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ISSUES IN POLICING

Enforcing Immigration Law at the State and Local Levels

A Public Policy Dilemma

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Enforcing immigration laws is a daunting task. According to recent estimates, almost 12 million out-of-status aliens currently reside in the United States (Passel and Cohn, 2008). This includes individuals who originally entered the country legally but now have expired visas, as well as those who entered illegally. A third subgroup, called fugitive aliens or alien absconders, consists of those who have been processed through the immigration system and subsequently ignored deportation orders. They are the target of stepped-up national law-enforcement efforts to locate and remove them from the country. There were approximately 560,000 immigrants in the fugitive-alien category in 2008, which comprises approximately 5 percent of all out-of-status immigrants (Mendelson, Strom, and Wishnie, 2009).[1]

The recent focus on immigration legislation reform has generated heated debate, much of it centering on the backlog of cases with no end in sight as large numbers of immigrants continue to enter the United States illegally, more deportation orders are issued, and federal enforcement workloads, manpower, and budgets increase exponentially. Some critics argue that the federal government is neglecting its immigration enforcement responsibilities and that existing approaches to clearing the backlog are woefully inadequate. At the current rate and budget levels under which the Department of Homeland Security's (DHS) Immigration and Customs Enforcement (ICE) is operating, it would take 15 years and more than $5 billion just to clear the absconder backlog (Mendelson, Strom, and Wishnie, 2009, p. 2). Many assert that it is utterly unrealistic to expect that the immigration problem can be solved by federal law enforcement alone. "The absconder population is exhibit number one," said Victor Cerda, ICE's former chief of staff and general counsel. "We haven't been able to handle the 600,000-plus who went through the legal system. What's going to lead us to believe we're going to handle the 12 million?" (Aizenman, 2007).

One possible response to this dilemma would be to encourage the creation of partnerships among federal immigration agencies and state and local law-enforcement agencies so that their combined expertise, manpower, and other resources could be directed at apprehending and deporting fugitive aliens. ICE currently has approximately 20,000 employees (not all of whom are law enforcement officers) throughout the United States, compared with the more than 800,000 state and local full-time sworn law enforcement officers (Reaves, 2007). Although including these law enforcement officers might indeed help to reduce the backlog by increasing manpower, a counter argument could be made that gains in that area would be offset by a corresponding reduction in the ability of state and local law enforcement officers to fulfill their core mission to protect and serve all members of the public, whether or not they are citizens.

Currently, the federal government does not require state and local polities to carry out specific immigration enforcement actions. Immigration control is a federal responsibility, and, within broad limits, states and localities have the right to formulate their own policies about how to enforce immigration law (Pham, 2006). There is no consistent national approach at this time. However, comprehensive immigration reform may address the issue of state and local participation in immigration enforcement in the near future. Before such legislation is drafted, it is important to understand the potential effects of policy changes.

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[1] This number has doubled since 2001 when, after the September 11 terrorist attacks on the World Trade Center, federal officials discovered that they could not account for more than 300,000 immigrants who were to have been deported, including more than 5,000 from countries with known al Qaeda groups. According to a Homeland Security report, between 2001 and 2007, spending on fugitive operations increased from $9 million to $183 million per year, about $10,000 per arrest (Aizenman, 2007). In 2008, this budget increased to $218,945,000.

This paper provides a brief overview of federal legislation that addresses the problem of unauthorized immigration. It then highlights emerging state and local responses to immigration issues, particularly to the problem of apprehending illegal aliens who face potential criminal charges and deportation. The authors seek to clarify the needs and concerns of key stakeholders by describing variations in enforcement approaches and making the pros and cons of these approaches more explicit. They also suggest areas for research to add empirical evidence to the largely anecdotal support that now characterizes discussions of comprehensive immigration reform.

Congress implemented immigration reform legislation in 1986 and 1996.

Federal Immigration Reform Legislation Since 1986

The 1986 Immigration Reform and Control Act (IRCA) (Pub. L. 99-603) was the first comprehensive bill aimed at reducing illegal immigration. Its main provisions included sanctions against employers who hired undocumented workers, stronger enforcement of immigration law at the borders and inside the country, and the largest program ever conducted to legalize the presence of a large portion of the unauthorized migrant population (Cooper and O'Neil, 2005).

Over the years, however, concerns continued to mount that immigrants were taking jobs from U.S. citizens, increasing the crime rate, and draining scarce public resources. Thus, in 1996, Congress passed legislation that further constrained immigrants' rights:

- The Antiterrorism and Effective Death Penalty Act (Pub. L. 104-132) greatly reduced the rights of individuals suspected of criminal activity or terrorism and put in place an alien-terrorist removal court that accelerated the process of removing criminal aliens.
- The Personal Responsibility and Work Opportunity Reconciliation Act (Pub. L. 104-193) restricted unauthorized immigrants' access to essential public services.
- The Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) expanded the range of offenses for which immigrants could be deported and increased penalties for violations, curtailed immigrants' due-process rights, further reduced their access to public services, and tightened security at the U.S.-Mexico border (Mitnik, Halpern-Finnerty, and Vidal, 2008, p. 5).[2]

Section 642(a) of IIRIRA also expressly prohibited noncooperation policies that would prevent public employees from reporting individuals' immigration status to ICE.

As part of the IIRIRA legislation, Section 287(g) was incorporated into the Immigration and Nationality Act (INA) (Pub. L. 82-414).[3] Section 287(g) authorized the federal government to enter into voluntary agreements with state, county, and local law-enforcement agencies to train officers to help identify individuals who are in the country illegally. The program is supervised by ICE, formerly the Immigration and Naturalization Service (INS):

> Originally conceived with a narrow mandate [to arrest unauthorized immigrants already subject to outstanding warrants of deportation—i.e., fugitive aliens], the program has undergone at least two major transformations. The first, following the Sept. 11, 2001 attacks, sought to utilize the program as a tool to fight terrorism and promote public safety. The second transformation, which occurred around 2006, made the program a broader, more generalized immigration enforcement program. (Chishti, 2009, p. 2)

A third transformation occurred in July 2009, when Secretary of Homeland Security Janet Napolitano announced (DHS, 2009) that she would standardize all 287(g) memoranda of agreement (MOAs) to make policies and procedures surrounding immigration enforcement requirements more consistent at the national, state, and local levels and to place the focus on criminal aliens.

There have been other attempts at the federal level to encourage the participation of state and local jurisdictions in enforcing immigration law—for example, the Clear Law Enforcement for Criminal Alien Removal (CLEAR) Acts of 2003 (H.R. 2671) and 2005 (S. 1362)—but the proposed legislation has not been enacted.[4]

[2] With certain exceptions, IIRIRA bars persons who have been "unlawfully present" in the United States for 180–364 days from being admitted in any legal status for a three-year period unless they obtain a pardon. Those who have been unlawfully present for more than a year are barred from legal admission for ten years unless they obtain a pardon. Those who return to the United States without a pardon are permanently barred.

[3] The INA was created in 1952. It organized a variety of statutes governing immigration law into one location and is divided into titles, chapters, and sections. Although amended many times, the INA continues to be the basic body of immigration law.

[4] The CLEAR Acts of 2003 and 2005 proposed giving state and local law-enforcement agencies the authority to "investigate, apprehend, detain, transport and remove noncitizens from the United States." This legislation would have made unlawful presence in the United States a felony, and it sought to greatly increase penalties for immigration violations. It would have authorized financial assistance to state and local police agencies that enforce immigration law and mandated training for their personnel. It would have required insertion of data related to immigration violations into the National Crime Information Center database and mandated that state and local entities participate in the Institutional Removal Program, which identifies removable noncitizens in federal and state correctional facilities, ensures that they are not released into the community, and removes them from the United States after the completion of their sentences. See the summaries of the CLEAR Acts prepared by the National Immigration Law Center (NILC) (2008) and the National Council of La Raza (undated).

State and Local Participation in Enforcing Federal Immigration Law

Approaches That Limit State and Local Immigration Enforcement

As they attempt to regulate and control their environments, city, county, and state officials have often been confronted by competing goals with respect to their relationships with immigrant populations. For example, police officers must balance their obligations to serve and protect all members of the public (whether or not they are citizens) with their law-enforcement responsibilities. Thus, the response in some cases has been to adopt a policy of limited cooperation—e.g., to support federal efforts to remove illegal immigrants convicted of felonies but otherwise to decline to identify and remove undocumented aliens, on the basis that this is a federal function.

Limited-cooperation policies may become codified. According to the National Immigration Law Center, as of December 2008, states and municipalities have passed 87 laws, resolutions, and policies providing some degree of "sanctuary," which range from local government agents refusing to cooperate in the enforcement of immigration offenses to the equivalent of a "don't ask, don't tell" rule for immigration status.[5] Indeed, four states—Alaska, Montana, New Mexico, and Oregon—explicitly prohibit the use of state resources for the purpose of immigration enforcement.[6]

Moreover, some of the largest cities in the United States—including New York, Los Angeles, San Francisco, the District of Columbia, Chicago, Baltimore, Boston, Detroit, Minneapolis, St. Louis, Newark, Philadelphia, Austin, and Seattle—have passed legislation limiting local enforcement of immigration laws. To support this position, a national group representing 57 police chiefs from cities with populations greater than 1.5 million stated in 2006 that local enforcement of immigration would "undermine [the] trust and cooperation" necessary for effective policing (International Association of Chiefs of Police, 2007; Keen, 2006). In 2008, the Police Foundation's conference proceedings and findings were decidedly against the cooperation of state and local law enforcement in immigration enforcement (Police Foundation, 2009).

Approaches That Favor State and Local Immigration Enforcement

Although Section 287(g) of IIRIRA created a mechanism that enabled ICE and state and local law-enforcement agencies to enter into partnerships for the purpose of identifying and removing illegal aliens, the program was slow to start. It was not until 2002 that the state of Florida participated in a pilot with the first agreement, and, at the beginning of 2007, only eight agreements were in effect. ICE offers a four-week training program to better equip designated officers to perform immigration law-enforcement functions, and, as of January 2010, more than 1,000 officers had completed this training. At the beginning of 2010, 67 Section 287(g) agreements had been signed with various state and local criminal-justice agencies. For 2006 through 2009, those agreements have been credited with the identification of more than 130,000 potentially removable aliens (ICE, 2010).

Approaches differ in how much state and local officials assist federal officials in enforcing immigration laws.

State and local criminal-justice agents also have access to the Law Enforcement Support Center (LESC) database, which historically has been a place to find a suspect's criminal-history information. Recently, immigration information has been included in the data set, and, in fiscal year (FY) 2008, LESC responded to 807,000 queries about immigration status (ICE, 2008).

Another mechanism through which state and local criminal-justice agents have participated in immigration enforcement is the Criminal Alien Program (CAP),[7] whose primary goal is to identify incarcerated immigrants within federal, state, and local facilities and secure final orders of removal prior to the termination of their sentences so that they cannot be released into the community. The program also provides partial federal reimbursement for the cost of incarcerating criminal aliens. In FY 2005, CAP provided $287.1 million to 752 state, county, and local jurisdictions.[8] In FY 2007, ICE removed 164,296 criminal aliens from state and local detention and 11,292 from federal detention. These individuals were referred for immigration proceedings and constituted approximately 60 percent of all immigration removals. CAP continues to grow. In FY 2008, ICE prepared 221,085 charging documents to deport

[5] The following states have at least one "sanctuary" provision passed in their jurisdictions: Alaska, Arizona, California, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Texas, Washington, and Wisconsin. (NILC, 2008)

[6] Although there are state resolutions prohibiting use of resources for immigration enforcement, agencies within Alaska, Montana, and New Mexico have entered into 287(g) MOAs with the Department of Homeland Security, seemingly in direct violation of state policy.

[7] CAP is part of an umbrella initiative created by ICE in 2007 and authorized under Section 287(g) of IIRIRA. Called Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS), the initiative provides support to state and local agencies involved in immigration enforcement. Among the ACCESS programs are Asset Forfeiture/Equitable Sharing, Border Enforcement Security Task Forces, Customs Cross-Designation, Document and Benefit Fraud Task Forces, and Fugitive Operation Teams.

[8] CAP published data on its effectiveness as part of an audit conducted by the Office of the Inspector General (U.S. Department of Justice, 2007).

criminal aliens when their sentences expire—over 45,000 more than in the previous year.

Are the Partnerships Working?

Anecdotal evidence suggests that state and local partnerships with ICE may be effective. In 2007, Maricopa County (Ariz.) Sheriff Joe Arpaio entered into a close partnership with ICE. Since then, he has provided training to 60 detention officers who have interviewed 106,000 inmates and identified 16,000 who are illegal immigrants (Maricopa County Sheriff's Office, 2008). ICE has since revoked the 287(g) partnership, but the officers continue to enforce all state and federal immigration laws and have arrested more than 200 people on immigration charges. As of January 2010, deputies have arrested 3,600 out-of-status immigrants and identified 31,000 deportable immigrants in the Maricopa County jail facilities to turn over to ICE for removal (Maricopa County Sheriff's Office, 2010).

Achieving a totally consistent national approach—if that is desired—appears to be a very difficult goal.

However, there are serious reservations about the program's success. Maricopa County racked up a $1.3 million debt in only three months. The clearance rate dropped dramatically from 10.5 percent of investigations cleared by arrest in 2005 down to 2.5 percent in 2007. Response time grew substantially; patrol cars were late two-thirds of the time for the most serious calls for service. Although it cannot be definitely demonstrated that the drop in many of the police effectiveness ratings was due to the diverted focus of the department, the statistics do suggest that other police functions suffered, at least in part, as a result of enforcing immigration regulations. Additionally, charges of racial profiling have tainted the sheriff's claims of achievement (Hensley, 2008), and a lawsuit alleging racial profiling is pending before the U.S. District Court in Arizona (ACLU, 2008).

Another well-publicized effort to reduce the illegal immigration population in Prince George's County, Maryland, also received mixed reviews. The policy is projected to cost around $14.2 million over five years and has resulted in the questioning of only 626 suspected illegal immigrants in the first six months, which was less than 2 percent of those charged with a crime (Mack, 2008; Vargas, 2007). According to residents, a climate of fear and mistrust was created within the immigrant community—both legal and illegal—as well as among the citizenry overall. Additionally, within months of the policy implementation, the county jail was overflowing with detainees awaiting deportation (Mack, 2008). The county itself was polarized regarding its views of the policy and the police force, with satisfaction with the police dropping drastically within the Hispanic community from 97 percent in 2005 to 73 percent in 2008 after the adoption of this anti–illegal-immigrant policy.

Research Directions

Utilizing state and local assets to support immigration enforcement is clearly a highly contentious issue. If the lines of debate are starkly drawn, on one side will be those who consider the problem a federal matter and who believe that state and local law enforcement should play no role beyond helping federal officials locate and deport illegal aliens who have been convicted of committing felonies. Critics of this position counter with detailed accounts of serious crimes by illegal aliens with previous incidental contacts with local law-enforcement officials who could have referred them to ICE for deportation prior to commission of the crime (thus indicating that each of those crimes was potentially avertable).

On the other side are those who favor full state and local support for federal enforcement efforts. They believe that failure to do so represents both a legal failure and a breach of the public safety. They point out that federal officials are clearly understaffed (and unlikely to ever have sufficient staff) to provide effective enforcement. However, their critics say that making it difficult for undocumented aliens to live in a locality may violate constitutional guarantees and federal mandates regarding public services in such areas as health care and education (Seghetti, Viña, and Ester, 2004). In addition, many local law-enforcement officers believe that, if they are required to enforce immigration law, a vulnerable population will be put even more at risk.

What the two sides currently have in common is a reliance on anecdotal, rather than empirical, data to support their assertions. In the case of ICE 287(g) partnerships, the situation is complicated by the absence of documented program objectives, wide variation in the nature and extent of the supervision provided by ICE field officials over officials from participating agencies, and lack of direction regarding data collection and reporting procedures by those agencies (GAO, 2009, pp. 4–5). The Department of Homeland Security is currently attempting to correct these deficiencies (DHS, 2009).

States and localities have traditionally had wide discretion in whether and how to enforce immigration law. Therefore, achieving a totally consistent national approach appears to be a very difficult goal. If uniformity is to be sought, federal incentives might help institute a truly integrated national policy. Determining whether such a goal is desirable requires one to gather information useful to key stakeholders—information that is quantitative,

not anecdotal. The authors suggest that additional research be conducted to address such questions as the following:

- Can effective immigration enforcement occur without state and local support?
- Does enforcing immigration law at the state and local levels affect the ability of participating agencies to carry out their primary missions?
- If different jurisdictions exercise radically different immigration enforcement policies, what is the impact on national immigration objectives?
- What are the effects of local immigration enforcement on public safety?
- How can immigration enforcement be conducted so that it is not subject to charges of racial bias or profiling?

Examining the ways in which various entities are currently addressing challenges like these and evaluating the effects of those approaches according to clearly specified performance measures could be an important step toward achieving some measure of policy integration in immigration reform. ■

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About This Paper

Almost 12 million out-of-status aliens currently reside in the United States, and it is estimated that it will take 15 years and more than $5 billion for the Department of Homeland Security's Immigration and Customs Enforcement to apprehend just the current backlog of absconders. One proposed solution to this enforcement problem is for federal agencies to partner with state and local law-enforcement agencies to apprehend and deport fugitive aliens. Currently, the federal government does not require state and local agencies to carry out specific immigration enforcement actions; however, comprehensive immigration reform may address this issue in the near future. Before such legislation is drafted and considered, it is important to understand all the potential impacts of a policy incorporating immigration enforcement by nonfederal entities. As there is very limited evidence about the effects of involving state and local law enforcement in immigration enforcement duties, this paper seeks to clarify the needs and concerns of key stakeholders by describing variations in enforcement approaches and making their pros and cons more explicit. The paper also suggests areas for research to add empirical evidence to the largely anecdotal accounts that now characterize discussions of the involvement of state and local law enforcement in immigration enforcement efforts.

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This research was conducted under the auspices of the Center on Quality Policing (CQP), part of the Safety and Justice Program within RAND Infrastructure, Safety, and Environment (ISE). The center's mission is to help guide the efforts of police agencies to improve the efficiency, effectiveness, and fairness of their operations. The center's research and analysis focus on force planning (e.g., recruitment, retention, and training), performance measurement, cost-effective best practices, and use of technology, as well as issues in police-community relations.

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