RACIAL PROFILING IN IMMIGRATION ENFORCEMENT: STATE AND LOCAL AGREEMENTS TO ENFORCE FEDERAL IMMIGRATION LAW

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INTRODUCTION

After the tragic attacks of September 11, 2001, the lack of communication and cooperation among local, state, and federal law enforcement became the subject of intense criticism.[1] Under pressure to deal with illegal immigration, the Department of Justice ("DOJ") began to consider extending immigration enforcement responsibilities to state and local agencies.[2] In 1996, the DOJ had asserted that state and local officers do not have the power to enforce civil immigration violations,[3] such as overstaying one's visa,[4] but have power only to enforce criminal immigration violations, such as illegal entry into the country.[5] In

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1. Marc M. Harrold, *Community Policing and Enforcement of Immigration Laws*, IMMIGR. L. TODAY, Sept.–Oct. 2005, at 31, 31.

2. Nat'l Immigr. Law Ctr., *Justice Dept. Contemplates Extending Immigration Enforcement Responsibilities to State and Local Agencies*, IMMIGRANTS' RTS. UPDATE, Apr. 12, 2002, *available at* http://www.nilc.org/immlawpolicy/arrestdet/ad049.htm.

3. Assistance by State and Local Police in Apprehending Illegal Aliens, 20 Op. Off. Legal Counsel 26, pt. II.B (1996).

4. *See id.*

5. Gonzales v. City of Peoria, 722 F.2d 468, 476 (9th Cir. 1983), *overruled on other grounds by* Hodgers-Durgin v. De la Vina, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999). Many other cases allow for state and local enforcement of criminal violations but not civil violations. *See, e.g.*, Farm Labor Org. Comm. v. Ohio State Highway Patrol, 991 F. Supp. 895, 903 (N.D. Ohio 1997) (permitting state highway patrol officers to enforce criminal provisions of federal immigration law); Gutierrez v. City of Wenatchee, 662 F. Supp. 821, 824 (E.D. Wash. 1987) (holding that local police officers cannot detain people based on a suspicion of violation of civil immigration laws); Gates v. L.A. Superior Court, 238 Cal.

a 2002 Memorandum for the Attorney General, the Office of Legal Counsel ("OLC") withdrew the 1996 position and instead concluded that "[s]tates have inherent power, subject to federal preemption, to make arrests for violation of federal [civil and criminal immigration] law."[6]

News of the 2002 OLC Memorandum sparked heated debate over the effects of state and local enforcement of federal immigration law.[7] Opponents of state and local enforcement include not only members of the immigrant community but also local law enforcement officials, who have worked consistently to build trust in immigrant communities in order to encourage crime reporting and cooperation in criminal investigations.[8] Another major concern about state and local enforcement is the potential for civil rights violations, especially racial profiling.[9] This concern stems from the belief that state and local officers lack the knowledge, training, and experience needed to approach immigration enforcement in a way that prevents civil rights violations.[10] Indeed, immigration advocates see the 2002 OLC Memorandum as an effort by the DOJ to receive state and local assistance in immigration enforcement without having to train the state and local

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Rptr. 592, 600 (Ct. App. 1987) (holding that only the Immigration and Nationalization Service has authority to enforce civil immigration provisions). For an in-depth analysis of state and local authority to enforce federal immigration law, including a discussion of the distinction between civil and criminal violations, see Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004).

6. *Secret Justice Department Memo Released*, 10 BENDER'S IMMIGR. BULL. 1453, 1529, 1537, 1542 (2005) (republishing the 2002 OLC Memorandum that was ordered disclosed in *National Council of La Raza v. Department of Justice*, 411 F.3d 350 (2d Cir. 2005)).

7. *See, e.g.*, Press Release, ACLU, Secret Immigration Enforcement Memo Exposed (Sept. 7, 2005), *available at* http://www.aclu.org/immigrants/gen/19984prs20050907.html; Nat'l Immigr. Law Ctr., *supra* note 2. Analysis of the 2002 OLC Memorandum is beyond the scope of this Note. For a detailed refutation of the OLC Memorandum, see ACLU, REFUTATION OF DEPARTMENT OF JUSTICE IMMIGRATION MEMO (2005) [hereinafter ACLU, REFUTATION], *available at* http://www.aclu.org/immigrants/gen/19902res20050906.html#attach (follow "Download" hyperlink).

8. Nat'l Immigr. Law Ctr., *supra* note 2. For further discussion of the effect on community policing efforts, see *infra* Part I.C.

9. Linda Reyna Yanez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 TEX. HISP. J.L. & POL'Y 9, 12 (1994) ("The danger reaches a worrisome level if one considers that the potential for civil rights violations lurks not only over undocumented aliens but over legally admitted aliens and U.S. citizens as well."); Nat'l Council of La Raza, State/Local Police Enforcement of Immigration Laws (CLEAR Act), http://www.nclr.org/content/policy/detail/1063/ (last visited Jan. 13, 2007). Especially after the terrorist attacks of September 11, 2001, there have been many complaints about racial profiling and civil rights violations in immigration enforcement. *See infra* Part IV.C.

10. Yanez & Soto, *supra* note 9, at 12–13. For a discussion of civil rights violations by state and local officers enforcing immigration laws without specialized training, see *infra* Part I.B.

officers in the complexities of immigration law enforcement or to spend federal resources on officer supervision.[11]

To avoid the controversy surrounding the 2002 OLC Memorandum, states and localities wishing to enforce civil as well as criminal immigration violations may enter into a special agreement with the DOJ.[12] The Immigration and Nationality Act[13] ("INA") provides for the training and authorization of state and local officers to enforce immigration law if the state or local jurisdiction enters into a Memorandum of Agreement ("MOA") with the DOJ.[14] Under an MOA, designated state and local officers may

> 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), [and] may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.[15]

As of February 2007, Florida; Alabama; Los Angeles County, California; San Bernardino County, California; the Arizona Department of Corrections; Riverside County, California; and Mecklenburg County, North Carolina had entered into MOAs with the federal government.[16] Twelve additional jurisdictions

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11. *See, e.g.*, Nat'l Immigr. Forum, *From Community Policing to Community Profiling: The Justice Department's Proposal to Have Local Police Enforce Immigration Laws*, IMMIGR. DAILY, May 28, 2002, http://www.ilw.com/immigdaily/digest/2002,0528.shtm (follow "From Community Policing to Community Profiling: The Justice Department's Proposal to Have Local Police Enforce Immigration Laws" hyperlink); Nat'l Immigr. Law Ctr., *supra* note 2.

12. While the 2002 OLC Memorandum suggests that state and local law enforcement officers have inherent authority to enforce civil immigration law, the Author found no other source supporting the 2002 OLC Memorandum's conclusion. *See supra* note 5. In fact, the ACLU indicates that "the legal memo is filled with legal errors." Press Release, ACLU, *supra* note 7. Furthermore, the 2002 OLC Memorandum is "unsupported by OLC or judicial precedent." ACLU, REFUTATION, *supra* note 7. Accordingly, "many law enforcement officers, state and local elected officials, and members of Congress have opposed" the 2002 OLC Memorandum for reasons including the following: "negative effects on public safety resulting from fear of the police in immigrant communities;" "increased cost and liability implications for state and local governments;" "lack of training in immigration law among police officers;" "increased risk of racial profiling;" and "particular dangers for individuals suffering from domestic abuse." *Id.* Hence, if a state or locality would like to enforce civil immigration law, rather than rely on the 2002 OLC Memorandum, it should voluntarily enter into a special agreement with the DOJ.

13. 8 U.S.C. §§ 1101–1537 (2000).

14. Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g). Some of these agreements were called "Memoranda of Understanding" ("MOUs") when they were made. E-mail from Robert Hines, Program Manager of 287(g) Agreements, Immigration and Customs Enforcement ("ICE"), to author (Sept. 22, 2006, 11:54:09 EST) [hereinafter E-mail from Robert Hines #3] (on file with author). However, in this Note, all agreements will be referred to as MOAs because that is what they are presently called. *Id.*

15. Immigration and Nationality Act § 287(g)(1), 8 U.S.C. § 1357(g)(1).

16. Telephone Interview with Robert Hines, Program Manager of 287(g) Agreements, Immigration and Customs Enforcement, in Washington, D.C. (Oct. 11, 2005);

throughout the United States were working on agreements with Immigration and Customs Enforcement ("ICE"), and hundreds more jurisdictions had inquired about creating programs.[17]

One of the questions surrounding the MOA programs is whether federal training in immigration enforcement and civil rights will prevent or reduce the likelihood of racial profiling by state and local officers.[18] The officers empowered by the MOAs are authorized to perform their immigration duties only within the ordinary course of their normal duties, such as when officers stop someone for a traffic violation or investigate a crime unrelated to immigration.[19] However, the danger exists that officers will stop people for the sole purpose of investigating their immigration status.[20]

This Note explores the likelihood that such racial profiling will occur under the MOA program. Part I discusses instances of racial profiling by state and local officers who do not receive federal training because they are not participants in the MOA program, and the effect of state and local enforcement of immigration law on community policing efforts. Parts II and III analyze the MOAs currently in existence and the federal training mandated by the MOAs. Part IV traces the use of race as a factor in generating reasonable suspicion for stops by federal immigration officers. Finally, Part V concludes that while there have been no official racial profiling complaints filed against MOA officers, the federal training provided through the MOA program will not prevent racial profiling by MOA officers. Accordingly, the best implementation of the MOA program is within the jails and prisons, where racial profiling is less of an issue.

I. ATTEMPTS OF NON-MOA STATE AND LOCAL OFFICERS TO ENFORCE FEDERAL IMMIGRATION LAW

Racial profiling refers to the law enforcement technique of singling out a person for a stop, interrogation, arrest or other investigation because of race or

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E-mail from Robert Hines #3, *supra* note 14. Orange County, California has submitted a request to ICE for an MOA, but the MOA has not been completed yet. E-mail from Robert Hines, Program Manager of 287(g) Agreements, Immigration and Customs Enforcement, to author (Jan. 20, 2006, 14:33:29 EST) [hereinafter E-mail from Robert Hines #1] (on file with author).

17. Peter Whoriskey, *States, Counties Begin to Enforce Immigration Law*, WASH. POST, Sept. 27, 2006, at A01.

18. According to Mark Dubina, Special Agent Supervisor of the Tampa Bay Regional Operations Center, Florida Department of Law Enforcement, there are police chiefs who are opposed to local enforcement of immigration law but who have "embraced" the MOA program because of its focused mission and "thorough training." *U.S. Representative Michael D. Rogers (R-AL) Holds Hearing on Border Security Partnerships Before the Subcomm. on Management, Integration, and Oversight of the H. Comm. on Homeland Security*, 109th Cong. (2005) [hereinafter *Hearings*] (statement of Mark F. Dubina, Special Agent Supervisor, Tampa Bay Regional Operations Center, Florida Department of Law Enforcement).

19. Telephone Interview with Robert Hines, *supra* note 16.

20. *See infra* Part I.B (discussing racial profiling by police officers who teamed with Border Patrol agents to enforce immigration law).

ethnic appearance.[21] Even if the officer's conduct is based only *in part* on race or apparent ethnicity, the conduct is still considered racial profiling, unless the officer is searching for a particular perpetrator of a specific crime and the reported description of the perpetrator includes a racial or ethnic description.[22] Hence, there is a difference between using race or ethnicity as a predictor, because of a preconceived notion or stereotype that members of a certain race or ethnic group are more likely to commit a crime, and using it as part of a description of a specific suspect.[23] Racial profiling creates and encourages negative stereotypes about certain racial and ethnic groups within the United States and is antithetical to the principles of justice and equality.[24] Furthermore, racial profiling does not improve law enforcement efficiency.[25] Nonetheless, studies show that racial profiling is prevalent in state and local law enforcement.[26]

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21. *See* Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1415 (2002); U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES 1 (June 2003) [hereinafter GUIDANCE], *available at* www.usdoj.gov/crt/split/documents/guidance_on_race.pdf ("'Racial profiling' at its core concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures.").

22. *See* Gross & Livingston, *supra* note 21, at 1415, 1416 n.6 (providing definitions of racial profiling).

23. David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 MISS. L.J. 423, 435–36 (2003) [hereinafter Harris, *Using Race or Ethnicity*].

24. United States v. Montero-Camargo, 208 F.3d 1122, 1135 (9th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 889 (2000); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 723–24 (2000) [hereinafter Johnson, *The Case Against Race Profiling*].

> Stops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone. Such stops also send a clear message that those who are not white enjoy a lesser degree of constitutional protection—that they are in effect assumed to be potential criminals first and individuals second.

Montero-Camargo, 208 F.3d at 1135.

25. *See* Harris, *Using Race or Ethnicity*, *supra* note 23, at 455–59. Statistics reveal that when police officers base stops and searches on race or ethnic appearance instead of suspicious behavior, "'hit rates'—the rates of searches that succeeded in finding contraband like drugs or guns—[are] actually lower . . . ." *Id.* at 457. For example, a study of New Jersey State Police officers found that "[w]hen [police officers] used only behavioral cues in stopping whites, they did almost twice as well as when they stopped blacks and five times as well as when they stopped Latinos." *Id.* at 458. Furthermore, searching only those people who exhibit suspicious behavior also does not "sweep such a high number of innocent people into law enforcement's net." *Id.* at 457.

26. AMNESTY INT'L, THREAT AND HUMILIATION: RACIAL PROFILING, DOMESTIC SECURITY, AND HUMAN RIGHTS IN THE UNITED STATES, at xiv (2004), *available at* http://www.amnestyusa.org/racial_profiling/report/rp_report.pdf; Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1, 2–3 (2005); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 983–87 (1999);

Racial profiling can be attacked on Fourth Amendment and Fourteenth Amendment grounds.[27] However, as will be shown in Parts I.A, III.B, and IV, the Fourth Amendment protection against unreasonable searches and seizures provides very little protection against racial profiling, especially in the context of immigration enforcement and routine traffic stops.[28] Similarly, the Fourteenth Amendment provides little protection because plaintiffs must show that the governmental actors *intended* to discriminate, and that the suspect's race was the *sole* reason that he or she was singled out.[29]

A. Racial Profiling by State and Local Law Enforcement Officers in Ordinary Law Enforcement

Police need only reasonable suspicion that a law has been violated to perform a brief investigatory stop of a pedestrian[30] or a vehicle.[31] In *Whren v.*

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see also, e.g., Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 440–41 (1997) (noting that even after Maryland State Police agreed to implement a new training program to prevent racial profiling and to maintain documents of all stops involving searches, Maryland State Police officers continued the "pattern and practice of stopping African-Americans"); David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 560–69 (1997) [hereinafter Harris, *"Driving While Black"*] (discussing racial profiling and pretextual stops in Colorado, Florida, Illinois, and Maryland); *III. Racial Discrimination on the Beat: Extending the Racial Critique to Police Conduct*, 101 HARV. L. REV. 1494, 1496 (1988) ("[M]any police officers freely admit[] that police use race as an independently significant, if not determinative, factor in deciding whom to follow, detain, search, or arrest." (footnote call numbers omitted)). *Contra* MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC: FINDINGS FROM THE 2002 NATIONAL SURVEY 4, 10 (2005), *available at* http://www.ojp.usdoj.gov/bjs/abstract/cpp02.pdf (finding that while Blacks and Hispanics were not significantly more likely than Whites to be stopped by police, they were more likely than Whites to be searched during a routine traffic stop).

27. William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 19 (2004).

28. *See infra* Parts I.A, IV.

29. *See* Washington v. Davis, 426 U.S. 229, 239–41 (1976); United States v. Avery, 137 F.3d 343, 355 (6th Cir. 1997) ("In order to prevail under the Equal Protection Clause, [a defendant] must prove the decision makers in his case acted with discriminatory purpose. . . . [A] defendant would have to demonstrate by a preponderance of the evidence that a police officer decided to approach [or pursue him] or her *solely* because of his or her race." (emphasis added) (first and third alterations in original) (citations omitted) (emphasis omitted) (internal quotation marks omitted)); Carter, *supra* note 27, at 33, 37.

> By focusing exclusively on the subjective intent of the governmental actor, rather than on the nature of the injury to the victim, equal protection doctrine currently offers little hope for persons alleging racial profiling. Most often, individuals alleging racial profiling point to a pattern of disproportionate investigations of racial minorities yet are unable to provide proof of discriminatory intent in an individual case. The difficulty of providing such proof means that racial profiling will usually be insulated from serious equal protection scrutiny.

Carter, *supra* note 27, at 33.

30. Terry v. Ohio, 392 U.S. 1, 30–31 (1968).

United States, because the police officers had probable cause[32] to believe that the suspects had violated traffic laws, the Supreme Court permitted what appeared to be a racially motivated stop of an automobile.[33] The suspects were young African-American men who remained at a stop sign for twenty seconds, made a U-turn, and turned without signaling.[34] The Court held that actual subjective motives, no matter what they were, would not enter the probable-cause Fourth Amendment analysis.[35] The effect of *Whren* is that police officers can stop any driver for whom there is probable cause of a traffic violation, regardless of the officers' subjective motivation, and the officers may use that stop to investigate whatever crime they choose.[36] Such stops are often called "pretextual stops" because the traffic violation is a pretext for initiating contact, further investigation, and even custodial arrest.[37]

B. Racial Profiling by State and Local Law Enforcement Officers While Enforcing Immigration Law

There is evidence of racial profiling when state and local officers have teamed up with federal officers to investigate immigration violations.[38] For example, in Chandler, Arizona, about 120 miles from the U.S.–Mexico border, disaster resulted when the Chandler Police Department and the Tucson Border Patrol Sector formed a joint operation to investigate illegal immigration in July

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31. Alabama v. White, 496 U.S. 325, 331 (1990).

32. Probable cause is a higher standard than reasonable suspicion. *Id.* at 328–31. For further discussion of reasonable suspicion, particularly in immigration enforcement, see *infra* Part IV.

33. Whren v. United States, 517 U.S. 806, 813, 818 (1996). The *Whren* holding references probable cause because the officers in that case had probable cause. *Id.* at 817–18. However, *White* makes clear reasonable suspicion justifies a stop of a vehicle. 496 U.S. at 328–31 (concluding that when officers stopped a suspect based on an anonymous tip, since that "tip had been sufficiently corroborated to furnish reasonable suspicion that respondent was engaged in criminal activity," the stop was reasonable under the Fourth Amendment).

34. *Whren*, 517 U.S. at 808–10.

35. *Id.* at 813–14.

36. *See* Harris, *"Driving While Black," supra* note 26, at 559.

37. *See* JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 244–46 (3d ed. 2006). The Supreme Court has upheld warrantless custodial arrests for petty offenses, including not wearing a seatbelt. Atwater v. City of Lago Vista, 532 U.S. 318 (2001). For a discussion of racial profiling where pretextual traffic stops were performed for the explicit purpose of investigating drug crimes, see Harris, *"Driving While Black," supra* note 26, at 561–63.

38. *See, e.g.*, Velasquez v. Senko, 643 F. Supp. 1172 (N.D. Cal. 1986) (denying summary judgment and dismissal for a class action complaint alleging violation of constitutional and statutory rights resulting from a series of INS, Border Patrol, and local police raids); Cervantes v. Whitfield, 613 F. Supp. 1439 (N.D. Tex. 1985) (disapproving proposed settlements of class action challenging the legality of INS, the Texas Department of Public Safety, and the Deaf Smith County Sheriff's Department practices regarding suspected immigration violators). For a discussion of suggested improvements to the law regarding racial profiling and the harm caused by racial profiling, see William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2162–80 (2002).

1997.[39] The joint operation, known as the "Chandler Roundup,"[40] lasted five days and resulted in the arrest and deportation of 432 undocumented immigrants, all of whom were Hispanic.[41] The joint operation cost the city $400,000 for the settlement of lawsuits in which plaintiffs alleged that they were stopped and questioned based exclusively on their apparent Mexican descent.[42]

As part of the Chandler Roundup, many Chandler Police officers were paired with INS/Border Patrol agents, while other officers called for INS/Border Patrol assistance only after they had reason to believe a suspect was an illegal immigrant.[43] Police officers received no special training prior to the joint operation.[44] They were merely supposed to provide security for the immigration officers who accompanied them.[45]

Even though Chandler Police officers were instructed to stop vehicles based only on probable cause of violations of state or local laws and not based on a belief that individuals were illegal immigrants,[46] the Arizona Attorney General's Office ("AG") concluded that many of the stops were conducted for the purpose of investigating those of apparent Mexican descent.[47] Very few of the vehicles that were stopped during the Chandler Roundup were stopped based on known violations of law.[48] Some police reports contained brief statements of violations, such as a turn into the wrong lane, a missing headlight, a rolling stop at a stop sign, or a broken windshield.[49] However, it appears that many of the stops were conducted for the sole purpose of investigating citizenship based on skin color.[50] Chandler Police records indicate that officers conducted state and national records checks, mostly on individuals with Spanish surnames, to determine whether

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39. Nat'l Immigr. Forum, *supra* note 11.

40. *See, e.g.*, Mary Romero & Marwah Serag, *Violation of Latino Civil Rights Resulting from INS and Local Police's Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 CLEV. ST. L. REV. 75, 79 (2005); OFFICE OF THE ATT'Y GEN., STATE OF ARIZ., RESULTS OF THE CHANDLER SURVEY 35 n.4 (1997) [hereinafter RESULTS OF THE CHANDLER SURVEY] (on file with author) (copies available through the Arizona Attorney General's office). The joint "operation was based on an 'informal' working relationship" between the Chandler Police Department and the INS/Border Patrol, with no formal written agreement. RESULTS OF THE CHANDLER SURVEY, *supra*, at 30.

41. RESULTS OF THE CHANDLER SURVEY, *supra* note 40, at 1.

42. Romero & Serag, *supra* note 40, at 80; Nat'l Immigr. Forum, *supra* note 11.

43. RESULTS OF THE CHANDLER SURVEY, *supra* note 40, at 8–9.

44. *Id.* at 31.

45. *Id.* at 29.

46. *Id.* at 9.

47. *Id.* at 31.

48. *Id.* at 10. On day three of the Roundup, from 4:00 to 6:00 in the morning, a total of forty-three vehicles were stopped. *Id.* Of those, officers identified only seven that were stopped based on a law violation. *Id.* For seven vehicles, the officers actually stated that there was no probable cause, and for the other twenty-nine vehicles, officers articulated no violation of law as the reason for the stop. *Id.*

49. *Id.* at 13.

50. *Id.* at 31.

suspects were wanted for law violations, yet in many of their reports, the officers stated no reason for the record checks.[51]

The Chandler Roundup involved officers stopping both drivers in their vehicles and individuals coming and going from grocery stores, gas stations, and convenience stores.[52] The Chandler Police Department checked in and around schools, stopped children, entered homes, and targeted particular businesses, all to inquire into citizenship.[53] Many people told the AG that the police were stopping anyone who was dark-complexioned or "Mexican-looking" and that "non-Mexican-looking" people were permitted to pass by freely.[54]

One driver who was stopped stated that when she asked the police officer whether "he wanted to see her driver's license or her immigration papers," he responded that he was only looking for immigration papers.[55] Another woman was sitting in her vehicle when a Chandler Police officer approached her and said, "Hey lady, you Mexican, huh?"[56] He then inspected her immigration papers, but never asked for her driver's license, proof of insurance, or registration; nor did he give her a ticket or warning or tell her why she had been questioned.[57] This woman was stopped and asked for her immigration papers three times in as many days, and the police never gave her a citation or any legal reason why they had stopped her.[58]

Numerous legal permanent residents ("LPRs") and U.S. citizens were stopped and questioned on multiple occasions "for no other apparent reason than their skin color or Mexican appearance or use of the Spanish language."[59] The majority of people arrested as a result of the Chandler Roundup were voluntarily deported without any other warrants or charges indicating other criminal activity.[60] The AG concluded that the joint operation violated the Equal Protection and Fourth Amendment rights of American citizens and legal residents in the Chandler area.[61]

C. The Effect of State and Local Enforcement of Immigration Law on Community Policing

Another main concern about state and local enforcement of federal immigration law is the effect on the community policing effort,[62] which focuses on

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51. *Id.* at 14.
52. *See id.* at 21–25.
53. *Id.* at 32.
54. *See id.* at 22.
55. *Id.* at 24.
56. *Id.* at 25.
57. *Id.*
58. *Id.* at 25–26.
59. *Id.* at 31.
60. *Id.* at 28.
61. *See id.* at 32.
62. Nat'l Immigr. Law Ctr., *supra* note 2; LISA M. SEGHETTI, STEPHEN R. VIÑA & KARMA ESTER, CONG. RESEARCH SERV., ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 24–25 (2004), *available at* http://fpc.state.gov/documents/organization/31349.pdf.

"strengthening relationships between police and the people they are charged with protecting."[63] If local police are involved in immigration enforcement, potential victims and witnesses of crime may hesitate to contact or cooperate with police because they may fear that the police will have them deported.[64] Indeed, the Chandler Roundup jeopardized the trust between the residents of Chandler and the Chandler Police.[65] In contrast, the City of Chicago has a "don't ask" policy, forbidding city employees, including police, to inquire into immigration status.[66] One Chicago officer noted that this policy has enabled him to form a strong bond with the community he protects.[67] As a result of residents' trust, he plays soccer with the children, and teenagers and residents tell police the identity of gang members and drug dealers in the community.[68]

On the other hand, many immigrants are unaware of the laws and do not realize that police officers cannot arrest them for civil immigration violations.[69] For example, when three people were killed inside a Houston Vietnamese

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63. David Hench, *Building Trust vs. Checking for Visas: Making Police Enforce Immigration Laws Could Actually Detract from Crime Fighting, Some Officials Say*, PORTLAND PRESS HERALD, Mar. 29, 2004, at 1B.

64. SEGHETTI, VIÑA & ESTER, *supra* note 62, at 24; Karen Brandon, *U.S. Weighs Local Role on Immigration: Some Police Fear Dual Duty Would Hurt Minority Ties*, CHI. TRIB., Apr. 14, 2002, at C10. Proponents of state and local enforcement contend that local officers know their communities well and offer the federal government an advantage in immigration enforcement. *See* SEGHETTI, VIÑA & ESTER, *supra* note 62, at 25. For a discussion of the effects of local enforcement of immigration laws on victims of domestic violence, see Gail Pendleton, ABA Comm'n on Domestic Violence, Local Police Enforcement of Immigration Laws and Its Effects on Victims of Domestic Violence, *available at* http://www.nationalimmigrationproject.org/DVPage/DVSA%20CLEAR%20Article.doc (last visited Feb. 5, 2007).

65. RESULTS OF THE CHANDLER SURVEY, *supra* note 40, at 32, 34.

66. Oscar Avila, *Bill Imperils Immigrants' Fragile Trust in Police*, CHI. TRIB., Mar. 31, 2004, at C1 (discussing the proposed CLEAR Act, which would require that local police forces assist with immigration enforcement as a condition for federal grants to local governments). At least thirty other jurisdictions also prohibit their officers from enforcing immigration laws. Rachel L. Swarns, *Local Officers Join Search for Illegal Immigrants*, N.Y. TIMES, Apr. 12, 2004, at A14. These cities are often called "sanctuary cities" or cities with "non-cooperation policies." SEGHETTI, VIÑA & ESTER, *supra* note 62, at 21. For a list of cities and counties that have "non-cooperation policies," see *id.* at 21 n.75. For a state-by-state list of policies, resolutions, and laws limiting local officers from enforcing immigration law, see NAT'L IMMIGR. LAW CTR., LAWS, RESOLUTIONS AND POLICIES INSTITUTED ACROSS THE U.S. LIMITING ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL AUTHORITIES (July 2004), http://www.nilc.org/immlawpolicy/LocalLaw/tbl_local_enfrcmnt_0704.pdf.

67. *See* Avila, *supra* note 66, at C1.

68. *Id.*

69. *See, e.g.*, *id.* (recounting a story of a woman who was scared of a Boy Scout leader because "a badge is a badge to many immigrants"). While the 2002 OLC Memorandum suggests that police officers have civil immigration powers, police do not have authority, absent MOAs, to arrest for civil immigration violations. *See* Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2000) (suggesting that a jurisdiction must enter an MOA before its law enforcement officers have authority to perform the duties of an immigration officer); *supra* note 12.

restaurant in July 2002, most of the witnesses ran away, not only because they were afraid that they might be implicated in the crime, but also because many of them were in the country illegally.[70] The police were able to get witnesses to come forward only after they spoke to the Vietnamese community during a popular Vietnamese-language radio show and assured people that they were only seeking information.[71]

The International Association of Chiefs of Police ("IACP") has never adopted a policy or resolution about state and local enforcement of immigration law because members of the law enforcement profession are not in agreement.[72] Members of the IACP who oppose local involvement in immigration enforcement have expressed concern over the "chilling effect" that involvement would have on the willingness of immigrants to report criminal activity and to assist in criminal investigations.[73] Other members believe that local law enforcement has a duty to assist the federal government in apprehending law violators, even if the area of law is immigration.[74]

As the Chandler Roundup illustrates, fears of racial profiling resulting from state and local enforcement of immigration law are well-founded. However, one might argue that with federal training under a formal cooperative agreement, perhaps the police officers would not have resorted to racial profiling and civil rights violations.[75] Such federal training is available to officers performing duties under an MOA under section 287(g) of the INA.[76]

II. THE MOAS

Section 287(g) of the INA[77] was enacted in 1996 to enhance state and local law enforcement cooperation and communication with federal immigration authorities, thereby multiplying the ICE forces.[78] Section 287(g) provides the opportunity for state or local law enforcement agencies to enter MOAs for the authorization of designated state and local officers "to identify, process, and when appropriate, detain immigration offenders they encounter during their regular, daily law-enforcement activity."[79] The state or local agencies voluntarily contact

70. Harrold, *supra* note 1, at 34.

71. *Id.*

72. *Hearings*, *supra* note 18 (statement of Chief Jimmy Fawcett, Sixth Vice President, International Association of Chiefs of Police); *see* Whoriskey, *supra* note 17.

73. *Hearings*, *supra* note 18 (statement of Chief Jimmy Fawcett, Sixth Vice President, International Association of Chiefs of Police).

74. *Id.* Chief Fawcett also mentioned concerns about the complexity of immigration law, training requirements, liability concerns, and limitations on warrantless arrests. *Id.*

75. *See Hearings*, *supra* note 18 (statement of Mark F. Dubina, Special Agent Supervisor, Tampa Bay Regional Operations Center, Florida Department of Law Enforcement).

76. Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2000).

77. *Id.*

78. U.S. Immigration and Customs Enforcement, Fact Sheet: Section 287(g) Immigration Enforcement (Sept. 9, 2005) [hereinafter Fact Sheet], http://www.ice.gov/pi/news/factsheets/section287g.htm.

79. *Id.*

ICE, and together the agencies create an MOA that is specific to the responsibilities and procedures appropriate to the state or local agency's needs.[80]

The MOA outlines the purpose of the agreement, the statutory authority permitting the MOA, and the scope of the functions that the DOJ authorizes the state and local officers to perform.[81] The MOA also establishes the qualifications and nomination procedures for officers to be selected for the MOA program,[82] the training and certification procedures and guidelines, and the division of financial responsibility for the program.[83] The federal government pays for the training and training materials, but the state and local jurisdictions are responsible for replacement workers while the MOA officers are in training and the officers' salaries, benefits, official issue material, and local transportation.[84] The MOA also explains the scope of ICE supervision, required review and evaluation of the program, and liability and responsibilities under the MOA.[85] The MOA lists federal, state, and local points of contact, and requires the state and local jurisdiction and ICE to communicate with the community and coordinate media releases.[86] Finally, there must be a complaint procedure in place, permitting individuals the option of submitting complaints to state, local, and/or federal agencies.[87]

ICE develops a training course revolving around various immigration law enforcement issues and skills.[88] The officers are required to pass related examinations, and then the officers are certified to implement the MOA.[89] After certification, ICE remains in contact with the state or local agency, providing support and advice.[90]

A. Florida's MOA

In April 2002, Florida became the first state to enter into a 287(g) MOA.[91] Motivated by the concern that many of the September 11, 2001 hijackers had lived

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80. *Id.*

81. *E.g.*, Florida's Memorandum of Understanding with the Department of Homeland Security, at 1 (2002) [hereinafter Florida's MOA], *available at* http://www.fdle.state.fl.us/Domestic_Security/DS_5/INS_FDLE_MOU.pdf.

82. *E.g.*, *id.* at 4. All candidates must be U.S. citizens able to qualify for appropriate federal security clearances and must have a certain number of years of experience in law enforcement. *Hearings*, *supra* note 18 (statement of Paul Kilcoyne, Deputy Assistant Director, Investigative Services Division, U.S. Department of Homeland Security).

83. *E.g.*, Florida's MOA, *supra* note 81, at 4–5.

84. *E.g.*, *id.* at 5; *Hearings*, *supra* note 18 (statement of Charles Andrews, Administrative Division Chief, Alabama Department of Public Safety).

85. *E.g.*, Florida's MOA, *supra* note 81, at 6–8.

86. *E.g.*, *id.* at 8–10.

87. *E.g.*, *id.* at 7, 11–14.

88. Fact Sheet, *supra* note 78. For further discussion of the training program, see *infra* Part III.

89. Fact Sheet, *supra* note 78.

90. *Id.*

91. Telephone Interview with Robert Hines, *supra* note 16.

in Florida,[92] the Florida Department of Law Enforcement ("FDLE") worked with ICE to create an MOA to authorize certain state and local Regional Domestic Security Task Force ("RDSTF") officers to perform specific immigration officer functions.[93]

Thirty-five veteran FDLE officers were trained in the initial class, and twenty-seven additional officers were trained in April 2005.[94] The MOA specifies that the MOA officers must have an associate's degree and be U.S. citizens with at least three years of experience as sworn law enforcement officers.[95] The nominees come from a pool of state and local officers who primarily investigate anti-terrorism and domestic security cases as RDSTF officers.[96]

Among other functions, the MOA authorizes certified agents to "[i]nterrogate [persons] in order to determine probable cause for an immigration arrest, . . . [t]ransport aliens under arrest, . . . and [d]etain arrested aliens in INS approved detention facilities."[97] MOA officers also have access to national databases such as the National Crime Information Center and the Law Enforcement Support Center to assist in the identification of the suspects they encounter.[98] The MOA dictates that this immigration power should be used only in the normal course of officers' regular duties when investigating anti-terrorism and domestic security cases.[99] Accordingly, the MOAs are not designed to authorize investigatory street sweeps.[100] In exercising their 287(g) authority, the participating state and local officers are required to follow INS policies and procedures, absent a written agreement to the contrary.[101] MOA officers are bound by all federal civil rights regulations and statutes[102] and are considered federal employees for

92. *Id.*

93. Florida's MOA, *supra* note 81, at 1. The mission of the RDSTFs is to coordinate federal, state, and local agencies to "prevent, preempt and disrupt any terrorist attacks or other domestic security threats within the State of Florida; or, in the event of such an attack, to effectively respond to the incident to facilitate recovery and investigation." *Hearings*, *supra* note 18 (statement of Mark F. Dubina, Special Agent Supervisor, Tampa Bay Regional Operations Center, Florida Department of Law Enforcement).

94. *Hearings*, *supra* note 18 (statement of Mark F. Dubina, Special Agent Supervisor, Tampa Bay Regional Operations Center, Florida Department of Law Enforcement).

95. Florida's MOA, *supra* note 81, at 4.

96. *Hearings*, *supra* note 18 (statement of Mark F. Dubina, Special Agent Supervisor, Tampa Bay Regional Operations Center, Florida Department of Law Enforcement).

97. Florida's MOA, *supra* note 81, at 3.

98. *Hearings*, *supra* note 18 (statement of Charles Andrews, Administrative Division Chief, Alabama Department of Public Safety).

99. *Hearings*, *supra* note 18 (statement of Mark F. Dubina, Special Agent Supervisor, Tampa Bay Regional Operations Center, Florida Department of Law Enforcement); Telephone Interview with Robert Hines, *supra* note 16.

100. Telephone Interview with Robert Hines, *supra* note 16.

101. Florida's MOA, *supra* note 81, at 4.

102. *Id.* at 7.

purposes of the Federal Tort Claims Act[103] and worker's compensation claims[104] when performing MOA functions.[105]

In all cases, the local ICE Immigration Supervisor, the FDLE Special Agent Supervisor, and the ICE Team Leader to the RDSTF "must agree on a decision to arrest or detain a person pursuant to the 287(g) authority."[106] According to Mark F. Dubina, Special Agent Supervisor to the FDLE, "there have been no examples where persons have been arrested or detained that were not directly related to a domestic security complaint or focused investigation."[107] Investigations as of July 2005 concerned "unauthorized persons working in critical infrastructure"[108] and "nationals or citizens of countries designated as sponsors of terrorism or countries in areas of geographic concern."[109] The MOA officers have arrested individuals involved in surveillance of sensitive domestic security areas and illegal aliens working in secured or restricted areas of nuclear plants, seaports, and airports.[110] The FDLE considers 287(g) authority to be a "valuable tool[]" in its efforts to protect domestic security and "strongly supports" continuing the MOA.[111]

B. Alabama's MOA

The Alabama Department of Public Safety entered into an MOA in September 2003 in response to an increase in forged documents presented by persons applying for non-driver identification cards and driver's licenses.[112] Twenty-one state troopers were trained and certified under the MOA.[113] A second class of twenty-two troopers received training in 2006.[114] In the course of their normal duties, the MOA officers screen for fraudulent documents.[115] State troopers

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103. 28 U.S.C. § 2671 (2000).

104. *See* 5 U.S.C. § 8101(1)(B) (2000).

105. Florida's MOA, *supra* note 81, at 6.

106. *See Hearings*, *supra* note 18 (statement of Mark F. Dubina, Special Agent Supervisor, Tampa Bay Regional Operations Center, Florida Department of Law Enforcement).

107. MARK F. DUBINA, THE 287(G) PROGRAM: ENSURING THE INTEGRITY OF AMERICA'S BORDER SECURITY SYSTEM THROUGH FEDERAL–STATE PARTNERSHIPS 4 (2005) (on file with author) (report accompanying congressional testimony).

108. *Id.* at 5.

109. *Id.*

110. *Id.*

111. *Id.* at 6.

112. *Hearings*, *supra* note 18 (statement of Charles Andrews, Administrative Division Chief, Alabama Department of Public Safety).

113. CHARLES E. ANDREWS, THE 287(G) PROGRAM: ENSURING THE INTEGRITY OF AMERICA'S BORDER SECURITY SYSTEM THROUGH FEDERAL–STATE PARTNERSHIPS 3 (2005) [hereinafter ANDREWS, THE 287(G) PROGRAM] (on file with author) (report accompanying congressional testimony); Telephone Interview with Robert Hines, *supra* note 16.

114. E-mail from Robert Hines, Program Manager of 287(g) Agreements, Immigration and Customs Enforcement, to author (Jan. 20, 2006, 14:53:49 EST) [hereinafter E-mail from Robert Hines #2] (on file with author).

115. Telephone Interview with Robert Hines, *supra* note 16.

use their training to identify fraudulent documents as well as undocumented individuals.[116]

Hence, the Alabama MOA, which allows MOA-certified officers to use their MOA powers at any time in the course of fulfilling their normal duties, which include the broad duties of a state trooper, provides broader immigration authority than the Florida MOA, because the normal duties of the Florida MOA-certified officers are exercised only in conjunction with ongoing investigations related to domestic security.[117] For example, when one Alabama MOA trooper stopped a van for a traffic violation and received conflicting information from the front-seat passenger and the driver, the trooper detained the occupants of the van and initiated the necessary interview and paperwork for ICE.[118] By the time the ICE agents arrived, the occupants had already been processed, and two people were charged with trafficking of illegal immigrants.[119] This incident illustrates one of the attractive aspects of the MOA program: State and local officers trained under the MOA do not have to wait for ICE officers in order to arrest, detain, or interrogate individuals suspected of violating the INA.[120] After eighteen months in operation, the Alabama MOA officers made over 200 arrests and seized over $689,000 related to criminal immigration offenses.[121]

C. More Limited MOAs for Implementation in the Jails

In addition to authorizing state and local officers to stop, arrest, detain, and transport individuals suspected of violating the INA, the 287(g) program can assist jurisdictions in identifying criminal aliens within their jails, thus expediting deportation proceedings.[122] Los Angeles County, California; San Bernardino County, California; the Arizona Department of Corrections ("ADOC"); Riverside County, California; and Mecklenburg County, North Carolina have entered into limited MOAs for the purpose of identifying, processing, and detaining criminal aliens who have already been arrested.[123] Under these MOAs, the MOA personnel are only authorized to engage in enforcement activities at the jail.[124]

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116. ANDREWS, THE 287(G) PROGRAM, *supra* note 113, at 4; Telephone Interview with Robert Hines, *supra* note 16.

117. CITY OF COSTA MESA CITY COUNCIL, AGENDA REPORT (2005), *available at* http://www.ci.costa-mesa.ca.us/council/agenda/2005-12-06/ (follow "120605 Consideration of MOU with Immigration and Customs Enforcement Bureau.pdf" hyperlink; then follow "attachment 2" hyperlink).

118. *Hearings*, *supra* note 18 (statement of Charles Andrews, Administrative Division Chief, Alabama Department of Public Safety).

119. ANDREWS, THE 287(G) PROGRAM, *supra* note 113, at 4–5.

120. Telephone Interview with Robert Hines, *supra* note 16. For a discussion of benefits of the program, see *Hearings*, *supra* note 18 (statement of Kris W. Kobach, Professor of Law, University of Missouri-Kansas City School of Law) (praising the MOA program as an additional tool for fighting violent alien street gangs, particularly because police can use the ICE databases to access information about the gangs).

121. Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL'Y REV. 323, 346 (2005).

122. Telephone Interview with Robert Hines, *supra* note 16.

123. *Empowering Local Law Enforcement to Combat Illegal Immigration: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of*

ADOC's MOA authorizes twenty-two[125] ADOC officers, operating within two ADOC facilities,[126] "to interview foreign national inmates to determine whether there is probable cause for an immigration violation; complete the processing for criminal aliens, including fingerprinting; prepare documentation to place aliens in deportation proceedings concurrent with their prison term; and prepare documentation to deport aliens following their terms."[127] In Los Angeles County, eight Sheriff's Custody Assistants[128] are authorized to "interview detainees, take statements from them and prepare affidavits, and draft immigration detainer forms and notices to appear that will then have to be approved by ICE supervisors."[129] The Los Angeles Custody Assistants and ten San Bernardino County Jailers were trained in December 2005.[130] Mecklenburg County, North Carolina began to enforce immigration law in April 2006, with ten deputies and two sergeants in the program.[131] Since the MOA officers in the jails do not have the authority to stop individuals, the type of racial profiling discussed in this Note should not be an issue.[132]

However, some Latino leaders in Mecklenburg County have complained that the MOA program in the jail "is contributing to a discriminatory climate in which Hispanic drivers feel as if they are being 'hunted' by police."[133] The

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the H. Comm. on H. Gov't Reform, 109th Cong. (2006) (statement of Kenneth A. Smith, Special Agent-in-Charge, Immigration and Customs Enforcement); Telephone Interview with Robert Hines, *supra* note 16; E-mail from Robert Hines #3, *supra* note 14. While San Bernardino's MOA authorizes the transport of aliens under arrest, the Los Angeles MOA and the ADOC MOA do not authorize transport of aliens. CITY OF COSTA MESA CITY COUNCIL, *supra* note 117 (follow "120605 Consideration of MOU with Immigration and Customs Enforcement Bureau.pdf" hyperlink; then follow "attachment 3," "attachment 4," and "attachment 5" hyperlinks).

124. Linton Joaquin, *L.A. County to Enter Limited MOU with ICE to Permit Immigration Enforcement at County Jail*, IMMIGRANTS' RTS. UPDATE (Nat'l Immigr. Law Ctr., L.A., Cal.), Feb. 10, 2005, *available at* http://www.nilc.org/immlawpolicy/arrestdet/ad085.htm (reporting on L.A. County's MOA); Telephone Interview with Robert Hines, *supra* note 16.

125. The ADOC MOA initially authorized ten officers, and has since added twelve more. E-mail from Robert Hines #3, *supra* note 14.

126. The two facilities are the Arizona State Prison Complex–Alhambra and the Arizona State Prison Complex–Perryville. CITY OF COSTA MESA CITY COUNCIL, *supra* note 117 (follow "120605 Consideration of MOU with Immigration and Customs Enforcement Bureau.pdf" hyperlink; then follow "attachment 5" hyperlink).

127. Press Release, Bart Graves, Media Relations Adm'r, Ariz. Dep't of Corr., ADC, State of Arizona, DHS and ICE Agree to Speed Criminal Alien Removals, http://www.azcorrections.gov/News/ICE-MOU.html (last visited Jan. 15, 2007).

128. E-mail from Robert Hines #2, *supra* note 114.

129. Joaquin, *supra* note 124.

130. E-mail from Robert Hines #2, *supra* note 114.

131. Whoriskey, *supra* note 17.

132. Nonetheless, the MOAs all require presentations on the DOJ Guidance. CITY OF COSTA MESA CITY COUNCIL, *supra* note 117 (follow "120605 Consideration of MOU with Immigration and Customs Enforcement Bureau.pdf" hyperlink; then follow "attachment 3," "attachment 4," and "attachment 5" hyperlinks). For further discussion of the MOA training, see *infra* Part III.

133. Whoriskey, *supra* note 17.

implication is that the police officers are more likely to arrest Latino motorists for traffic violations, knowing that once the individuals are booked at the jail, the Mecklenburg County MOA officers will have the authority to inquire into their immigration status and turn them over to ICE officials.[134] For example, in Mecklenburg County, from April to September 2006, approximately 1,200 foreign-born people were arrested for crimes "ranging from traffic violations and trespassing to sex crimes, and nearly 600 [were] found to be here illegally."[135]

ICE considers implementation of the MOA program in the jails to be successful.[136] In a five-month period, Mecklenburg County placed 345 illegal immigrants in deportation proceedings.[137] After eight months of participation in their MOAs, Los Angeles County "interviewed more than 4,879 foreign-born inmates and placed immigration detainers on 2,808 immigrants" and ADOC "placed 304 removal orders and 212 illegal immigrants [were] deported."[138] These limited MOAs illustrate that certain implementations of the MOA program can avoid encouraging racial profiling in the field[139] and minimize negative effects on community policing, while allowing state and local officers access to federal databases for the purpose of identifying criminal aliens.[140]

III. TRAINING OF THE MOA OFFICERS

A. ICE Training Course Under the MOA

The ICE training course for the MOA officers, led by ICE instructors, typically takes five weeks and focuses on issues dealing with immigration law enforcement.[141] In contrast, federal immigration officers are trained for five months.[142] The time difference may be related to the fact that MOA officers are seasoned state and local law enforcement officers, while immigration officers are not required to have pre-employment experience as law enforcement officers.[143]

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134. *See id.*

135. *Id.*

136. E-mail from Robert Hines #3, *supra* note 14.

137. Franco Ordoñez, *A Qualified Success: Immigrant Program Gets Results, but There Are Gaps*, CHARLOTTE OBSERVER, Aug. 27, 2006, at 1B.

138. *Id.*

139. *But see* Whoriskey, *supra* note 17 ("[Mexican carpenter Guadalupe] Lara says police now unfairly target Latinos [in Mecklenburg County].").

140. *See infra* Part V.B.

141. *Hearings*, *supra* note 18 (statement of Charles Andrews, Administrative Division Chief, Alabama Department of Public Safety); Fact Sheet, *supra* note 78; CITY OF COSTA MESA CITY COUNCIL, *supra* note 117 (follow "120605 Consideration of MOU with Immigration and Customs Enforcement Bureau.pdf" hyperlink; then follow "attachment 2" hyperlink).

142. *Hearings*, *supra* note 18 (statement of Paul Kilcoyne, Deputy Assistant Director, Investigative Services Division, U.S. Department of Homeland Security).

143. The only job qualification for immigration officers that is explicitly related to law enforcement experience is the demonstrated ability to "learn law enforcement regulations, methods, and techniques through classroom training and/or on-the-job instruction." U.S. Customs and Border Protection, GS-1896-5/7, Border Patrol Agent—Fact Sheet, at 2 (Aug. 1, 2006), http://www.cbp.gov/linkhandler/cgov/careers/customs_careers/border_careers/border_patrol_factsheet.ctt/careers_bpa_fact.doc.

MOA training includes presentations on the scope of officer authority under the MOA, the elements of the MOA, civil rights law, liability issues, cross-cultural issues, the DOJ's Guidance Regarding the Use of Race by Federal Law Enforcement Agencies ("DOJ Guidance")[144] and the ICE Use of Force Policy.[145] The MOA officers learn to distinguish illegal aliens, refugees, people claiming asylum, legal non-immigrants, and legal immigrants.[146] They also learn how to access federal immigration databases, which use name recognition to alert officers as to whether an individual is a criminal alien.[147]

B. The DOJ's Racial Profiling Policy

In response to President George W. Bush's declaration that racial profiling is "wrong and we will end it in America,"[148] the Civil Rights Division of the DOJ developed the DOJ Guidance, a guidance document, for federal officials.[149] While the guidance asserts that "this guidance in many cases imposes more restrictions on the consideration of race and ethnicity in [f]ederal law enforcement than the Constitution requires,"[150] the guidance also states that it does not create any enforceable rights or benefits,[151] and that it does not place these intensified restrictions on officials involved in national security and protection of the nation's borders.[152] As a result, federal officials involved in immigration enforcement are permitted to consider race and ethnicity in their enforcement duties.[153] Thus, if U.S. intelligence sources believe terrorists from a certain ethnic

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144. GUIDANCE, *supra* note 21.

145. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, INS DETENTION STANDARD: USE OF FORCE (2000), *available at* http://www.ice.gov/doclib/partners/dro/opsmanual/useoffor.pdf; *e.g.*, CITY OF COSTA MESA CITY COUNCIL, *supra* note 117 (follow "120605 Consideration of MOU with Immigration and Customs Enforcement Bureau.pdf" hyperlink; then follow "attachment 3," "attachment 4," and "attachment 5" hyperlinks); Florida's MOA, *supra* note 81, at 4. The guidance was not published until 2003, so the earlier MOAs (Florida and Alabama) do not state that the guidance is used in training. However, Robert Hines, the program manager of 287(g) agreements for ICE, states that the guidance is now used in all trainings. Telephone Interview with Robert Hines, *supra* note 16.

146. *See* Sessions & Hayden, *supra* note 121, at 346.

147. *See id.*; Press Release, Sen. Jeff Sessions, Sessions Calls for Expansion of Federal Immigration Enforcement Training in Alabama (Feb. 21, 2005), http://sessions.senate.gov/pressapp/record.cfm?id=232438.

148. GUIDANCE, *supra* note 21, at 1 (quoting President George W. Bush, Address of the President to the Joint Session of Congress (Feb. 27, 2001) (transcript available at http://www.whitehouse.gov/news/releases/2001/02/20010228.html)).

149. *See id.*

150. *Id.*

151. *Id.* at 1 n.2.

152. *See id.* at 9.

153. *Id.* ("[B]ecause enforcement of the laws protecting the [n]ation's borders may necessarily involve a consideration of a person's alienage in certain circumstances, the use of race or ethnicity in such circumstances is properly governed by existing statutory and constitutional standards."); *see also* Kevin R. Johnson, *Racial Profiling after September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67 (2004) [hereinafter Johnson, *Racial Profiling after September 11*] (analyzing racial profiling in criminal and

group are planning an attack on a commercial airline, federal officers would be permitted to subject *all* individuals of that ethnic group to heightened scrutiny before allowing them to board planes.[154] The guidance also endorses *United States v. Brignoni-Ponce*,[155] which allowed the use of race or ethnicity as a factor for stopping individuals suspected of violating immigration law.[156]

In *Brignoni-Ponce*, the Supreme Court found that Border Patrol officers who stopped Brignoni-Ponce's car based solely upon a belief that the car's three occupants were of Mexican descent violated the Fourth Amendment's protection against unreasonable searches and seizures.[157] However, the Court did not end its discussion there, but rather stated that "Mexican appearance" is indeed a *relevant* factor.[158] The principle applied in *Brignoni-Ponce* not only applies to cases involving reliance on apparent Mexican appearance, but also applies to cases involving any perceived indicia of national origin,[159] which include race or ethnic appearance. Therefore, "as a matter of course," immigration officers are permitted to consider a suspect's apparent ethnicity as one of the factors in deciding to stop that suspect.[160]

Allowing such broad discretion for law enforcement in determining whether a person's appearance falls into a certain racial or ethnic group creates potential for abuse.[161] After all, "'[r]ace' is not a narrowly tailored classification upon which law enforcement activities should be based."[162] Nonetheless, immigration officers, while on roving patrol, may lawfully consider race or ethnic appearance as a factor in determining which individuals to stop and question.[163] Thus, the guidance, which was inspired by a call to end racial profiling in America, actually provides for racial profiling in the context of immigration

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immigration law enforcement and predicting the future of racial profiling in consideration of September 11th and the DOJ Guidance).

154. *See* GUIDANCE, *supra* note 21, at 10. The DOJ Guidance specifically mentions heightened scrutiny for men, but presumably women from that ethnic group could also be subject to heightened scrutiny, since the guidance deals only with questions of race and does not raise the issue of gender. *See id.*

155. 422 U.S. 873 (1975).

156. *See* GUIDANCE, *supra* note 21, at 9 (citing *Brignoni-Ponce*, 422 U.S. at 886–87).

157. *Brignoni-Ponce*, 422 U.S. at 886–87.

158. *Id.* ("The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."); *e.g.*, United States v. Cruz-Hernandez, 62 F.3d 1353, 1355–56 (11th Cir. 1995) (allowing a stop based on seven factors, one of which was that the suspect "appeared to be Hispanic").

159. Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to* Is There A Plenary Power Doctrine?, 14 GEO. IMMIGR. L.J. 289, 294 (2000).

160. *Id.* For a discussion of allowable factors immigration officers may consider in deciding whom to stop, see *infra* Part IV.A.

161. Johnson, *Racial Profiling After September 11*, *supra* note 153, at 86.

162. *Id.* (explaining that one of the problems after September 11th was the federal government's use of a "dragnet of any Arab and Muslim noncitizens who fit a profile," regardless of individualized suspicion).

163. *Brignoni-Ponce*, 422 U.S. at 886–87; *see* Johnson, *Racial Profiling After September 11*, *supra* note 153, at 84.

enforcement.[164] In order to assess the effect of federal training on racial profiling, it is important to trace the use of race as a factor in generating reasonable suspicion for stops by immigration officers.

IV. IMMIGRATION OFFICERS' USE OF RACE AS A FACTOR IN FORMULATING REASONABLE SUSPICION FOR STOPS

Section 287(a)(1) of the INA[165] does not require a warrant for officers or employees of the INS, now part of the Department of Homeland Security and the DOJ, "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States."[166] This authority may be exercised without individualized suspicion "within a reasonable distance[, about 100 air miles,] from any external boundary of the United States."[167] Even when immigration officers are not within 100 miles of the border or its functional equivalent, however, they may still stop individuals if the officers have individualized suspicion that the individuals are violating the INA, such as by being in the country illegally.[168] However, in order to stop a vehicle, officers on roving patrol must be aware of specific articulable facts that could be combined with rational inferences to create a reasonable suspicion that a person in the car may be an illegal alien.[169] According to not only the DOJ but also the U.S. Supreme Court, immigration officers are permitted to consider an individual's race or ethnic appearance as one of these articulable facts.[170]

A. Allowable Factors for Reasonable Suspicion in Immigration Enforcement

Any number of factors may be considered in deciding whether there is reasonable suspicion to justify a stop by immigration officers.[171] These factors include characteristics of the area; proximity to the border; normal traffic patterns in the location; the officer's previous experience with alien traffic; information about recent border crossings; the driver's behavior; characteristics of the vehicle; and the appearance of the suspect, including dress, haircut, and race or ethnic appearance.[172] Courts also consider whether the time of the stop was during a change of shift for Border Patrol officers, because that is a likely time for smugglers to try to pass through checkpoints undetected.[173] Officers may rely on

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164. For a discussion advocating prohibition of the use of racial profiling in immigration enforcement, see Johnson, *The Case Against Race Profiling*, *supra* note 24.

165. Immigration and Nationality Act § 287(a)(1), 8 U.S.C. § 1357(a)(1) (2000).

166. *Id.*

167. *Id.* § 287(a)(3), 8 U.S.C. § 1357(a)(3); 8 C.F.R. § 287.1(a)(2) (2006) (defining "reasonable distance" as "within 100 air miles from any external boundary").

168. *Brignoni-Ponce*, 422 U.S. at 884. For a discussion of civil rights complaints and race-based immigration enforcement in various regions of the United States, see Johnson, *The Case Against Race Profiling*, *supra* note 24, at 700–01.

169. *Brignoni-Ponce*, 422 U.S. at 884.

170. *Id.* at 886–87; *see* GUIDANCE, *supra* note 21, at 9; *supra* Part III.B.

171. *Brignoni-Ponce*, 422 U.S. at 884.

172. *Id.* at 884–87.

173. United States v. Rodriguez-Sanchez, 23 F.3d 1488, 1490 (9th Cir. 1994), *overruled on other grounds by* United States v. Montero-Camargo, 208 F.3d 1122, 1134 n.22 (9th Cir. 2000).

other factors such as the type of car,[174] evasive maneuvers and unusual driving,[175] the belief that the suspect vehicle originated at the border,[176] violation of a traffic law,[177] and even whether children inside the vehicle were waving abnormally at the officer.[178] Officers have tried to assert that the avoidance of eye contact and excessive checking of the rearview mirror can be factors in reasonable suspicion, but most courts have rejected such arguments.[179] Furthermore, the officer's suspicion must be based on more than a "hunch,"[180] but the officer may use his or her own experience in detecting illegal entry and smuggling.[181] Reasonable

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174. *Id.* (A Monte Carlo is "a car known . . . to be commonly used in border violations due to its large size and low cost."). *But see* United States v. Hernandez-Alvarado, 891 F.2d 1414, 1416, 1418–19 (9th Cir. 1989) (finding no reasonable suspicion where factors included the nervous demeanor of the individuals, reduction of speed, the presence of a two-way radio antenna on the vehicle, the defendant's residence in a neighborhood known for narcotics activity near the U.S.–Mexican border, indications that the car was purchased from a dealer known for drug trafficking, and the size of the defendant's trunk).

175. *Rodriguez-Sanchez*, 23 F.3d at 1493.

176. United States v. Orozco-Gonzalez, 60 F. Supp. 2d 599, 600 (W.D. Tex. 1999) (noting that the belief that a vehicle originated at the border is a "vital element" of reasonable suspicion).

177. United States v. Rubio-Hernandez, 39 F. Supp. 2d 808, 830 (W.D. Tex. 1999).

> Although a Border Patrol Agent is not legally permitted to stop a vehicle for a traffic violation, whether or not an individual commits a traffic violation can be one factor to consider as to whether there is a reasonable suspicion that the car's driver or its passengers are in the country illegally.

Id.

178. United States v. Arvizu, 534 U.S. 266, 276–77 (2002).

179. United States v. Jones, 149 F.3d 364, 370 (5th Cir. 1998) (recognizing that preoccupation with the presence of law enforcement may arouse suspicion, but if any driver, innocent or guilty, might be preoccupied in such a way, such preoccupation cannot contribute to reasonable suspicion); Gonzalez-Rivera v. INS, 22 F.3d 1441, 1447 (9th Cir. 1994).

> A driver's failure to look at the [B]order [P]atrol car [cannot be used to justify the agent's suspicion] since the opposite reaction, a driver's repeated glancing at a Border Patrol car, can also be used to justify the agent's suspicion. To give weight to this type of justification "would put the officers in a classic 'heads I win, tails you lose' position [and] the driver, of course, can only lose."

Id. (citation and quotation omitted).

180. United States v. Hernandez-Alvarado, 891 F.2d 1414, 1420 (9th Cir. 1989) (Alarcon, J., concurring).

181. *Arvizu*, 534 U.S. at 273 (officers can "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person'" (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)); United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975). For a discussion of how this factor permits excessive discretion and abuse among immigration officers, see *infra* Part IV.B–C.

suspicion is not a difficult standard to meet; it requires less than a preponderance of the evidence that the suspect is likely violating the law.[182]

In evaluating whether immigration officers had reasonable suspicion to justify a stop, courts apply the totality of the circumstances test.[183] The factors relied upon by the officer are not analyzed individually, in isolation from the other factors, but rather are considered together.[184] Therefore, even if a factor taken by itself may not be indicative of criminal behavior, if it is combined with other factors, the sum may generate reasonable suspicion.[185] There is no "ironclad formula" or minimum number of factors for formulating reasonable suspicion,[186] and race or ethnic appearance may be one of these factors.[187]

B. Abuse of Reasonable Suspicion Leading to Racial Profiling

Individual officers' biases and informal law enforcement policies may result in stops based on race or ethnic appearance.[188] Moreover, racial stereotypes frequently invade officers' subconscious decisionmaking.[189] Thus, "Border Patrol officers may use racial stereotypes as a proxy for illegal conduct without being subjectively aware of doing so."[190] Combined with the Supreme Court's permission for immigration officers to consider race or ethnic appearance, unconscious reliance on stereotypes "greatly increases the potential for abuse."[191] Indeed, the Supreme Court has admitted that "the concept of reasonable suspicion is somewhat abstract"[192] and that it is an "elusive concept."[193] Since reasonable suspicion is such an elusive concept, it can be used to disguise unspoken assumptions by law enforcement officers.[194]

> Reasonableness, then, is not a definite, arithmetic, objective quality that is independent of aims and values. It is a concept that is considerably more subtle, complex, malleable, and mysterious than the simplistic model of decisionmaking relied upon by those who accept at face value the "reasonableness" or "rationality" of conduct that expresses not only controversial moral and political judgments, but also deep-seated, perhaps unconscious, affections, fears, and aversions.[195]

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182. *Arvizu*, 534 U.S. at 274.
183. *Id.* at 273.
184. *Id.* at 274.
185. *Id.* at 274–75.
186. United States v. Lopez-Martinez, 25 F.3d 1481, 1484 (10th Cir. 1994).
187. United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975).
188. Johnson, *The Case Against Race Profiling*, *supra* note 24, at 687.
189. Gonzalez-Rivera v. INS, 22 F.3d 1441, 1450 (9th Cir. 1994).
190. *Id.*
191. Johnson, *The Case Against Race Profiling*, *supra* note 24, at 696–97.
192. United States v. Arvizu, 534 U.S. 266, 274 (2002).
193. United States v. Cortez, 449 U.S. 411, 417 (1981).
194. Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 371 (1998).
195. *Id.* (quoting RANDALL KENNEDY, RACE, CRIME, AND LAW 144–45 (1997)).

Plaintiffs in lawsuits against the U.S. government often allege that immigration officers rely almost entirely on race or ethnic appearance in choosing whom to stop.[196] In *Nicacio v. INS*,[197] the plaintiff class included "all persons of Mexican, Latin, or Hispanic appearance who have been, are, or will be traveling by motor vehicle on the highways of the State of Washington."[198] The INS officers conducted stops in an agricultural area of central Washington during a time when there was a high number of workers in the area performing seasonal agricultural field labor.[199] The Chief Patrol Agent for that sector testified that the INS policy was to rely on Hispanic appearance, a "hungry look," a person's age, work clothes, and a "dirty, unkempt appearance."[200] The Ninth Circuit found that the probative value of these factors was so weak that they did not provide a rational basis for the stops.[201] In fact, the district court found that many of the stops were based primarily on the officers' intuition.[202] One officer testified, "[W]e have been around . . . and just from experience we can tell who is illegal and who is not. Sometimes it's an air about a person or the way he looks, or carries himself, but it's kind of hard to just say right off . . . ."[203] The court was not convinced, finding that "[w]hile an officer may evaluate the facts supporting reasonable suspicion in light of his experience, experience may not be used to give the officers unbridled discretion in making a stop."[204] Therefore, the court affirmed the district court's order that the INS officers document the basis for every future stop, even those stops not resulting in arrests.[205]

While some plaintiffs have been successful in their claims against immigration officers,[206] proving that race was the *exclusive* factor for a stop is quite difficult.[207] Furthermore, although courts occasionally find Fourth Amendment violations, "race-based discriminatory enforcement generally

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196. *See, e.g.*, Hodgers-Durgin v. De la Vina, 199 F.3d 1037 (9th Cir. 1999) (en banc) (refusing to grant injunction for alleged racial profiling because plaintiffs failed to show future injury since the named plaintiffs had been stopped only once in the last ten years of driving that highway); Nicacio v. INS, 797 F.2d 700 (9th Cir. 1985) (affirming district court's injunction because INS stops based on Hispanic appearance, type of automobile, and/or time of day did not generate reasonable suspicion), *overruled in part by Hodgers-Durgin*, 199 F.3d at 1045; Murillo v. Musegades, 809 F. Supp. 487, 500 (W.D. Tex. 1992) (granting motion for preliminary injunction because "[t]he stopping, questioning, detaining, frisking, arresting, and searching of individuals based *solely* upon racial and ethnic appearance reprehensibly violates the Fifth Amendment").

197. 797 F.2d 700.

198. *Id.* at 701.

199. *Id.* at 703.

200. *Id.* at 704.

201. *Id.*

202. *Id.*

203. *Id.* at 705.

204. *Id.*

205. *Id.* at 705–06. Standard Border Patrol policy is to document only those stops which result in arrest. Telephone Interview with Robert Hines, *supra* note 16.

206. *E.g.*, Gonzalez-Rivera v. INS, 22 F.3d 1441 (9th Cir. 1994); Nicacio v. INS, 797 F.2d 700 (9th Cir. 1985); Ill. Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976); Murillo v. Musegades, 809 F. Supp. 487 (W.D. Tex. 1992).

207. Johnson, *The Case Against Race Profiling*, *supra* note 24, at 706.

continues unabated, unreported, and unremedied."[208] Immigration officers are familiar with the case law and are experienced enough to create prefabricated profiles that will satisfy courts that their stops were not based solely upon race or ethnic appearance.[209] It is easy for immigration officers to strengthen reasonable suspicion through interrogation and subsequently "come up with the necessary articulable facts after the fact."[210]

C. The Effect of September 11th on Racial Profiling in Immigration Enforcement

While there seemed to be a national consensus condemning the use of racial profiling before September 11, 2001, after the terrorist attacks there was widespread support for racial profiling in the form of intense scrutiny of men of Arab or Muslim descent as part of the "war on terrorism."[211] The public seemed to think that, because the September 11th hijackers were Arab and Muslim men, racial profiling was the best way to allocate limited resources to prevent terrorism.[212] Consequently, Muslims and Arab Americans "have been 'raced' as

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208. *Id.* at 699.

209. *See* United States v. Garcia-Camacho, 53 F.3d 244, 246 n.2 (9th Cir. 1995) (noting a suspicion of the recurrence of Border Patrol agents' explanation of the same profiles, almost word-for-word, used to show reasonable suspicion in previous cases) (citing United States v. Rodriguez, 976 F.2d 592, 594, 595 (9th Cir. 1992)); *Rodriguez*, 976 F.2d at 594 (9th Cir. 1992) (noting that courts "must be watchful for mere rote citations of factors which were held, in some past situations, to have generated reasonable suspicion"). The *Rodriguez* court had previously heard the profile the Border Patrol agents presented as evidence. 976 F.2d at 595. The court asserted, "[i]n fact, this profile is so familiar, down to the very verbiage chosen to describe the suspect, that an inquiring mind may wonder about the recurrence of such fortunate parallelism in the experiences of the arresting agents." *Id.* (noting that alleged factual similarities with two previous cases was "troubling"). Accordingly, the court stated that it "must not accept what has come to appear to be a prefabricated or recycled profile of suspicious behavior very likely to sweep many ordinary citizens into a generality of suspicious appearance merely on hunch." *Id.* at 595–96.

210. Edwin Harwood, *Arrests Without Warrant: The Legal and Organizational Environment of Immigration Law Enforcement*, 17 U.C. DAVIS L. REV. 505, 531 (1984). Harwood argues that the fact that officers can so easily generate reasonable suspicion indicates that "[a]ny strenuous effort by the courts to properly enforce the reasonable suspicion standard would probably come to naught." *Id.* at 532.

211. Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 351–53 (2002) ("Airlines removed Arab and Muslim passengers, including, in one instance, a Secret Service agent assigned to protect President Bush. Immediately after September 11, hate crimes against Arabs, Muslims, and others rose precipitously."); ACLU, SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11 (2004), *available at* www.aclu.org/FilesPDFs/racial%20profiling%20report.pdf; Gross & Livingston, *supra* note 21, at 1422; David Harris, *Flying While Arab: Lessons from the Racial Profiling Controversy*, C.R. J., Winter 2002, at 8 (tracing the history and ineffectiveness of racial profiling and arguing that it not be used against Arabs and Muslims in the reaction to the September 11, 2001 attacks).

212. Stephen H. Legomsky, *The Ethnic and Religious Profiling of Noncitizens: National Security and International Human Rights*, 25 B.C. THIRD WORLD L.J. 161, 178–79 (2005).

'terrorists': foreign, disloyal, and imminently threatening."[213] Almost immediately after the terrorist attacks, people appearing to be Arab or Muslim, whether or not they were, found themselves victims of racial profiling.[214] Federal agents and departments responsible for terrorism investigations and immigration enforcement "have become increasingly prone to target individuals thought to be Arab, Muslim, or nationals of Arab or Muslim countries."[215]

Before September 11th, immigration enforcement focused heavily on undocumented immigrants and those who profited from undocumented immigration.[216] However, since September 11th, immigration enforcement has "taken a decidedly antiterrorist national security turn, changing the nature of immigration enforcement, the relationship between immigrant communities and enforcement agencies, and public perception of immigrants in the process."[217] As the National Hispanic Leadership Agenda's Civil Rights Committee explains, the U.S. government's national security focus has led to the targeting of immigrants based on appearance or their immigrant status, even if there are no factual links to terrorist activities.[218] Under the guise of counter-terrorism, the federal government institutionalized racial profiling against Arabs and Muslims.[219]

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213. Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L.J. 1, 12 (2001).

214. *See* Akram & Johnson, *supra* note 211, at 295 ("The federal government responded with ferocity to the events of September 11. Hundreds of Arab and Muslim noncitizens were rounded up as 'material witnesses' in the ongoing investigation of the terrorism or detained on relatively minor immigration violations."). For a more complete discussion of the impact on the Muslim-American community, see Arsalan T. Iftikhar, *Civil Rights; Muslim American Community Has Inspiring Examples in Its Struggle for Dignity in America*, ISLAMIC HORIZONS, July–Aug. 2004, at 16. For a discussion of why racial profiling *should* be used in the government's efforts to combat terrorism, see Heather Mac Donald, *Why the FBI Didn't Stop 9/11*, CITY J., Autumn 2002, at 14, *available at* http://www.city-journal.org/html/12_4_why_the_fbi.html.

215. Legomsky, *supra* note 212, at 178 ("The expression 'flying while Arab' has crept into our vocabulary."). For a discussion of how the DOJ Guidance merely ratified the federal government's racial profiling practices regarding South Asians, Muslims and Arabs, see Muneer I. Ahmad, *A Rage Shared by Law: Post–September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1267–78 (2004) (identifying governmental racial profiling of South Asians, Muslims and Arabs in airport profiling, race-based immigration polices, selective enforcement of generally applicable immigration laws, and secret arrests).

216. NAT'L HISPANIC LEADERSHIP AGENDA'S CIVIL RIGHTS COMM., HOW THE LATINO COMMUNITY'S AGENDA ON IMMIGRATION ENFORCEMENT AND REFORM HAS SUFFERED SINCE 9/11, at 7 (2004), *available at* http://www.nclr.org/files/26073_file_NHLA_report.pdf.

217. *Id.*

218. *Id.* For further discussion of the effect of post–September 11th policies and racial profiling, see Katherine Culliton, *How Racial Profiling and Other Unnecessary Post-9/11 Anti-Immigrant Measures Have Exacerbated Long-Standing Discrimination Against Latino Citizens and Immigrants*, 8 UDC/DCSL L. REV. 141 (2004).

219. LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUC. FUND, WRONG THEN, WRONG NOW: RACIAL PROFILING BEFORE & AFTER SEPTEMBER 11, 2001, at 25–26, *available at* http://www.civilrights.org/publications/reports/racial_profiling/racial_profiling_report.pdf (last visited Feb. 5, 2007); *see also* Akram & Johnson, *supra*

Shortly after September 11th, "many Arab and Muslim noncitizens living in the United States, with no known ties to terrorism[,] were required to report to law enforcement officials for interviews related to terrorist activities, simply by virtue of nationality or religious affiliation."[220] Federal officials also conducted secret closed immigration hearings for Arab and Muslim detainees, changed priority for deportation so that noncitizens from Arab countries were deported first, arrested Arab and Muslim immigrants en masse as a part of Preventive Detention, and implicitly encouraged state and local police to enforce immigration laws by engaging in racial profiling of Arabs, Muslims, South Asians, and Sikhs.[221] Because of law enforcement beliefs about who is likely to be a participant in terrorist activity, "Arabs, Muslims, South Asians, and Sikhs are now subjected to traffic stops and searches based in whole or in part on their race, ethnicity, or religion."[222] For example, when a Georgia police officer pulled over an Arab-American driver for performing an illegal U-turn, the officer ordered the driver out of the car at gun point, threatened and searched him, and called him a "bin Laden supporter."[223]

Because the federal government's immigration power is said to be a plenary power, there is limited judicial review of immigration laws.[224] Through the immigration laws, the plenary power doctrine allows the federal government to target any group considered to be undesirable.[225] When there are perceived threats to national security, this plenary authority increases exponentially.[226] The federal government has selected Arabs and Muslims as such an "undesirable group."[227]

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note 211, at 313–16 (discussing institutional racism and the racialization and targeting of Arabs and Muslims through the immigration laws); Leti Volpp, *Critical Race Studies: The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (discussing post–September 11th racial profiling, orientalism, and the relationship between identity and citizenship).

220. Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 105 (2005).

221. Thomas M. McDonnell, *Targeting the Foreign Born by Race and Nationality: Counter-Productive in the "War on Terrorism"?*, 16 PACE INT'L L. REV. 19, 25–26 (2004).

222. LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUC. FUND, *supra* note 219, at 22.

223. *Id.*

224. Akram & Johnson, *supra* note 211, at 329 ("The so-called 'plenary power' doctrine creates a constitutional immunity from judicial scrutiny of substantive immigration judgments of Congress and the Executive Branch."). *But see* Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 258 (2000) (suggesting that the immigration plenary power cases "may be largely dicta").

225. *Id.*

226. *Id.*

227. *See, e.g.*, Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002) (describing experience of Pakistani detainee in United States); Gross & Livingston, *supra* note 21, at 1415–18 (presenting framework for defining and evaluating racial profiling after September 11); David A. Harris, *New Risks, New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001*, 2004 UTAH L. REV. 913 (2004) (analyzing racial profiling before and after September 11 and assessing other articles

Accordingly, efforts to eradicate racial profiling have been temporarily curtailed by September 11th.[228]

V. CONCLUSION

A. Assessment of the Florida and Alabama MOAs Currently in Effect

As of September 2006, Florida and Alabama are the only jurisdictions that have entered into MOAs to empower state and local law enforcement officers to enforce immigration law out in the field,[229] where racial profiling is an issue. Florida's MOA is narrowly focused on counter-terrorism and domestic security, deputizing officers already involved in domestic security task forces.[230] Meanwhile, Alabama's MOA empowering state troopers is not limited to domestic security investigations.[231] Since federal immigration officers do not have the power to enforce traffic laws,[232] MOA officers may exercise more power to make stops than their federal counterparts. In order to pull over a vehicle, state officers need only reasonable suspicion of a traffic violation, which is quite common,[233] but federal immigration officers need to have reasonable suspicion that someone may be violating an immigration law.[234] As the Chandler Roundup illustrated, this power over traffic violations could result in local officers' use of traffic violations as a pretext for investigating an individual's immigration status.[235]

One difference between the Chandler Police officers and the Florida and Alabama MOA officers is that the MOA officers have received specialized training in the complexities of immigration law, civil rights, and cultural sensitivity.[236] One advocate of the MOA program suggests that "[o]nce the officers receive the training, then they become unlikely to make a mistake that would trigger an actionable violation of anyone's civil rights."[237] The key word is

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on racial profiling, including Gross & Livingston, *supra* note 21); Volpp, *supra* note 219 (discussing the exclusion from citizenship of people who appear to be Muslim, Arab, or Middle Eastern).

228. Johnson, *Racial Profiling After September 11*, *supra* note 153, at 87.

229. Telephone Interview with Robert Hines, *supra* note 16. Orange County, California has reportedly submitted a request to deputize officers in the field, and ICE is still considering it. William M. Welch, *City Puts Itself on Immigration Watch*, USA TODAY, Jan. 26, 2006, at 6A; E-mail from Robert Hines #1, *supra* note 16.

230. *Hearings*, *supra* note 18 (statement of Chief Jimmy Fawcett, Sixth Vice President, International Association of Chiefs of Police).

231. *See Hearings*, *supra* note 18 (statement of Charles Andrews, Administrative Division Chief, Alabama Department of Public Safety) (describing Alabama's reasons for entering into the MOA, which included "the increase in forged documents presented by individuals applying for the Alabama driver's license and non-driver identification cards and the lack of presence of and access to immigration officers").

232. Immigration and Nationality Act § 287, 8 U.S.C. § 1357 (2000).

233. *See supra* Part I.A.

234. United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975); *see supra* Part IV.

235. *See supra* Part I.A–B.

236. *See supra* Part III.

237. *Hearings*, *supra* note 18 (statement of Kris W. Kobach, Professor of Law, University of Missouri-Kansas City School of Law).

actionable. The MOA training includes instruction on the DOJ Guidance,[238] which *permits* immigration officers to use racial profiling in a way that would *not* be actionable.[239] While Robert Hines, the ICE program manager of the 287(g) agreements, states that ICE does not tolerate racial profiling,[240] Supreme Court case law permits immigration officers to consider race or ethnic appearance as a factor for reasonable suspicion, and there is evidence that immigration officers do use race as a factor.[241] Officers are also quite capable of reporting legitimate factors for pulling over a vehicle after they have had the opportunity to interact with the suspect(s), even though their initial motivation may have been the race or ethnic appearance of the vehicle's occupant(s).[242] Hence, while officers' behavior might not be an "actionable" civil rights violation, it may still be racial profiling.[243]

An argument can be made that because the MOA officers are closer to the community and may value community policing functions, they may be less likely than federal immigration officers to use racial profiling in immigration enforcement.[244] After all, the MOAs do not authorize investigatory immigration sweeps by state and local officers.[245] However, the Chandler Roundup, as well as post–September 11th experiences, indicate that overzealous officers may resort to racial profiling in immigration enforcement, even within the execution of their ordinary duties.[246]

Neither Florida nor Alabama has received an official complaint about the MOA program.[247] While the FDLE does not have a formal policy outlawing racial profiling, the Florida Police Chiefs Association has established policies and procedures to address the issue of racial profiling.[248] Alabama's Department of Public Safety has a written policy strictly forbidding bias-based enforcement and any form of racial profiling or discrimination.[249] However, a 2005 Ask Alabama statewide public opinion poll indicated that more than fifty-four percent of all respondents believed that local law enforcement officers, including state troopers, used racial profiling on a regular basis.[250]

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238. GUIDANCE, *supra* note 21.

239. *See supra* Part III.B.

240. E-mail from Robert Hines #2, *supra* note 114.

241. *See supra* Part IV.

242. Harwood, *supra* note 210, at 531.

243. For a discussion of what constitutes racial profiling, see *supra* Part I.

244. See *supra* Part I.C for a discussion of the effect of immigration enforcement on community policing efforts.

245. Telephone Interview with Robert Hines, *supra* note 16.

246. *See supra* Parts I.B, IV.C.

247. E-mail from Robert Hines #2, *supra* note 114.

248. Fla. Police Chiefs Ass'n, Racial Profiling, http://www.fpca.com/profiling.htm (last visited Feb. 5, 2007).

249. Press Release, Ala. Dep't of Pub. Safety, DPS Investigates Allegations (Feb. 7, 2005), *available at* http://www.dps.state.al.us/public/administrative/pio/newsrelease/02-07-05-InvestigatesAllegations.pdf.

250. Jannell McGrew, *Poll Points to Racial Profiling*, MONTGOMERY ADVERTISER, Mar. 25, 2005, at C3.

In conclusion, while there have been no complaints filed against the MOA officers, the use of racial profiling by MOA officers is not unlikely. The current state of the law regarding immigration enforcement permits federal immigration officers to consider the race or ethnic appearance of an individual when officers are deciding whom to stop.[251] The MOA officers are trained in the DOJ Guidance,[252] which explicitly endorses racial profiling in the immigration context.[253] Since the MOA officers are not authorized to perform immigration sweeps,[254] they should be stopping individuals only in the normal course of their duties.[255] As *Whren v. United States*[256] indicates, police officers may stop anyone for whom they have probable cause of a traffic violation, regardless of the officers' subjective motives.[257] Hence, if an MOA officer wanted to use a traffic violation as a pretext to stop someone to investigate immigration laws, the Fourth Amendment's protection from unreasonable seizures would not prevent the officer from doing so.[258] Furthermore, since federal immigration officers are permitted to consider race, it seems unlikely that federal training would deter racial profiling. Therefore, state and local MOA officers are not any less likely to use racial profiling in immigration enforcement than state and local officers who are not trained in the MOA program.

B. Suggestions for the Future of the MOA Program

The MOA program can be quite beneficial to state and local law enforcement.[259] It provides MOA officers access to national databases to identify criminal aliens[260] and increased familiarity with patterns of alien and drug smuggling, enhancing officers' enforcement capabilities.[261] However, the price to civil rights and community policing efforts may be too high. Several localities, including the Commonwealth of Virginia, which originally expressed interest in the MOA program, ultimately abandoned it because of concerns about racial profiling and the effect on community policing.[262]

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251. *See supra* Parts III.B, IV.

252. GUIDANCE, *supra* note 21.

253. *See id.* at 9.

254. Telephone Interview with Robert Hines, *supra* note 16.

255. *Id.*

256. 517 U.S. 806 (1996).

257. *Id.* at 813–14.

258. *See id.*

259. *See* E-mail from Robert Hines #3, *supra* note 14 (stating that the MOA programs "have proven to be very productive in identifying criminal aliens").

260. *Hearings*, *supra* note 18 (statement of Charles Andrews, Administrative Division Chief, Alabama Department of Public Safety).

261. *Hearings*, *supra* note 18 (statement of Kris W. Kobach, Professor of Law, University of Missouri-Kansas City School of Law).

262. Mary Beth Sheridan, *Va. Police Back Off Immigration Enforcement; Other Legislation, Fear of Abuse Cited*, WASH. POST, June 6, 2005, at B01. Virginia abandoned negotiating an agreement with the DOJ when the state legislature passed a bill allowing police to arrest illegal aliens who were convicted felons. *Id.* Some jurisdictions also oppose involvement in an MOA because they do not have the resources to be in the program, since

States and localities considering entering an MOA should be cautious in composing the MOA. The MOA program is not designed to authorize investigatory immigration sweeps by state and local officers.[263] MOA officers should be limited in their MOA authority so as to prevent racial profiling and to reduce negative effects on community policing. Intense educational outreach should occur as well. The best course of action may be to leave the enforcement of civil immigration law to federal officers.[264] Significantly, even though the MOA program has been available to state and local law enforcement agencies since 1996, only two jurisdictions, Florida and Alabama, have entered into agreements for use by officers in the field.[265]

The MOA program would be most beneficial to state and local jurisdictions in their prisons and jails.[266] While the MOA program is voluntary, ICE is emphasizing the development of agreements with jurisdictions for use in jails,[267] focusing on criminal aliens.[268] In the custodial setting, criminal aliens can be identified quickly and placed in federal custody, so as to alleviate the costs of keeping those individuals in state and local jails.[269] Interviews of inmates are based on information provided on the booking sheet, such as the place of birth, or on the fingerprints taken at the time of arrest.[270] Hence, racial profiling and community policing efforts should not be affected.[271] While some Latino leaders in Mecklenburg County, where the MOA program is being implemented in the jail setting, have complained that there is a "discriminatory climate" precisely because of the MOA,[272] the risk of racial profiling is higher where MOA officers, such as those in Alabama, are empowered to enforce immigration law out in the field. Jurisdictions concerned with alleviating an illegal immigration problem would best be served by entering into an MOA limited to custodial situations as opposed to an agreement that would deputize officers in the field, where racial profiling could be a problem.

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it requires that the state and local jurisdictions give up their MOA officers while they are in the five-week training. *Id.*

263. Telephone Interview with Robert Hines, *supra* note 16.

264. State and local officers are not precluded from enforcing criminal immigration violations. *See supra* text accompanying note 5.

265. For further discussion of MOAs implemented in jails, see *supra* Part II.C.

266. Of course, MOA implementation in the jails expedites identification and deportation of only those illegal immigrants who have committed a crime unrelated to immigration. If a jurisdiction's goal is to detect illegal immigrants in the community, regardless of whether they have been arrested for different crimes, the best course of action is to leave that responsibility to the federal officers.

267. *Hearings*, *supra* note 18 (statement of Paul Kilcoyne, Deputy Assistant Director, Investigative Services Division, U.S. Department of Homeland Security).

268. Telephone Interview with Robert Hines, *supra* note 16.

269. *Hearings*, *supra* note 18 (statement of Paul Kilcoyne, Deputy Assistant Director, Investigative Services Division, U.S. Department of Homeland Security).

270. E-mail from Robert Hines #2, *supra* note 114.

271. *But see* Whoriskey, *supra* note 17 (suggesting the officers in the field may target Latinos for arrest for traffic violations so that the individuals may be brought to the jails and investigated for immigration violations there).

272. *Id.*