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Aaron Haas

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Profiling and Immigration*

Aaron Haas[†]

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Introduction

Police stops, detentions, and arrests based on racial or ethnic profiling have been widely condemned.¹ Racial profiling refers to the use of an individual's race or ethnicity by law enforcement personnel as a key factor in deciding whether to engage in enforcement action.² In addition to questions about its effectiveness as a tool of law enforcement,³ such profiling raises the prospect of discrimination based on race or ethnicity and differential treatment of individuals solely based on personal traits or characteristics. There are increasing reports of police profiling based on

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1. See, e.g., Samuel R. Gross & Deborah Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1413 (2002) (stating that prior to September 10, 2001, a consensus had been reached condemning racial profiling).

2. See John Knowles, Nicola Persico & Petra Todd, *Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 109 J. POL. ECON. 203, 204 (2001) (explaining that race is one of the factors police use when deciding whether to search cars).

3. See Heather Mac Donald, Op-Ed., *Fighting Crime Where the Criminals Are*, N.Y. TIMES, June 26, 2010, at A19 (noting the criticism from civil rights groups after the New York Police Department released its annual data on stop-and-frisk interactions).

Hispanic ethnicity,⁴ with indications that such profiling will continue to rise in the future.

This concern is based on two inter-related trends: the criminalization of immigration enforcement and the localization of immigration enforcement. Together, these trends mean that local law enforcement—who are engaged in the vast majority of interactions between individuals and the police—are increasingly focused on finding immigration violators and treating them as criminal suspects. In the past, local law enforcement traditionally saw itself as focused on protecting public safety in the community, while the immigration system was a civil matter of solely national concern.⁵ Today, immigration enforcement is mediated through the criminal justice system, and local and state police are encouraged to actively participate in finding and detaining undocumented aliens.

In this paper, which is based on a presentation I made at this journal's spring symposium, I argue that ethnic profiling of the Hispanic community has the potential to become a significantly greater problem in the coming years. In Part I, I explain the criminalization of immigration enforcement. In Part II, I will discuss the localization of immigration enforcement. I will argue that the combination of these trends creates the danger of profiling. In Part III, I will discuss how these trends have manifested themselves in Virginia, focusing specifically on an Attorney General advisory opinion that state and

4. See, e.g., Ann M. Simmons, *Immigration Traffic Laws Criticized in Louisiana*, L.A. TIMES, Feb. 4, 2007, at A16 (noting that a state law allowing police to arrest people they suspect are illegal immigrants has been used primarily to detain Latinos).

5. The preeminence of the federal government in immigration enforcement was established as early as the Chinese Exclusion Cases, the first major immigration cases to reach the Supreme Court. See *Chae Chan Ping v. United States*, 130 U.S. 581, 605–06 (1889) (noting that the ability to establish relations with other nations is a federal power). The majority stated:

The control of local matters being left to local authorities, and national matters being intrusted [sic] to the government of the Union, the problem of free institutions existing over a widely extended country, having different climates and varied interests, has been happily solved. For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power. To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.

Id.

local law enforcement officers have Arizona-style authority to detain undocumented immigrants. Finally, I conclude with ideas for how to prevent or mitigate the potential for immigration-based ethnic profiling and areas of further study.

I. Criminalization of Immigration Enforcement

Currently, more than 50% of all federal criminal prosecutions are immigration-related.⁶ Between 2001 and 2009, the number of immigration prosecutions in federal court more than quadrupled.⁷ In 2001, there were 16,310 immigration-related prosecutions.⁸ In 2007, there were 39,458 such prosecutions,⁹ and in 2008, there were 79,431 criminal immigration enforcement actions in federal courts.¹⁰ By 2009, that number jumped to 91,899, an increase of 463% in eight years and an increase of 133% just since 2007.¹¹ For example, in April 2010, there were 9,941 federal immigration prosecutions.¹² Customs and Border Protection—the agency within the Department of Homeland Security that includes the Border Patrol—initiated 7,822 new prosecutions in that month alone.¹³ Immigration and Customs Enforcement, charged with handling

6. *FY 2009 Federal Prosecutions Sharply Higher: Surge Driven by Steep Jump in Immigration Filings*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Dec. 21, 2009), <http://trac.syr.edu/tracreports/crim/223/> (last visited November 3, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

7. *Id.*

8. *Graphical Highlights: Federal Criminal Prosecutions Filed by Selected Program Areas*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (2007), http://trac.syr.edu/tracreports/crim/184/include/table_1.html (last visited November 3, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

9. *Backgrounder Southwest Border Security Operations*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Dec. 2010), <http://trac.syr.edu/tracatwork/detail/A375.html> (last visited November 3, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

10. *Criminal Immigration Prosecutions Are Down, But Trends Differ by Offense*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Mar. 17, 2010), <http://trac.syr.edu/immigration/reports/227/> (last visited November 3, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

11. *FY 2009*, *supra* note 6.

12. *Immigration Enforcement under Obama Returns to Highs of Bush Era*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Jul. 15, 2010), <http://trac.syr.edu/immigration/reports/233/> (last visited November 3, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

13. *Id.*

deportations, initiated another 2,119 federal prosecutions in that single month.¹⁴

This program is straining our federal criminal justice system through a number of unintended consequences. For one, other criminal behavior is being neglected because these prosecutions are using up so much of the time of prosecutors, investigators, and judges. Thus, between 2003 and 2008, white-collar prosecutions fell by 18%, weapons prosecutions shrank by 19%, organized crime prosecutions fell by 20%, public corruption prosecutions dropped by 14%, and drug prosecutions declined by 20%.¹⁵ From 2003 to 2009, while immigration prosecutions increased 450%, to 91,899—the number of prosecutions for business fraud dropped from 322 to 82.¹⁶ As we now know, egregious abuses by the financial industry during this period led to a severe economic crisis, and massive frauds like that of Bernie Madoff went undetected and unprosecuted until it was too late.

This crowding-out of other prosecutions in pursuit of immigration violators includes violent criminal activity. The *New York Times* reported last year:

The emphasis [on immigration crimes], many federal judges and prosecutors say, has siphoned resources from other crimes, eroded morale among federal lawyers and overloaded the federal court system. Many of those other crimes, including gun trafficking, organized crime and the increasingly violent drug trade, are now routinely referred to state and county officials, who say they often lack the finances or authority to prosecute them effectively.¹⁷

United States attorneys on the Southwest border usually decline to prosecute drug suspects with 500 pounds of marijuana or less—about \$500,000 to \$800,000 worth.¹⁸ A federal judge in Austin, Judge Sam Sparks, recently expressed his frustration at the increasing toll of these prosecutions on his docket, writing “[t]he expenses of prosecuting illegal entry and reentry cases (rather than deportation) on aliens without any significant criminal history is simply mind-boggling.”¹⁹

14. *Id.*

15. Solomon Moore, *Push on Immigration Crimes Is Said to Shift Focus*, N.Y. TIMES, Jan. 12, 2009, at A1.

16. *FY 2009, supra* note 6.

17. *Id.*

18. *Id.*

19. Steven Kreytak, *Federal Judge Questions Immigration Prosecutions*, AUSTIN AMERICAN-STATESMAN (Feb. 5, 2010), <http://www.statesman.com/news/local/federal-judge->

The federal criminal justice system today is mostly about immigration enforcement. In April 2009, for example, criminal immigration cases made up the majority of new federal criminal prosecutions nationwide—about 9,037 out of 17,180—and outnumbered all white-collar, civil rights, environmental, drug-related and other criminal cases combined.²⁰ The Department of Homeland Security accounted for 59% of all crimes referred to federal prosecutors during that month.²¹ The reorientation of the federal criminal justice system towards immigration enforcement can be seen in the geographic disparity of the caseloads. Presently, just five of the country's ninety-four judicial districts handled 75% of all criminal cases in federal district courts nationwide.²² These five districts are the five main districts along the United States-Mexico border—Southern California, Arizona, New Mexico, West Texas, and South Texas.²³ The concentration of federal prosecutions along the southwest border can only be attributed to the dramatic increase in immigration-related criminal enforcement.

These immigration prosecutions essentially consist of being found having crossed into the United States without permission. More than 90% of the immigration-related federal prosecutions are for illegal entry or illegal reentry.²⁴ While it is not a violation of criminal law to be present in the United States without permission, it is illegal to cross into the United States without permission.²⁵ Therefore, someone who has stayed in the United States past an authorized period of stay by, for example, overstaying

questions-immigration-prosecutions-216667.html?printArticle=y (last visited November 3, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

20. *Immigration Prosecutions for April 2009*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Apr. 2009), <http://trac.syr.edu/tracreports/bulletins/immigration/monthlyapr09/fil/> (last visited November 3, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

21. *Id.*

22. See Russell Goldman, *What's Clogging the Courts? Ask America's Busiest Judge*, ABC NEWS (July 23, 2008), <http://abcnews.go.com/TheLaw/story?id=5429227&page=1> (last visited November 3, 2011) (explaining how the courts along the United States-Mexico border handle a disproportionate amount of the country's crime) (on file with the Washington and Lee University Journal of Civil Rights and Social Justice).

23. *Id.*

24. *Illegal Entry Becomes Top Criminal Charge*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (June 10, 2011), <http://trac.syr.edu/immigration/reports/251/> (last visited November 3, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

25. See 8 U.S.C. § 1325 (2011) (describing what constitutes improper entry by an alien); see also 8 U.S.C. § 1326 (2011) (stating the criminal penalties for reentry by removed or deported aliens).

a temporary visa, has not violated any criminal law. On the other hand, a person who has crossed the border into the United States without permission has committed a crime, regardless of the length of time that the person was improperly in the United States. This distinction in the law means that criminal enforcement is strongly connected to border enforcement, in which the violators are almost exclusively of Hispanic ethnicity, as opposed to the broader diversity of unauthorized immigrants from all over the world who entered the country legally but have overstayed a visa.

Much of the increase is due to Operation Streamline, an “interior enforcement” program designed to dramatically increase criminal immigration prosecutions, often through large-scale raids followed by mass plea bargains.²⁶ Operation Streamline entails arrests made by federal agents, primarily in the border region.²⁷ Operation Streamline, and the dramatic increase in federal immigration prosecutions associated with it, has raised a number of concerns among scholars and advocates.²⁸ The resources entailed in this ambitious agenda have crowded out resources for other kinds of cases and other criminal activity.²⁹ The burden on the system and the cost to taxpayers are also significant.³⁰ The mass detentions and prosecutions also raise issues of due process, including access to counsel.³¹

26. See Ted Robbins, *Border Patrol Program Raises Due Process Concerns*, (National Public Radio broadcast Sept. 13, 2010), <http://www.npr.org/templates/story/story.php?storyId=129780261> (last visited November 3, 2011) (providing a description of Operation Streamline) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

27. *Id.*

28. See AM. CIVIL LIBERTIES UNION & NAT’L IMMIGRATION FORUM, OPERATION STREAMLINE FACT SHEET 1 (2009), available at <http://www.immigrationforum.org/images/uploads/OperationStreamlineFactsheet.pdf> (last visited November 3, 2011) (explaining that Operation Streamline takes away resources from other law enforcement duties and criminal prosecutions) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

29. See Goldman, *supra* note 22 (stating that critics claim Operation Streamline prevents resources from going to the pursuit of more dangerous offenders).

30. See Ted Robbins, *Morning Edition: Border Convictions: High Stakes, Unknown Price* (National Public Radio broadcast Sept. 14, 2010) <http://www.npr.org/templates/story/story.php?storyId=129829950> (last visited November 3, 2011) (quoting Homeland Security Secretary Janet Napolitano as saying it is a “very expensive program”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

31. See JOANNA LYDGATE, CHIEF JUSTICE EARL WARREN INSTITUTE OF RACE, ETHNICITY, AND DIVERSITY, ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 1 (2010), available at http://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf (last visited November 3, 2011) (stating that the Ninth Circuit found conducting en masse migrant hearings to be a due process violation) (on file with the Washington and Lee

Many of the prosecutions are rushed, rely heavily on plea bargains, and often occur with minimal access to adequate legal representation.³² As this system expands beyond the border area to the rest of the nation, I believe these issues will follow. Moreover, I believe additional issues will crop up, particularly in the manner of detaining and arresting aliens accused of violating federal criminal law. Local law enforcement will be primarily tasked with arresting these individuals, and there is significant danger that their efforts will be marked by increased profiling.³³ It is this localization of immigration enforcement, combined with its criminalization, which will create the conditions for greater profiling of the Hispanic community by the police.

II. Localization of Immigration Enforcement

Local law enforcement has been empowered to enforce immigration laws, and their size and reach will make them the primary and front-line agents of civil and criminal immigration enforcement.³⁴ This localization of immigration enforcement has occurred through a number of federal initiatives.³⁵ The Secure Communities program checks the fingerprints of individuals arrested or otherwise processed by local law enforcement against federal databases operated by the Department of Homeland Security.³⁶ Individuals who are positively matched as subject to deportation

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32. *See id.* at 4 (stating that many defendants complete the criminal proceeding in one day, with attorneys representing up to eighty clients in a single hearing).

33. *See infra* Part II (discussing increased profiling at the local law enforcement level).

34. *See* 8 U.S.C. § 1252(c) (1996) (detailing circumstances under which local law enforcement can arrest illegal aliens); *see also* 8 U.S.C. § 1357(g) (2006) (describing how the Attorney General can enter into memoranda of understanding with local law enforcement to enforce immigration laws).

35. *See Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited November 3, 2011) (describing how the Secure Communities Program operates) (on file with the Washington and Lee University Journal of Civil Rights and Social Justice); *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. Law No. 104-208 (1996) (discussing section 287(g) enforcement); *Criminal and Alien Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/criminal-alien-program/> (last visited November 3, 2011) (detailing the tenets of the Criminal and Alien Program, and how Immigration and Customs Enforcement (ICE) utilizes them) (on file with the Washington and Lee University Journal of Civil Rights and Social Justice).

36. *See Secure Communities*, *supra* note 35 (describing the process by which individuals are processed through the government system).

are asked to be held by local jails until transferred to a federally-operated immigrant detention facility, where they are placed in removal proceedings.³⁷ The 287(g) program, named after the section of the United States Code from which the authority derives,³⁸ takes the Secure Communities program a step further by actually deputizing local law enforcement to check immigration status of suspected aliens and detain those determined to be subject to removal.³⁹ The Criminal Alien Program (CAP) stations federal Homeland Security officials at state and local prisons and jails, or allows them to remotely monitor the facilities, to check the immigration status of individuals processed through the facilities.⁴⁰ A large portion of aliens placed in deportation proceedings are located by local law enforcement agents and transferred to federal immigration custody through one of these programs. This use of local police, sheriffs, and other non-federal agents is the essential platform upon which the federal government's immigration enforcement strategy is based.

The idea of these programs is to find undocumented or criminal aliens who are being detained anyway for violations of the law in the areas where they reside.⁴¹ The federal government can then take hold of the aliens after the local criminal process has completed.⁴² However, even in the initial phases of this effort, these programs appear to change the behavior of some local law enforcement agencies in such a way that they target for arrest individuals suspected of violating immigration law.⁴³ That is, they are not

37. *See id.* (discussing local law enforcement procedures regarding potential deportation).

38. *See* Pub. Law No. 104-208 (detailing the provisions of section 287(g)).

39. *See Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited November 3, 2011) (explaining how ICE uses Section 287(g)) (on file with the Washington and Lee University Journal of Civil Rights and Social Justice).

40. *See Criminal and Alien Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/criminal-alien-program/> (last visited November 3, 2011) (detailing how the Criminal and Alien Program processes individuals) (on file with the Washington and Lee University Journal of Civil Rights and Social Justice).

41. *See* sources cited *supra* note 35 (discussing the objectives of each program).

42. *See id.* and accompanying text.

43. *See* Trevor Gardner II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, POLICY BRIEF: THE CHIEF JUSTICE EARL WARREN INSTITUTE OF RACE, ETHNICITY, & DIVERSITY, 1, UNIVERSITY OF CALIFORNIA, BERKELEY (Sept. 2009) http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf (last visited November 3, 2011) (concluding that local police officers began targeting individuals strictly based on racial appearance more often after the Criminal Alien Program changed from in person review to remote access) (on file with the Washington and Lee Journal of Civil Rights and

simply handing over undocumented or criminal aliens who happen to have come into their grasp; rather, in at least some instances, they are actually pursuing such aliens, often under the pretense of criminal investigation, for the very purpose of handing them over to the federal government for immigration enforcement actions.⁴⁴

A study by the Earl Warren Institute at the University of California, Berkeley, examined changing police behavior in Irving, Texas, after the initiation of CAP in April 2007.⁴⁵ The study found that in the following three months, from April 2007 to July 2007, the number of traffic arrests of Hispanic motorists increased 223%, from 48 to 155.⁴⁶ Such a dramatic increase in traffic arrests focused on a specific ethnicity in such a short period of time is hard to explain in terms of local law enforcement.⁴⁷ It appears that local officers saw an opportunity to deport undocumented aliens, using pretextual stops or heightened scrutiny to justify detention of aliens who can then be transferred to federal immigration custody regardless of the validity of the alleged underlying criminal activity on which the stop was based.⁴⁸

This misuse of local criminal arrest authority to advance an immigration enforcement agenda appears to have occurred in other parts of the country in the border region that has heretofore been the focus of these efforts. Perhaps the most notorious example is the “sweeps” conducted by the sheriff’s office in Maricopa County, Arizona, in which a large number of agents descend upon a single area.⁴⁹ While these sweeps were ostensibly

Social Justice).

44. *See id.* at 5–6 (illustrating the ways in which the local police target certain groups); *see also* Sarah Mehta, *Local Enforcement Tactics Lead to Racial Profiling, Human Rights Abuses*, AM. CIVIL LIBERTIES UNION BLOG OF RIGHTS (Mar. 29, 2011, 9:57 AM), <http://www.aclu.org/blog/human-rights-immigrants-rights/local-enforcement-tactics-lead-racial-profiling-human-rights-abu> (discussing the case of a woman who was questioned by law enforcement because of her appearance and accent) (on file with the Washington and Lee University Journal of Civil Rights and Social Justice).

45. *See* Gardner & Kohli, *supra* note 43, at 1 (giving a brief overview of the Texas study).

46. *Id.* at 6.

47. *See id.* at 8 (examining the number of traffic arrests).

48. *See id.* at 8 (giving examples of officers pulling over individuals for discretionary reasons).

49. *See* Daniel Gonzalez, *Sheriff’s Office Says Race Plays No Role in Who Gets Pulled Over*, THE ARIZONA REPUBLIC (Oct. 5, 2008), <http://www.azcentral.com/news/articles/2008/10/05/20081005arpaio-profiling1005.html> (last visited November 3, 2011) (discussing in detail allegations against Maricopa County police concerning racial profiling during police stops) (on file with the Washington and Lee University Journal of Civil Rights and Social Justice).

focused on criminal activity, the patterns of detention and arrest indicate that immigration enforcement may have been the true motive.⁵⁰ *The Arizona Republic* reported,

The records show that most people arrested were Latinos, even when the sweeps were held in predominantly White areas. The sweeps frequently targeted heavily Latino areas or day-labor corridors, and most of those arrested during highly discretionary stops for reasons such as cracked windshields were Latinos, the records show. Immigration enforcement also seemed to be a main goal of the operations, which is prohibited: In five of the eight sweeps, immigration arrests outnumbered other types of arrests, the records show.⁵¹

These federal-local immigration enforcement partnerships may be encouraging the use of ethnic profiling.⁵²

The twin trends of criminalizing and localizing immigration enforcement have created a situation in which local police are encouraged to target Hispanics for detention and arrest.⁵³ This kind of profiling has already been seen in the border areas, but, as the underlying trends go national, it can be expected that profiling will also be increasingly seen throughout the country.⁵⁴ The situation is also ripe for exploitation by local officials who have little understanding of federal immigration law, or have a political or personal agenda in regard to illegal immigration. Recent events by the Attorney General and others in Virginia illustrate these concerns.

III. Virginia and Immigration Enforcement

In theory, the newly formed federal-local partnership for immigration enforcement should not lead to an increase in stops, detentions, or arrests of individuals suspected of being present without authorization. This civil

50. See *id.* (discussing the overrepresentation of Hispanic arrests).

51. *Id.*

52. See Gardner & Kohli, *supra* note 43, at 1 (“The Warren Institute’s study of arrest data finds strong evidence that Irving police engaged in racial profiling of Hispanics . . .”).

53. See *id.* at 4 (“[T]he Criminal Alien Program tacitly encourages local police to arrest Hispanics for petty offenses.”).

54. See Gabriela Garcia, *Philadelphia’s Police and ICE Collaborations Might Be the Worst of All*, CHANGE.ORG (Aug. 10, 2011), <http://news.change.org/stories/philadelphias-police-and-ice-collaborations-might-be-the-worst-of-all> (last visited November 3, 2011) (lamenting the Secure Communities’ actions in Philadelphia amid fears that racial profiling might occur) (on file with the Washington and Lee University Journal of Civil Rights and Social Justice).

infraction alone cannot be the basis of police stops.⁵⁵ Local law enforcement is only supposed to check the immigration status of individuals who have separately been detained for criminal violations, in accordance with their normal job duties.⁵⁶ The immigration checks are added onto an otherwise lawful stop, but are not to form the original basis of the stop itself.⁵⁷ However, due to misunderstandings between the civil-criminal distinctions, arguably augmented by political or personal agendas, there is increasing evidence that the system does not work as planned in practice.⁵⁸

In 2010, the Virginia Attorney General was asked whether local police have existing authority to conduct Arizona-style stops of people suspected of violating the immigration laws.⁵⁹ His response, in relevant part, was,

So long as the officers have the requisite level of suspicion to believe that a violation of the law has occurred, the officers may detain and briefly question a person they suspect has committed a federal crime. Furthermore, the United States Supreme Court has found that so long as the questioning does not prolong a lawful detention, police may ask questions about immigration status.⁶⁰

This finding appears to say that Virginia law enforcement officers have the authority to briefly detain an individual they suspect is in violation of immigration laws and question him about his immigration status.⁶¹ Such a finding would be consistent with the Arizona law, which says that “where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person.”⁶²

55. *See supra* text accompanying notes 43–53 (discussing examples of officer rationale for police stops).

56. *See id.* (describing the job duties of local law enforcement as determined by agency policy on checking immigration status).

57. *See id.* (detailing how immigration checks are supposed to operate under regular police stops).

58. *See* Gardner and Kohli, *supra* note 43, at 1 (listing racial profiling as one potential consequence of federal-local immigration partnerships).

59. *See* 2010 Op. Va. Att’y Gen. 47, 1 (Jul. 30, 2010) available at <http://www.oag.state.va.us/Opinions%20and%20Legal%20Resources/Opinions/2010opns/10-047-Marshall.pdf> [hereinafter Advisory Opinion] (stating that he was analyzing the issues presented in response to a request for an official advisory opinion on the matter) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

60. *Id.* at 3 (citing *Muehler v. Mena*, 544 U.S. 93, 100–01(2005)).

61. *See id.* (discussing the ability of Virginia police to briefly detain individuals).

62. ARIZ. REV. STAT. ANN. § 11-1501(B) (2010).

However, a closer look at the operative language indicates that his opinion is more circumscribed, consistent with the law, but articulated in such a confusing manner that it will likely lead to improper enforcement. First, he says that officers may briefly detain and question a person if they have a reasonable suspicion that a crime has been committed.⁶³ This does not apply to immigration violations because they are civil offenses, not crimes. He then follows up that statement by saying that a person, once lawfully detained, may be asked of his immigration status so long as it does not prolong the detention.⁶⁴ This claim is based on a case in which someone was questioned while independently detained pursuant to a valid search warrant,⁶⁵ but it would not apply to someone stopped simply for suspicion of violating immigration law (because such a detention would not be lawful), nor would it ordinarily apply to questioning beyond what an officer needs to ascertain whether a crime has been committed (because it would prolong the detention).

It is true that law enforcement officers have the right to stop people suspected of committing a crime, and it is also true that immigration status can be examined so long as it does not prolong the stop.⁶⁶ However, the coupling of these propositions and the way in which they are worded lead to a strong possibility for misinterpretation. Without sufficient parsing, the opinion appears to allow for stops based on suspected violations of immigration law and questioning about the same. Indeed, the Attorney General's opinion then combines these two separate propositions to reach the inaccurate conclusion that Virginia officers have existing authority to do what the Arizona law ordered its officers to do—stop and question individuals suspected of being in the country unlawfully. He writes, “Virginia law enforcement officers have the authority to make the same inquiries as those contemplated by the new Arizona law.”⁶⁷ This bold conclusion rests on the propositions that the Arizona law is constitutional,

63. See Advisory Opinion, *supra* note 59, at 3 (“So long as the officers have the requisite level of suspicion to believe that a violation of the law has occurred, the officers may detain and briefly question a person they suspect has committed a federal crime.”).

64. See *id.* (“[S]o long as the questioning does not prolong a lawful detention, police may ask questions about immigration status.”).

65. See *Muehler v. Mena*, 544 U.S. 93, 100–01 (2005) (finding that no independent reasonable suspicion is needed for an officer to question an individual about immigrant status).

66. See *id.* (concluding that when a detention is not prolonged, officers “[do] not need reasonable suspicion” to inquire about “name, date and place of birth, or immigration status”).

67. Advisory Opinion, *supra* note 59, at 3.

which has been found not to be the case by the courts,⁶⁸ and that Virginia law enforcement officers have existing authority to do what the Arizona legislation attempts to authorize. However, the Attorney General's opinion is almost certainly incorrect, and will likely lead to improper stops and profiling of Hispanic motorists.

To understand why Virginia officers do not “have the authority to make the same inquiries as those contemplated by the new Arizona law,”⁶⁹ it is necessary to look at what the Arizona law actually authorizes. Section 2 of SB 1070 reads, “[f]or any lawful contact made by a law enforcement official . . . where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person.”⁷⁰ This provision has a few elements. First, it requires a lawful contact. Presumably, a lawful contact occurs when an officer has reasonable suspicion that a crime has occurred—the standard set by the Supreme Court⁷¹ and mirrored in the Virginia Attorney General's opinion.⁷² Second, once a “reasonable suspicion” that a person is unlawfully present has been established, the officer must make a “reasonable attempt” to ascertain the person's immigration status.⁷³

This provision creates a few scenarios in which profiling could occur. First, an officer could stop someone based on reasonable suspicion that he has committed a criminal violation of the immigration laws. However, illegal presence is not a criminal violation. Illegal entry and reentry are criminal violations.⁷⁴ This raises the question of how an officer in a state far removed from the border, such as Virginia, could establish a reasonable suspicion that an individual has entered the country unlawfully? It is hard to see how such a suspicion could be established without use of a racial or

68. See *United States v. Arizona*, 703 F.Supp.2d 980, 1008 (D. Ariz., 2010) (granting a preliminary injunction against those portions of the law related to police stops), *aff'd*, 641 F.3d 339, 344 (9th Cir. 2011).

69. Advisory Opinion, *supra* note 59, at 3.

70. S. 1070, 49th Leg., Second Reg. Sess. (Ariz. 2010).

71. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that stopping and searching a suspected armed criminal is allowed under the Fourth Amendment).

72. See Advisory Opinion, *supra* note 59, at 3 (“So long as the officers have the requisite level of suspicion to believe that a violation of the law has occurred, the officers may detain and briefly question a person they suspect has committed a federal crime.”).

73. See S. 1070, 49th Leg., Second Reg. Sess. (Ariz. 2010) (requiring law enforcement officers to make a reasonable attempt to ascertain the immigrant status of persons suspected of being an alien).

74. See *supra* note 25 (describing the criminality of illegal entry).

ethnic profile. The second scenario is that an individual is stopped on suspicion of a separate criminal offense, but the stop is prolonged because the officer has “reasonable suspicion” that the person is in the country unlawfully. Again, it would appear that this suspicion would have to be based on profiling. The final scenario is that an officer who suspects the person is undocumented and wants to check his status uses a pretext to stop him. Under any scenario, this provision enables and even invites profiling from local law enforcement.

Local law enforcement’s new role as the primary enforcer of immigration law will lead to profiling of not only undocumented immigrants, but of Hispanics who reside in the country legally. They face the prospect of more frequent police stops on suspicion of an unlawful status, and longer police stops as their documentation is checked and verified. The constant demands to “show one’s papers” will itself constitute a form of harassment, and one that is particularly objectionable to many Americans, as can be seen by the vigorous opposition to any form of national identification card.⁷⁵ If a person does not have documentation on him or is not able to quickly produce the requested documentation, he faces detention or prolonged stops that could significantly hamper his life. Moreover, there is no system in place at the state and local levels to avoid repeated inquiries of the same individual. That is, under this new legal regime, nothing would prevent immigration status inquiries any time a person who generates suspicion (through, for example, his accent or appearance) encounters the police, necessitating a constant and ongoing pressure to demonstrate one’s legal presence at any time.

It should also be noted that immigration status is often not clear, particularly to local law enforcement officers who have little to no training or experience in the immigration system. Some people may be lawfully present and even known to federal immigration authorities, but without documentation. A person seeking asylum, for example, is known to the federal government and is permitted to be in the country while his application is adjudicated. But he would not ordinarily have documentation attesting to legal presence, nor would he fall into any established category of legal status. Aliens who have been victims of

75. *See generally*, NATIONAL IDENTIFICATION SYSTEMS: ESSAYS IN OPPOSITION (Carl Watner & Wendy McElroy eds., 2004) (providing information and perspectives on the opposition that has occurred in response to both historical and contemporary efforts to issue a national identification card).

crimes and are applying for U⁷⁶ or T visas⁷⁷ or self-petitioning under the Violence against Women Act⁷⁸ would be in the same category. People who cannot return to their homeland due to natural disasters, such as the recent earthquake in Haiti,⁷⁹ may be under Temporary Protected Status but without any documentation to satisfy non-federal agents.⁸⁰ Foreigners present under the Visa Waiver Program, under which nationals of certain friendly countries are not required to obtain a visa to visit the United States, may not have any relevant documentation.⁸¹ Perhaps the most affected group is U.S. citizens, who are generally not in the habit of carrying a passport or birth certificate with them in the course of their day-to-day lives. The kind of profiling likely to be engendered by these new laws will cause a severe burden for many people.

It can also be expected that the problems identified at the federal level in the border states will migrate to the state level as immigration enforcement undergoes a similar migration. As mentioned above, aggressive immigration enforcement through the federal criminal justice system has been a burden on taxpayers, has crowded out resources for other prosecutions, and has undermined due process and access to counsel.⁸² As local police, prosecutors, and jails are asked to play a significantly greater role in immigration enforcement, they will have less time to spend on their traditional duties enforcing criminal laws to promote public safety. A police officer who detains an individual to ascertain immigration status will have less time to patrol

76. See Immigration and Nationality Act § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (granting visas to qualified aliens who had been victim to serious criminal activities).

77. See *id.* (granting visas to qualified aliens who had been victims of human trafficking).

78. See *id.* § 204(a)(1)(A)–(B), 8 U.S.C. 1154(a)(1)(A)–(B) (allowing certain family members to file a petition with the Attorney General asking for immigrant visas).

79. See *TPS Designated Country: Haiti*, U.S. CITIZENSHIP & IMMIGRATION SERVS, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextchannel=e54e60f64f336210VgnVCM100000082ca60aRCRD&vgnnextoid=e54e60f64f336210VgnVCM100000082ca60aRCRD> (last visited November 3, 2011) (showing Haiti as a country designated with temporary protected status) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

80. See Immigration and Nationality Act § 244, 8 U.S.C. 1254a (2006) (giving the Attorney General authority to grant an alien temporary protected status).

81. See *id.* § 217, 8 U.S.C. 1187 (2006) (listing the ways foreign visitors can be in the U.S. without a visa or border identification card).

82. See *supra* Part I (discussing how the increase in immigration-related prosecution is burdening the criminal system).

and investigate criminal activity in his area. Jail space that would ordinarily be used for people who commit crimes will be dedicated to holding suspected illegal or criminal aliens on detainers issued by the Department of Homeland Security. Local governments will be forced to make difficult trade-offs or to pour more resources into law enforcement in order to meet the additional burdens created by their new roles as front-line enforcers of the immigration laws.

The new role of local law enforcement will exacerbate the problems at the federal level and extend them beyond the border areas. The significantly increased federal criminal dockets are mainly confined to five judicial districts in the Southwest because the cases are generated by federal enforcement activities in those areas, particularly the Border Patrol.⁸³ As local law enforcement take over as the primary feeders of immigration violators into the federal criminal system, the federal courts in the entire country will start to experience the same problems as those in the Southwest. In Virginia, for example, the new authority described by the Attorney General can expect to locate more undocumented immigrants, many of whom will then be transferred to federal custody and criminally prosecuted for illegal entry or illegal reentry. The Federal District Court for the Eastern District of Virginia, based in Northern Virginia, which is known for aggressive pursuit of immigration violators, has already experienced some of this increase in immigration prosecutions.⁸⁴

Whereas five years ago, this district ranked 21st in the country in immigration prosecutions, it had moved up to 13th by 2009, and 9th in 2010.⁸⁵ Bulging federal criminal dockets, almost exclusively due to immigration prosecutions, will likely be a national phenomenon if present trends continue.

To date, these trends have been marked by a rapid push to significantly alter the nature of immigration enforcement with insufficient thought put into whether this movement will lead to

83. See Goldman, *supra* note 22 (explaining that the increase in federal criminal dockets is driven by five districts in the Southwest) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

84. See *Immigration Prosecutions for November 2010*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Feb. 16, 2011), <http://trac.syr.edu/tracreports/bulletins/immigration/monthlynov10/fil/> (last visited November 3, 2011) (describing the increase in federal criminal immigration enforcement in Eastern District of Virginia) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

85. *Id.*

increased profiling, and, if so, how to combat that tendency. In Part IV, I suggest ways to determine the extent to which ethnic profiling has increased as a result of the issues raised in this Article, and things police agencies can do to ensure that their new role in immigration enforcement does not lead to profiling.

IV. Proposals

Secure Communities and the other federal programs identified above have been rapidly adopted by many jurisdictions throughout the country, with little thought put into effectiveness, desirability, or collateral consequences by the local law enforcement agencies asked to participate. The Department of Homeland Security has established a goal of having every jurisdiction in the country participating in Secure Communities by 2013.⁸⁶ As of March 31, 2011, Secure Communities was activated in 1,315 jurisdictions in forty-two states, or 41% of all jurisdictions in the country.⁸⁷ Virginia has been an enthusiastic proponent of this program, with all 129 jurisdictions in the Commonwealth participating in Secure Communities as of June 15, 2010.⁸⁸ In fact, Virginia is one of only a handful of states outside of the border area that is fully participating in Secure Communities.⁸⁹

However, many jurisdictions have begun to question whether participation in immigration enforcement is an effective use of limited resources or if it may have a deleterious effect on other priorities, such as fighting crime and establishing strong ties to the community.⁹⁰ For that reason, states and localities have been more willing to refuse to sign up for

86. *See Activated Jurisdictions*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT 1 (Aug. 2, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf> [hereinafter I.C.E.] (last visited November 3, 2011) (stating the Department of Homeland Security's goal is to have every jurisdiction in the country participating in Secure Communities by 2013) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

87. *Id.*

88. *Id.* at 24.

89. *See id.* (indicating that Virginia has full participation in Secure Communities).

90. *See* Jason Buch, *Unlike Texas, Some States Ditch ICE Effort Targeting Criminals: Other States Leaving Secure Communities, But in Texas, Lawmakers Will Likely Expand the ICE Program*, THE HOUSTON CHRONICLE, (June 12, 2011), <http://www.chron.com/news/houston-texas/article/Unlike-Texas-some-states-ditch-ICE-effort-1619438.php> (stating that "several northern states are dropping out of the program that matches the fingerprints of those arrested against a U.S. Immigration and Customs Enforcement database").

the program, or even to terminate existing participation.⁹¹ On May 4, 2011, for example, Illinois announced that it was terminating its involvement in the program.⁹² On May 27, 2011, the California General Assembly approved a measure that would allow localities to opt out of participation in Secure Communities.⁹³ On June 2, 2011, New York Governor Andrew Cuomo announced that his state would suspend its participation in the program in order to weigh mounting evidence of its costs on local communities and police agencies.⁹⁴ These states join cities like Washington, D.C.,⁹⁵ San Francisco,⁹⁶ and Providence, Rhode Island,⁹⁷

91. *See id.* (providing an explanation for why states are not willing to sign up for the program).

92. *See* Sarah Phelan, *Illinois Pulls out of Secure Communities*, S.F. BAY GUARDIAN POLITICS BLOG (May 4, 2011, 8:03 p.m.), <http://69-22-180-117.sfbg.com/politics/2011/05/04/illinois-pulls-out-secure-communities> (last visited November 3, 2011) (reporting that Illinois planned to terminate its involvement with Secure Communities) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

93. *See California to Let Counties "Opt Out" of Secure Communities Immigration Program*, FOX NEWS LATINO (May 27, 2011), <http://latino.foxnews.com/latino/politics/2011/05/27/california-legislators-pass-let-counties-opt-controversial-secure-communities/#ixzz1O97ScUgi> (last visited November 3, 2011) (reporting that the California General Assembly approved a measure that allows local communities to opt out of Secure Communities) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

94. *See* Letter from Mylan Denerstein, Counsel to N.Y. Governor Cuomo, to John Sandweg, Counsel to Sec'y of U.S. Dep't of Homeland Sec. (June 1, 2011), <http://www.governor.ny.gov/assets/Secure%20Communities.pdf> (last visited November 3, 2011) (announcing that New York planned to suspend participation in Secure Communities) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

95. *See* Renee Feltz & Stokely Baksh, *The Anti-Arizona: As Other States Get Tough on Immigration Enforcement, D.C. Bucks the Trend*, THE AM. PROSPECT (May 4, 2010), http://prospect.org/cs/articles?article=the_anti_arizona (last visited November 3, 2011) (reporting that Washington, D.C. intended to cease participating in Secure Communities) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

96. *See* Brent Begin, *San Francisco to Defy Secure Communities Immigration Program*, S. F. EXAM'R (May 5, 2011), <http://www.sfexaminer.com/local/2011/05/san-francisco-defy-secure-communities> (last visited November 3, 2011) (reporting that San Francisco would begin releasing low-level illegal immigrant criminals despite federal requests to hold them) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

97. *See* Gregory Smith, *State Police Chief: Providence Decision on ICE 'Dangerous'*, THE PROVIDENCE JOURNAL (Feb. 24, 2011), <http://news.providencejournal.com/breaking-news/2011/02/ri-state-police-chief-criticiz.html#.TsKD12Cmkg9> (last visited November 15, 2011) (reporting that Providence Public Safety Commissioner Steven M. Pare asked permission of the Department of Homeland Security for the city to stay out of Secure Communities) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

which have also expressed an intention to withdraw their participation in the program.

One important step for scholars and activists concerned with the implications of these programs on potential profiling of Hispanic residents is to gather empirical data on whether such profiling is occurring. Anecdotal evidence from other jurisdictions indicates that profiling is occurring, as mentioned above.⁹⁸ However, more comprehensive studies are needed. The facts that Secure Communities is a relatively new program, has been activated at different times and in different places, and is implemented in some places but not others, create opportunities for useful study. We can look at how Secure Communities has affected arrest rates of Hispanics in similarly-situated communities in which the program was activated at different times. For example, Secure Communities started in Fairfax, Virginia in March 2009, while it was implemented in Arlington, Virginia in April 2010.⁹⁹ Comparing the arrest and detention rates of Hispanics during this one-year period in which the program was active in one Northern Virginia community but not the other would provide useful context.

A comparison can also be made between arrests of Hispanics before activation and after activation in one locale. In the City of Lexington, Virginia, the home of Washington and Lee University, for example, Secure Communities was activated on June 15, 2010.¹⁰⁰ We can look at total arrests and arrest rates of Hispanics in Lexington in the year before activation and the year after activation to see if the program encouraged profiling in this city. Finally, we could compare total arrests, arrest rates, and growth of arrests between states that have strongly implemented Secure Communities and those that have not. While Virginia has activated Secure Communities in all 129 jurisdictions, the neighboring state of Kentucky has activated the program in only 1 of 120 jurisdictions.¹⁰¹ It would be fruitful to see whether, for example, there is a higher rate of Hispanic arrests relative to their portion of the population in Virginia in comparison to Kentucky.

There is room for other kinds of research to determine the prevalence and effect of immigration-related profiling. One big concern is that

98. *See supra* text accompanying notes 34–54 (discussing how the localization of immigration enforcement leads to targeting Hispanic individuals suspected of being illegal immigrants).

99. I.C.E., *supra* note 86, at 24.

100. *Id.*

101. *Id.* at 9.

profiling stemming from the localization and criminalization of immigration enforcement will damage relations between local law enforcement and immigrant communities. It would be instructive to determine if there has been a decrease in such cooperation, as evidenced in, for example, a decrease in the reporting of crimes to local police by non-citizens. There has been a big push in the last ten to fifteen years to encourage immigrants to feel safe about reporting crimes, especially domestic violence, to local authorities.¹⁰² We need to study whether domestic violence reports, arrests, and prosecutions have declined for immigrant victims in Secure Communities jurisdictions since the time of the activation of the program. This kind of information can be obtained through statistical studies, such as the number of arrests, the number of prosecutions, or the number of 911 calls. Alternatively, surveys can be taken in immigrant communities and among law enforcement gauging degrees of trust, cooperation, and willingness to report crimes and support prosecutions of offenders among immigrants in the communities.

There are certain steps that law enforcement agencies can take now to address the potential of profiling due to these changes. Local governments should pass laws making clear that officers cannot arrest or detain anyone solely to investigate immigration status. This is already the law, but the confusing nature of many of these changes combined with misinformation call for a clarification of police authority.¹⁰³ Police agencies should also make clear to immigrant communities through public education that victims and witnesses from crimes will be protected from immigration enforcement if they call on the police and cooperate with the police. Local police agencies need to insist on dialogue with the federal government over priorities instead of being a passive recipient of federal mandates. They also must maintain a dialogue with immigrant communities, who may not understand the role of the police and who may have misconceptions about police due to experiences in their home countries. Local law enforcement

102. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (adding a number of protections for immigrant victims of domestic violence to encourage them to go to the police without fear of deportation). The act establishes the U visa for victims of criminal activity including domestic violence who have suffered substantial physical or mental abuse and who have assisted or may assist in the investigation or prosecution of the crime; allows victims of domestic violence to naturalize even if the spouse did not live with the citizen abuser for the requisite period of time; and makes other changes to laws to accommodate victims of domestic violence. *Id.*

103. See *Terry v. Ohio*, 392 U.S. 1, 27–28 (1968) (stating that law enforcement may briefly stop and investigate an individual only when there is reasonable suspicion that the person is involved in criminal activity).

must also be vigilant in monitoring and investigating accusations of profiling. Finally, local law enforcement agencies should promulgate clear written policies and procedures for government interactions with immigrants, so as to avoid any misunderstanding between the police and immigrants.

Immigration enforcement traditionally occurred through civil mechanisms at the federal level.¹⁰⁴ Increasingly, however, immigration enforcement is conducted through the criminal justice system and through state and local law enforcement agencies.¹⁰⁵ This criminalization and localization of immigration enforcement is exemplified in Virginia by the Attorney General's opinion from 2010, which seems to call on local police to stop and detain people suspected of violating the immigration laws.¹⁰⁶ These trends create the potential for unlawful profiling, as illegal immigration is often associated with the Hispanic ethnicity. Such profiling can be avoided through changes in the law and police practice, but further study needs to be done on this emerging issue. With the right approach, we can enforce the immigration laws, keep police focused on fighting crime, and protect the civil rights and liberties of all people.

104. *See supra* Part I (describing the criminalization of immigration enforcement).

105. *See supra* Part I (describing the criminalization of immigration enforcement).

106. *See supra* text accompanying notes 59–73 (discussing the advisory opinion of the Virginia Attorney General).