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Missouri, the “War on Terrorism,” and Immigrants: Legal Challenges Post 9/11

*Sylvia R. Lazos Vargas**

I. INTRODUCTION

The 2000 census confirmed what many already knew—the traditional image of what it means for Missouri to be a heartland state is changing. The 2000 census shows that the fastest growing racial/ethnic group in Missouri are Latinos. A total of 118,592 Missourians self identify as Latinos, almost doubling during the last decade.¹ Latino growth has outpaced the growth of African-Americans (92% versus 15%) and Whites (92% versus 6%).² This follows a trend experienced by other Midwestern agricultural states.³ The City of St. Louis now boasts various first generation immigrant communities. According to the most recent census, about ten percent of St. Louis residents are foreign born residents.⁴ In St. Louis, the Bosnian community, which settled in St. Louis following the break-up of the former Yugoslavia, totals about 30,500. There is also a Vietnamese refugee population.⁵ Kansas City, which has been

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1. OFFICE OF SOCIAL AND ECONOMIC DATA ANALYSIS (OSED), HISPANIC POPULATION IN MISSOURI, 1990-2000 (2002) [hereinafter OSED HISPANIC POPULATION].

2. Latinos grew from 61,702 in 1990 to 118,592 in 2000, an increase of 56,890 or 92.2%. African-Americans grew from 548,208 to 629,391, an increase of 81,183 or 14.8%. Whites grew from 4,486,228 to 4,748,083, an increase of 261,855 or 5.8%. OFFICE OF SOCIAL AND ECONOMIC DATA ANALYSIS (OSED), AN OVERVIEW OF CHANGES IN RACE OF MISSOURI'S POPULATION IN 2000 (2002).

3. Kansas' Latino population doubled (100.9%) from 93,670 in 1990 to 188,252 in 2000. Nebraska's Latino population grew from 36,969 to 82,473 (223%). Iowa's Latino population grew from 32,647 to 82,473 (152%). By comparison, Illinois' Latino population grew from 904,446 to 1,530,262. See 2000 U.S. CENSUS BUREAU, DEMOGRAPHIC PROFILES.

4. Phillip O'Connor, *Refugees May Represent 10 Pct. of City's Population, Agency Says*, ST. LOUIS POST-DISPATCH, Feb. 24, 2001, at 10.

5. Julian Pecquet, *Muslim-Dominated Bosnian Community in St. Louis Seeks*

home to Missouri's largest Latino community since the early 1900s, now accounts for one-third of the state's Latinos.⁶ Nationally, Kansas City was ranked eleventh in net growth of Latinos among all urban centers.⁷

This growth in first generation immigrants has not been limited to Missouri's large urban centers. In rural Missouri and its small towns, the major group of first generation immigrants is Latinos. The ten counties experiencing the largest proportional increases in Latino population growth are:

Table 1

Missouri County	Total Latino Population	% Latino of Total Population	% Growth Latino Population	Major Employers
Sullivan	634	8.8%	2164.3%	Milan Poultry Company, Premium Standard Farms
McDonald	2030	9.4%	2106.52%	Simmons, Hudson Foods
Barry	1713	5.0%	1027%	Tyson Foods
Moniteau	435	2.9%	845.7%	Cargill
Pettis	1527	3.9%	753.07%	Tyson Foods
Lawrence	1195	3.4%	466.4 %	Tyson Foods, Willow Brook, Cuddys, Schreibers
Saline	1050	4.4%	404.8%	Conagra and Excel
Taney	962	2.4%	395.9%	None (services, construction, etc.)
Dunklin	824	2.5%	387.6 %	Migrant farm workers
Jasper	3615	3.5%	353.6%	Butterball, Schreibers (cheese), Legget and Platt
Newton	1147	2.2%	224.9%	Twin Rivers (meat) and Moark and Timberview (egg packers)
Missouri	118592	2.1%	92.2%	

SOURCE: University Outreach and Extension, Office of Social and Economic Data Analysis

Counsel and Integration, MO. DIGITAL NEWS, Sept. 28, 2001, at <http://www.mdn.org/2001/STORIES/BOSNIA.HTM>.

6. OSEDA HISPANIC POPULATION, *supra* note 1. Kansas City's population of 35,150 Latinos in 2000 represents thirty percent of the state's Latinos. *Id.*

7. See Robert Suro & Audery Singer, Brookings Institution and Pew Hispanic Center, *Latino Growth in Metropolitan America: Changing Patterns, New Locations*, July 2002, available at <http://www.brook.edu/dybdocroot/es/urban/publications/surrosinger.pdf>.

A. Data Analysis

For seven of the ten counties, Latino hyper-growth contributed to overall increases, as they experienced the greatest proportional population growth in Missouri—Taney (55.3%), McDonald (28.0%), Barry (23.5%), Moniteau (20.6%), Newton (18.4%), Lawrence (16.4%), and Sullivan (14.1%).⁸ The prototypical Missouri farm town—almost all White, English speaking, of European heritage, and mostly middle class—is becoming diverse. In Milan, Latinos now make up 22% of the local population, in Noel and Southwest City, Latinos now represent close to 40%.⁹

Rural immigrant hyper-growth is fueled by the draw of jobs, primarily from meatpacking and food processing industries. About three-quarters of Latino immigrants indicate work as the major reason why they have moved to Missouri.¹⁰ In a past decade of full employment, Missouri businesses, and more specifically, Missouri's food processing industry, have turned to immigrant labor for what employers saw as a dependable and willing labor force. This is known as demand-pull immigration because labor movement is pulled by industry that

8. OFFICE OF SOCIAL AND ECONOMIC DATA ANALYSIS (OSED), MISSOURI POPULATION AND COMPONENTS OF CHANGE, 1990-2000 BY COUNTY WITH STATE TOTALS.

9. The percentage of Latinos in other Missouri towns are Sedalia, 5.6%, California, 7.6%, and Southwest City, 37.3%. Daryl Hobbs, Office of Social and Economic Data Analysis (OSED), Overview of Missouri's Hispanics (March 2002), presented at De Colores, available at www.oseda.missouri.edu/presentations/hispanic_conf_mar02.ppt [hereinafter OSED Hispanics Overview].

10. Just under 80% of the respondents cite work as the reason for coming to Missouri. In California, the percentage so stating is slightly above 50%, Sedalia about 71%, Jefferson City 60%, and Columbia 82%. Cristina Vasquez Case, Learning about the Newcomers to Missouri Towns, Presentation for Cambio de Colores 2002 conference, available at www.missouri.decolores.edu; see also DEPARTMENT OF RURAL SOCIOLOGY, UNIVERSITY OF MISSOURI-COLUMBIA, A STUDY OF MINORITIES IN SELECTED NON-METROPOLITAN COMMUNITIES IN MISSOURI (1999-2002) [hereinafter MID-MISSOURI SURVEY] (funded by the Missouri Department of Social Services).

acts as a magnet.¹¹ As made clear by Table 1, *supra*, in rural Missouri the meat processing industry is a major draw.¹²

States such as Iowa and California have recognized that welcoming immigrants who fuel these states' principal industrial economic engines is vital to long term growth.¹³ Missouri, like other Midwestern states that have also undergone industrial and agricultural reconfiguration,¹⁴ is facing the challenge of a rapidly growing immigrant population. The state took note of these demographic changes and formed the Joint Interim Committee on Immigration

11. This is a concept from labor economics. What researchers contend is that U.S. capital and more specifically U.S. employers, are a magnet for both legal and illegal immigration from Mexico and Central America. U.S. wages "pull" immigrant labor to the United States. U.S. minimum wages can be six to ten times higher than prevailing wages in Mexico and Central America. Even the relatively well educated will seek out harsh jobs in hopes of attaining life long dreams of middle class comfort. See PHILIP L. MARTIN & WAYNE A. CORNELIUS, *THE UNCERTAIN CONNECTION: FREE TRADE & MEXICO-U.S. MIGRATION* (1993); ALEJANDRO PORTES & RUBEN G. RUMBAUT, *IMMIGRANT AMERICA: A PORTRAIT 17-20* (1990); Marcus Stern, *Jobs Magnet*, S. DIEGO UNION-TRIB., Nov. 2, 1997.

12. In the MID-MISSOURI SURVEY, over 68% of Latino immigrants stated that they worked in a factory/industry or farm/poultry setting—more than ten times the next nearest work setting, schools (6%). See MID-MISSOURI SURVEY, *supra* note 10. See generally Steven A. Henness, *Latino Immigration and Meatpacking in the Rural Midwest: An Inventory of Community Impacts and Responses*, Dept. of Rural Sociology, University of Missouri-Columbia, *Latinos in Missouri Occasional Paper Series* (2002), available at <http://www.ssu.missouri.edu/RuralSoc/Latinos/>.

13. Iowa's plan for the next decade recognizes that "but for" Latino immigration the state would be a declining population state. Iowa has requested to be designated as an "immigration enterprise zone," which will allow for immigrants to be relocated to the state in greater numbers and more rapidly. IOWA: STRATEGIC PLANNING COUNSEL—GOAL 1, at 3 (2000), available at <http://www.iowa2010.state.ia.us/library/finalreport/2010goal1.pdf>. California's non-political Little Hoover Commission acknowledges that the state's economy "has become dependent on immigrants." It urges that the state put in place legislation to ensure that California immigrants successfully integrate and continue to contribute to the economy. Press Release, Little Hoover Commission, *We the People: Helping Newcomers Become Californians* (June 18, 2002), available at <http://www.lhc.CA.gov.lhcdir/report166.html>.

14. See generally Betty Wells & Jennifer Bryne, *The Changing Face of Community in the Midwest US: Challenges for Community Developers*, 33 COMMUNITY DEV. J. 70-77 (1999); Marc Cooper, *The Heartland's Raw Deal: How Meatpacking Is Creating a New Immigrant Underclass*, THE NATION, Feb. 3, 1997; ANY WAY YOU CUT IT: MEAT PROCESSING AND SMALL-TOWN AMERICA (Donald D. Stull, et al. eds., 1995); THE HIDDEN AMERICA: SOCIAL PROBLEMS IN RURAL AMERICA FOR THE TWENTY-FIRST CENTURY (Robert M. Moore, III ed., 2001).

that met during 1998 and 1999.¹⁵ As the Committee recognized, the state must meet many challenges in order to grow as a community.

This Article focuses on the legal impacts of immigration at the *state* level. The pros¹⁶ and cons¹⁷ are primarily considered and debated at the federal level, however, because immigration has been mainly a prerogative of the federal government. States have not had much of an impact on immigration policy. Nevertheless, the repercussions of inconsistent choices have fallen on the states.¹⁸ Missouri and many other states are now home to Latinos and other immigrants because they have found in the Midwest their version of the American dream: a job, upward mobility, and security. Many are providing essential labor to key industries, like agriculture, meatpacking, and construction. Immigrant newcomers are resettling areas that might otherwise be in decay. Yugoslavian and Vietnamese refugees have played a major role in revitalizing the City of St. Louis, and Latinos have made it possible for Kansas City's inner city to grow rather than decline over the last decade.¹⁹ That is the good news. The bad news is that there is likely a significant proportion with problematic

15. REPORT OF THE JOINT INTERIM COMMITTEE ON IMMIGRATION (Dec. 1999) [hereinafter JT. COMM. REP. IMMIGRATION].

16. Academics have documented that the process of immigrant resettlement revitalizes urban centers and what were once declining communities. See PORTES & RUMBAUT, *supra* note 11, at 23-30.

17. Critiques have been based on economic and cultural concerns. Cultural critics believe that current immigration patterns are mostly non-European, and this changes the character of the United States. See PETER BRIMMELow, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* (1995). It has long been a point of controversy whether Latin American immigrants are taking jobs away from native born Americans. See ROY H. BECK, *THE CASE AGAINST IMMIGRATION: THE MORAL, ECONOMIC, SOCIAL, AND ENVIRONMENTAL REASONS FOR REDUCING U.S. IMMIGRATION BACK TO TRADITIONAL LEVELS* (1996). *But see* BILL ONG HING, *TO BE AN AMERICAN: CULTURAL PLURALISM AND THE RHETORIC OF ASSIMILATION* 44, 45 (1997) (going through the arguments against immigration and describing studies rebutting). Studies have concluded that immigrants do not have a negative effect on the U.S. economy. The Urban Institute concluded "immigrants actually generate significantly more in taxes paid than they cost in services." See *id.* at 53; MICHAEL FIX & JEFFEREY PASSEL, *BROOKINGS INSTITUTE, US IMMIGRATION AT THE BEGINNING OF THE 21ST CENTURY* (1996) ("on average, an additional immigrant generated a positive net contribution to the country").

18. See, e.g., Lawton Chiles, Editorial, *Chiles: Let U.S. Bear Burden of Immigration*, *ORLANDO SENTINEL*, Mar. 20, 1994, at G3 (Florida's then governor stating that "federal immigration policy has created a nightmare for state and local governments.").

19. But for the doubling of the Latino population in the central city (55,243 or 103% growth), it would have declined. See Brookings Institution Center on Urban and Metropolitan Policy, *Racial Change in the Nation's Largest Cities: Evidence from the 2000 Census* (April 2001), at Table 3, available at <http://www.brookings.edu/urban>.

immigration status. The numbers fall into a wide array; however, most estimates hover at eight million nationally.²⁰ While undocumented immigrants account for less than four percent of the *total* U.S. labor force, they are concentrated in a few industries, including construction, hospitality (about 10%), textiles, meatpacking (20%), and agriculture (half the work force).²¹

This creates tough economic and legal issues. Prior to 9/11, the nation functioned with this legal inconsistency. Many middle class benefits (like cheap food, a construction boom, affordable hotel service) were made possible by—take your choice—“undocumented workers” or “law breakers.” Post 9/11, this tension is coming to a head in two areas: first, the Department of Justice’s initiative to federalize local police as immigration enforcement, discussed in Part II; second, access to driver’s licenses, discussed in Part III. Part III.C discusses the Missouri State Attorney General’s racial profiling report that shows that racial profiling of Latinos is most acute in hyper-growth rural communities and examines what these data tell us about law enforcement’s relationship with immigrant Latino communities in rural Missouri.

20. According to the Bureau of the Census based on the 2000 census, the number of foreign born who are unauthorized is 8,835,450. This estimate is part of a technical report reconciling the data gathered in the 2000 census and its estimation methods for the population of the United States prior to the census. See Gregory J. Robinson, Bureau of the Census, ESCAP II, *Demographic Analysis Results*, at T. 3-5 (2002). According to the Attorney General of the United States, John Ashcroft, the *total* number of undocumented immigrants in the United States may be between six to ten million. John Ashcroft, United States Attorney General, Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002). According to recent estimates by the Pew Foundation and the Urban Institute, the number is close to eight million. Frank D. Bean, & Jennifer Van Hook, The Pew Hispanic Center, *Estimates of Numbers of Unauthorized Migrants Residing in the United States: The Total, Mexican, and Non-Mexican Central American Unauthorized Populations in Mid-2001* (March 21, 2002); B. Lindsay Lowell & Roberto Suro, The Pew Hispanic Center, *How Many Undocumented: The Numbers Behind the U.S.-Mexico Migration Talks* (March 21, 2002).

21. Lowell & Suro, *supra* note 20; Philip A. Martin, The Pew Hispanic Center, *Guest Workers: New Solution, New Problem?* (March 21, 2002) (placing 47% of agricultural labor force as unauthorized). For a discussion of possible numbers in Missouri, see Sylvia R. Lazos Vargas, *Cambio de Colores (Change of colors): Legal and Policy Challenges as Latinas/os Make Their Homes in Missouri*, University of Missouri Extension and Outreach (forthcoming 2003).

II. WHETHER LOCAL LAW OFFICERS SHOULD ENFORCE IMMIGRATION LAW

The Attorney General of the United States, former Missouri Senator and Governor John Ashcroft, recognizes that lax enforcement of immigration laws has been responsible for the undocumented workers living within U.S. borders.²² In June 2002, the Department of Justice requested that local law enforcement cooperate with the federal government in patrolling for noncitizens who have overstayed their visas in the United States. This cooperation would increase the nation's ability to enforce immigration laws by adding 650,000 state officers to the Immigration and Naturalization Service's ("INS") 20,000 border patrol force.²³ Attorney General Ashcroft proposed that states participate *voluntarily* in the course of "encounters" by checking the National Crime Information Center (with photographs, fingerprints, and other information) system that post 9/11 maintains a list of persons who violate INS Entry-Exit Registration rules.²⁴ Ashcroft views this cooperation as part of a "narrow anti-terrorism mission."²⁵ Thus far, only North Carolina and the Las Vegas Police Department have stated their intent to actively enforce immigration laws.²⁶ Most, like Missouri, have not taken up this invitation. Others have called it a bad idea.²⁷ A key reason is that the implications are (a) legally complex, and (b) politically charged.

A. What is the legality of local law enforcement being involved in the enforcement of federal immigration laws?

There are four legal aspects to the Ashcroft proposal: (1) Tenth Amendment federalism concerns, (2) federal preemption, (3) criminal procedure, and (4) state authority of state officers to engage in arrests under federal law.

1. Tenth Amendment Concerns

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."²⁸ Under *Printz v. United States*,²⁹ the

22. Ashcroft Remarks, *supra* note 20.

23. Ashcroft Remarks, *supra* note 20.

24. Ashcroft Remarks, *supra* note 20.

25. Ashcroft Remarks, *supra* note 20.

26. Cheryl Thomson, *Florida Has also Taken Steps*, WASH. POST, Apr. 4, 2002.

27. *See infra* notes 100, 105-06 and accompanying text.

28. U.S. Const., amend. X.

29. 521 U.S. 898 (1997).

federal government cannot “command” local law enforcement to take on a task that is essentially federal in character.³⁰ The same principles that prevent the federal government from requiring state and local governments to enact legislation or adopt federal regulatory programs³¹ also prohibit the federal government from requiring state or local executive officers to implement federal law. These principles do not prohibit states from *consenting* to participate in federal law enforcement activities.³² In this situation, no Tenth Amendment violation is involved because the federal government is only asking for voluntary state compliance.

2. Federal Preemption

Attorney General Ashcroft’s Department of Justice maintains that states have “inherent power”³³ to participate in federal immigration law enforcement efforts. This is a reversal from Janet Reno’s Department of Justice position that state and local law enforcement lack legal authority to detain persons for civil violations of federal immigration law and could only hold those violating criminal law for very short periods until INS personnel became available.³⁴

Do states have any role in the enforcement of immigration laws? It depends on what they are doing. Courts have repeatedly noted “the preeminent role of the Federal Government with respect to the regulation of aliens within our

30. The Court held that the Brady Bill requirements that state law enforcement officers perform background checks of handgun purchasers, at state expense, was a violation of the Tenth Amendment. *Id.* at 922 (“The power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 states.”).

31. *New York v. United States*, 505 U.S. 144, 172 (1992).

32. The Court noted that it was not addressing questions concerning whether Congress could require states to provide information to the federal government or whether the federal government could condition federal funds on state legislative regulatory or executive action. *Printz*, 521 U.S. at 918. In *Reno v. Condon*, the Court further emphasized this distinction. 528 U.S. 141, 148-50 (2000).

33. Ashcroft Remarks, *supra* note 20 (“[T]his narrow, limited mission that we are asking state and local police to undertake voluntarily—arresting aliens who have violated criminal provisions of the Immigration and Nationality Act or civil provisions that render an alien deportable, and who are listed on the NCIC—is within the inherent authority of the states.”). The Department of Justice has not yet published this opinion.

34. See Office of Legal Counsel, U.S. Department of Justice, *Memorandum of Opinion for the United States Attorney Southern District of California, Assistance by State and Local Police in Apprehending Illegal Aliens* (Feb. 5, 1996). The opinion states that local police lack legal authority to detain illegal immigrants “solely on suspicion of civil deportability,” but per case law, have authority to detain based on criminal violation of immigration or other laws.

borders.”³⁵ Nevertheless, there is room for state action.³⁶ The leading Supreme Court case is *DeCanas v. Bica*,³⁷ where the Court considered whether the federal immigration laws preempted a California state law that imposed penalties on employers for hiring undocumented workers.³⁸ In *DeCanas*, the Court rejected the argument that federal immigration law was so “comprehensive” or “pervasive” that “every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised.”³⁹ Hence, states can be active in immigration enforcement, as long as courts do not interpret the federal immigration statute to prohibit or preempt such local activity.⁴⁰

Under the *DeCanas v. Bica* analysis, the question then becomes whether local law enforcement can “cooperate” with federal authorities by performing checks during “encounters” and detain persons suspected of having an irregular status in the United States. The Attorney General’s position is that this is permissible under current law. The question remains unsettled, however.

The case on which the Department of Justice appears to rely most heavily is *United States v. Salinas-Calderon*,⁴¹ in which a Kansas Highway Patrol trooper pulled over an erratically driven vehicle and asked the driver for his license. The driver did not answer. Instead the man’s wife responded, explaining that the driver did not speak English, but that she did. The officer then asked if the man had a green card, and she responded that he did not. There

35. *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (“Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders.”); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (“The power of [C]ongress to exclude aliens . . . and to have its declared policy in that regard enforced exclusively through executive officers . . . is settled by our previous adjudications.”) (quoting *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895)) (alteration in original).

36. See generally Jay T. Jorgensen, Comment, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 B.Y.U. L. REV. 899.

37. 424 U.S. 351 (1976).

38. In *DeCanas*, the Supreme Court upheld a California law forbidding the employment of undocumented workers. *Id.* at 352-53.

39. See *id.* at 355.

40. See *id.* at 363-65. For example, the Court noted that federal preemption would prevent state and local governments from enacting regulations that discriminate against aliens lawfully admitted to the United States if the regulations “impose[d] additional burdens not contemplated by Congress.” *Id.* at 358 n.6. The Court stated that “[t]he proper approach is to reconcile the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted.” *Id.* at 358 n.5 (quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 361 (1963), quoted in *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973)).

41. 728 F.2d 1298 (10th Cir. 1984).

were six other males in the back of the vehicle who also did not speak English. The officer then contacted the INS, who told him to have the group follow him to the sheriff's office to talk to the INS by telephone. The court held that the trooper had probable cause to arrest Salinas.⁴² In footnote three, the Tenth Circuit stated:

Appellee argues that the state trooper did not have the authority to detain the passengers while he inquired into federal immigration matters, and further, his question about the defendant's green card was based on a mere hunch. These arguments are without merit. A state trooper has general investigatory authority to inquire into possible immigration violations. Moreover, the trooper's question about the green card was reasonable under the circumstances, and thus lawful.⁴³

The language is broad and seems to state that local officers have general authority to inquire into immigration matters. The Tenth Circuit in various subsequent cases has cited this sense for the case.⁴⁴ The Tenth Circuit has also cited *Salinas-Calderon*, however, as going to the appropriateness of probable cause for a stop when an officer has reason to suspect that the driver is an illegal

42. *Id.* at 1300.

43. *Id.* at 1301 n.3 (citations omitted).

44. In *United States v. Favela-Favels*, 41 Fed. Appx. 185 (2002), the court upheld *Salinas-Calderon*, citing it to justify the general investigative authority of a state officer to inquire into possible immigration violations. In *United States v. Hernandez-Dominguez*, 1 Fed. Appx. 827 (2001), the defendant was stopped by an "officer" on a traffic violation. While the officer was checking the defendant's license and registration, the defendant revealed that he was an illegal alien. The court said that further detention of the defendant was, therefore, justified. It then parenthetically quoted *Salinas-Calderon*. See also *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999) (affirming this rule).

immigrant.⁴⁵ The citations accompanying footnote three support this reading of *Salinas-Calderon*.⁴⁶

The Tenth Circuit has also been aggressive in interpreting local authority in the context of statutory interpretation arguments. Under the *DeCanas* analysis, state law enforcement activities would be most clearly pre-empted if the federal statutory immigration law scheme were to restrict such activity.⁴⁷ The Tenth Circuit's *United States v. Vasquez-Alvarez* decision held that law enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws.⁴⁸ Plaintiff Vasquez claimed that his 1998 *criminal* arrest by a local law enforcement officer was illegal under federal law because local police could only arrest him for immigration crimes if the INS first confirmed that he was an aggravated felon with a prior conviction for illegal reentry. The case revolved around the interpretation of the Immigration and Naturalization Act (INA) § 1252c:

45. In *United States v. Santana-Garcia*, 264 F.3d 1188 (10th Cir. 2001), the Tenth Circuit cited *Salinas-Calderon* in a case where defendants were pulled over for a traffic violation and the officer later realized they were illegal aliens. The court pointed out that state law enforcement officers "'have the general authority to investigate and make arrests for violations of federal immigration laws,' and that federal law as currently written does nothing 'to displace . . . state or local authority to arrest individuals violating federal immigration laws.'" *Id.* at 1193. In *United States v. Galindo-Gonzales*, 142 F.3d 1217 (10th Cir. 1998), defendant was convicted of knowingly transporting aliens. The defendant was stopped at a roadblock for the purpose of checking his driver's license, vehicle registration, and proof of insurance. The officer noted that the men all spoke in Spanish, however, and the driver could barely speak English. During the discussion of search and seizure requirements, the court noted that under *Salinas-Calderon*, a case involving an initial stop based on reasonable suspicion, a state trooper had general investigative authority to inquire into possible immigration violations. *Id.* at 1223.

46. Footnote three cites *Terry v. Ohio*, 391 U.S. 1 (1968), the foremost probable cause case, and a three-page Tenth Circuit opinion, *United States v. Saldaña*, 453 F.2d 352 (10th Cir. 1972), in which a border patrol agent working the Will Rogers Turnpike in Oklahoma arrested a man for knowingly transporting illegal aliens and the court affirmed that it was permissible under search and seizure principles for the officer to question the detainees about their citizenship status before searching them. *Salinas-Calderon*, 728 F. 2d at 1301 n.3.

47. *DeCanas*, 424 U.S. at 363 ("There remains the question whether, although the INA contemplates some room for state legislation, [state regulation] is nevertheless unconstitutional because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' in enacting the INA.").

48. *Vasquez-Alvarez*, 176 F.3d at 1300; *see also* *United States v. Galindo Gonzalez*, 142 F.3d 1217 (1998).

[T]o 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 the United States after such conviction,
- but only after the state or local law enforcement officials obtain appropriate confirmation from the [INS] of the status of such individual and only for such period of time as may be required for the [INS] to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.⁴⁹

The plaintiff made an *exclusio unius* argument that the statute's explicit detailing of areas of local authority in criminal arrests precluded the inference of additional authority.⁵⁰ The court rejected this argument, finding that the legislative history showed a concern that local law enforcement not be barred from enforcing immigration law in criminal area.⁵¹

The narrow interpretation of this holding is that a local official may arrest persons for *criminal* violations when done in the lawful course of a state officer's stop or arrest authorized under state law.⁵² A much broader interpretation would hold that state and local law enforcement officers are

49. 8 U.S.C. § 1252c(a) (2000).

50. Defendant argued that all arrests not authorized by Section 1252c were prohibited by it, and that its passage displaced existing federal and state authority for local law enforcement officers to arrest for immigration violations. *Vasquez-Alvarez*, 176 F.3d at 1297.

51. *Id.* at 1299-1300 ("There is simply no indication whatsoever in the legislative history to Section 1252c that Congress intended to displace preexisting state or local authority.").

52. According to the court's statement of facts:

INS Special Agent . . . Valentine . . . observed an apparent drug transaction between an Hispanic male and another individual . . . Valentine telephoned Edmond Police Officer Bob Pratt and asked him to investigate the suspicious transaction [and] expressed suspicion that the Hispanic male was an illegal alien. Valentine asked Pratt to arrest the Hispanic male if Pratt came in contact with him and found that he was, in fact, in the country illegally. . . . Pratt went to the restaurant and [interviewed] a restaurant employee. . . . Upon questioning, the employee told Pratt that his name was Ronnie Alvarez and admitted that he was an illegal alien. In light of the request from Valentine, Pratt arrested the illegal alien and transported him to the city jail to be held for the INS. At that time, Pratt did not know that the illegal alien had a history of prior criminal convictions and deportations.

Id. at 1295-96.

empowered to arrest for *criminal* violations of federal immigration law.⁵³ This interpretive tension has not yet been resolved.

The legal terrain is further confused by the Ninth Circuit's *Gonzales v. City of Peoria* decision,⁵⁴ wherein the local police department adopted a policy authorizing local officers to arrest undocumented persons for violating immigration laws.⁵⁵ On the preemption issue, the Ninth Circuit held that "federal law does not preclude local enforcement of the *criminal* provisions of the [Immigration and Naturalization] Act,"⁵⁶ but for *civil* violations the court found that federal law was so pervasive and comprehensive that state action was preempted. Accordingly, the court held that the authority of state officials to enforce the INA "is limited to criminal violations."⁵⁷ Further, state law enforcement authority to enforce federal immigration laws is subject to two other requirements. First, state law must grant local police the affirmative authority to make arrests under federal statutes.⁵⁸ In this case, the court found that under Arizona's common law a state officer could execute a warrantless arrest for a misdemeanor.⁵⁹ Authority to make arrests, the court ruled, did not extend to detaining persons where they had admitted that they lacked proper documentation under federal immigration law.⁶⁰ Second, the court held that

53. The court stated in dicta that federal law as currently written does nothing "to displace . . . state or local authority to arrest individuals violating federal immigration laws." Rather, federal law "evinces a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws." *Id.* at 1300.

54. 722 F.2d 468 (9th Cir. 1983).

55. *Id.* at 472 (the official memorandum stated that "state law enforcement officers have the authority to make arrests for federal violations [and] . . . take illegal aliens into custody.").

56. *Gonzales*, 722 F.2d at 475 (emphasis added). The court concluded that the city's enforcement activities were in harmony with the enforcement activities of federal officials because both "[f]ederal and local enforcement ha[d] identical purposes—the prevention of the misdemeanor or felony of illegal entry." *Id.* at 474.

57. *Id.* at 474-76 ("We assume that the civil provisions of the Act regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration.").

58. *Id.* at 475.

59. *Id.*

60. The court stated:

Arrest of a person for illegal presence would exceed the authority granted . . . [A]n arresting officer cannot assume that an alien who admits he lacks proper documentation has violated [criminal provisions]. Although the lack of documentation or other admission of illegal presence may be some indication of illegal entry, it does not, without more, provide probable cause of the criminal violation of illegal entry. The arrest must therefore be supported by additional evidence that the arrestee entered without inspection.

police procedures and actions must comport with the requirements of the Fourth Amendment.⁶¹ The court found that the city's procedures violated Fourth Amendment requirements because they did not require probable cause.⁶²

This case imposes upon local officers the burden of determining when violations are civil versus criminal. *Salinas-Calderon*, if read broadly, provides for local general investigative authority in federal immigration matters. *Rodriguez v. Peoria* proscribes *civil* immigration enforcement. The Tenth Circuit's *Vasquez-Alvarez* decision allows state police officers to engage in the enforcement of only *criminal* immigration violations. The legal terrain is confusing. It is made even murkier since Attorney General Ashcroft's entreaty to local law enforcement skirts whether he intends local law enforcement to intervene only in encounters where there may be a criminal violation or rather all encounters.

A further statutory argument can be made that under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 any delegation of federal immigration enforcement authority to state officers must follow the strict procedures of the Act, rather than the loose invitation to "cooperate" extended by Attorney General Ashcroft. Section 133 creates the authority to enter into a cooperative agreement:

[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.⁶³

Section 133, it is argued, sought to clarify the confusion and complexity that arises when local law enforcement becomes involved in federal immigration matters. Section 133 is specific about how this is to occur: cooperative arrangements can only be authorized through *formal* agreements (not invitations

In implementing the arrest authority granted by state law, local police must be able to distinguish between criminal and civil violations and the evidence pertinent to each. In the future, this may require refinements of both the written policies and officer training programs.

Id. at 476-77.

61. U.S. CONST. amend. IV ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated.").

62. *Gonzales*, 722 F.2d at 477.

63. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, sec. 133, § 287, 110 Stat. 3009-563 (codified at 8 U.S.C. § 1357(g)(1) (2000)).

contained in a press release such as Ashcroft's).⁶⁴ Section 133 imposes numerous constraints. First, the agreement must describe the services state officers will provide.⁶⁵ The state must designate specific officers who will be authorized to "perform a function of [a federal] immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States."⁶⁶ In addition, state officers or employees must "have received adequate training regarding the enforcement of relevant Federal immigration laws."⁶⁷ The federal government must certify that such officers "have received adequate training regarding the enforcement of relevant Federal immigration laws."⁶⁸ Finally, the statute requires that any and all local law enforcement officials performing these functions be subject to the direction and supervision of the Attorney General.⁶⁹

By its terms, the Act permits additional kinds of arrangements that could extend to Ashcroft's invitation to state officers. Section 133(10) states in a catch-all proviso that:

(10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State . . .

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.⁷⁰

Under the statutory canon *inclusio unius est exclusio alterius*,⁷¹ it would be erroneous to interpret this proviso as being broader than the body of the statute and thereby applying to Ashcroft's entreaty. Where the legislature went through the trouble of enumerating in full detail the circumstances under which the federal government can delegate authority to the states, the implication is that the legislature did not intend a catch-all provision such as Section 133(10) to include delegations not of the type of the prior enumerations. Moreover, under the Whole Act Rule,⁷² the proviso should be interpreted narrowly. The scheme

64. *Id.*

65. *See id.*

66. *Id.*

67. *Id.* (codified at 8 U.S.C. § 1357(g)(2) (2000)).

68. *Id.*

69. *Id.* (codified at 8 U.S.C. § 1357(g)(3) (2000)).

70. *Id.* (codified at 8 U.S.C. § 1357(g)(10) (2000)).

71. This canon means "inclusion of one thing indicates exclusion of the other." WILLIAM ESKRIDGE, JR., PHILIP FRICKEY, & ELIZABETH GARRETT, *CASES & MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (3d ed. 2001).

72. This rule provides that each section must be interpreted together with the rest of the section and the entire statute. Any attempt to segregate any portion of the statute

of the Act is that delegations are narrow and carefully delineated. The statute's numerous requirements are designed to ensure that delegations are tight in scope and explicit. Moreover, the federal government must supervise and train state officers engaged in immigration enforcement actions to ensure that there is no overreaching.

The more prudent approach would be for states to enter into Section 133 agreements. This approach has been followed by Florida Governor Jeb Bush who entered into such an agreement with the Department of Justice.⁷³ Significantly, in this pilot project only thirty-five Florida local law enforcement officers will aid and assist the INS in narrow anti-terrorist work "under the direct supervision" of the federal INS officials.⁷⁴ Florida has emphasized that the task force would *only* work on anti-terrorism suspects and not focus on general enforcement of immigration laws.⁷⁵

3. Possible Fourth Amendment Constitutional Challenges

Attorney General John Ashcroft's proposal does not address whether the "encounters" for the National Crime Information Center ("NCIC") checks could be considered stops that require reasonable suspicion under the Fourth Amendment. This is an issue that state law enforcement would have to resolve, however, if they were to cooperate in the manner envisioned by the Ashcroft Justice Department.

A "stop" is a type of seizure where there is a show of force and show of authority. In *United States v. Mendenhall*,⁷⁶ the Court concluded that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."⁷⁷ Innocent contacts or police-citizen encounters, such as stopping to ask for directions, do not constitute a stop.⁷⁸ In *Mendenhall*, the Court further gave examples that might indicate a

distorts legislative intent. *Id.* at 635.

73. Memorandum of Understanding between Department of Justice and the State of Florida (July 2, 2002), at <http://www.homelanddefense.org>.

74. *Id.*

75. Mike Branom, *35 Police Officers Receive Immigration Enforcement Powers in Florida*, SOUTH FLORIDA SUN-SENTINEL, Aug. 16, 2002, at <http://www.usbc.org/info/everything/0802policeofficers.htm> ("[o]fficials would only work on anti-terrorism matters—not routine immigration cases.").

76. 446 U.S. 544 (1980).

77. 446 U.S. at 553.

78. In *United States v. Sokolow*, 490 U.S. 1, 7 (1989), the Court reiterated that: In *Terry v. Ohio*, . . . we held that the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion

seizure, even where the person did not attempt to leave: “[T]he threatening presence of several officers, the display of a weapon . . . , some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.”⁷⁹ The length of the encounter must be reasonable.⁸⁰ There is not a time limit as to when an “encounter” becomes a stop. The duration, location, invasiveness, and freedom to walk away are all factors in this “totality of circumstances” test.⁸¹

Accordingly, NCIC “encounters” *may* be considered a stop, in which case the officer must meet the legal standard of “reasonable suspicion.”⁸² Courts have not ruled whether, as a class, NCIC checks are “stops” under the Fourth Amendment; rather, their approach has been to examine the fact circumstances of each case as it arises.⁸³ For example, in *United States v. McManus*,⁸⁴ the Eighth Circuit held no seizure occurred when the defendant was told to have a seat while the officer held the defendant’s driver’s license and conducted three routine computer checks as part of a vehicle identification number (VIN) verification procedure.⁸⁵ By contrast, in *State v. Damm*,⁸⁶ a Kansas federal

supported by articulable facts that criminal activity “may be afoot,” even if the officer lacks probable cause. . . [T]he Fourth Amendment requires some minimal level of objective justification for making the stop [that] is considerably less than proof of wrongdoing by a preponderance of the evidence We have held that probable cause means a fair probability that contraband or evidence of a crime will be found, and the level of suspicion required for [reasonable suspicion] is obviously less than that for probable cause

Id. at 7 (citations omitted).

79. *Mendenhall*, 446 U.S. at 554.

80. In *State v. Taber*, 73 S.W.3d 699 (Mo. Ct. App. 2002), the court held that: Stopping a motor vehicle and detaining its occupants for an alleged traffic violation constitutes a seizure within the meaning of the Fourth Amendment If an officer has an articulable suspicion that the driver of a vehicle is committing, or has committed, a traffic violation, then there is a sufficient basis for a . . . stop of the vehicle. . . . However, [i]f the detention extends beyond the time reasonably necessary to effect its initial purpose, the seizure may lose its lawful character unless a new factual predicate for reasonable suspicion is found during the period of lawful seizure.

Id. at 705 (citations omitted).

81. *Id.*

82. *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

83. *See, e.g., United States v. McManus*, 70 F.3d 990, 993 (8th Cir. 1995) (declining to rule on the overall issue of whether the NCIC checks are searches under the Fourth Amendment, but deciding in this particular case that the NCIC check was justified).

84. *Id.*

85. *Id.*; *see also United States v. Harris*, 528 F.2d 1327, 1330 (8th Cir. 1975)

district court found that the officer exceeded the scope of traffic stop when she compelled passengers, for whom she had not developed reasonable suspicion, to produce their driver's licenses and then ran computer checks on the licenses. Checks revealed a passenger was wanted on a warrant; the passenger was arrested and a search incident to arrest revealed drugs. The court held that the search was illegal because it was tainted by the illegal scope of the stop.⁸⁷

In sum, the cumulative case authority indicates that this is an open issue that courts will decide on a case by case approach. Hence, to agree to do NCIC checks as requested by Attorney General Aschroft will mean that local police departments will be subjecting their actions to the exacting scrutiny of Fourth Amendment requirements.

4. Authority Under Missouri State Law

Missouri has no express prohibition against local cooperation with federal immigration law enforcement, unlike Oregon⁸⁸ and various municipalities.⁸⁹ Without a prohibition, the question becomes whether, under state law, local law enforcement has the authority to execute detentions and arrests for federal immigration law. Missouri Revised Statutes Section 548.05 authorizes sheriffs, deputies, and highway patrol officers to execute warrantless searches, similar to the issue in *Rodriguez v. Peoria*, but such authority extends only to violations of state law. Section 548.05 allows for warrantless detention and arrest where the "officer has reasonable grounds to believe [the suspect] has violated *any law*

(NCIC was justified because officer had viewed multiple scratches on the car); *United States v. Lopez*, 777 F.2d 543, 547-48 (10th Cir. 1985) (NCIC check warranted when out-of-state automobile was not registered to driver); *United States v. Rubio-Rivera*, 917 F.2d 1271, 1276 (10th Cir. 1990) (immigration agent authorized to conduct an NCIC check as part of his normal inquiry at border checkpoint).

86. 787 P.2d 1185 (Kans. 1990).

87. *Id.* at 1188; *see also* *Wilson v. State*, 874 P.2d 215, 222, 224 (Wyo. 1994) (The law enforcement officer lacked any "reasonable suspicion of past criminal conduct" and the court further concluded that, "when no observed violation of the law is present, the intrusion required to run an NCIC or warrants check requires reasonable suspicion of criminal conduct.").

88. Oregon law prohibits law enforcement from apprehending "any persons whose only violation of law is that they are persons of foreign citizenship residing in the United States in violation of federal immigration laws." OR. REV. STAT. § 181.850 (2001).

89. Los Angeles passed an ordinance in 1979 that reads: "No officer of the LAPD shall cooperate with the INS to inquire into the immigration status of an individual except and unless required by city, state, or federal law to inquire into the immigration status of an individual seeking LAPD employment." Reginald Shareef, *Police Should Work with INS*, ROANOAKE.COM, Oct. 29, 2001, www1.roanoke.com/columnists/shareef/3850.html.

of this state.”⁹⁰

Missouri Revised Statutes Sections 84.440 and 84.090 cover Kansas City and St. Louis. The statute would seem to set up broader authority, because a police official may detain or arrest an individual where the officer “shall have reason to believe that any person has committed, or is about to commit, within the city or on public property of said city beyond the corporate limits thereof . . . any breach of peace or violation of law and order.”⁹¹ Arguably the term “any violation of law and order” could reach federal immigration violations. Under the statutory canon of *ejusdem generis*,⁹² however, “any violation of law

90. MO. REV. STAT. § 544.216 (2000) (emphasis added). The text reads: Any sheriff or deputy sheriff, any member of the Missouri state highway patrol, and any county or municipal law enforcement officer in this state, except those officers of a political subdivision or municipality having a population of less than two thousand persons or which does not have at least four full-time nonelected peace officers unless such subdivision or municipality has elected to come under and is operating pursuant to the provisions of sections 590.100 to 590.150, . . . may arrest on view, and without a warrant, any person the officer sees violating or who such officer has reasonable grounds to believe has violated any law of this state, including a misdemeanor or infraction.

Id.

91. *Id.* § 84.440 (emphasis added). The full text reads: In case any police official shall have reason to believe that any person has committed, or is about to commit, within the city or on public property of said city beyond the corporate limits thereof any breach of peace or violation of law and order, or that any person found within the city or on public property of said city beyond the corporate limits thereof is charged with the commission of crime in the state of Missouri, against whom criminal proceedings shall have been issued, or when any person may have committed an offense within view of a member of such police force, said police official may cause such person to be arrested by any member of the police force. In cases where officers make arrest for crime committed within their view, the offenders shall at once be conveyed before some police judge or some judge in the city and the proper complaint against him shall be filed by said officer.

Id. The statute pertaining to St. Louis reads:

In case they shall have any reason to believe that any person within said cities intends to commit any breaches of the peace, or violation of the law or order beyond the city limits, any person charged with the commission of crime in said cities and against whom criminal process shall have issued, may be arrested upon the same in any part of this state by the police force . . .

Id. § 84.090(10).

92. This rule provides that “[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” See ESKRIDGE & FRICKEY, *supra* note 71, at 637.

and order” should be read in conjunction with “breach of peace,” where the former (“any violation of law and order”) should not be interpreted to be broader than the latter (“breach of peace”). As construed by Missouri courts,⁹³ and defined by statute,⁹⁴ breaches of peace are *minor* offenses that do not rise to the level of federal criminal activity. Accordingly, the general term “any violation of law and order” is constricted by the narrower meaning of “breaches of peace” and, therefore, should not include federal crimes but, rather, should mean civil law misdemeanors under state law.

In addition, a narrow interpretation is consistent with the overall scheme of the statute (the Whole Act Rule). According to Missouri court interpretations, this is a restrictive statute, narrowly detailing in what areas law enforcement may perform arrests.⁹⁵ If the legislature had intended for law enforcement to have broad authority, it would not have expended the time and effort in writing up Missouri Revised Statutes Sections 548.05, 84.440, and 84.090.⁹⁶

Therefore, under this Article’s interpretation of applicable statutes, Missouri law enforcement *does not* have the authority to attempt to enforce federal immigration laws, and is legally precluded from engaging in federal immigration law enforcement, even if limited in scope.

B. Politics and Policy

If Missouri cooperation with federal efforts was desired, a legislative clarification that Missouri state law enforcement does have such authority would be prudent.⁹⁷ There are important policies and interests in conflict.

93. In *Kansas City v. Thorpe*, 499 S.W.2d 454 (Mo. 1973), the Supreme Court of Missouri held that in Missouri “breach of the peace,” unless otherwise defined in the ordinance or statute using the term, refers only to acts or conduct inciting violence or intended to provoke others to violence. *Id.* at 458. The court also reasoned that the term “breach of the peace” had to be narrowly construed to avoid possible constitutional infirmities for vagueness and over breadth. *Id.*

94. MO. REV. STAT. § 574.010 (2000). The statute defines the crime of “peace disturbance” as limited to making noise, using offensive language, making threats, creating odors, fighting, using public places as private property, and obstructing traffic and impeding ingress to other adjoining properties.

95. See *City of Fredericktown v. Bell*, 761 S.W.2d 715, 716 (Mo. Ct. App. 1988) (holding that the warrantless search statute should “be narrowly construed to avoid the possibility of serious abuse”).

96. See also *id.* at 717 (arguing that the warrantless search provision must be construed together with other provisions relating to the same subject matter in order “to harmonize and so as to give meaning to all the provisions of each”).

97. Significantly, South Carolina Attorney General Charlie Condon urged the South Carolina legislature to pass a bill that would clarify whether law enforcement could work with the INS to enforce immigration laws. He cites the terrorist attacks of

On one side are admittedly noble motivations, wanting to help the federal government with the awesome responsibility of homeland security. The federal Office of Homeland Security wants increased cooperation from state governments.⁹⁸ As well, those who argue for stricter enforcement of immigration laws argue that undocumented immigrants are clearly breaking laws by not regularizing their status within U.S. borders or by failing to exit voluntarily. Local police, some argue, should enforce all laws, whether local or federal.⁹⁹

On the other side of the ledger are a wide range of arguments and interest groups. First, as set forth in Part II.A.2, *supra*, the interplay between federal and state law in this area makes the area highly complex. Simply determining whether a person is in the United States legally or is deportable requires some familiarity with the complex ways in which federal immigration law cubbyholes entries, classifies visas, and provides exemptions. A wide array of groups that include local law enforcement as well as immigration attorneys would argue that it is for just these reasons that the federal immigration statute requires training and supervision of local law enforcement in cooperative efforts. Moreover, as Part II.A.3, *supra*, discusses, police officers must also be wary of Fourth Amendment restrictions.

A second practical argument is that such efforts could undermine ongoing community relationships. “Community-based policing” refers to the idea that law enforcement is more effective when police efforts are supported by the community.¹⁰⁰ For example, police can obtain valuable information from neighbors and rely on local residents to monitor suspicious activities. It is argued that when local police become involved in immigration law, community-policing enforcement efforts are undermined.¹⁰¹ Immigrants typically live in tightly-knit

September 11 as the source of immediacy for these actions. See Mary Beth Sheridan, *Plan to Have Police in Florida Help INS Stir Rights Debate, Activists Say Immigrants’ Trust at Issue*, WASH. POST, March 6, 2002, at A17.

98. The Office of Homeland Security views coordinating cooperation with states as an important part of its mandate, and acknowledges the attraction of using 650,000 local law enforcement officers in federal homeland security efforts. At the same time, the strategic plan repeatedly bows to federalism concerns. See Office of Homeland Security, *National Strategy for Homeland Security* 11, 13 (July 2002), available at www.whitehouse.gov/homeland/book/index.html.

99. According to Jim Pasco, executive director of the National Fraternal Order of Police, which represents 300,000 officers across the country, “[i]f these people are in violation of the law, then state, local and federal police have an obligation to move against violators of immigration law.” Eric Schmitt, *Administration Split on Local Role in Terror Fight*, N.Y. TIMES, April 29, 2002, at A1.

100. See generally *Colloquium on Community Policing*, 90 CAL. L. REV. 1415 (2002).

101. According to Denver Police Department Chief Gerry Whitman, “Communication is big in inner-city neighborhoods and the underpinning of that is trust.

communities that are often geographically segregated. Although individuals may recognize that the undocumented are law breakers, the repercussions may be viewed as too harsh to make calls that might involve inquiries into a suspect's immigration status. Immigrant communities begin to see police departments as a federal enemy, not a local friend. Distrust creates an environment where criminal activity is more likely as people become afraid to talk to local police.

Third, chambers of commerce have opposed more vigorous enforcement of immigration laws. They have argued that an aggressive push to rid the country of undocumented workers would destabilize many industries. Tom Donahue, President of the U.S. Chamber of Commerce, stated pithily, “[i]f we sent them all home, this economy would stop.”¹⁰²

Fourth, immigrant, Asian, and Latino groups have unanimously opposed such laws on civil rights grounds. The biggest concern is that dragnet immigration law enforcement actions have been applied in a heavy handed manner using methods akin to racial profiling. In 1997, local authorities in Chandler, Arizona conducted a series of roundups to help Border Patrol agents find violators of federal immigration laws. Local residents, including U.S. citizens and at least one local elected official, complained that they were stopped during the operations. The complaints led to an investigation by the Arizona Attorney General. The Chandler official report concluded that police stopped Latinos without probable cause, bullied women and children suspected of being illegal immigrants, and made impermissible late-night entries into homes of suspects. In 1999, the Chandler City Council unanimously approved a \$400,000 settlement of a lawsuit resulting from the roundup efforts.¹⁰³

Fifth, in areas where immigrants and ethnic minorities represent a significant voting block, police immigration enforcement efforts that go awry have the potential for producing political backlash. For example, in 1998, the Salt Lake City Council abandoned a cooperative agreement in which local police

If a victim thinks they're going to be a suspect (in an immigration violation), they're not going to call us, and that's just going to separate us even further.” Michael Riley, *Immigration Bill Has Police Uneasy: Official Says They're Unprepared to Add INS Cases*, DENV. POST, Apr. 22, 2002, at A12.

102. Editorial, *RICOing Immigrants*, WALL ST. J., April 18, 2002.

103. Grant Woods, Office of the Attorney, *Civil Rights Division: Survey of the Chandler Police Department—INS/Border Patrol Joint Operation* (1997), at 33. The Chandler survey concluded that local police involvement in immigration enforcement: [c]an present a conflict to the purpose and intent of neighborhood and community policing. . . . It is this mutual trust and respect that will in turn enhance the ability local police to obtain from willing citizens the information and support necessary to carry out their mission to protect and serve. This joint operation . . . greatly harmed the trust relationship between the Chandler Police and many of the City's residents.

Id. at 33-34.

were engaged in federal immigration enforcement. The Latino community organized and charged racial profiling, forcing Police Chief Ruben Ortega to withdraw his bid for re-appointment.¹⁰⁴ In Los Angeles, Asians and Latinos formed a coalition to push through the local city council a resolution, which still stands, forbidding local law enforcement from becoming involved in federal enforcement of immigration laws.

There is still a larger issue. State law enforcement is being invited to become involved in a quagmire created by Congress and the INS. Lax federal immigration enforcement is responsible for the current situation in which millions of undocumented persons are working and contributing to local communities, yet are technically “law breakers.” Until the federal government addresses how to stem large flows of undocumented persons, estimated at up to 350,000 per year,¹⁰⁵ resources that states expend will be like a drop of water in a large sea.¹⁰⁶ Arlington, Texas, Police Chief Theron Bowman puts it succinctly, “We can’t and won’t throw our scarce resources at quasi-political, vaguely criminal, constitutionally questionable, nor any other evolving issues or unfunded mandates that aren’t high priorities with our citizenry. . . . Our policing authority and professional mission is derived from the citizens.”¹⁰⁷

The stark division between states and the federal government over control and management of national borders has led constitutional analysts to opine that under federalism principles the role of states in immigration enforcement must be limited and largely subservient to the federal government.¹⁰⁸ The federal government is better suited to balancing the wide array of national social, political, and economic interests, and judging the consequences of their actions, or inactions, in regulating foreign nationals. Moreover, such actions have

104. After a 1996 reform act was passed, Salt Lake City attempted a cooperative agreement under Section 133 deputizing twenty local officers to focus on undocumented immigrants. After the Latino community organized against the plan, the city council voted it down. Dawn House, *Rights Advocates Slam Plan for Local Police to Enforce Immigration Laws; Immigration Plan Draws Criticism*, SALT LAKE TRIB., April 5, 2002, at A1; Sheridan, *supra* note 97.

105. Donna Tam, *Bill Seeks to Remove “Undocumented” Stigma*, ASIAN WEEK, July 11, 2002, available at http://www.asianweek.com/2002_07_05/bay_bill.html.

106. Dallas Police Association President Glenn White put it this way, “The strain on local police already is enormous, and to ask us to arrest and detain immigrants is something the federal government needs to address by funding the INS some more and hiring additional personnel.” Michelle Mittelstadt & Alfredo Cocchado, *Local Authorities Could Enforce Immigration*, DALLAS MORN. NEWS, Apr. 4, 2002, at 1A.

107. Jennifer Emily, *Two Chiefs Oppose Immigration Role*, DALLAS MORN. NEWS, Apr. 5, 2002, at 27A.

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

international impacts that only the federal government can properly weigh and negotiate.¹⁰⁹

The federal government will put pressure on states to assist in homeland security initiatives. Accordingly, in the next legislative session, the Missouri legislature will be pressed into weighing these difficult policy choices. From the state perspective, support of federal immigration enforcement efforts will carry substantial economic, social, and political costs—without any guarantee that the homeland will be any more secure. Community costs, in particular, will be dear, as is underscored by law enforcement's reluctance to step into the breach drawn by John Ashcroft's Department of Justice. Finally, whether any such envisioned state role in immigration enforcement is constitutional is a legal limbo. Courts will spend the next few years struggling to draw the lines of state co-authority, which underscores how much of the post 9/11 initiatives are novel and upset the traditional task allocation between the federal and state and local governments in immigration enforcement. Meanwhile, states that do join in enforcement efforts envisioned by the Ashcroft Department of Justice surely will be challenged with litigation by civil rights and immigrant advocates every step of the way.

III. DRIVER'S LICENSES AND RACIAL PROFILING

In 2003, the Missouri state legislature will likely deal with proposals relating to what is, by and large, a mundane form of identification. As discussed in Part III.A, *infra*, the most controversial issue is who should be able to hold a driver's license. Other brooding concerns revolve around the way that requirements are administered, as discussed in Part III.B, *infra*.

A. Access to Driver's Licenses

Recently, at both the federal and state level, there has been a push to increase requirements for access to driver's licenses. Proponents of increased restrictions see driver's licenses as the equivalent of a national identity card; opponents see driver's licenses as only certifying that the holder is fit to drive.

The push to a more restrictive environment is being led by those who see in a driver's license the functional equivalent of national identification.¹¹⁰ Airlines

109. *Zschernig v. Miller*, 389 U.S. 429 (1968) (in which the Supreme Court struck down a state statute that forbade noncitizens from inheriting property unless the noncitizen's country of origin reciprocated such benefits to U.S. nationals). In this case, Justice Douglas stated that a state cannot conduct foreign policy, directly or indirectly.

110. This includes a wide variety of groups like the American Association of Motor Vehicle Administrators, immigration reform groups like the Federation of

accept a driver's license as identification when boarding flights.¹¹¹ Disturbingly, all but one of the Al Qaeda terrorists possessed a valid state driver's license.¹¹² The anti-terrorism effort has brought into focus that states' requirements for driver's licenses vary widely. Some states make access very easy,¹¹³ others, like Florida's new driver's license law, very difficult.¹¹⁴ The President's National Strategy on Homeland Security proposes a federal initiative to standardize requirements for driver's licenses among the states.¹¹⁵

Federalism principles do not preclude federal activity in this area,¹¹⁶ even if up to now this has been mainly a state law domain. The federal bill getting the most attention has been sponsored by Representative Jim Moran. It would require state driver's licenses to be embedded with a micro-chip containing biometric information, such as a digitalized signature, voice, fingerprint, palm print, hand geometry, face recognition, and iris recognition.¹¹⁷ This micro-chip

American Immigration Reform (FAIR), and conservative think tanks like the Heritage Foundation.

111. According to an opinion poll conducted by the American Association of Motor Vehicle Administrators, about seventy-five percent of Americans carry some form of DMV-issued identification. [Http://www.aamva.org/Documents/idsNationalOpinionSurvey.pdf](http://www.aamva.org/Documents/idsNationalOpinionSurvey.pdf) [hereinafter *AAMVA poll*].

112. Tom Wolfsohn, Panel Discussion, *America's Identity Crisis* (May 14, 2002), at <http://www.cis.org/articles/2002/idpanel.html>.

113. Tennessee only requires an affidavit attesting to residency to obtain a driver's license. In North Carolina, applicants who do not have a Social Security number are issued the SSN 999-99-9999. See Marti Dinerstein, Center for Immigration Studies, *America's Identity Crisis: Document Fraud Is Pervasive and Pernicious*, April 2002, at <http://www.cis.org/articles/2002/back302.html>.

114. Florida now requires biometric identifiers on all licenses, and licenses for noncitizens will be clearly marked on their face, expire sooner than those for citizens, and must be renewed in person. See FLA. STAT. ANN. § 322.051, .08, .17, .18, .19 (West 2001).

115. *National Strategy for Homeland Security*, *supra* note 98, at 49. The report recognizes that licenses are a state matter; the federal government is to "assist the states in crafting solutions to curtail the future abuse of driver's licenses by terrorist organizations." The report acknowledges inevitable variation among the states. *Id.*

116. One basis for federal intervention is the spending power, whereby the federal government conditions highway funds or additional funds upon a state's willingness to comply with federal uniform standards. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987) (tying state drinking age requirements to the receipt of federal highway funds). Alternatively, the Commerce Clause could also likely support any such efforts. Roads and highways are quintessential arteries of commerce. Regulating access to highways falls within interstate commerce because of direct effect on interstate traffic. See *Houston, E & W.T.R. Co. v. United States*, 234 U.S. 342 (1914).

117. The Moran Bill requires that a computer chip be embedded in a driver's license or identification card with encoded biometric data matching the holder of the

information would make licenses less subject to forgery.¹¹⁸ Some opponents, however, see this as the functional equivalent of a national identity card.¹¹⁹ As the congressional session closes, the Moran bill remains in committee. This fate might indicate that driver's license reforms that would be this far-reaching face tough opposition from a coalition of libertarians and civil rights activists.¹²⁰ Even though according to polls Americans now support reform efforts,¹²¹ these same polls show hostility to reforms that "look like" a national identity system and "Big Brother" identity techniques.¹²²

This leaves open a variety of approaches that will most likely play out at the state level. Already during the 2002 state legislative session, thirty-one states have considered approximately sixty-one different reforms.¹²³ Five states—Colorado, Florida, Kentucky, New Jersey, and Ohio—enacted new laws that link a driver's license to being lawfully in the country.¹²⁴ Virginia increased

license, and that the data be encrypted to prevent access to data stored on the chip. The bill does not set forth what biometric data should be part of a driver's license, but leaves it to administrative agencies working with states to develop such procedures. *See* Driver's License Modernization Act, H.R. 4633, 107th Cong. (2d Sess. 2002).

118. According to the American Association of Motor Vehicle Administrators, biometric authentication systems use unique physiological characteristics to confirm the person's identity with a high degree of certainty. Natalie Smith, *Putting a Finger on Biometrics*, MOVE MAG., Summer 2002, available at <http://www.aamva.org/products/Move/archive/proPublicationsMOVESummer2002FingerOnBiometrics.asp>.

119. Robert Ellis Smith, *A National ID Card: A License to Live*, PRIVACY J., Dec. 2000; Phyllis Schlafly, *Homeland Security or Homeland Spying?*, COPLEYS NEWS SERV., July 23, 2002.

120. *See* John L. Miller & Stephen Moore, Cato Institute, *A National ID System: Big Brother's Solution to Illegal Immigration* (Sept. 7, 1995) (conservative think tank); National Council of La Raza, *Racing Toward "Big Brother": Computer Verification, National ID Cards, and Immigration Control* (1995) (Latino advocacy).

121. Seventy-seven percent of Americans support closing driver's license "loopholes." *See AAMVA poll*, *supra* note 111.

122. For example, Americans do not support information sharing (where driver's license bureaus share personal information with federal agencies and private parties). The characterizations of reform efforts that most frequently drew negative reactions were if respondents viewed the reform as likely to be linked to "easy access to personal information" (24%) or "encourages personal information sharing and tracking by governmental agencies" (29%). Another 17% rejected efforts toward a national identity card. *Id.*

123. *See* Tyler Moran, National Immigration Law Center, *Most State Proposals to Restrict Driver's License for Immigrants Have Been Unsuccessful*, July 12, 2002 (unpublished memorandum on file with author).

124. COLO. REV. STAT. ANN. § 42-2-107 (West 2002) (SB 112); FLA. STAT. ANN. § 322.051 (West 2002) (SB 520/HB 223); KY. REV. STAT. ANN. § 186.412 (Michie 2002) (HB 188); N.J. STAT. ANN. § 39:3-10 (West 2002) (S2630); OHIO REV. CODE ANN. §

requirements for noncitizens, asking them to submit fingerprint information, and authorized state agencies to share information with federal agencies. Ohio granted its agency authority to implement “security features.”¹²⁵ New Mexico repealed requirements that applicants have a Social Security number, but limited driver’s licenses to persons lawfully in the United States.¹²⁶ South Carolina provides that noncitizens’ licenses expire with the holder’s visa.¹²⁷

In Missouri, an applicant for a driver’s license must provide “full name, Social Security number, age, height, weight, color of eyes, sex, residence, and mailing address.”¹²⁸ The 2002 Missouri legislature considered two proposals, H.B. 1881¹²⁹ and H.B. 1416,¹³⁰ amending this provision. Both were reported out of committee with a “Do Pass” recommendation. H.B. 1881 met with greater legislative success as it was approved in the House and was being considered in the Senate when the session ended.¹³¹ H.B. 1881 adds as valid identification an individual taxpayer identification number (“ITIN”) issued by the Internal Revenue Service to people who file income taxes but who are not eligible for a

4507.09 (Anderson 2002) (SB 184).

125. Further, Ohio now requires that noncitizens be issued “nonrenewable licenses,” which now expire with visa; holders must show lawful presence in the United States to renew a license. S.B. 184, 124th Gen. Assem., Reg. Sess. (Ohio 2002).

126. N.M. STAT. ANN. § 66-5-9 (Michie 2002).

127. S.C. CODE ANN. § 56-1-40 (Law Co-op. 2002), *amended by* H.R. 3933, Reg. Sess. (S.C. 2002) and H.R. 4670, Reg. Sess. (S.C. 2002).

128. MO. REV. STAT. § 302.171 (2000) (emphasis added).

129. H.B. 1881, 91st Gen. Assem., Reg. Sess. (Mo. 2002) (introduced by Rep. Rizzo).

130. H.B. 1416, 91st Gen. Assem., Reg. Sess. (Mo. 2002). Section 1 provides: Any person applying for a driver’s license and who possesses an immigration visa shall notify the department at the time of application and provide documentation relating to the visa upon request by the director. The department shall clearly print a “V” on the front of the driver’s license of an individual with an immigration visa. Any person possessing a valid Missouri driver’s license and an immigration visa shall notify the department upon expiration of the visa.

Id. § 1.

131. Missouri House of Representatives, Activity History for H.B. 1881, *at* <http://www.house.state.mo.us/bills02/action02/aHB1881.htm>.

Social Security number,¹³² and allows the Director of Revenue to accept notarized foreign birth certificates for identification.¹³³

H.B. 1881 addresses an underinclusiveness problem whereby Missouri residents who do not have a Social Security number cannot legally drive in Missouri. The addition of ITIN allows persons who file tax returns to apply for a driver's license. In this subgroup are noncitizens lawfully within the United States who are not authorized to work but who are Missouri residents, such as relatives of foreign students who have a valid visa, and noncitizens who are in the process of applying for legal status and are not yet eligible to work in the United States.¹³⁴ It also includes undocumented workers who work and reside in Missouri.

The principal merit of this reform lies in allowing driver's license bureaus to accept a wider variety of documents that authenticate that the individual applying for a driver's license is who she says she is. Social Security numbers are not foolproof. The federal government is currently making greater efforts to ensure that Social Security numbers are not "stolen."¹³⁵ Unfortunately, the ITIN is even less reliable as identification since it only attests that the holder is paying taxes.

132. H.B. 1416, § 1, 91st Gen. Assem., Reg. Sess. (Mo. 2002). If someone is not eligible for a valid Social Security number, that person is eligible to apply for an ITIN. Some examples of persons who might be eligible for an ITIN are: an individual who has earned income in the U.S., but who is not eligible for a Social Security number, and an individual who is listed as a spouse or dependent on the tax return of a U.S. citizen. See National Immigration Law Center, *Immigrants and Employment: Immigrants and ITINs* (July 2001), at http://www.nilc.org/immsemployment/ITINs/ITINs_short.htm.

133. H.B. 1881, 91st Gen. Assem., Reg. Sess. (Mo. 2002). Section 4 provides in part:

Any alien, as that term is defined in section 442.566, RSMo, may apply for a driver's license pursuant to this section provided he or she complies with the requirements set forth in subsection 1 of this section. The director may also require such applicant to provide a translated and notarized copy of a birth certificate in addition to all other required information.

Id. § 4.

134. Social Security Administration, *Benefit Information: Social Security Card and Number: Questions about Your Social Security number and Card: How does a non-citizen obtain a Social Security number to get a drivers license?*, at <http://www.ssa.gov>. The Social Security Administration issues Social Security numbers to noncitizens who are lawfully authorized to work and for the following nonwork purposes: Federal statute or regulation requires a Social Security number to get the particular benefit or service; or state or local law requires Social Security numbers to get general assistance benefits to which she is entitled. *Id.*

135. Social Security now verifies the birth record for all U.S.-born applicants by contacting the custodian of the record. *Id.*

If proof of identity of noncitizens is a primary homeland security concern, H.B. 1881 allows the Director of the Department of Revenue to accept notarized foreign birth certificates and the *matricula consular* (consular official identification) issued on the basis of foreign birth certificates. Foreign birth certificates and the *matricula*, issued by the Mexican embassy, arguably have much higher reliability than U.S. birth certificates, Social Security numbers or ITINs. In many civil code countries, only the federal government issues birth certificates, unlike in the United States, where 600-plus local jurisdictions with differing rules and procedures issue birth certificates.¹³⁶ This decentralization, according to experts, has made birth certificates in the United States subject to “identity theft.”¹³⁷ In addition, notarization in civil law jurisdictions is a stringent legal process whereby an attorney-notary “gives faith” as to the veracity of the document that he or she notarizes.¹³⁸ If Missouri were to accept the *matricula* or like equivalents, based on foreign birth certificates, Missouri would have a reliable proof of identity for noncitizens who are issued licenses in Missouri.

The fundamental policy fissure is whether workers who have settled in Missouri but who do not have a legal immigration status should be granted the privilege to drive.¹³⁹ H.B. 1881 does not address this concern. One response is to focus on the purpose of licenses, to ensure that responsible drivers are on the roads, rather than the broader function of vouching for lawful presence in the United States. Post 9/11 homeland security has come to mean that the country should do a better job of ensuring that foreign nationals who are within our borders are properly authorized. Yet, this stance also affects the thousands of unauthorized undocumented immigrants who have settled in the state, are contributing to the economy and paying taxes, and are good neighbors.

Immigrant advocates argue that states should focus on the narrower mission of driver’s licenses—ensuring responsible drivers are on the roads.¹⁴⁰ When licenses only qualify motorists as capable drivers, roads are safer for everyone. The lack of public transportation and the day-to-day necessity of getting back and forth from jobs, stores, and medical care, force the unlicensed to drive. They

136. See Dinerstein, *supra* note 113.

137. See Dinerstein, *supra* note 113.

138. See Pedro A. Malavet, *Counsel for the Situation: The Latin Notary, A Historical and Comparative Model*, 19 HASTINGS INT’L & COMP. L. REV. 389, 440 (1996).

139. See also Jim Sanders, *Immigrant-license Bill Returns to Davis*, SACRAMENTO BEE, Aug. 21, 2002, at A1 (describing struggle between legislature, Latino groups, and Governor of California over reforms allowing undocumented immigrants to obtain driver’s licenses).

140. See generally Michele L. Waslin, National Council of La Raza, *Safe Roads, Safe Communities: Immigrants and State Driver’s License Requirements*, NCLR ISSUE BRIEF NO. 6 (May 2002).

may not necessarily know the rules of road. Not having a license also means that these individuals will not have automobile insurance. Finally, by making driver's licenses difficult to obtain, many immigrants remain unaware of laws that prohibit drinking and driving. Such lawlessness creates negative unintended consequences, most notably in rural Missouri where immigrants are driving whether they have licenses or not—and they are driving great distances. An anecdote illustrates the public safety issue. A recent entry in *The Dunklin Democrat* reported an incident in which a Latina immigrant driving without a license crossed the median and crashed into a father and son on the opposite road.¹⁴¹ She was cited for imprudent driving, *no operators license*, and no child restraint. How many more people have been injured, in part because licensing requirements make it difficult to reach those who most need driver's education, can only be speculated. Admittedly, making driver's licenses more accessible will not necessarily mean that immigrants will adopt safer driving habits. What it does mean is that, first, these new drivers will have to learn Missouri driving rules in the process of obtaining a license and second, that these drivers will be in a position to purchase automobile insurance. These are important gains that will decrease the public safety hazards experienced in rural Missouri.

Immigrant rights advocates are skeptical whether restrictive license requirements address valid homeland security concerns.¹⁴² Perhaps the place to start is the practice of accepting driver's licenses to board aircraft. It may be appropriate to require noncitizens to produce more verifiable documents than a driver's license when they board a plane, like a passport or a notarized birth certificate. Further, state legislative efforts that would link driver's licenses to legal presence in the United States have the unintended consequence of shifting policing burden of beginning to crack down on illegal immigration to the states. The state administrative process of issuing a driver's license would become a point where state officials would be forced to verify lawful presence. With at least eight million undocumented persons in the United States, it is clear that federal monitoring of legal presence has been very lax. The formidable challenge of enforcing legal presence requirements would then be shifted to state driver's license bureaus. The magnitude of the problem is so vast that Congress is now considering regularizing the status of the many undocumented workers who have settled in the United States, *as a homeland security measure*, recognizing that INS resources would be better used if they focused on the

141. See *Police Reports*, DAILY DUNKLIN DEM., Aug. 14, 2002, at <http://news.mywebpal.com/partners/885/public/index.html> (“Head-on crash near Kennett injures five . . . a 1980 GMC driven south by Flor B. Garza . . . ran off the highway, the driver overcorrected and the vehicle crossed the centerline hitting a northbound 1990 Plymouth driven by Oras W. Butler. . . . Garza was cited for careless and imprudent driving, *no operators license* and no child restraint.”) (emphasis added).

142. See Waslin, *supra* note 140.

foreigners who might pose a realistic terrorist threat.¹⁴³ One way to bring this issue into focus is to consider the profiles of the Al Qaeda terrorists and the prototypical immigrant undocumented worker. None of the terrorists involved in 9/11 terrorist acts were *working* in the United States.¹⁴⁴ By contrast, many undocumented workers are employed in difficult manual labor, like food processing, agriculture, and the resort and hotel industries. Others are political refugees who have fled disintegrating countries, like many in the Croatian and Vietnamese communities in St. Louis. None of these groups constitute terrorist threats.

One final way to frame this issue is to consider the constitutional concerns raised by state attempts to regulate driver's license access more stringently. The first constitutional question is whether access to a driver's license is a governmental benefit that constitutes a property interest under the Fourteenth Amendment's Due Process Clause.¹⁴⁵ Whether a person is legally in the United States or not, the Due Process Clause of the Constitution protects persons from government processes that deprive them of "life, liberty or property," without proper safeguards. In *Plyler v. Doe*, the United States Supreme Court held that the undocumented merited constitutional protections because some "will remain in this county indefinitely and become lawful residents or citizens. . . . States [should not] . . . promot[e] the creation and perpetuation of a subclass."¹⁴⁶ Under *Board of Regents v. Roth*,¹⁴⁷ property interests are defined by existing state rules that proscribe benefits and support claims of entitlement. A benefit that constitutes "property" must be important to individuals in their daily lives, or otherwise create a reasonable expectation upon which persons have relied.¹⁴⁸ Access to a driver's license could be said to be such a right. In a country where public transportation is lacking in all but large metropolitan areas, being able to drive a car to eat, work, go to school, get medical care, and worship makes driving a prerequisite to filling basic human needs. A court could hold access to

143. Marcelo Balive, *Will Immigration Reform Help the U.S. Fight Terrorism?*, PACIFIC NEWS SERVICE, Oct. 29, 2002 (citing Rep. Dick Gephardt's speech introducing a bill that would grant undocumented immigrants legal status, as an "amnesty [that] would aid the anti-terror war by bringing the hard-working undocumented 'out of the shadows' so that authorities can focus on catching real terrorists.").

144. As a California advocate put it, "Terrorism . . . is the type we've seen from the Timothy McVeighs and the Ted Kaczynskis . . . or people involved in anthrax—not farm workers from the Central Valley or restaurant workers." See Sanders, *supra* note 139.

145. U.S. CONST., amend. XIV, § 1.

146. See *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding constitutional protections applied to the right of children of undocumented workers to go to school).

147. 408 U.S. 564, 577 (1972).

148. *Id.* There is tension between these alternative definitions.

a license as being a property right because it is a key instrument to have meaningful access to basics; not holding it to be a property right creates a “subclass within our boundaries” as described by *Pyle* since only this class of residents would have to struggle with transportation to obtain their basic needs.¹⁴⁹ This issue has not yet been placed before the Supreme Court.¹⁵⁰

Missouri’s regulation of access to driver’s licenses should also be analyzed under the Supreme Court’s jurisprudence focusing on alienage discrimination. Under *Graham v. Richardson*,¹⁵¹ and related cases, state laws enacted for the purpose of regulating aliens are invalid. Most modern instances of alienage discrimination, however, do not involve direct or explicit discrimination. In *Graham*, for example, the regulation of entry of noncitizens was indirect. Arizona and Pennsylvania denied welfare benefits to resident noncitizens who had not resided in the United States for a specified term (in Arizona’s case, a 15-year durational residency requirement).¹⁵² The Court invalidated the state statutes on two grounds, as violating the Equal Protection Clause and encroaching upon the exclusive federal power of immigration.¹⁵³

It could be argued that Missouri’s statute denies access to driver’s licenses to some noncitizens since it conditions the benefit of lawfully driving upon the applicant holding Social Security identification. Under the Equal Protection rationale of *Graham*, classifications based on alienage cannot be the basis for discrimination.¹⁵⁴ The Equal Protection attack, however, would have to establish that the statute classifies on the basis of citizen/noncitizen classification. It is by *impact* only that this argument could be made. In *impact* cases, legislative discrimination does not exist unless there is intent.¹⁵⁵ As originally drafted, the imposition of Social Security identification to access a driver’s license was not intended to reach aliens, but rather was supposed to reach the spouses of welfare recipients who had evaded their child support obligations. Only in subsequent post 9/11 discussions has it become part of the legislative consciousness that this requirement is excluding aliens. Thus, actual legislative discrimination as conceptualized in cases like *Palmer v. Thompson*¹⁵⁶ would not likely be found in

149. 457 U.S. at 230.

150. The Court has considered whether a state government must provide a hearing before suspending a driver’s license. See *Bell v. Burson*, 402 U.S. 535, 542-43 (1971) (so requiring).

151. 403 U.S. 365 (1971); see also *Hines v. Davidowitz*, 312 U.S. 52 (1940) (striking down a Pennsylvania alien registration statute); *Toll v. Moreno*, 458 U.S. 1 (1982) (striking down state law denying noncitizens in-state tuition).

152. *Graham*, 403 U.S. at 372.

153. *Id.* at 376-77.

154. *Id.*

155. *Washington v. Davis*, 426 U.S. 229 (1976).

156. 403 U.S. 217 (1971) (where the Court was not willing to attribute the

this case, since legislators never “intended” to discriminate against aliens (i.e., consciously tried to harm them). The requisite intent could be shown circumstantially, however, under principles established in *Washington v. Davis*¹⁵⁷ and *Personnel Administrator of Massachusetts v. Feeney*.¹⁵⁸ The Court in *Feeney*¹⁵⁹ stated that “when the adverse consequences of a law upon an identifiable group are plainly inevitable . . . a strong inference that adverse effects were desired can reasonably be drawn.” Here, to require a Social Security number “plainly” and “inevitably” leads to the consequence that most noncitizens will not be able to drive legally in Missouri.

If the statute could be said to classify by alienage, rather than be an exercise of the state’s police power, a court would also focus on the federalism concerns of *Graham*.¹⁶⁰ Language in *Graham* illustrated how a court would jealously guard the federal prerogative to regulate noncitizens.¹⁶¹ In *Graham*, the Court emphasized that the right to travel applied with equal vigor to noncitizens, as they had the right to “enter and abide in any State in the Union.”¹⁶² The Court explained that “states [should] . . . neither add nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United State or the several states.”¹⁶³

In sum, driver’s license laws are vulnerable to constitutional attack. First, a *Roth* rationale could view access to the benefit of driving as an important “property” right that raises due process concerns. Second, under *Graham*’s dual Equal Protection-federalism analysis, Missouri’s driving regulations could be viewed as so restricting the movement of noncitizens as to deny them “an equality of legal privileges with all citizens.”¹⁶⁴ While this Article does not conclude that these attacks would be successful, the framing of the constitutional issues is helpful to underscore the strong link between access to driver’s licenses and basic civil rights.

discriminatory and segregationist “intent” of some legislators as constituting intent to discriminate).

157. 426 U.S. at 235 (Stevens, J., concurring) (“[T]he most probative evidence of intent will be the objective evidence of what actually happened rather than the subjective mind of the actor . . . the actor is presumed to have intended the natural consequences of his deeds.”)

158. 442 U.S. 256 (1979).

159. 442 U.S. at 262, 279 n.25.

160. *Compare Graham* (striking down state regulation restricting welfare benefits to noncitizens) with *Matthews v. Diaz*, 426 U.S. 67 (1976) (upholding federal regulation restricting welfare benefits to noncitizens).

161. *Graham v. Richardson*, 403 U.S. 365, 377 (1971).

162. *Id.* at 378.

163. *Id.* (quoting *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948)).

164. *Id.*

B. Due Process and Equal Protection Concerns

As reported by a survey of first generation Latinos living in Southwest Missouri, the number one obstacle that they experience in settling in Missouri communities is getting a driver's license.¹⁶⁵ Part of the problem is legal, as discussed in Part III.A, *supra*, but there are also shortfalls in the way that the license system is administered.

First, current law leaves room for possible discrimination aimed at non-English speakers and first generation immigrants. Under Missouri regulations, *each officer* receiving documentation can determine what documents fulfill the statutory requirements.¹⁶⁶ Arguably, the intent is to allow for necessary discretion by individual officers because their work involves case by case analysis. It is not intended to encourage inconsistent practices from bureau to bureau or discrimination on the basis of nationality, citizenship, or accent. Elsewhere, the statute provides for uniformity in state-wide testing, thus, showing an intent that *procedures* be as uniform as possible.¹⁶⁷ Nevertheless, according to reports, there may be inconsistent practices among bureaus with some driver's license officials interpreting their mandate aggressively. In Noel and Mexico, Missouri, driver's license officials reportedly were calling local police when they suspected that a document submitted in support of a driver's license application was false.¹⁶⁸ The only persons who were being referred were applicants of Latino origin. There are also reports that Jasper County is

165. The SOUTHWEST SURVEY asked respondents an open ended question, "what is the hardest thing for you to do in this community?" The number one response, cited twice as often as the next response, was getting a driver's license (40%). See Jim Wirth, THE STORY OF THE HISPANIC/LATINO EXPERIENCE IN SOUTHWEST MISSOURI: SURVEYS OF LATINO ADULTS, LATINO YOUTH, AND NON-HISPANIC SERVICE PROVIDERS/COMMUNITY RESIDENTS, at 39 (University of Missouri Outreach & Extension) (2001-02) (on file with Author) [hereinafter SOUTHWEST SURVEY]. Surprisingly, only one percent responded that getting a job was difficult in these communities.

166. The Missouri Driver Guide provides that "additional documentation may be required if the documentation submitted is questionable or if the license office clerk or Missouri State Highway Patrol examiner has reason to believe the person is not who he or she claims to be." MISSOURI DEP'T OF REVENUE, MISSOURI DRIVER GUIDE (2001), at <http://dor.state.mo.us/mvdl/drivers/dlguide/chapter1.htm>.

167. See MO. REV. STAT. § 302.173 (2000) ("The director shall prescribe regulations to ensure uniformity in the examinations and in the grading thereof").

168. E-mail from Pat Williams, Diversity Coordinator, Outreach & Extension, University of Missouri-Columbia to Sylvia R. Lazos Vargas, Associate Professor of Law, University of Missouri-Columbia School of Law (May 20, 2002) (on file with author). These are fee offices. One possible source of inconsistent practices is that fee offices are not subject to direct supervision by the Department of Revenue.

prosecuting persons who submit false documentation with felony forgery and subjecting them to deportation. Darren Wallace, a public defender for the 29th judicial circuit (Jasper County) estimates that he has handled 124 felony forgeries in his five-year tenure. Since June 2000, the prosecutor's office has begun charging Latinos who submit false documentation with felony forgery, and Wallace has handled twenty-seven such cases since June 2000.¹⁶⁹ According to Wallace, Latino clients will not fight charges or deportation because waiting for their day in court means they will sit in a Missouri jail.¹⁷⁰

These reports, if true, reveal erroneous practices. First, the driver's license statute provides that presenting false documents is a misdemeanor *punishable only with a fine under the law*.¹⁷¹ The statute does not provide for incarceration or felony prosecution.¹⁷² While it is true that an applicant submitting false documents is violating other criminal statutes, namely felony forgery, the driver's license statute expressly provides for a penalty in the specific context of applying for a driver's license. The plain meaning of the statute limits the penalty in this case to a fine. Second, under the analysis presented in this Article, local police overstep their authority if they enforce federal immigration laws in this manner. Finally, such reports raise the possibility that driver's license officials could be "racially profiling" applicants and unlawfully discriminating on the basis of ethnicity, national origin, and alienage. That is, an applicant who comes in and is unable to speak English, speaks with an accent, or "looks foreign" is treated more stringently (even being jailed) than an applicant who speaks unaccented English and "looks American." Such unequal treatment based on national origin characteristics could be actionable under an Equal Protection claim.¹⁷³

These complaints raise concerns about the need to review license bureau practices statewide. How consistent are bureau practices with respect to the documentation required by the statute? The statute requires the Director of

169. Interview with Darren Wallace, Oct. 18, 2002.

170. *See id.*

171. MO. REV. STAT. § 302.230 (2000) ("Any person who makes a false unsworn statement or affidavit or knowingly swears or affirms falsely as to any matter or thing required by sections 302.010 to 302.540 shall be deemed guilty of a misdemeanor and punishable only by a fine.")

172. MO. REV. STAT. § 570.090 ("A person commits the crime of forgery if, with the purpose to defraud, the person (1) makes . . . any writing so that it purports to be made by another . . .").

173. In *Whren v. United States*, petitioners claimed that "pretextual stops" based on racial profiling violated the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809 (1996). The Court upheld pretextual stops provided there was probable cause, and noted that claims of racial discrimination must be challenged under the Equal Protection Clause. *Id.* at 813. *See generally* Angela Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1996).

Revenue to make records of denials available for public scrutiny;¹⁷⁴ however, this information is not readily available to public inquiries. The possibility of having this information as readily available as the racial profiling reports¹⁷⁵ should not be foreclosed if there are continuing reports of discriminatory practices. Further, these complaints reveal a need for the Director of Revenue to provide training: first, the permissibility of actions by officials who attempt to enforce federal laws; second, what kinds of law enforcement actions does the statute permit if application records appear to be counterfeit; and third, what kind of special scrutiny is permissible to be applied to immigrants, Asians, and Latinos.

A second area of concern is the availability of driver's license education materials in a language other than English. No court has held that making materials or examinations available only in English rises to a violation of a constitutional Equal Protection right.¹⁷⁶ The Supreme Court has barred private citizen suits under the Civil Rights Act for administering the driver's license examination only in English.¹⁷⁷ Latinos in rural Missouri raise unavailability of

174. Missouri Revised Statutes Section 302.120 provides that "The director of revenue shall file every application for a license received by him and shall maintain suitable indices containing, in alphabetical order: . . . All applications denied and on each thereof note the reasons for such denial." MO. REV. STAT. § 302.120 (2000).

175. Missouri's racial profiling legislation applies only to stops by law enforcement agencies and not administrative actions such as those by the Department of Revenue. *Id.* § 590.650.

176. Courts usually regard government decisions to provide services only in English as a facially neutral act, not as intentional discrimination necessary to make a constitutional Equal Protection claim. *See* *Washington v. Davis*, 426 U.S. 229, 239-40 (1976). When challenges are made against state and federal governments providing services only in English to non-English speakers, the courts have failed to recognize a constitutional duty under the Equal Protection Clause. *See, e.g.,* *Ramirez v. Plough, Inc.*, 863 P.2d 167, 175 (Cal. 1993) (holding that there was no constitutional right for Spanish speakers to receive notice in Spanish terminating or reducing their welfare benefits); *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984) (for failure to provide Social Security forms and services in Spanish); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975) (administering an employment exam in English to non-English speakers). *See also* Steven Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1089 (1996).

177. In *Alexander v. Sandoval*, the Supreme Court held that there was no private cause of action under Title VI of the Civil Rights Act that would have prohibited the Alabama Department of Public Safety from administering its driver's license examination only in English. *Alexander v. Sandoval*, 532 U.S. 275, 292-93 (2001). The state of Alabama had adopted an exclusionary English-only provision requiring the state to conduct all state business in English. *Sandoval* argued that this practice constituted discrimination based on national origin. In this case the Court did not examine the possible constitutional Equal Protection challenge.

material as a significant concern and point out that without driver's license materials in Spanish, they are effectively barred from applying for a driver's license.¹⁷⁸ Nevertheless, recently issued federal regulations require all recipients of federal financial assistance to provide *meaningful access* to services to Limited English Proficient ("LEP") persons or non-English speaking clients.¹⁷⁹ These rules apply to state drivers license bureaus that receive some federal funds.¹⁸⁰ What services must be provided are the result of a four factor assessment, which includes the number of such persons to be serviced, frequency with which they come into contact with the program, the importance of the program, and resources available.¹⁸¹ Missouri driver's license bureaus could be in violation of this directive. For public education reasons and as a result of this directive, Missouri bureaus should reassess state-wide the availability of drivers' education materials to non-English speakers.

C. Racial Profiling of Latinos in Rural Missouri

In 2000, Missouri became the fourth state in the nation to pass legislation on racial profiling.¹⁸² The Missouri statute requires the more than six hundred

178. Leigh E. Herbst, *The Impact of New Immigrant Patterns on the Provision of Police Services in Midwestern Communities* (University of Nebraska-Omaha Ph.D. dissertation 2002).

179. Department of Justice regulations require all recipients of federal financial assistance from the department to provide meaningful access to LEP persons. See *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, 67 Fed. Reg. 41455, 41459 (June 18, 2002) (final).

180. *Policy Guidance on the Title VI Prohibition Against National Origin Discrimination as It Affects Persons with Limited English Proficiency*, 67 Fed. Reg. 4968, 4970 (Feb. 1, 2002).

181. Recipients are required to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons. While designed to be a flexible and fact-dependent standard, the starting point is an individualized assessment that balances the following four factors: (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs. As indicated above, the intent of this guidance is to find a balance that ensures meaningful access by LEP persons to critical services while not imposing undue burdens on small business or small nonprofits. *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, 67 Fed. Reg. 41455, 41459 (June 18, 2002) (final).

182. MISSOURI ATTORNEY GENERAL, ANNUAL REPORT ON 2000 MISSOURI TRAFFIC STOPS, at <http://www.ago.state.mo.us/rpexecsummary.htm> [hereinafter 2000 RACIAL

law enforcement agencies in Missouri to keep records on each traffic stop,¹⁸³ by the race and ethnicity of the detainee, which in Missouri has come to mean White, African-American, and Latino.¹⁸⁴ Local law enforcement can be penalized for not reporting.¹⁸⁵ Consequently, the 2000-01 reports cover upwards of ninety percent of Missouri's law enforcement agencies.¹⁸⁶

The Missouri Attorney General calculates a "disparity index" that reflects the likelihood drivers of a given race or ethnic group are being stopped.¹⁸⁷ It is

PROFILING REPORT].

183. Missouri Revised Statutes Section 590.650(2) provides:

Each time a peace officer stops a driver of a motor vehicle for a violation of any motor vehicle statute or ordinance, that officer shall report the following information to the law enforcement agency that employs the officer:

- (1) The age, gender and race or minority group of the individual stopped;
- (2) The traffic violation or violations alleged to have been committed that led to the stop;
- (3) Whether a search was conducted as a result of the stop;
- (4) If a search was conducted, whether the individual consented to the search, the probable cause for the search, whether the person was searched, whether the person's property was searched, and the duration of the search;
- (5) Whether any contraband was discovered in the course of the search and the type of any contraband discovered;
- (6) Whether any warning or citation was issued as a result of the stop;
- (7) If a warning or citation was issued, the violation charged or warning provided;
- (8) Whether an arrest was made as a result of either the stop or the search;
- (9) If an arrest was made, the crime charged; and
- (10) The location of the stop.

MO. REV. STAT. § 590.650(2) (2000).

184. MO. REV. STAT. § 590.650(1) (2000) ("As used in this section 'minority group' means individuals of African, Hispanic, Native American or Asian descent.").

185. MO. REV. STAT. § 590.650(6) (2000) ("If a law enforcement agency fails to comply with the provisions of this section, the governor may withhold any state funds appropriated to the noncompliant law enforcement agency.").

186. The 2000 Annual Report compliance rate was 97%, and included information from 634 law enforcement agencies reporting information on 453,189 stops from August 28 (when the law took effect) through December 31. Only eight police departments did not submit the information required by law. See *Executive Summary*, in 2000 RACIAL PROFILING REPORT, *supra* note 182. In 2001, more than ninety-one percent of the 668 law enforcement agencies in Missouri filed racial profiling reports. The agencies recorded 1,389,947 traffic stops, resulting in 99,860 searches and 76,567 arrests. See *id.*

187. According to the statisticians, "[t]he disparity index is a gauge of the

obtained by dividing the proportion of stops in comparison to the proportion represented by the driving age minority group in the local population.¹⁸⁸ A value of one represents no disparity; values greater than one indicate over-representation in stops.¹⁸⁹ The reports calculate a search rate, representing what percentage of stops result in searches.¹⁹⁰

Statewide data indicate that African-Americans had a disparity index of 1.27 and 1.33,¹⁹¹ respectively for 2000 and 2001, meaning that African-Americans were about one-third more likely to be stopped as compared to the rest of the population. By comparison, Latinos' state-wide disparity index in 2000-01 of 0.98 and 0.96 meant that their likelihood of being stopped was slightly *lower* than for the rest of population. On the other hand, Latinos had the highest search rates (12.54%), compared to African-Americans (11.47%) and Whites (6.43%). A Latino driver in Missouri was twice as likely to have a vehicular stop result in a search than was a White driver.

Tables 2-5 list Latino "hot spot" racial profiling agencies which were selected based on two criteria: first, the stop disparity index must have been over 1.00 for each of 2000 and 2001 to ensure that this was not a problem of just one year; and second, stops in that jurisdiction must have been greater than ten in order to eliminate outliers based on a small sample size. Disaggregated data show that in hyper-growth rural areas, Latinos are being stopped at very high rates. "Driving while brown" in these jurisdictions means a likelihood of being pulled over anywhere from 12% to 1250% higher in relation to their proportion in the local population.¹⁹² By comparison, the two largest law enforcement agencies in Missouri, the Kansas City and St. Louis City police departments, reported stop disparity indices for Latinos significantly below 1.0; that is, in these urban areas Latinos were *less likely* than Whites to be stopped on the road.¹⁹³

Forty percent of the law enforcement agencies on the hot spot list are in Southwest Missouri. It is also Southwest Missouri that has been the most

likelihood drivers of a given race or ethnic group are stopped based on their proportion of the residential population age 16 and older, and not of the population of motorists on the state's streets, roads, and highways." See *Findings, in MISSOURI ATTORNEY GENERAL, ANNUAL REPORT ON 2001 MISSOURI TRAFFIC STOPS, at* <http://www.moago.org/rpexecsummary2001.htm> [hereinafter 2001 RACIAL PROFILING REPORT].

188. *Findings, in 2001 RACIAL PROFILING REPORT, supra* note 187.

189. *Findings, in 2001 RACIAL PROFILING REPORT, supra* note 187.

190. "Search Rate" is the number of searches divided by the number of stops (x 100). *Findings, in 2001 RACIAL PROFILING REPORT, supra* note 187.

191. *Findings, in 2001 RACIAL PROFILING REPORT, supra* note 187, at T.1.

192. See *supra* Table 1.

193. In 2001, the Kansas City Police Department reported a stop disparity index for Latinos of 0.77, and the St. Louis City Department of 0.56. See *Racial Profiling Data Tables, in 2001 RACIAL PROFILING REPORT, supra* note 187.

impacted by the transformation of rural towns by the meatpacking industry. “Driving while brown” in Southwest Missouri nets one between a 12% (Aurora Police Department in Lawrence county) to 1500% (Goodman Police Department in McDonald county) times greater likelihood of being stopped than other persons in the community.

Table 2

Law Enforcement agency	Total pop. +16	% Latino	2001 Index (no. stops)	2001 Search Rate
Aurora P.D. (Lawrence County)	5292	2%	1.12 (25)	8
Barry County Sheriff	26132	4%	2.23 (34)	17.66
Carl Junction P.D., (Jasper County)	3880	1%	1.56 (41)	12.2
Carterville P.D., (Jasper County)	1383	0.7%	4.7 (79)	24.05
Carthage P.D. (Jasper County)	9829	11.2%	1.18 (299)	12.71
Diamond P.D. (Newton County)	607	1%	12.67 (131)	16.7
Goodman P.D. (McDonald County)	866	0.5%	14.43 (79)	12.66
Jasper P.D.	755	2%	1.15 (6)	0
McDonald County Sheriff	15422	8%	1.82*	7.69*
Monett P.D. (Barry County)	5650	2%	1.43 (146)	0
Neosho P.D. (Newton County)	8040	4%	1.48 (202)	8.42
Newton County Sheriffs	40360	2%	2.38 (29)	17.24
Noel P.D. (Mc Donald County)	1120	33%	1.31 (352)	6.82
Pierce City P.D. (Lawrence County)	1063	0.9%	3.29 (18)	0
Pineville P.D. (McDonald County)	584	0.7%	10.3 (90)	13.33
Sarcoxie P.D. (Jasper County)	1037	0.8%	2.54 (10)	20

* 2000 reported number

These data point to a difficult situation. The seventeen law enforcement agencies above are geographically crowded into a rural five-county corner of Missouri where jurisdictions overlap or are contiguous. Yet the townships are small population-wise. This points to a high degree of law enforcement contact in the every day lives of Latinos. For example, Noel, a township of only one thousand persons, reported 352 stops of Latinos in 2001. This high number in a small jurisdiction *could* suggest that almost every Latino over sixteen has been stopped (total number of Latinos over 16 is 373 versus 352 total stops in 2001), or that every Latino in Noel either has been stopped or likely knows someone who has.

Southwest Missouri agencies also report very high search rates. For example, the 25% search rate reported by the Carterville Police Department in Jasper County means that one in four stops turned into a search of the vehicle, with questioning, and often a physical “stop and frisk” of the driver.

Mid-Missouri is also represented on the hot spot list:

Table 3

Law Enforcement agency	Total pop. +16	% Latino	2001 INDEX (no. stops)	2001 Search rate
Crocker P.D.	770	0.5%	6.61 (16)	14.29
Lexington P.D.	3478	2%	1.44 (29)	20.69
Marshall P.D.	9720	6%	1.26 (63)	6.35
Pettis County Sheriffs	30218	3.3%	2.24 (88)	32.95
Phelps County Sheriffs	31541	1.1%	7.65 (53)	47.17
Saline County Sheriffs	18711	3.7%	1.85 (11)	54.55
Trenton P.D.	4991	1.5%	1.39 (15)	6.67

Pettis, Saline, and Phelps County Sheriffs Departments are stopping Latino drivers two to eight times more frequently than their representation in the population. Stops are frequently evolving into searches—one in three in Pettis, and one in two stops in Saline and Phelps counties.

In Dunklin County, Kennett Police Department, which covers a smaller jurisdiction than Dunklin County’s sheriff,¹⁹⁴ has three times as many stops. Kennett, which is 13% African-American and Latino, reported the most traffic stops of any Dunklin County jurisdiction, a total of 1198, which included 989 Whites, 163 African-Americans, and 38 Latinos. Kennett could be a “hot spot” for almost anyone.

Table 4

Law Enforcement agency	Total pop. +16	% Latino	2001 INDEX (no. stops)	Search rate
Dunklin County Sheriff	25565	2%	2.48 (12)	33.33
Kennett P.D.	8594	1%	2.41 (38)	13.16

Finally, agencies in small jurisdictions of 1000 persons or less are overrepresented on this list, making up around 20% of the “hot spot” list.¹⁹⁵ All of the double digit disparity indices can be accredited to this group.¹⁹⁶

194. The Dunklin County Sheriff’s Department reported 257 traffic stops. Of these, 223 were White motorists, 19 black and 12 Hispanic. *See Racial Profiling Data Tables, in 2001 RACIAL PROFILING REPORT, supra note 187.*

195. *See infra* Table 6.

196. *See supra* Table 2 (showing Latino Racial Profiling Hotspots). Goodman P.D. (14.43), Diamond P.D. (12.67) and Pineville P.D. (10.23) are the only double digit

Table 5

Law Enforcement Agency	Total Pop. +16	Location	2000 Stop Disparity Index	2001 Index (no. stops)	Search Rate
Goodman P.D.	866	SW Mo	20.45	14.43 (79)	12.66
Diamond P.D.	607	SW Mo	14.6	12.67 (131)	16.7
Pineville P.D.	584	SW Mo	12.5	10.3 (90)	13.33
Crocker P.D.	770	Mid Mo	5.51	6.61 (16)	14.29
Oakview P.D.	320	KC metro	3.89	4.93 (67)	7.46
Platte Woods P.D.	400	KC edge	2.38	3.56 (25)	28
Lone Jack P.D.	403	KC edge	3.64	2.37 (15)	6.67

This is not just an issue of small numbers, where small sample sizes lead to randomly appearing results. The number of stops that some of these agencies are undertaking is disproportionate to the size of their jurisdictions. For example, Diamond Police Department in Southwest Missouri serves a township of only 600, and is located on a rural Missouri state highway. Their reported Latino stop disparity indices of 12.67 in 2001 and 14.6 in 2000, for a total of 131 stops, is twice the population of Latinos in this jurisdiction.¹⁹⁷ Moreover, one out six stops in Diamond resulted in a search of the vehicle, almost three times the state wide average for White drivers.¹⁹⁸

There is more bad news. There is increasing noncompliance from state law enforcement agencies in these areas. Two Southwest law enforcement agencies, McDonald County's sheriff and Southwest City Police Department in McDonald County, which reported high stop disparity indices for 2000, have chosen to no longer comply with the racial profiling reporting law.¹⁹⁹ In Dunklin County, Arbyrd, Holland, and Parma were police departments whose reports did not comply with requirements; Steele chose not to submit a report.²⁰⁰ In preparing the 2000 Racial Profiling report, Attorney General Jay Nixon emphasized the importance that law enforcement agencies comply with the racial profiling law.²⁰¹

stop disparity index law enforcement agencies.

197. See *supra* Table 2.

198. See *Racial Profiling Data Tables*, in 2001 RACIAL PROFILING REPORT, *supra* note 187, at T.1.

199. In 2001, non-reporting agencies and noncompliant reports increased, with 41 agencies failing to submit reports and 10 agencies submitting reports not compliant with the law. See *Executive Summary*, in 2001 RACIAL PROFILING REPORT, *supra* note 187.

200. See 2001 RACIAL PROFILING REPORT, *supra* note 187.

201. See *Executive Summary*, in 2001 RACIAL PROFILING REPORT, *supra* note 187.

The law empowers the governor to withhold state money from police agencies that do not comply with the requirement;²⁰² however, as of yet, it does not appear that the governor will exercise this option.

These high indices do not necessarily coincide with racial profiling. As the Missouri Attorney General states, law enforcement offers possible legitimate reasons as to why such indices are showing racial bias, like patrolling crime ridden areas, which also coincide with where minorities live. Interstate highways may bring more outsiders into the jurisdiction so the disparity indices are reflecting the racial profiles of nonresidents traveling through as well as local residents.²⁰³ These explanations have limited application in rural Missouri, however. Rural areas do not contain ghettos or barrios that are crime ridden. Moreover, all rural jurisdictions are located on some rural, state or interstate highway. This Article now considers other plausible explanations for such high stop and search rates.

1. Are immigrant Latinos committing more traffic violations?

One possibility is that Latino immigrants in rural Missouri *are* committing more traffic violations. Latinos in rural Missouri are first generation immigrants mostly working in meat packing and farm work, most have only a basic education and come from rural areas in Mexico and other Latin America countries.²⁰⁴ This is not the profile of a community that is likely to commit violent crimes; however, it is a demographic and cultural profile that reflects a greater likelihood of committing traffic violations.²⁰⁵ Many newly settled Latinos come from rural areas in Latin America where driving without a license may not necessarily result in trouble with the local police; because of a lack of resources, enforcement of traffic laws is not a high priority. Immigrant adults who have learned to drive under one set of rules may be having trouble adjusting to United States' driving rules and customs. Accordingly, Latinos in rural Missouri may be getting stopped more often because they *are* committing more vehicle related infractions. Anecdotal observations from community workers confirm this

202. If a law enforcement agency fails to comply with the provisions of this section, the governor may withhold any state funds appropriated to the noncompliant law enforcement agency. MO. REV. STAT. § 590.650(6) (2000).

203. See *Executive Summary*, in 2001 RACIAL PROFILING REPORT, *supra* note 187.

204. See MID-MISSOURI SURVEY, *supra* note 10; SOUTHWEST SURVEY, *supra* note 165.

205. A recent survey of law enforcement conducted as part of a doctoral dissertation reports that the violations for which Latinos are most likely to be detained are, first, driving violations, then forging (for documentation), and finally domestic disturbances. See Herbst, *supra* note 178 (data from survey).

hypothesis.²⁰⁶ As well, a review of the jail report for McDonald County for June 2002, while not representative, but nonetheless suggestive, shows that Latinos were arrested *five times* more frequently than is proportionate to their population, and over *one-third* of the arrests involved driving violations.²⁰⁷

This underscores the importance of making driver's licenses more readily available. In rural Missouri there is *no* public transportation. People must drive, whether they have a license or not. It is also evident, if the McDonald report is representative, that Missouri law enforcement in rural areas is spending a great deal of resources on policing roads, rather than on more serious crimes.

2. Are local police enforcing immigration law?

Another possibility is that some local police are getting involved in immigration law enforcement, even though, as argued in Part II.A.4, *supra*, the exercise of such jurisdiction is of dubious legality in Missouri. Nevertheless, the McDonald County booking report seems to indicate that local law enforcement jurisdictions in rural Missouri are getting involved in federal immigration law enforcement. At least two out of the eleven bookings of Latinos mention immigration law enforcement.²⁰⁸

The legal line between racial profiling and attempting to enforce immigration law is clear, but one that may be difficult to apply in real life law enforcement. If state officers are stopping Latinos on Missouri roads because their "Mexican appearance" leads an officer to suspect that they are undocumented (or an Asian were stopped for the same suspicion), then this is racial profiling and a violation of Fourth Amendment civil rights. State law enforcement must comply with Fourth Amendment constraints. Under *Terry v. Ohio*²⁰⁹ and its progeny, any stop must be made pursuant to "reasonable

206. See, e.g., Murray Bishoff, *Hispanic Pentecostal Church Feels Pressure in Purdy: Pastor's concern about harassment increases after church window shot out*, MONETT TIMES (June 8, 2001), at http://www.monett-times.com/NF/omf/monett/news_story.html?rkey=0008211+ci=gdn (Pentecostal minister of Spanish-speaking church in Monett reporting that most police action involving local Latinos has been for driving while intoxicated or driving without a license violations).

207. McDonald County Booking Report as reported by Sheriff Robert M. Evenson (June 5, 2002) (unpublished report on file with author). In the week of May 27 to June 3, 2002, there were 25 total arrests; 11 (44%) involved Latinos and 14 Whites/Anglos (56%). The proportion of the population in McDonald County that represents Latinos 16 and over is 8%. Latinos are 5.5 times (44%/8%) over represented in this booking report. Four of the eleven (36%) arrests involved some traffic violation.

208. See *id.*

209. *Terry v. Ohio*, 392 U.S. 1, 30 (1968) ("[A] police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion."); *United States v. Cortez*, 449 U.S. 411, 417

suspicion.” In the normal state traffic violation situation, *Terry* is not an issue because the officer has observed a violation of state law. For example, if an officer observes a vehicle driven by a Latino that is swerving, then the officer has first hand evidence of a traffic violation and can stop the vehicle. If an officer, on the other hand, stops a vehicle solely because the driver “looks Mexican” and he, therefore, thinks she may not have a driver’s license, then this is racial profiling and violates the Fourth Amendment.²¹⁰

A more subtle legal question is whether, once that officer has stopped the vehicle, can he or she proceed to question the driver about the driver’s immigration status? The answer is “yes” if the officer has made observations, or through questioning, has come to reasonably suspect an immigration law violation. The U.S. Supreme Court has stated in dicta that, *with respect to immigration law enforcement*, stops made *away from the border* on the basis of “Mexican appearance” can constitute a legitimate consideration under the Fourth Amendment for making an immigration stop.²¹¹ The case law, however,

(1981) (“The Fourth Amendment applies to seizures of the person, including brief investigatory stops such as [vehicle stops] An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.”); *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (“Law enforcement agents can “stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot,’ even if the officer lacks probable cause. The officer[, however,] “must be able to articulate something more than an ‘inchoate and unparticularized suspicion or hunch””).

210. *See Coleman v. States*, 562 A.2d 1171, 1175 (Del. 1989) (“The majority of [c]ourts have held that race, as a single criteria [sic], provides an insufficient basis for the detention or arrest of a suspect. Generally, however, courts have upheld the use of race as an identifying factor when the totality of circumstances reveals other nonracial factors.”).

211. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) (finding that “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican Americans to ask if they are aliens.”). The governing case law on border searches is *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (“Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.”). *But see* Kevin R. Johnson, *The Case against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 676-77 (2001). As Professor Johnson explains:

At first blush, reliance on “Mexican appearance” in immigration enforcement might not appear problematic given the widespread belief that the overwhelming majority of undocumented persons in the United States come from Mexico. In fact, however, only about one-half of the undocumented persons in this country are Mexican nationals. . . . U.S. citizens or lawful

applying to *state* officers makes clear that they *must have reasonable suspicion or probable cause* if they are attempting to enforce immigration law. *Salinas-Calderon*, a 1984 Tenth Circuit case, establishes that where a police officer has already detained a person with probable cause, the local law enforcement officer may make an arrest based on a violation of immigration law when the circumstances of the arrest lead to probable cause that the person is violating federal law.²¹² In *Salinas-Calderon*, the court concluded that given the *entire circumstances* of the stop—the driver’s initial errant driving, the suspicious answers in response to the officer’s questioning (that he was not a U.S. citizen), and what the driver was transporting (six single males who spoke no English and stated that they were not U.S. citizens)—that the officer had probable cause to arrest the driver on immigration law violations.²¹³

In *United States v. Montero-Camargo*, the Ninth Circuit held that reasonable suspicion under *Terry* requires *particularized* suspicion.²¹⁴ In this case California highway police officers stopped a vehicle that had swerved and made a U-turn, breaking California motor vehicle laws. After making the stop on the basis of a traffic violation, the court found that the officers had violated Fourth Amendment guarantees when they questioned the driver about his immigration status based solely on his “Hispanic or Mexican appearance.”²¹⁵ The officers testified that their suspicions were aroused because it was general knowledge that in that area of California, fifty miles north of the border, there were many arrests based on illegal status.²¹⁶ The Ninth Circuit held that such broad generalities do not constitute *particularized* suspicion required under the Fourth Amendment.²¹⁷

permanent residents . . . bear the brunt of race-based immigration enforcement. . . . Although the Supreme Court has not revisited this area . . . at least one court of appeals has questioned the continued lawfulness of reliance on race in immigration enforcement.

212. *Salinas-Calderon*, 728 F.2d at 1301. See *supra* notes 41-46 and accompanying text.

213. *Id.* (“Applying the objective probable cause test to these facts, it is our view [that the trooper] had probable cause to make a warrantless arrest for violation of the immigration laws at this point in time.”). For the key facts of *Salinas-Calderon*, see *supra* notes 41-43 and accompanying text.

214. 208 F.3d 1122, 1129 (9th Cir. 2000).

215. *Id.* at 1131 (“Where . . . the majority (or any substantial number) of people share a specific characteristic, that characteristic is of little or no probative value in such a particularized and context-specific analysis.”).

216. *Id.* at 1127. (“Both agents testified that almost all of the stops made by the Border Patrol at the turnaround site resulted in the discovery of ‘a violation of some sort’ involving either illegal aliens or narcotics.”).

217. *Id.* at 1129 (stating that the requirement of *particularized* suspicion encompass “first, . . . assessment . . . based upon the totality of the circumstances; [s]econd, that assessment must arouse a reasonable suspicion that *the particular person*

Thus, based on both state law and constitutional law, state officers cannot roam at will and check on the credentials of persons who *may* be illegal immigrants.

Now consider whether the preemption cases discussed in Part II.A.2, *supra*, are consistent with this conclusion. Recall the facts of *United States v. Vasquez-Alvarez*.²¹⁸ Vasquez was questioned and stopped by an Oklahoma state police officer based on an INS officer's personal observation that Vasquez had committed a crime based on federal and state law—selling cocaine.²¹⁹ After detainment and questioning, the state police officer discovered that Vasquez had a felony record and, therefore, was in violation of immigration law.²²⁰ Like in *Salinas-Calderon*, a reasonable suspicion based on a violation of state law led to a subsequent arrest based on immigration law. Unless a “foreign looking person” is engaged in conspicuous and unusual behavior (the equivalent of “driving erratically” under *Salinas-Calderon*), there is no reasonable suspicion to stop and make a subsequent check for violation of the immigration laws.

This leads back to the issue posed in Part II, *supra*. Is it wise policy to allow local police to enforce federal immigration laws? In this Author's opinion, to give a broader mandate to law enforcement by encouraging enforcement of immigration laws, when concerns about potential civil rights violations have been raised by the racial profiling data, is unwise. As discussed above, immigration laws are complex as is Fourth Amendment law. In the rough and tumble world of law enforcement on-the-streets versus law enforcement on-the-law-books, police officers may be inadvertently violating immigrants' civil rights because they do not understand legal subtleties and have not been trained. The zeal to enforce immigration laws could lead unwittingly to racial profiling. Sheriff Ralph Lopez of San Antonio puts the issue in this way: “what are we saying? ‘Hey you’ve got an accent. Let me see your passport.’ It damn near leads us to racial profiling.”²²¹ As the Missouri State Attorney general states, it is tough to make conclusions based on the data; in some instances, there may be unlawful racial profiling, while in others, factors like being proximate to a major interstate highway may skew statistics.²²² True, but real concerns are being raised. Further extending law enforcement responsibilities, without ensuring that

being stopped has committed or is about to commit a crime.”); *see also* *United States v. Galindo-Gonzales*, 142 F.3d 1217, 1224-25 (10th Cir. 1998) (during the course of roadblock an officer may ask questions about the passengers' identities only with reasonable suspicion of a crime).

218. 176 F.3d 1294 (10th Cir. 1999).

219. *Id.* at 1295-96.

220. *Id.* at 1296.

221. Elaine Aradillas, *Law Enforcers Wary of INS Job; Local Agencies Reluctant to Enforce Immigration Laws*, SAN ANTONIO EXPRESS-NEWS (Apr 5, 2002), at http://archives12.newsbank.com/ar-search/we/Archives/?p_action=keyword.

222. *See* 2000 RACIAL PROFILING REPORT, *supra* note 182.

current practices are sound, would expose state agencies to possible litigation and poison long term community-law enforcement relations.

A final area of concern is the disturbing statistic that, state-wide, Latinos are twice as likely to be searched as any other minority group.²²³ This same problem may be occurring with other immigrant groups, but racial profiling data are not kept that would allow us to look at this more general question. As mentioned in the prior analysis, the search rates in Southwest Missouri and mid-Missouri rural counties are inordinately high. In some hot-spot jurisdictions one in two stops result in searches, eight times the state wide search rate for Whites.

There are various reasons for lawful searches. For example, if there is an outstanding warrant on the driver then this would lead to a lawful search. Alternatively, if an officer observes suspected contraband in plain view he or she may proceed to search. Consider, however, whether immigrant Latinos are *more* likely than other Missouri citizens to have outstanding warrants or be involved in contraband. One could posit the opposite, that immigrants are probably *less likely* to be involved in contraband because they come to work, not smuggle drugs. They may be *more likely* to have outstanding warrants *based on traffic violations*, however, for the reasons discussed previously. This would lead us back to the Catch-22 that the lack of access to driver's licenses and drivers' education materials are having unintended ripple effects, such as an inordinately high search rate. This reason does not seem plausible, however, since driving violations do not normally lead to warrants. A more likely reason for the high search rates is language barriers. In rural Missouri, many Latino immigrants have trouble communicating in English.²²⁴ In addition, the Joint Legislative Committee on Immigration reported that law enforcement saw language barriers as a key issue.²²⁵ Thus, when a police officer is questioning a non-English speaking driver there may be *no communication*. What the officer takes to be consent may not be consent but a non-response.²²⁶ Waivers of constitutional

223. The overall search rate was 7.18%, and for Whites (6.43%), African Americans (11.47%), and Latinos (12.54%). See *Executive Summary, in 2001 RACIAL PROFILING REPORT*, *supra* note 187.

224. This is the number one barrier for Latinos in Mid and Southwest Missouri. See *SOUTHWEST SURVEY*, *supra* note 165, at 26 (35% cited language barriers as one of the greatest issues facing Latinos).

225. JT. COMM. REP. IMMIGRATION, *supra* note 15, at 8-9.

226. Suppose a police officer stops and questions a non-English speaking Latino driver. The officer asks if he can search the car. The driver understands nothing and just looks back with a blank stare. The police officer proceeds to search. Was there consent for a search in this case? If these are the facts, then this is a nonconsent that does not rise to the level of a knowing waiver. See generally Maria L. Ontiveros, *Adoptive Admissions and the Meaning of Silence: Continuing the Inquiry into Evidence Law and Issues of Race, Class, Gender, and Ethnicity*, 28 SW. U. L. REV. 337 (1999).

protections must be “knowing and intelligent.”²²⁷ This is a fact and circumstances analysis that courts undertake and varies on a case by case basis. The basic principle, however, is that if the driver does not understand what the officer is asking, he or she cannot consent to a search.²²⁸

There are no clear answers as to what is happening “on the streets,” but the statistics raise concerns that civil rights may be being violated. Where do we go from here? First, the limitations of Missouri’s racial profiling law must be understood. It is primarily an informational tool for the public and law enforcement agencies. It provides information so that observers can perform the kind of analysis presented here. The statute requires individual police agencies to review the statistics to determine if officers are making a disproportionate number of stops against minority groups.²²⁹ The law also encourages continuing education to “promote understanding and respect for racial and cultural differences and the use of effective, non-combative methods for carrying out law enforcement duties in a racially and culturally diverse environment.”²³⁰

Such a monitoring system is good, but arguably not enough. When asked to single out agencies that were egregious, Missouri State Attorney General Jay

227. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). A court may find a proper waiver “[o]nly if the ‘totality of the circumstances surrounding the interrogation’ reveal both an uncoerced choice and the requisite level of comprehension.” *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (citation omitted). A court should take into account factors, such as age, education, and intelligence of the defendant and the length of detention and questioning. *United States v. Chalan*, 812 F.2d 1302, 1307 (10th Cir. 1987). “Language barriers are a factor to consider, because they may impair a suspect’s ability to act knowingly and intelligently. *United States v. Granados*, 846 F. Supp. 921, 923 (D. Kan. 1994) (citation omitted).

228. *See Granados*, 846 F. Supp. at 925 (holding that, in an exchange with a state highway official, there was intelligent consent, when the driver did speak some English even if not fluent); *United States v. Bernard S.*, 795 F.2d 749, 752 (9th Cir. 1986) (holding that Apache defendant had such a limited proficiency in the English language as displayed in a recorded interview that he could not have understood request for waiver of his constitutional rights).

229. Each law enforcement agency must adopt procedures for determining whether any officers have a pattern of disproportionately stopping people of color, and provide counseling and training to any such officers. MO. REV. STAT. § 590.650(5) (2000).

230. The Missouri legislature passed new Peace Officers Standards and Training (POST) requirements:

Peace officers who make traffic stops shall be required to receive annual training concerning the prohibition against racial profiling and such training shall promote understanding and respect for racial and cultural differences and the use of effective, non-combative methods for carrying out law enforcement duties in a racially and culturally diverse environment.

MO. REV. STAT. § 590.650(1) (2000).

Nixon responded “this report should not be used for finger pointing.”²³¹ Thus far, no law enforcement agency listed on the Latino “hot spot” list has publicly done any analysis (hopefully, they are doing so in private). None has announced that they are undergoing any training (hopefully, they are doing so in private). It may be unrealistic that elected officials from the local sheriffs to the governor would ever push such a “hot button” political issue on their own because the topic is so controversial and the political upside gains are so elusive. Any pressure exerted must be local—by community-based organizations or human rights commissions.

Positive steps that might foreclose broken community-police relations include legislative, administrative, and local action. First, this analysis underscores the importance of driver’s license reforms already advocated. Second, clarification is needed as to the role of law enforcement agencies in immigration law enforcement. Third, local action can raise the issue of continuing education for officers making traffic stops as required by law. The data suggest that needed education is both legal and cultural. As to the legal issues, the law is sufficiently complex that law enforcement would benefit from education as to when may a state officer inquire about immigration issues or ask for immigration papers, and what does “consent” to a search mean when the driver does not understand English. As to cultural issues, the primary barrier is language. The Joint Interim Committee on Immigration in 1999 concluded that local law enforcement were being overwhelmed by language needs, and that they saw a need for further training and translation services.²³² A recent survey also shows that law enforcement is highly aware that language barriers are having a negative impact on law enforcement’s relationship with new immigrants.²³³ Some agencies are managing to provide this training, but at a very low level.²³⁴ Based on a telephone survey of rural counties that have also reported very high levels of racial profiling,²³⁵ translation services remain a huge unmet need. As Table 7, *infra*, shows, many police departments in rural Missouri have no translators on hand, or use persons who are not trained to provide such services.

231. *Nixon Issues Annual Traffic Stops Reports*, THE DAILY DUNKLIN DEMOCRAT, June 2, 2002, at http://news.mywebpal.com/news_tool_v.2.cfm?pnpid=885&show=archivedetails&ArchiveID=787342&om=1.

232. JT. COMM. REP. IMMIGRATION, *supra* note 15, at 8-9.

233. Herbst, *supra* note 178 (reporting on survey of law enforcement).

234. For example, the Newton County Sheriff’s department has undertaken a concerted effort to provide services to Spanish speaking residents, and in 1999 sent two officers to training to learn some Spanish. See Gary Grimmert, *Officers Learning Spanish to Better Serve the Public*, NEOSHO DAILY NEWS, June 29, 2001, at <http://www.neoshodailynews.com/archives/index.inn?loc=detail&doc=2001/June/29-613-news02.txt>.

235. See *infra* Table 7. The survey interviewed police departments in hyper-growth jurisdictions. The calls were made in February and March 2002.

Yet, the federal government now requires that state agencies, like police departments that receive federal monies,²³⁶ take reasonable steps to ensure meaningful access by LEP persons.²³⁷ This is a case by case flexible determination, weighing the importance of the service (being able to avoid arrest) and the relatively high number of encounters that law enforcement is having with non-English speakers (as shown by the racial profiling statistics). The racial profiling data for immigrant Latinos dictates that law enforcement all around the state, not just rural areas, reassess the availability of translation services for all immigrant groups.²³⁸

IV. SUMMING UP: POST 9/11 AND BEYOND

In 1999, the Joint Interim Committee identified the challenges to the state.²³⁹ There was only one legislative initiative, H.B. 1306, which creates the Missouri Multicultural Center and Program.²⁴⁰ In the last legislative session, H.B. 1306 was approved by the House but stalled in the Senate,²⁴¹ due in large part to Missouri's budget crisis. The Committee did a great service to the people of Missouri by expending great efforts to listen to what Missourians had to say about immigration. H.B. 1306, however, is a modest first step. Post 9/11, this vision of the role of state government in meeting the challenge of immigration of Latinos should be expanded.

A. Driver's Licenses

As Part II argued, access to driver's licenses is the most important state civil rights issue for Latinos in the 2003 legislative session. Post 9/11, there are valid homeland security concerns about easing documentary requirements for the issuance of a license. If one defines homeland security broadly to include lawful presence, however, one embarks on a path that has great potential for clashing with the civil rights of immigrants and raises constitutional concerns that states

236. DOJ regulations state that local police departments are subject to its Limited English Proficient regulation. See Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455, 41459 (June 18, 2002) (final).

237. See *supra* notes 179-81 and accompanying text (discussing LEP regulations).

238. See *Executive Summary*, in 2001 RACIAL PROFILING REPORT, *supra* note 187.

239. JT. COMM. REP. IMMIGRATION, *supra* note 15, at 7.

240. H.B. 1306, 91st Gen. Assem., Reg. Sess. (Mo. 2002). The bill was reported favorably out of the House in the 2002 sessions, but did not reach the Senate floor for a vote.

241. Missouri House of Representatives, Activity History for H.B. 1306, at <http://www.house.state.mo.us/bills02/action02/aHB1306.htm>.

may be overstepping the boundaries of what are appropriate state concerns. Missouri now has a large community of settled immigrants, which includes Latinos, ex-Yugoslavians, and Vietnamese. Most contribute significantly to the economy and their communities. Inevitably, among this group are those who have not yet legalized their status, but “ardently” desire it.²⁴² To lump these settled immigrants into the amorphous category of a possible “homeland security” threat would be disruptive of Missouri businesses who rely on their labor. From the perspective of constitutional norms, accumulation of the practices such as denial of a license, arbitrary administrative practices that make obtaining a license burdensome and very difficult, and prosecutorial practices that select out immigrants for felony convictions threaten to create what the Supreme Court called a “subclass within our boundaries.”²⁴³ From a pragmatic standpoint, federal immigration has never attempted to uproot settled immigrants; doing so now would threaten to overwhelm local law enforcement. Moreover, states should think long and hard before they take on tasks created by lax federal policies. States function best when they focus on local concerns, such as ensuring that the roads are safe for everyone and that holders of licenses are who they say they are.

B. Racial Profiling

Latinos are most likely to be stopped and searched in hyper-growth rural counties. Are Latinos being racially profiled because they “look foreign”? Or are too many recent immigrants driving recklessly? Do they get searched at higher rates because too many do not speak English? It is not possible to draw conclusions, but data indicate cause for concern. Post 9/11, public opinion has been more approving of racial profiling as a step to counter terrorism.²⁴⁴ In this environment, it is more important than ever that law enforcement not engage in sloppy policy and act on stereotypes of who is foreign and, therefore, constitutes

242. See, e.g., Murray Bishoff, *Immigrant Concerns Aired to Blunt: Congressman assemblies [sic] area Hispanic leaders as focus group*, MONETT TIMES, June 20, 2001, at [http://monett-times.com/NF/omf/monett/news_story.html?rkey=0008312+\[cr=gdn](http://monett-times.com/NF/omf/monett/news_story.html?rkey=0008312+[cr=gdn). In a forum in Monett with Representative Blunt, Latino leaders informed him that immigrants in Southwest Missouri were in Missouri “to stay.” *Id.* They saw opportunities, plentiful jobs, and a cost of living that allowed them to buy homes and progress economically. *Id.* Further, they reported that many immigrants had “a burning desire” to achieve citizenship. *Id.*

243. *Plyler v. Doe*, 457 U.S. 202, 222 (1982).

244. In a CNN/USA Today/Gallop poll, 58% agreed that racially profiling Arabs and Arab *Americans* at airports would be an acceptable anti-terrorism practice. Patrick O’Driscoll, *Poll: Suspicions of Arabs, Arab-Americans deepen*, USA TODAY, Sept. 16, 2001, at <http://www.usatoday.com/news/nation/2001/09/16/poll-arab-americans.htm>.

a safety threat. The legislature encouraged law enforcement to self monitor and self educate on cultural and racial issues. Community groups should engage local law enforcement in constructive dialogue. The executive branch and the legislature should continue to monitor results.

C. Translation Support for Law Enforcement

In Missouri, bilingual law enforcement officers are few, and too many departments, particularly in rural areas, do not have ready access to translation services. State law enforcement need to assess their responsibilities under newly issued federal regulations. This is good policy as well. Facilitating communication would ease concerns that civil rights of immigrants are being violated, promote harmonious community relations, and would allow law enforcement to function more safely in potentially dangerous situations. In areas that have experienced hyper-growth of non-English speakers, state funds may be needed to assist local law enforcement obtain language training and subsidize trained translators.

To conclude, states have a role in securing the homeland. The focus of their role, however, should not be activities that are best handled by the federal government. Rather, the focus of state homeland security activity should be on what states do best, focusing on local issues and building harmonious relationships in local communities.

Table 6: 2000-01 Latino Racial Profiling “Hot Spots”*

Law Enforcement Agency	Population Over 16	Latino Population %	2000 Stop Disparity Index	2001 Stop Disparity Index	2001 Search Rate	Ratio Arrests/ Searches
Aurora P.D.	5,292	2	1.4	1.12 (25)	8.0	2/2
Barry County Sheriff	26,132	4	1.81	2.23 (34)	17.65	2/6
Carl Junction P.D.	3,880	1	1.54	1.56 (41)	12.20	3/5
Cartersville P.D.	1,383	.7	3.57	4.7 (79)	24.05	20/19
Carthage P.D.	9,829	11.2	1.13	1.18 (299)	12.71	38/38
Claycomo P.D.	1,56	2	1.31	1.48 (160)	16.88	29/27
Concordia P.D.	1,873	1	1.65	2.79 (12)	23.08	2/3
Crocker P.D.	770	.5	5.1	6.61 (16)	6.25	1/1
Diamond P.D.	607	1	14.5	12.67(131)	16.79	21/22
Dunklin County Sh.	25,565	2	1.71	2.48 (12)	33.33	1/4
Eureka P.D.	5,483	1	1.39	1.32 (39)	23.08	1/9

Goodman P.D.	877	.5	20.45	14.43 (79)	12.66	5/10
Jasper P.D.	755	2	1.47	1.15 (6)	0	0
Kennett P.D.	8,594	1	2.74	2.41 (38)	13.16	6/5
Leadington P.D.	164	.6	1.42	2.05 (20)	15.0	3/3
Lexington P.D.	3,478	2	1.42	1.44 (29)	20.69	2/6
Lone Jack P.D.	403	.5	3.64	2.37 (15)	6.67	1/1
Marshall P.D.	9,720	6	1.9	1.26 (63)	6.35	3/4
McDonald County Sheriffs	15,422	8	1.82	0	0	0
Monett P.D.	5,650	10	1.73	1.43 (146)	0	19/0
Neosho P.D.	8,048	4	1.18	1.48 (202)	8.42	17/17
Newton County Sheriff	40,360	2	1.45	2.39 (29)	17.24	5/5
Noel P.D.	1,120	33	1.12	1.31 (352)	6.82	22/24
Oakview P.D.	320	1	3.89	4.93 (67)	7.46	0/5
Perry County Sheriff	13,978	.4	1.22	2.28 (18)	50.0	3/9
Pettis County Sheriff	30,218	3.3	2.01	2.24 (88)	32.95	34/29
Phelps County Sheriff	31,541	1.1	8.03	7.65 (53)	47.17	18/25
Pierce City P.D.	1,063	.9	2.95	3.29 (18)	0	0
Pineville P.D.	584	.7	12.5	10.3 (90)	13.33	4/12
Platte City P.D.	2,922	2.6	1.64	1.14 (70)	15.71	8/11
Platte Woods P.D.	400	.8	2.38	3.56 (25)	28.00	1/7
Saline County Sheriff	18,711	3.7	2.54	1.85 (11)	54.55	2/6
Sarcoxie P.D.	1,037	.8	3.56	2.54 (10)	20.0	0/2
Smithville P.D.	4,104	1.4	1.18	1.88 (40)	25.0	5/10
St. George P.D.	1,111	.6	1.28	1.41 (14)	0	0/0
Ste. Genevieve County	13,691	.7	2.75	1.82 (12)	16.67	0/2
Trenton P.D.	4,991	1.5	1.39	1.39 (15)	6.67	0/1
Warren County Sheriff	18,693	1.0	1.73	1.35 (12)	66.67	3/8
Washington P.D.	10,238	1.9	1.59	1.22 (20)	15.0	3/3

Woodson Terrace P.D.	3,248	1.9	1.79	1.82 (35)	22.86	2/8
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* Stop disparity indices over 1.00 for each of 2000-01 and greater than 10 total stops during each year.

O = jurisdiction did not submit a report as required by state law.

Source: Missouri Attorney General, ANNUAL REPORT ON 2001 MISSOURI TRAFFIC STOPS (2002), at <http://www.moago.org/rpexecsummary2001.htm>; Missouri Attorney General, ANNUAL REPORT ON 2000 MISSOURI TRAFFIC STOPS (2001), at <http://www.ago.state.mo.us/rpexecsummary.htm>.

Table 7: Law Enforcement Interpreter Services in Selected Counties, March 2002

Law Enforcement Office	Do you have a Spanish speaker on staff?	If someone comes in and doesn't speak English what is your protocol/procedure?
Barry County Sheriff's Dept.	Yes.	Not possible to get a response.
Buchanan County Sheriff	No, don't think so.	City yes, the county, no.
Cass County Sheriff	Yes. (qualified)	A couple of people who speak Spanish who already work there.
Clay County Sheriff	Yes.	Bring in the Spanish speaker.
Dunkin County Sheriff	No. (qualified)	We've got a Mexican who could translate for us. He's an inmate.
Jasper County Sheriff	Don't know.	We just get someone.
Johnson County Sheriff	No. Not on staff.	We usually get someone from the college
Lawrence County Sheriff	No.	Well, they'd have to find an interpreter.
McDonald County Sheriff	Yes. (qualified)	We have a receptionist who speaks Spanish. We'd try to get an interpreter or the receptionist, or a multi-lingual inmate.
Moniteau County Sheriff	No.	There are interpreters around. We just bring one in, when we need one.
Pettis County Sheriff	No.	We have several interpreters on call.
Platte County Sheriff	Don't know, no. (qualified)	No. INS handles it all.
Saline County Sheriff	No.	We have interpreters that we pay.
Sullivan County Sheriff	No.	We have a list of interpreters that we call.
Taney County Sheriff	No.	If someone came in and didn't speak English it is our job to find them an interpreter and help them out.
Newton County Sheriff	No. (qualified)	We usually can decipher. We have a lady down at the jail who speaks Spanish. Otherwise they bring an interpreter.
Branson Police Dept.	Yes. (qualified)	We have a couple of officers who speak limited Spanish. We just call them in.

California Police	No. She left to work for Corrections.	We have a lady in the building. Otherwise we have nothing.
Carthage Police	Yes. (qualified)	One individual does but isn't always here. They should bring their own interpreter.
Cassville Police	No.	The Sheriff's office, I think has a couple of people that we call. Otherwise, we could try to get an interpreter.
Joplin Police	Yes. (qualified)	We have an officer who speaks Spanish. If we need to, we call him in.
Milan Police	No. But we have access to translators.	The Sheriff's office has a list of translators and we contact them.
Monnett Police	No.	We have a list that we call if we need somebody.
Noel Police	Yes/No (unclear). Same dispatcher as McDonald County Sheriff.	They have their own translator that they call out any time day or night.
Sedalia Police	No.	We have interpreters that we can contact.
Springfield Police	Yes. We have one.	We can call this person in.
Mo. State Troopers Assn.	No. Varies by Troop	There are a number of Spanish speaking troopers.

Source: Telephone interviews by Dee Al-Mohammad with Missouri law enforcement offices (Feb.-Mar. 2002) (on file with author).