JUSTICE STRATEGIES

LOCAL DEMOCRACY ON ICE:

Why State and Local Governments Have No Business in Federal Immigration Law Enforcement

A Justice Strategies Report
February 2009

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Justice Strategies, a project of the Tides Center, Inc., is a nonpartisan, nonprofit research organization. Our mission is to provide high quality policy research to advocates and policymakers pursuing more humane and cost-effective approaches to criminal justice and immigration law enforcement.

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EXECUTIVE SUMMARY

Over five percent of the US population is deportable, including twelve million undocumented residents and legal permanent residents with past offenses. While programs to permanently or temporarily legalize status can shrink the numbers in the shadows, they cannot erase an ever-present deportable population. Meanwhile, more than fifteen percent of US families include at least one parent who is a noncitizen and one child a citizen. Deportable people—who by law must be expelled from our borders—are in fact integrated into American families, businesses, and communities. This paradox complicates a basic question: Who should enforce our nation's immigration laws?

A tiny statute passed under the administration of Bill Clinton and implemented by George W. Bush provides one answer to that question. 287(g) refers to a law, written into the 1996 comprehensive immigration reforms, which for the first time in US history created a formal mechanism for federal executives to extend to local community-based agencies the extraordinary arrest and incarceration powers originally carved out for immigration police stationed at the borders. This *devolution*—shifting immigration enforcement from federal to local hands—brings the border to the interior of our nation.

Born in 2003, Immigration and Customs Enforcement (ICE) is one of three immigration agencies within the Department of Homeland Security. The Bush administration identified devolution of immigration law enforcement as a primary strategy to build capacity and established the 287(g) program as its premiere project. The program recruits state and local police, as well as correctional staff in jails and prisons to perform civil immigration arrests and detentions on behalf of the federal government.

The devolution of civil immigration enforcement to criminal justice agencies adds new questions to an old debate: Does immigration enforcement serve a public safety mandate? Who should pay for the federal deportation mandate? Are civil immigration and criminal law enforcement compatible enterprises? Is ICE competent to oversee the transfer of extraordinary civil immigration powers to local authorities?

"Local Democracy on ICE" examines the 287(g) program specifically, as well as ICE devolution generally. We conducted an extensive literature review and interviews with diverse sources including elected leaders, court officials, security experts, reform advocates, and activists. The following findings contribute to a public safety discussion grounded in facts.

The 287g Program has failed.

The 287(g) program has harmed, not served, our public safety.

ICE marketed the 287(g) program as a public safety measure to get "criminal illegal aliens" off our streets. But civil immigration powers are extraneous to that mission. Criminal law provides sufficient authority for state and local police to arrest anyone, including a noncitizen, suspected of a crime. The arrest powers delegated under the 287(g) program become useful precisely when an arrestee is *not* a "criminal illegal alien." When an officer lacks reasonable suspicion of a crime, civil immigration powers still allow for arrest and incarceration.

ICE powers take the handcuffs off law enforcement, at the same time distracting police from their core public safety mission. Immigrants make a poor target for anti-crime campaigns. Studies consistently show that immigrants have a lower rate of crime than American-born citizens, and commit fewer violent crimes. Legally, the 287(g) program is equivalent to requiring police to check the tax returns of every person stopped for a speeding ticket.

From the outset, the 287(g) program drew widespread criticism. The Major Cities Chiefs Association and other community policing proponents feared the program would make immigrant victims of crime afraid to call 911.

Legal scholars questioned the wisdom of allowing constitutional questions raised by devolution to be trampled by executive force. Civil rights were a key concern. Numerous racial profiling lawsuits against 287(g) deputized agencies are now pending.

Race, not crime, has propelled 287(g) program growth. In the start-up phase of the program, ICE did not prioritize regions heavily impacted by "criminal illegal alien" activity. FBI and census data indicate that sixty-one percent of ICE-deputized localities had violent and property crime indices lower than the national average. Meanwhile eighty-seven percent had a rate of Latino population growth higher than the national average. ICE signed nearly eighty percent of its 287(g) agreements with agencies in the US South. While it is true that crime rates in that region are higher than in others, ICE's focus in the South is disproportionate and confounds a balanced approach to public safety.

ICE has recruited any and all law enforcement agencies to do its bidding, hastily devolving deportation powers into ill-equipped local hands. Partners include street police and traffic cops, corrections officers in state prisons and local jails. By August 2008, more than 840 officers in twenty states were deputized, and 70,000 immigrants detained. County sheriffs make up sixty-two percent of ICE partners. In Butler County, Ohio, ICE extended deportation authority to the sheriff *after* he sought re-election on a nationally publicized anti-immigrant platform. ICE granted the largest and most powerful 287(g) contract to Sheriff Joe Arpaio of Maricopa County in Arizona after mismanaged jails cost his county over $43 million in death and abuse lawsuits; and after he trespassed into neighboring jurisdictions to unlawfully dump immigrants at the border for deportation.

Traffic violators and day laborers are the program's central targets. ICE asserts that the 287(g) program is not designed to crack down on overcrowded apartments, day laborer activities, or traffic offenses. Yet ICE has deputized the Missouri State Highway Patrol, an agency whose core mandate is to enforce the traffic laws. Sheriff Arpaio summarizes the program's real added value, "When we stop a car for probable cause, we take the other passengers too." His 287(g) "crime suppression sweeps" have targeted day laborers and drivers of color, including US citizens. In Gaston, North Carolina, ninety-five percent of state charges filed against 287(g) arrestees were for misdemeanors—60 percent were for traffic violations that were not DWIs. In Berry Hill, Tennessee, a police officer arrested—rather than issued a routine ticket to—a driver in her last days of pregnancy. In jail, an ICE-deputized corrections officer placed a civil immigration detainer on her, subject her to indefinite incarceration pending ICE action. She went into labor while shackled to a jail hospital bed.

287(g) sets up states and localities to bail out the federal government.

The 287(g) program is unfunded, by statute. The 1996 law prohibits the feds from reimbursing a state or local agency for the cost of civil arrests and incarceration. ICE may have misrepresented this fact. A sheriff at the 2007 conference of the National Association of Sheriffs alleges that ICE representatives said the feds pay up to $90 per day for each 287(g) arrestee. In 2006 Congress gave the 287(g) program its first budget line of $5 million, and continued that level of funding through fiscal year 2008. Monies were intended for ICE personnel and infrastructure expenses only. Yet through 2008, ICE overspent by at least $50 million in program costs.

ICE fact sheets incorrectly tout the 287(g) program as a net money saver. The program purportedly saved Arizona $9 million by accelerating the removal of immigrants from the prison system. But this truncated economics does not count the $30 million in state monies appropriated from 2007 through 2009 to fund partnerships with ICE. With a $2 billion budget deficit, among the largest for any state in the nation, Arizona has yet to fully itemize the costs of immigration enforcement. And despite infusions of state cash, Maricopa County accrued a $1.3 million budget deficit in the program's first three months.

Under 287(g), state and local governments essentially sign a blank check to bolster ICE's failed business of immigration enforcement. Unrelated Homeland Security grants may be fanning the rumor that 287(g) is a money generator. After Alabama signed a 287(g) agreement, the city of Hoover absorbed more than $400,000 in homeland security grants to buy a new fire truck and open a "Department of Homeland Security and Immigration." While Hoover found gold in the Homeland Security hills, Virginia's Prince William County lost a small fortune. When the county board of supervisors approved 287(g) participation, it appropriated an extra $1.4 million of local tax revenue to fund year one. The actual cost amounted to $6.4 million with a newly projected five-year cost of $26 million. The board had to raise property taxes by five percent and slash parts of the police and fire rescue budgets to further the mission of 287(g).

Fiscally responsible leaders have rejected the program. In Morris County, New Jersey, a Democratic mayor sought a 287(g) contract. But a technical requirement—provision of local jail beds to house arrestees—served to disrupt his unilateral action. The county jail's Republican sheriff investigated the ICE partnership. He found that a neighboring county lost $250,000 in unanticipated security and litigation costs while participating in ICE's devolved detention program. After learning that ICE does not protect individual deputized local officers from legal liability, he rejected the 287(g) bid. Law enforcement agencies nationwide have said no to the 287(g) program because it serves neither public good nor organizational interest.

The devolution program is destined to fail.

Civil and criminal law enforcement are incompatible enterprises.

The 287(g) program rests on a faulty assumption that the civil immigration mandate can be seamlessly absorbed into the crime-control mission shared by criminal justice agencies. Like the universally feared tax audits of the Internal Revenue Service, the deportation authority wielded by ICE falls within civil law. But unlike the IRS, ICE is the only federal agency with the power to perform mass "civil" incarceration. Counter-intuitively, civil immigration law provides greater search, arrest, and incarceration powers than criminal law. The Constitution's protections against arrest without probable cause, indefinite detention, trial without counsel, double jeopardy, and self-incrimination, as well as the statute of limitations, do not apply equally (or in some cases at all) in the civil immigration context.

While the line between civil and criminal law is a moving target, 287(g) is defining the parameters by executive force. At the 2008 Police Foundation conference, the executive director of ICE's Office of State and Local Coordination stunned the audience when he explained to them the value of civil immigration powers, "We can make a person disappear." Nationwide, the 287(g) program has promoted vigilante immigration enforcement and normalized the widely refuted idea that local law enforcement has the inherent authority to enforce immigration laws. In Arizona localities that have not yet joined the 287(g) program are now detaining suspected immigrants for ICE, without criminal charges. In a reversal of longstanding policy, the Miami Police Department now claims that it has the inherent authority to arrest anyone suspected of the federal immigration offense of crossing the border illegally.

The "Arizona Experiment" illustrates how incompatible civil immigration and criminal law enforcement really are. The *Wall Street Journal* has called Arizona the nation's leading laboratory in locally driven immigration enforcement. Arizona's first 287(g) program, brokered by state and federal executives, accelerated a massive crackdown on immigration violators. In 2005, one year before state legislatures around the country began to replicate federal immigration offenses in their own penal codes, Arizona blazed the trail becoming the first state in US history to enact its own international human trafficking statute. The novel law's enforcement resulted in the prosecution of nearly 500 victims, but not a single trafficking boss.

In Arizona the civil immigration mandate swiftly corrupted the mission of the criminal justice system. Another state law overwhelmed the bail system by amending the Constitution to strip undocumented immigrants of the right to bail. Arizona's criminal process morphed into a hybrid immigration proceeding. In the face of two masters, judicial officers who were neutral arbiters on criminal charges became prosecutors on immigration charges. They were even required to accept uncorroborated allegations about immigration status by police as sole proof of deportability. Prosecutors no longer have to prove that an immigrant poses a risk of flight or threat to society to impose pretrial detention. Allegation of a civil immigration violation makes proof irrelevant.

ICE is incompetent to manage devolution programs.

ICE suffers from mission conflict. Since its inception, ICE's budget has grown more than 200 percent to more than $5.4 billion. While ICE is responsible for interior immigration enforcement, it is also the largest investigative arm of the Department of Homeland Security. But ICE has forsaken intelligence in favor of brute force. In the ten-year strategic plan of ICE's Detention and Removal Office, entitled *Endgame*, the agency sets out its aim to "remove all removable aliens"—a goal utterly disconnected from economic realities and measurable public safety impacts. *Endgame* also notes that unique differences between civil and criminal detention rules threaten the integrity of ICE detention operations.

ICE has failed to supervise its 287(g) contracts, in violation of federal law. By statute, ICE is responsible to "supervise and direct" all 287(g) activity. As one 287(g) contract explains, "Participating LEA personnel are not authorized to perform immigration officer functions, except when working under the supervision of an ICE officer." Across the board participating localities report that the primary direction given by ICE is training on how to check for immigration status through electronic media. While federal immigration officers typically receive five months of initial training, 287(g) deputized officers receive lessons compressed into a five-week crash course. ICE personnel do not lead or directly oversee 287(g) arrests. ICE has accepted vague paperwork from deputized agencies in lieu of real accounting. Faced with criticism that he has not followed requirements of his ICE contract, Sheriff Arpaio responded, "Do you think I'm going to report to the federal government? I don't report to them."

ICE continues to fail the residents of Maricopa County. After Phoenix Mayor Phil Gordon asked ICE to audit Maricopa County for abusing the 287(g) program to target "people with broken tail lights," ICE agents reported that their internal investigation confirmed everything was fine. ICE did not intervene when Sheriff Arpaio permitted volunteers untrained in immigration enforcement to support his 287(g) sweeps. These sweeps have targeted day laborers and drivers of color. The conservative Goldwater Institute criticizes Maricopa County for rampant violation of the 287(g) contract. Janet Napolitano, former governor of Arizona and now secretary of Homeland Security, rescinded $600,000 in state grants to Maricopa County when she saw the 287(g) sweeps spiral out of control. Elected leaders have called for a Department of Justice investigation of Sheriff Arpaio. But no agency has held ICE accountable for its repeated failure to terminate the nation's largest and most publicly criticized 287(g) contract.

ICE has failed at management of its largest devolution program: civil immigration detention. The question of whether immigration enforcement should be devolved from federal to local hands cannot be separated from the question of whether ICE is competent to oversee this legally and organizationally complex process. In its short life, ICE has already been the focus of eight internal Homeland Security audits. Mismanagement of the civil detention system, ICE's largest devolution program, is the most frequent theme. One audit notes, "ICE is not well positioned to oversee the growing detention caseload." Over eighty people have died in "civil" custody, yet ICE lobbies for more resources to detain noncitizens who have not been deemed either a risk of flight or threat to society.

Our Recommendations

Our broken immigration system must be fixed, not burdened with avoidable dead weight. To redress the harms that the 287(g) program has already inflicted on public safety and local democracy, we recommend:

The Obama Administration should terminate the 287(g) program. Day laborers and drivers of color make poor law enforcement targets. The 287(g) program fails to strike the correct balance between safety and rights. The program also amounts to a local and state bailout of the failed federal immigration enforcement business.

The U.S. Government Accountability Office should investigate the 287(g) program. ICE asserts that it has already conducted an internal investigation of all 287(g) contracts and has found no errors. Documented abuses from Maricopa County, Arizona to Prince William County, Virginia, tell another story. The GAO, as a neutral party, must determine how the program has impacted public safety; and how much local, state, and federal tax monies have been used for its implementation.

The Justice Department should investigate the 287(g) program for violation of the executive order banning racial profiling. Widespread "crime suppression sweeps" in Maricopa County and documented cases of racial profiling throughout the country warrant an investigation of the program's compliance with the US Constitution, particularly the equal protection clause of the Fourteenth Amendment and the Fourth Amendment ban on arrest without probable cause. The Department of Homeland Security should adopt the ban on racial profiling set by the Department of Justice.

Congress should require a racial impact analysis before authorizing new immigration law enforcement programs. In the 21st century, non-citizens in the U.S. are increasingly people of color. Immigration law enforcement efforts, while not intentionally based on race, have a disproportionate impact on people of color, including US citizens.

Congress should create mandatory, meaningful reporting requirements for monitoring *all* ICE operations. Facing a global fiscal crisis, the United States cannot afford wasteful spending. The ICE budget, which has grown more than 200 percent since the agency's inception in 2003, is not above public scrutiny. Congress should require ICE to systematically document and disclose detailed data related to the implementation and impact of *all* its programs.

INTRODUCTION

Over five percent of the US population is deportable, including twelve million undocumented residents and legal permanent residents with past offenses. While programs to permanently or temporarily legalize status can shrink the numbers in the shadows, they cannot erase an ever-present deportable population. Meanwhile, more than fifteen percent of US families include at least one parent who is a noncitizen and one child a citizen. Deportable people—who by law must be expelled from our borders—are in fact integrated into American families, businesses, and communities. This paradox complicates a basic question: Who should enforce our nation's immigration laws?

A tiny statute passed under the administration of Bill Clinton and implemented by George W. Bush provides one answer to that question. 287(g) refers to a law, written into the 1996 comprehensive immigration reforms, which for the first time in US history created a formal mechanism for federal executives to extend to local community-based agencies the extraordinary arrest and incarceration powers originally carved out for immigration police stationed at the borders. This *devolution*—shifting immigration enforcement from federal to local hands—brings the border to the interior of our nation.

Under Homeland Security's Immigration and Customs Enforcement (ICE), 287(g) was developed into a program that targets criminal law enforcement agencies as frontline enforcers of civil immigration laws. In 2005, ICE began recruiting diverse state and local law enforcement agencies—from county sheriffs to traffic police—to arrest suspected noncitizens. Critics warned that merging immigration enforcement into police work could lead to rampant abuse. Time has shown that, indeed, the 287(g) program harms, rather than serves, public safety. Unfunded by federal statute, it draws state and local tax monies into the failed federal immigration enforcement business. Not only has the 287(g) program failed. It was destined to fail because civil immigration and criminal law enforcement are incompatible enterprises. Also, ICE is incompetent to manage devolution.

The report is organized into five chapters. In Chapter 1, *287(g): A Pilot Project in Devolution*, we provide an overview of the ICE 287(g) program nationwide. The program confers to state and local law enforcement agencies the extraordinary search, arrest and detention powers of the federal immigration authority. Ironically, these "civil" powers are *more* potent that criminal powers. ICE has described the program as a public safety effort to get "criminal illegal aliens" off the streets. Yet local 287(g) officers have used their civil powers precisely when they lack probable cause of a crime. Data indicates that racial demographics—rather than crime rates—have propelled growth of the 287(g) program. The ICE literature also incorrectly advertises the 287(g) program as a net money saver. Yet by law, the feds cannot reimburse states and localities for participating. Through the program, states and localities are set up to bailout the federal government's failed immigration enforcement business.

In Chapter 2, *The Arizona Laboratory*, we investigate the impact of the 287(g) program on taxpayers, the criminal justice system, the immigrant community and US citizens. The introduction of 287(g) in this conservative law-and-order state accelerated a massive crackdown on immigration violators that swiftly corrupted the mission of the criminal justice system. ICE has granted its largest and most comprehensive 287(g) contract to the infamous Maricopa County Sheriff, Joe Arpaio. Arpiao was already widely criticized for mismanaging his county jails and for trespassing into neighboring jurisdictions to unlawfully dump immigrants at the border for deportation. For months on end Arpaio's "posse" has conducted grand-standing "sweeps" of day laborers and made dubious arrests of Latinos for minor traffic violations. Yet ICE claims, despite ample documentation to the contrary, that Arpaio has not violated the terms of his 287(g) contract.

In Chapter 3, *ICE: Force without Mission*, we examine ICE's structural failure to supervise devolution efforts more generally. Under the Bush Administration, immigration authority was merged into homeland security and ICE became the largest investigative arm of the Department of Homeland Security. Yet ICE has prioritized force over intelligence. The agency sets out to "remove all removable aliens"—a goal utterly disconnected from economic realities and measurable public safety impacts. Internally, ICE is a case study in organizational failure. Inadequate oversight of immigration detention, its largest devolution program, has led to numerous detainee deaths and congressional demands for reform.

Chapter 4, *New Jersey Dollars & Sense*, recounts how a vigorous campaign for a 287(g) contract waged by the Democratic mayor of Morristown, New Jersey was defeated. A community-based immigrants rights organization charged that it would harm police relations with immigrant communities. A technical requirement of the 287(g) program—dedicated jail beds—required the Republican sheriff of Morris County to weigh in. He determined that the proposed 287(g) program did not appear to serve any public safety mandate, but it would cost local taxpayers a fortune. Morris County Freeholders decided to reject the Mayor's plan.

Finally, we include a set of recommendations for reform. A thorough investigation of the program should be undertaken by the General Accounting Office. Moreover, basic safeguards against mismanagement of all ICE immigration enforcement programs are needed.

CHAPTER I:

287(G): A PROJECT IN DEVOLUTION

In the aftermath of September 11th the Bush Administration moved to shift immigration enforcement from federal to local hands.

When smoke was still rising from the ashes of Ground Zero former Attorney General John Ashcroft declared that all police have the "inherent authority" to arrest and detain deportable immigrants.[1] This claim, known as the inherent authority doctrine, reversed norms asserted by Ashcroft's own agency. In 1989 the Department of Justice took the position that local police are not allowed to enforce most immigration laws.[2] Ashcroft refused to disclose the rationale underlying his wildly controversial idea. To date, only a heavily redacted legal memo has been made public.

The inherent authority doctrine has far reaching implications. Well over five percent of the US population is deportable, including more than twelve million undocumented residents and legal permanent residents with past criminal convictions. More than fifteen percent of US families are mixed-status with at least one parent who is a noncitizen and one child who is a citizen. While programs to permanently or temporarily legalize status can shrink the numbers in the shadows, they cannot erase an ever-present deportable population. Deportable people—who by law must be expelled from our borders—are, in fact, integrated into American families, businesses, and communities. This paradox complicates a basic question: Who should enforce our nation's immigration laws?[3] Ashcroft proposed that the power rests in local public servants.

Ashcroft's position conflicted with the longstanding plenary power doctrine. In the late nineteenth century, the US began denying physical entry to Chinese immigrants based solely on their race and national origin.[4] When Chinese exclusion received its first legal challenge in 1893, the Supreme Court issued a two-pronged ruling.[5] First, the Court upheld that the nation possessed a sovereign right to protect its borders and, therefore, sanctioned *de jure* discrimination based on immigration status. The Supreme Court echoed this historic decision in 2003 when it said, "Congress regularly makes rules [in immigration] that would be unacceptable if applied to citizens."[6] Second, the Court identified the duties accompanying this sovereign right as those of the federal government. If the US is defined as a *nation* by its immigration policies, leaving the enforcement of immigration laws to state discretion would destroy the consistency of the American identity by fracturing the country into immigrant-receiving versus policing states. Immigration remains one of the few plenary police powers entrusted to the federal government.

While Ashcroft's post-September 11th declaration was inconsistent with immigration history it can be explained by two contemporary trends in American law enforcement: expanding the mission and jurisdiction of criminal agencies to include a new activity;[7] and bringing immigration violations within the purview of the criminal justice system.[8] Although the inherent authority doctrine came at a moment when the US underwent a massive expansion of executive power, critics from all corners charged that it was a radical and even chaotic proposition.[9] The delegation of immigration control to agencies that historically have no immigration expertise lends itself to rampant abuse. Criminologist Jonathan Simon observes, "Never in our history has the government unveiled a dramatic power of local law enforcement that we never knew it had before … Locally, you simply don't see that type of juridical expansion. You see more creep, accumulated powers over time."[10]

Inherent authority faded from public discourse just as a set of other controversies pushed Ashcroft to resign from the Justice Department.[11] Yet the nation's lead prosecutor articulated the vision of a newly energized movement to restrict migration by devolving immigration enforcement from federal to local hands. Devolution proponents charge that states and localities have no choice but to enforce immigration laws because the feds have failed to protect the borders. Additionally, they maintain that state and local agencies can more effectively capture migrants than the mammoth federal bureaucracy, thereby discouraging future flows.[12]

Locally, the devolution movement has gained ground by creating new state-level immigration statutes tackling employment, law enforcement, drivers' licenses, and public benefits. According to the National Conference of State Legislatures, more than 1,500 pieces of legislation related to illegal immigration were introduced in 2007.[13] Of these, 244 became law—three times the number passed in 2006. At the federal level, lawmakers have introduced and passed a growing number of bills to make immigration enforcement mandatory for states and local agencies.[14] To date there is no concomitant movement against devolution.

A tiny section of law passed under the Clinton Administration provided the vehicle for devolution.

Under the Bush Administration the greatest advance in devolution came through Section 287(g) of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act. Two years after the deregulation of North America's economic borders through international treaty, a Republican Congress and Democratic President Bill Clinton passed domestic laws that tightened the physical borders.[15] The 1996 laws may be remembered as comprehensive interior enforcement reforms. Failing to speak to the question of legalization, they instead expanded the deportation and detention systems. Moreover, they reduced the value of lawful permanent residency by growing the categories of legal residents who could be *de-legalized* and expelled permanently.[16]

Section 287(g) enables the federal government to devolve the powers of immigration officers to state and local employees. Specifically, Section 287(g) states:

> The Attorney General may enter into a written agreement with a State, or *any* political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function *at the expense* of the State or political subdivision and to the extent consistent with State and local law.[17] [Emphasis added]

The statute indicates that any public servant may become a deportation agent, from a police officer to a traffic safety agent, public benefits caseworker, or hospital employee. First, however, the state or local entity must sign a written agreement with the federal government that details the powers and duties to be authorized, the contract duration, and the specific federal immigration office that will "supervise and direct" each deputized officer. Each state or local officer must also receive "adequate training regarding the enforcement of relevant Federal immigration laws."[18]

The work is purely voluntary. State and local agencies are not required to perform deportation duties, nor are they to be financially compensated. Congress expressly forbade a profit motive. Nevertheless, elected leaders were willing to invest local resources. As Utah Senator Orrin Hatch explained, "A lot of States, just to get these people out of their States and get them into detention facilities, would pay for the costs themselves."[19]

By wrapping parameters around the ability of a public servant to perform immigration functions, 287(g) flatly refutes the inherent authority doctrine. Even immigration officers are not authorized to make arrests without formal certification via federal procedures.[20] But by creating a deputizing process, the statute presents, for the first time in American history, a formal mechanism for federal executives to extend extraordinary arrest and incarceration powers to community-based agencies.

Civil immigration law permits greater search, arrest, and incarceration powers than criminal law.

The restrictionist Center for Immigration Studies—advocating that local public servants take on immigration enforcement—emphasized "immigration law provides *powerful investigative authorities* not available to local or even other federal LEAs" [Emphasis added].[21] This observation reveals one reason agencies might volunteer for the unfunded deportation mandate: to expand their powers. To appreciate the potentially transformative impact of 287(g) one must understand the difference between civil immigration and criminal laws.

Civil immigration law is as complicated as the tax code. Like the Internal Revenue Service, the federal immigration authority is a civil agency. But unlike tax auditors, immigration agents have the power to conduct mass *civil* incarceration. These civil officers, in fact, have investigation, apprehension, and detention powers that law enforcement officers in the criminal justice system do not have. This fact is counterintuitive. The word "civil" sounds less severe than "criminal." One might infer that civil violations are less serious than criminal ones and, therefore, involve less force and fewer penalties than criminal enforcement. That is increasingly not the case. Taken together, the 1996 laws are cited for making prosecutorial power the cornerstone of the civil immigration system, both by moving discretion out of the hands of immigration judges to those of deportation agents and prosecutors, and by arming these civil officers with new harsh powers like the ability to enforce mandatory detention and lifelong exclusion.[22]

As the rules of "civil enforcement" evolve through litigation, executive policies, and legislation, the line between civil and criminal law becomes an ever-moving target. While the Constitution applies to all persons, civil enforcement generally has fewer procedural safeguards than criminal enforcement since, according to the traditional rationale, civil penalties are less severe than criminal penalties. In immigration, however, civil penalties for possession of marijuana (e.g., lifelong exclusion) may be more severe than the likely criminal penalty (e.g., probation). Nevertheless, key constitutional protections for criminal defendants are not applied equally to civil immigration respondents:

- **ARREST WITHOUT PROBABLE CAUSE.** Police seeking to search or arrest a person must have some small level of evidence, typically probable cause. The exclusionary rule of the Fourth Amendment gives officers an incentive to comply since evidence obtained unlawfully cannot be admitted in criminal court. But the Supreme Court has ruled that this constitutional protection does not apply equally to civil immigration arrests.[23] Following September 11, 2001, law enforcement officers conducted mass sweeps in Arab, Muslim and South Asian communities.[24] Immigration law was the tool of choice. Thousands were *civilly* arrested—not for reasonable suspicion of terrorism or crime, but for overstaying a visa.
- **INDEFINITE INCARCERATION.** The US currently incarcerates 2.3 million people. While Black males comprise the largest incarcerated group with 4.8 percent in prison or jail, immigrants are the fastest growing segment of the prison population.[25] The immigration authority is the only civil federal agency that has the power to implement policies of mass incarceration. Immigration detention typically occurs in a criminal penal institution. Yet in the eyes of the law, it is a civil *process* that a suspected noncitizen endures while in deportation proceedings—not a sentence imposed for a criminal conviction. The Eighth Amendment protection against cruel and unusual punishment is not applicable. In the same 1996 legislation that contained section 287(g), Congress created a "mandatory detention" statute that permits the immigration authority to indefinitely hold broad categories of noncitizens who face deportation including legal residents convicted of simple possession of drugs and people who enter the US seeking asylum.[26] By 2005 the percentage of immigration

detention bed space devoted to mandatory detainees reached eighty-seven percent.[27]

- **TRIAL WITHOUT COUNSEL.** Not all people facing deportation have a hearing. Those that do are "respondents" rather than defendants. The right to a public defender, as provided in the Sixth Amendment, does not apply to civil proceedings. A respondent goes before the "immigration judge"—a civil adjudicator appointed by the attorney general—rather than a member of the Title III judiciary.[28] The immigration court reports that from 2003 to 2007 less than fifty percent of respondents secured legal representation for any part of their deportation proceedings. The lack of counsel impacts the ability to preserve rights and raise arguments, such as challenges to unlawful civil arrest. The legal representation data does not count those denied a court hearing and deported through a process also created in 1996 called "expedited removal."

Representation in Immigration Courts

Year	Represented	Unrepresented	Total
FY03	120,170	130,647	250,817
FY04	117,777	142,134	259,911
FY05	110,282	204,445	314,727
FY06	113,602	210,447	324,049
FY07	115,900	156,979	272,879

Source: Executive Office of Immigration Review

- **NO PROTECTION FROM DOUBLE JEOPARDY AND SELF-INCRIMINATION.** Deportation, like detention, is a civil consequence rather than a "punishment." Therefore deporting a noncitizen after completion of a criminal sentence is not considered double jeopardy in violation of the Fifth Amendment. Also the constitutional right to remain silent—the protection against self-incrimination—receives inconsistent application in immigration courts. Should an immigration suspect choose to remain silent, some immigration courts will draw an adverse inference from a failure of the suspect to speak—something not allowed in criminal cases in similar contexts.

- **NO STATUTE OF LIMITATIONS.** There is no statute of limitations on immigration offenses. A wide range of people may be subject to deportation including a lawful permanent resident (green card holder) convicted of committing a crime at any point in the past; someone who overstayed their visa and is currently sponsored for legal residency through a US citizen spouse; and a person who crossed the border over twenty years ago, even if that person is now the parent of American-born children.

It is incorrect to say that civil immigration officers *always* have more power than police. For example, a criminal search warrant issued by a judicial court allows an officer to enter a private dwelling against the resident's will. The immigration "warrant," which is issued by the prosecuting agency itself, does not grant the same authority. As Michael Chertoff, Homeland Security Secretary under George Bush, explained, "[A] warrant of removal is administrative in nature and does not grant the same authority to enter dwellings as a judicially approved search or arrest warrant."[29]

Under ICE, the 287(g) statute evolved into a program that takes the handcuffs off criminal law enforcement agents by giving them the tools of civil immigration officers.

Following the September 11th attacks, the US Congress formed the Department of Homeland security. The Bureau of Immigration and Customs Enforcement, or ICE, is one of three immigration agencies comprising the department. ICE soon turned to the 287(g) statute as a "force-multiplier" in its mandate to enforce immigration laws within the US interior.

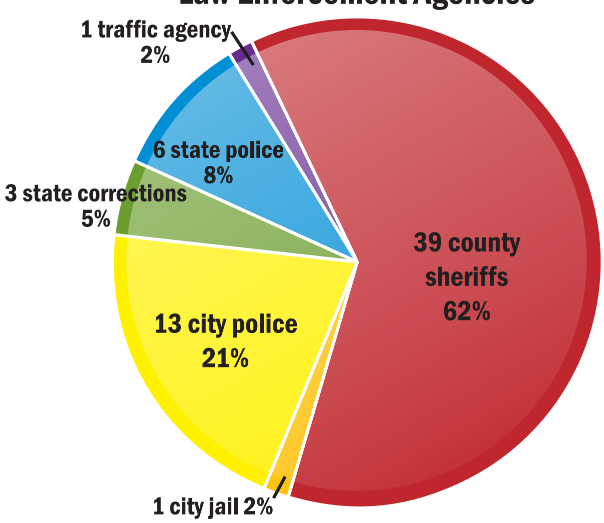
The 287(g) statute had scant history before the creation of ICE. In 2002 the state of Florida and the Justice Department's Immigration and Naturalization Service signed the first Memorandum of Agreement (MOA) to "address the counter-terrorism and domestic security needs of the nation and the State." The MOA authorized thirty-five state police officers to provide back-up support to immigration enforcement activities led by the federal government.[30]

When ICE renewed that 287(g) MOA with Florida, the newborn agency modified the language to make the targets *less* serious but the tools *more* powerful. The reference to "counter-terrorism" was deleted, leaving only the vague mandate of "domestic security." Rather than provide back-up support to the feds, the deputized officers could now lead the charge themselves with the power to "arrest without warrant for civil and criminal immigration violations."

The program mission was expanded, both in the breadth of civil powers given and in the types of partners sought. An ICE fact sheet marketed the 287(g) program as a tool for *all* state and local law enforcement officers who are "first responders on the scene when there is an incident or attack against the United States. During the course of daily duties, they will often encounter foreign-born criminals and immigration violators who pose a threat to national security or public safety."[31]

The US has nearly 39,000 state and local governments and more than 1.8 million police and corrections employees.[32] By August 2008, ICE signed a total of sixty-three MOAs that deputized more than 840 officers and led to 70,000 civil arrests. In the start-up phase of 287(g), rather than test the program with one type of agency,

Law Enforcement Agencies

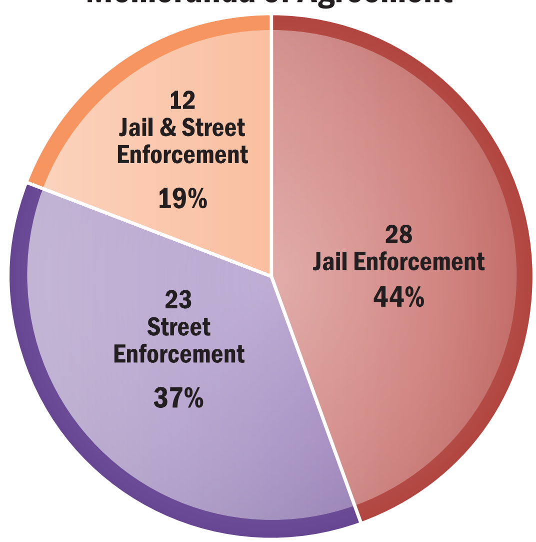


Source: Immigration and Customs Enforcement, 2008

ICE recruited all law enforcement agencies—a broad term encompassing many missions—to the frontlines of its pilot project in devolution.[33]

The program has two types of MOAs: one for Taskforce Officers (TFO) who may conduct civil immigration searches and arrests on the streets; and one for Jail Enforcement Officers (JEO) who may place civil warrants on all noncitizens (undocumented and legal) in a correctional facility or jail so that they may be held while awaiting transfer into ICE custody. ICE granted twenty-eight MOAs for jail enforcement, twenty-three for street enforcement, and twelve containing both of these powers.

Memoranda of Agreement



Source: Immigration and Customs Enforcement, 2008

While law enforcement agencies are the target partner, "criminal illegal aliens" are the purported public safety target.

The ICE fact sheet states that 287(g) partners "gain necessary resources and authority to pursue investigations relating to violent crimes, human smuggling, gang/organized crime activity, sexually related offenses, narcotics smuggling, and money laundering."[34] But the primary skill taught in this devolution program is checking for immigration status through electronic media. While a federal immigration officer typically requires five months of initial training, ICE provides state and local officers with a five-week crash course on immigration law and civil enforcement powers at the Federal Law Enforcement Training Facility in Glynco, Georgia.[35] ICE also provides deputized agencies with access to notoriously inaccurate federal databases. A government audit found that one of these databases, which ICE relied on heavily for home raids, proved inaccurate in up to fifty percent of cases, thereby leading to the collateral arrest of unintended targets.[36]

The ICE fact sheet continues:

> The 287(g) program is not designed to allow state and local agencies to perform random street operations. It is not designed to impact issues such as excessive occupancy and day laborer activities. In outlining the program, ICE representatives have repeatedly emphasized that it is designed to identify individuals for potential removal, who pose a threat to public safety, as a result of an arrest and/or conviction for *state crimes*. It does not impact traffic offenses such as driving without a license *unless* the offense leads to an arrest … Officers can only use their 287(g) authority when dealing with persons suspected of committing state crimes *and* whose identity is in question *or* are suspected of being an illegal alien.[37] [Emphases added]

This crime-fighting language sounds good, but raises a basic question: Are immigrants a strategic target group for crime fighters? Studies consistently indicate that immigrants commit fewer violent and nonviolent crimes.[38] By these public safety measures, immigrants are not a strategic target for an anti-crime campaign. Furthermore, criminal law already gives state and local law enforcement the power to execute criminal arrests when anyone, including a noncitizen, is suspected of a crime.

The 287(g) program is useful precisely when an arrestee is *not* a "criminal illegal alien" and an officer lacks reasonable suspicion for a crime. The civil powers take the handcuffs off law enforcement while simultaneously redirecting their attention to a dubious public safety target. P.J. Crowley, a Homeland Security expert at the Center for American Progress, is not opposed to local police involvement in counter-terrorism but does oppose the 287(g) program as a distraction.

> If we are going to intercept a terrorism plot, it's much more likely that the cop on the beat is going to stumble on that than some terrorist analyst from a computer saying "oh, eureka!" … It's probably going to be a cop walking around with a dog who will find someone … this [287g] program is draining resources away from terrorism and chasing people who are a challenge to us, but not a security threat. That's the great irony.[39]

The 287(g) program raised social, legal, and financial concerns from the outset.

The first critics of the 287(g) program charged that it would break trust between police and immigrant victims of crime and place police in an adversarial relationship with entire communities at exactly the same time that counter-terrorism and anti-crime efforts required partnership.[40] While it is methodologically difficult to calculate the rate of *unreported* crime, community policing concerns have permeated the debate. In 2006, police chiefs of the nation's largest cities issued a joint statement rejecting local immigration enforcement, citing community policing and funding concerns.[41] In one 287(g)-deputized city a resident wrote a letter to the editor of the daily newspaper asserting, "Immigrants are being marginalized and victimized by cops and robbers alike."[42]

In North Carolina, one county resolution against joining the ICE program charged, "Jurisdictions that have entered into these memoranda of agreement have experienced increased violence against Latino/Hispanic communities and increased incidents of reported racial profiling against people of color communities."[43] Early on, critics of the 287(g) program charged that it could easily lead to racial profiling. Similarly to some new state and local laws on immigration, the 287(g) program may have racially-motivated discriminatory intent. In Arizona, deputized local government agencies and officers are now facing a class action lawsuit with lawyers raising equal protection arguments under the Fourteenth Amendment in court.[44]

Devolution efforts like 287(g) and local immigration laws raise another constitutional issue. Under the supremacy clause of the Constitution, state and local governments can be preempted from acting in legal arenas where the federal legislative scheme is sufficiently complex and comprehensive. Courts may find that Congress did not intend that the state or locality play any role in immigration enforcement, whether it be in making laws or applying them.

The city of Hazleton, Pennsylvania, is a case study in preemption. In the wake of September 11, 2001, Latino New Yorkers moved into Hazleton, increasing its population by up to thirty percent. While the newcomers included citizens and long-term legal residents, their visibility prompted the city to pass a series of immigration ordinances prohibiting the employment and housing of "illegals."[45] But the Hazleton ordinances risked replicating a federal statute. The 1986 Immigration Reform and Control Act, popularly known for giving "amnesty" to three million immigrants, was the first bill in the US to make the hiring of undocumented labor a criminal act.[46] Hazleton distinguished its ordinance from the 1986 law by highlighting that the city terminated the permits of noncompliant landlords and employers—an altogether different sanction from the civil and criminal penalties imposed by the feds.[47] A US district court rejected the argument, striking down the ordinances on the grounds of federal preemption.

Legal liability is another issue raised but not settled by the 287(g) program. The 1996 statute explains that any deputized agent is "subject to the direction" of the feds. Each MOA consistently names ICE as the supervisor and provides that the federal government will assume liability for any 287(g) deputized officer facing a lawsuit under the Federal Tort Claims Act (FTCA). According to law professor Nancy Morawetz this legal protection may be feeble. She explains:

> The devil is in the details. If ICE directs local officers in a way inconsistent with local and state rules, there may be no federal protection from lawsuit. Local authorities have no protection when they engage in racial profiling because that is directly against official federal policy, even if the federal government itself in practice engages in similar profiling. Locals think they are wearing federal protection. Ironically, though, the 287(g) MOA may be protecting ICE from liability by displacing it onto local shoulders.[48]

Morawetz, director of the immigration clinic at New York University School of Law, spoke about these legal liability issues at the Police Foundation's 2008 conference. She presented a common scenario: If a deputized officer incorrectly used civil immigration authorities to search, interrogate, or arrest a US citizen believed to be an undocumented Mexican national, would that citizen sue the 287(g) deputized officer or ICE as the supervising agency?[49] In the context of civil detention, the federal government has argued that local criminal facilities that house ICE detainees should be considered the "legal custodian" and the respondent for lawsuits, such as habeas corpus actions.[50]

Criminologist David Harris, an early critic of the 287(g) program, explained a basic tendency of law enforcement agencies to grow their police powers by testing the law's limits.

> [Law enforcement] begins with the deployment of new tactics or technologies. When the new tactics—roadway checkpoints to detect drunk driving, for example—become contested issues in courts, law enforcement agencies and their allies fight hard to get judges to bless the new approaches. Once approved, these new tactics come into wider use throughout law enforcement, and yet another new tactic at the next legal boundary line—for example, roadway checkpoints not to apprehend drunk drivers but to detect those carrying narcotics—undergoes the same cycle of use and constitutional testing in court.[51]

Following the police conference Nancy Morawetz reflected, "Police seem to see civil immigration law as just another tool in the toolbox. But ICE is dangling civil powers like a carrot to join the program. Pendergraph began the morning panel literally saying to the police officers, 'We can make a person disappear.' Jaws dropped. People couldn't believe he said that."[52] James Pendergraph is the executive director of the ICE Office of State and Local Coordination.

Data indicates that race—rather than crime—has propelled 287(g) program growth.

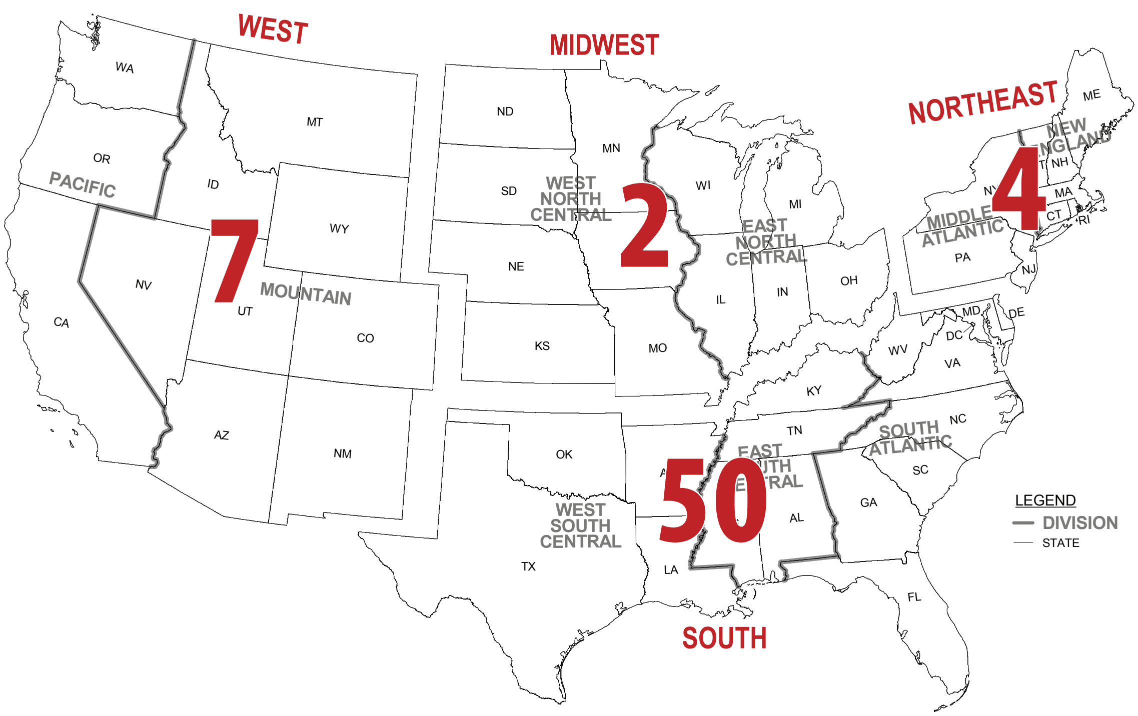
In the initial phase, ICE did not assess or prioritize regions heavily impacted by "criminal illegal alien" activity. While the relationship of the 287(g) program to public safety is elusive at best, race seems to be a guiding factor. By August 2008, among ICE-deputized states and localities:

- Sixty-one percent had a violent crime index lower than the national average of 473.5. Also fifty-five percent witnessed an overall decrease in violent crimes from 2000 to 2006.
- Sixty-one percent had a property crime index lower than the national average of 3334.5. Also sixty-five percent saw an overall decrease in property crimes from 2000 to 2006.
- Eighty-seven percent had a rate of Latino population growth higher than the national average.[53]

ICE signed nearly eighty percent of its 287(g) agreements with agencies located in the US South. While it is true that crime rates in that region are higher than in others, ICE's focus in the South is disproportionate and confounds a balanced approach to public safety.

In the coming years the 287(g) program may spike property crime arrests and clog criminal courts as police performing immigration arrests increasingly lodge minor state charges in addition to civil federal charges. The current focus on traffic enforcement against "criminal illegal aliens" is instructive. In Gaston, North Carolina, ICE-deputized officers reported that misdemeanors constituted ninety-five percent of state charges filed against 287(g) arrestees; sixty percent of these charges were

Number of 287(g) Agreements by Census Regions



Source for 287(g) agreements: Immigration and Customs Enforcement, Map adapted from "Census Regions and Divisions of the United States" U.S. Department of Commerce Economics and Statistics Administration U.S. Census Bureau for non-DWI traffic violations.[54] Neighboring Alamance County reported that eighty percent of 287(g) arrestees had been charged with misdemeanors—forty-five percent were charged with non-DWI traffic violations.

In Berry Hill, Tennessee, a police officer stopped Juana Villegas, a Latina woman, for driving without a license.[55] She was in her last days of pregnancy. The officer had the option to write a ticket or make an arrest. He chose the latter and told her three other American-born children in the car to say goodbye to their mom. Villegas was taken to Davidson County Jail where ICE-deputized corrections officers placed a civil immigration detainer on her. Subject to indefinite incarceration and pending ICE action, Villegas could no longer post the bond needed for her release. While in custody, she went into labor.[56] Although technically a civil detainee, standard jail policies were applied. She was shackled to her hospital bed before and after giving birth and was not allowed to nurse her newborn son for the following two days.

Tennessee was an early proponent of the 287(g) program. As chair of the Tennessee Senate Transportation and Safety Committee, State Senator Mark Norris of Collierville cited the importance of curbing illegal immigration, not crime. "Our troopers must have the authority in the course of their regular duties to detain, interrogate and arrest illegal aliens."[57] Against the grain of its own fact sheet, ICE deputized the Tennessee Department of Safety in June 2008 to perform civil immigration arrests on the streets and highways. In that same month, the Missouri State Highway Patrol—an agency whose mandate is traffic law enforcement—also joined the 287(g) ranks.[58]

Local politicians have launched "crime suppression sweeps" against day laborers, drivers of color, and "gang members."

Alabama Governor Bob Riley was the second state executive to sign a 287(g) MOA. In October 2003, when counter-terrorism was still the purported program mission, ICE deputized twenty-one state troopers from the Alabama Department of Public Safety to perform civil immigration searches, arrests, and detentions. Colonel Mike Coppage, the agency's director, promised they would not conduct "sweep" searches but would simply add immigration checks to their normal duties. By February 2005, forty-four immigrants had been seized under the program. Alabama Senator Jeff Sessions announced plans to train twenty-five more troopers to identify and detain noncitizens during traffic stops.[59]

The counter-terrorism mission crept when the mayor of Hoover, Alabama, announced plans to put his city at the forefront of local immigration enforcement. Founded in the era of white flight, Hoover is a suburb of the predominantly African-American city of Birmingham. In 2000 eighty-eight percent of the town's 63,000 residents were White, compared to just twenty-four percent of Birmingham. But Hoover's racial composition underwent a shift in the 1990s. Between 1990 and 2000, the Latino population grew to four percent of the city population, compared to 1.6 percent in Birmingham and 1.7 percent statewide.

In 2004 Tony Petelos campaigned for mayor on a promise to work with the feds to crack down on immigrant day laborers. City officials had already been debating what to do about the "Lorna Road problem"—a stretch of land near the Interstate 459 overpass where Latino men gathered each morning to look for work.[60] Homeland Security funding and partnership with ICE provided Petelos a creative way to make good on his anti-immigration campaign promise.

Following his election victory, Mayor Petelos explained, "Homeland security starts from the bottom up. Hoover is taking the lead on this."[61] Hoover became a hub for DHS activity. It bought a new $325,000 fire truck with DHS grants. It hosted a three-day conference on "agroterrorism."[62] The mayor tapped Police Chief Bob Berry to head the new city "Department of Homeland Security and Immigration" at an annual salary of $110,000.[63] Petelos traveled to Washington, DC, to meet with the Alabama congressional delegation. He had his eyes set on $28 million earmarked by the feds for the state's counter-terrorism efforts.

Birmingham immigrant rights advocate Helen Rivas questioned his wisdom, asking, "Are they assuming that tomato pickers are going to be throwing bombs?"

Hoover itself did not join the 287(g) program. But in July 2005, the city served as a major launch site for another ICE "criminal illegal alien" effort called Operation Community Shield. According to DHS Secretary Chertoff, a national two-week sweep was needed to rid the country of "the very worst gang offenders here in the United States." Hoover police chief Nick Derzis was one among fourteen law enforcement officials at Chertoff's side in Washington for the launch. While reports of gang activity were rare in central Alabama, Derzis explained, "We're in the stage where we're trying to be proactive."[64] Local attorney George Huddleston charged that it was "insane to think that Hoover, Alabama is a hotbed of gang activity."

Gang affiliation is as nebulous as traffic violations are plentiful.[65] For Hoover police, the term was like Velcro: put on and take off as needed. Captain A.C. Roper explained, "We have seen indicators of the initial stages of gang activity, graffiti on walls and the sides of businesses. We have also arrested several individuals on charges who have had various gang tattoos." The police admitted that they saw no gang infiltration in schools, a typical site for recruitment. Officials charged that gangs were concentrating in apartment complexes along Lorna Road. Business managers in the area said they had not seen evidence of gang activity.[66] On the morning of the first "gang" raid, thirty people with Latino names were booked at the Hoover City Jail. Rather than face the penalties *and* protections of the criminal justice system, they were quickly transferred to a jail in neighboring Gadsden where ICE conducts civil immigration processing for deportation.[67]

Huddleston alleges that a chain of memos and emails he received in a discovery motion prove that the Hoover DHS was created solely to police the Latino population. Both a local judge and the local ICE office were willing to collaborate on the problem of day laborers. Weeks after the "gang" raids the Hoover City Council terminated a contract with Catholic Family Services, a faith-based community group that operated a day laborer pick-up center near Lorna Road. In the coming months ICE trained local police to detect fake IDs—a useful criminal charge in selective enforcement campaigns against undocumented immigrants.[68]

ICE has deputized politicians *after* they champion anti-immigrant agendas.

By August 2008, sixty-two percent of 287(g) partners were county sheriff departments. The sheriff is an elected official who performs a variety of duties, including the execution of civil eviction orders, criminal arrests for property and violent crimes and running the county jail. The 287(g) program deputizes two types of sheriff's employees: corrections officers in the jail and officers on street patrol.

On the street level, sheriff's officers already have the power to arrest anyone, including immigrants, when there is probable cause to believe that a crime may have been committed. The 287(g) authority enables officers to civilly arrest an individual when they lack evidence of a crime. The arresting agency must then hold the civil arrestee in a local jail. A county jail typically holds pre-trial detainees who are innocent until proven guilty and people convicted of low-level crimes that carry a sentence of less than one year. ICE-deputized corrections officers place civil warrants on any noncitizen detainee—legal or undocumented, convicted or pending charges—to ensure that they are placed in deportation proceedings upon resolution of the criminal case.

Sheriffs are an ideal partner for ICE because of their capacity to incarcerate civil immigration arrestees. While police chiefs have questioned the public safety value of deputizing law enforcement agencies, sheriffs have sought 287(g) authority as a political trophy in local anti-immigration campaigns.

Consider Sheriff Richard Jones of Butler County, Ohio. Upon being elected in 2005 Jones showed single-minded fixation on undocumented immigrants. He mailed ICE an invoice for \$71,610—his estimated cost of jailing fifteen

Waukegan IL - Protestor against 287(g) program holds sign that combines the English word "police" with "La Migra," the Spanish word for "Border Patrol." Photo by Aarti Shahani.

"Being part of the 287(g) program will not only assist us with local issues and the deportation of illegal aliens process, but can lead to a closer working relationship with ICE and hopefully the housing of more of *their* prisoners" [Emphasis added].[72]

His original complaint about the cost of incarcerating undocumented detainees quickly morphed into a desire to lock up more people, this time without criminal charges. For example, ICE-deputized Butler officers used their 287(g) powers during a routine traffic stop to arrest Armando Mondragon. He was kept in the county jail for forty-two days without criminal charges. A county corrections officer deputized to use 287(g) authority placed a civil "detainer" on him, thereby initiating deportation proceedings.[73] Mondragon has lived in the US since 1996 and is the father of five American-born children.

undocumented detainees for a total of 1,023 billable days. He asked on his blog, "Why should Butler County taxpayers have to pay for jail costs associated with people we don't believe should ever have been in this country, let alone this state, or county, to begin with?"[69] In 2006 he erected a yellow street sign outside his office reading "Illegal Aliens Here" with an arrow pointing to the adjoining jailhouse. He also posted six billboards in the conservative, blue-collar town warning, "Hire an illegal—break the law!" He took out half-page newspaper ads with the same message and started a tip line for people to report employers suspected of hiring undocumented immigrants.[70]

Butler County did not have a documented "criminal illegal alien" problem. In fact, its violent crime index dropped forty percent in the years preceding entry into the ICE program and stood far below the statewide average.[71] But the county did have a tough-on-immigration campaign, documented in national newspapers, which sought to use the tools of criminal law enforcement against foreigners. Rather than take pause, ICE granted the Butler County Sheriff's Office the tools of civil immigration officers. Sheriff Jones signed a 287(g) agreement in January 2008. It conferred both the power to issue civil detainers in the jails and perform civil arrests on the street. He commented,

By statute, ICE is prohibited from reimbursing a state or locality for the costs of civil arrests and incarceration under the 287(g) program. ICE may be misrepresenting this fact. An attendee at the 2007 conference of the National Association of Sheriffs alleges that ICE agents told the audience that they pay up to ninety dollars per day for each immigrant arrested under the 287(g) program.[74] Other sheriffs like Jones see the unfunded program as a fast track to *funded* federal initiatives like the State Criminal Alien Assistance Program.[75] This program partially reimburses states and localities for the cost of incarcerating noncitizens facing criminal charges. Butler County enrolled just after joining 287(g) and received a total of $26,565 for FY 2008.[76] While Hoover, Alabama, found gold in the Homeland Security hills, Sheriff Jones has collected pennies.

For some, the 287(g) program has amounted to handing ICE a blank check.

Incarceration may be the greatest single expense for a state or local entity under the 287(g) MOA. The deputized entity must hold a person arrested under a civil immigration warrant in its own correctional facility until ICE takes the detainee into federal custody.

Prince William County, Virginia grossly underestimated the cost of local immigration enforcement. While the 287(g) program was being debated, Police Chief John Evans of Manassas Park asserted that the program would target "serious habitual misdemeanants such as two- to three-time time repeat DWI offenders, but is not intended for minor nuisance offenses and routine traffic violations." [77] Against concerns of racial profiling, ICE representatives assured local officials, "This program is designed to identify serious and violent criminal alien violators for potential deportation."[78] Prince William County approved the 287(g) program and appropriated an extra $1.4 million of local tax revenue to fund it.[79]

But this allocation proved insufficient for two reasons. First, deputized officers routinely arrested and detained immigrants without suspicion of a serious crime. Second, ICE failed to pick up detainees within the seventy-two hour period it had promised.[80] As a result, the county spent $6.4 million for the first year of its 287(g) program, and projected a cost of $26 million over five years.[81] To sustain the expense, the Board of Supervisors raised property taxes by five percent and is contemplating additional increases.[82] Meanwhile, they slashed $3.1 million from the budget for installation of video cameras in police cars.[83] Police said they needed the cameras to protect officers from increasing accusations of racial profiling which accompanied enforcement of the county's 287(g) program. The supervisors also cut more than $1.2 million in public safety needs like fire and rescue personnel, and in related police, foster care and protective services for the American children of deported immigrants.

287(g) Federal Budget

Fiscal Year	287(g) appropriated (in millions)	287(g) actual (in millions)	DHS Totals for State & Local Law Enforcement (in millions)
2006	5	50	29.4
2007	5.4		46.4
2008	5	17.2	78.5
2009	59	not yet known	100

Source: Congressional Research Service and Office of Management and Budget

In a board meeting attended by more than one hundred concerned citizens, a forty-five year resident of the county charged that the local immigration policies were "dividing neighbor against neighbor. ... Even the children are discriminating against one another in the school system." [84] Some immigrant families left the school system altogether and sent their children to schools in 287(g)-free towns.[85]

The cost of the 287(g) program to taxpayers is difficult to estimate. At the state and local level, each deputized agency commits to paying for both personnel and civil incarceration, the length of which depends on variables including ICE action. Legal liability is another expense. Cost at the federal level is also unclear. Congress gave ICE a budget line for the 287(g) program for the first time in 2006: $5 million to pay for ICE expenses including supervisory personnel, training costs, and technology.[86] By statute, deputized agencies cannot be federally reimbursed for personnel or incarceration costs. The program is purely voluntary. Yet rapid growth and consistent over-spending of the program budget raise red flags.

In 2006 and 2007 Congress appropriated approximately $5 million for each year of the program. Yet ICE spent a total of $50 million over the two-year period. ICE spent $17.2 million in fiscal year 2008—a strange drop given that 2008 saw more MOAs than in previous years. For fiscal year 2009, Congress flooded ICE with cash for 287(g), growing the program budget to $59 million. The Department of Homeland Security has other programs that support the local enforcement of immigration laws. But for the first time 287(g) is funded to be the premiere devolution program, receiving over half of total Homeland Security funds for state and local law enforcement.

Ironically, the 287(g) program is normalizing the claims of the inherent authority doctrine.

The very existence of a federal statute that enumerates and limits the powers of an immigration officer contradicts the inherent authority doctrine. Any public servant—federal, state, or local—must obtain training and permission to enforce civil immigration laws.[87] Yet the executive exercise of 287(g) normalizes the idea that local law enforcement has inherent authority after all and opens the doors to devolution programs with even fewer controls.

Consider Florida where the nation's first 287(g) agreement was signed in 2002. The MOA between the Florida State Police and federal immigration authorities was largely a symbolic act of patriotism. In the wake of a national tragedy, a state agency was committing its own resources to helping overstretched feds protect the homeland.

The next agency in the state to join the ICE program was the Collier County Sheriff's Office. From 2000 to 2006 Collier County saw a forty-four percent drop in its property crime rate and a twenty percent drop in violent crimes. But the Latino population had grown by sixty-one percent in that same period. In June 2007, at a local council meeting, Collier County Sheriff Don Hunter itemized the crises of immigrant "gang members," students and hospital patients asserting, "MS-13 [gang] is hiding out in our agricultural populations. They are trying to blend into the regular population … There are thousands of students in our schools that do not speak English. The vast majority of them are illegal. There are people clogging up our emergency rooms."[88]

In his campaign for the 287(g) program, Hunter shifted his language saying, "My goal would be to severely restrict the number of illegal foreign criminal aliens within Collier County who repeatedly violate law, who repeatedly victimize persons living in Collier County."[89] ICE granted Collier County a 287(g) MOA to deputize twenty-four officers in the jails and on the streets. The chief of county corrections Scott Salley said, "We feel that the ICE agents are going to be a strong partner, but they can't do it alone … The short term is to help us out here [sic], but they have other obligations. We will, in time, be able to perform these functions with our staff."[90]

The idea that civil immigration enforcement is by default a local duty has caught on in areas where 287(g) has entered. Charu al-Sahli, an advocate with the Florida Immigration Action Center and an early critic of the program, was surprised to watch the swift spillover effect of the 287(g) program: "Some sheriffs' offices are vying for 287(g) powers. Others are doing immigration arrests without having an agreement. The thesis that ICE just wants to go informal seems to be true." She recalls the difficulties in even talking with Hunter and other sheriffs in the Florida panhandle about issues raised by 287(g). "Sheriffs are far more political than police chiefs. We are more likely to get meetings with police chiefs, who are more sympathetic to community policing concerns."[91] Maria Rodriguez echoes the frustration: "Our members want to work with—not against—law enforcement. But they can't get face time. How do you promote civic participation when sheriffs shut the door on you?"[92] Rodriguez is the director of the Florida Immigrant Coalition, a statewide membership organization for immigrant community groups.

The greatest proof of the 287(g) program's slippery slope may be recent legal opinions by the Miami-Dade Police Department that reverse the city's position on local immigration enforcement. In 2006, Miami's police chief was one among many representatives of global cities to speak out against the local enforcement of civil immigration violations.[93] New York City Police Commissioner Ray Kelly said, "We want recent immigrants in particular to know that the Police Department is not an immigration agency."[94] One year later, Miami-Dade issued two legal opinions asserting local authority to enforce immigration laws.[95] While recognizing that police cannot perform a civil immigration arrest or detention without special permission, the agency asserted that its officers could arrest an undocumented immigrant as a suspect for the federal misdemeanor of improper entry.[96] The memos explained that Miami-Dade police do not uniformly enforce immigration law for lack of resources, *not* for lack of legal authority.[97] In response to the gray areas surrounding the legal claim, the first memo compared border crossing to other federal felonies when it reasoned: "Although the Supreme Court has not ruled on this matter, there are persuasive court decisions which suggest that state or local police may already have the authority to arrest for violations of federal law."[98]

The evolution of the 287(g) program begs two fundamental questions. First, are civil immigration and criminal law enforcement compatible enterprises for criminal law enforcement agencies? Second, is ICE competent to supervise devolution programs? The first question relates in part to the murkiness produced when civil and criminal laws intersect. It may not be wise to allow the executive branch—whose powers grow instantaneously through 287(g)—to blaze trails by practice through the dense thicket of social, legal and financial issues surrounding the devolution of immigration enforcement. The second challenges the organizational capacity of the federal agency charged with leading the devolution campaign.

No case study better answers both questions than Arizona. In 2005 the border state became the ICE poster child for interior immigration enforcement. Arizona has the largest 287(g) program in the country. Starting in the state prison system, ICE moved to introduce civil immigration enforcement into street operations. The 287(g) program—along with subsequent state and local "criminal illegal alien" campaigns—has made Arizona the nation's leading laboratory in local immigration enforcement. The results are striking. As one Arizona criminologist put it, "If you want to see how 287(g) does *not* work like a laser, come to Arizona."[99]

CHAPTER II:

THE ARIZONA LABORATORY

INTRODUCTION

In the Grand Canyon State, an unnatural landmark disrupts the scenery: prisons. While the United States leads the world in incarceration rates, Arizona is the prison capital of the American West.[1] The state devotes one tenth of its general fund expenditures to Corrections—among the highest proportions in the nation.[2] Currently 35,000 people are in state custody. If trends continue, that number will spiral upwards by fifty-two percent over the next decade.

With 6.1 million residents, Arizona's statewide population is also spiraling upwards, growing three times faster than the national average.[3] Notably, Latino population growth has outpaced that of Whites.[4] Twenty-nine percent of residents are Latino—nearly double the national average. The state's percentage of foreign-born residents is comparable to the rest of the US. Yet some attribute the racial demographic shift to a spike in *illegal* immigration.

Sheriff Joseph Arpaio of Maricopa County, or Sheriff Joe, as Arizonans call him, has brought immigrants into the criminal justice system. He spent decades building his reputation as a maverick lawman. In January 2007 the Bureau of Immigration and Customs Enforcement (ICE) granted him the largest and broadest 287(g) program in the country. Sheriff Joe quickly deployed the new civil powers to conduct random street raids and lock up arrestees without probable cause. He spoke candidly about the added value of these powers: "When we stop a car for probable cause, we take the other passengers too."[5] While fans marveled at the Sheriff's unfettered force, critics sued him for rampant racial profiling. In the court of public opinion, Arpaio both enjoys high approval ratings and suffers routine indictments for civil rights abuses in the *New York Times*.

But as is the case with many epic stories, the hero is not the driving character, nor is his crusade the central battle. The *Wall Street Journal* has called Arizona a "laboratory for new ways to crack down on illegal immigrants."[6] This characterization keys into a basic fact: Arizona is the nation's leader in locally driven immigration enforcement. The mix of political leadership that has created the Arizona laboratory is not especially unique. As every branch of government has engineered different responses to unbridled prison expansion, rapid population shifts, and xenophobic fury over foreigners of color, the federal immigration mandate has devolved into state and local hands. The recurring element in each Arizona laboratory experiment is the "criminal illegal alien." With the sum of the work greater than the individual parts, the case of Arizona provides a window for viewing how a federal agency can traverse the politics of local democracy and, in the process, poison the local criminal justice system.

In 2005 former governor and moderate Democrat Janet Napolitano worked to shift the focus of anti-immigrant zeal from public assistance to public safety. While nativists complained that immigrants drained the public coffers, Napolitano redirected her attention to a purportedly emerging crisis of undocumented felons in the state prison system. To address the problem, the governor brokered Arizona's initial 287(g) agreement. The first of its kind in the country, the contract deputized state prison guards to perform civil deportation duties. The governor later signed a second agreement with ICE to deputize street and highway police in the state's Department of Public Safety.

The 287(g) program did not assuage anti-immigrant zeal as much as it conceded a new target, and helped to spark other novel public policy solutions. In March 2005 the State Legislature passed the first state-level human trafficking law in the country, making "the smuggling of human beings for profit or commercial purpose" a felony.[7] Within months, Maricopa County attorney Andrew Thomas, a conservative prosecutor known for taking test cases, issued a legal opinion charging that the victims of trafficking were conspirators in the crime. His conspiracy theory campaign rounded up thousands of undocumented immigrants, secured their conviction in state courts, and effectively widened the pool of "criminal illegal aliens."

State Representative Russell Pearce of Mesa, Arizona, an ideological politician and savvy bureaucrat, created a new sanction for immigrants in the criminal courts: pretrial incarceration. In November 2006 he bypassed his colleagues and successfully entreated voters to pass Proposition 100. This amendment to the state Constitution overwhelmed the bail system by stripping undocumented immigrants of the right to bail. Arizona's criminal process morphed into a hybrid immigration proceeding. In the face of two masters, judicial officers who were neutral arbiters on criminal charges became prosecutors on civil immigration charges.

Sheriff Joe, a glutton for media attention, capitalized on each moment. He offered an endless supply of cheap jail beds to aid Governor Napolitano's crackdown. Arpaio formed a special unit to take Thomas' legal maneuvers to the streets for a test drive. He partnered with Pearce to secure state funding for his local anti-immigration campaigns. He asked ICE for civil immigration powers that blurred the limits of his executive power and effectively took the handcuffs off his police force. Armed with legal, fiscal, and communications resources, Arpaio's "criminal illegal alien" crackdown spilled over rapidly, even drawing a few American citizens into the crosshairs. In just two years, racial profiling and state-sponsored terror became the norm in Maricopa County.

The role of ICE in producing the Arizona laboratory remains under-scrutinized. Ironically, Arizona deepened its relationship with ICE through the 287(g) program only because the federal agency was failing in its own duty to deport immigrants in the state corrections system. But once the door was opened, ICE leadership showed extraordinary opportunism by using Arizona's local and state resources to build the federal agency's detention and deportation capacity. ICE granted Maricopa County the most robust 287(g) contract in the country. When local politicians expressed concern that Sheriff Joe was fueling a nativist campaign, ICE spokespeople defended his use of the 287(g) program.

ICE's failure to properly supervise its 287(g) agreements is consistent with the agency's inability to properly manage its federal detention system.[8] The Maricopa County 287(g) program remains in full effect. Not only has it served as a national model, it also acts as a gateway drug, pulling law enforcement agencies that previously resisted deportation work into the fold.

Arizona faces a $2 billion budget deficit—among the largest for any state in the nation.[9] The cost of immigration enforcement campaigns to state and local taxpayers, while yet to be itemized, is undoubtedly sizeable. Perhaps the greatest casualty of immigration enforcement in Arizona is local democracy. In this moment of global economic crisis, financial and civil rights concerns beg the question: Who is investigating the role of ICE in the Arizona laboratory?

Immigration is a strategic site for the white supremacist movement in Arizona.

Russell Pearce is the godfather of Arizona's immigration experiments. He represents Mesa in the Arizona House of Representatives. He stands in stark contrast to the breed of politician who incites anti-immigrant sentiment for political popularity. Pearce is a devout Mormon, but when friends and foes alike call him a "True Believer," they are referring to his belief in law and order.[10] He chairs the Appropriations Committee, a powerful body that controls state revenue expenditures.

Pearce's twenty-three years of service as a sheriff's deputy in Maricopa County took a physical toll. A teenager who may have been Mexican shot off the third finger on Pearce's right hand when he was trying to make an arrest for underage drinking.[11] Ironically, years later, Pearce's tenure heading the Arizona Motor Vehicle Division ended in disgrace after his son Justin, a low-level employee at the

Division, was arrested for issuing fake licenses to underage residents.[12]

Although he publicly distances himself from the white supremacy movement in Arizona, Pearce's base includes white supremacists.[13] His documented relations include the White Knights of America, a white nationalist organization that features calls for "national socialism" on its website.[14] In June 2007 he spoke at a White Knights rally in Phoenix along with J.T. Ready, a neo-Nazi who has served as a Republican precinct committeeman in Mesa for several years.[15]

Through his anti-immigration crusades, Pearce's extremist views on race are becoming normalized. He has publicly advocated the revival of "Operation Wetback," a 1950s program that deported more than 130,000 Mexicans largely on the basis of their skin color—among them an unknown number of US citizens and Native Americans.[16] But Pearce's long-term vision does not cloud his short-term traction. He was the original drafter of Proposition 200, a sweeping initiative approved in November 2004 by fifty-six percent of all state voters, including forty-seven percent of Hispanic voters. The initiative required that people who register to vote or apply for public benefits prove that they are US citizens, even when citizenship is not a requirement for the benefit sought. It also moved to turn state employees into immigration police by requiring them to report suspected "illegal immigrants" to the feds. Public servants failing to do so could be slapped with lawsuits, criminal charges, and penalties including a fine of $750 or a jail term of four months.[17]

Prop 200 had political and financial backing from hate groups,[18] including a half million dollars from the Federation for American Immigration Reform (FAIR).[19] FAIR founder John Tanton has urged vigilance in the face of an increasingly multicultural society, "As whites see their power and control over their lives declining, will they simply go quietly into the night? Or will there be an explosion?"[20] FAIR president Dan Stein posed a rhetorical question, "Should we be subsidizing people with low IQs to have as many children as possible?"

Tucson resident Jen Allen said, "Arizona has been the incubator for many immigration policies passed through the ballot or the legislature. We started the sad trend that caught on nationwide years later." Allen is the director of the Border Action Network, which has monitored state-level immigration bills since 2006. Prop 200 was one battle in an ongoing war between Pearce and Napolitano, who had a history of vetoing bills he supported. A year earlier the governor vetoed a voter-identification bill passed by the legislature.[21] Prop 200 resuscitated and expanded that measure.

An outspoken critic at public rallies, Napolitano was among Prop 200's staunchest opponents. She successfully mitigated the initiative's intended impact by challenging it procedurally. Almost immediately after voters approved Prop 200, proponents charged that the governor was dragging her feet to avoid implementation. Arizona Attorney General Terry Goddard had quickly issued an opinion that interpreted the measure narrowly to apply only to a handful of state benefits (e.g., rental and housing assistance) under the state Welfare Code, and not to broader state programs such as health insurance for the poor. By early 2008, Prop 200 proponents were *still* battling in court to force state agencies to demand legal proof of state residency prior to benefit approval. Pearce claimed that the governor's narrow implementation of the initiative amounted to a "back-door veto."[22]

GOVERNOR NAPOLITANO TRIANGULATED THE ANTI-IMMIGRANT AGENDA

Governor Napolitano is considered one of the nation's most astute public executives. Appointed by former President Bill Clinton as the US Attorney for Arizona, she then successfully ran for Arizona Attorney General in 1998 and swept into the governor's office in 2003. *Time Magazine* has named her one of "America's 5 Best Governors."[23] She takes pride in her political profile stating, "I'm hard to pigeonhole. I'm very pro-choice, but I'm also a prosecutor."[24] In 2009 President Barack Obama appointed her Secretary of the Department of Homeland Security—an agency she sharply criticized while a governor.

Triangulation has been the trademark of her leadership on immigration issues.[25] Principled opposition to the extreme measures in Prop 200 cost Napolitano precious political capital. She recovered by finding common ground with opponents while blunting the sharpest edges of their agenda. Border Patrol "crack down" operations in California and Texas had pushed migrants to enter through Arizona. Napolitano entreated ICE and the Border Patrol to conduct joint operations with Arizona's Department of Public Safety to catch human traffickers at the border, as well as in the state capital. When neither agency expressed interest, she became America's first governor to call a state of emergency related to border crossings. In a harshly worded letter to then Homeland Security Secretary Michael Chertoff, she charged, "This bewildering resistance is a further example of ICE's inattention to Arizona."[26]

Prior to Napolitano's charge, the short history between ICE and the state of Arizona had been rocky. ICE offices around the country are each headed by a Special Agent in Charge (SAC). Phoenix ICE went through six SACs in its first two years and could not retain stable leadership.[27] The very first SAC shot himself in the head while driving on the interstate to a press conference. Early in 2005 officials at the Arizona Department of Corrections complained that they could not get ICE to move 544 immigrants who had completed their criminal sentence from the state prison system into the civil deportation system.[28] The administration charged that it cost $223,000 daily to incarcerate undocumented immigrants.[29]

Governor Napolitano brokered the initial 287(g) agreement in Arizona, deepening the state's relationship with ICE.

Napolitano circumvented Phoenix ICE and wrote directly with Secretary Chertoff in July 2005, arguing for use of 287(g) powers in Arizona to detain traffic violators. "Local law enforcement officers often come into contact with large numbers of UDAs [undocumented aliens] during routine traffic or other law enforcement activities."[30] She forged ahead to convene an Immigration Enforcement Summit, to which Homeland Security sent representatives.[31] The summit was a closed-door, invitation-only event for more than one hundred law enforcement officials from federal, state, and local levels of government. The governor, who was vacationing in Russia, did not attend. She entrusted her policy tsars to report the recommendations. At the conference, a 287(g) agreement between ICE and the Alabama Department of Public Safety was touted as a successful model.[32]

Tucson Police Chief Richard Miranda, a summit participant, was against the move to deputize. "It's very important for the federal agencies to understand that when they come into our communities, they have a significant impact on the relationships we have been building with our Hispanic communities."[33] When critics charged that Napolitano was pandering to a xenophobic agenda, her director of public safety wrote in an op ed in *The Arizona Republic*, "Let me be clear: We will not indiscriminately stop people based on skin color. We will not be roaming neighborhoods or going to job centers. We are not going to engage in 'sweeps.'"[34]

The conference ended with plans to deputize two state agencies to perform civil arrest and detention duties: the Department of Corrections and the Department of Public Safety. In September 2005 ICE signed a 287(g) Memorandum of Agreement (MOA) with the Arizona Department of Corrections. In the agency's press release, Corrections Director Dora Schriro announced, "It is an excellent opportunity for Arizona to partner with ICE and expedite the deportation of undocumented aliens sooner, providing Arizona taxpayers with welcome relief."[35]

The MOA gave ten deputized corrections officers the civil authority to issue an immigration warrant (or "detainer") for any prisoner suspected of being a noncitizen—legal or undocumented. It was the first time in the country that corrections officers became deportation agents. After receiving ICE training on immigration laws and procedures, the deputized officers interview any foreign-born prisoner to determine whether there is probable cause for an immigration violation. Their duties include fingerprinting; preparing documents to begin deportation proceedings before the end of their prison sentence; and preparing documents to deport them.

Under the bundle of federal immigration reforms passed in 1996, most felony convictions result in mandatory deportation. One's length of residency in the US, number of American-born children, and proof of rehabilitation are irrelevant. Yet the matter is not always so straightforward. For example, an immigrant may be a US citizen without knowing it.[36] If an immigrant has a well-documented fear of persecution back home, it could lead to a claim to remain in the United States under the internationally-binding Convention Against Torture.[37] Also the interplay between state criminal convictions and the federal grounds of deportability is dynamic—whether a state criminal conviction results in deportation shifts from one case to the next.[38]

Director Schriro described the swift deportation process in the state prisons stating, "They begin deportation literally the first day that they are admitted … We have individuals trained by ICE who are bilingual. As part of the intake process, they go through this ICE procedure. Once [immigrants] are identified, their status is ascertained … For many it's resolved in a mere matter of days."[39] Given its complexity, US immigration law is likened to the tax code. It appears that corrections officers deputized under 287(g) play the role of prosecutor, taking immigration status itself as conclusive proof of deportability. Since they are civil cases, deportation respondents are not assigned public defenders. Few, if any, Arizona prisoners are in a position to obtain a lawyer to raise claims such as derivative citizenship or documented fear of persecution.

Without legal safeguards, there are many disincentives to seek a court hearing to challenge deportation. On the other hand, the state's early parole program provides one great incentive to sign off on self-deportation. Under Arizona law, a person convicted of low-level drug and property crimes may qualify for release under parole after serving half of the prison sentence. A noncitizen, legal or undocumented, can gain release early by signing up for deportation.[40] Arizona prisoners are undoubtedly eager to gain release from prison, even if it means expulsion from the US.

DOC officials touted the 287(g) program as a money saver. By March 2007, Arizona taxpayers had purportedly saved nearly $9 million by accelerating ICE's removal of eligible state prisoners.[41] Director Schriro added another benefit to the list:

> From my perspective, forget about cost savings for the moment. As an administrator of state prisons I need to know as much as I possibly can about inmates as individuals for the classification decisions I make. If I don't know that someone is amenable to deportation, I might place them in a custody level or assign them a job that might increase the possibility of escape. I think 287(g) is important for the fundamental classification processes we pursue.

The ICE fact sheet states that 287(g) participants "ensure that criminal aliens incarcerated within federal, state and local facilities are not released into the community upon completion of their sentences."[42] But in New York, which does not have the 287(g) program, the same goal has been accomplished without making corrections officers perform civil deportation duties. New York immigrant prisoners are identified for deportation by ICE. The New York State Department of Correctional Services maintains an "institutional hearing program" staffed by ICE personnel in three prisons. ICE trial attorneys prepare and prosecute the resulting deportation cases; and immigration judges, assigned by the Executive Office for Immigration Review, hear and decide those cases. Since 1995 prisoners convicted of non-violent offenses have been eligible for early parole from New York State prisons to their home countries.[43]

In March 2007 Arizona deputized seven more officers to staff the first "ICE unit" within a state prison—a trailer office set up with ICE technology for 287g activities.[44] The program was designed to reduce population pressures and save substantial sums by seamlessly moving deportable prisoners from state criminal custody into federal civil custody. Schriro explained, “We provided staff. I did a balancing act and decided for all the reasons I mentioned, it was advantageous to us to provide the resources that were necessary. It would be nice if we were reimbursed for it.”

Rather than defuse the anti-immigrant agenda, Napolitano shifted its focus.

The public target of Prop 200 was the immigrant seeking either voting rights or welfare benefits. Napolitano’s state level 287(g) program, presumably targeting “criminal illegal aliens,” shifted public outrage to a lower common denominator. It was an ironic moment in partisan history. Arizona Republican Senator John McCain was gaining notoriety for championing comprehensive immigration reform in Congress by proposing increases in border and interior enforcement while granting limited legalization. Meanwhile Napolitano was perhaps the least noticed Democrat to effectively institute interior immigration enforcement by devolving deportation duties from federal to local hands.

Napolitano’s move to deputize state corrections officers as immigration enforcers encountered no resistance. It did not, however, receive praise either.[45] To Representative Pearce, the state’s first 287(g) agreement was a step backward. “This question of inherent authority is crazy. They’ve done several programs to incentivize local enforcement. 287(g) is not needed. It is meant to be a carrot, not a permission slip.”[46] The few media articles to document the program took no notice of the legal significance in grafting civil enforcement duties onto criminal justice process. They instead assessed it as a political concession from the liberal governor. The faint praise offered by rightwing restrictionist Mark Krikorian, director of the Center for Immigration Studies, was foretelling. “This effort by the governor is not a bad idea, but it shouldn’t be over-hyped … It’s one step in the right direction, but only one step.”[47]

Napolitano’s chief of staff Dennis Burke promised that more steps were in store. “Before the governor opened up the dialogue with Secretary Chertoff, the local feds were basically stonewalling the state. The devil is in the details. We need to get the feds to focus not only on the border but also the impact of illegal immigration on metropolitan Phoenix.”[48] Napolitano’s partnership with ICE did not change the focus as much as expand it.

AS THE STATE’S TOP EXECUTIVE STRATEGIZED WITH THE FEDS, THE ARIZONA LEGISLATURE RAISED THE ANTE

Nearly a century ago, Arizona passed a measure that required employers to hire American citizens rather than immigrants and punished violators with jail time.[49] Fearful of prosecution, a local restaurant owner fired his Austrian cook. The cook sued. The US Supreme Court ruled in the worker’s favor, striking down the state law since it denied noncitizens the equal protection guaranteed by the Fourteenth Amendment. Also affirming principles of preemption and the plenary power doctrine, the Justices wrote, “[T]he authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government.”[50]

In 2005 Arizona flirted with the Constitution’s limits once more when the legislature passed the first state-level human trafficking law in the country.[51] It made “the smuggling of human beings for profit or commercial purpose” a state-level class four felony. The bill emulated *and* contradicted the federal Trafficking Victims Protection Act of 2000.[52] The federal law not only provided for prosecution of traffickers, but also required the feds to secure appropriate services for victims from social service agencies in the US, as well as from counterparts in the victims’ home countries. Arizona legislators brought in victims to testify during their deliberations, however, the state law they enacted glossed over the victims’ rights as well as international relations aspects of human trafficking.[53] It also failed to clearly define “smuggling.” Coming one year before a nationwide spike in state-level immigration legislation, Arizona was blazing the trail in a movement to devolve immigration controls.[54]

One county prosecutor creatively interpreted the state statute to test executive power against the intent of the legislature and the checks of the judiciary.

A study by Arizona State University suggests that local law enforcement executives receive little guidance in how to prioritize immigration.[55] They find themselves caught between conflicting pressures from both the public and private sectors. The new smuggling statute is a case in point. When Phoenix police raided a "drophouse" where traffickers store human cargo, they turned the matter over to the feds, believing theirs was the proper venue.[56] The Arizona Department of Public Safety deferred enforcement because the governor was negotiating inter-agency partnerships with Homeland Security. City police chiefs and county sheriffs uniformly declined prosecution, with one exception.

County Attorney Andrew Thomas is the chief prosecutor of Maricopa County. The county encompasses the state capital of Phoenix—a bustling metropolis two hundred miles from the US-Mexico border. Its current population of 3.1 million doubled over the past decade, making it the nation's fifth largest city.[57]

An elected leader, Thomas' reputation rests on his Harvard Law degree, his marriage to a Latina, and his record of relentless prosecution. While his jurisdiction's murder rate remained constant, Thomas doubled the number of capital punishment cases and turned Maricopa County into the nation's new death penalty capital.[58]

Thomas ran for office in 2004 with a campaign pledge to end illegal immigration. Soon after Napolitano spearheaded the state-level 287(g) program, he convened his own law enforcement summit featuring nativist leadership from around the country.[59] He wrote to the governor, "Given the state of emergency you have appropriately called, the anti-coyote law is too important a tool to sit and gather dust because of concerted nonenforcement."[60]

Thomas eagerly politicized the trafficking law. At the scene of a crime, it is often difficult to discern who is the victim and who is the perpetrator. Thomas developed a legal premise that made the difference irrelevant by asserting that any individual who pays a trafficker (or "coyote") is a felony conspirator in the trafficking act. He published his conspiracy theory of immigrant smuggling in his agency's 2005 annual report.[61] Subsequently, Sheriff Joe formed an anti-smuggling unit to enforce the novel theory.

Maricopa's conspiracy theorists highjacked a constitutional battle with a political campaign.

Arizona's new law—the nation's first state-level international human trafficking law—was a constitutional test in its own right. Any legal practitioner could anticipate the judicial battle ahead. Kyrsten Sinema, a Democratic representative who had sponsored the legislation because she believed it supported trafficking victims, was indignant announcing, "As soon as it passed, it was perverted by Thomas and Sheriff Joe."[62] The conspiracy theory created an unanticipated anti-immigrant extreme.

All but two of the immigrants caught in the first sweep had simply paid to be smuggled.[63] Thomas justified the public investment as collective deterrence. "By targeting coyotes, we'll be able to have a multiplier effect on the crime rate."[64] He indicted them for the class four felony of Conspiracy to Commit Human Smuggling. He offered pleas to the lesser offense of Solicitation to Commit Human Smuggling—a class five felony—and probation with the condition that they agree to leave the country. Nearly thirty took the plea bargain in order to get out of jail. A dozen cases were dismissed. The remaining defendants went to trial before Arizona Superior Court Judge Thomas O'Toole.

Judge O'Toole was an appointed judge on the verge of retirement. He had little to lose professionally, but he nonetheless walked a tightrope. He, like everyone else, knew that these were test cases in a raging battle over the relationship of immigration enforcement and the criminal justice system. Attorneys appointed to represent the remaining defendants moved to dismiss, arguing that the law was preempted by the federal Constitution; that the conspiracy theory of smuggling was legally impossible and contradicted the state legislatures' intent; and that the court lacked jurisdiction.[65]

The judge overruled the defense's arguments. His written decision reasoned that it was unclear whether the Maricopa prosecutors were violating the legislature's intent. The burden was on lawmakers, not his court, to clarify the purpose of the bill. But O'Toole blunted the prosecution's victory when he divided the defendants into two groups. He distinguished between those who simply paid the smuggler, and those who paid less by offering a service: "Just because you buy a ticket on the Underground Railroad doesn't mean you operate it … but some guy who drives the van to get a reduced rate can be convicted for smuggling."[66] O'Toole also ruled against Thomas on evidence. Before a jury could convict two men who drove for a reduced fee, the judge terminated proceedings because the prosecution failed to present a body of evidence to suggest a crime actually took place. He ruled that the defendants' confessions alone could not prove guilt.

In July 2008 the Arizona Court of Appeals upheld the conviction of Juan Barragan-Sierra, a mere ticket holder on the "Underground Railroad," explaining that "the language of the conspiracy and human smuggling statutes ... is clean and unambiguous, and those statutes, read together, plainly allow the person smuggled to be convicted of conspiracy to commit human smuggling."[67]

The conspiracy theory faced resistance from two opposing quarters: an immigrant rights coalition and ICE. Pro-America, a coalition formed in response to immigration enforcement in Phoenix, was the lead plaintiff in a lawsuit alleging that Sheriff Joe and County Attorney Thomas violated the US Constitution in a public relations stunt to "garner local and national media attention and further their political fortunes."[68]

ICE passively resisted Sheriff Joe's force. After two men were acquitted of all conspiracy charges in O'Toole's court, Sheriff Joe attempted to have them deported. ICE officers did not respond positively. Flabbergasted, Sheriff Joe ordered his own deputies to drive the immigrants beyond Maricopa County's jurisdiction and hand them over to US Border Patrol agents. Representative Sinema, who supported the trafficking statute, expressed her horror: "That's totally illegal. It's kidnapping."[69] But Arpaio must have confused these acquitted men with "criminal illegal aliens" when he reasoned to the media, "When a guy gets convicted, I have to do something with him … I made my own personal decision. We transport them to the border or to the Border Patrol."[70] In one month, his deputies made nineteen trips to the border to deport fifty-three immigrants.

The campaign left its targets with a lifelong punishment.

Despite short-term resistance, the conspiracy theory campaign aligned with the federal agency's overall mission. In 2003 the ICE Detention and Removal Office issued a ten-year strategic plan entitled *Endgame*; it included a goal of "eliminat[ing] the backlog of fugitive aliens, focusing on criminals first."[71] In the first months of the campaign, approximately 250 people were arrested, the majority of whom were undocumented immigrant males in their twenties who planned to find work in California.[72] Most people charged under the Arizona conspiracy theory quickly entered a plea of guilty, thereby joining the ranks of the "criminal illegal aliens" who are top-priority law enforcement targets.

Federal immigration law stretches the concept of felony disenfranchisement into the civil arena. Virtually any crime, even a misdemeanor, bars the undocumented person from gaining legal status; and the lawful permanent resident from naturalizing. Once a noncitizen has a criminal record, the path to citizenship is permanently blockaded. Thomas explained that his conspiracy theory intentionally sought to capitalize on these collateral effects:

> The policy of requiring a felony conviction for any plea agreement is an important one … That conviction will harm their ability to immigrate here legally and become a citizen … In a sense, it is this office's attempt to enforce a no-amnesty program. It's hard for somebody with a felony conviction to receive amnesty down the road for citizenship purposes, so it serves that additional purpose. All the better, as far as I'm concerned.[73]

According to law enforcement databases, in the first two years of the conspiracy theory campaign, deputies arrested 578 immigrants using traffic stops, most of them men in their twenties and thirties from central Mexico.[74] Of those, 498 faced one charge: paying a smuggler. Deputies found just one firearm and seven suspects with drugs, five of whom possessed relatively small amounts of marijuana. Incarceration of the human smuggling defendants has cost Maricopa County over $5 million.[75] The state smuggling law has yet to impact the Arizona prison population; to date, no one has received a prison sentence for human trafficking.

ANOTHER STATE IMMIGRATION MEASURE SPIKED THE COUNTY JAIL POPULATION

Throughout her tenure, Governor Napolitano worked to stave off the most extreme anti-immigrant measures. In 2005 she vetoed a raft of anti-immigrant bills passed by the legislature. SB 1306 would have given explicit and direct authorization to local law enforcement officers to "investigate, apprehend, detain or remove aliens in enforcement of United States immigration laws." SB 1118 would have implemented the voter ID provisions in Prop 200. SB 1167 would have made English the "official language" of the state. SB 1402 would have appropriated more than $700,000 to investigate fraudulent applications for driver licenses. HB 2030 required applicants for state benefits to provide proof of legal status. HB 2709 would have required the state to contract for a private prison that would be constructed in Mexico to hold Arizona prisoners with Mexican citizenship. SB 1511 would have prohibited law enforcement and other government agents from accepting identification cards issued by foreign nations as proof of identity.

Russell Pearce fumed at how effectively Napolitano blunted his victories, charging that she was a spectator to "the destruction of America and our neighborhoods."[76] Pearce found himself locked out of Napolitano's invitation-only Immigration Enforcement Summit when he arrived with a gaggle of fellow legislators. He complained, "The Governor vetoed a bill of mine that would have made it clear that local law enforcement has the authority to arrest illegal aliens. Then she calls a law enforcement summit on the issue of how local law enforcement can help. Wow what a day."[77]

Putting his pen to paper once more, Pearce wrote another state-level immigration bill. While the human-trafficking statute defined a new category of crime, Proposition 100 created a new *pretrial* punishment for immigrants charged with crimes. Pearce took Prop 100 straight to the voters in the November 2006 elections who approved it by seventy-eight percent.

Prop 100 added immigrants to the list of criminal defendants who cannot apply for bail. The Arizona Constitution designates that criminal defendants facing certain charges, while innocent until proven guilty, do not have the right to seek bail because they are categorically a flight risk or threat to society.[78] Those charged for capital offenses were stripped of bail when the Arizona Constitution was first established. Arizona lawmakers later added people charged with serious sex offenses; those arrested while already out on bail for a prior felony charge; and those deemed to pose a danger to the community.[79] Prop 100 amended the state Constitution to create a new no-bail category:

> For serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident

or the presumption great as to the present charge.[80]

The term "serious felony" had no clear legal meaning in Arizona statutes. Lawmakers promptly amended the criminal code to define it as Aggravated Driving Under the Influence, and any felony in classes one through four—including the charge of conspiracy to smuggle. In fact, most Arizona felonies are classified in levels one through four, including felony shoplifting, simple drug possession cases, as well as most thefts and forgeries.[81]

"Proof evident, or presumption great"[82] is a standard of evidence higher than probable cause (typically required to arrest a suspect), but lower than proof beyond a reasonable doubt (the standard needed to convict). Pearce saw the legislated parameters as a compromise. "We passed the initiative at the ballot to ensure the handcuffs are off law enforcement. My position is if you are here illegally and jaywalking, you should not be released."[83] He threatened to use his powers as appropriations chair to withhold state revenue if Governor Napolitano vetoed his bill. She acquiesced.

Prop 100 set off chaos in the courts.

No data source indicates that immigrants commit more crimes than citizens. In fact, the opposite appears to be true.[84] But the volume of arrestees who are foreign-born exceeds that of prior no-bail categories. Upon Prop 100's implementation, that volume overwhelmed the courts. Meanwhile the law's intent and implementation turned the Maricopa County court into a battleground over criminal procedure.

Within twenty-four hours of arrest, every defendant receives a hearing before the Initial Appearance Court, a subset of the Arizona Superior Court. The court informs a defendant of the charges against him or her, appoints counsel if a defendant is indigent, and makes the initial determination concerning conditions of release.[85] No defense attorney is required to be present and the proceedings do not yield an official record.

Historically, neither prosecutors nor defenders were present at Initial Appearance hearings. Immigration status was simply a factor to be considered in the court's assessment of flight risk and community ties.[86]

Under Arizona law, any person faced with a denial of bail under the Constitution is entitled to a "Simpson Hearing."[87] In this full and adversarial evidentiary hearing, the prosecution carries the burden of convincing the court that the evidence against the defendant rises to the level of "proof evident, or presumption great." The defendant is represented by counsel and has the right to testify, to cross-examine the state's witnesses, and to dispute the evidence presented.

Maricopa County Attorney Thomas began assigning prosecutors to the Initial Appearance Court to argue that immigrant defendants be denied bail. But he took the position that court officials, and not just local law enforcement, were obligated to provide evidence about whether a defendant lacked legal immigration status.[88] Defense attorneys, on the other hand, charged that Prop 100 turned the bail system into a regimen for pretrial punishment. They raised issues about the standard of evidence required to determine whether a defendant had "entered or remained in the United States illegally."[89] They charged that any inquiry by court officials about legal status would violate both the defendants' right not to incriminate themselves, and the separation of powers doctrine.

Court officials struggled to understand their newfound situation. Sheila Madden, an Initial Appearance Court commissioner, issued a memo—approved by the Presiding Criminal Court Judge—that discussed the burden of proof and factors that should be considered by commissioners when determining if defendants were non-bondable under Proposition 100. Under her direction, the manager of the Superior Court's Pretrial Services Agency instructed the pretrial staff who interview defendants to determine bail suitability not to ask citizenship questions due to concerns about violating the Fifth Amendment protections against self-incrimination.

Commissioners were not familiar with federal immigration law and remained puzzled over what evidence would be sufficient to serve as a basis for denying bail. A detainer placed by ICE was thought to be insufficient because, as one court officer noted, "Immigration holds get taken off and put on all day long."[90] Neither police nor prosecutors submitted sufficient evidence in Simpson hearings regarding the immigration charge to meet the standard of evidence. Therefore, the court set bail for most immigrant defendants.

This situation erupted in a media circus when one of the undocumented immigrants subject to Prop 100 was granted a $10,000 bail because prosecutors failed to present sufficient evidence regarding his immigration status. The immigrant defendant had been released from criminal custody directly to ICE officers who then deported him to Mexico. The County Attorney's Office failed to meet the legal requirement to proceed with his preliminary hearing by the end of the tenth day after arrest. Eleven days later he returned to Maricopa County and was arrested for the murder of his cousin.[91] Whether the defendant had a $10,000 bond or was held non-bondable, if the county attorney did not proceed on the tenth day, the law required that the defendant be released.

However, the County Attorney's Office "spun" its own failure to win in the media—claiming that the "activist judiciary" had refused to hold the defendant in jail without bond. Criticized for not doing his job, Thomas turned the tables and alleged that judges were to blame since ninety-four percent of defendants subject to Prop 100 had been given an opportunity to post bail. Ignoring the fact that many did not possess the means to do so, he charged, "The judiciary of Maricopa County is openly defying the will of the people and creating a crisis of public safety. It is only a matter of time before illegal immigrants wrongly released by these judicial officers commit additional crimes, including violent crimes."[92] Pearce also blamed the liberal bench.[93] An *Arizona Republic* columnist followed suit writing, "Judges who ignore no-bail law may as well give you the finger."[94]

Chief Justice Ruth McGregor of the Arizona Supreme Court responded. In April 2007 she issued an order outlining new Initial Appearance procedures in Prop 100 cases.[95] A full evidentiary bail hearing should be held within twenty-four hours if the court found probable cause to believe that a defendant had committed a crime, and:

> If the allegation involves A.R.S. § 13-3961.A.5, the court shall then determine whether probable cause exists to believe that the defendant entered or remained in the US illegally and that the proof is evident or the presumption great that the defendant committed the charged serious felony.[96]

The defendant would be represented by counsel and could present evidence, testimony, and witnesses. Any testimony presented by the defendant would not be admissible on the issue of guilt at later proceedings. At the hearing, the standard of evidence would be "proof evident and presumption great" for both of the issues at hand—commission of the crime and immigration status.[97]

At the same time, Chief Justice McGregor rejected Commissioner Madden's concerns about self-incrimination, asserting that Pretrial Services officers *could* inquire about the immigration status of arrestees. But she contended that the responsibility for providing factual information to the court in cases affected by Prop 100 should remain with law enforcement and prosecutors. She ordered that the court form filled by police be revised to capture immigration status information for Prop 100 purposes. And she assured lawmakers that her office would invest resources to train judicial officers so that immigrants do not fall through the cracks.[98]

McGregor's order was rescinded just three months later when the legislature passed an emergency bill to "clarify" Prop 100.[99] As drafted by Russell Pearce, the proposition had been stunningly inattentive to the impact of weaving immigration law into criminal court proceedings. In the aftermath, Pearce saw a window of opportunity to codify the extremes. Skewing Thomas' data by claiming that all immigrant defendants who were granted bond actually gained release, Pearce charged that Maricopa County judges had opened the floodgates. "The courts were releasing 94.7% of immigrants charged with serious crimes."[100] His clarification bill lowered the evidentiary standard for determining immigration status to probable cause and required that the determination be made at Initial Appearance. The bill set forth a menu of different items of proof to be accepted by the court, including an ICE hold, "an indication by a law enforcement agency that a person is in the United States illegally," the defendant's confession, or court-collected information. When Governor Napolitano signed the clarification bill, she reprimanded the courts for seeking an evidentiary standard higher than the policeman's probable cause.

> Such a higher standard is inconsistent with the intent of voters in enacting Proposition 100, the burden of proof required of prosecutors in federal cases, and the position of the State Attorney General … It is appropriate that our standard of proof be consistent with Arizona voter intent and federal law.[101]

The Chief Justice duly acquiesced. New court rules formulated in the wake of the clarification bill eliminated the requirement for an evidentiary hearing within twenty-four hours. A determination about bail eligibility would now be made at Initial Appearance. An evidentiary hearing would only be held later if "new evidence becomes available in the case."[102] Meanwhile, legal challenges to Prop 100 and the procedures used to implement its no-bail provisions were winding their way through the Arizona courts. The Maricopa County public defender brought suit on behalf of Jose Segura and Francisco Medrano Tovar, two defendants who had been refused bail.[103] Defenders argued that in requiring them to present "material new facts" in order to be granted a full evidentiary hearing, the court had deprived Segura and Tovar their right to due process.

In April 2008 a three-judge panel of the Arizona Court of Appeals held in favor of the plaintiffs on this point: "Initial appearances serve the limited function of providing some check on the ability of the state to hold a defendant, but they continue to be ill-suited to support conclusive findings affecting a defendant's liberty." They concluded that both Segura and Tovar were entitled to a full evidentiary hearing.[104] In September 2008, Chief Justice McGregor amended court rules again, to specify that where a motion for reexamination of conditions of release "involves whether the person shall be held without bail, the motion need not allege new material facts."[105]

The judiciary salvaged the bill from any punitive intent.

In *Hernandez v. Lynch*, public defenders in Maricopa County charged that the language in Prop 100 was so broad that it would apply to legal permanent residents and naturalized citizens if they had initially entered the US without proper documents.[106] Ever ready to push the legal envelope where immigrants are concerned, Andrew Thomas agreed. Appearing to defend Prop 100 before the Arizona Court of Appeals in May 2007, lawyers from the Maricopa County Attorney's Office argued that applying Prop 100 to a naturalized US citizen who had violated immigration laws in the past would serve "legitimate governmental interests."[107]

Defense attorneys took Thomas' rationale as clear evidence that Prop 100 had a punitive intent and was thereby unconstitutional. The Arizona Court of Appeals sidestepped the constitutional question by carving out an acceptable application. While Prop 100 applied to undocumented persons, it could not apply to naturalized citizens or "green card" holders because that would be punitive and unconstitutional. Maricopa County Public Defender Tracy Friddle, who represented defendants of various immigration statuses, petitioned the Arizona Supreme Court:

> Rather than scrutinizing the proposition in light of this and other evidence of punitive intent, the Court grafted exceptions for "persons who enjoy lawful residency status or citizenship at the time

> they seek bail" in an attempt to rescue it from unconstitutionality.[108]

The state's highest court refused to hear the case. Immigration rights advocates continue to battle Prop 100 in the courts. A class action lawsuit filed in United States District Court in April 2008 challenges the constitutionality of Prop 100, the implementing statute, and the new court rules. Lawyers for the plaintiffs charged that the law serves no legitimate governmental interest and requires the court to *disregard* whether pretrial release is warranted under the circumstances of the case:

> For criminal defendants subject to the Proposition 100 laws, judicial officers are required to ignore a host of relevant facts, such as longstanding, close family and community ties, employment history, history of appearances, severity of the offense charged, and criminal history or lack thereof. By way of example, under the Proposition 100 laws, an individual with no criminal history who is a long-time Arizona resident, employed, and the parent of U.S.-citizen children can be the subject of mandatory pretrial detention though charged with a nonviolent offense such as shoplifting or perjury, while a repeat offender not subject to Proposition 100 but charged with a far more serious crime is given a bail hearing and the possibility of release.[109]

Under Prop 100 and public pressure, Arizona's criminal process has morphed into a hybrid immigration proceeding.

Before Prop 100, the Arizona Constitution denied bail to high-risk defendants with categories that implicated small numbers of people. But Prop 100 broke the system by overwhelming it with nearly every immigrant arrested—including those charged with the newly created self-smuggling crime. The state's immigration enforcement law may be the only unfunded mandate that Pearce ever liked.

Pearce distrusted the state's urban judiciary: "These damn appointed judges won't respect the law … Elected judges in rural areas are good."[110] Prop 100 did not only tie the hands of judges, but subverted their foundational mission to be the neutral arbiter of justice. The bill overwhelmed the court's bail process. The criminal court has become schizophrenic, legally speaking. For a criminal charge, the judge treats the defendant as innocent until proven guilty. But in a Prop 100 case, the court acts as the arbiter of immigration status with power to deny defendants' fundamental liberty interests by application of federal civil law.

Throughout the months of controversy over implementation of Prop 100, open warfare had erupted time and again between the Maricopa County attorney and the Superior Court. Presiding Judge Barbara Rodriguez Mundell charged that Prop 100 was being used as a weapon in a political attack on the court. Private attorney Dennis Wilenchik, appointed by Andrew Thomas to act as special counsel, filed motions to remove Judge Timothy Ryan—then serving as the criminal court's Associate Presiding Judge—from *all* cases brought by the prosecutor's office because he had ruled against prosecutors on cases of immigrants denied bail under Prop 100.[111] Commissioner Madden's application for appointment to a judgeship in the Superior Court was vigorously opposed by Russell Pearce and other conservative legislators. She remains a commissioner.

The courtroom atmosphere changed radically. Previously the Maricopa County Adult Probation Department had reported the names of foreign-born probationers to ICE, but got no response from the agency. To protect staff against charges of negligence, Probation proactively hired the private security firm Transunion to increase its capacity to identify foreign-born people, as well as to dedicate personnel to work more closely with ICE.[112]

One veteran Superior Court judge, more than fatigued with Thomas' theatrics, commented, "Andrew Thomas prosecutes everything. He's book smart and common sense dumb. He's got political aspirations. He ran for attorney general and was defeated. His reputation before winning County Attorney was that he couldn't hold a job."[113]

Arizona's pretrial detention of immigrant defendants mirrors ICE's practice of civil incarceration.

In 1996 mandatory detention became the norm for immigrants facing the civil deportation proceedings of the federal government. Congress terminated the discretion of immigration judges to grant bail to most respondents, thereby making prosecutorial discretion the only form of release from incarceration. From ICE's birth in 2003 to June 2005, the percentage of detention bed space devoted to mandatory detainees increased from sixty-three percent to eighty-seven percent. DHS's own Inspector General has expressed concern that mandatory detention "limits ICE's ability to detain high risk/high priority aliens." [114]

Arizona's no-bail rule for immigrants mirrors the federal practice of relying on broad legal categories to rationalize blanket detention. "Serious felony" is a label that applies to a wide range of crimes, from murder, to conspiracy, self-smuggling, and simple possession of drugs.[115] Yet because the label is so powerfully normalized, the underlying charge is concealed from public scrutiny. Maricopa County Sheriff Joe Arpaio illustrated the point. In response to charges that he is abusing his power in the Maricopa conspiracy theory campaign, he retorted with circular logic. "It's a Class 4 felony. You can't even get out on bond, so it must be somewhat serious."[116]

ICE TOOK THE HANDCUFFS OFF LAW ENFORCEMENT

Factually speaking, Russell Pearce's laws and Andrew Thomas' tactics did not take the handcuffs off law enforcement. ICE did. The federal agency showed extraordinary opportunism when it went to Maricopa County—ground zero in the Arizona laboratory—to introduce the most powerful 287(g) contract in the nation.

Given Sheriff Joe's public record, ICE should have been cautious. The Maricopa County Sheriff's Office use of criminal law to stop suspected immigrants in random traffic stops was already documented. Unlike his ex-chief deputy Russell Pearce, the "True Believer," Sheriff Joe issues press releases to announce his every move. He was already the target of both jail lawsuits and media criticism for racial profiling in the conspiracy theory arrests.

His tactics had made the local ICE office uneasy, as evidenced by their initial unwillingness to deport his conspiracy theory arrestees. The sheriff remains angry about this resistance. "I had big problems with ICE prior to the new agent in charge. I had to put aliens in my vehicles and I had to take them down to the border."[117] But at the federal level, ICE decided to replace its unwilling local leadership. The experiment to merge civil and criminal power in Arizona continued with many variables, and no apparent controls.

Yet in other respects, Sheriff Joe was an ideal partner. He was politically popular and resourceful. His autobiography is entitled *America's Toughest Sheriff*. He believes that limits to police power are handcuffs on justice, and he has built an international profile by testing these limits. Opting out of the county's affordable offices, he leased luxury space in the Wells Fargo high rise in Downtown Phoenix. At the same time, he established a "Tent City Jail," warehousing 10,000 detainees (including youth) in tents in the blazing desert sun. He started the first women's chain gang in the world. He dyed male detainees' boxer shorts pink in a grandstanding show of control through emasculation. He replaced three meals a day with two meals featuring oxidized green bologna sandwiches—for punitive, rather than cost-saving, reasons. All of the detainees under his control are either pretrial defendants or people convicted of offenses that carry sentences of less than one year.[118] Roberto Reveles of Somos America, an outspoken critic of Maricopa's immigrant raids, observed: "There was not much public outrage when Sheriff Arpaio started the Tent City and the chain gangs. People talked about it like a fraternity prank."[119]

Deaths turned prank into tragedy. In one case, an African-American man who was legally blind and mentally disabled was arrested for shoplifting dish towels.[120] He was sent to Arpaio's Tent City, against the jail doctor's own written warning that he was too vulnerable to survive there. Within days, a corrections officer handcuffed and beat the detainee severely. He was then placed in solitary confinement, denied any medication for his preexisting condition or his new wounds, and offered food just twice in six days. His life ended, the MCSO reported, when he "fell out of his bed" and broke his neck. His bed was four feet off the ground. Examiners found that the deceased detainee also had ruptured intestines, broken toes, and severe internal injuries. After allegedly tampering with video evidence, Sheriff Joe settled a lawsuit for $2 million with the family of the deceased prisoner. In fact, in the last decade Maricopa County taxpayers have paid over $43 million in jail death and abuse suits against him, and another $1 million in consulting fees to correctional consultants whose advice he has yet to pay heed.

Neither monetary nor human loss has deterred the state's increasingly boundless capacity for incarceration. For the governor and the feds, Maricopa jails have been a resource. During Napolitano's negotiations for state-level 287(g) power, she wrote to Homeland Security Secretary Chertoff, "Maricopa County Sheriff Joe Arpaio has agreed to assist in providing the bed space needed to house individuals detained by this squad." Sheriff Arpaio, who did not attend her law enforcement summit, pledged limitless support for the pilot project: "If I have to set up tents from here to Mexico, I'll do it … The important thing is to get these people off the streets."[121]

ICE gave Sheriff Joe the largest and most comprehensive 287(g) contract in the nation.

This was not the first time 287(g) arose as an option for the county. In 2001 the police chief of Mesa, Pearce's home city, considered joining the federal program. But he backed away, his spokesman explained, because "he thought there was a program already in place … But there isn't, so he's abandoning the idea to deputize officers. It won't be an issue again."[122]

In January 2007 the Maricopa County Board of Supervisors approved a partnership between the Maricopa County Sheriff's Office and ICE. One month later, ICE added 160 Maricopa officers to the 200 officers already deputized nationwide.[123] It was the first time that ICE gave local law enforcement officers both the power to arrest on the streets and to issue detainers in jail.[124] Although this was meant to be a groundbreaking project, the MOA was issued for an indefinite period of time. The ICE press release promised that the new powers would finally enable officers to "complete the processing of any *criminal aliens* and prepare the documentation to place those aliens in deportation proceedings." The Special Agent in Charge for Arizona promised the powers would be used to "combat the violence and crime that go hand in hand with illegal immigration."[125]

Maricopa County—Sheriff Arpaio marches immigrant arrestees into Tent City, a jail notorious for death and abuse. Photo by Carlos D. Garcia

A basic examination of the MOA shows a discrepancy between the contract and the media message. The deputized officer has the power to interrogate, arrest without warrant, and detain and transport "any alien or person believed to be an alien." This includes legal residents and makes no requirement of criminal suspicion or charge.

The MOA explicitly outlines that Maricopa County pays all costs and may even donate office space to ICE. To receive any federal funding, the locality must apply separately for an immigration detention contract that provides reimbursement for civil incarceration.[126] In cases where the arrestee is charged criminally, ICE does not fund pretrial detention or the criminal sentence itself.

The MOA is also elusive about indemnification. "[Deputized officers] will enjoy the same defenses and immunities available to ICE officers from the personal liability arising from tort lawsuits based on actions conducted *in compliance with* this MOA … ICE will not be liable for *defending or indemnifying acts of intentional misconduct* on the part of participating LEA personnel" [Emphasis added].[127] But what is "misconduct"? While the ICE fact sheet guarantees that the 287(g) power is not meant for raids or random traffic stops, these functions may not technically be a violation of the Maricopa County MOA.

On accountability, the language is even less clear. The MOA names ICE as the project manager:

> The ICE supervisory officer, or designated team leader, will evaluate the activities of all personnel certified under this MOA … Participating LEA personnel are not authorized to perform immigration officer functions, except when working under the supervision of an ICE officer. Participating LEA personnel shall give timely notice to the ICE supervisory officer within 24 hours of any detainer issues under the authorities set forth in the MOA.[128]

The consequences of poor performance and the structure of accountability remain unwritten. MOA does not specify what misconduct will result in contract termination. It provides no clear controls. If a conflict arises, two ICE employees (the Special Agent in Charge and the Field Office Director) and the Sheriff "shall attempt to resolve the conflict."

With support from activists above and below, Sheriff Arpaio deployed 287(g) powers to conduct raids that, according to ICE literature, violated the program's intent.

In 2005 the Phoenix Police Department used trespassing and traffic rules to regulate day laborers. But diplomatic negotiations between city officials and immigrant communities, as well as the creation of a day labor center, led police to end their public patrol.[129] In 2006, however, some Phoenix officers returned to policing day laborers, this time as private security guards for a local business. Pruitt's Home Furnishings is located in East Phoenix—an overlapping jurisdiction for the Maricopa County Sheriff and the Phoenix Police Department. The store neighbors a Home Depot where immigrants searching for work congregate, waiting for business owners to hire them for short-term projects. Pruitt's owners hired off-duty Phoenix police, presumably to patrol the front of the store as day laborers passed by.

Pruitt's private police force incited controversy when immigrant proponents charged, the off-duty officers used skin color, language, and accent as the sole measures to stop and arrest community members.[130] American Freedom Riders, an anti-immigrant motorcyclist organization, brought in leather-clad protesters shouting obscenities at immigrants congregated in front of the store.[131] Maricopa sheriff's deputies soon began moonlighting at Pruitt too. Frustrated immigrant advocates threatened to orchestrate a boycott of the store. Pruitt's owners yielded.[132] According to organizer Salvador Reza, "The owners wanted our money more than they hated our skin. We had an unspoken agreement to stop using off-duty officers sometime around the Christmas holidays."[133]

But the ceasefire never materialized, thanks to agitation by a Washington-based organization. Judicial Watch is a fifteen-year-old think tank that describes itself as "a conservative, non-partisan

American educational foundation that promotes transparency, accountability and integrity in government, politics and the law."[134] Funded by prominent critics of Bill Clinton, including more than $7 million from conservative billionaire Richard Mellon Scaife, the group is best known for filing a raft of lawsuits against members of the Clinton administration.

In October 2007 Judicial Watch filed a complaint with the Maricopa County Sheriff's Office on behalf of "frustrated Phoenix business owners, organized as the '36th and Thomas Coalition'"—the location of Pruitt Furniture.[135] The complaint indicted the Phoenix Police and Mayor Phil Gordon for preventing off-duty officers from arresting immigrants. Asserting the widely refuted inherent authority doctrine, Judicial Watch wrote, "Every local police officer is empowered to uphold the rule of law and ought to cooperate with federal officials on immigration matters."[136]

On-duty officers, deputized by ICE and paid for by the public dime, replaced the private security force. They claimed full legal authority under civil immigration law to conduct sweeps. They brought along volunteers from the Sheriff's "posse"—a wing of the office that enables community members to support the deputies. It includes outspoken members of groups including FAIR and the American Freedom Riders. The same activists who months before were hurling insults at the immigrants standing by Pruitt could today—as volunteers of a force that was volunteering for ICE—assist with civil immigration arrests.[137]

In July 2008 the Phoenix newspaper *East Valley Tribune* released a multi-media expose that unearthed key details.[138] Government reports indicate that the first 287(g) sweep occurred against day laborers, using one of the human smuggling teams created during the conspiracy theory campaign. The reports that deputies sent to ICE, in accordance with the MOA, consistently lacked any probable cause ground for the arrests or simply stated that the arrests occurred in response to business owners' complaints. It remains unknown how many day laborers were taken.

The Maricopa units also used the 287(g) powers to enhance their anti-smuggling operations. By June 2008, Sheriff Joe announced his 1,000th arrest on state smuggling charges. Every arrestee was either driving or riding in a vehicle. No human trafficking bosses were captured. When asked to report a reason for stopping a vehicle, arresting officers often strained to remember what the probable cause may have been. ICE captured the information about day laborer and traffic arrests, but did nothing to stop the actions.

The immigration raids have divided Arizona internally, and polarized the state from the rest of the nation. While the United States elected the first African-American president in its history in November 2008, Sheriff Joe easily won re-election to his fifth term in office with the support of over fifty-five percent of Maricopa County voters.[139] He remains a celebrity with a popular mandate. Few politicians risk challenging him. Reza, perhaps his most outspoken critic, described the intensification of the sheriff's tactics: "Now he's going to Mesa, he's going after corn vendors with M-16s. Whenever we did a demonstration, he would start arresting people on the way there. Sheriff's officers with ski masks, assault rifles."[140]

A recent policy report published by the conservative Goldwater Institute is sharply critical of Arpaio's diversion of law enforcement resources to "high-profile, extremely expensive, yet low-yielding immigration sweeps."[141] Sheriffs patrol deputies stop cars for such minor traffic violations as burned out license-plate lights and failure to use proper turn signals, while arrest rates for criminal offences plummet and response times to citizens' 911 calls increase. The report details the difficulties that arise when Arpaio's "saturation patrol sweeps" are conducted in communities that already have their own police departments:

> Far from the careful coordination that might reasonably be expected in such large-scale law-enforcement operations in jurisdictions with police departments—a hallmark of MCSO before Arpaio—the sweeps often have taken place with little warning and virtually no coordination.

> As Arpaio put it, "I'm the sheriff, and I don't need to be invited to Mesa. I can go in anytime I want." The sweeps involve not only large numbers of deputies but armed posse members, facing scores of impassioned demonstrators who either favor or oppose the sweeps. Instead of aligning their operations, the police departments in the targeted jurisdictions have to call out large numbers of their own officers—diverting them from other assignments and/or paying overtime—to maintain order. Characterizing the sweeps as "a circus," Mesa Police Department Sergeant Fabian Cota charges that "the way [MCSO] is doing the sweeps, it's endangering our guys.[142]

Arpaio's well-honed media strategy has afforded him the public persona of a maverick. Interviewed in his office on January 17, 2008, by Telemundo—one of the largest Spanish-language TV networks in the US— he invited the cameras to film the Pruitt raid he had scheduled for the afternoon on the following day. "I'm sending out my posse of 500 to go after them." The Telemundo reporter asked, "Could you do it earlier?" The Sheriff responded, "If you were CNN."

Even US citizens have felt the brunt of Arpaio's anti-immigrant crusades.

Americans of color, local political leaders who publicly criticize Arpaio, and the employers of undocumented workers are the frontline of American citizens impacted by the "criminal illegal alien" crack down. Victims of racial profiling are the most obvious example. Israel Correa, a Latino man, was stopped by sheriff's deputies for driving without headlights on.[143] Correa was born in Maricopa County, but had an accent that the deputies may have considered foreign-sounding. They arrested Correa "on an ICE hold." He was kept in custody for several hours after his immigration status was correctly documented. His car was impounded and the Sheriff's office confiscated his private property—including $2,000 in cash and a legally registered handgun.

The Phoenix-based business firm Steptoe & Johnson, in conjunction with the Arizona American Civil Liberties Union (ACLU) and other attorneys, filed a class action lawsuit against Sheriff Arpaio, his office, and Maricopa County. The suit charged that the immigration raids—dubbed as "crime suppression sweeps"—violated the equal protection provisions of the Constitution by utilizing rampant racial profiling.[144] Dan Pochoda, Arizona ACLU's legal director, explained: "This lawsuit is not just directed to Joe Arpaio. It is a message to other local agencies: these [practices] will not go unchallenged and will require significant money to defend."[145]

The lawsuit was filed on behalf of Latino community members, including a US citizen detained in front of his family's auto repair shop after police heard him listening to Spanish radio. Notably, ICE is not among the parties sued. Even though it is legally responsible for overseeing 287(g) arrests, the agency does not itself execute them. Litigators believed that naming ICE would complicate the legal argument and therefore excluded the federal agency from liability in the lawsuit. The claim is pending in the US District Court in Arizona.

Business owners have also entered Sheriff Joe's line of sight. In July 2007, legislators enacted a state-level employer sanctions law designed to suspend the business license of anyone who knowingly hires an undocumented immigrant; and to permanently revoke the license of second-time offenders.[146] The legislation was technically incoherent, but Napolitano signed it into law with the understanding that a clarification bill would follow.[147] Sheriff Joe immediately established a hotline for citizens to report employers whom they suspect of hiring undocumented workers. A local Chamber of Commerce official charged that small businesses are a casualty of the sheriff's need for media attention.[148]

Thus far, Sheriff Joe's employer sanctions raids have only arrested and prosecuted employees suspected of working illegally.[149] The main fallout of the state employer sanctions laws for citizens is the disincentive for economic development. State Representative Bill Konopnicki reported: "We have already lost three fairly good sized companies who have chosen not to come to Arizona because of these punitive laws. In Yuma, where I grew up, they lost a lettuce crop because they had no one to harvest the lettuce."[150] Meanwhile he and other business proponents in the legislature have tried to redress the impact on employers by shifting the risks onto undocumented employees, and by creating a state-level temporary guest worker program. The unprecedented move would draw businesses into Arizona by creating a legal avenue to cheap foreign labor.

Political critics in the private sector have also been targeted. ACLU attorney Dan Pochoda was arrested by Arpaio's "posse" during a rally at Pruitt Furniture, when he stopped for a few minutes to speak with one of the participants. Thomas's office prosecuted him for criminal trespassing. He had to bear the expense of a trial where he was acquitted of all charges.[151]

The executive editor and the CEO of the *Phoenix New Times*—a media outlet wedded to the muckraking journalism of earlier eras—were also arrested. The *Phoenix New Times* was the first local publication to unabashedly criticize the Maricopa conspiracy theory and Arpaio's immigration raids. In a story headlined, "Breathtaking Abuse of the Constitution," the paper's editor and CEO detailed a grand jury subpoena seeking information about the identity, purchasing habits, and browsing proclivities of the their online readership.[152] After sustained public criticism, the Maricopa County Attorney's Office dropped the misdemeanor charges.

Citizens and the elected leader of Guadalupe, Arizona, were shocked to find themselves in the 287(g) crossfire. The town's founders are Yaqui Indians. Forty-four percent of the population is Native American and fourteen percent is foreign-born.[153] For decades, Guadalupe has contracted with the Maricopa County Sheriff's office to perform public safety duties. The town historically had difficulty getting the sheriff's office to respond to crimes. But in April 2008, the town saw "crime suppression teams" it never requested. Guadalupe became a theatre for Sheriff Joe. People were cited or arrested for traffic violations including "improper use of car horn."[154] The community was outraged.

Guadalupe Mayor Rebecca Jimenez hand-delivered a stern statement to Arpaio in the parking lot of a local business and ordered him to leave. During a radio interview in the immediate aftermath, she asked and answered a question for her constituents. "Did we foresee him coming into our small little community to do his grandstand for his own political agenda? No..."[155] Arpaio, wholly unused to resistance, asserted that the town could not opt out of his immigration sweeps. He threatened to terminate all services, and gave the mayor 180 days to decide if she wanted to continue the contract.[156] The negotiations stand unresolved. In response to growing public protest, Arpaio snarled sarcastically, "Thank you, demonstrators, for calling me Hitler and Nazi. Thank you."[157]

Other law enforcement agencies fell into line. Phoenix Mayor Phil Gordon castigated Sheriff Joe in March 2008 for his relentless raids in Latino districts of the city. "The posse didn't lock up murderers. They locked up people with broken tail lights." The Maricopa County Sheriff's Office responded with a public records request seeking the mayor's e-mails, cell phone records, and meeting calendar.[158]

Mayor Gordon also requested a federal investigation into the Maricopa Sheriff's Office for civil rights violations including racial profiling. Gordon detailed the Maricopa crime suppression programs that used posse members and 287(g) powers to stop and arrest Latinos. He charged that the sheriff "put our residents' well-being, and the well-being of law enforcement officers, at risk."[159] Gordon had no traction with ICE officials, who insisted that Maricopa County had not violated its 287(g) contract and refused to curtail the local immigration enforcement.[160]

Just a month earlier, the Phoenix Police Department had signed a 287(g) MOA with ICE. Gordon caved to pressure from a police union leader, a controversial figure who was exposed for spreading false rumors that a local murder was perpetrated by

Mexican military men.[161] But Gordon was not the only one who folded. The elected sheriffs of Pima, Pinal, and Yavapai counties also signed onto the 287(g) program.

The state funded the immigration raids in Maricopa County.

ICE fact sheets claim that Arizona taxpayers have saved millions of dollars with the state corrections 287(g) program.[162] But that is truncated economics, given that the Maricopa County program is draining the state coffers. Sheriff Joe credited Representative Pearce: "Pearce helped us get state funding. It was very unusual. We hired fifteen deputies."

The Department of Public Safety in Arizona has long promoted an anti-gang enforcement program, the Gang Intelligence and Team Enforcement Mission (GITEM). Originally created as a highly visible foot patrol, budget cuts forced it to focus on investigations and terminate funding to law enforcement partners. The DPS director commented: "This created difficulties for many agencies and resentment for the dramatic cut to the program."[163]

A national survey of 300 large cities found that the formation of gang units is more closely associated with the availability of funding and the size of the Latino population, than with the extent of local gang or crime problems.[164] GITEM's transformation confirms the pattern. In March 2006 the Arizona legislature voted to add immigration enforcement into the agency's mandate. Inserting an extra "I" for immigration into the acronym, the program was reborn as GIITEM.[165]

One year later Russell Pearce championed an appropriations bill to fund the new immigration mandate at $10 million, making it the largest single budget line for GIITEM.[166] Pearce lamented that it was not more: "We had funds dedicated solely to alien enforcement—$56 million in HB 2577—but the Governor vetoed it. She's vetoed about 16 bills."[167] The bill required the Department of Public Safety to enter into a new 287(g) agreement in order to receive the additional monies. By April 2007, the Arizona Department of Public Safety became the second state agency deputized with civil immigration powers.

GIITEM Appropriations

Fiscal Year	Amount of Funding	Fiscal Year	Amount of Funding
1994	$5,892,000	2002	5,712,700
1995	6,944,100	2003	4,244,100
1996	5,500,000	2004	4,271,700
1997	6,175,000	2005	4,641,200
1998	6,159,000	2006	9,022,700
1999	6,199,000	2007	26,544,100
2000	6,349,000	2008	31,799,700
2001	6,349,400	2009	31,799,700

Source: Arizona State Legislature and Arizona Department of Public Safety 1994-2008

Immigration resuscitated the agency budget. GIITEM became a fiscal pass through which state monies could go to the Maricopa deputies. At a news conference announcing the funding, while flanked by Pearce, House Speaker Jim Weiers, and Senate President Tim Bee, Sheriff Joe announced, "My part of this GIITEM task force is we will go after illegal immigration."[168] The state funding directly supported the Maricopa conspiracy campaign and day laborer sweeps.

Representative Konopnicki, who was also critical of the state funds being poured into prison expansion, remarked on the politics of the appropriations, "If you vote against those things, you get labeled as someone who is for illegal immigration. So what's happened is that people have fallen in lock step. They don't like to be beat up in the press."[169] Konopnicki also raised concerns about the price tag. Despite infusions of state cash, the Maricopa County Sheriff's Office accrued a budget deficit of $1.3 million in the first three months of the 287(g) MOA.[170] As overtime hours for deputies have spiraled upward, the total costs remain uncalculated.

Arizona as a whole stands as a cautionary tale. By targeting "criminal illegal aliens" political leaders set off a domino effect that transformed the very fabric of law enforcement in local democracy. In October 2008 ICE sent Arizona another new Special Agent in Charge, Michael Allen. In a TV interview with the local PBS, Allen was asked if Maricopa County was improperly using the federal 287(g) program. Allan both defended Sheriff Joe and shielded ICE from liability for his actions:

> The state of Arizona has been very aggressive and progressive in enacting state laws which focus on illegal immigration … They don't need ICE authority to do much of what they do in the area of immigration enforcement because the state of Arizona has empowered them to enforce laws that are very similar and parallel and track many of the federal statutes … [Sheriff Joe] often refers to his enforcement of immigration law in a sequence—state *and* federal immigration law. And that's how we envision the use of the 287(g) authority. The sheriff's office and other agencies throughout the state have to rely on their own inherent authority to conduct police activities on a daily basis, how they enforce state laws regularly. Our vision for the 287(g) authority is that authority kicks in *after* a cross-designated officer has exhausted all their resources and authorities under state law, and then the 287(g) authority kicks in.[171]

The *Phoenix New Times*, whose editors were targeted by Thomas and Sheriff Joe, observed the normalizing effect of the 287(g) program. "Cops anywhere in Maricopa County equal *La Migra* … The changes, along with the new police policies, have essentially transformed police, state troopers, deputies, and jail and prison guards into part-time immigration enforcers."[172]

Dan Pochoda of the ACLU Arizona believes the future of Arizona looks ominous. While he is optimistic about the turnaround in national political leadership, Pochoda commented, "Arizona seems to have been the sacrificial lamb. Pearce, Arpaio, and Thomas' crowd are in greater control, and absent even potential veto threats from Governor Napolitano who is heading to DC."[173] Obama selected Governor Napolitano to take Chertoff's position as Secretary of Homeland Security. With incoming Governor Jan Brewer more politically aligned with the anti-immigration efforts, not even the threat of a veto stands in Pearce's way.

Jen Allen of the Border Action Network is more hopeful. She observes that the current economic crisis could force politicians to re-prioritize public monies:

> Most state immigration bills died [in 2008]. Only two made it out, showed up on Governor Napolitano's desk, and she vetoed them. We got zero coverage of this huge turn around. Our activism helped: we were at every single committee hearing, we had the technology to click and email the legislature. But the other truth is that nothing happens in a vacuum. Our state and local economy was the big factor. Many legislators were frustrated with Russell Pearce. His own stalwart, socially conservative republicans say, 'with all due respect, you are wasting our time. We need to respond to budget, education, healthcare, housing.' His bills have died in committee … Our county budgets have been hacked by millions of dollars. A lot of our county monies were invested in Lehman [Lehman Brothers, the investment bank that failed in September 2008]. It all tanked.[174]

CHAPTER III:

ICE: FORCE WITHOUT MISSION

Under the Bush Administration, immigration authority was merged into homeland security.

The 287(g) program is a graduated path to the inherent authority doctrine. Enlisting law enforcement to pick up deportable immigrants does not solve a public safety crisis, so much as assert that immigration is a problem to be solved by crime strategies. If 287(g) is a force multiplier for ICE, the very merger of immigration into Homeland Security has multiplied the conflicts in the mission of each mandate.

Illegal immigration may be, in the words of historian Mai Ngai, an "impossible subject," both "a social reality and a legal impossibility … a person who cannot be and a problem that cannot be solved."[1] At the federal level, either the government is fickle or immigration is a type of problem that keeps changing. Immigration authority has passed through many hands. First entrusted to the Treasury Department in 1891, it moved to the Department of Labor in 1933, and then to the Department of Justice in 1940. Under the Bush Administration in 2003, it entered the newly formed Department of Homeland Security (DHS), where it remains today.

Following the September 11th attacks, a new question quickly reframed an old debate: Is immigration authority inherently a counter-terrorism project? In testimony before the US Senate, historian Bill Ong Hing cautioned that it is not:

> The vast majority of immigrants and non-immigrants are simply not relevant to the issue of national security, and to make them so would pose an unnecessary distraction and a drain on resources of the new Homeland Security Department. Long before September 11, INS miscues provided legitimate fodder for criticism and calls for reform, and even dismantling of the agency. But the need to reform INS and the need to provide better national security should not be confused. The temptation to conflate the two issues is enticing.[2]

Congress decided to insert both service and enforcement functions into the Department of Homeland Security and divide them into three bureaus: Citizenship and Immigration Services, to process visas and naturalization forms; Customs and Border Protection, or the Border Patrol; and Immigration and Customs Enforcement, or ICE.[3]

Homeland Security itself is another complicated enterprise. The agency, representing the largest reorganization of the federal government since the New Deal, was a dramatic response to the September 11th attacks. But it was not a decisive victory. It is more, in the words of PJ Crowley, "a work in progress." Crowley, a senior fellow at the Center for American Progress who directs Homeland Security policy, described the problem of compounding two ambivalent missions:

> People frequently describe the Pentagon as an aircraft carrier. It starts down a particular path and it's really difficult to turn in a new direction. DHS's problem is the opposite. [The original office] was formed in 2001, it was tilted almost exclusively in one direction, then in 2005 another with Katrina, then the collapse of immigration reform and the enforcement-only crowd … DHS is worried about border security, and about transit systems. We know because of Katrina that emergency preparedness and response is an important mission. We understand that keeping dangerous technologies out of the hands of rogue elements is important. 9/11 told us that high profile targets—the Pentagon and World Trade Center—that's important. Got it. There are many things called Homeland Security, properly in that lens. Immigration is a dimension of border

> security, but you could make a case: should immigration be seen through an economic lens, an international lens, a labor lens? We currently have it through a security lens. Over time we have to decide which one fits best.[4]

The Department of Homeland Security elevated the interior enforcement mandate.

Prior to September 11, 2001, the Justice Department's Immigration and Naturalization Service (INS) played the dual role of social worker and enforcer. That is, processing visas and naturalization applications; as well as arresting, incarcerating, and deporting migrants. A bipartisan commission that studied immigration for the previous five years urged Congress to hand services over to the State Department because: "Migration issues are international in character and they require understanding and cooperation among many nations. State can and should play the key role in the broad questions of migration policy, as it now does in refugee matters."[5]

But pre-existing interests within the halls of Congress pushed another agenda. Founded in 1999, the Immigration Reform Caucus had only a handful of members before the September 11th attacks.[6] In August 2001, its founder Rep. Tom Tancredo introduced a bill to put a moratorium on legal immigration to the US. The national security debate boosted the caucus' restrictionist agenda, even recruiting more than one hundred new congressional members. In the Senate, where heads are typically cooler, Sam Brownback of Kansas urged:

> Not only do we need to intercept terrorists, but we also need to investigate fraud, remove criminal aliens, and enforce employment related immigration laws. Additionally, immigration functions are not limited to the ports of entry. In fact, they extend to a wide array of determinations that are made within the United States.[7]

This demand to extend enforcement from the border to the interior won decisively within the Department of Homeland Security.

Federal Immigration Budget
Net Appropriations, in millions

Fiscal Year	Services	Enforcement	
	Citizenship and Immigration Services (visas and citizenship)	Immigration and Customs Enforcement (interior enforcement)	Customs and Border Protection (border enforcement)
2003	695	2,444	5,237
2004	235	3,407	4,899
2005	160	3,537	5,371
2006	114	3,483	6,749
2007	182	3,964	8,183
2008	161	5,261	10,954

Source: Congressional Research Service 2003-2008

By 2008, Homeland Security priorities shifted dramatically, with the overall picture skewed heavily toward enforcement. Funding for services was cut to one quarter of its original levels. Border and interior enforcement appropriations grew more than 200 percent. The rapidly growing budgets of ICE and Border Patrol, in stark contrast to the depleted resources for citizenship, have changed the economic debate on immigration. It is no longer enough to argue about whether immigrants are valuable workers; if they have created jobs or stolen them; if they have depressed wages or saved cities from recession.[8] We must now also consider the impact of immigration enforcement (not immigrants *per se*) on the economy.

In the face of two missions, ICE has prioritized force over intelligence.

The money trail within ICE is a separate matter. ICE is the nation's interior immigration police force. It is entrusted with identifying and expelling noncitizens already within the country. ICE agents, together with Border Patrol, form the largest civil law enforcement agency in the country. But ICE has another, presumably more important, mission: counter-terrorism. ICE is officially *the* investigative arm of Homeland Security. When its sister agencies refer cases, ICE is supposed to bring them to fruition by digging for evidence and handing serious security threats to the US Attorney for criminal prosecution.

From the outset, the dual missions of this hybrid organization raised a resource question. Would ICE invest in the skills needed for counter-terrorism, like the investigation of financial and customs issues, or would it repeat the INS legacy of raids for the sake of raiding? It appears that the largest investigative arm of Homeland Security has chosen muscle over brain. ICE started flush with cash but searching for a mission. Their operations were inconsistent, shuffling between child porn, gangs, and worksite raids. While ICE's overall budget increased in 2008, the percentage devoted to counter-terrorism declined by ten percent to $2.2 billion—less than half of its total $5.2 billion appropriations.[9]

Shortly after its birth, ICE's Office of Detention and Removal issued a ten-year strategic plan entitled *Endgame*.[10] The agency's core investigative function is conspicuously absent from the ambitious plan. ICE rejects counter-terrorism in favor of prioritizing "violations not directly linked to terrorism," and sets as its ultimate goal the capacity to "remove all removable aliens." ICE's legacy organization, the INS, had many defects. Rather than redress them, ICE has narrowly defined capacity-building as the deployment of the greatest force to remove the biggest number. The centerpiece of ICE's operations is the virtually absolute prosecutorial power to incarcerate and exile whole classes of noncitizens, created in the same 1996 laws that included the 287(g) provision. ICE names "removal" and "custody management," or physical deportation and detention, as its "core business functions."

Endgame is essentially a numbers racket. The goal to "remove all removable aliens" rests on a reconstruction of migration as a threat to national security. While the immigration debate is mired in ideological disagreement, just about everyone agrees that migration does not just happen. It is produced. Migration experts analyze the macro and microstructures that push people from one place and pull them into another.[11] Even Lou Dobbs—the former corporate cheerleader turned populist and then iconic nativist—links migration to capital in his protectionist trade platform.[12]

ICE is the predominant voice in the debate claiming that anti-crime strategies will deter the movement of people across borders. ICE's primary evidence of effectiveness is the growth in the agency's operations:

TOTAL DEPORTATIONS

Year	Removals	"Criminal Aliens"	Percentage "Criminal Aliens"
1994	45,674	32,512	71%
1995	50,924	33,842	66%
1996	69,680	38,015	55%
1997	114,432	53,214	47%
1998	174,813	62,108	36%
1999	183,114	71,188	39%
2000	188,467	73,065	39%
2001	189,026	73,545	39%
2002	165,168	72,818	44%
2003	211,098	82,822	39%
2004	240,665	91,508	38%
2005	246,431	91,725	37%
2006	280,974	97,365	35%
2007	319,382	99,924	31%

Source: Department of Homeland Security, Office of Immigration Statistics 1994-2007

The data that ICE features in its annual reports illustrates a rapid escalation in the use of force. But hyper-enforcement does not equal effective deterrence. In criminal justice work, the line from arrest and incarceration to deterrence is hotly debated and never direct. And in the realm of immigration, prosecution may *increase* violations. Breadwinners who historically moved back and forth between the US and Mexico or Canada now fear the risks of crossing are too high. They are bringing their families here to settle.[13]

Crowley asserts that replacing real counter-terrorism work with interior immigration enforcement may spark another danger:

> If you compare why the US does not have a homegrown terrorism challenge, but Europe does, it's because we have always successfully integrated foreign born populations … the lion's share of the immigration challenge is hemi-spheric, and Mexican … when you target them, you end up with a community that doesn't feel welcome. It's that dynamic that produces humiliation, distrust, and domestic terrorists.[14]

The ICE term "criminal alien" is so broad, it becomes vacant.

The "criminal alien" data released by ICE is noteworthy for two reasons. First, as ICE intensifies its operations the overall portion of deportees with criminal records has dropped from seventy-one percent in 1994 to thirty-one percent in 2007. Secondly, the category itself is exceedingly broad. "Criminal aliens" refers to *any* noncitizen (legal or undocumented) with *any* criminal record.

Consider Ansar Mahmood, among the nearly 100,000 "criminal aliens" deported in 2004.[15] Mahmood came to the United States as a lawful permanent resident. He delivered pizza in Columbia County, New York. Four weeks after September 11th officials detained him on suspicion of terrorism. He was a Pakistani man taking pictures near a water treatment plant. He was cleared, but he allowed law enforcement agents to search his home without a warrant. They found evidence that he had helped an undocumented couple get a home and a car. He was convicted of harboring illegal aliens in criminal court and subject to mandatory detention and mandatory deportation.

The citizens of Columbia County formed a defense committee for Mahmood. They secured political support from members of Congress and petitioned ICE to grant prosecutorial discretion. But ICE still deported him to Pakistan in 2004 after three years in detention. New York Senator Charles E. Schumer, regarded as a national security hawk in the Democratic Party, commented, "It's a disgrace … Mahmood wanted to be an ideal citizen, and he's the kind of person America should embrace. There is no reason he should be deported."[16]

While the War on Drugs federalized what were formerly state crimes, the War on Immigrants works in reverse. It is devolving federal enforcement to the states. Criminologist Jonathan Simon cautions that the Drug War "created enormous incentive for police officers to not police real crime. It overly rewarded work with fewer real responsibilities. It devalued investigation of murder and rape cases. The War on Drugs is a classic example in garbage policing."[17] The War on Immigrants creates the same incentive.

Arizona's human trafficking statute and Conspiracy Theory campaign illustrate how, at the state level, new criminal codes for immigration-related offenses are filling up the "criminal alien" pool.[18] At the federal level, growing portions of criminal convictions are for immigration matters that were previously treated as purely civil violations. Under former President Bill Clinton, immigration law prosecutions doubled from 1996 to 2000.[19] Under the Bush Administration, referrals climbed from just under 24,000 in 2003 to almost 40,000 in 2004, and prosecutions rose eighty-two percent—from almost 21,000 to just under 38,000.[20] The most common charge is illegal reentry. Immigration offenses are now the largest category of federal prosecutions, exceeding even drug enforcement.

Internally, ICE is a case study in organizational failure.

Force has not come without scrutiny. In just five years, ICE has been the subject of eight internal audits conducted by Homeland Security's own internal investigators, the Office of the Inspector General (OIG). One recurring theme is the misconduct of ICE personnel, which ranges from gross negligence to criminal behavior. One audit notes that in joint operations, the resentment of ICE staff toward colleagues at the Federal Bureau of Investigations has caused the agency to under perform and neglect leads on terrorism.[21] Competition rather than collegiality mars ICE relations with the Border Patrol too.[22] Another audit found that ICE staff failed to meet basic security requirements in protecting a federal building.[23] In an investigation of ICE staff misconduct, auditors were concerned that "completed internal affairs cases, in which the misconduct allegations had been substantiated, were not receiving timely or effective attention with a probable erosion of good discipline."[24]

By 2006, the specter of terrorism had largely faded, but ICE tactics had escalated with raids sweeping through Latino communities. ICE agents wore a new uniform, with the word "POLICE" printed on their jackets. But the quality of their police work is doubtful. Home raids typically resulted in "collateral arrests" of people who happened to be there. The OIG found that data used by ICE's fugitive operations to identify targets for home raids is inaccurate in up to fifty percent of cases.[25]

Local law enforcement officers in Marshalltown, Iowa, were caught off guard by ICE personnel in their own jurisdiction. When ICE raided the Swift Meats plant agents had notified the county sheriff only ten minutes prior to executing the raid. In congressional testimony, Marshall County Sheriff Ted Kamatchus, who is also president of the National Sheriffs' Association, criticized ICE activity not as criminal or civil enforcement, but as "one example of potential dangers that could arise from an expansion of presidential authority to deploy military and federal officials to local communities."[26]

Through Operation Community Shield, ICE has partnered with local police in immigrant "gang raids." Gangs are a conspicuous law enforcement target. It appears, however, that traditional gang enforcement methods have no significant rehabilitative or deterrent effects. Gang membership is typically short-lived with people leaving of their own accord. A recent report by Justice Strategies, produced for the Justice Policy Institute, documents how joint law enforcement taskforces are sprouting nationwide even though gang membership is in decline, even in jurisdictions where overall crime rates are dropping as well.[27]

In 2007, Nassau County, New York, débuted a triple-sized joint taskforce with ICE and local police conducting the largest immigrant gang raid to date.[28] An anticipated public relations victory turned into a mutiny when failures in personnel and intelligence came to a head. Nassau County police pulled out in the middle of the operation charging that ICE officers turned their guns on the local cops and withheld intelligence on those ultimately arrested.[29] Of the 186 arrested on Long Island, twenty-eight were identified as suspected gang members subject to criminal charges. The remaining 129 were collateral arrests of people swept into deportation proceedings, including one US citizen. These stats are not an anomaly. Raids are like air bombs. By design, they target communities rather than individuals.[30]

ICE officers on the beat are not, however, responsible for problems that start at the top. Former ICE chief Julie Myers, a personal friend of George Bush's Homeland Security secretary, was appointed to the post despite having zero expertise in immigration or law enforcement. She built a fool's reputation when, at the company Halloween party, she gave "Best Costume" to a white employee who painted his face black and wore fake dreadlocks and a prisoner jumpsuit, mimicking a Rastafarian detainee. Under media scrutiny, Myers denied the event occurred.

After pictures surfaced, a congressional investigation determined that she had led a "coordinated effort to conceal" her role in the scandal.[31] A former high-level DHS official posits, "ICE's fiscal priorities are a combination of Julie Myers, a couple of very influential directors and the political pressures and PR issues … ICE is pretty tied to the news. You follow the news, that's where the money is going." Myers left her post in good standing with her friend-turned-boss lauding her years of positive service and concluding, "I look forward to our continued friendship."[32]

Criminologist Patrick O'Hara warns that corrupt or racist individuals make a poor diagnosis for why law enforcement agencies fail. "Mindset and motivation are elusive concepts in general, and specific worldviews are hard to pin down, easy to deny, difficult to reverse, and not necessarily linked to action."[33] All organizations, including law enforcement, struggle with hierarchical assent, the shunning of whistleblowers, policy sabotage by renegade workgroups, and abuse of the organization's resources by executives and rank-and-file alike. But because law enforcement agencies in particular are divided mainly by rank into a rigid hierarchy and by specialization into duties, some themes recur. O'Hara describes six common organizational pathologies among which is "structural failure"—when processes are going according to plan but still fail. ICE—at the midpoint of *Endgame*, with a growing budget but with no limit to the insatiable need for more resources—may be a textbook example.

Immigration detention is ICE's most matured devolution program.

In *Endgame*, ICE identifies partnership with other agencies as the first of three capacity-building strategies. The 287(g) program began in earnest as a premiere pilot project in service of this strategy. In April 2008, ICE reframed 287(g) as simply one option among many in ICE ACCESS, "an umbrella of services and programs offered for assistance to local law enforcement officers."[34] Other options included the street-level anti-gang Operation Community Shield, and the Criminal Alien Program to identify aliens incarcerated in criminal facilities for deportation.

Through the 287(g) program deputized state and local law enforcement agencies perform civil arrests and detentions on their own dime, acting as feeders into the federal deportation system. The ICE civil detention system, in contrast, provides the bodies and the cash. ICE contracts more than 400 local jails and state prisons to hold over half its civil immigration detainees. Payment to contracted facilities is stipulated in an Inter-Governmental Service Agreement (IGSA).[35]

The total number of people whom ICE detained annually grew from 202,000 in 2002 to 257,000 by 2006. The average daily detained population has climbed steadily since 1994.

The dip in 2005 detention figures reflects a loss of manpower. From March 2004 to May 2005, ICE underwent internal financial management problems that led to a hiring freeze in the Detention and Removal Office and the larger agency.[36] ICE personnel did not use their prosecutorial discretion to assess and release detainees. By June 2005, eighty-seven percent of detention bed space was filled with mandatory detainees.[37]

According to Andrea Black, coordinator of the Detention Watch Network, a national coalition working for reform of the US detention and deportation system, "ICE's single-minded emphasis on detention as a deterrence tool, along with intense lobbying by private prison contractors and county jailers, has resulted in the creation of a detention industry totally divorced from public safety. Americans have seen an exponential increase in detention beds over the past decade, despite the availability of effective and low-cost alternatives."[38]

ICE's reliance on mass incarceration and its goal of building detention capacity make local sheriffs—as the keepers of bed space—an ideal partner. Yet in civil detention, as with the 287(g) program, the irreconcilable differences between civil and criminal rules have threatened the integrity of ICE operations. In *Endgame*, ICE itself cites the housing of detainees in subcontracted county jails as a key "threat" to that integrity.

> Detained aliens are in administration custody (versus punitive or correctional) and are therefore afforded rights and privileges not gained by prisoners incarcerated in other federal institutions … Even the detention by DRO [Detention and Removal Office] of those with criminal convictions ("criminal aliens") is strictly administrative in nature, not punitive … it is important that law-

Civil Detention	
Year	Average Daily Detention Population
1994	6,785
1995	7,475
1996	9,011
1997	11,871
1998	15,447
1999	17,772
2000	19,458
2001	20,429
2002	20,282
2003	21,133
2004	22,812
2005	19,619
2006	21,450
2007	30,295
2008	31,345
Sources: Congressional Research Service and Department of Homeland Security 1994-2008	

> makers, immigration organizations and the public understand the uniqueness of administrative (DRO) detention vs. the punitive detention administered by the BOP and other custodial agencies.[39]

Civil detainees, even when held in criminal facilities, are supposed to receive treatment as outlined in the ICE "Detention Standards."[40] The thirty-eight standards outline rights from legal and telephone access to religious and medical services to marriage requests. Promulgated in November 2000, they were the result of negotiations between the American Bar Association, the Justice Department, and detainee advocates who cited the legacy Immigration and Naturalization Service for detainee abuse.[41]

The precepts of law and order apply not only to the individual subjects of law, but also to the organizations that keep order. Yet, in the world of immigration detention the civil law enforcement agency has built its own capacity by flagrantly breaking the rules. The failures of jails and prisons to observe the Detention Standards—and of ICE to adequately supervise its most matured devolution program—challenge the assumption that civil and criminal law enforcement are compatible. Here, normalizing error is part and parcel of building capacity.

ICE failure in the oversight of immigration detention has led to numerous detainee deaths.

The 287(g) program as it evolved in Arizona is just one glaring example of how ICE has devolved enforcement powers without proper supervision. The 287(g) statute requires that a federal agency "supervise and direct" each deputized officer and the program contract names ICE as the supervisor. But where was ICE when Sheriff Joe Arpaio denied any obligation for compliance with the basic requirements set forth in his 287(g) MOA? The conservative Goldwater Institute explains:

> [Maricopa County Sheriff's Office's] contract with ICE requires specific procedures for immigration enforcement, such as establishing trustworthy evidence that crimes are taking place. Such evidence has not always preceded the sweeps, such as the sweep in October 2007 in Fountain Hills, the town where Arpaio lives. Fountain Hills is not connected to human smuggling activity. To the criticism that he has not followed requirements of the ICE contract, Sheriff Arpaio has responded, "Do you think I'm going to report to the federal government? I don't report to them."[42]

Yet civil immigration detention, where ICE is ultimately responsible for oversight as well, stands as the best documented example of negligence. The most frequent theme in government OIG audits of ICE is detention mismanagement. In an investigation of five county jails subcontracted to house detainees, the OIG found that every single facility violated the Detention Standards.[43] The audit itself was a procedural fluke: Detainees had no formal procedure to report abuse. Instead detainees' complaints were echoed by advocates and the media. Three facilities investigated failed to properly monitor those who attempted to commit suicide. Also in three facilities, 196 of 481 medical requests were not responded to in a timely fashion. Four of five jails violated the rules for hunger strikers. Crawling with vermin, facilities were literally home to mice and men. Detainees got food poisoning too. In 2006, at the same time that bird flu crossed the globe, facilities served undercooked poultry to immigrant detainees.

In an investigation of a private telephone company subcontracted by ICE to service detainees, the General Accounting Office (GAO) of Congress found that "insufficient internal controls and weaknesses in ICE's compliance review process resulted in ICE's failure to identify telephone system problems at most facilities GAO visited."[44] The auditors also reprimand ICE for the most basic error: "The structure of the contract does not provide a mechanism for the government to withhold payment from the contractor."

In 2001 the Supreme Court ruled that it is unlawful to indefinitely detain a person who has already been ordered deported, but cannot be shipped out because the receiving country either no longer exists or cannot accept the deportee. ICE dragged its feet with compliance. By 2007 the Inspector General audited and found that ICE lost in its system more than nineteen percent of people eligible for release. The audit asserts, "The weaknesses and potential vulnerabilities in the POCR [post-order custody review] process cannot be easily addressed with ICE's current oversight efforts, and ICE is not well positioned to oversee the growing detention caseload that will be generated by DHS' planned enhancements to secure the border."[45]

In a separate audit, the OIG found that ICE insufficiently prioritizes data needed to fulfill its mandate and appraise its performance in civil detention. The audit charges that ICE lacks even a functioning data management system. Failures to monitor the detainees who are actually removed, and to maintain a civil detainee classification system measuring the risk level of detainees, were among the holes in data collection.[46]

ICE's abysmal failure to manage detention has been the subject of media headlines and congressional concern. Beginning in 2004, *National Public Radio* ran a series of stories on corrections officers in a New Jersey county jail attacking civil detainees with guard dogs;[47] an officer thrashing another detainee's knee caps while he was recovering from knee surgery;[48] and the death of Richard Rust, a young Jamaican man from Brooklyn who collapsed in a Louisiana detention facility.[49] It took an ambulance over forty-five minutes to arrive and officers ordered that no one give him CPR as he lay dying.

Although Rust's death occurred in civil detention, a prison medical expert suggested that the cause was "deliberate indifference" to serious medical needs, a "cruel and unusual punishment."[50] Janis Rosheuvel, the director of Families for Freedom, an organization that documented Rust's death and other abuses, charged, "When it doesn't kill you, detention breaks you down. 'Civil' prison adds insult to injury. Even the people who have claims to stay here sign out because they can't take it."[51] Moved by the death, one congressman introduced a bill to investigate all detainee deaths.[52] Eleven representatives wrote a letter to the Government Accountability Office demanding a full investigation of detention conditions. They wrote, "Congress is currently considering legislation to significantly expand the numbers of and classes of aliens subject to mandatory detention in DHS custody. Before such expansion, we must be certain that DHS is capable of protecting detainees in its charge."[53]

In May 2008 another barrage of media stories resurrected the detention management crisis. The *New York Times* exposed the "death by detention" of at least sixty-six immigrants.[54] A week later, the *Washington Post* reported at least eighty-three detainees dead and widespread medical neglect.[55] Soon after, the House and Senate both introduced legislation to address detainee medical care.[56]

By Fall 2008, no legislation had passed. Arizona Congressman Raul Grijalva sponsored another briefing on detention conditions, following constituents' reports of rampant abuse by ICE and Border Patrol against detainees in short-term confinement.[57] The faith-based group No More Deaths, located in Arizona, reported widespread denial of food and water to detainees; physical and verbal abuse; and even the separation of minors from their families during the deportation process.[58] A retired judge, part of the team of trained volunteers and medical professionals documenting violations, reported repeated complaints that "water was provided in a single, large dirty bucket with one ladle placed in the middle of a large detention room."[59]

The US Congress has responded to the detention crisis with a demand for improved conditions. But that may be putting the cart before the horse. ICE has glaring failure points. Devolution strategies multiply these failure points and make errors spiral. The poor conditions indicted in media and advocacy accounts are a symptom of the organizational failures documented in governmental audits of ICE. To date, the solution to ICE negligence has been limited to *internal* checks.

CHAPTER IV:

NEW JERSEY DOLLARS & SENSE

Morris County is an affluent New Jersey community. Its median household income of $92,000 is nearly double the national average.[1] While statewide the number of white residents has dipped since 2000, Morris County has seen a slight increase. But the sharpest growth in the county has been in the foreign-born population—from fifteen percent in 2000 to nineteen percent in 2006.[2]

Morristown, the county seat, was home to George Washington's headquarters during the American Revolution. The town made history again when, in February 2007, its Democratic mayor was the first in the Garden State to apply to ICE for a 287(g) agreement. The ensuing debate polarized the community. A local organization swiftly mobilized a broad cross-section of leaders to educate elected officials. Proponents of 287(g) were decisively defeated when the Republican county sheriff flagged a basic fact: The ICE program requires jail beds, but does not pay for them.

The mayor of Morristown waged a vigorous campaign for a 287(g) contract with ICE.

Donald Cresitello, the mayor of Morristown, is a tenacious politician. He was first elected the town's mayor as a Democrat in 1978, serving until 1981. He ran again in 1997 as a Republican, but lost in the primary race. In 2005, he switched back to a Democrat and won the post in a race dominated by the issue of illegal immigration.[3]

In 2006, while the US Congress was in the middle of debating a plan to overhaul the nation's immigration system, Cresitello stumbled upon the 287(g) program. He suspected it could be a novel way to make good on an election promise: cracking down on day laborers and residential overcrowding.[4] Soon after his lawyers looked into the program, Cresitello decided, "The tool was important for law enforcement."[5] In February 2007, three months before the final push to pass Comprehensive Immigration Reform failed in Congress, Cresitello announced plans to deputize ten officers with civil immigration powers.

The mayor was not a straightforward or traditional xenophobe. He took pride in his daughter, a law student at the Catholic Seton Hall University, who was studying to defend the immigrant victims of human trafficking. He said of illegal immigration:

> This is another form of slavery. That's all it is. Here you have non-skilled labor working at slave wages, being denied benefits, decent housing, everything. You think the employer gives a shit about them? You think Archer Daniels Midland cares? It's just another form of the sharecropper. It's Big Business taking advantage of poor people. My vision is for the federal government to solve this problem with a pathway to legalization. If the federal government doesn't do that, then we need to go the way Arizona has gone.[6]

But when Cresitello headed in that direction, the move drew criticism from different corners: His own police chief Peter Demnitz questioned the need for the 287(g) program.[7] Wind of the Spirit, a community organization that worked to build trust between police and Latino residents following September 11, 2001, charged the mayor with betrayal.[8] Founding member Diana Mejia said, "After so many years of working together, how could they do this to us?"

Cresitello talked tough as he described his plans to reporters, asserting that deputized police could use civil immigration powers expansively against day laborers, tenants in overcrowded apartments, even jaywalkers. "The way I understand it, if they're stopped in conjunction with a violation, then you would have the authority to look beyond that, to look into the federal aspect of the violation … A police officer has the discretion to decide when to enforce any law. This is not different."[9] He claimed to have the popular mandate stating, "I can't find people who are here who are legal residents who would oppose me in general. Colombians that are here for years and years say, 'We don't want those people hanging out on the streets.'"[10]

The Colombian Consulate felt differently and sent a letter of concern to ICE asking for clarification about the program. ICE's written response contradicted Cresitello's claims: "The 287(g) program is not designed to allow state and local agencies to perform random street operations. It is also not designed to impact issues such as excessive occupancy and day laborer activities."[11] Still, an information vacuum grew around the mysterious 287(g) program and filled with rumors.[12]

A community-based organization worked to influence decision makers publicly and behind the scenes.

Wind of the Spirit (WotS) is a leading community organization in Morristown focused on immigration. Its members are no strangers to the police department. When agencies around the country stepped up identification requirements following September 11, 2001, the group worked out an agreement with the city to accept its membership card as adequate ID.

Undocumented victims of crime would come to the WotS office to meet with police and report crimes. WotS gave cultural sensitivity presentations for patrol officers and even recruited translators to help police process Spanish-speaking arrestees. According to founding member Diana Mejia, who is also a community organizer with the American Friends Service Committee, Mayor Cresitello turned the tide. "We used to have this collaborative relationship. Then the new administration killed it with their politics of cleaning the town of 'illegals.'"

In the summer of 2007, as ICE raids swept the country, one raid landed in Morristown. WotS member Pilar was among the undocumented residents whose homes were targeted. The raid reminded her of life in Guatemala decades ago, she explained in her native Spanish:

> On December 6, 1989, my husband was disappeared. There was a lot of violence that year. I don't know what happened. He probably was killed. A car came, a grey one, and they took him at 6 p.m. He was coming home from shopping in another town.[13]

In 1996 she paid a coyote to come to the United States. She came alone with a few belongings on her back and a telephone number for a family friend in South Carolina. When that number did not work, Pilar followed a fellow traveler into New Jersey. She soon sent for her children. They rebuilt a good life in Morristown.

But Pilar's memories of Guatemala came rushing back on June 6, 2007:

> They knocked on my door hard. I opened it. They pushed the door in. They didn't look like police. There were in plain clothes. One woman entered with a gun. She wore a jacket that said I-C-E. Just her. The other person, who spoke Spanish, had jeans, no uniform. Another tall man was at the open door. Those three people were bad. They treated me bad. The woman shoved the pistol in me. I asked, "Why are you here? What are you looking for?" I reached for the phone. They pulled it out of the jack. They pushed past me. I followed them up the stairs. My son was in the bathroom. He was practically naked. They saw the tattoo on his arm. They said, "You're a gang member, aren't you? AREN'T YOU?"

ICE agents took Pilar's son, Juan Carlos—a high school student—into custody. Days before, a friend had rubbed a temporary, water-based tattoo on his arm. In immigration courts and the media, tattoos are taken as a symbol of gang membership. But Pilar refocused the issue. "They took him because of the color of his skin, not the silly tattoo on it." He stayed in detention in Hudson County Jail, another ICE-contracted facility, for the next three months. The immigration judge set bail at $10,000. "We couldn't believe the amount," Pilar explained. "Everybody gave us a little bit. A thousand here, two thousand dollars there. That's how we put it together."

WotS leaders were looking for legal counsel to help the raided families when Cresitello stepped up his 287(g) campaign with an anti-immigration rally at city hall. The mayor later reflected that ICE activity increased his interest in the program:

> We are a center of activity that is more likely to be a target of terrorism than any other town in New Jersey. We need tools that other towns don't have. The plan would be to work with ICE, to keep us in the loop on investigations, so we would be part of investigations. Rather than having them come in on their own, we would be in the loop. One of the houses they raided, we were trying to get in there for a year for stacking violations.[14]

The rally was intended as a media spectacle, with organizers anticipating 1,000 protesters. Yet less than 300 showed up—and half of them had come to counter-protest.[15] The truly glaring figure was the $18,000 that the city paid in security costs.[16] Police in riot gear formed a barricade that ran the block. On the mayor's side stood out-of-state activists disgruntled with a recent defeat in the courts against local immigration enforcement in Pennsylvania.[17] They were joined by members of a white supremacist Internet forum called Stormfront.[18]

Opposite the barricade were out-of-state activists for open borders and a locally organized human chain whose t-shirts spelled NO HUMAN BEING IS ILLEGAL. Participants included members of WotS, Christian ministers and lawyers. They stood silently in protest. A Morristown native viewing the scene recalled that the last time her town witnessed such overt conflict was on July 4, 2000, when the Nationalist Movement (a Mississippi-based white supremacist organization) held a rally entitled "Independence from Affirmative-Action Day."[19]

For fear of deportation, WotS discouraged undocumented members from attending the rally. The group hosted a community forum in a local church, where local residents attended to learn about the 287(g) program and express concerns. Over the length of the campaign the group held

Anti-immigration protestor standing in the mayor's camp of Morristown rally. Photo by Stanley Rogouski.

Police in riot gear dividing the sides. Photo by Stanley Rogouski.

Immigrant rights organizer Diana Mejia caught crossing the line. Photo by Stanley Rogouski.

five forums and vigils that drew 2,000 people. They also presented a petition against the ICE program to the city's political leadership, with more than 3,000 signatures collected.

But traditional protest tactics were only a piece of the strategy. Using relationships built over the years, WotS lobbied behind-the-scenes to get meetings with key decision makers. In one meeting with the Morris County Freeholders a diverse delegation—including Pilar's son Juan Carlos, a local businessman, a local lawyer, a minister, and legal experts from New York University School of Law—came to express concern. Some attendees referenced the importance of maintaining trust between immigrants and the police. But the conversation quickly turned to dollars and cents when Mejia dropped a stack of papers, ten inches thick, on the conference room desk. It outlined potential lawsuits.[20]

Exercising due diligence WotS members also requested a meeting with Mayor Cresitello. He invited the group into his office on Christmas Eve. The meeting began with a heated argument. Following the ICE raids, WotS leaders had held workshops to teach residents about their constitutional right to see a judicial warrant before admitting any law enforcement officer into their homes. Nationwide, local organizations in communities targeted by ICE raids educated residents about the differences between civil and criminal warrants, prompting mass resistance to opening the door to ICE.[21] Cresitello sharply reprimanded Mejia. "You didn't need to educate them and tell them 'Don't open the door.'"[22] She retorted, "It's the law. Shouldn't we follow the law?"

Juan Carlos offered his story as a human example of the cruel deportation system. The mayor sympathetically offered to give him a letter of support in immigration court. He also tried to put Mejia's concerns in perspective: "Just like Italians were pushed out, African Americans and Latinos will be pushed out."

A technical requirement of the 287(g) program—dedicated jail beds—disrupted the mayor's plan.

ICE officials injected a surprising twist in the politicking when they revealed a basic requirement of the 287(g) program: It requires a jail. ICE does not just grant a local agency the privilege of performing civil immigration arrests. It also confers the duty of incarcerating each suspected noncitizen. Morristown itself does not operate a jail. Cresitello expressed his frustration: "I don't think ICE should be putting the requirement on me, that I find a jail to hold our prisoners."[23] He turned to the Morris County Freeholders, a legislative body that oversees the county budget, to ask if the Morris County Jail would donate beds to his immigration crackdown.

The Morris County Jail had lived through its own controversy almost two decades prior. In the 1980s, elected leaders decided that the county needed to replace a fifty-year-old facility with a new and bigger one. A decade-long battle ensued over where to build it. No one wanted the jail in their backyard. Former Freeholder Peter O'Hagan, who headed a 1989 study on where to locate the new facility, commented, "We went through hell on this jail."[24]

In 1995, a state judge finally settled the issue by ruling that the county could build the jail in Collinsville, home to forty percent of the county's Black families, against the residents' claim of environmental racism.[25] The failed lawsuit starkly contrasted with one already won by the county against the state. In 1993 the Supreme Court of New Jersey had ruled that the state could not solve its problem of prison overcrowding by forcing Morris County and others to house its prisoners.[26]

Opened in 1999, the new jail is a $32 million, six-story facility with eight housing pods, 277 cells and the capacity to house 528 detainees. Before its opening, the daily cost of incarceration was estimated at $191.06 per person.[27] Politicians promised the community that they would not play motel with the new space. It would be used strictly for housing local arrestees subject to pre-trial or short-term confinement.

The mayor argued that the 287(g) program was a worthy exception. He turned to the Freeholders for help and even suggested that the entire county should get deputized by ICE. The Freeholders politely turned to their sheriff for his expert opinion.

In the face of ICE silence, the Republican sheriff conducted an investigation of the 287(g) program.

Sheriff Edward Rochford is not an open border activist. He was an ardent supporter of John McCain during each of his failed presidential runs. He sized up Morristown's chief executive affably. "I grew up with Mayor Cresitello. I know him. We are friends. He wants to go after day laborers and people stacking" in overcrowded apartments.[28]

Rochford is a fiscal conservative always on the lookout for new funding streams. Before the new Morris County Jail opened he had asked the Freeholders to approve a contract with federal authorities to house federal immigration detainees because the estimated annual payment of $10 million would offset jail construction costs.[29] The Freeholders declined.

In 2003, the sheriff enrolled Morris County Jail in the State Criminal Alien Assistance Program (SCAAP). Managed by the Bureau of Justice Assistance in Washington, DC, the program reimburses local and state facilities for part of the cost of incarcerating local arrestees who are non-citizens. Morris County has received a total of $2.1 million in SCAAP payments through end of 2008.[30] Yet in 2004, when Sheriff Rochford approached the Freeholders about another contract offer to house federal prisoners for per diem payment, they turned it down.[31]

This time, the intractable Freeholders were approaching the sheriff. He was ready to find out how the 287(g) program could benefit his bottom line. He submitted a long list of questions to ICE officials. To his surprise, Rochford recounts, ICE was not eager to help.

> We had a meeting with ICE reps in Newark. They were very nice, but wouldn't answer our questions. I thought, "If they are like that prior to us signing on, what would they be like after?" You know the only question ICE answered? I asked if we were sued, by a group, the inmate or family, who defends us? They said, "Oh, we give you government attorneys." But typically on a lawsuit two parties are named: the government title and the individual officer. They only represent the title. So who represents me as an individual? They said, "We only do the title, not the individual." So we're talking about $80,000 in legal fees that my family pays![32]

After the meeting, Rochford set out to further investigate the program: What authority did it grant? What was the supervisory structure? How did funding work? Would ICE legally indemnify the sheriff and his employees? He commented:

> Most sheriffs go into this blindly. When you buy a house or a car, you read what you're signing. The same principle applies here. The sheriffs who are against it say, "Why waste resources when the feds aren't doing their job?" Some do it for political purposes. Usually it's money or publicity.[33]

Given the chronic errors in ICE databases, Rochford worried that American citizens could sue for being wrongfully categorized as immigrants. His eyebrows raised even higher after interviewing authorities in neighboring Passaic County. Passaic County was among the private and public correctional agencies that had signed an inter-governmental service agreement with ICE to house civil immigration detainees under a contract that would pay "per diem" expenses for each prisoner. In the wake of September 11, 2001, public scrutiny of Passaic's contract grew with civil rights groups clambering at the jail gates in protest for detainees' human rights.[34] While 287(g) is a different ICE devolution program, Rochford thought his neighbor's experience with the feds could prove instructive.

Passaic County's warden told Rochford that five pro-immigrant demonstrations had cost his jail $50,000 for riot control teams; patrols for the jail's interior and the demonstration area outside; mounted police for crowd control; undercover agents to photograph demonstrators; and sniper units for lethal force protection.[35] The county spent another $200,000 in litigation costs in response to detainees' lawsuits, while ICE secured its own dismissal from these lawsuits by way of motion in federal court.

Discrepancies between state and federal rules on holding detainees proved volatile. For example, sheriffs interpret the New Jersey Administrative Code to allow officers to use dogs to search and control prisoners.[36] But, ICE detention standards explicitly forbid the use of canine force against civil detainees. Passaic jailers followed the state code, even after contracting with ICE. In November 2004, *National Public Radio* broadcast an exposé on the treatment of ICE detainees in the Passaic County Jail, charging that guards were taunting and beating detainees, and terrorizing them with dogs.[37] In 2006 the Department of Homeland Security's inspector general launched his own investigation of the jail. Passaic officials complained that auditors were intrusive. Their final report indicted Passaic for rampant detainee abuse.[38] On the verge of losing the ICE contract, the Passaic sheriff terminated it himself.

Sheriff Rochford reflected on the aftermath. "Passaic really suffered from its work with ICE. It became so reliant on immigration money, now that it's done, they have to lay off officers."[39] He also considered that even if ICE offered Morris County a separate contract for housing detainees, the purported federal reimbursement rate of $95 per day was too low given the relatively high cost of incarceration for any jail in the Northeast US.[40]

Given personnel, overhead, and indirect costs, Sheriff Rochford suspected that signing a 287(g) contract was essentially handing a blank check to ICE. The County Administrator John Bonnani echoed, "ICE tries to make [287g] sound like the greatest thing since sliced bread. But there's 21 county jails and *none* of them have signed up. Why? I think the feds just want jail space."[41]

Sheriff Rochford compiled his findings in a fifteen-page report to the Freeholders.[42] Just to be certain he had portrayed the details correctly, he asked ICE officials to review the draft:

> We gave ICE the option of proofreading our report. They didn't respond! We said, "You can check it. Please just don't change anything factual." How do you not take that type of offer? And while you are asking me to come on board! In our report, we spoke with many experts. But ICE was the single most influential source because they did nothing.[43]

In the face of ICE silence during the research process, Mayor Cresitello submitted a set of "Anticipated Answers" to each of the questions the sheriff had posed to ICE officials. In his own report, Sheriff Rochford cautioned Cresitello's document should not be relied upon for guidance.

> We do not believe it would be prudent to use answers that we are unsure are correct and of which the origin is unknown. We also do not understand how Morristown is privy to an "Anticipated Answer" when we are still awaiting a response from ICE.[44]

The final report, unedited by ICE, includes an estimate that to have the capacity to house 60 civil detainees, the county would pay $1.3 million in personnel and facility start-up costs. The lack of ICE funding for basic costs was noted in boldface: "**ICE would not reimburse the County for any start up costs such as those mentioned.**" Collateral expenses such as lawsuits or security against protesters could not be accurately projected.

The 287(g) program did not appear to serve any public safety mandate.

ICE claims that the 287(g) program is an essential tool for capturing "criminal illegal aliens."[45] Yet in Morristown, no one persuasively made the case that immigrants are a strategic target group. Even Mayor Cresitello fell short of making a public safety argument. “If we had a 287(g) in Morristown, there’s no question that people would be frightened. They’d leave the community. Do I say all illegals leave? No. I just say, ‘Get out of Morristown. Go to Dover!’”[46]

Sheriff Rochford said that the anticipated fallout from the Morris County sheriff’s report was no more than a trickle. “We got four letters blasting us for not doing it. We sent them the report. Three retracted.”[47] According to his warden, Frank Corrente, in the eighteen months preceding Rochford’s investigation only one percent of 4,500 jail admissions were foreign born.[48] Without 287(g) authority, jail officers reported each one to ICE. ICE agents visited the facility and placed a federal warrant on any detainee, legal or undocumented, who may be deportable.[49]

Sheriff Rochford concluded that 287(g) was simply unnecessary. “You can’t put a dollar amount on safety, but the system is working. Why expose officers to undue liability? New Jersey taxes are already so high. 287(g) would hit the taxpayer. When are we going to have our own Boston Tea Party?”[50]

Conclusion

In August 2007 New Jersey Governor Jon Corzine created his state’s first “blue ribbon” commission on immigration. At the inauguration, the chairman criticized Morristown’s “flurry” of anti-immigrant action.

> …For every Hightstown, a town that is welcoming and embracing its newest residents, there is a Morristown, where an attempt to federally deputize the local police to enforce civil immigration violations, is creating division, spurring resentment and making segments of the population feel unsafe and reluctant to report crimes for fear of deportation. For this very reason, we cannot have each of our 566 municipalities creating separate immigration policies.[51]

The Morris County Freeholders saved the city from statewide disgrace when they rejected federal partnership once more in January 2007. Without a jail to hold civil immigration arrestees, Cresitello lost his bid to bring 287(g) to Morristown. He moved on to launch a political campaign for the US Senate, hoping to unseat incumbent Frank Lautenberg. His anti-immigration platform did not carry him past the Democratic primary. Meanwhile, Robb Pearson—the lead organizer of Morristown’s pro-287(g) rally—made a 180-degree turn, repenting for his activism in an open letter to the Morris County *Daily Record*. “I had allowed myself to be overly influenced by toxic super-nationalism, which was underscored by exclusionary and bigoted political viewpoints using the logic of ‘rule of law’ as a justifying façade.”[52] Juan Carlos, the high school student picked up in the ICE raids, was deported to Guatemala in September 2008. His living family remains in Morristown.

RECOMMENDATIONS

We cannot put a price tag on safety. But American citizens should not be obliged to pay for specious federal programs. Nor should we allow the operations of our criminal justice system to be highjacked by a broken immigration system. Our broken immigration system must be fixed, not burdened with avoidable dead weight. To address the harms that the 287(g) program has already inflicted on public safety and local democracy, we recommend:

The Obama Administration should terminate the 287(g) program.

Day laborers and drivers of color make poor law enforcement targets. The 287(g) program amounts to a local and state bailout of the failed federal immigration enforcement business. It has taken the handcuffs off local law enforcement by giving them civil arrest powers, while at the same time distracting them from their core public safety mission. The program fails to strike the correct balance between safety and rights. It has harmed US citizens of color, disrupted the operation of the criminal justice system, and burdened US taxpayers with unnecessary costs. The 287(g) program must be terminated immediately.

The US Government Accountability Office should investigate the 287(g) program.

The GAO should conduct a thorough investigation of the 287(g) program to determine how its operations have impacted public safety; and how much local, state, and federal tax monies have been used for its implementation. Critical questions include: How did ICE determine which agencies would be deputized and what civil immigration powers to include in each contract? How did ICE personnel comply with the federal requirement to “supervise and direct” each participating agency? Which localities violated the terms of their contract and precisely what violations have occurred? Who are the 70,000-plus immigrants arrested under the program? And, how has the program diverted resources from critical needs such as community policing?

ICE asserts that it has already conducted an internal investigation of all 287(g) contracts and has found no errors. Documented abuses from Maricopa County, Arizona, to Prince William County, Virginia, tell another story. ICE itself cannot be charged with investigating its own errors. Thorough documentation of the poor performance of this program will provide essential feedback for reform efforts undertaken at ICE and the Department of Homeland Security under the new administration. An independent assessment is urgently needed.

The Justice Department should investigate the 287(g) program.

The Civil Rights Division of the Department of Justice should investigate the 287(g) program for violation of the executive order banning racial profiling. Deputized agencies appear to have systemically violated the 287(g) contract obligations on record keeping. Widespread “crime suppression sweeps” in Maricopa County and documented cases of racial profiling throughout the country warrant an investigation of the program’s compliance with the US Constitution, particularly the equal protection clause of the Fourteenth Amendment and the Fourth Amendment ban on arrest without probable cause. Following a criminal arrest an arrestee typically can file a lawsuit to challenge constitutional violations. But victims of unlawful civil immigration arrests have a legal and practical barrier to suing: They are deported. The Department of Homeland Security should adopt the ban on all racial profiling set by the Department of Justice.

Congress should require a racial impact analysis before authorizing new immigration law enforcement programs.

In the twenty-first century, noncitizens in the U.S. are increasingly people of color. Immigration law enforcement efforts, while not intentionally based on race, have a disproportionate impact on people of color, including US citizens. The 287(g) program in Maricopa County, for example, has clearly enabled racial profiling. Given the nexus between migration status and skin color, the federal government must conduct a racial impact analysis of any immigration enforcement efforts before implementing them.

Congress should create mandatory, meaningful reporting requirements for monitoring *all* ICE operations.

Facing a global fiscal crisis, the United States cannot afford wasteful spending. The ICE budget, which has grown more than 200 percent since the agency's inception in 2003, is not above public scrutiny. ICE is a novel agency with a complicated mission. Internal reports conducted by the Office of the Inspector General indicate that ICE routinely fails to collect critical data needed to analyze its own performance and impact. The 1996 immigration reforms made prosecutorial power the cornerstone of the immigration enforcement system. ICE has extraordinary power to create programs and exercise discretion. ICE does not disclose how it chooses state and local partners in its various devolution programs and does not adequately report on their operations. Holes in data collection are detrimental to the most basic external oversight of the public agency. Congress should require ICE to systematically document and disclose detailed data related to the implementation and impact of *all* its programs.

APPENDIX A: CRIME IN FOCUS

State	Jurisdiction	Violent Crimes Index (2006)	Property Crimes Index (2006)	Violent Crimes Index Change (2000 - 2006)	Property Crimes Index Change (2000 - 2006)
Florida	Manatee County	1,023.3	4,850.3	13.2%	21.7%
Nevada	Las Vegas	982.9	4,667.4	64.2%	20.6%
North Carolina	Durham	936.7	5679.4	-5.1%	-27.0%
Florida	Jacksonville	837.2	5,416.2	-25.0%	-7.1%
Oklahoma	Tulsa County	815.9	3,126.7	30.9%	-2.1%
Tennessee	State	760.2	4128.3	7.5%	-1.3%
Arizona	Phoenix	737.8	5934.3	-0.1%	-10.7%
Forida	State	712	3986.1	-12.3%	-18.4%
California	Los Angeles County	682.9	1885.3	-28.3%	1.1%
South Carolina	Beaufort County	646.4	3,518.8	-14.8%	-18.8%
New Mexico	State	643.2	3937.2	-15.1%	-17.3%
South Carolina	York County	622.7	2,775.6	-7.8%	-16.9%
Colorado	El Paso County	604.6	1635.6	187.1%	-8.7%
Texas	Harris County	578.6	3,300.6	31.4%	10.0%
Missouri	State	545.6	3826.5	11.3%	-5.2%
Florida	Bay County	535.8	3158.8	-11.3%	-24.2%
Virginia	City of Manassas	521.8	3181.1	34.8%	-13.7%
Arizona	State	501.4	4627.9	-5.7%	-12.6%
Arizona	State	501.4	4627.9	-5.7%	-12.6%
Florida	Brevard County	491.6	2,517.5	-16.9%	-17.3%
Florida	Collier County	477.4	1873.2	-20.2%	-44.1%
USA	***nationwide***	***473.5***	***3334.5***	***-6.5%***	***-7.8%***
Georgia	State	471	3889.2	-6.7%	-8.4%
Arkansas	Springdale	462.3	4305.6	99.7%	29.9%
Massachusetts	State	447	2391	-6.1%	-6.2%
Alabama	State	425.2	3936.1	-12.5%	-3.0%
Arizona	Yavapai County	415.1	1996.8	3.9%	-36.1%
California	Riverside County	392.8	2982.6	-22.6%	32.8%
Colorado	State	391.6	3451.3	17.2%	-5.4%
Virginia	Fairfax County	387.7	2199.8	44.8%	-28.5%
Georgia	Whitfield County	380.1	3490.5	126.0%	3.4%
California	San Bernardino County	354.8	2110.6	-1.7%	-5.4%
North Carolina	Cumberland County	353.6	3124.9	-26.6%	-20.1%
Arkansas	Washington County	295.6	1698.3	0.9%	114.8%
Arizona	Maricopa County	264.3	2082.4	-3.4%	-6.1%
Massachusetts	Framingham	249	2,400.3	36.6%	42.6%
Texas	Farmers Branch	238.6	4,376.2	-20.0%	-10.0%
Arizona	Pinal County	238.1	4058.8	-66.1%	58.7%

continued next page

APPENDIX A: CRIME IN FOCUS (continued)

State	Jurisdiction	Violent Crimes Index (2006)	Property Crimes Index (2006)	Violent Crimes Index Change (2000 - 2006)	Property Crimes Index Change (2000 - 2006)
Virginia	Prince William County	235.6	2167.9	16.4%	-16.0%
Arizona	Pima County	228.4	3989.2	-14.1%	20.4%
North Carolina	Alamance County	214.2	2110.7	41.9%	10.1%
Arkansas	Rogers	206.5	5152.8	1.5%	45.9%
Arkansas	Benton County	195.8	1416.6	143.2%	196.4%
California	Orange County	187.7	1186.3	4.2%	-9.6%
Texas	Carrollton	187.3	3,093.9	-1.3%	-3.2%
Georgia	Hall County	159.5	2208	*Not Available*	*Not Available*
North Carolina	Henderson County	130	1744.1	33.2%	5.8%
North Carolina	Wake County	116.8	1588.1	-18.0%	-20.6%
New Hampshire	Hillsborough County	105.4	1,650.4	51.0%	12.3%
Maryland	Frederick County	88.2	1,021.5	47.5%	11.8%
Virginia	Loudoun County	79.7	1364.1	-50.1%	-32.6%
Ohio	Butler County	75.3	1,414.1	-40.8%	3.2%
North Carolina	Cabarrus County	56.4	2119.8	-39.5%	15.4%
Virginia	Rockingham County	46.3	540	63.6%	-5.7%
Alabama	Etowah County	6.4	801.7	-96.3%	-33.3%

Source: Federal Bureau of Investigations 2000-2006
Note: Includes only those jurisdictions for which crime data is available.

APPENDIX B: RACE IN FOCUS

State	Jurisdiction	Latino Population Growth (2000 – 2006)
Virginia	Loudoun County	159.7%
Virginia	Prince William County	150.3%
Maryland	Frederick County	147.4%
Arkansas	Benton County	100.1%
South Carolina	York County	95.4%
North Carolina	Cabarrus County	92.1%
Arkansas	Washington County	86.0%
North Carolina	Wake County	84.4%
North Carolina	Mecklenburg County	81.1%
North Carolina	Gaston County	80.2%
North Carolina	Alamance County	72.2%
Ohio	Butler County	71.8%
North Carolina	Henderson County	67.8%
Texas	Denton County	63.5%
Georgia	Hall County	62.1%
Georgia	Cobb County	61.3%
Florida	Collier County	61.0%
Georgia	State	60.0%
Florida	Manatee County	58.4%
Tennessee	Davidson County	58.0%

continued next page

APPENDIX B: RACE IN FOCUS (continued)

State	Jurisdiction	Latino Population Growth (2000 – 2006)
North Carolina	Durham	57.4%
Florida	Brevard County	56.8%
Nevada	Las Vegas	54.2%
Arizona	Yavapai County	54.1%
South Carolina	Beaufort County	53.7%
Oklahoma	Tulsa County	53.3%
California	Riverside County	52.9%
Florida	Jacksonville	52.9%
Florida	Bay County	52.5%
Alabama	Etowah County	51.7%
Tennessee	State	51.6%
Arizona	Pinal County	49.1%
Arizona	Maricopa County	48.0%
Georgia	Whitfield County	47.7%
Alabama	State	46.9%
Virginia	Rockingham County	42.5%
Arizona	State	39.2%
California	San Bernardino County	37.2%
Florida	State	35.8%
Missouri	State	35.7%
Texas	Harris County	32.6%
Arizona	Phoenix	30.8%
Massachusetts	Barnstable County	27.3%
Colorado	El Paso	27.0%
Colorado	State	27.0%
USA	nationwide	25.3%
Arizona	Pima County	24.3%
Massachusetts	State	19.1%
California	Orange County	12.8%
New Mexico	State	12.5%
California	Los Angeles County	11.0%
Massachusetts	Framingham	7.5%
North Carolina	Cumberland County	-23.4%

Source: US Census 2000-2006
Note: Includes only those jurisdictions for which census data is available.

ENDNOTES

CHAPTER 1. 287(g): A Project in Devolution

1 See: "Re: Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations" [memorandum]. Office of Legal Counsel, Department of Justice (3 Apr. 2002). A heavily redacted copy was provided to the American Civil Liberties Union in July 2005, in response to a lawsuit under the Freedom of Information Act.

2 "Re: Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File" [memorandum]. Office of Legal Counsel, Department of Justice (11 Apr. 1989). The 1989 opinion states, "Because not everyone for whom a warrant of deportation is outstanding has violated a criminal law, we believe that a warrant of deportation fails to constitute a sufficient basis for including in the NCIC Wanted Person File all persons subject to such a warrant." The NCIC database is accessed by local police to see if a person stopped has any outstanding warrants. The 2002 Office of Legal Counsel opinion cited in endnote 1 reverses the 1989 opinion.

3 There are two legal regimes that govern noncitizens within the United States: immigration laws that articulate the power of government to determine membership; and domestic laws that determine the rights of territorially present persons. The proper jurisdiction of each regime appears as a battle between "separation" and "convergence" models. The convergence model advocates powerful membership regulation and, treating alienage as a morally relevant status, recognizes formal rather than sociological community ties. The separation model limits the moral relevance of alienage and instead emphasizes individual rights. The community's right to control immigration is just one part of an ongoing relationship between the individual and the polity. See: Bosniak, Linda S. Membership, Equality, and the Difference that Alienage Makes. 69 N.Y.U. L. Rev. 1047 (1994). Bosniak also points to how the debate between separation and convergence is not the same as that between nationalism and communitarianism, as the former one agrees that the nation-state, by policing citizenship, protects liberal values. See: Bosniak, Linda S. Citizenship Denationalized. 7 Ind. J. of Global Legal Stud. 447 (2000).

Peter Schuck posits that there exists a harmful dialectical relationship between open-door communitarianism and exclusionary nativism that only efficient immigration machinery can sedate. In order for the concept of citizenship to be meaningful, the institution must be limited and protected by the state. See: Schuck, Peter H. The Transformation of Immigration Law. 84 Colum. L. Rev. 1, 1 (1984).

4 For an excellent history of restriction in US immigration law, see: Ngai, Mai. Impossible Subjects: Illegal Aliens and the Making of Modern America. Princeton, NJ: Princeton University Press, 2004.

5 *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

6 *Demore v. Kim* (01-1491), 538 U.S. 510 (2003).

7 See Simon, Jonathan. Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear. New York: Oxford University Press, 2007. Simon argues that unlike most European countries, the United States manages risk by developing a crime strategy to reduce it—that is, by codifying the underlying behavior into the penal code and investing in its criminal prosecution.

8 Under former President Bill Clinton immigration law prosecutions doubled from 1996 to 2000. Immigrants became the fastest growing segment of the federal prison population. The total length of incarceration for an immigration felony conviction spiked, from about four months in 1985 under the Reagan Administration to twenty-one months in 2000. See: Bureau of Justice Statistics. Special Report: Immigration Offenders in the Federal Criminal Justice System, 2000. Washington: Department of Justice, August 2002. Available at http://www.ojp.usdoj.gov/bjs/pub/pdf/iofcjs00.pdf.

Under the Bush Administration immigration offenses became the largest category of federal prosecutions. Referrals climbed sixty-five percent, from just under 24,000 in fiscal year 2003 to almost 40,000 in fiscal year 2004. In the same period, prosecutions rose eighty-two percent, from almost 21,000 to just below 38,000. The increase in convictions was similarly up, from 18,000 to 31,000. Immigration-related offenses now account for one-third of federal prosecutions—the largest single group, exceeding even drug enforcement (which now comprises about a quarter of the federal prosecution caseload). See: Transactional Records Access Clearinghouse. Prosecution of Immigration Cases Surge in U.S. 2005. Syracuse, NY: Syracuse University, 2005. Retrieved 22 July 2008, from http://trac.syr.edu/tracins/latest/131/.

9 On the expansion of executive powers following September 11th, see: Chang, Nancy. Silencing Political Dissent: How Post-September 11 Anti-Terrorism Measures Threaten Our Civil Liberties. New York: Seven Stories Press, 2002.

10 Simon, Jonathan. Personal interview by Aarti Shahani and Judith Greene. 21 Mar. 2008. On file with authors.

11 Georgetown University law professor David Cole summarized his legacy, "We had an attorney general who treated criticism and dissent as treason, ethnic identity as grounds for suspicion and Congressional and judicial oversight as inconvenient obstacles … He was a disaster from a civil liberties perspective but also from a national security perspective." See: Bumiller, Elisabeth. "Ashcroft Quits Top Justice Post; Evans Going, Too." New York Times 10 Nov. 2004. Retrieved 30 Aug. 2008 http://www.nytimes.com/2004/11/10/politics/10cabinet.html.

12 See, for example, Schuck, Peter H., and John Williams. Removing Criminal Aliens: The Pitfalls and Promises of Federalism. 22 Harv. J.L. & Pub. Pol'y 367, 374 (1999). Meanwhile, other skeptics of the plenary power doctrine believe that immigration is an inherently federal function. See: Motomura, Hiroshi. Federalism, International Human Rights, and Immigration Exceptionalism. 70 U. Colo. L. Rev. 1361 (1999). Motomura argues that as the plenary power doctrine grows obsolete in immigration, the foundations of immigration exceptionalism, which legislates against judicial review in removal, are crumbling. The fact that constitutional norms increasingly define immigration jurisprudence has two seemingly contradictory implications: Lawmakers ought to end immigration exceptionalism against judicial review and give each immigrant a hearing; meanwhile the government should *not* end immigration exceptionalism with regard to federalism because the US traditionally defines itself *as a nation* through its newcomers.

13 Since 2006 the National Conference of State Legislators has monitored this movement. See regularly updated reports at http://www.ncsl.org/programs/immig/index.htm. Last visited 8 July 2008.

14 See: Kretsedemas, Phil. "What Does an Undocumented Immigrant Look Like? Local Enforcement and the New Immigrant Profiling." Keeping Out the Other: A Critical Introduction to Immigration Enforcement Today. Eds. David C. Brotherton, and Philip Kretsedemas. New York: Columbia University Press, 2008. Kretsedemas summarizes the movement for inherent authority from 2002 through 2006 including the REAL ID Act enacted in 2005, along with the proposed CLEAR Act and HR 4437. He argues that responses against locally driven immigration enforcement are fractured, taking on only the most egregious violations without an overt analysis in opposition to the fundamental premise of devolution.

15 In 1996 lawmakers were overhauling death penalty, prisoner, welfare, and immigration systems. States criticized the feds for the latter's failure to close our physical borders. Some sued for the costs of educating, medicating and incarcerating legal and undocumented immigrants. See, for example: Schuck, Schuck, Peter H., and John Williams. Removing Criminal Aliens: The Pitfalls and Promises of Federalism. 22 Harv. J.L. & Pub. Pol'y 367, 374 (1999).

16 See: Subhash, Kateel, and Aarti Shahani. "Families for Freedom, Against Deportation and Delegalization." Keeping Out the Other: A Critical Introduction to Immigration Enforcement Today. Eds. David C. Brotherton, and Philip Kretsedemas. New York: Columbia University Press, 2008.

17 See: Powers of Immigration Officers and Employees, INA § 287(g) (1996), 8 U.S.C. § 1357(g). See also: Standards for Enforcement Activities for Regulations Which Further Define and Curtail Immigration Officers' Powers, 8 CFR § 287.8.

18 Powers of Immigration Officers and Employees, INA § 287(g) (1996), 8 U.S.C. § 1357(g).

19 Comments of Senator Orrin Hatch, in: Re-Create a Meltdown. 104th Cong. 2nd sess., S11504 (1996).

20 See: 8 U.S.C. § 1357 (5)(B)(iii).

21 Center for Immigration Studies. Immigration Enforcement Disrupts Criminal Gangs in Virginia: State Should Expand Involvement of Local LEAs. Washington: Center for Immigration Studies. January 2008. Available at www.cis.org.

22 A former commissioner of the federal immigration authority under Bill Clinton argued that along with prosecutorial power comes the obligation to exercise prosecutorial discretion. She described prosecutorial discretion in a memo to her agency's directors, enforcement officers, and attorneys writing, "Service members are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process—from planning investigations to enforcing final orders—subject to their chains of command and to the particular responsibilities and authority applicable to their specific

position." Her memo outlined basic factors to consider in granting discretion, such as community ties, humanitarian concerns, honorable military service, and the agency's limited enforcement resources. See: Meissner, Doris. "Exercising Prosecutorial Discretion" [memorandum]. Washington: Immigration and Naturalization Service, Department of Justice. 17 Nov. 2000.

23 *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). Lawyers and scholars argue that now that violations are widespread, the exclusionary rule should apply. See, for example: Aldana, Raquel E. Of Katz and Aliens: Privacy Expectations and the Immigration Raids. 41 U.C. Davis L. Rev. 1081 (Feb. 2008). See also: Burch, Stella Jane. "Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza. 2008 Wis. L. Rev. 6 (2008). The 9th Circuit ruled in favor of extending the exclusionary rule to civil immigration proceedings in a case where immigration agents forcefully entered a home without a judicial warrant. See: *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008).

24 See: Cole, David. Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism. New York: The New Press, 2004.

25 Bureau of Justice Statistics. Prisoners in 2006; Prisoners in 2007. In Prison Statistics. Web. 2007. Available at http://www.ojp.gov/bjs/prisons.htm.

26 INA § 236(c) (1996), 8 U.S.C. § 1226(c). Categories subject to mandatory detention include "arriving aliens" and those "released" from criminal custody. After the 1996 laws were enacted and before September 11, 2001, both the legislative and judicial branches revisited the wisdom of the laws' detention and deportation provisions. The Supreme Court ruled that indefinite civil detention is unconstitutional. See: *Zadvydas v. Davis*, 533 U.S. 678 (2001). The bipartisan Fix '96 campaign included legislative proposals to repeal the mandatory deportation and detention provisions. See, for example: H.R. 4966, Restoration of Fairness in Immigration Law Act of 2000. 106th Cong., 2nd sess. (26 July 2000). See also: H.R. 1485, Family Reunification Act of 1999. 106th Cong., 1st sess. (20 Apr. 1999); and H.R. 5062, To establish the eligibility of certain aliens lawfully admitted for permanent residence for cancellation of removal under section 240A of the Immigration and Nationality Act. 106th Cong., 2nd sess. (27 July 2000).

27 Office of Inspector General. Detention and Removal of Illegal Aliens. Washington: Department of Homeland Security, April 2006. The report notes that the increase in the mandatory detention population limits the agency's ability to use discretion-based detention in non-mandatory cases.

28 Attorney General John Ashcroft also caused controversy when he removed judges from the administrative bench who, he charged, took cases with "no colorable grounds for appeal" and thereby delayed review of urgent matters. He overhauled the decision-making structure of the Board of Immigration Appeals, the appellate body of the immigration court system, and reduced the number of judges from twenty-three to eleven. See: Executive Office for Immigration Review. Board of Immigration Appeals. AG Order No. 2609–2002, Procedural Reforms to Improve Case Management [EOIR No. 131]. Washington: Department of Justice, 26 Aug. 2002. Retrieved 30 Nov. 2008, from http://www.usdoj.gov/eoir/vll/fedreg/2002_2003/fr26aug02.pdf.

29 Chertoff, Michael. "Letter to Senator Christopher J. Dodd." Washington: Department of Homeland Security, 14 June 2007. On file with authors.

30 See: Appleseed. Forcing Our Blues into Gray Areas: Local Police and Federal Immigration Enforcement. A Legal Guide for Advocates. Washington: Appleseed Network, Jan. 2006: 30. For an excellent summary of the Florida Department of Law Enforcement Pilot Program, see: Little, Cheryl and Kathie Klarreich. Post 9/11 Scapegoating of Immigrants. Miami: Florida Immigrant Advocacy Center, Apr. 2005, 50-54.

31 Immigration and Customs Enforcement. Factsheets: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act. Washington: Department of Homeland Security, 6 Sept. 2007.

32 See: Bureau of Labor Statistics. Career Guide to Industries, 2008-09 Edition. Washington: U.S. Department of Labor, 12 Mar. 2008. Retrieved 31 Jan 2009, from http://stats.bls.gov/oco/cg/cgs042.htm; and Bureau of Justice Statistics. "Justice System Employment and Payroll." Sourcebook of Criminal Justice Statistics Online. Washington: Department of Justice, 2009. Retrieved February 4, 2009, from http://www.albany.edu/sourcebook/pdf/t1172006.pdf.

33 Immigration and Customs Enforcement. Factsheets: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act [updated]. Washington: Department of Homeland Security, 18 Aug 2008.

34 Immigration and Customs Enforcement. Factsheets: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act. Washington: Department of Homeland Security, 6 Sept. 2007.

35 Immigration and Customs Enforcement. ICE Strategic Context. Washington: Department of Homeland Security, 2009. 6.

36 Office of Inspector General. An Assessment of United States Immigration and Customs Enforcement's Fugitive Operations Teams. Washington: Department of Homeland Security, March 2007.

37 Immigration and Customs Enforcement. Factsheets: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act. Washington: Department of Homeland Security, 6 Sept. 2007.

38 While the undocumented population doubled from 1994 to 2004, data from the Bureau of Justice Statistics indicates that the US witnessed a sharp drop in both violent and property crime rates. See: Bureau of Justice Statistics. Reported Crime in the United States—Total [1960 to 2007]. In Data Online: Crime Trends. Web. Retrieved 30 Jan 2009. Available online at http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/statebystaterun.cfm?stateid=52.

A study by the conservative Americas Majority Foundation finds that crime rates are lowest in states with the highest growth rates of immigrants. See: Nadler, Richard. Immigration and the Wealth of States. Overland Park, KS: Americas Majority Foundation, Jan. 2008: 9. Available at http://www.amermaj.com/ImmigrationandWealth.pdf. Another study finds that US incarceration rates among young men are lowest for immigrants. In 2000 the 3.5 percent incarceration rate for native-born men ages eighteen to thirty-nine was five times higher than the 0.7 percent rate for foreign-born men. See: Immigration Policy Center. The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates among Native and Foreign-Born Men. Washington: American Immigration Law Foundation, Spring 2007. Available at http://www.immigrationpolicy.org/images/File/specialreport/Imm%20Criminality%20(IPC).pdf.

One journalist in Arizona suggested that media played a key role in propagating myths about immigrant criminality. See: Kiefer, Michael. "Media Coverage May Be Feeding Illegal-Immigrant-Crime Beliefs." Arizona Daily Star 9 Apr. 2007. Retrieved 14 July 2008, from http://www.azstarnet.com/metro/177523.php.

39 Crowley, P.J. Personal interview by Aarti Shahani. 31 Oct. 2008. On file with authors.

40 For excellent summary of initial law enforcement objections to the 287(g) program, see: Appleseed. Forcing Our Blues into Gray Areas: Local Police and Federal Immigration Enforcement. A Legal Guide for Advocates. Washington: Appleseed Network, Jan. 2006. See also: Harris, David. The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America. 38 Rutgers L. J. (Fall 2006).

41 See the adopted "Nine Point Position Statement" in Major Cities Chiefs Association. Immigration Committee Recommendations for Enforcement of Immigration Laws by Local Police Agencies. Sun Valley, ID: Major Cities Chiefs, June 2006. Retrieved 30 Dec. 2008, from http://www.houstontx.gov/police/pdfs/mcc_position.pdf.

42 Paliga, Gailya. "Letter to the Editor: Victims Repeatedly." The News & Observer (Raleigh) 16 Aug. 2008: A8.

43 Orange County Board of Commissioners. A Resolution Opposing the Use of Local Law Enforcement to Enforce Civil Immigration Law and Policy. Orange County, NC: Board of Commissioners, 23 Jan. 2007. On file with authors.

44 For a deeper treatment of racial profiling and equal protection issues raised by the 287(g) program, see Chapter II: The Arizona Laboratory.

45 *Lozano, et al. v. City of Hazleton. No. 3:06 CV 1586* (M.D. *P*a. 2006)

46 Immigration Reform and Control Act of 1986, P.L. 99-603, 100 Stat 3359 (6 Nov. 1986).

47 Litigators raised four constitutional issues: United States Constitution's supremacy clause, due process clause, equal protection clause, and privacy guarantees. The court granted claims based on pre-emption and due process. See: *Lozano, et al. v. City of Hazleton. No. 3:06 CV 1586* (M.D. *Pa.* 2006). The court based its decision on the explicit pre-emption of the federal Congress when it passed the 1986 law and also on two types of implied preemption: First, "field preemption exists where the federal regulatory scheme is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" A second type of implied preemption, called "conflict preemption," exists when a party cannot comply with the different legal schemes, or when the state or local law obstructs the execution and objectives of Congress. In Hazleton, the court continued, due process was violated by denying a meaningful notice to tenants or hearing to employees. Employers could

just fire employees rather than go through trouble of documentation. Employers, employees, landlords, and tenants would all be referred to a court that cannot even hear their claims.

For an overview of the federal preemption of immigration law, see Rodríguez, Cristina, Muzaffar Chisti, and Kimberly Nortman. Testing the Limits: A Framework for Assessing the Legality of State and Local Immigration Measures. Washington: Migration Policy Institute, 2007. Available at http://www.migrationpolicy.org/pubs/NCIIP_Assessing%20the%20Legality%20of%20State%20and%20Local%20Immigration%20Measures121307.pdf.

48 Morawetz, Nancy, and Alina Das. Personal Interview by Aarti Shahani. 26 Aug. 2008. On file with authors.

49 Morawetz, Nancy, and Alina Das. Personal Interview by Aarti Shahani. 26 Aug. 2008. On file with authors.

50 Rosenbloom, Rachel E. Is the Attorney General the Custodian of an INS Detainee? Personal Jurisdiction and the 'Immediate Custodian' Rule in Immigration-Related Habeas Actions. 27 N.Y.U. L. Rev. & Soc. Change (2002). See also: *Vasquez v. Reno*, 233 F.3d 688, 697 (1st Cir. 2000). For a recent treatment of habeas corpus issues in deportation proceedings, see: American Immigration Law Foundation. Introduction to Habeas Corpus. Washington: American Immigration Law Foundation, 2008. Available at http://www.ailf.org/lac/pa/lac_pa_0406.pdf.

Federal courts have ruled differently on which parties are responsible for legal custody in habeas actions challenging the physical detention of a civil immigration detainee. See Supreme Court decision in: Rumsfeld v. Padilla, 542 U.S. 426 (2004). It is also unclear how the Prison Legal Reform Act (PLRA) applies to immigration detainees housed in jails and prisons. While the Supreme Court has not ruled on this issue, some lower courts have held that the sections of the PLRA applying to "prisoners" do not apply to civil detainees, such as the exhaustion requirement, the mental and emotional injury requirement, and the filing fee provision. See: Agyeman v. INS, 296 F.3d 871 (9th Cir. 2002). But the section of the PLRA on the requirements for and termination of injunctive relief, which apply to "all civil actions with respect to prison conditions," may apply to immigration detainees. See: Vasquez v. Carver, 18 F. Supp.2d 503 (E.D. Pa. 1998). See also: Center for Constitutional Rights and National Lawyers Guild. The Jailhouse Lawyer's Handbook: How to Bring a Federal Lawsuit to Challenge Violations of Your Rights in Prison. New York: Center for Constitutional Rights and National Lawyers Guild, 2003. Available at http://www.jailhouselaw.org/CCRNLGJHL.pdf.

The proper respondent in a lawsuit seeking monetary damages for medical neglect is also unclear. The Supreme Court ruled in *West v. Atkins* that for defendants facing criminal charges, "contracting out medical care does not relieve the state of its constitutional duty to provide adequate medical care to those in its custody." See: *West v. Atkins*, 487 U.S. 42 (1988). Although West specifically extended liability to the private physician under contract with the state to provide care (rather than to the state itself), the basic premise was that the obligation is the state's and it is a non-delegable obligation. If a detainee or if a class of detainees sues regarding inadequate medical care, overcrowding, or another violation, it is unclear if liability rests with ICE (assuming the Eighth Amendment test applies) for the Fifth Amendment civil immigration detainee's claim. According to Tom Jawetz of the American Civil Liberties Union, "The question for both local and federal defendants should be whether the defendants were deliberately indifferent to the serious medical needs of the detainees. The evidence to prove that may well be quite different. The on-site people can show deliberate indifference by not keeping medical records, responding slowly to medical requests, having a bad emergency response system, etc. The off-site folks may have liability if they routinely and unreasonably delay or deny requests for off-site medical care or if they know of inadequate treatment but send detainees there anyway, or if they are so willfully ignorant of the problems that you can presume indifference." See: Jawetz, Tom. Personal email to Judith Greene. 18 Dec. 2008. On file with authors.

51 Harris, David. The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America. 38 Rutgers L. J. 1, 4 (Fall 2006).

52 Morawetz, Nancy, and Alina Das. Personal interview by Aarti Shahani. 26 Aug. 2008. On file with authors.

53 See appendix for tables that present index crime and Latino population data for the 287(g) jurisdictions.

54 Barrett, Michael. "Officers Decide When to Arrest, But for Immigrant Community Decision Can Lead to Deportation." Gaston Gazette 7 July 2008. Retrieved 30 Sept. 2008, from http://www.gastongazette.com/news/cloninger_22388___article.html/charges_arrested.html. See also: McKinney, Jeremy. "287(g) Program Won't Keep Us Safer." Greensboro News & Record 12 Oct. 2008. Data was disclosed followed an American Civil Liberties Union public records request. See ACLU North Carolina fact sheet on file with authors.

55 Ross, Janell. "Pregnant Woman's Jailing Questioned." The Tennessean. 4 Aug. 2008.

56 Preston, Julia. "Immigrant, Pregnant, Is Jailed Under Pact." The New York Times. 20 July 2008.

57 Sloan, Scott. "Norris Targets Legislation to Immigration Training." The Commercial Appeal (Memphis) 3 Nov. 2005. Retrieved 28 Nov. 2008, from http://senatornorris.org/media2005/11-09-05a.htm.

58 For the purpose of the Missouri State Highway Patrol, see http://www.mshp.dps.missouri.gov/MSHPWeb/AboutThePatrol/patrolGeneral.html. Last visited 28 Aug. 2008.

59 Abrams, Vivi. "More Troopers to Train for Immigration Busts." Birmingham News 22 Feb. 2005.

60 Hernandez, Daisy, and Vanessa Huang. "Roundups: Watching the War on Terror." Colorlines 8.1, Spring 2005: 10.

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63 Taylor, Steven L. "What in the World is Homeland Security?" Birmingham News 19 Dec. 19 2004.

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67 Sanford, Peggy. "ICE Raid Needs Absolute Certainty." Birmingham News 27 July 2005.

68 Hansen, Jeff, Kelli Hewett Taylor, and Dawn Kent. "Banished: Jefferson County Judge Orders Illegal Immigrants to Leave; U.S. Justice Department Says Only Federal Judges Have That Authority." Birmingham News 19 Mar. 2006.

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70 Preston, Julia. "Sheriff Defies Immigrants by Billboard and by Blog." New York Times 30 July 2006. Retrieved 20 Nov. 2008, from http://www.nytimes.com/2006/07/31/us/31sheriff.html.

71 Federal Bureau of Investigation. Uniform Crime Reports. Washington: Federal Bureau of Investigation, 2006-2008.

72 Seper, Jerry. "Ohio Deputies Get Federal Training." The Washington Times 9 Jan. 2008. Retrieved 19 Nov. 2008, from http://video1.washingtontimes.com/immigration/2008/01/ohio_deputies_get_federal_trai.html.

73 Hershey, William. "Illegal Immigrant Home from Jail, Lawyer Says Armando Mondragon's Arrest Could Help Him." Dayton Daily News (OH) 16 Aug. 2008: A4.

74 Rochford, Edward. Personal interview by Aarti Shahani. 10 Mar. 2008. On file with authors.

75 Reagan's 1986 legalization created a program to provide partial reimbursement to states for the costs incurred in incarcerating noncitizens that have committed crimes. The State Criminal Alien Assistance Program (SCAAP) was funded for the first time in 1994. Every state in the nation, as well as the Virgin Islands and Puerto Rico, now receive SCAAP funding. The program, administered by the Bureau of Justice Assistance, is described at: http://www.ojp.usdoj.gov/BJA/grant/scaap.html.

Joining 287(g) was not traditionally a prerequisite for SCAAP, yet an internal report indicates that ICE may try to make it one. See: Office of Inspector General. Cooperation of SCAAP Recipients in the Removal of Criminal Aliens from the United States (Audit Report 07-07, Redacted—Public Version). Washington: Department of Justice, Jan. 2007. Retrieved 29 Nov. 2008, from http://www.usdoj.gov/oig/reports/OJP/a0707/final.pdf.

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79 HR 1645, Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (Strive). Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. 110th Cong., 1st sess. (6 Sept. 2007) (testimony of Corey A. Stewart, chairman of the Prince William Board of County Supervisors). Retrieved 4 Sept. 2008, from http://judiciary.house.gov/hearings/September2007/Stewart070906.pdf.

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CHAPTER 2. The Arizona Laboratory

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26 County of Gloucester v. State, 132 N.J. 141 (1993).

27 Morris County Sheriff's Office. An Impact Review of the United States Bureau of Immigration and Customs Enforcement 287(g) Program Upon the County of Morris. Morris County, NJ: Sheriff's Office, October 2007. 8. Estimate provided by the accounting firm of Deloitte & Touche LLP to the County of Morris in January 1997.

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31 Rochford, Edward. Personal interview by Aarti Shahani. 10 Mar. 2008. On file with authors. The Freeholders declined the offer by US marshals against the advice of Sheriff Rochford and the county treasurer.

32 Rochford, Edward. Personal interview by Aarti Shahani. 10 Mar. 2008. On file with authors.

33 Rochford, Edward. Personal interview by Aarti Shahani. 10 Mar. 2008. On file with authors.

34 In the immediate aftermath of September 11, 2001, the most vocal protests came from Desis Rising Up and Moving, a South Asian organization based in Queens, New York. See, http://www.drumnation.org/. Protest built within New Jersey too, as evidenced by the growth of the New Jersey Civil Rights Defense Committee, an activist organization that developed relationships with Passaic detainees, documented allegations of abuse, and frequently outreached to the media. See, http://www.nj-civilrights.org/.

35 Morris County Sheriff's Office. An Impact Review of the United States Bureau of Immigration and Customs Enforcement 287(g) Program Upon the County of Morris. Morris County, NJ: Sheriff's Office, October 2007. 9.

36 Morris County Sheriff's Office. An Impact Review of the United States Bureau of Immigration and Customs Enforcement 287(g) Program Upon the County of Morris. Morris County, NJ: Sheriff's Office, October 2007. 9.

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[38] Office of the Inspector General. Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities. Washington: Department of Homeland Security. 22 Dec. 2006. While the report was critical, the New Jersey Civil Rights Defense Committee charged that it understated abuse. The group, in partnership with Rutgers University, issued a subsequent "shadow report." Retrieved on 11 Nov. 2008, from http://www.nj-civilrights.org/archived/Home/20071003.htm.

In the immediate aftermath of the September 11th attacks, Amnesty International investigated New Jersey county jails including Passaic County and issued its own report charging abuse. See: Amnesty International. USA: Amnesty International's Concerns Regarding Post September 11 Detentions in the USA. London: Amnesty International. 4 Mar. 2002. Retrieved 11 Nov. 2008, from http://www.amnesty.org/en/library/asset/AMR51/044/2002/en/dom-AMR510442002en.html.

[39] Rochford, Edward. Personal interview by Aarti Shahani. 10 Mar. 2008. On file with authors.

[40] Morris County Sheriff's Office. An Impact Review of the United States Bureau of Immigration and Customs Enforcement 287(g) Program Upon the County of Morris. Morris County, NJ: Sheriff's Office, October 2007. 8.

[41] Bonnani, John. Personal interview by Aarti Shahani. 10 Oct. 2007. On file with authors. As of August 2008, neighboring Hudson County Jail joined the ICE program without public hearing or media scrutiny. Local residents were not aware of the new partnership with ICE until that November, when the federal agency updated its 287(g) factsheet, online at http://www.ice.gov/pi/news/factsheets/section287_g.htm.

[42] Morris County Sheriff's Office. An Impact Review of the United States Bureau of Immigration and Customs Enforcement 287(g) Program Upon the County of Morris. Morris County, NJ: Sheriff's Office, October 2007. In his report and personal interview, Sheriff Rochford repeatedly and (we believe) unintentionally misstated that all of his deportable immigrants are "illegal." When asked, however, he clarified that all non-citizens, including lawful permanent residents (or green card holders), are referred to ICE.

[43] Rochford, Edward. Personal interview by Aarti Shahani. 10 Mar. 2008. On file with authors.

[44] Morris County Sheriff's Office. An Impact Review of the United States Bureau of Immigration and Customs Enforcement 287(g) Program Upon the County of Morris. Morris County, NJ: Sheriff's Office, October 2007. 14.

[45] See, for example: Immigration and Customs Enforcement. Factsheets: Delegation of immigration authority Section 287(g) Immigration and Nationality Act. 6 Sept. 2007. This initial fact sheet, which was removed from the ICE website in late 2008, continually focuses on the program as a response to criminal activity: "[Participants] ensure that criminal aliens incarcerated within federal, state and local facilities are not released into the community upon completion of their sentences." Also, local partners purportedly "gain 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."

[46] Wind of the Spirit Meeting with Mayor Donald Cresitello. Personal notes by Personal notes. 19 Dec. 2007. On file with authors.

[47] Rochford, Edward. Personal interview by Aarti Shahani. 10 Mar. 2008. On file with authors.

[48] Corrente, Frank. Personal interview by Aarti Shahani. 7 Jan. 2008. On file with authors.

[49] If the jail referrals to ICE made 287(g) seem inessential, a statewide policy requiring police to call ICE suggested the program was downright superfluous. In September 2007, following the murder of three students by an alleged undocumented immigrant, New Jersey Attorney General Anne Milgram directed all police to check the immigration status of anyone arrested for a "serious crime." She defined the term expansively to include any indictable offense (misdemeanor or felony) and Driving While Intoxicated. The directive expressly applies to "undocumented immigrants." See: NJ Att'y Gen. Law Enforcement Directive no. 2007-03. 22 Aug. 2007.

A subsequent memo to criminal and municipal court officers elaborates that flagging for ICE referral should occur "only if the officer has reason to believe that defendant is an illegal immigrant." [Emphasis in original.] The consistent reference to non-citizens who are out of status suggests that the AG directive does not apply to lawful permanents residents (green card holders). See: Administrative Office of the Courts (NJ). Directive no. 11-07. 25 Oct. 2007.

The state directive permits an immigration inquiry if there is already basis for criminal arrest—the same slippery slope treaded by 287(g) deputized officers nationwide. In response to the state order, Cresitello recited his own version of the Inherent Authority Doctrine: "Any Morristown police officer has right to ask name, address, country of birth under federal law. Anne Milgram can't make NJ a sanctuary state, as she's attempting to do." See: Cresitello, Donald. Personal interview by Aarti Shahani. 10 Mar. 2008. On file with authors.

The New Jersey statewide directive differs from an administrative order passed by New York City Mayor Michael Bloomberg, which indicates that any city agency may report a non-citizen if "the individual to whom such information pertains is suspected by such officer or employee of such officer's or employee's agency of engaging in illegal activity, other than mere status as an undocumented alien…" See: New York City. Office of the Mayor. "Exec. Order No. 41, City-wide Privacy Policy and Amendment of Executive Order No. 34 Relating to City Policy Concerning Immigrant Access to City Services." 17 Sept. 2003.

50 Rochford, Edward. Personal interview by Aarti Shahani. 10 Mar. 2008. On file with authors.

51 Chen, Ronald. "Press Conference, Liberty State Park, Announcing the Creation of the Governor's Blue Ribbon Advisory Panel on Immigrant Policy" [remarks]. Trenton, NJ: Department of the Public Advocate, 6 Aug. 2007. Available at http://www.nj.gov/publicadvocate/home/pdf/immigrantpolicypanel/ImmigrantSpeech080607.pdf.

52 Pearson, Robb. "Transformation: One year after the ProAmerica Rally." The Daily Record 14 July 2008. Retrieved 15 July 2008. Available at http://www.dailyrecord.com.

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ACKNOWLEDGEMENTS

During our research on this urgent and complex federal program, numerous people generously gave us their insights, expertise and time. The authors sincerely thank for their unique contributions:

Charu al-Sahli, Jennifer Allen, Joe Arpaio, Andrea Black, John Bonnani, Frank Corrente , Donald Cresitello, PJ Crowley, Alina Das, Scott Decker, Bassina Farbenblum, Tracy Friddle, Robin Goldfaden , Amy Gottlieb, David Harris, Lydia Hernandez, Tom Jawetz, Laura Jones, Subhash Kateel, Dan Kesselbrenner, Bill Konopnicki, Phil Kretsedemas, Joanne Lin, Peter Markowitz, Diana Mejia , Nancy Morawetz, Chris Newman , Dan Pachoda, Russell Pearce, Kevin Pranis, Lawrence Ragonese, Roberto Reveles, Salvador Reza, Diana Ritchie , Helen Rivas, Edward Rochford, Liana Rowe, Dan Saban, Luissana Santibáñez, Jose Serrano, Rinku Sen, Kerri Sherlock, Dora Schiro, Jonathan Simon, Kyrsten Sinema, Kathy Waters, Nicola Wells, Seth Wessler, Eric Wingerter, Michael Wishnie, and the staff and members of Detention Watch Network, the Florida Immigrant Coalition, the National Day Labor Organizing Network, and Wind of the Spirit.

We also thank the Open Society Institute-New York for its invaluable financial support.

The report was edited by Amy Sonnie and designed by Mizue Aizeki.

Justice Strategies, a project of the Tides Center, Inc., is a nonpartisan, nonprofit research organization dedicated to the proposition that grassroots movements can win real criminal justice reforms if given access to the right information and public education tools. Our mission is to provide high quality "action research" to advocates and policymakers working to change the laws, policies and practices that drive mass incarceration and racial disparity in the U.S., and who are pursuing more humane and cost-effective approaches to criminal justice and immigration law enforcement. Justice Strategies' work is focused on sentencing and correctional policy, the political economy of incarceration, and the detention and imprisonment of immigrants. Our researchers have represented their findings before legislative committees and commissions, and at professional conferences and community forums across the country. They serve as a critical resource for the policymakers, media, and organizations working on policy reform at the local, state and national level.

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