt to push out undocumented immigrants, Hazleton’s IIRA created stiff fines and penalties for individuals and organizations that provided them with services.⁶ News of the IIRA spread, and hundreds

participates in the 287(g) program, “the reality is that crime accompanies any large-scale illegal immigration.”¹

In 1996 the federal government provided the authority and the funding for local law enforcement officers to be trained by ICE to determine immigration status so that ICE could begin possible deportation proceedings for people in the country illegally. Some people object to the new authority, but the bottom line is that it works to make communities safer. Since 2006, when the first North Carolina county signed on to the 287(g) JEM, the participating sheriff’s offices have identified more than fifteen thousand people as suspected illegal aliens and referred them to ICE for a decision on deportation.

Sheriff’s offices in Alamance, Cabarrus, Cumberland, Gaston, Henderson, Mecklenburg, and Wake counties participate in the JEM. In this model, sheriffs screen for illegal aliens only among people arrested and brought to the county’s detention center. Sheriff Alan Cloninger of Gaston County, among the first four counties in North Carolina to sign on,

considers the JEM “one of the fairest ways” to address the problem of illegal immigration “because no one is checked as to their alien status unless they are arrested,” he said.²

Because citizens are divided in their views on U.S. immigration policy, North Carolina’s participation in the 287(g) program has been the subject of heated debate. The program is one component under the ICE’s ACCESS (Agreements of Cooperation in Communities to Enhance Safety and Security) umbrella of services and programs, which provides local law enforcement agencies with an opportunity to team with ICE to combat specific law enforcement challenges in their communities. Some have confused the sheriffs’ involvement in the JEM with the Durham Police Department’s participation in a 287(g) task force model.³ By focusing on the sheriffs’ participation in the 287(g) program, which is limited to the JEM, this article aims to correct many misconceptions and distortions of fact circulated by some who object to tenets of the 287(g) law.

(For a description of other responsibilities of sheriffs’ offices in their interactions with the state’s foreign-born population, see the sidebar on page 15.)

What Is 287(g)?

In 1996 the Illegal Immigration Reform and Immigrant Responsibility Act added Section 287(g) to the Immigration and Nationality Act. The section authorizes the secretary of the U.S. Department of Homeland Security (of which ICE is a part) to enter into agreements with state and local law enforcement agencies permitting designated officers to perform some functions of immigration law enforcement, provided that they receive appropriate training and that they operate under the supervision of ICE officers.

Section 287(g) came about because criminal activities are most effectively thwarted through a multiagency approach that encompasses federal, state, and local resources, skills, and expertise. State and local law enforcement officers play a critical role in protecting national security. They often are the first respon-

of copycat cities and counties around the country followed suit, passing varying elements of the IIRA.⁷ The American Civil Liberties Union (ACLU), along with several other groups, sued the City of Hazleton in federal district court on the grounds that local anti-immigration ordinances, such as the IIRA, were unconstitutional.⁸ In spring 2007, the district court ruled that the City of Hazleton, as a municipality, had no authority to regulate illegal immigration. Rather, harkening back to the *DeCanas* case, the court ruled that this responsibility should be left to the federal government.⁹

The mounting legal bills owed by the City of Hazleton after its defeat in court most likely contributed to the dropoff in adoption of the IIRA by additional cities and by counties. Instead, local jurisdictions turned to 287(g). To date, sixty-three local law enforcement agencies around the country have partnered with

The lack of adequate oversight and transparency in 287(g) programs raises concerns about racial profiling.

U.S. Immigration and Customs Enforcement (ICE) to implement what is now commonly called the 287(g) program.¹⁰ North Carolina jurisdictions have shown keen interest in the program, with eight localities already participating and dozens more in the application queue.¹¹

In North Carolina, the support for the 287(g) program primarily comes from sheriffs and county commissioners, although the reasons for supporting the program appear to vary. Local law enforcement officials remark that their main interest in the program is to equip officers to identify undocumented immigrants who are criminals. They rationalize that this program is merely one additional tool that officers can use to fight crime. In particular, they consider the program to be a way to weed out terrorists and violent criminals.¹²

Interest in the 287(g) program among local government officials revolves

around the belief that undocumented immigrants are taxing their school systems, hospitals, and prisons while not paying a fair share of taxes. They charge undocumented immigrants with using local resources, but not contributing to the local coffers, or at least not contributing enough to cover expenses.

Beyond their fiscal concerns, local government officials blame undocumented immigrants for a host of social ills in their communities, such as increased crime and lowered quality of life.¹³ Although little empirical evidence exists to substantiate such claims, support for the 287(g) program in the North Carolina localities that have adopted it still is overwhelming.

The Mecklenburg County Sheriff’s Office was the first to implement the program, in February 2006. Since then, seven other local authorities, including the Alamance, Cabarrus, Cumberland, Gaston, Henderson, and Wake County sheriff’s offices and the Durham Police Department, have adopted it. Further, the statewide North Carolina Sheriffs’ Association has partnered with ICE in

ders on the scene in an attack against the United States, and in the course of their daily duties, they frequently encounter foreign-born criminals and illegal aliens who pose a threat to national security or public safety.

The training provided to state and local law enforcement officers by ICE under the 287(g) program gives these cross-designated officers the necessary resources and authority to pursue immigration-status investigations relating to violent crimes and other felonies, such as human smuggling, gang activity, organized crime, sex-related offenses, narcotics smuggling, and money laundering. The counties participating in this partnership with ICE are eligible for increased resources and support from ICE to identify criminals who also are illegal aliens.

Counties working with ICE under authorization by 287(g) sign a memorandum of agreement (MOA) that defines the scope and the limitations of their authority. The MOA establishes the supervisory structure for the local officers working under the cross-designation

and prescribes the agreed-on complaint process governing the officers' conduct during the life of the MOA. Under the statute, ICE supervises on site all cross-designated officers when they exercise their immigration authorities. The agreement must be signed by the ICE assistant secretary and the sheriff before officers trained under 287(g) may enforce immigration law.

Law enforcement personnel selected to participate in the 287(g) program must be U.S. citizens, pass a background investigation, have a minimum of two years' experience in their current position, and have no disciplinary actions pending against them. They complete a four-week training program conducted by certified instructors. The training underscores instruction that law enforcement officers already have received about the importance of avoiding racial or ethnic profiling.

Altogether, 287(g) programs in North Carolina have identified more than 15,000 suspected illegal aliens.

As of the end of 2008, sixty-seven local law enforcement agencies in twenty-three states had signed MOAs with ICE and sent officers for training.

How Do North Carolina Sheriffs Work under 287(g) Agreements?

Several steps must take place before someone can be incarcerated in North Carolina. First, the person must be arrested by a law enforcement officer in connection with the commission of a crime. Second, the person must appear before a magistrate, and the magistrate must find probable cause to believe that the person did commit a crime. Third, the magistrate must establish a bond for the person's release. If the person fails to post the bond, then the person is detained in the county jail.

Sheriff's office personnel (1) incarcerate, (2) investigate, and (3) inform. They do not have the authority to extradite

hopes of adopting the program throughout North Carolina. With such widespread interest in the program and with other new programs that allow law enforcement agencies to identify undocumented immigrants (for example, the Secure Communities program), North Carolina may be one of the first states to have a statewide immigrant-identification program implemented at the purely local level.¹⁴

The devolution of immigration enforcement through the 287(g) program has granted tremendous powers to local law enforcement agencies. But the lack of adequate oversight and transparency raises many concerns:

- Does the program effectively capture the "tough, hardened, repeat criminals" among the undocumented population, as argued by local law enforcement and ICE officials?
- Does the program divert local law enforcement agencies from other duties that are necessary to keep communities safe?

- Does the program actually serve to decrease the number of crimes reported by undocumented immigrants, thereby increasing their vulnerability to crime?
- Is the program cost-effective in fighting crime, or are there other, more cost-effective ways to do so?
- Does the program encourage racial profiling?
- Will the program encourage immigrants, both documented and undocumented, to leave these jurisdictions, thereby negatively affecting local businesses, the housing market, and the overall economic competitiveness of the state?

Legal Considerations

The 287(g) program presents a number of legal issues that implicate individual rights and affect communities. It has been more than two years since the inauguration of these programs in

North Carolina. Sufficient time has passed to permit an evaluation of program compliance with federal and state legal obligations, as well as law enforcement agency compliance with the 287(g) memorandum of agreement (MOA) that governs the program.

Statutory Authority

In 1996 the U.S. Congress amended the Immigration and Nationality Act by adding Section 287(g), which authorizes the federal government to enter into agreements with local law enforcement agencies and to deputize local law enforcement officers to act as immigration officers in the course of their daily activities. Section 287(g) authorizes the attorney general to enter into a written agreement with a

State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immi-



Jerry Wolford / Greensboro News & Record

gration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.¹⁵

Historically there has been a clear division between the enforcement of civil immigration laws and the enforcement of criminal immigration laws.¹⁶ Civil violations of the Immigration and Nationality Act include being unlawfully present in the United States and working without proper employment authorization.¹⁷ Criminal offenses include trafficking in humans, harboring undocumented immigrants, and, in the case of immigrants who were previously deported or excluded, reentering the United States.¹⁸ Federal authorities have long held exclusive jurisdiction over regulation of civil immigration laws, whereas federal,

state, and local authorities have had concurrent jurisdiction over enforcement of criminal immigration laws.¹⁹ The written agreements under 287(g) effectively erase that line, enabling local law enforcement officers to enforce civil immigration law for the first time in history.

Compliance with Federal Law

Local law enforcement officers who have been deputized to enforce immigration laws pursuant to Section 287(g) of the Immigration and Nationality Act are required to “have knowledge of, and adhere to, Federal law” with regard to 287(g) functions.²⁰

Equal Protection of the Law

The Equal Protection Clause of the Fourteenth Amendment extends its protection to all people within the jurisdiction of the United States and prohibits law enforcement agencies from stopping, detaining, or seizing people on the basis of racial characteristics.²¹ That is, they may not engage in “racial profiling,” defined as “the law enforcement prac-

tice of using race, national origin, or ethnicity as a salient basis for suspicion of criminal activity.”²²

Most 287(g) programs in North Carolina are “detention model programs” (sometimes called jail-enforcement model programs), meaning that officers trained under 287(g) are not authorized to check the immigration status of people unless they have been arrested on other charges and are detained in jail facilities.²³ Nevertheless, evidence from the 287(g) counties suggests that the existence of the program may be affecting how officers are enforcing the law “on the streets.”

For example, criminal defense and immigration attorneys in 287(g) counties report that, before the 287(g) programs went into effect, their clients were rarely, if ever, arrested for driving with no license or driving with a revoked license. Further, anecdotal evidence suggests that license and driving-while-intoxicated checkpoints have increased considerably in 287(g) counties since the MOA went into effect.

wanted inmates to other states. Even those trained under 287(g) do not have the authority to deport inmates who are illegally in this country. They *incarcerate* people who have been arrested by a law enforcement officer and ordered by a magistrate to be detained in connection with criminal activity.

The county jail staff *conduct an investigation* to determine the identity of the criminal defendant and to learn whether the person has a prior criminal record or is wanted by another law enforcement agency, including ICE. If they determine that the person is wanted by another law enforcement agency, they *inform* the appropriate agency that the wanted person is incarcerated in the county jail.

The seven North Carolina counties now participating in the 287(g) JEM were among about twenty that applied to ICE. ICE selected a geographically diverse mix of counties that had adequate jail space. Each county's sheriff negotiated the MOA individually, and it was signed by the respective chairs of the board of county commissioners.

Consequently the tail may be wagging the dog. That is, rather than simply processing people who already are in the jails, officers in 287(g) counties are making the discretionary decision in many instances to arrest people instead of issuing them a citation, thereby increasing the number of people in the jails for processing.

Anecdotal evidence also suggests that this new tactic may be contributing to racial profiling in the field. Because officers are not permitted to engage in immigration enforcement on the streets, the general rule applies regarding the prohibition against law enforcement stopping, detaining, or seizing people on the basis of racial characteristics.²⁴ Nevertheless, residents in local communities where 287(g) programs are in effect have expressed concerns that some police officers are violating legal standards and engaging in racial profiling by stopping motorists who appear to be Latino.²⁵ Local residents and advocacy groups have raised concerns that under the guise of pretextual ve-

Mecklenburg County was the first jurisdiction in North Carolina to participate in the 287(g) program. At the National Sheriffs' Association's annual conference in 2005, Jim Pendergraph, who was then sheriff of Mecklenburg County, learned about the federal initiative. He talked with a California sheriff who had investigated the 287(g) JEM and was considering signing on with ICE to train some of his deputies. The California sheriff was very impressed by what he had learned about the success of the 287(g) JEM in identifying and deporting criminal illegal aliens.

When Sheriff Pendergraph returned to Mecklenburg County after the conference, he explored the possibility of providing 287(g) training to some of his officers. Mecklenburg County's detention center had processed an increasing number of offenders whom Sheriff Pendergraph suspected to be in the country illegally, but often by the time he received results from fingerprints that he sent to ICE, the offenders had been released.

The problem of criminal aliens was on the public's mind in 2005 because an

illegal immigrant, driving while impaired and without a license, caused a car crash that killed Scott Gardner, a high school teacher in nearby Gaston County, and left Gardner's wife in a coma. The illegal alien had five previous convictions in the United States for driving while impaired. Representative Sue Myrick of North Carolina pushed hard in the U.S. Congress for passage of the Scott Gardner Act, which stipulated that any illegal alien convicted of driving while impaired would face automatic deportation. The bill passed in the House but not in the Senate.⁴

By mid-2006, Mecklenburg County had launched a 287(g) JEM. Sheriff Pendergraph sent twelve deputy sheriffs for ICE training. In 2007, the program's first full year of operation, 287(g) officers identified more than 2,200 illegal aliens among about 45,000 people arrested in Mecklenburg County. Those numbers held steady in 2008, said Julia Rush, director of communication for the Mecklenburg County Sheriff's Office.⁵

"Whenever you remove that many people convicted of a crime, that makes for a safer community," Rush noted.⁶

hicle stops (stops in which officers detain people for a traffic offense because they actually are suspicious of the people's immigration status) and license and driving-while-intoxicated checkpoints, law enforcement officers appear to be targeting Latino-appearing people for minor traffic offenses.²⁶

The numbers coming out of 287(g) counties bear out this concern. For instance, data for Alamance and Mecklenburg counties reveal that the overwhelming number of people who have been stopped by police officers have been arrested for traffic offenses. The 2007 totals for the Alamance County 287(g) program show that, in 2007, of 662 people arrested and processed under 287(g), 302, or 45.6 percent, were arrested on a traffic stop, and 132, or 19.9 percent, were arrested for driving while intoxicated. Five hundred forty-six, or 82.5 percent,

were charged with misdemeanors, and 116, or 17.5 percent, with felonies.²⁷ In Mecklenburg County, 1,028 of 1,545 undocumented immigrants arrested during the first nine months of the county's participation in the 287(g) program, or 66.5 percent, were stopped for some

type of traffic violation.²⁸

A study of arrest data in Davidson County, Tennessee, which also has entered into a detention model MOA, has revealed that the arrest rates for Latino defendants driving

without a license more than doubled after the implementation of the 287(g) program.²⁹ Two explanations for this statistic are most likely: officers may have stopped more Latino drivers and therefore found more instances of driving without a license, or officers may have arrested more Latino drivers to allow the correction officers to check their status.

Similarly, as described earlier, North Carolina data for current 287(g) counties

Evidence suggests that the 287(g) program may affect officers' enforcement of the law "on the streets."

The main advantage that Sheriff Pendergraph saw for Mecklenburg County in the 287(g) program was that it would provide immediate information on an inmate's immigration status. Not only does ICE provide training for local law enforcement officers, but also it provides participating counties with computers linked to the ICE database. Instead of waiting days or weeks for a fingerprint report to be sent back from ICE, Mecklenburg County detention officers can check the fingerprints against ICE's database themselves. They get information back in minutes.

"The 287(g) program establishes a record on 100 percent of the people who come into our facility," said Henderson County Sheriff Davis. "They either have fingerprints on file, or they don't. In the case where ICE doesn't have prints on file, the burden of proof is on the detainee to verify his or her identity. It is one of the rare times in U.S. law when the burden of proof is on the accused."⁷

ICE fingerprints everyone who applies for a visa to accept employment in the United States or for a "green card," which

grants permanent-resident status and with it eligibility to be employed in the United States. If a detention officer checking an inmate's fingerprints against the ICE database finds no record, that flags the inmate as a possible illegal alien.

In a 287(g) facility, said Cabarrus County Sheriff Brad Riley, "every arrestee who comes into our facility is asked two questions: What's the country of your birth? And what country are you a citizen of?"⁸ The ICE-trained officers attempt to verify the inmate's answers. If the information cannot be verified, the officers refer the inmate to ICE for determination of status and possible deportation. The 287(g) officers themselves may not authorize deportation orders, but they can refer illegal aliens to ICE for a determination process that might end in deportation by a federal immigration judge.

How Does 287(g) Compare with North Carolina State Law?

In 2007, North Carolina's General Assembly enacted Section 162-62 of

the North Carolina General Statutes (hereinafter G.S.), effective January 1, 2008. G.S. 162-62 requires detention facility personnel in North Carolina to attempt to determine the U.S. residency status of any person brought to the facility and charged with a felony or an impaired-driving offense. Officers may check people's birth certificate, driver's license, and Social Security Number information to verify their identity. But the only guaranteed way of identifying people without such documentation is through fingerprints.

For facilities not operating under the 287(g) program, getting fingerprint reports back in a timely fashion—before detainees are released on bond or have served the time required to satisfy the charges—rarely happens. Even when detainees are confirmed to be illegal aliens, ICE often does not pick them up. Sending an officer to the facility to transport a single inmate is not cost-effective for ICE unless the inmate is wanted on very serious charges or the transporting officer can pick up several inmates in one trip.

show that an overwhelming number of people who are stopped by police officers in 287(g) counties are arrested for traffic offenses. To the extent that arrest rates for Latino drivers have increased significantly in these counties since they adopted 287(g), the statistics may support allegations of racial profiling.

In addition to quantitative data, qualitative evidence suggests discriminatory attitudes toward immigrants, as indicated by racially hostile comments about Latino immigrants made by some law enforcement agency personnel. Alamance County Sheriff Terry Johnson, in reference to Mexicans, stated, "Their values are a lot different—their morals—than what we have here. In Mexico, there's nothing wrong with having sex with a 12-, 13-year-old girl . . . They do a lot of drinking down in Mexico."³⁰ Johnson County Sheriff Steve Bizzell recently vocalized his views about immigrants, stating that they are "breeding like rabbits" and they "rape, rob and murder American citizens." He also described Mexicans as "trashy."³¹ These

race-based statements, made by strong proponents of the 287(g) program in North Carolina, contribute to concerns about the possibility that racial profiling is occurring in 287(g) counties.

To the extent that racial profiling is occurring under the 287(g) programs, it also violates Title VI of the Civil Rights Act of 1964, which states, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."³² Section 287(g) agencies receive financial assistance from the federal government and therefore must abide by the provisions of this act. They must not "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."³³

Racially hostile comments made by some officers indicate discriminatory attitudes toward immigrants.

Racial profiling also violates U.S. Department of Justice guidelines developed "to ensure an end to racial profiling in law enforcement."³⁴ Those guidelines prohibit law enforcement officers from using race or ethnicity in making law enforcement decisions such as ordinary traffic stops.³⁵

A report by the U.S. Government Accountability Office (GAO) released on March 4, 2009, validates the foregoing concerns. The GAO's report confirms that the 287(g) program is not being used to target dangerous criminals. Rather, "participating agencies are using their 287(g) authority to process for removal aliens who have committed minor crimes, such as carrying an open container of alcohol." Further, according to the GAO, a lack of documented program objectives may result in a "misuse of authority." Indeed, the GAO reported that "more than half of the 29 state and



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local law enforcement agencies . . . reviewed reported concerns members of their communities expressed about the 287(g) program, including concerns that law enforcement officers in the 287(g) program would be deporting removable aliens pursuant to minor traffic violations (e.g., speeding) and concerns about racial profiling.”³⁶

Application of Federal Immigration Laws

Immigration law is a complicated, ever-evolving, and specialized area of law and law enforcement.³⁷ The challenges inherent in allowing local law enforcement officers to undertake immigration enforcement, an area outside their expertise, were recognized in a recent article published by the International Association of Police Chiefs:

Addressing immigration violations such as illegal entry or remaining in the country without legal sanction would require specialized knowledge of the suspect’s status and visa history and the complex civil and

*criminal aspects of the federal immigration law and their administration. This is different from identifying someone suspected of the type of criminal behavior that local officers are trained to detect. Whether or not a person is in fact remaining in the country in violation of federal civil regulations or criminal provisions is a determination best left to these agencies and the courts designed specifically to apply these laws and make such determinations after appropriate hearings and procedures. The local patrol officer is not in the best position to make these complex legal determinations.*³⁸

The article’s author further explained, “When local police have waded into immigration enforcement, it has often come with disastrous and expensive consequences.”³⁹

As examples from around the country demonstrate, local enforcement of immigration laws has resulted in detention and deportation of U.S. citizens.⁴⁰ Law enforcement experts predict more erro-

neous detentions and deportations if additional databases with various inaccuracies are created to “fight illegal immigration.”⁴¹

North Carolina is not immune to these errors. Indeed, at a conference in Charlotte on the consequences of the 287(g) program, an immigration attorney recounted that a U.S. citizen client of his was wrongly detained in North Carolina while authorities were attempting to deport the client.⁴² Other North Carolina attorneys have shared similar concerns about at least two more clients.⁴³

A recent survey by the U.S. Government Accountability Office determined that ICE does not have adequate means to keep local officers updated on the changing nature of immigration law:

ICE does not have a mechanism to ensure the timely dissemination of legal developments to help ensure that officers make decisions in line with the most recent interpretations of immigration law. As a result, ICE officers are at risk of taking actions

In contrast, officers in a 287(g) program must identify the citizenship status of every foreign-born person brought to the detention center, even those brought in on misdemeanor charges or traffic violations. To make that requirement feasible, ICE provides 287(g) facilities with computers and access to its database. Also, the facilities have an ICE officer on site to supervise the program, and he or she can cost-effectively transport inmates to hearings on their immigration status.

Cabarrus County Sheriff Riley, whose county was one of the first four North Carolina counties to sign on to the 287(g) program, said, “ICE is dealing with so many agencies, and they have to triage. Under 287(g), there is a 100 percent guarantee that the individuals will be processed.”⁹

Has the 287(g) JEM Been Effective in North Carolina?

North Carolina sheriffs in the 287(g) JEM are satisfied with its efficacy. The program has been successful in ad-

ressing the problem of illegal aliens who commit crimes.

When Terry S. Johnson became sheriff of Alamance County in 2002, his 156-bed jail routinely held more than three hundred inmates. His deputies responded to as many as seven home invasions every week. Alamance County has a large Hispanic community, drawn to the area by agricultural job opportunities, the many construction jobs in the fast-growing Triangle, and jobs in meat-processing plants. In 2006, Sheriff Johnson talked to Sheriff Pendergraph, who had just gotten the 287(g) program up and running in Mecklenburg County.

“He said, ‘It’s the greatest thing I’ve ever done as sheriff,’” Johnson reported. “I thought he was trying to sell me, but I knew I had to do something. People were coming into jail under one name, and then two weeks later, the same people came in under another name, but the photographs were the same.”¹⁰

The revolving-door practice of arrest and release tied up the court system, cost the taxpayers money through the increased need to hire court-appointed

lawyers and Spanish-language interpreters, and multiplied the impact on the crime victims.

Sheriff Johnson negotiated a 287(g) agreement, and within the first months of operation in 2006, the program identified 519 illegal aliens. In 2007, its first full year, it identified 2,698 inmates as illegal aliens and transferred them to ICE for hearings. In 2008 that number jumped to 4,067.¹¹

“What is so impressive to me is that our overall crime rate has dropped 19.5 percent,” Sheriff Johnson said. “Because crime has come down, it has cut down on the number of calls we have to respond to. Our local inmate population has dropped tremendously. The almost daily reports of home invasions a few years ago dropped in 2008 to only one for the entire year.”¹²

What Are the Program’s Costs and Benefits in North Carolina?

ICE supplies the training, but local law enforcement agencies pay the salaries of their cross-trained officers. ICE provides

*that do not support operational objectives and making removal decisions that do not reflect the most recent legal developments.*⁴⁴

Other Federal Laws

There are other areas of concern with regard to compliance with federal laws. Section 287(g) officers must comply with federal law governing criminal procedure, and this requires them to disclose information that may call into question the credibility of a particular witness who supplies information against a detainee, including, in some circumstances, officers’ personnel files. However, undocumented immigrants often are hurried through the system without counsel and are encouraged, if not coerced, to sign voluntary agreements to depart from the United States within a prescribed period. These circumstances inhibit detainees from obtaining exculpatory information, particularly information related to officer misconduct and racial profiling.

Section 287(g) officers also must comply with the provisions of the Vienna

Convention on Consular Relations. Pursuant to these provisions, officers must inform detained immigrants of their right to contact their

consular office and to have their communications forwarded to the applicable consular officer in a timely manner.⁴⁵ Consular officers have the right to visit immigrants in detention and may arrange legal counsel for them.⁴⁶ Concerns have arisen that detainees may not always be informed of these rights.

Compliance with North Carolina Law

Racial profiling also violates the North Carolina Constitution. Article 1, Section 19, states, “No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.”⁴⁷ North Carolina courts have refused to countenance the targeting of Latinos by law enforcement agencies. In *State v.*

People who think that their rights have been violated by 287(g) don’t always know how to pursue their complaints.

Villeda, the trial court dismissed charges against a Latino defendant who demonstrated that his arrest was “motivated ‘in part by [his] race or national

origin” in violation of Section 19.⁴⁸ The court considered the state trooper’s discriminatory assertion “‘Everyone knows that a [Latino] male buying liquor on a Friday or a Saturday night is probably already drunk,’” as well as his admission to patrolling a specific area “‘for the purpose of looking for [Latino] males.’”⁴⁹ The trooper’s citation history also was indicative of a practice of racial profiling: 71 percent of his citations had been filed against Latinos in an area where Latinos made up only 32 percent of the total population. The North Carolina Court of Appeals affirmed the trial court’s decision to dismiss the charges against the defendant.⁵⁰

North Carolina state agencies and the North Carolina General Assembly have joined with the courts in denouncing

access to its fingerprint database and pays for the computers and the network. ICE also pays for an on-site ICE agent to supervise the program at each 287(g) facility.

The 287(g) process requires extra personnel and some extra work to process people arrested. Sheriff's office personnel have to learn about the new equipment and procedures, and facility administrators must make sure that the computer network does not breach jail security, said Debbie Tanna, public information officer for the Cumberland County Sheriff's Office.¹³

North Carolina's General Assembly has realized the potential benefit of 287(g) to its communities and has granted funds to the North Carolina Sheriffs' Association for the past two years to help sheriffs combat illegal immigration. The association has used part of the funding to provide training and technical assistance to all sheriffs in complying with G.S. 162-62, to assist them in negotiating MOAs with ICE, and to reimburse counties for the overtime costs of covering shifts while

deputies participate in the four-week ICE training course.

ICE has a joint federal-local working group called the executive steering committee. One critical goal of the committee is to coordinate the participation of interested North Carolina sheriffs in the ICE ACCESS program, particularly the 287(g) JEM, using current ICE resources and identifying ICE resources needed in the future to support the sheriffs of North Carolina.

Some sheriff's offices are able to offset their 287(g) personnel costs with an ICE per diem for bed space when an inmate is held at the local facility after ICE accepts custody. Because the paperwork can be done on site at a 287(g) facility, ICE picks up the tab much sooner than if the county had to wait for an off-site ICE agent to travel to the facility.

Counties that are not part of the 287(g) program must nonetheless run

Alamance County Sheriff Terry S. Johnson says that his county's overall crime rate has dropped nearly 20 percent since he introduced 287(g).

their Illegal Alien Queries as required by G.S. 162-62 through the federal computers and report when they have an illegal alien in custody. Inmates deemed

illegal aliens are turned over to ICE and transported by an ICE officer to the closest location where hearings on immigration status are held. Henderson County Sheriff Davis accepts detained illegal aliens from western counties. His 287(g) deputies are reimbursed by ICE for their time and mileage in transporting illegal aliens from nearby counties and housing them in the Henderson County detention facility.

"For ICE to send an officer out from the Charlotte office—that's an inefficient use of their time," he said.¹⁴

Sheriffs unanimously agree that the effort is worthwhile and beneficial to their counties.

"We're finding people who are wanted in other states and other counties," said Wake County Sheriff Donnie Harrison.

racial profiling. In the *Villeda* case, the court noted that the state trooper's questionable citation history had triggered an investigation by Internal Affairs.⁵¹ Such an investigation itself suggested that racial profiling ought not to be tolerated by state agency regulations. The North Carolina General Assembly has attempted to eliminate racial profiling by enacting legislation that requires collection, correlation, and maintenance of information on traffic law enforcement.⁵² The statute requires the North Carolina attorney general to establish within the Department of Justice a Division of Criminal Statistics. This division is mandated to collect, maintain, analyze, and disclose data related to racial profiling, including the race and the ethnicity of people stopped by law enforcement officers.

Compliance with the MOAs

The MOAs are binding contracts between local law enforcement agencies and ICE. These documents set out authority and obligations with regard

to local enforcement of immigration law and contain a number of requirements that govern the implementation of the program. Local residents have expressed concerns that the terms are vague and that the program lacks sufficient oversight.⁵³ Recently the U.S. House of Representatives Appropriations Committee stated in a report that it "is concerned that ICE has not established adequate oversight of state and local law enforcement agencies that are delegated authority to enforce Federal immigration laws."⁵⁴ Following are some general concerns about the lack of adequate oversight in 287(g) counties in North Carolina.

The Complaint Process

MOAs contain a section that requires 287(g) programs to promulgate a complaint mechanism for people who believe that their rights have been violated.⁵⁵ Some information about the complaint process is included in the appendix to the MOA. However, many 287(g) programs have not released MOAs to the

public or otherwise provided notice of the process. Some programs have been reluctant to release information about the process even after a request has been made. For example, the ACLU of North Carolina waited five months before the Alamance County Sheriff's Office responded to a public records request for the MOA appendices. Although the sheriff's office now posts its MOA on its website in English, it does not appear to have any established complaint mechanism associated with its 287(g) program.⁵⁶ Whether any other 287(g) programs have created the required complaint mechanism is not known. If they have, the information has not been disseminated to the public.

Adherence to Civil Rights Standards and Provision of Interpretation Services

Another section of the MOAs sets forth applicable civil rights standards and requires an interpreter for people who do not speak English.⁵⁷ The MOAs do not, however, establish a process by which an interpreter may be obtained,



Jerry Wolford / Greensboro News & Record

or address how an affected person would be apprised of his or her rights to an interpreter. Anecdotal evidence suggests that not all people who are stopped by law enforcement officers in 287(g) counties are notified of their right to ask for an interpreter or are provided one.⁵⁸

Required Steering Committee and Community Outreach

The MOAs also contain a section requiring the ICE assistant secretary and the head of the local law enforcement agency to establish a steering committee.⁵⁹ The steering committee is charged with monitoring compliance with the terms of the MOA, including the complaints filed against 287(g) programs. A first meeting of the steering committee is required no later than nine months after the initial group of participating personnel is certified by ICE to act as immigration officers.⁶⁰ Currently, local residents have no way of determining whether such a meeting has taken place, whether the committee

has made any findings, and if so, what the substance of the findings is. In Alamance County, county commissioners and sheriff's officials have made an effort to communicate with concerned residents, but have rejected the involvement of community members other than law enforcement officials on a steering committee.

At least one 287(g) program (Alamance County) has been reluctant to commit to establishing a steering committee at all, much less one that includes a community member and holds meetings that are open to the public.⁶¹ Furthermore, at the state level, a spokesperson for the North Carolina Sheriffs' Association recently informed the Joint Legislative Oversight Committee that the meetings of the executive steering committee established by ICE and the association are not open to the public. However, the association and the 287(g) counties receive state taxpayer money from the North Carolina General Assembly to support their 287(g) programs. Thus these committees should be considered

to be "public bodies," and their steering committee meetings should be subject to North Carolina's open meetings law.⁶²

Finally, the MOAs include a section providing that a 287(g) program "may, at its discretion, engage in community outreach with organizations interested in the MOA."⁶³ This requires 287(g) programs to exercise their discretion in good faith and to engage in discourse not only with organizations that are favorably disposed toward the program, but also to include communication with critics of the program. Without a steering committee composed of citizens representing a full spectrum of views, it is less likely that critics of the program will be able to engage in constructive discourse about the program.

Alamance County: A Case Study

Alamance County, which adopted the 287(g) program in 2007, provides a case study for analyzing how the impacts of 287(g) reach far beyond the undocu-

“We’re getting criminals off the street that need to be gotten off the street.”¹⁵

About thirty-five thousand people come through Wake County’s detention facility every year. Sheriff Harrison expects between 10 and 15 percent to be of interest to ICE. Wake County initiated the 287(g) program in July 2008 and, in its first six months, sent more than nine hundred inmates to ICE for hearings on their immigration status. Sheriff Harrison has not noticed that the 287(g) program has freed up bed space—“We’re always going to have criminals,” he said—but he takes satisfaction in knowing that he’s “not letting a child molester or murderer back on the street.”¹⁶

Gaston County Sheriff Alan Cloninger volunteered for the 287(g) program in part to discourage settlement by criminal aliens who were fleeing from neighboring Mecklenburg County because of its 287(g) program. He had to create and fill three new positions to handle the extra workload. The expense was worthwhile, he said, because his officers can lodge the detainees and maintain the

paperwork without having to wait for ICE to send an agent. In 2008, the jurisdiction’s first full year as a 287(g) county, he sent more than four hundred inmates to ICE.¹⁷

“The savings that result could be a million things that aren’t directly related to the sheriff’s office: medical issues, department of social service issues, job openings,” he said. “I believe it has saved the taxpayers money.”¹⁸

Why Has Community Opposition to the Program Arisen?

Despite 287(g)’s overwhelming support from sheriffs in all seven counties, some community members have raised concerns about the program’s potential for targeting Hispanics, North Carolina’s largest and fastest-growing immigrant population. According to a recent economic impact study, 7 percent of the state’s population in 2004 was Hispanic, and Hispanics accounted for 27.5 per-

cent of the state’s population growth that year. Nearly 80 percent had migrated from another country or U.S. state.¹⁹

Laura Roselle, a political science

professor at Elon University in Alamance County, is part of a vocal group of advocates for the Hispanic

community. She is concerned about the potential for racial or ethnic profiling by law enforcement officers and the effect on those left behind when a family member is deported. She also worries that the fear of being deported may discourage Hispanics from contacting law enforcement for help, thus leaving them more vulnerable to becoming victims of crime.

“If people are afraid, they aren’t going to come to this community,” Roselle said. “For me, that’s not fine. Diversity builds a community and an economy.”²⁰

Henderson County Sheriff Davis summed up community fears: “Some citizens think we can stop anyone who

Gaston County Sheriff Alan Cloninger believes that 287(g) has saved taxpayers money.

mented immigrant population. Alamance County’s Latino population of more than fourteen thousand people is among the fastest-growing in the state, and it includes mixed-status families of third-generation U.S. citizens, legal permanent residents, and undocumented immigrants.⁶⁴ Interviews with Alamance County residents since the inception of the 287(g) program illustrate the short- and long-term social costs of the program for Latino communities as well as the larger population.⁶⁵ These impacts include (1) the erosion of trust between law enforcement authorities and immigrant communities, (2) an increase in unreported crime, and (3) an increase in anti-immigrant sentiment in the general population.

The Alamance County Sheriff’s Office initiated the 287(g) program in summer 2007. A general lack of transparency, and confusion about who would be targeted under the program, set the groundwork for controversy around the program and erosion of trust between law enforcement and local immigrants.⁶⁶

When 287(g) was presented to the public in 2006, sheriff’s office personnel assured residents that they would be targeting for deportation people who commit violent crimes, as opposed to people who commit lesser infractions, like driving without a license.⁶⁷ Their assurances were supported by the language of the webpage of the U.S. Department of Homeland Security, which describes how the program gives local and state officers “necessary resources and authority to pursue investigations relating to violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling and money laundering.”⁶⁸

After the program began, however, it became clear that the majority of those being processed under the 287(g) program were not felons, but traffic offenders. The State Highway Patrol set up roadblocks to check licenses in places where Latinos shopped, lived, and worshipped. For example, of the more than 170 checkpoints that have been conducted in Alamance and Orange counties,

about 30 have been conducted outside Buckhorn market on a Saturday or Sunday morning, when Latino shoppers arrive by the hundreds.⁶⁹ Police have arrested people at schools and libraries and during recreational events.⁷⁰ For example, in August 2008, five immigrants were arrested and later deported for fishing without a license on the Haw River.⁷¹ Victims of crime also have been deported.⁷² Given that the program was being carried out in a very different manner than the sheriff’s office had promised the general public, trust between immigrants and law enforcement quickly disintegrated.

Evidence of the erosion of trust was immediately apparent. In summer 2007, Latino neighborhoods throughout the county shut down, and people closed themselves up in their houses and apartments, fearful that they or their family members would be deported. Health care providers at local clinics reported that patients were missing appointments or not bringing their children to appointments. On Webb Avenue and Graham

looks Hispanic and arrest and deport them,” he said. “Of course, we can’t do that. The Fourth Amendment to the Constitution is the barrier to that. Our government is based on minimal intrusion. Law enforcement officers must have a reason to arrest that person.”²¹

The illegal aliens deported are not always Hispanic. Mecklenburg County has sent inmates from seventy countries to ICE.

Alamance County Sheriff Johnson countered profiling accusations with this comment: “The people we pick up self-identify. We don’t tell them to violate the law or drink and drive. That is an individual choice that they have made to violate the law.”²²

Sheriff’s deputies routinely receive training against profiling, whether or not they are part of the 287(g) program. Their initial law enforcement training and mandatory legal updates cover prohibitions against profiling. State law requires that officers record their reason for stopping someone for a traffic violation.²³ North Carolina legislation requires the State Bureau of Investi-

gation to collect and maintain statistics on traffic law enforcement.²⁴ The statistics reveal the initial purpose of traffic stops by the driver’s sex, race, and ethnicity, and by the type of violation. All these data are available on the website of the State Bureau of Investigation.²⁵

In Cabarrus County, Sheriff Riley compares his arrest statistics every two weeks with those of the police chiefs in his county to make sure that his deputies are not pulling in a higher number of Hispanics for traffic violations than their counterparts in municipalities are. Riley also took a systematic approach to reaching out to Hispanics. He and Sergeant Keely Litaker, who coordinates the 287(g) program and is fluent in Spanish, met with leaders of the local Hispanic community to explain the 287(g) program and to reassure them that all crime victims could count on the sheriff’s help,

regardless of their immigration status. Once they had the trust of the Hispanic leaders, Riley and Litaker conducted educational meetings with church groups and other large groups of Hispanics to reiterate that only illegal aliens who committed crimes would be targeted by the 287(g) program.

“We wanted buy-in from the community, so they would understand,” Riley said. “If you are here doing the things American citizens are expected to do,

then you’re in no danger. If you are here selling dope and doing illegal things, you probably should move.”²⁶

Riley also opened the sheriff’s office’s doors to the media. He even educated some judges.

“We’re trying to do it right,” he said.²⁷ As

a result, his county now has very little resistance to the 287(g) program.

Tanna, the public information officer in Cumberland County, also reached out to the local newspaper to educate

Officers must record their reasons for stopping people for traffic violations. These data are available online by drivers’ sex, race, ethnicity, and type of violation.

Hopedale Road, where there are more than forty Latino businesses, sidewalks emptied of people, and business slowed. An informal poll of fifteen businesses in Graham conducted in August 2007 revealed that all had lost significant revenue. The local resource center, Centro la Comunidad, normally full of activity, saw its client intake decrease. Distrust of the police was so strong that posters began to appear in public places throughout the county, warning Latinos to avoid law enforcement officers at all costs. Fear extended to the entire Latino community, creating a wide-reaching impact for the many county residents who live in families with some members who are undocumented, usually parents, and others who are U.S.-born citizens or legal permanent residents, usually children.⁷³

The disintegration of the image of police as a protection for all people had a number of repercussions. New immigrants always have been easy targets for crime because of their vulnerability in low-security housing and their use of

cash, a result of their limited access to financial institutions and savings accounts in which they can deposit wages earned. The perception that police were no longer protecting Latinos provided an additional incentive for criminals to target them. Further, one informant related that she had been turned away from a local police precinct in summer 2007 after reporting a crime, because she could not produce a valid driver’s license. Of 25 Latinos interviewed between June 2007 and November 2008, 23 stated that they felt the 287(g) program had decreased their trust in law enforcement. The same number stated that they would hesitate before reporting crime.

The specter of deportation had a particularly negative impact on the children of immigrants, further illustrating how policies affect the entire community, not just undocumented people. An eighteen-year-old man interviewed in Mebane reported that he felt the need to carry a gun for self-protection. A woman whose fifteen-year-

old son attended Graham High School voiced concern that the growing anti-immigrant climate had created incentives for her son to join a gang for protection. In July 2008, three children were stranded in a car on the shoulder of Interstate 85 in the middle of the night for eight hours when their mother was arrested by an Alamance County sheriff deputy for a traffic violation.⁷⁴ Tina Manning, lead English-as-a-second-language coordinator for the Alamance-Burlington School System, spoke of students’ fear that their parents would be deported:

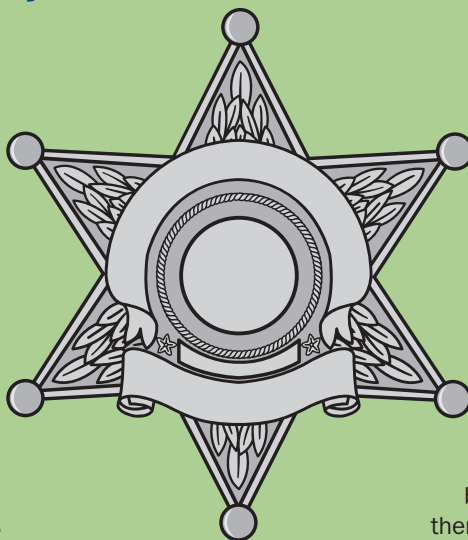
It has been a horrible experience. There are students whose parents have been taken away while they are at school. They get home and they’re gone. It has had a heart-rending impact on children, even children born here. They are in fear that if they go home, another parent will have been taken away, or that they will be taken away. . . . It puts a stop to learning.⁷⁵

Other Responsibilities of Sheriff's Offices in Relation to the State's Foreign-Born Population

Sheriff's offices in all of North Carolina's counties—not just those participating in the 287(g) program—have additional responsibilities in their interactions with the state's foreign-born population. A state law (G.S. 162-62) that became effective on January 1, 2008, requires North Carolina's jailers to attempt to determine whether an inmate charged with a felony or an impaired-driving offense is a legal resident of the United States. As part of standard booking procedure, jailers now ask all inmates charged with those crimes if they are in the country legally. If, through questioning, a review of documentation, or both, jailers are unable to determine whether an inmate is a legal resident or citizen of the United States, they must, when possible, make an Illegal Alien Query to the Law Enforcement Support Center of U.S. Immigration and Customs Enforcement, a federal bureau.

Also, more than half of North Carolina counties (sixty-two in 2008) and the North Carolina Department of Correction have for several years inquired into inmates' legal status as part of their application for federal funds under the State Criminal Alien Assistance Program (SCAAP). SCAAP provides federal money to state and local governments to offset the costs of jailing certain undocumented criminal aliens. A county may apply for SCAAP reimbursement for foreign-born inmates who have no claim to U.S. citizenship if they (1) are undocumented or have failed to maintain their nonimmigrant status, (2) have been held in custody for four or more consecutive days, and (3) have been convicted of at least one felony or two misdemeanors. The U.S. Department of Justice uses a payment formula to determine the award amount. In 2008, Mecklenburg County received more than \$1 million in SCAAP funds. Some counties contract with outside accounting firms to help them process their SCAAP applications, including cross-referencing jail rosters with nationwide criminal records to identify eligible inmates.

Further, thirteen North Carolina counties—initially Buncombe, Gaston, Henderson, and Wake counties, now also Cabarrus, Catawba, Cumberland, Duplin, Durham, Harnett, New Hanover, Orange, and Robeson counties—participate in a pilot program that takes advantage of the “full interoperability” of the federal government's biometric identification systems. As part of routine



booking at most jails, fingerprints are checked against FBI records to determine a detainee's criminal history. Under the pilot program, sheriff's offices simultaneously check prints against U.S. Department of Homeland Security immigration records. The additional check helps officers verify identities of arrested people and uncover pending charges or “immigration detainees” (“holds” requiring jailers to notify federal officials before releasing an inmate) against them. The technology is part of Immigration and Customs Enforcement's Secure Communities plan for identifying and removing criminal aliens.

Another part of the Secure Communities plan took hold in North Carolina in 2008. The General Assembly enacted a version of the so-called Rapid REPAT (Removal of Eligible Parolees Accepted for Transfer) program (G.S. 148-64.1). Under the program, certain nonviolent criminal aliens may receive an early release from their state sentences if they have a final order of removal and they agree not to return to the United States. North Carolina now is one of a half-dozen states that have adopted a version of the law, which gives the state's Post-Release Supervision and Parole Commission discretionary authority to release eligible inmates to Immigration and Customs Enforcement for immediate deportation. The inmate must have been convicted of one of a handful of specifically enumerated nonviolent offenses (including driving while intoxicated) and must have served at least half of the minimum sentence imposed. If the released person ever is found to have returned to the United States unlawfully, he or she will be returned to the North Carolina Department of Correction to serve the remainder of his or her state sentence. Similar programs in effect in Arizona and New York over the past decade have saved those states millions of dollars in incarceration costs, according to Immigration and Customs Enforcement.

—James M. Markham

The author is a School faculty member specializing in criminal law and procedure, with a focus on the law of sentencing, corrections, and the conditions of confinement. Contact him at markham@sog.unc.edu.

the community on 287(g). “Many in the Hispanic community now understand what the program is trying to do: keep serious criminal offenders out of the U.S.,” she said. “A lot of them feel that they are living in a much safer community. It’s not a program to harass people.”²⁸

Are the Wrong People Getting Caught in the Net?

Sheriffs acknowledge that although the intent of the program is to rid the community of dangerous criminals, sometimes people convicted of less serious crimes also are deported. Occasionally those instances result from traffic stops in which an officer would have let off with a traffic ticket a U.S. citizen whose identity the officer could verify, but would arrest a suspected illegal alien whose identity the officer could not verify at the side of the road. North Carolina sheriffs working under 287(g) reported to ICE a total of 5,369 charges against 4,832 inmates turned over to the agency in 2008. Of those, 2,421 offenses, or 45 percent, involved serious

criminal violations, including murder, assault, illegal drug offenses, theft, domestic violence, and trespass. Another 1,282, or 24 percent, involved driving while impaired, and 1,666, or 31 percent, involved violations of motor vehicle law.²⁹

When an officer or a deputy stops someone—for example, for speeding—and that person does not have a driver’s license in his or her possession, the officer has to attempt to determine the driver’s identity, gauge the likelihood that the driver will show up in court, and ascertain the existence of any outstanding warrants for the driver. Drivers who are U.S. citizens are likely to have driver’s license information available to the officer from the computer of the state’s division of motor vehicles, and their records likely can be verified.

“If we have determined who he is,” Sheriff Riley said, “we can verify that

he didn’t just rob a bank. So we do not take him to the detention facility.”³⁰ The drivers who have no valid identification and no driver’s license are held because their identity and criminal history cannot be verified without fingerprints. “We’re not just bringing them to jail because they speak broken English,” he said.³¹ This is not profiling but protocol.

Most people incarcerated in the county jail are incarcerated on the basis of criminal charges filed not by sheriff’s deputies, but by various other law enforcement

Detaining drivers who cannot produce a valid driver’s license or identification card is protocol, not racial profiling.

agents in the county, such as city police, State Highway Patrol troopers, State Bureau of Investigation agents, alcohol law enforcement agents, wildlife enforcement officers, and university police. Some people are incarcerated because a magistrate issued an arrest warrant (on a finding of probable cause that they committed a crime), the

As the 287(g) program continued, the rhetoric against immigrants and the authorization of local police to enforce immigration law spread to other community institutions, affecting treatment of immigrants in the workplace and neighborhoods. One woman who emigrated to Graham from El Salvador reported that she was fired in 2007 after working seven years at a textile company in Burlington. She related that after the 287(g) program was implemented, the atmosphere in the factory changed. Supervisors cut her hourly wages from \$8.30 to \$8.10 and revoked bathroom breaks.

Informants also described how their status increasingly became a leveraging tool in situations of conflict with community members. In one case, a Graham resident said that her landlord neglected to make necessary repairs in her apartment because of her immigration status, threatening to report her family to the police if they refused to pay rent.

Immigrants were not the only community members affected. County em-

ployees were targeted for their work with undocumented immigrants. In August 2008, law enforcement officials were tipped off by an undisclosed source that the county’s medical director, Kathleen Shapley-Quinn, and nurse practitioner Karen Saxer were treating undocumented patients at a public health clinic and not revealing their real names to employers in notes excusing work absences. The two employees were suspended for weeks until a probe by the State Bureau of Investigation requested by the sheriff’s department cleared them of wrongdoing, finding that they were “forced to follow conflicting directives from state and federal officials regarding the release of information about illegal immigrants” and had committed no crime.⁷⁶

As informants have made clear, the 287(g) program has impacts outside the undocumented-immigrant community. For the thousands of Latinos born in Alamance County who own businesses and houses and no longer have any connections to Latin America, North

Carolina is home. Given the permanence of Latino communities throughout the state, the social costs of the 287(g) program raise important questions about how communities should deal with the inevitability of demographic change and growing diversity. The marginalization of the Latino population by decreasing trust in law enforcement and growing anti-immigrant sentiment presents barriers to the formation of cohesive, integrated, and conflict-free communities.

Proposals for Improvement

The complexities of the 287(g) program and the difficulties in its implementation illustrate that it is an ineffective means of immigration enforcement. The federal government’s reliance on local law enforcement to enforce immigration laws is a strong indication of a systemic problem. It points to the need for comprehensive immigration reform at the federal level that would allow local police and county sheriffs to return to their primary function of protecting

warrant was served, and they were then arrested by a deputy sheriff. A small percentage of people incarcerated in the county jail are arrested by deputy sheriffs for violations of criminal law that occurred in the deputy sheriffs' presence.

But even the less serious crimes can wreak hard consequences on the community, Wake County Sheriff Harrison said. A driver who cannot get a license cannot get automobile insurance, either, and if that speeding driver causes a serious accident, the victim and the taxpayers have to pay the costs.

"We've got to do our job; we feed everybody out of the same spoon," Sheriff Harrison explained. "Are we supposed to turn our heads and say, 'You're hard-working people; we're not going to charge you today'? Then tomorrow they kill somebody, and people say, 'Why didn't the sheriff charge them yesterday?'"³²

The less serious offenses sometimes are precursors to more serious crimes. Sheriff Davis's files in Henderson

County have examples from before 287(g) went into effect:

- An illegal alien with a history of convictions for assault on a woman was arrested following an incident of domestic violence. After serving his time, he was released to the community and then shot and killed his girlfriend and their son. Had the 287(g) program been in effect, he would have been deported after any one of the earlier assault charges.
- A Turkish student who overstayed his visa was arrested for speeding. After he was released to the community, he was rearrested, this time on a sex offense for taking indecent liberties with a child. Under the 287(g) program, he would have been sent back to Turkey after the speeding stop.

Conclusion

In North Carolina, sheriffs exercise their 287(g) authority only in detention facilities against criminals who self-select by breaking state laws. Criminal

illegal aliens cost taxpayers money and crime victims heartache. By giving local law enforcement officers the ability to facilitate the removal of a segment of the criminal element, 287(g) programs make communities safer.

For people who are in the United States illegally and want to avoid the possibility of facing deportation proceedings, the solution is simple, according to Mecklenburg County's public information officer, Rush. "Our message has never changed. If you're doing things you shouldn't do and putting others in jeopardy, then we need to take a look," Rush said. "If you don't want to encounter the 287(g) program, don't commit a crime."³³

Notes

1. Rick Davis (sheriff, Henderson County), interview by a North Carolina Sheriffs' Association representative, December 2008.

2. Alan Cloninger (sheriff, Gaston County), interview by a North Carolina Sheriffs' Association representative, December 2008.

3. Under a memorandum of agreement effective in 2008, ICE trained one Durham

their communities from crime. Until this reform occurs, 287(g) agreements should be limited to processing only the people convicted of felonies, in furtherance of the original intent of the statute. Also, the program must be counterbalanced by effective oversight,

public transparency, and accountability. Further, there should be an independent evaluation to determine the program's costs and effectiveness

as a crime-prevention and -detection tool. These reforms are urgently required: 287(g) is a situation worthy of concern to noncitizens and citizens alike.

Good Governance, Transparency, and Conformity with the Law

Across the state, the 287(g) programs lack transparency. There is no provision for community input into the creation or the implementation of the MOAs. There are no community-protection

mechanisms sufficiently embedded in the program to counterbalance the power that the program grants to contracted law enforcement authorities. Section 287(g) MOAs often are created without community notification or opportunity for public comment. Affected constituent groups rarely have the opportunity to discuss or debate the program with their elected officials

before its implementation. As a result, contracts for the program have been negotiated without the protections inherent in and necessary to the democratic process.

The following recommendations would provide additional protections for basic rights in the implementation of 287(g).

Transparency

- Ensure the availability of the MOA in both English and Spanish, and detail the MOA's purpose and policy.

- Amend the complaint mechanism in the MOA to clarify the process and to provide notice of the right to file a complaint.
- Improve relations with the news media and other organizations.

Accountability

- Increase community participation in the program's implementation and oversight.
- Improve the performance of law enforcement personnel by (1) outlining designated functions of officers trained under the 287(g) program, (2) providing detailed guidelines for the nomination of personnel to be trained as 287(g) officers, (3) detailing and updating the training of personnel, (4) continuing to review certification and authorization of personnel in light of potential complaints filed, and (5) monitoring ICE supervision of personnel.
- Provide specific information on the process for selecting the steering

Until comprehensive immigration reform is enacted, 287(g) should focus only on people convicted of felonies.

Police Department (DPD) officer to investigate certain federal immigration offenses. The officer remains a member of the DPD and can file detainers only for specified serious offenses: criminal gang activity; violent crimes, including but not limited to homicide, aggravated assault, armed robbery, and other similar crimes; production, sale, or distribution of forged identity documents, or identity theft; firearms offenses; offenses involving homeland security; and any felony that occurs within the jurisdiction of the DPD. Other immigration-related duties performed by the officer are (1) processing, preparing, and serving charging documents on aliens for removal and (2) presenting federal criminal cases to the U.S. Attorney's Office, Middle District of North Carolina, for egregious reentry and prohibited people in possession of firearms. M. Ray Taylor (captain, Durham Police Department), interview by John B. Stephens, March 4, 2009.

4. In the first session of the 109th Congress, Representative Myrick successfully added an amendment to the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (HR 4437), which passed the House in December 2005. The amendment was a bill, the Scott Gardner Act (HR 3776), that Myrick had introduced earlier in the session.

5. Julia Rush (director of communication, Mecklenburg County Sheriff's Office),

interview by a North Carolina Sheriffs' Association representative, December 2008.

6. *Ibid.*

7. Davis, interview.

8. Brad Riley (sheriff, Cabarrus County), interview by a North Carolina Sheriffs' Association representative, December 2008.

9. *Ibid.*

10. Terry S. Johnson (sheriff, Alamance County), interview by a North Carolina Sheriffs' Association representative, December 2008.

11. *Ibid.*

12. *Ibid.*

13. Debbie Tanna (public information officer, Gaston County Sheriff's Office), interview by a North Carolina Sheriffs' Association representative, December 2008.

14. Davis, interview.

15. Donnie Harrison (sheriff, Wake County), interview by a North Carolina Sheriffs' Association representative, December 2008.

16. *Ibid.*

17. Cloninger, interview.

18. *Ibid.*

19. John D. Kasarda and James H. Johnson Jr., *The Economic Impact of the Hispanic Population on the State of North Carolina* (Chapel Hill, NC: Frank Hawkins Kenan Institute of Private Enterprise, University of North Carolina at Chapel Hill, 2006).

20. Laura Roselle (political science professor, Elon University), interview by a North Carolina Sheriffs' Association representative, December 2008.

21. Davis, interview.

22. Johnson, interview.

23. *State v. Styles*, No. 442A07 (N.C. December 10, 2007) (holding that "reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected"), www.aoc.state.nc.us/www/public/sc/opinions/2008/pdf/442-07-1.pdf.

24. G.S. 114-10.01.

25. North Carolina State Bureau of Investigation, www.ncsbi.gov.

26. Riley, interview.

27. *Ibid.*

28. Tanna, interview.

29. North Carolina Sheriffs' Association, Report to the chairs of the House and Senate Appropriations Committees and the chairs of the House and Senate Appropriations Subcommittees on Justice and Public Safety, on the operations and effectiveness of the Illegal Immigration Project, February 27, 2009.

30. Riley, interview.

31. *Ibid.*

32. Harrison, interview.

33. Rush, interview.

committee, ensure that it includes a broad range of community interests, and set forth the committee's required review of activities.

- Open the meetings of local steering committees and the North Carolina Sheriffs' Association's executive steering committee to the public.
- Increase information and participation for effective community outreach and input.
- Conform fully with the letter and the spirit of the law.
- Revise all current 287(g) programs and implement all new 287(g) programs to permit processing only of people convicted of felonies.
- Amend the guidelines for forwarding and reviewing complaints. Make information publicly available in both English and Spanish.
- Clarify what notice of civil rights standards must be given and how interpretation services will be provided.

- After modification of the MOA, update officer training to reflect the changes, indicate the availability of the MOA, and specify the duration and the circumstances of termination of the MOA.

Program Evaluation

In addition to recommending the preceding improvements in the program, we recommend that an organization not affiliated with local or state law enforcement agencies conduct an independent evaluation of the program as a crime-prevention and -detection tool. A cost-effectiveness analysis is one way to evaluate whether the resources allocated to the 287(g) program produce significant gains in securing the safety of communities or whether there are less expensive and more successful ways to address crime in immigrant communities. To date, we know of no such evaluation of

The 287(g) program's effectiveness in preventing and detecting crime needs an independent evaluation.

the 287(g) program, nor were any research studies conducted in advance of the program's implementation to show that local immigration policing

is effective at preventing crime or enforcing the law.

Notes

Parts of this article are drawn from a report entitled *The Policies and Politics of Local Immigration Enforcement Law*, coauthored by the UNC School of Law Immigration/ Human Rights Clinic (Katherine Bandy, Catherine Currie, Evelyn Griggs, Jill Hopman, Nicole Jones, Rashmi Kumar, Marty Rosenbluth, Christina Simpson, and Deborah Weissman) and the ACLU of North Carolina Legal Foundation (Rebecca C. Headen and Katherine Lewis Parker).

1. *DeCanas v. Bica*, 424 U.S. 351, 354 (1976).

2. 8 U.S.C. § 1357(g) (2008).

3. HR 4437, 109th Cong., 1st sess. (2005).