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NOTES

State and Local Law Enforcement Response to Undocumented Immigrants

CAN WE MAKE THE RULES, TOO?

I. INTRODUCTION

In 2005, in the towns of New Ipswich and Hudson, New Hampshire, local police arrested eight suspected undocumented immigrants¹ on charges of criminal trespass when they failed to provide proper identification.² Local police resorted to this tactic after the federal authorities declined to take action against the suspects.³ This novel approach to immigration regulation at the state level drew national attention as several other local law enforcement offices throughout the country contemplated administering a similar approach.⁴ On August 12, 2005, however, a state judge dismissed these charges, stating that they represented an unconstitutional attempt to regulate the enforcement of

¹ The term “undocumented immigrant” is used to describe persons who “(1) have entered the country without inspection or with false documents; (2) have stayed beyond the expiration of their visas; (3) are working without authorization; or (4) are otherwise in violation of immigration laws.” Victor C. Romero, *Whatever Happened to the Fourth Amendment?: Undocumented Immigrants’ Rights After INS v. LOPEZ-MENDOZA and UNITED STATES v. VERDUGO-URQUIDEZ*, 65 S. CAL. L. REV. 999, 999 n.1 (1992).

² Anand Vaishnav, *N.H. Judge Dismisses Immigrants’ Trespass Charges*, BOSTON GLOBE, Aug. 13, 2005, at B3.

³ *Id.*

⁴ Andrew Wolfe, *Immigrants Cleared of Trespass Charges*, NASHUA TELEGRAPH, Aug. 12, 2005.

immigration violations.⁵ The judge reasoned that the police action violated the supremacy clause because the federal regulation was “so pervasive” that it left no room for supplementation by the states.⁶

While the charges against these eight suspects were dismissed, the fact that law enforcement felt compelled to take the action they did reflects the growing nation-wide concern about undocumented immigrants who live and work in the United States. Typically, handling immigration matters is something that falls within the purview of the federal government. This New Hampshire case illustrates, however, that the federal government does not always take action, or at least, as swiftly as some might hope. As a result, local authorities across the country have started to take their own action by expanding criminal statutes to cover undocumented immigration, discriminatorily applying the law against undocumented immigrants, and acting as deputies of the federal immigration law. They have resorted to these methods because it is thought that the federal government’s limited number of agents is inadequate to address the large numbers of undocumented immigrants.⁷

This Note argues that the immigration legislation should remain within the purview of the federal government and that the state and local governments should neither expand laws nor arbitrarily and discriminatorily administer existing laws to address the issue of undocumented immigration, despite the perceived incapability of the federal government to handle the issue. Instead, the local authorities should adhere to the systematic delegation of authorities that are made available by the existing federal immigration laws. Part II of this Note provides background information regarding

⁵ *Hampshire v. Barros-Batistele*, No. 05-CR-1474, 1475 (Nashua D. Ct. 2005), available at http://www.courts.state.nh.us/district/criminal_trespass_decision.pdf.

⁶ *Id.* (quoting *Appeal of Conservation*, 147 N.H. 89 (2001)).

⁷ Mohar Ray, “*Can I See Your Papers?*” *Local Police Enforcement of Federal Immigration Law Post 9/11 and Asian American Permanent Foreignness*, 11 WASH. & LEE RACE & ETHNIC ANCESTRY L.J. 197, 197 (2005).

[W]ith a maximum of 5,500 federal immigration agents available to enforce immigration controls and an estimated eight million undocumented immigrants within the United States, the federal government is in dire need of increased manpower if it chooses to prioritize undocumented immigration control and criminal immigration enforcement issues on the federal agenda.

Id.

the undocumented immigration situation within state and local communities, as well as a brief overview of the powers at both the federal and state level dealing with immigration matters. Part III describes and analyzes the various and conflicting ways that state and local authorities address undocumented immigrants within their communities. Part IV argues that these state and local methods should not be used to combat illegal immigration because of their unlawful expansion of established authority and inherent ineffectiveness. Instead, this Note advocates that adherence to the established method of regulated delegation of local enforcement by federal authorities is the more appropriate response to the undocumented immigration issues.

II. BACKGROUND

The issue of undocumented immigration is of significant importance. The population of undocumented immigrants is reportedly at a record high and the rate of increase appears to be steady.⁸ It is the local communities that must ultimately absorb the impacts of this trend. The communities have voiced their concerns and are now looking for solutions.⁹ The federal government has primary authority to regulate and enforce the immigration law.¹⁰ However, the steady increase in the population of undocumented immigrants reveals that the federal government does not have adequate resources to address the situation alone.¹¹ Where the federal government lags, the onus falls on state and local law enforcement forces to assist in the cause.¹² This has increasingly placed state and local authorities under scrutiny. The question becomes if and how state and local law enforcement agencies can take matters into their own hands. Both statutory law and the general judicial support for state and local enforcement of immigration law uphold the view that this is a viable option.¹³ Serious

⁸ 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, 324-26 (2005).

⁹ David M. Turoff, Note, *Illegal Aliens: Can Monetary Damages be Recovered from Countries of Origin Under an Exception to the Foreign Sovereign Immunities Act?*, 28 BROOK. J. INT'L L. 179, 179-80 (2002).

¹⁰ IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 25 (10th ed. 2006).

¹¹ Sessions & Hayden, *supra* note 8, at 330.

¹² *Id.*

¹³ *Id.*

concerns arise, however, when considering where the appropriate limits of this authority should be set.

A. *Undocumented Immigration Issues in Context*

The federal government appears to be overwhelmed by its efforts to control immigration, especially considering the large and increasing number of undocumented immigrants. There are an estimated eight to ten million undocumented immigrants living within the United States.¹⁴ The efforts made by the federal government to control the influx had little success as the population has shown a continuous growth at a rate of approximately 400,000 undocumented immigrants a year.¹⁵ One former U.S. ambassador¹⁶ has criticized the “very chaotic [federal immigration] system” as being under-funded and lacking any true cooperative effort with local authorities.¹⁷ The Department of Homeland Security is said to be “choking on massive workloads” with an estimated backlog of 4.1 million pending immigration applications of various kinds.¹⁸

The backlog at the federal level can create havoc on the state and local levels, since it is ultimately the local community that must absorb the growing population of undocumented immigrants. The main complaints voiced by these communities are that these undocumented immigrants are responsible for a significant amount of job displacement among documented immigrants and native-born Americans, adversely affect their general way of life, and drain valuable resources from the communities forced to deal with this sizable population.¹⁹

¹⁴ *Id.* at 324 n.1. See also Paul Magnusson, *Go Back Where You Came From: Across the Country, a Grassroots Backlash Against Illegals is Building*, BUS. WK., July 4, 2005, at 86 (according to a new study by the Pew Hispanic Center, 1.4 million Mexicans have crossed over into the U.S. with 85% of them entering illegally since 2000).

¹⁵ *Hearing on Comprehensive Immigration Reform II Before the S. Comm. On the Judiciary*, 109th Cong. (2005) (statement of Mark Krikorian, Ctr. for Immigr. Stud.) [hereinafter *Immigration Reform II*].

¹⁶ George Bruno, a private attorney in Manchester, and former U.S. ambassador to Belize.

¹⁷ Stephen Seitz, *Judge: Fining Illegals for Trespass Intrudes on Federal Authority*, UNION LEADER, Aug. 13, 2005 (quoting George Bruno).

¹⁸ *Immigration Reform II*, *supra* note 15.

¹⁹ Ryan D. Frei, Comment, *Reforming U.S. Immigration Policy in an Era of Latin American Immigration: The Logic Inherent in Accommodating the Inevitable*, 39 U. RICH. L. REV. 1355, 1380 (2005).

In past years of rising unemployment, state and local communities have contended that immigrants, in particular undocumented immigrants, are responsible for taking jobs away from American citizens.²⁰ Empirical studies conducted in the early 1990s estimated that the total cost of job displacement due to undocumented immigrants would reach approximately \$171.5 billion between 1993 and 2002.²¹ A recent study has also shown that new undocumented immigrants have substantially increased their ability to find work while the documented immigrants and native-born American citizens have seen a decrease in their ability to find employment between 2000 and mid-2003.²² Even the Supreme Court has supported the view that undocumented immigrants deprive citizens and legally admitted aliens of jobs and that their continued employment poses a threat to the wages and working conditions of citizens and legally admitted aliens.²³

The impact of lost jobs is especially concentrated in the area of low-skilled American workers where an estimated forty to fifty percent of wage loss is due to undocumented immigrants.²⁴ It is estimated that there are more than 100,000 day laborers²⁵ distributed over at least four hundred different hiring sites within the United States.²⁶ These workers for hire supply the increasing demand for cheap labor found in various communities.²⁷

Aside from taking jobs away, many communities contend that these groups create “unsanitary conditions” and are simply “aesthetically detrimental” to their neighborhood,

²⁰ *Id.*

²¹ Turoff, *supra* note 9, at 184 n.40.

²² Frei, *supra* note 19, at 1379.

²³ *DeCanas v. Bica*, 424 U.S. 351, 356-57 (1976): Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. *Id.*

²⁴ Frei, *supra* note 19, at 1379.

²⁵ Day laborers can be defined as individuals who gather at a particular hiring site to sell their labor for an hour, the day, or a particular job. Due to their undocumented status or their inability to speak English, these laborers turn to this trade out of necessity. Mauricio A. Espana, *Day Laborers, Friend or Foe: A Survey of Community Responses*, 30 *FORDHAM URB. L.J.* 1979, 1980-81 (2003).

²⁶ Steven Greenhouse, *Front Line in Day Laborer Battle Runs Right Outside Home Depot*, *N.Y. TIMES*, Oct. 10, 2005, at A1.

²⁷ Espana, *supra* note 25, at 1980.

thus lowering the quality of life for many local residents.²⁸ The complaints that the day laborers are unsanitary and aesthetically detrimental demonstrate the general disfavor that some local communities find with the presence of undocumented immigrants.²⁹ The citizens of towns bordering Mexico cite this as a major issue within their communities.³⁰ In one border town residents complained that the constant flow of approximately three hundred undocumented immigrants that travel through their town each night is overwhelming.³¹ The residents associate this growing population with an increase in crime, nuisance, and reckless behavior.³² Regardless of the validity of these concerns,³³ the undocumented immigrants, whether working as day laborers or in transit from a border country, are highly visible, and local residents point the finger at them for unfairly forcing them to shoulder increased economic and social burdens.³⁴

The burdens that the local communities complain about are supported by empirical evidence from recent studies.³⁵ One study estimated that \$5.4 billion was spent in public assistance to undocumented immigrants in 1990.³⁶ That same study stated that \$11.9 billion was spent in public assistance and displacement costs for an undocumented population of 4.8 million in 1992.³⁷ More recent studies support these findings with an estimated \$24 billion spent on social services for undocumented immigration.³⁸ With an undocumented immigration population that is already estimated to be nearly double the amount cited in 1992,³⁹ it is not surprising that the state and local communities are beginning to look to their local

²⁸ *Id.*; See also Jon Ward, *Arrests Not Linked to Illegals Crackdown*, WASH. TIMES, Oct. 29, 2004, at B1 (local police receive “complaints about disorderly conduct by some of the day laborers such as public drunkenness, urinating in public and harassment of women who were entering a nearby rape crisis counseling center.”).

²⁹ Frei, *supra* note 19, at 1380.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ There are arguments that these assertions are facially invalid and that undocumented immigrants actually provide positive contributions to the U.S. economy and help create jobs in urban areas. Turoff, *supra* note 9, at 184 n.41.

³⁴ Frei, *supra* note 19, at 1380.

³⁵ Turoff, *supra* note 9, at 183-84.

³⁶ *Id.* at 183.

³⁷ *Id.* at 183-84.

³⁸ *Id.* at 184.

³⁹ Current estimates state that there are eight to ten million undocumented immigrants within the U.S. Sessions & Hayden, *supra* note 8, at 327.

law enforcement agencies to address these issues that they deal with on a daily basis.

B. Exclusive Federal Authority over Immigration Law

Historically, the federal government has had exclusive authority over immigration issues since the late nineteenth century.⁴⁰ In 1849, the Supreme Court stated that the “whole subject of the admission of foreigners into the United States, and the terms upon which they shall be admitted, belongs, and must belong, exclusively to the national government.”⁴¹ The text in both the Constitution and the subsequent legislation by Congress, as well as general foreign policy concerns, empower the federal government with this exclusive authority.

The enumerated and implied Constitutional powers are viewed as the source of Congress’ exclusive authority over immigration issues.⁴² The enumerated powers are derived from the commerce,⁴³ naturalization,⁴⁴ migration and importation,⁴⁵ and war power clauses.⁴⁶ The implied Constitutional powers stem from the notion that this authority is simply an incident of sovereignty.⁴⁷ This concept has its foundation in the “accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within

⁴⁰ Although there was no established federal immigration law until 1875, there was limited state legislation in the area to varying degrees. Frei, *supra* note 19, at 1361, 1363.

⁴¹ Smith v. Turner (Passenger Cases), 48 U.S. (7 How.) 283, 305 (1849).

⁴² Kurzban, *supra* note 10, at 25.

⁴³ Congress is authorized to “regulate Commerce with foreign Nations, and among the several States.” U.S. CONST. art. I, § 8, cl. 3.

⁴⁴ Congress is granted the power to “establish a uniform Rule of Naturalization.” U.S. CONST. art. I, § 8, cl. 4.

⁴⁵ “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.” U.S. CONST. art. I, § 9, cl. 1.

⁴⁶ Congress has the authority to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” U.S. CONST. art. I, § 8, cl. 11. This war power “permits the federal government to stop the entry of every alien and to expel them from the U.S.” Kurzban, *supra* note 10, at 25.

⁴⁷ Kurzban, *supra* note 10, at 25; Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) (J. Field declared that the power to exclude foreigners is “an incident of sovereignty.”).

its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”⁴⁸

Congress’s pervasive legislative activity further establishes that the federal government’s “plenary authority over immigration extends to the control of aliens within the borders of the U.S.”⁴⁹ Congress demonstrated this authority when it first enacted the Immigration and Nationality Act (“INA”) in 1952, which remains the basic statute of current immigration law to this day.⁵⁰ Within the general framework regarding admittance and deportation, there are many provisions of the INA that regulate the activities of foreign nationals within the United States.⁵¹ Since its enactment, there have been several significant amendments to the INA which have reached even further into the regulation of foreign national activity.⁵² One recent example is the USA PATRIOT Act which was enacted into law in response to the terrorist attacks on the United States on September 11, 2001.⁵³

With regard to the administration of the federal law, Congress has delegated most of its immigration authority to the executive branch.⁵⁴ Now, instead of the Immigration and Naturalization Service (“INS”), the Department of Homeland Security (“DHS”), part of the executive branch, has nearly all of the authority to administer and enforce the federal immigration laws.⁵⁵ The DHS is subdivided into three bureaus: the U.S. Citizen and Immigration Services (“UCIS”),⁵⁶ Immigration and Customs Enforcement (“ICE”), and Customs

⁴⁸ *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

⁴⁹ Austin T. Fragomen, Jr. & Steven C. Bell, *IMMIGRATION PRIMER* 4 (1985).

⁵⁰ Stephen Yale-Loehr, *Overview of U.S. Immigration Law*, 1477 *PLI/CORP* 49, 56 (2005).

⁵¹ *See, e.g.*, 8 U.S.C. § 1426 (2000) (aliens who seek exemption or discharge from the U.S. armed forces on account of their alien status are permanently barred from seeking citizenship); 8 U.S.C. § 1428 (2000) (temporary absences for “ministerial or priestly functions of a religious denomination” are excused and considered being “physically present and residing in the United States for the purpose of naturalization”); 8 U.S.C. § 1430(c) (2000) (special naturalization procedures for those who can prove that they work for certain nonprofit organizations within the U.S.).

⁵² Yale-Loehr, *supra* note 50, at 56.

⁵³ *Id.* at 57.

⁵⁴ Fragomen & Bell, *supra* note 49, at 4.

⁵⁵ Yale-Loehr, *supra* note 50, at 59.

⁵⁶ The UCIS Bureau performs the functions of adjudication of petitions and applications for immigration benefits. ROBERT C. DIVINE, *IMMIGRATION PRACTICE* 2-2 (2006-2007 ed. 2006).

and Border Protection (“CBP”) bureaus.⁵⁷ The regulations promulgated by these various agencies provide the basic structure for enforcing the INA.⁵⁸

Separate and apart from the Constitution and the federal statutes lie foreign policy concerns related to the direct impact that immigration matters have on relations with other countries.⁵⁹ These concerns grant inherent authority over this area to the national government.⁶⁰ Therefore, the federal government must act in uniformity, as it does in all other areas of foreign policy, in order to advance two important aspects of immigration regulation.⁶¹ First, the manner in which the United States decides to treat foreign nationals, including deciding which ones to admit or expel, impacts U.S. relations with the home country of those nationals.⁶² Second, the federal government proactively utilizes immigration policy to advance significant foreign policy objectives that reach far beyond the admittance of individuals into the United States.⁶³ These two critical aspects are the main reasons why the Supreme Court has ruled in favor of federal exclusivity over immigration matters. For example, when the Court struck down a California statute that regulated the arrival of foreign passengers in *Chy Lung v. Freeman*, it noted that the federal government alone would be called to respond to any foreign policy consequences of state created immigration policy; therefore, the federal government alone should be the one to create such policy.⁶⁴

⁵⁷ *Id.* The CBP and ICE Bureaus handle the functions of border patrol, detention and removal, intelligence, investigations and inspections. *Id.*

⁵⁸ Yale-Loehr, *supra* note 50, at 59.

⁵⁹ 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, 991 (2004).

⁶⁰ Kurzban, *supra* note 10, at 25.

⁶¹ Pham, *supra* note 59, at 994.

⁶² *Id.* at 992-93.

⁶³ *Id.* at 993-94.

⁶⁴ *Chy Lung v. Freeman*, 92 U.S. 275, 279-80 (1875).

If [the federal] government has forbidden the States to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible?

The Constitution of the United States is no such instrument. The passage of laws which concern the admission of citizens and subjects of foreign nations

The effect of post September 11th immigration legislation on relations between the United States and Mexico provides a specific example of how immigration policy decisions directly affect foreign policy.⁶⁵ The United States severely restricted the immigration admittance standards in the interests of national security after the attacks by terrorists on September 11, 2001.⁶⁶ Prior to these attacks, the United States and Mexico were involved in negotiations that would have established a historic bilateral migration agreement between the two countries.⁶⁷ However, the September 11th terrorist attacks halted these discussions.⁶⁸ This was seen as a principal driving force behind the Mexican President's decision to break from the United States and vote against military action in Iraq.⁶⁹ Foreign relations between the two countries have been described as "colder" ever since.⁷⁰

The changes that the federal government has made to the definitions regarding the admittance of refugees demonstrate the second foreign policy concern surrounding immigration.⁷¹ The President, in consultation with Congress, has the authority to determine the number of refugees to be admitted based on "humanitarian concern" or for other reasons of national interest.⁷² The United States has historically used this power to modify the refugee guidelines to admit nationals from countries that the United States considered adversaries.⁷³ By labeling these foreign nationals "legitimate refugees," the United States uniformly denounced the policies advanced by their home countries.⁷⁴ The federal government would lose the ability to send any strong unified statement without the exclusive authority to create these definitions.

to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.

Id. at 280.

⁶⁵ Pham, *supra* note 59, at 992.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 993.

⁷⁰ *Id.*

⁷¹ Pham, *supra* note 59, at 993.

⁷² *Id.* at 992 n.139.

⁷³ *Id.* at 993.

⁷⁴ *Id.*

C. *State and Local Authority to Enforce Immigration Law*

Despite what appears to be overwhelming authority for exclusive jurisdiction over immigration matters by the federal government, some argue that state and local law enforcement agencies can enforce immigration laws and have had inherent authority to do so ever since Congress enacted the Immigration and Nationality Act in 1952.⁷⁵ Three sources that support this viewpoint are: (1) specific text within the INA; (2) federal judicial decisions;⁷⁶ and (3) Congressional amendments that followed the enactment of the USA PATRIOT Act and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) that added further explicit authority to the powers of the state and local law enforcement agencies.⁷⁷

1. Statutory Support for Local Enforcement of Immigration Laws

There is text within the INA that specifically supports local enforcement of immigration law. Title 8 Section 1324(c) states that:

No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and *all other officers whose duty it is to enforce criminal laws*.⁷⁸

Some argue that state and local law enforcement personnel fall under the “all other officers whose duty it is to enforce criminal laws” provision.⁷⁹ This interpretation is most strongly supported by the INA’s legislative amendment history.⁸⁰

When Section 1324 was first enacted in 1954, the text read: “and all other officers *of the United States* whose duty it is to enforce criminal laws.”⁸¹ However, subsequent amendments ultimately removed the phrase “of the United States” from the statute.⁸² This reflects the Congressional

⁷⁵ Michael M. Hethmon, *The Chimera and the Cop: Local Enforcement of Federal Immigration Law*, 8 D.C. L. REV. 83, 86-87 (2005).

⁷⁶ *Id.* at 85-87.

⁷⁷ *Id.* at 83-84; Sessions & Hayden, *supra* note 8, at 344.

⁷⁸ 8 U.S.C. § 1324(c) (2000) (emphasis added).

⁷⁹ Sessions & Hayden, *supra* note 8, at 341-42.

⁸⁰ Hethmon, *supra* note 75, at 86.

⁸¹ *Id.* (emphasis added).

⁸² *Id.*

intent not to limit the arrest authority to members of the federal government agencies, but rather to include state and local law enforcement departments as well.⁸³

In order to clarify any confusion surrounding the state and local enforcement authority, Congress passed the Doolittle Amendment to the AEDPA of 1996.⁸⁴ The amended Act now states:

(a) In general

Notwithstanding any other provisions of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who:

(1) is an alien illegally present in the United States; and

(2) has previously been convicted of a felony in the United States and deported or left in the United States after such conviction, but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such a period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.

(b) Cooperation

The Attorney General shall cooperate with the States to assure that information in the control of the Attorney General, including information in the National Crime Information Center, that would assist State and local law enforcement officials in carrying out duties under subsection (a) of this section is made available to such officials.⁸⁵

After the terrorists attacked the United States on September 11, 2001, Congress enacted the USA PATRIOT Act, the Homeland Security Act, and the Enhanced Border Security and Visa Entry Reform Act.⁸⁶ All of these amendments had a common stated goal: “to improve federal and local cooperative efforts to detect and detain aliens participating in terrorist activities in the United States.”⁸⁷ Section 287(g) of the INA addresses this particular legal concern by specifically authorizing the Attorney General to contract with state and

⁸³ *Id.* at 86-87.

⁸⁴ Sessions & Hayden, *supra* note 8, at 344.

⁸⁵ 8 U.S.C. § 1252c (2000).

⁸⁶ Hethmon, *supra* note 75, at 83-84.

⁸⁷ *Id.* at 84.

local agencies and have them perform certain functions of a federal immigration officer.⁸⁸ The specific provision states that:

[T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.⁸⁹

State or local law enforcement officials that operate under one of these agreements receive extensive immigration law training.⁹⁰ They are also given much broader authority to enforce the immigration laws as compared to their non-deputized counterparts who only retain general inherent authority.⁹¹

2. Judicial Support for Local Enforcement of Immigration Law

Some courts have upheld the general proposition that state officials are not preempted from enforcing the federal immigration laws. In *People v. Barajas*, the California Supreme Court did not find any express limitation on the local enforcement of specific areas of federal immigration law.⁹² The defendant in *Barajas* was originally arrested by local police for a traffic violation and for possession of a knife.⁹³ The arresting police officer proceeded to question the defendant about his immigration status after reading him his Miranda rights.⁹⁴ The defendant replied that he had left his “green card” at home.⁹⁵ The police issued a misdemeanor citation and released the defendant.⁹⁶ The local police still suspected that the defendant was an undocumented immigrant and therefore

⁸⁸ Sessions & Hayden, *supra* note 8, at 342.

⁸⁹ 8 U.S.C. § 1357(g)(1) (2000).

⁹⁰ Sessions & Hayden, *supra* note 8, at 345.

⁹¹ *Id.*

⁹² *People v. Barajas*, 147 Cal. Rptr. 195, 199 (Cal. Ct. App. 1978).

⁹³ *Id.* at 197.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

inquired with federal officials about the defendant's status.⁹⁷ The INS agent informed the police that the defendant was apprehended on two prior occasions and was "formally deported" the second time.⁹⁸ The INS agent then instructed the local police to arrest the defendant for violating Section 1326 of Title 8 by reentering the country after deportation without express permission from the Attorney General.⁹⁹ The local police officers arrested the defendant as instructed.¹⁰⁰

The defendant in *Barajas* claimed that the local police officers did not have the authority to arrest him for violations of federal immigration law.¹⁰¹ The court rejected this argument and stated that the specific text found in Sections 1325 and 1326 of Title 8 at the time did not contain the limiting language that Section 1324 had.¹⁰² The court stated that all three sections were originally drafted together, yet only Section 1324 was subsequently amended to include only "officers of the United States."¹⁰³ The court drew from this a clear Congressional intent that "arrests for violation of Section 1324 were to be made only by federal personnel, while by clear implication, Sections 1325 and 1326 arrests were to be made by state and local officers as well."¹⁰⁴ The court went on to cite the supremacy clause as a "two-edged sword, and in the absence of a limitation, the states are bound by it to enforce violations of

⁹⁷ *Id.*

⁹⁸ *Barajas*, 147 Cal. Rptr. at 197.

⁹⁹ *Id.*

Any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisoned not more than 2 years, or both.

8 U.S.C. § 1326(a) (2000).

¹⁰⁰ *Barajas*, 147 Cal. Rptr. at 197.

¹⁰¹ *Id.* at 198.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

the federal immigration laws.”¹⁰⁵ This proposition strongly supports state and local enforcement authority by not only deeming it to be constitutionally acceptable, but a required obligation.

All of the federal circuit courts that have ruled on this issue have held similarly when it comes to criminal violations of federal immigration laws. In *Gonzalez v. City of Peoria*, the Ninth Circuit placed an interesting gloss over the *Barajas* decision.¹⁰⁶ The defendants in *Gonzalez*, like the ones in *Barajas*, were stopped by local police, questioned, arrested, and detained in order to be released to federal immigration authorities.¹⁰⁷ The defendants made similar claims that these arrests were unlawful under federal immigration law.¹⁰⁸ The *Gonzalez* court ruled against them, however, stating that the text of Title 8 Section 1325 did not preclude local police from enforcing the statute.¹⁰⁹ The distinguishing aspect of the *Gonzalez* decision lies in the particular attention to the fact that the *Barajas* opinion was based on a criminal offense.¹¹⁰ The court stated that local authorities must distinguish between the criminal violation of illegal entry and the civil violation of illegal presence when enforcing violations of the federal immigration statute.¹¹¹ The opinion went on to state that the civil provisions of the code constituted a “pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration.”¹¹²

In *Lynch v. Cannatella*, the Fifth Circuit also addressed the issue of state and local enforcement of federal immigration laws.¹¹³ The court struck down the defendants’ arguments for

¹⁰⁵ *Id.* at 199.

¹⁰⁶ *Gonzalez v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983), *overruled on other grounds by* *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1041 (9th Cir. 1999).

¹⁰⁷ *Id.* at 472.

¹⁰⁸ *Id.* at 474.

¹⁰⁹ *Id.* at 475-77.

¹¹⁰ *Id.* at 476.

¹¹¹ *Id.* at 477.

¹¹² *Gonzalez*, 722 F.2d at 477. It has been argued that this is merely dicta and outside the scope of the decision since the civil provisions of the INA were not an issue in this case. Sessions & Hayden, *supra* note 8, at 333. However, in support of the Ninth Circuit position, some states have specifically authorized the arrests for criminal violations of the INA but do not permit arrests based solely on undocumented immigrant status since these individuals may only be in violation of the civil provisions of the INA. OFFICE OF THE ATTORNEY GENERAL STATE OF NEW YORK, INFORMAL OPINION NO. 2000-1, (2000) available at http://www.oag.state.ny.us/lawyers/opinions/2000/informal/2000_1.html.

¹¹³ *Lynch v. Cannatella*, 810 F.2d 1363, 1366 (5th Cir. 1987).

preemption and broadly held that there was no federal immigration law that precluded the enforcement of immigration law by state and local law enforcement personnel.¹¹⁴ With this broad statement the *Lynch* court seemed to indirectly disagree with the civil and criminal distinction drawn by the Ninth Circuit in *Gonzalez*.¹¹⁵

In *United States v. Vasquez-Alvarez*, the Tenth Circuit rendered a decision that seemed to be more consistent with the broad holding in *Lynch* than the more restrictive decision set forth in *Gonzalez*.¹¹⁶ The Oklahoma police arrested the defendant in *Vasquez-Alvarez* based on his suspected undocumented status.¹¹⁷ Federal immigration authorities revealed that he had been previously arrested on felony charges and subsequently deported just as the defendant in *Bajaras*.¹¹⁸ The *Vasquez-Alvarez* Court reviewed the post AEDPA version of Title 8 U.S.C. Section 1252(c) and ruled that one of the main purposes in amending the statute was to settle any confusion regarding the authority of state and local authorities to enforce the federal immigration law.¹¹⁹ The Tenth Circuit used this reasoning to uphold the general concept that federal immigration law did not preempt the

¹¹⁴ *Id.* at 1371. The court referenced the 1970 version of 8 U.S.C. § 1223(a) which outlined the duties of agents whose vessels bring aliens into U.S. ports and the duties of the immigration officials with regard to the removal of those aliens from the vessel. Despite including the text “immigration officer” within the text of § 1223(a) the court stated that “[n]o statute precludes other federal, state, or local law enforcement agencies from taking other action to enforce this nation’s immigration laws.” *Id.*

Entry through or from foreign territory and adjacent islands

Upon the arrival at a port of the United States of any vessel . . . bringing aliens . . . the immigration officers may order a temporary removal of such aliens for examination and inspection . . . but such temporary removal shall not be considered a landing, nor shall it relieve vessels . . . from any obligations which, in case such aliens remain on board, would, under the provisions of this chapter, bind such vessels A temporary removal of aliens from such vessels . . . ordered pursuant to this subsection shall be made by an immigration officer at the expense of the vessel . . . and such vessel . . . shall, so long as such removal lasts, be relieved of responsibility for the safekeeping of such aliens: Provided, that such vessels . . . may with the approval of the Attorney General assume responsibility for the safekeeping of such aliens during their removal . . . for examination and inspection, in which event, such removal need not be made by an immigration officer.

8 U.S.C. § 1223(a) (1970).

¹¹⁵ See *Lynch*, 810 F.2d at 1371.

¹¹⁶ *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295-96 (10th Cir. 1999).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1300.

ability of state and local law enforcement personnel to enforce the federal statutes.¹²⁰

The essential holding of the *Bajaras* opinion has been supported by the subsequent federal court decisions in the Fifth, Ninth, and Tenth Circuits. The general rule that federal immigration law does not preempt state and local law enforcement remains intact even if the parallel courts did not address the specific warning regarding civil penalties pointed out by the *Gonzalez* court. This authority at least signifies that criminal law enforcement of federal immigration law is not out of the reach of state and local authorities.

III. THE STATE AND LOCAL LAW ENFORCEMENT RESPONSE TO UNDOCUMENTED IMMIGRANTS

The state and local law enforcement agencies dealing with the rising population of undocumented immigrants within their communities have taken various steps to address the issue. The response taken by the New Hampshire authorities represents a novel technique, but not the only one. There are three main categories of responses that state and local authorities have used recently. First, existing state criminal statutes have been expanded to cover undocumented immigrants.¹²¹ The second category is similar in that it involves existing state laws, but distinct in that it deals with the arguably discriminatory enforcement of laws such as loitering and criminal nuisance.¹²² Third, state and local law enforcement agencies have received specific authority from the Department of Homeland Security to act as deputies of the federal immigration law pursuant to Section 287(g) of the Immigration and Nationality Act as amended by the Homeland Security Act of 2002.¹²³

A. *Expansion of Existing State Laws to Address Undocumented Immigration*

Local authorities have expanded existing state criminal statutes to cover undocumented immigrants. In the recent

¹²⁰ *Id.*

¹²¹ Local New Hampshire law enforcement's use of the criminal trespass statute to detain suspected undocumented immigrants is an example of this first method. *See infra* Part I.

¹²² *See infra* Part III.B.

¹²³ 8 U.S.C. § 1357(g) (2000).

New Hampshire case, police arrested the eight suspected undocumented immigrants on separate occasions for criminal trespass after they produced fake identifications during traffic stops.¹²⁴ The current New Hampshire criminal trespass statute states that “[a] person is guilty of criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or remains in any place.”¹²⁵ The local police from New Ipswich and Hudson, New Hampshire read this statute as authorizing them to arrest the suspected undocumented immigrants within the state’s borders because, as undocumented immigrants, they do not have any legal permission to be anywhere in the United States.¹²⁶

Richard E. Gendron, the police chief in one of the New Hampshire towns said, “the problem of illegal immigration is a real one faced by local police officers across the country.”¹²⁷ He further stated that he “resorted to local charges after federal Immigration and Customs Enforcement officers declined to pick up the defendants when [the] officers stopped them earlier this year and the defendants could not produce valid immigration documents.”¹²⁸ Officer Gendron was then quoted as saying that he still believed that he was “acting within the mission to enforce the laws of the state of New Hampshire, and acting in the best interests of the citizens of Hudson and in the interest of homeland security.”¹²⁹ This novel interpretation of the reach of the statute was not explicitly struck down by the state judge citing a lack of precedent or legislative history on the subject.¹³⁰ Instead, the judge relied on federal preemption standards stating that the charges were unconstitutional attempts to regulate in the area of enforcing immigration violations.¹³¹ Despite the court’s ruling, some still support the police chief’s broad interpretation of the criminal trespass statute. State Representative David Buhlman has stated that he would seek legislation that would “beef up” the statute to

¹²⁴ *Judge Dismisses Trespassing Charges Against Illegal Immigrants*, FOSTERS, Aug. 12, 2005.

¹²⁵ N. H. REV. STAT. ANN. § 635:2 (2005).

¹²⁶ Wolfe, *supra* note 4.

¹²⁷ Vaishnav, *supra* note 2, at B3.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Wolfe, *supra* note 4.

¹³¹ *New Hampshire v. Barros-Batistele*, No. 05-CR-1474, 1475 (Nashua D. Ct. 2005), available at http://www.courts.state.nh.us/district/criminal_trespass_decision.pdf.

legitimize its use against undocumented immigrants despite the ruling on federal preemption.¹³²

New Hampshire is not the only state that has considered using this type of response. State Representative Courtney Combs of Ohio has announced that he is drafting a new offense called “state trespass” that would make it a state criminal offense for an undocumented immigrant to cross Ohio’s borders.¹³³ The proposal is only a portion of a multi-tiered program that Combs is hoping to implement with the help of the Butler County Commissioner and a local Sheriff in an effort to round up all of the undocumented immigrants in the state and deport them.¹³⁴ The proposed plan also involves adding a charge of falsification against inmates who lie about their citizenship when they are booked for another crime.¹³⁵ Once arrested, the state will make a demand to the federal immigration authorities to begin deportation proceedings or charge the federal government a fee of seventy dollars a day per prisoner.¹³⁶ Butler County has already acted on the threat by billing the federal government \$71,610 to house fifteen undocumented immigrant prisoners from June to October, 2005.¹³⁷ It is conceded, however, that this is merely a symbolic protest since the federal government does not have any obligation to pay the fines.¹³⁸ The symbolism behind this movement and others like it represents the growing frustration with the inadequate federal government response to the issue of undocumented immigration. Representative Combs denies that this is any sort of discrimination against a particular ethnic group, but instead believes that it is “about national security and the federal government’s failure to act.”¹³⁹ Whichever way people feel about Representative Combs’ action, what seems apparent is that this is just the beginning of states’

¹³² *Judge Dismisses Trespassing Charges Against Illegal Immigrants*, *supra* note 124.

¹³³ Mari Lolli, *Cracking Down on Illegal Aliens*, CINCINNATI POST, Oct. 22, 2005, at A10.

¹³⁴ Sheila McLaughlin, *Butler Co. Talks Tough on Illegal Immigrants*, CINCINNATI ENQUIRER, Oct. 22, 2005, at 1.

¹³⁵ *Id.*

¹³⁶ *Id.* The charge of seventy dollars is said to offset the cost of keeping these individuals in state run holding facilities. *Id.*

¹³⁷ *U.S. Billed For Immigrants*, CINCINNATI ENQUIRER, Oct. 27, 2005, at 3.

¹³⁸ *Id.*

¹³⁹ Lolli, *supra* note 133, at A10.

actions to deal with the growing undocumented immigrant population.

The local governments in New Hampshire and Ohio are not the only communities seeking new ways to address undocumented immigrants. A recent case in Canyon County, Idaho further exemplifies the trend of local communities prepared to use creative interpretations of state and local laws in order to address immigration issues within their regions.¹⁴⁰ Canyon County filed suit in the District of Idaho against several local employers for violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”).¹⁴¹ A violation under 18 U.S.C. § 1962(c) requires that an enterprise be conducted through a pattern of racketeering activity.¹⁴² Further, any RICO plaintiff must allege a direct causal link between the injury and the defendant’s violation in order to make a valid claim.¹⁴³ Canyon County claimed that the defendants used their businesses as “association-in-fact enterprises for the purpose of obtaining and employing illegal immigrant workers to reduce labor costs.”¹⁴⁴ Canyon County further asserted that it was harmed by being forced to provide medical and criminal justice services to these undocumented immigrants as a direct result of the defendants’ illegal racketeering activity.¹⁴⁵

The court first focused on Canyon County’s standing based on the alleged harm being inflicted by the defendants.¹⁴⁶ The defendants cited the “municipal cost recovery rule” in an effort to bar Canyon County’s claim.¹⁴⁷ This rule holds that “the cost of public service for the protection from fire or safety hazards is to be borne by the public as a whole, not assessed

¹⁴⁰ Canyon County v. Syngenta Seeds, Inc., No. CV05-306-S-EJL, 2005 WL 3440474, at *1 (D. Idaho Dec. 14, 2005).

¹⁴¹ *Id.*

¹⁴² 18 U.S.C. § 1962(c) (1988).

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.

Id.

¹⁴³ Canyon County, 2005 WL 3440474, at *2.

¹⁴⁴ *Id.* at *1.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at *2.

¹⁴⁷ *Id.*

against the tortfeasor whose negligence creates the need for the service.”¹⁴⁸ Canyon County alleged that the racketeering conducted by the defendants constituted criminal activity and therefore the “public nuisance” exception to the “municipal cost recovery rule” should apply.¹⁴⁹ The court refused to apply this “public nuisance” exception for two reasons.¹⁵⁰ First, the current Idaho Code does not “specifically identify criminal conduct as a public nuisance.” Secondly, the court did not see this as a proper public nuisance claim.¹⁵¹ The court stressed the fact that Canyon County was not acting as a government entity “attempting to ‘abate’” a public nuisance in this action.¹⁵² Instead, the court labeled the action a civil lawsuit in which Canyon County was appearing as a private party seeking to recover damages.¹⁵³ Therefore, granting the relief sought in this action would “do nothing to stop or ‘abate’ the Defendants’ alleged criminal conduct.”¹⁵⁴ The court went on to state that the action should be dismissed due to the plaintiff’s failure to overcome the “basic flaw” that the action was predicated on recovery for the “costs of municipal services.”¹⁵⁵ This critical decision was celebrated by the local migrant worker council as a message that the immigration problems cannot be “solved in this manner.”¹⁵⁶ However, the county commissioner, who is just as determined as Representative Renzullo in New Hampshire and Representative Combs in Ohio to address the undocumented immigrant situation without the assistance of federal authorities, is seeking to appeal this decision.¹⁵⁷ It would not be surprising to see similar actions taken by more local communities throughout the country if the undocumented immigrant population continues to expand at its current rate.

¹⁴⁸ *Flagstaff v. Atchison, Topeka & Santa Fe Railway Co.*, 719 F.2d 322, 323 (9th Cir. 1983) (citing *City of Bridgeton v. B.P. Oil, Inc.*, 369 A.2d 49 (1976)).

¹⁴⁹ *Canyon County*, 2005 WL 3440474, at *3.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Canyon County*, 2005 WL 3440474, at *6.

¹⁵⁶ Rebecca Boone, *Judge Dismisses Idaho Lawsuit Against Employers of Allegedly Illegal Immigrants*, COLUMBIAN (Vancouver, WA), Dec. 15, 2005, at C5.

¹⁵⁷ *Id.*

B. Targeted Enforcement of Existing State Laws to Address Undocumented Immigration

Other state and local enforcement agencies have taken a different approach to the undocumented immigration problem by enforcing existing laws in arguably discriminatory ways rather than expanding those laws' interpretations or creating new legislation. In Virginia, twenty-two day laborers were arrested near a 7-Eleven on a charge of loitering, after being warned for several weeks that they should not be gathering around the convenience store.¹⁵⁸ The local police denied that this was an immigration concern, and instead labeled it "purely a community maintenance issue."¹⁵⁹ However, once the immigrants were arrested, those that could not produce identification were immediately taken into custody and officers performed background checks on them. The investigations revealed that some of them were flagged with deportation notices from the Bureau of Immigration and Customs Enforcement.¹⁶⁰ These men were reported and faced deportation.¹⁶¹ Given the loitering provision's history of discriminatory enforcement in the past,¹⁶² the local immigrant population may have reason to become alarmed about the precedent that these arrests have created.¹⁶³ The local police still maintain, however, that deportation of these individuals was not the ultimate goal of the arrests. They claim that the arrests were in response to numerous complaints from local citizens regarding the disorderly conduct of some of the day laborers.¹⁶⁴

Similar community maintenance concerns were used as the justification for the raiding and closing of a home in

¹⁵⁸ Ward, *supra* note 28, at B1.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² In *Chicago v. Morales*, the Supreme Court struck down a city ordinance which prohibited "'criminal street gang members' from 'loitering' with one another or with other persons in any public place" due to a vagueness violation of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. The Court concluded that the ordinance afforded "too much discretion to the police and too little notice to citizens who wish to use the public streets." It further stated that the ordinance's "relative importance to its application to harmless loitering is magnified by its inapplicability to loitering that has an obviously threatening or illicit purpose." 527 U.S. 41, 45-46, 63-64 (1999).

¹⁶³ Ward, *supra* note 28, at B1.

¹⁶⁴ *Id.*

Farmingville, New York, which sheltered as many as sixty-four male occupants believed to be day laborers.¹⁶⁵ This was the first house in the locality to be shut down for illegal overcrowding, and the raid resulted in an additional 117 people being targeted for investigation.¹⁶⁶ The police arrested the owner of the home on criminal contempt and criminal nuisance charges due to her failure to adhere to State Supreme Court orders regarding compliance with building codes.¹⁶⁷ Supporters of the immigrant workers point out that a discriminatory intent may have been present because non-immigrant homes in neighboring communities would violate the specific text of the illegal overcrowding ordinance yet were not targeted.¹⁶⁸ County executive Steve Levy has argued that he is merely enforcing the law.¹⁶⁹ However, he also admitted to first trying to deputize

¹⁶⁵ Bruce Lambert, *L.I. Home Held Up to 64 Men, Authorities Say*, N.Y. TIMES, June 21, 2005, at B1.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* See N.Y. PENAL LAW § 215.50 (McKinney 2000); N.Y. PENAL LAW § 240.45 (McKinney 2000).

Criminal contempt in the second degree

A person is guilty of criminal contempt in the second degree when he engages in any of the following conduct:

...

3. Intentional disobedience or resistance to the lawful process or other mandate of a court except in cases involving or growing out of labor disputes as defined by subdivision two of section seven hundred fifty-three-a of the judiciary law; or

...

6. Intentional failure to obey any mandate, process or notice, issued pursuant to articles sixteen of the judiciary law, or to rules adopted pursuant to any such statute or to any special statute establishing commissioners of jurors and prescribing their duties or who refuses to be sworn as provided therein

N.Y. PENAL LAW § 215.50.

Criminal nuisance in the second degree

A person is guilty of criminal nuisance in the second degree when:

1. By conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons; or

2. He knowingly conducts or maintains any premises, place or resort where persons gather for purposes of engaging in unlawful conduct.

N.Y. PENAL LAW § 240.45.

¹⁶⁸ Lambert, *supra* note 165.

¹⁶⁹ Paul Vitello, *Responding to the Law of 'Nimby'*, N.Y. TIMES, July 17, 2005, at 14LI.

county police officers as federal immigration agents before being halted by the police union, thereby calling his stated innocuous motivation into question.¹⁷⁰

C. *Recruitment of State and Local Enforcement Agencies by the Federal Government*

Although Mr. Levy did not have much success in his attempt to deputize his local police force, other states have effectively implemented such programs. The judge that handed down the opinion in the New Hampshire case specifically stated that there were provisions in the federal law under which local authorities could be deputized to enforce federal immigration law.¹⁷¹

On August 15, 2005, Arizona Governor Janet Napolitano declared a state of emergency along the state border in an effort to provide relief to areas affected by a rising undocumented immigrant population and an increasing amount of cross-border crime.¹⁷² This action freed up both state and federal emergency funds that are normally reserved for natural disasters.¹⁷³ Prior to this declaration, Napolitano expressed disappointment and impatience with the federal government's "red tape," and its inability to provide any response to the immigration issues in her state.¹⁷⁴ The Secretary of the Department of Homeland Security, Michael Chertoff, finally gave in to the requests for action and offered to coordinate efforts between the federal agencies and the local police forces in Arizona.¹⁷⁵ The Arizona Department of Corrections and the U.S. Department of Homeland Security entered into a Memorandum of Understanding ("MOU") on September 16, 2005.¹⁷⁶ This agreement set forth the terms by which the U.S. Immigration and Customs Enforcement Bureau authorizes qualified state law enforcement personnel to

¹⁷⁰ *Id.*

¹⁷¹ *Judge Dismisses Trespassing Charges Against Illegal Immigrants*, *supra* note 124.

¹⁷² Michael Marizco, *State Grants Pima \$415K in Border-Emergency Funds*, ARIZ. DAILY STAR, Sept. 29, 2005, at B4.

¹⁷³ *Id.*

¹⁷⁴ Steven Bodzin, *Homeland Security Agrees to Coordinate With State Police*, L.A. TIMES, Aug. 24, 2005, at A17.

¹⁷⁵ *Id.*

¹⁷⁶ Memorandum of Understanding (Sept. 16, 2005), available at <http://www.ice.gov/pi/news/newsreleases/articles/050920phoenix.htm>.

perform certain functions of an immigration officer.¹⁷⁷ The authority to enter into this agreement comes from Section 287(g) of the Immigration and Nationality Act, as amended by the Homeland Security Act of 2002, Public Law 207-276.¹⁷⁸

The agreement contains specific terms and conditions under which the federal and state departments must operate,¹⁷⁹ including: the procedures for nominating and training personnel, supplying certification and authorization, and the supervision activities of the U.S. Immigration and Customs Enforcement agency.¹⁸⁰ This last section is significant given the concerns surrounding such a delegation of power. It specifically affirms that state corrections personnel “cannot perform any immigration officer functions pursuant to DHS authorities . . . except when working under the supervision of an ICE officer.”¹⁸¹ The agreement goes on to state that the actions of state personnel “will be reviewed by the ICE [agents] on an ongoing basis to ensure compliance with the requirements of the immigration laws and procedures and to assess the need for additional training or guidance for that specific individual.”¹⁸²

IV. THE IMPROPER USE OF STATE AND LOCAL LAW ENFORCEMENT TO ADDRESS UNDOCUMENTED IMMIGRANTS; DEPUTIZING IS THE BETTER ALTERNATIVE

The expansion and discriminatory enforcement of existing state laws to address undocumented immigration suffer from two critical flaws. First, these tactics impermissibly expand the powers that are recognized within the states’ authority under statutory law and case law and are in direct contradiction to established federal authority. Second, the methods imposed by these state and local authorities are not effective in addressing the concerns of their local communities and are merely shortsighted solutions to particularly complex issues. These state and local agencies should therefore rely on their ability to work in coordination with the federal authorities as deputies of federal immigration

¹⁷⁷ *Id.* ¶ I.

¹⁷⁸ *See* 8 U.S.C. § 1357(g)(1) (2000).

¹⁷⁹ Memorandum of Understanding, *supra* note 176, ¶ I.

¹⁸⁰ *Id.* ¶ IV-VII, IX.

¹⁸¹ *Id.* ¶ IX.

¹⁸² *Id.*

law as a more effective solution to their local concerns regarding undocumented immigrants.

A. *State and Local Actions Represent an Unlawful Expansion of Established Authority*

The state and local authorities are in direct conflict with established law when they choose to address the undocumented immigrant situation by either expanding or discriminatorily enforcing their existing state laws. These methods go beyond the limited recognized authority that state and local agencies have in the enforcement of immigration laws. More importantly, these tactics severely hamper the uniformity requirement that is inherent within all foreign policy areas in which the field of immigration law is undoubtedly a member.

Unlike the federal government, the states do not have any expressed constitutional authority over foreign policy.¹⁸³ However, this does not mean that they are completely devoid of the ability to assist in the enforcement of federal immigration laws. The courts have already determined that the Immigration and Naturalization Act “cannot be inferred [to mean] that the federal government has occupied the field of criminal immigration enforcement.”¹⁸⁴ The Act even provides specific provisions that allow state and local police officers to act as immigration officers within certain limitations.¹⁸⁵

This established authority has its limits. By accepting the concept that state and local law enforcement personnel have the inherent authority to make arrests under the federal immigration law, one must also accept the fact that this authority is limited to enforcement and does not include any permission to regulate.¹⁸⁶ Proposing otherwise would contradict the Supreme Court’s idea that “the federal government, as represented by Congress, has nearly complete power to determine immigration policies, thereby restricting the states

¹⁸³ Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 940 (1995).

¹⁸⁴ *Gonzalez v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983), *overruled on other grounds by* *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1041 (9th Cir. 1999). *See also supra* notes 105-20 and accompanying text.

¹⁸⁵ *See* 8 U.S.C. §§ 1252(c), 1324(c), & 1357(g) (2000) (different provisions within title 8 of the United States Code specifically authorizing limited arrest powers to “state or local law enforcement officials” and “others whose duty it is to enforce criminal laws”).

¹⁸⁶ *See DeCanas v. Bica*, 424 U.S. 351, 354 (1976) (stating that the “[p]ower to regulate immigration is unquestionably exclusively a federal power”).

from enacting immigration legislation of their own.”¹⁸⁷ However, the Court has never held that every state law that somehow deals with aliens is “a regulation of immigration and thus per se pre-empted.”¹⁸⁸ Federal authority is preemptive of state regulatory power only when there are “persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.”¹⁸⁹

When state and local authorities expand or interpret local laws as tools to deal with undocumented immigration, as they hope to do in New Hampshire and Virginia, they are impermissibly entering into the area of immigration regulation. Congress has unmistakably spoken regarding the limited role that state and local law enforcement agencies may play in the arrest of individuals for immigration violations. Indeed, Congress has provided specific statutes in each instance where it deemed it appropriate.¹⁹⁰ These statutes carry with them conditions and prerequisites by which state and local authorities must abide.¹⁹¹ When the states target undocumented immigrants by creating new expansive trespass laws or by discriminatorily enforcing a nuisance statute, they are granting themselves new powers that are entirely separate from those enumerated in the federal code. This expanded authority goes “directly to the subject matter of sanctions and penalties for immigration violations set forth in the INA,” and are therefore preempted by federal authority.¹⁹²

Most importantly, if state and local authorities were permitted to unilaterally create new immigration regulation in this manner they would be working directly against any attempt to have a uniform federal immigration policy. The

¹⁸⁷ Yale-Loehr, *supra* note 50, at 55.

¹⁸⁸ *DeCanas*, 424 U.S. at 355.

¹⁸⁹ *Id.* at 356. (citing *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)).

¹⁹⁰ *Supra* note 185 and accompanying text.

¹⁹¹ See 8 U.S.C. § 1252c (2000) (explicitly authorizes state and local police to make arrests of undocumented immigrants who have committed a felony and have been previously deported, but “only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such a period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States”).

¹⁹² *New Hampshire v. Barros-Batistele*, No. 05-CR-1474, 1475 (Nashua D. Ct. 2005), available at http://www.courts.state.nh.us/district/criminal_trespass_decision.pdf.

“very nature” of immigration regulation and its impact on foreign relations provide persuasive reasons why this should not be permitted.¹⁹³ If Ohio and New Hampshire, or their respective municipalities, passed their own trespass laws covering undocumented immigrants there would be no obligation on either party to pass identical or even similar regulations. Their definitions could be entirely independent of each other and therefore treat the same federally determined undocumented immigrant in drastically different ways.

The discriminatory enforcement of state and local laws such as nuisance and loitering, which is the other technique used by state and local law enforcement, lacks uniformity even within the borders of the municipality that is practicing it. This impact would only be exacerbated when brought to a nationwide basis. The end result would be a single country with a “thousand borders” which would be in direct conflict with the “constitutional mandate for uniform immigration laws.”¹⁹⁴

B. State and Local Actions are Ineffective

The conflict with established law is not the only difficulty that the states will face in adopting these methods to address their local undocumented immigration issues. These methods are ineffective since they do not address the primary issue and involve various difficulties in their implementation. These tactics not only fail to reach their supposed goals, but also promote a distrust of state and local authorities with the potential to further disrupt the lives of the local residents.

The fact that the loitering arrests in Virginia revealed undocumented immigrants that are already facing deportation procedures¹⁹⁵ does not justify the use of these statutes in this manner. The clearest counter to this justification is the fact that the state and local law enforcement agencies already have the authority to arrest individuals that they have probable cause to believe are undocumented immigrants.¹⁹⁶ The case law supports this approach and it is consistent with the rest of the existing immigration authority.¹⁹⁷ The law does not support

¹⁹³ See *supra* notes 58-93 and accompanying text.

¹⁹⁴ Pham, *supra* note 59, at 967.

¹⁹⁵ Ward, *supra* note 28, at B1.

¹⁹⁶ See *supra* Part II.C.

¹⁹⁷ *Id.*

arresting individuals that fit a broad category of stereotypical norms.¹⁹⁸ It should be pointed out that half of the supposed loiterers that were arrested in Virginia actually had valid documentation and were eventually released.¹⁹⁹ This rate of success should not be deemed an acceptable justification for rounding up individuals based on certain patterns of activity or appearance that fit a “typical” undocumented immigrant.

The closing of the crowded house in Long Island, New York addresses the situation with little more success than the arrests in Virginia. The individuals that were living within the home were not evicted and there were no reports that they were either arrested or submitted to any form of immigration proceedings.²⁰⁰ The individuals were merely forced out onto the streets to look for accommodations elsewhere, thereby pushing them out into neighboring communities, without solving the true national concerns that these local authorities rely on as their principal reason for acting in the first place. The court in *Canyon County* spotted this as a principal reason why the public nuisance claim should fail, since the civil claim was not directly targeted at abetting the practice of hiring undocumented immigrants.²⁰¹

The lack of federal cooperation at the outset of these independent actions only adds to the difficulty. The individuals that are eventually taken into custody are not guaranteed to reach the national agencies that can administer available solutions through deportation hearings if necessary or through proper immigration filings to gain legitimate status to remain and work within the United States.²⁰² Due to this fact, all individuals arrested by the state will be held in local jails, thus costing state and local communities more. Furthermore, the state system is not one that can address immigration issues. The states cannot propose it would be in their interests to construct a local immigration processing facility to administer immigration proceedings the federal

¹⁹⁸ *United States v. Brigoni-Ponce*, 422 U.S. 873, 886-87 (1975) (holding that the targeting of individuals based on their apparent Mexican ancestry by immigration officers was a violation of the Fourth Amendment).

¹⁹⁹ *Ward*, *supra* note 28, at B1.

²⁰⁰ *Lambert*, *supra* note 165, at B1.

²⁰¹ *Canyon County v. Syngenta Seed, Inc.*, No. CV05-306-S-EJL, 2005 WL 3440474, at *3 (D. Idaho Dec. 14, 2005).

²⁰² The CBP and ICE Bureaus of the federal government have exclusive authority over the functions of border patrol, detention and removal. *Divine*, *supra* note 56.

government currently controls. The costs and administration of such a system would pose tremendous burdens to law enforcement agencies that are already complaining about the costs of these quick fix approaches.²⁰³

Proponents of these tactics still argue that the proliferation of undocumented immigration is a threat to national security and could expose the country to terrorism.²⁰⁴ It is conceded that the Department of Homeland Security has taken a stricter stance on border control as a direct response to this very concern.²⁰⁵ However, it is a much more difficult proposition to argue that the arrests of a group of day laborers gathered around a 7-Eleven²⁰⁶ addresses this issue with any degree of effectiveness. The loiterers arrested in Virginia were never initially accused or investigated for any supposed threat to national security.²⁰⁷ It is possible that the expansion of criminal laws such as the trespass laws could provide the sufficient breadth to address any individual suspected of terrorism ties. Proponents of this idea are quick to point out that three of the suicide terrorists hijackers from the September 11th attacks were all stopped by local police forces for traffic violations, but were eventually released without any involvement of federal immigration authorities.²⁰⁸ This terrorist attack was unquestionably one of the worst experiences in our national history. However, the malevolence that surrounded it should not further disrupt our way of life by permitting arbitrary arrests and unlawful interrogations.

The proliferation of these discriminatory practices is one of the principle reasons why opponents of the state and local enforcement of immigration laws feel that there will be a detrimental impact on the lives of those affected by such an administration.²⁰⁹ The big difficulty that arises is the distrust amongst the general population of the state and local authorities called to implement this sort of administration.²¹⁰

²⁰³ See Pham, *supra* note 59, at 984.

²⁰⁴ Sessions & Hayden, *supra* note 8, at 327-28.

²⁰⁵ Yale-Loehr, *supra* note 50, at 57.

²⁰⁶ Ward, *supra* note 28, at B1.

²⁰⁷ *Id.*

²⁰⁸ Sessions & Hayden, *supra* note 8, at 327-28.

²⁰⁹ Three main concerns surrounding the local enforcement of immigration law are: 1) the lack of training in the intricacies of immigration law that may result in racial profiling, 2) a general distrust of local police amongst immigrant communities, and 3) deprivation of police resources. Pham, *supra* note 59, at 981.

²¹⁰ *Id.* at 983-84.

The basic idea surrounding this theory is that the state and local authorities lack the training and expertise to make valid arrests or inquiries and may choose to use inappropriate signals such as apparent ethnicity or race to determine whether or not to inquire about a person's immigration status.²¹¹ This distrust of local authorities could have severe impacts on the way people carry out their daily lives.²¹² Some municipalities such as New York City have addressed this concern by prohibiting certain city officers and public employees from inquiring about someone's immigration status.²¹³ This policy was part of an effort to ensure that all residents regardless of their immigration status receive critical services such as emergency healthcare and police protection.²¹⁴

C. Deputizing State and Local Authorities Represents a Better Solution

This is not a proposal to eliminate local enforcement of immigration laws within the United States.²¹⁵ It is merely a suggestion that there is a more effective and efficient way of approaching the situation that does not tread on preemptive authority while at the same time adding significant controls against discrimination and non-uniformity. One such approach is the authority to deputize local law enforcement agencies to work for, and under the supervision of, national immigration authorities.²¹⁶ Indeed this has been listed as the first step in

²¹¹ *Id.* at 982-83.

²¹² *Id.* at 983-84 (stating that Hispanic communities have neglected to inform police about situations revolving around the sniper attacks in October 2002 out of a fear of being investigated for their immigration status).

²¹³ In the wake of the sweeping reforms of the PATRIOT Act, New York City Mayor Bloomberg issued Executive Order 41 on September 17, 2003 in an effort to ensure that "all New Yorkers, including immigrants, can access City services that they need and are entitled to receive." The executive order protects the confidentiality of a broad range of information including immigration status. Anyone who seeks assistance from the police will not be asked about their immigration status unless there is a suspicion of illegal or criminal activity. It assures those seeking city services that they will not be asked about their immigration status unless it is necessary to provide those services. The order further instructs city workers to hold any information regarding immigrant status completely confidential. Mayor's Office of Immigrant Affairs, Mayor Bloomberg's Executive Order 41 Protects All New Yorkers, available at <http://www.nyc.gov/html/imm/downloads/pdf/eo41english.pdf>.

²¹⁴ *Id.*

²¹⁵ Some writers have supported the position that any state and local enforcement of immigration laws would be a bad policy to follow regardless of the involvement of federal authorities. See Pham, *supra* note 59, at 987-1003.

²¹⁶ 8 U.S.C. §1357(g) (2000).

any practical implementation of an immigration law enforcement program in a local jurisdiction.²¹⁷

This method of law enforcement addresses almost all of the flaws inherent in the previously mentioned techniques. The state and local authorities will be trained to “avoid actions that could constitute unconstitutional discrimination against citizens and lawfully-present aliens on the basis of national origin or foreign appearance.”²¹⁸ Moreover, these actions will be under the direct supervision and authority of the federal agencies that can actually take federally reserved actions such as deportation.²¹⁹ Most importantly, all deputized state and local authorities would be enforcing the single federal immigration law.²²⁰ This is in sharp contrast to the non-uniform tactics of creating new expansive trespass laws or discriminatorily enforcing public nuisance regulations. The burden, however, lies on the state governments to request this assistance and on federal authorities to act once they are asked, instead of waiting for a governor to declare a state of emergency before agreeing to cooperate.²²¹

V. CONCLUSION

State and local authorities should not feel powerless in their attempts to address the undocumented immigrant situations within their communities. The current federal structure of immigration regulation leaves room for the involvement of state and local officials. Those officials have specific authority to enforce the federal immigration law when it comes to criminal violations and can even enter into specific agreements with the federal government to receive the training and supervision necessary to allow their agencies to take on more expansive roles in the area of immigration enforcement. Conflicts only arise when the state and local authorities take it upon themselves to unilaterally create new immigration regulation whether by directly enacting new expansive laws or enforcing existing laws in a targeted manner against undocumented immigrants. These tactics not only go against

²¹⁷ Hethmon, *supra* note 75, at 126.

²¹⁸ *Id.* at 125-26.

²¹⁹ News Release, U.S. Immigration and Customs Enforcement, DHS, ICE, State of Arizona and ADC Agree to Speed Criminal Alien Removals (Sept. 20, 2005), available at <http://www.ice.gov/pi/news/newsreleases/articles/050920phoenix.htm>.

²²⁰ *Id.*

²²¹ See Marizco, *supra* note 172, at B4.

established law, but present further difficulties for the local communities that are forced to deal with them. It would be more appropriate for these state and local entities to adhere to their federally structured authority in order to protect against unlawful discrimination and preserve a single unified immigration policy across the entire nation.²²²

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²²² U.S. CONST. art. I, § 8, cl. 4 (authorizing Congress with the power to establish a “uniform Rule of Naturalization”).

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