THE LIMITS OF LOCAL POLICE INVOLVEMENT IN THE ENFORCEMENT OF IMMIGRATION LAWS

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INTRODUCTION

In the early morning hours of November 8, 1993, Leonel Garcia returned home from his graveyard shift job in Shelton, Washington, to find his house surrounded by police vehicles, engines running and lights blazing. Garcia, a permanent U. S. resident for over a decade, entered just as a Border Patrol Agent emerged from Garcia's bedroom and demanded to see his papers. Garcia's home was one of many in Shelton's small Hispanic community subjected to "consensual" searches by joint local police and Border Patrol teams that morning. The local county sheriff later stated publicly that he called on the Immigration and Naturalization Service [INS] to help rid the community of "rabble rousers."

Experiences like Leonel Garcia's are becoming increasingly more common. In the wake of swelling anti-immigrant sentiment, voters, elected officials, police chiefs, as well as INS officials seem bent on thrusting patrol officers into duty as part-time Border Patrol Agents. This phenomenon is manifested in anti-immigrant movements such as California's Initiative 187 as well as

individual police department condoning officer harassment of persons suspected of being illegal immigrants and joint local police/INS residential raids, anti-gang units and street sweeps. It is occurring in the face of nearly complete lack of local police authority to enforce federal immigration laws, given federal preemption under the U.S. Supremacy Clause and Congress' plenary power over the admission of aliens. It also raises potential "failure to train" liability for those municipalities who permit their officers to participate in such enforcement. City of Canton v. Harris, 489 U.S. 378 (1989)(municipalities subject to 42 U.S.C. ?1983 liability resulting from failure to train employees if such failure reflects deliberate indifference to constitutional rights).

Essentially, state and local law enforcement officers lack the statutory or constitutional authority to enforce federal immigration law. Any involvement in or other exercise of such assumed authority is void under the Supremacy Clause. U.S. Const., art. VI, cl.2. Under the Supremacy Clause, only Congress has power to pass laws relating to the admission of aliens. Fiallo v. Bell, 430 U.S. 787 (1977).

In the entire statutory and regulatory scheme relating to immigration, Congress has specifically delegated immigration detention authority to local law enforcement only in cases involving arrests for violations of "any law related to controlled

substances." 8 U.S.C. ?1357(d)(Detainer of Aliens for Violation of Controlled Substances Laws). With respect to all other immigration violations, by federal statute only the United States Attorney General can delegate detention authority. 8 U.S.C ?1103(a). Such authority has been carefully delegated to select categories of immigration officials based on their experience and training, but it has never been delegated to local law enforcement. 8 C.F.R. ?287.5.

In light of these restrictions, this article will address the recent contexts in which questions concerning local police involvement in immigration law enforcement have arisen. Specifically, it will look at four areas: First, it will address the federal preemption doctrine as it has been applied to civil violations of the Immigration and Nationality Act [INA]. Second, it will address the question of whether local police have statutory or other legal authority to enforce the criminal provisions of the INA. Third, it will look at legislation and individual police department policies that either require, condone or prohibit police involvement in civil immigration enforcement, thus giving rise to potential municipal liability. Finally, it will discuss recent federal litigation challenging joint local police/INS cooperative efforts such as residential raids and street sweeps, particularly looking at the municipal liability issues involved.

LOCAL POLICE, FEDERAL PREEMPTION AND CIVIL VIOLATIONS OF THE IMMIGRATION AND NATIONALITY ACT

Preemption Doctrine Applied to Immigration. The Supreme Court has repeatedly emphasized that Congress has nearly total power to regulate the enforcement of federal laws concerning the admission of aliens. Fiallo v. Bell, 430 U.S. 787, 792 (1977)("over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens"). This power is based on the constitutional provision that confers on Congress the power to "regulate matters relating to immigration." U.S. Const. art. 1, ?9, cl. 1. It is a Congressional power that is considered "exclusive." Galvan v. Press, 347 U.S. 522, 531-32 (1954).

Because Congressional power over immigration regulation is considered plenary, a number of courts have held that state and local police officers lack authority to enforce the civil provisions of the Immigration and Nationality Act [INA], 8 U.S.C. ?1101 et.seq. Gonzalez v. City of Peoria, 722 F.2d 468, 474 (9th Cir. 1983); Gates v. Superior Court, 193 Cal.App.3d 205, 238 Cal.Rptr. 592 (1987); People v. Barajas, 81 Cal.App.3d 999 (1978). Local agency arrests for civil violations of the Act are said to "intrude impermissibly" on the Congress' federal preserve. Gates, 193 Cal.App.3d at 218. In addition, state and local police enforcement of immigration law violates the Supremacy Clause to the extent that Congress has "preempted state authority in

immigration matters." U.S. Const., art. 6, cl. 2; Lopez v. I.N.S., 758 F.2d 1390, 1392 (10th Cir. 1985). Although Congress has not expressly stated an intent to preclude state authority to enforce immigration policy, congressional intent may be inferred where "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). While local police are not generally precluded from enforcing federal statutes, federal regulation of a particular field is presumed to preempt state enforcement activity when either (1) the nature of the regulated subject matter permits no other conclusion, or (2) Congress has unmistakenly so ordained. DeCanas v. Bica, 424 U.S. 351 (1976).

As courts have noted in other contexts, immigration law is among the most complex of federal laws. One court analogizes immigration law to King Mino's labyrinth in ancient Crete, describing it as a "baffling skein of provisions for the INS and courts to disentangle." Lok v. I.N.S., 548 F.2d 37, 38 (2nd Cir. 1977). As the Ninth Circuit has noted, "[t]he civil provisions of the [INA] 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." Gonzales, 722 F.2d at 475. See also Gates v. Superior Court, 193 Cal.App.3d at 214-215 (neither party disputed

the "exclusive authority of the federal government to enforce the civil provisions of the INA relating to such matters as admission, exclusion and deportation of aliens").

Because of this complexity and because of the detailed statutory scheme by which Congress has conferred enforcement authority under the INA only to those INS officers designated by the U.S. Attorney General, a strong argument can be made that state and local police officers are preempted from participating in any enforcement of the immigration laws. See, e.g., Gonzales v. City of Peoria, 722 F.2d at 474-475 (complexity of civil provisions is such that local police are preempted from enforcement). Authority to be involved in immigration enforcement extends only to those areas where local law enforcement has been expressly authorized by Congress to participate in immigration detentions.

Statutes and Regulations Concerning Detention Authority. The phenomena of increased local police involvement in immigration enforcement is happening regardless of the real world capacities of local police officers to make decisions about immigration status. This is partly a matter of lack of officer training in the dynamic complexity of immigration law. Said one court in the context of a labor dispute, "[d]etermining illegal alien status requires application of an intricate complex of statutory and regulatory provisions which an [officer] is probably untrained to

administer." Local 512, Warehouse & Office Workers v. n.l.r.b., 795 F.2d 705, 721 (9th Cir. 1986).

The civil provisions of the INA are not simple and straightforward. These provisions cover a range of matters, including admission of aliens, length of permitted stay, temporary and permanent residence status, citizenship, refugee processing, deportation and exclusion procedures. For example, the INA enumerates thirty-three general categories of persons who may not enter the United States. See 8 U.S.C. ?1182. Deportable persons can come from these or nineteen other categories. See 8 U.S.C. ?1251. Beyond this, the INA provides for many circumstances which prevent a "deportable alien" from actual deportation. See. e.g., 8 U.S.C. ?1254 (petition to suspend deportation); 8 U.S.C. ?1258 (political asylum); 8 U.S.C. ?1255 (adjustment to lawful permanent resident status).

Because of the complexity of the INA's civil provisions, it is usually difficult (if not impossible) for an untrained police officer to determine the immigration status of an individual. Possession of a "green card", for example, issued as permission to work in the United States is not necessarily conclusive evidence of legal presence. See 8 U.S.C. ?1251(a)(3), (4) (legal alien may be deported if institutionalized at public expense or convicted of crime of moral turpitude). Similarly, lack of any documentation is not prima facie evidence of illegal entry. Gonzales v. City of

Peoria, 722 F.2d at 476-77; 8 C.F.R. ?212.1(f)(no documents required for admission in "unforseen emergency"). Failure to carry "alien registration or alien receipt card" is, however, a misdemeanor under the INA. 8 U.S.C. ?1304(e).

The U.S. Attorney General is charged by statute with the administration and enforcement of the INA. 8 U.S.C. ?1103(a). The Attorney General is authorized to delegate any duties or powers conferred by the INA to officers of the INS or to any officers or employees of the Department of Justice or on any other employee of the United States. Id. Nothing in the INA gives the Attorney General the authority to delegate such enforcement authority to officers of state-created agencies such as city or county police departments and it is clear from a review of the federal regulations that no such authority has been extended.

By regulation, the Attorney General has delegated administrative enforcement authority to the INS Commissioner, who in turn has redelegated authority only to immigration officers [including immigration inspectors, border patrol agents and investigators]. Even within the INS, only those immigration officers, inspectors and agents who need enforcement authority and who are fully trained in how to exercise it are given law enforcement authority. See 8 C.F.R. ?287.5 (exercise of power by immigration officers) and 8 C.F.R. ?287.8 (standards for enforcement activities).

Also by federal regulation, only those immigration officers who have completed basic immigration law enforcement training are given the authority to arrest, to conduct searches, to execute warrants and to carry firearms. 8 C.F.R. ?287.5. If an immigration officer is qualified to exercise arrest authority "under regulations prescribed by the Attorney General," the authority to arrest without a warrant is limited to circumstances where the person "is likely to escape before a warrant can be obtained." 8 U.S.C. ?1357(a)[Powers Without Warrant]; 8 C.F.R. ?287.5(c)[Arrest Authority]. This regulation carefully sets out for each type of warrantless arrest the types of INS officers who have arrest authority based on their experience level and training as well as the approval of the INS Commissioner. In addition, a separate regulation specifically designates those immigration officers who are allowed to make arrests for violations of the INA, requires that warrants be obtained in most situations, and sets forth the procedures to follow when an officer decides to arrest. 8 C.F.R. ?287.8(c). This rule also codifies standards for INS officers to follow when conducting a detention not amounting to an arrest. Id. ("An immigration officer, like any other person, has the right to ask questions of anyone as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away").

In addition, INS officers with arrest authority are required

to give Miranda warnings that are significantly different from those to which local police officers are accustomed. Further, these specialized Miranda warnings differ, depending on whether the agent is contemplating civil or criminal proceedings. Special immigration Miranda warnings are to be read from specific forms, depending on the charges. See Border Patrol Handbook, pages 5-5 and 5-6. Civil Miranda warnings require that the subject be notified that a decision must be made regarding deportability within 24 hours. 8 C.F.R. ?287.3. Criminal Miranda warnings are to be read from Forms I-214, I-215B or I-263B, dependent on the crime, with subjects being given a copy of the form. Id.

Because the INA and its enforcing regulations are constantly amended, extensive and continuing training of police officers would be necessary to insure even a basic understanding of the civil and criminal provisions of the Act. Since 1986, for example, there have been two major legislative overhauls of the INA. The Immigration Reform and Control Act (IRCA) of 1986 and the Immigration Act of 1990 not only created new civil and criminal violations of the Act but created new classes of legal temporary and permanent residents as well as expanding the number and type of visas by which one could remain in the United States legally. Public Law 101-649 (1990) and Public Law 99-603 (1986). In addition, other "technical" amendments have created new types of documents with which to prove legal status. See, e.g., 8

U.S.C. ?1255A; Pub.L. 101-649 ?301.

Case Authority Regarding Local Police Immigration Enforcement. Because of being undocumented aliens nor do they have authority to arrest for illegal presence in the country. Border Patrol Handbook, page 11-6 (4/1/85)("Patrol agents should remember that state and local peace officers lack the authority to enforce federal immigration laws"). In Gonzales, for example, the practice at issue involved local police stopping of Latinos on the street. If the person could not produce what the officer believed was adequate documentation, he or she detained and turned over to immigration officials. Gonzales, 722 F.2d at 472. Specifically at issue was the policy of the Peoria (Arizona) Police Department to stop and arrest persons of Mexican descent "without reasonable suspicion or probable cause and based only on their race and appearance." Id. Numerous federal courts, both prior to and after Gonzales, have held that not even INS or Border Patrol Agents can make street or traffic stops based solely on racial heritage or ethnic appearance. See, e.g., Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (1976)(preliminary injunction prohibiting INS agents from stopping and interrogating persons based solely on their Spanish surnames or Hispanic appearance); Murillo v. Musegades, 809 F.Supp. 487 (W.D. Tex. 1992)(class action of U.S. citizens of Hispanic descent enjoining INS agents from questioning them about status); Ramirez v. Webb, 599 F.Supp. 1278 (W.D.Mich. 1984)(class

action enjoining INS officials from automobile or street stops without a warrant or objective articulable facts other than appearance); Nicacio v. United States I.N.S., 595 F.Supp. 19 (E.D.Wa. 1984)(Border Patrol/INS officials' policy of stopping vehicles on public highways based solely on Hispanic appearance or the agents' intuition declared unconstitutional).

The Ninth Circuit is the only federal court of appeals to have ruled on the question of the scope of local police enforcement of immigration law and the U.S. Supreme Court has not addressed this issue. In Gonzales, the Ninth Circuit held that because of the "pervasive regulatory scheme" for federal enforcement of *civil* violations of the INA, congressional intent to preclude local law enforcement could be inferred and was "consistent with exclusive federal power over immigration." Gonzales, 722 F.2d at 474-475. However, the Gonzales court went on to hold that this "pervasive regulatory scheme" reasoning did not extend to the INA's criminal provisions because the criminal provisions were only a "narrow and distinct element of it." Id. at 475. As will be discussed more fully below, this reasoning is flawed: Especially in light of the numerous amendments to the INA and the enforcing regulations that Congress and the Attorney General have enacted and promulgated since Gonzales, a strong argument can be made that just as local police are precluded from enforcing civil immigration violations, they are precluded from

enforcing the criminal provisions as well.

LOCAL POLICE AND CRIMINAL VIOLATIONS OF
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Statutory Authority. The INA contains specific provisions that criminalize certain behaviors related to immigration enforcement: 8 U.S.C. ?1324 (transporting, smuggling or harboring of aliens); 8 U.S.C. ?1325 (unauthorized entry of aliens, including marriage fraud); 8 U.S.C. ?1326 (reentry by previously deported alien); 8 U.S.C. ?1327 (aiding or conspiring to aid subversive aliens to enter the U.S.); 8 U.S.C. ?1328 (importation of aliens for immoral purposes such as prostitution); 8 U.S.C. ?1304(e) (failure to carry "green card" on person); 8 U.S.C. ?1306 (willful failure to register). In addition, other federal laws criminalize the making of false statements in immigration matters or the use of falsely procured documentation as evidence of citizenship. 18 U.S.C. ??1015 & 1546. Compared with the civil provisions, the criminal provisions comprise a "narrow and distinct element" of the INA. Gonzales, 722 F.2d at 475.

However, the INA expressly authorizes only INS officials to interrogate a person "believed to be an alien" and only INS officials can arrest a person for being in violation of the immigration laws. 8 U.S.C. ?1357. Even INS officers' ability to arrest for criminal violations under the INA without a warrant is limited to felonies under the INA and such warrantless arrests can

only be made if there is a likelihood that the person will escape before a warrant is obtained. 8 U.S.C. ?1357(a)(3)-(5); Border Patrol Handbook, page 17-5 ("arrests without warrants are unlawful when patrol agents have no reason to believe the suspects will abscond").

In addition, the INS and the Attorney General have exclusive responsibility to exercise discretion under the INA. This discretion covers, for example, who will be deported or who will be granted waivers or asylum. See, e.g., 8 U.S.C. ?1103(powers and duties of Attorney General and INS Commissioner); 8 U.S.C. ?1251(f)(1)(A)(waiver of deportation for fraudulent entry); 8 U.S.C. ?1254(a)(suspension in cases of extreme hardship); 8 C.F.R. ?208.8(a)(asylum); 8 C.F.R. ?236.1 (excludability). Finally, the INA contains many provisions which permit a deportable alien to remain in the U.S. pending appeal or a stay of deportation. See, e.g., 8 U.S.C. ?1254 (petition to suspend deportation); 8 U.S.C. ?1255(adjustment to permanent resident status); INS O.I. ?242(a)(22)(deferred action status); 8 C.F.R. ??3.22, 242.22(reopening petition or case); 8 C.F.R. ?243.4(stay of deportation by district director); INS O.I. ?107.1(stay of deportation by private bill in Congress).

Because of this "skein of provisions," and in light of the discretionary federal power to grant relief from deportation, no other governmental authority can realistically determine that any

particular person is in fact going to be deported or is an undocumented alien who has no legal right to remain in the country. Plyer v. Doe, 457 U.S. 202, 226 (1982). Under these circumstances, it is hard to believe, as one court has said, "that Congress wished to place upon [any officer], untrained in the intricacies of the immigration law, the responsibility of determining the alien status of an undocumented" person. Local 512 v. N.L.R.B., 795 F.2d 705 (9th Cir. 1986).

Only INS officials can make the initial alienage determination that is required as a basis for the probable cause necessary to make an arrest for violating the INA's criminal provisions. Only INS officers designated by the Attorney General can make determinations about the status of an alien and about the validity (or relevancy) of the papers presented to establish the right to remain in the country. NLRB v. Apollo Tire, 604 F.2d 1180, 1183 (9th Cir. 1979)("Questions concerning the status of an alien and the validity of his papers are matters properly before the INS"). It therefore follows that only INS officials can arrest for criminal violations of the statute because only they can make the initial determination as to whether "aliens" are reentering, being smuggled or transported illegally into the United States. Gonzales v. City of Peoria. In Gonzales, the Ninth Circuit stated that many of the problems in Peoria (Arizona) arose from the failure of the local police to "distinguish between civil and

criminal violations of the Act.... In some instances, the term [illegal alien] has been used by the City to mean an alien who has illegally entered the country, which is a criminal violation under ?1325. In others, it has meant an alien who is illegally present in the United States, which is only a civil violation." Gonzales, 722 F.2d at 476. "There are numerous reasons," the court continued, "why a person could be illegally present in the United States without having entered in violation of ?1325. Examples include expiration of a visitor's visa, change of student status, or acquisition of prohibited employment." Id. Accord, Texas State Att'y. Gen. Op. Letter (July 28, 1977)(the act of entering illegally is a crime while the continued presence after such an entry is not).

In Gonzales, the court held that "federal law does not preclude local enforcement of the criminal provisions of the [INA]." Gonzales, 722 F.2d at 475. This conclusion was based on an analysis of three INA criminal provisions and the legislative history originally enunciated in a California Court of Appeal case, People v. Barajas, 81 Cal.App.3d 999, 147 Cal.Rptr. 195 (1978). At issue in Gonzales was the authority of local police to arrest for illegal entry or reentry into the country under 8 U.S.C. ?? 1325 and 1326. Gonzales argued that the criminal statute for smuggling and harboring contained express arrest authority for not only INS officers but also for "all other

officers whose duty it is to enforce criminal laws." 8 U.S.C ?1324(c)("Bringing In and Harboring Certain Aliens - Authority to Arrest"). Gonzales, 722 F.2d at 745. He argued that because the other two statutes were silent on this question, local police had authority to arrest for harboring and smuggling, but not for entry or reentry.

The Ninth Circuit disagreed, relying on Barajas, and concluded that Congress amended the original version of ?1324(c) which contained the words "all other officers *of the United States* ..." and that by doing so, the amendment simply expanded arrest authority under ?1324 to match the other statutes and that it thus "implicitly made the enforcement authority as to all three statutes identical." Id. In Barajas, the California court pointed out that since Congress had not explicitly limited local enforcement of ?? 1325 and 1326, states were "*bound* by [the supremacy clause] to enforce violations of the federal immigration laws." Barajas, 147 Cal.Rptr. at 199, citing Havenstein v. Lynham, 100 U.S. 483, 490 (1880)(statutory law of U.S. is part of the law of each state just as if it were written into state statutory law).

Further, the Barajas court found that the police officer who arrested Mr. Barajas for reentering the country after deportation was not bound to comply with the warrant requirements of 8 U.S.C. ?1357 (powers to arrest for immigration violations limited to

those officers authorized by "regulations prescribed by the Attorney General"). The court stated that ?1357 "by its express terms applies only to "officers or employees of the immigration service." Barajas, 147 Cal.Rptr. at 199. Finally, it stated that the legality of the arrest was to be "determined by the law of arrest of the state in which it occurs ..." Id, citing Ker v. California, 374 U.S. 23, 37 (1963).

Both Barajas and Gonzales can be questioned in light of recent Congressional amendments to the INA since 1983 as well as the significantly increased training and experience requirements promulgated by the Attorney General in recent regulations. See 8 C.F.R. ?287.8(c)(1994)(only designated immigration officers allowed to make arrests). In 1986, Congress amended ?1357, adding a provision governing the "detainer of aliens for violation of controlled substances laws." 8 U.S.C. ?1357(d). This section explicitly requires local law enforcement officers to notify the INS and request an INS detainer if (1) the officer has arrested someone for violation of "any law related to controlled substances" and (2) the officer has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfuly present ..." Id.

8 U.S.C. ?1357 specifically requires that those making warrantless arrests for all civil or felony criminal INA violations be "authorized under regulations prescribed by the

Attorney General." Congress has now amended the statute to make one explicit exception and that is in a situation where a local police officer has already arrested someone for a drug violation and even in that situation, the scope of the local officer's arrest authority only extends to requesting an INS detainer from an INS official who is "authorized and designated by the Attorney General." Compare 8 U.S.C. ?1357(a)(1)(INS warrantless arrest authority for civil violation only where person is likely to escape) and 8 U.S.C. ?1357(a)(2)(INS warrantless arrest authority for criminal violation only where person is likely to escape) with 8 U.S.C. ?1357(d)(controlled substances laws detainer). Because of this amendment, it is now apparent that Congress intends 8 U.S.C ?1357 to govern all arrests made for violations of the immigration laws. Russello v. United States, 464 U.S. 16 (1983)("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

Even if the Ninth Circuit's reasoning in Gonzales is correct and local police authority to enforce the criminal provisions of the INA is not necessarily preempted, local police do not have the same authority granted to INS officers under 8 U.S.C. ?1357. Rather, the extent of authority of local police to enforce criminal immigration law is necessarily governed by state law.

Gonzales, 722 F.2d at 475. The propriety of an arrest for a violation of federal law by state law enforcement officers is determined by reference to state law. Miller v. United States, 357 U.S. 301, 305 (1958). Specifically, local police are restricted by whatever their particular state law is with regard to warrantless arrests. Because of the statutory limitations on misdemeanor arrest powers in most states, local police still have almost no arrest authority for criminal violations under the INA.

Where there is no evidence of prior illegal entry, a violation of 8 U.S.C. ?1325 (unauthorized entry) is a misdemeanor. The offense of unauthorized presence in the United States is a civil violation only. Under common law, which most states have adopted by statute, an officer "could execute a warrantless arrest only when it was committed in the officer's presence." Gonzales, 722 F.2d at 475. See, e.g., Texas Code of Criminal Procedure, Art. 14.02 (common law rule); State v. Nixon, 102 Ariz. 20, 423 P.2d 718 (1967)(common law rule). Many states have amended these statutes to allow for a warrantless misdemeanor arrest where the officer has probable cause to believe that the person has committed the offense or has committed certain offenses. Ariz.Rev.Stat.Ann. ?13-3883(1978); Wash.Rev.Code 10.31.100 (traffic offenses, drug use or possession and certain property and assault offenses).

The federal misdemeanor offense of illegal entry is completed

at the time of entry, rather than being a "continuing offense." U.S. v. Rincon-Jimenez, 595 F.2d 1192, 1194 (9th Cir. 1979). Therefore, in states such as California which have retained the unmodified common law rule, it would be necessary for a police officer to witness the illegal entry in order to make the arrest. In states with a modified version, a police officer can theoretically arrest for an illegal entry that he or she has not witnessed. However, as the Gonzales court pointed out, "[t]here are numerous reasons why a person could be illegally present in the United States without having entered in violation of ?1325." Gonzales, 722 F.2d at 476. "Examples include expiration of a visitor's visa, change of student status, or acquisition of prohibited employment." Id. In Gonzales, the court held that a local officer's arrest for illegal presence was beyond the scope of the arrest authority granted by state law. Id. See also, Gates v. Superior Court, 193 Cal.App.3d 205, 238 Cal.Rptr. 592 (Cal.App.2d Dist. 1987)(Los Angeles Police Department policy was constitutionally defective and in violation of state law as it allowed officers to arrest for misdemeanors that had not occurred in the officers' presence); Op. Texas Att'y Gen. No. H-1029 (1977) (Texas peace officers do not have authority to arrest an individual solely upon suspicion that he has previously entered the country illegally unless the officer personally witnessed the entry).

Even under a state law analysis, in most cases, local police officers would never have probable cause to believe that persons they come into contact with in street encounters have committed the federal crimes of smuggling or harboring aliens because they have no expertise in determining who is or who is not an alien. The officers would therefore lack the probable cause necessary to arrest for the felony violations of ?1324. The same analysis holds true for violations of ?1326, the felony of reentry by a previously deported alien. Therefore, as a practical matter, state law arrest authority limits the scope of a local police officer's INA arrest ability to situations where the officer has personally witnessed the illegal entry of a known alien.

An officer, however, may have sufficient probable cause for an initial arrest or detention based on violation of a state law such as reckless driving and then proceed to have sufficient "reasonable suspicion" regarding illegal status to call in INS officials to arrest for violations of the criminal provisions of the INA. In one case, a Kansas state trooper stopped a car full of individuals on suspicion that the driver was intoxicated, a state law violation. He then discovered that only one person spoke English and none had immigration papers. United States v. Salinas-Calderon, 728 F.2d 1298 (10th Cir. 1984). The trooper testified that at the time, he "didn't know exactly what I had." Id. at 1300. He proceeded to contact the INS who sent an agent to

give Miranda warnings in Spanish and make the arrest. The court upheld a challenge to the defendant's conviction for smuggling because the trooper had "objective" probable cause for the arrest under state law.

LEGISLATION AND MUNICIPAL POLICIES AFFECTING LOCAL POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT

Initiative 187. In late 1994, California voters passed Initiative 187, an anti-immigrant measure that a federal court has for the time being enjoined. Initiative 187 contains specific provisions regarding local police enforcement of immigration laws that will positively require exactly what the Supremacy Clause prohibits. Initiative 187 represents a further step along what appears to be a continuum of increasingly close cooperation between local law enforcement agencies and the INS.

The California Initiative requires every law enforcement officer in the state to proceed with a lengthy verification process whenever an arrested person is "suspected of being present in the United States in violation of federal immigration laws." Numerous initiative and legislative efforts in other states as well as in Congress are sure to replicate this requirement, in spite of the increasing expertise and training that is being required by regulation for INS officers designated by the Attorney General.

Initiative 187 specifically adds requirements to the California Penal Code for local police officers to:

(1) "Fully cooperate" with the INS regarding any person arrested [under state law] if that person is also suspected of violating immigration laws. Section 834b(a). Any local government action to prevent or prohibit such cooperation is "expressly prohibited." Section 834b(c).

(2) Attempt to verify the arrested person's immigration status as a U.S. citizen, a permanent resident, an alien admitted for a temporary period, or an alien present in violation of the immigration laws. Section 834b(b)(1). The verification procedure is to include, but not be limited to, questioning the person regarding his or her date and place of birth, entry into the U.S. as well as a demand for documentation regarding legal status.

(3) Notify the person regarding his or her "apparent status" as an alien in violation of the federal immigration laws and inform the person that he or she must obtain legal status or leave the United States. Section 834b(b)(2).

(4) Notify the California Attorney General and the INS of the "apparent illegal status" and also provide this information to other public entities. Section 834b(b)(3).

The Initiative contains no provisions for increasing the training that would be required for all local officers to meet the requirements of the new regulations regarding INS officers' arrest

procedures. 8 C.F.R. ??287.5, 287.8. A number of California police unions in California opposed Initiative 187 and with good reason: Trained, experienced INS officials often have difficulty determining immigration status during street encounters because of the infinite variables involved. See, e.g., Lopez v. United States INS, 758 F.2d 1390 (10th Cir. 1985)(car passenger held to be illegal alien even though his claim that U.S. citizen wife filed an I-130 on his behalf was verified where INS officials had not acted on her petition).

In addition, if ever enacted, the Initiative requires close cooperation between local police departments and the INS, thus nullifying non-enforcement ordinances in such cities as Oakland and San Francisco, department non-enforcement policies such as in Los Angeles as well as court approved settlement agreements that local California departments have entered into as part of settlements in "pattern and practice" Monell civil rights lawsuits. See, e.g., Robles v. City of South Gate, Case No. SEC 053-892 (Cal.Sup.Ct. L.A.County 1991)(South Gate Police Chief agreed to non-enforcement provision).

Most important, Initiative 187's provisions encourage and justify local police harassment of anyone who is not a citizen, legally or illegally present in the U.S. It does not permit officers to stop anyone solely to check immigration status, but it does give them the authority to detain and harass a person for

extended time periods to question the person's status, once an arrest has been made under state law. As one commentator has stated: "Although the courts have blocked implementation of 187, the measure's passage creates an atmosphere in which harassing immigrants now appears to have official approval." Daniel Kesselbrenner, "Dangerous Allies: Local Police, 187 & the INS," Policing by Consent (a Publication of the National Coalition on Police Accountability) No. 3, April 1995, page 14.

San Francisco. If it is ever enacted, Initiative 187 will nullify a San Francisco ordinance that prohibits the use of any city funds or resources "to assist in the enforcement of federal immigration law." The ordinance, passed in 1989, further prohibits city employees or officers from "gather[ing] or disseminat[ing] information regarding the immigration status of individuals in the City and County of San Francisco unless such assistance is required by federal or state statute, regulation or court decision." San Francisco Admin. Code Ch.12 ?H.2 (Immigration Status -- Use of City Funds Prohibited). The ordinance clearly prohibits San Francisco and San Francisco County Police Officers from assisting or cooperating with any Immigration and Naturalization Service [INS] investigation, detention or arrest of any person alleged to have violated the federal immigration laws. Id. The purpose of the ordinance is to "encourage persons who are illegally present in this country to report criminal activities

which they observe to local law enforcement officers." California Attorney General Opinion No. 92-607 (11/19/92).

Like Initiative 187, however, the constitutionality of the San Francisco ordinance may be questioned on Supremacy grounds, because it concerns a subject matter, immigration, where federal power to regulate is exclusive. Id, citing DeCanas v. Bica, 424 U.S. 351, 354-355 (1975). Although there is no affirmative duty for a state or local police officer to report to the INS knowledge of a person's suspected unlawful presence in the country [with the exception of drug-related offenses under 8 U.S.C. ?1324(c)], the federal constitution does not prevent an officer from advising the INS of such information. Gates v. Superior Court, 193 Cal.App.3d 205, 219 (1987). Such transfers of arrest information do not constitute enforcement of the civil provisions of the INA and a local authority can exchange such information, although it is not obligated to do so. Id.

The San Francisco ordinance may impermissably, even if indirectly, regulate immigration by prohibiting City cooperation with the INS in the administration of the INA. To the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" [detecting persons illegally present in the country], it may be preempted under the Supremacy clause. Hines v. Davidowitz, 312 U.S. 52, 67 (1941). However, the ordinance has never been declared unconstitutional by

a California court, although the California Attorney General has declared it so, on the basis that it promotes "assist[ing] illegal aliens in escaping detection" and thus frustrates Congressional purposes as enunciated in 8 U.S.C. ?1324 (harboring of aliens illegal). Cal. Attn'y Gen. Opinion No. 92-607 (11/19/92).

Los Angeles. In Gates v. Superior Court, mentioned above, a California Court of Appeals struck down several policies of the Los Angeles Police Department [LAPD] which authorized arrests for immigration violations. The most recent LAPD policy, Special Order No. 40, stated that "undocumented alien status in itself is not a matter for police action," directed officers not to "initiate police action with the objective of discovery the alien status of a person," and advised officers not to arrest of book for violations of 8 U.S.C. ?1325 (improper entry by alien). Gates, 238 Cal.Rptr. at 595. However, the policy required an arresting officer to notify superiors who would in turn notify the INS "[w]hen an undocumented alien is booked for multiple misdemeanor offenses, a high grade misdemeanor or a felony offense, or has been previously arrested for a similar offense." Further, once the INS had placed a hold on such a person under the policy, the LAPD could detain that person for up to 48 hours. Id.

In Gates, the LAPD petitioned the court for a writ of prohibition, seeking to set aside a trial court order that summarily adjudicated claims brought by Juan Villalazo Grajeda and

Raul Oswaldo Rivera in their favor. LAPD officers initially stopped Grajeda for jaywalking and subsequently arrested him for using a false green card, a felony violation of 18 U.S.C. ?1426(b). Gates, 238 Cal.Rptr. at 594. One of the officers testified that he learned how to distinguish a false green card from a real one during LAPD roll call and that he would arrest Grajeda again if he presented the same card. Grajeda was turned over to INS officials after being held by LAPD for over 33 hours. An INS agent examined the green card and released him. Id.

Rivera was arrested because, according to the officers, he admitted his undocumented status while the officers were questioning him for "criminal activity" and he had no identification. He was taken to the INS without being arrested for any state or local crime. Rivera denied admitting his undocumented status and said he had given his driver's license to the officers as identification. He posted bond at INS and subsequently petitioned for and was granted an Immigrant Visa. Id.

In Gates, the trial court entered the following findings of fact and conclusions of law:

(1) local law enforcement was preempted from enforcing the civil provisions of the INA;

(2) LAPD policies regarding immigration violations were constitutionally defective to the extent that officers could

question about alien status without probable cause to believe that a felony violation of federal law had been committed or a misdemeanor violation of federal law was being committed in the officers' presence since the policies impermissably permitted enforcement of the civil provisions of the INA;

(3) the LAPD policies were also constitutionally defective because they allowed officers to detain, stop, question and arrest suspected undocumented persons without according them the rights found in 8 C.F.R. ?287.3 granted to persons arrested without a warrant by the INS pursuant to 8 U.S.C. ?1357(a)(2);

(4) Grajeda's arrest violated his state and federal constitutional rights because the LAPD "acted as an agent of the INS" and, even assuming a probable cause basis for his arrest, the detention period of over 33 hours exceeded the scope of any detention the INS could have imposed on him;

(5) Rivera's arrest violated his federal and state constitutional rights because there was no probable cause to arrest for a felony violation of the INA and no misdemeanor violation of the INA was committed in the officers' presence. Gates, 238 Cal.Rptr. at 597.

The Court of Appeals in Gates followed the holding of Gonzales v. City of Peoria without analysis of the recent amendments and concluded that LAPD officers had the authority to arrest for criminal violations of the INA. Gates, 238 Cal.Rptr. at 598. The court pointed out that once a person had "reached a

place of repose within the country," an LAPD officer could not arrest for illegal presence even though an INS agent could potentially charge the person, if undocumented, with a criminal offense and prosecute for the illegal entry. Id.

In addressing the warrantless arrest limitations of 8 C.F.R. ?287.3, the court stated that the regulation was "intended by its drafters" only to apply to employees and officers of the INS, not to LAPD officers. In so holding, the court simply relied on People v. Barajas, another case whose holding is questionable in light of recent amendments to the INA. Gates, 238 Cal.Rptr. at 599, citing Barajas, 81 Cal.App.3d at 1006-1007.

The Gates court further held that 8 C.F.R. ?287.3 [requiring the presentation of an alien's case within 24 hours] did not establish constitutionally mandated standards for LAPD officers to follow. It based this ruling on Chairez v. INS, 790 F.2d 544 (6th Cir. 1986)(denying claim brought by suspected alien turned over to INS by local Michigan police). In Chairez, the Sixth Circuit held that the INA's warrantless arrest section, 8 U.S.C. ?1357 as interpreted by 8 C.F.R. ?287.3, did not "create an implied, private cause of action permitting aliens wrongfully detained to sue INS officials for damages." Gates, 238 Cal.Rptr. at 599-600. Because INS agents could not be sued for violating 8 C.F.R. ?287.3, the Gates court concluded that "it makes no sense to require the LAPD, which concededly neither is nor should be

involved in the admission, exclusion or deportation of aliens, to abide by the same regulations applicable to INS agents in the administration of these civil functions of the INA." Gates, 238 Cal.Rptr. at 599.

Finally, the Gates court upheld LAPD's policy that encouraged "transfer of legitimately obtained arrest information to the INS", stating that the policy "does not constitute enforcement of the civil provisions of the INA. Gates, 238 Cal.Rptr. at 601. It based this conclusion in part on a California Attorney General's opinion that found that "local authorities are under no legally enforceable duty to report to the INS information about persons who entered the country in violation of 8 U.S.C. ?1325," such officials, "as a matter of comity and good citizenship," may do so. Id., citing Cal. Attn'y Gen. Opinion No. 83-902. The Gates court, however, held that LAPD must release any person suspected of violating ?1325 and detained by the INS within 24 hours after the detainee has posted bond or been released on the state offense. Id. With this one exception, the court basically upheld the current LAPD policy and stated that Grajeda's arrest may have violated his rights and that Rivera was falsely arrested. Gates, 238 Cal.Rptr. at 602.

Whether Gates has had any impact on local law enforcement activities in California police departments with respect to immigration violations is a matter of dispute. Two recent

lawsuits illustrate in detail the problems that arise when local police presume to know and to arrest for violations of federal immigration laws. In one, a furniture factory worker was arrested and along with seven others by an L.A. area police officer for violating 8 U.S.C. ?1325, even though he had legally entered the country several years before. Robles v. City of South Gate, Case No. SEC 053-892 (Cal.Sup.Ct. L.A.County 1991). During discovery, the arresting officer admitted that he knew almost nothing about the statute, that he wasn't sure if it "applies to all nations or it applies only to Mexico." Deposition cited at page 11, note 25, Sheila Neville, "Who's Arresting the Foreign-Born? Challenging Local Police Enforcement of the INA," Immigration Newsletter, Vol. 19 No. 4 (March 1992). Another police officer testified that he had no idea how the plaintiffs were "illegal." Id.

The subsequent lawsuit, Robles v. City of South Gate, sought 42 U.S.C. ?1983 damages and injunctive relief for violating the plaintiffs' fourth and fourteenth amendment rights. A consent decree was entered after plaintiffs won an arbitration award. The consent decree prohibited South Gate officers from stopping, questioning or in any other way detaining any individual "solely for the purpose of determining their immigration status or enforcing the immigration laws" and directed the South Gate Police Chief to advise and instruct in writing all officers concerning this prohibition. Robles, Consent Decree 12/17/91, Case No. SEC

053-892 (Cal.Sup.Ct., L.A. County 1991).

In another case, LAPD officers responded to a call that someone was being held for ransom at an unknown address. The kidnappers fled as officers finally arrived, after which officers forced the person who had been kidnapped to kneel for 45 minutes until INS agents arrived. CARECEN v. Gates, Case No. CV 91-3265JMI (C.D.Cal.1991)(Complaint for Violation of Civil Rights, Damages, Injunctive, Declaratory and Other Relief).

Subsequently, the Central American Refugee Center and two of the Salvadoran nationals who were involved filed a class action lawsuit under 42 U.S.C. ?1983 against Los Angeles Police Chief Darryl Gates and the individual officers involved in the arrests. The class consisted of those persons of latino descent who had been or would be falsely arrested, imprisoned or "otherwise denied" protective services by LAPD officers. The plaintiffs sought damages as well as injunctive relief to, in part, enjoin the defendants from detaining persons for alleged violations of the immigration laws without legal authority under the INA. Neville, supra, at page 8.

In CARECEN, the plaintiffs also claimed "failure to train" liability against the Los Angeles Police Department. This claim was brought separately as a Taxpayer Action under Cal.Code of Civ.Procedure 526a. Plaintiffs alleged that the defendant LAPD had a policy of interrogating persons of latino descent or

appearance for the purpose of verifying their immigration status without "possessing facts sufficient to ground a reasonable suspicion of illegal activity" as well as a number of other activities for which they lacked authority under 8 U.S.C. ?1357. They also requested a declaratory judgment that, in part, declared these activities to be illegal, including a judgment that the LAPD's failure to properly train its officers regarding the authority to arrest persons suspected of violating immigration laws and that this failure to train violated plaintiffs fourth, fifth and fourteen amendment rights.

The Defendant LAPD brought a summary judgment of dismissal on, among other things, this failure to train claim. The trial court allowed the case to go forward on the excessive force claims [including a Monell claim against the City] but granted the motion as to the policy claims involving immigration law issues. The court found that the officers had probable cause to arrest the two individuals involved and that they were properly detained for less than 24 hours prior to being picked up by the INS. It therefore found that there were no triable fact issues regarding the LAPD's policy of failing to train its officers regarding immigration arrest authority. CARECEN, Case No. CV 91-3265(JMI)(C.D.Cal.1991) (Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment, 9/23/93, at pp. 6-9).

LOCAL POLICE/INS COOPERATIVE EFFORTS

The reality of local police involvement in immigration enforcement extends far beyond isolated patrol officer encounters with individuals suspected of violating the immigration laws. Joint raids or street sweeps, sometimes conducted at the request of a local police department, target specific minority communities with a one-time mass effort to "purge" a community of those suspected of being undocumented or illegal immigrants. With respect to such joint residential and street raids, the human rights organization Americas Watch stated in a 1992 report on INS abuses that "[s]uch [joint] raids typically are characterized by physical abuse, unlawful detention, and racial discrimination." Americas Watch Report (May 1992).

In joint efforts, local police officers often team up with INS officers to enter homes either with or without warrants searching for undocumented workers or to stop and detain individuals on the street. A number of written policies within the INS provide guidelines for assessing whether or not such operations violate internal INS procedure. M-69: The Law of Arrest, Search, and Seizure for Immigration Officers, Ch. VI, "Relations with Local and State Enforcement Agencies"; Border Patrol Handbook p. 21-4 (Rev. 4/1/85)(State and Local Law Enforcement Agencies); Post Academy Training Supplemental Reference (Rev. 07/92)(INS/Local Police Cooperation).

The INS policies limit cooperation between INS and state or

local police agencies to situations where "there are independent and articulable facts that clearly indicate that the involvement of both the INS and another law enforcement entity is required", such as where "an INS operation is likely to uncover a violation of state or local codes or result in, for example, a need for crowd or traffic control." M-69, supra, at p. VI-2. The INS policies emphasize that during such operations only "officers or employees of the Department of Justice" can examine "information furnished pursuant to legalization applications" and that in working with local police, "INS officers should make it clear that the INS officers are solely responsible for immigration law enforcement." Id. Finally, at least one INS policy states that: "INS officers will not direct, propose, or request that state or local law enforcement operations be carried out when these operations will be beneficial only to INS." Post Academy Training Supplemental Reference (Rev. 07/92).

Three federal courts have addressed the boundaries and responsibilities placed on the INS and the police during such joint operations. None has gone so far as to prohibit such operations, particularly when their sole purpose is to enforce civil INA violations. In a 1983 case, the Ninth Circuit held a class action preliminary injuction against the INS overbroad in part because it prohibited INS officers from obtaining the assistance of other law enforcement agencies to deal with problems

that might arise during an investigation such as traffic or crowd control. Zepeda v. INS, 753 F.2d 719, 732 (9th Cir. 1983)(nothing in the California Code prohibits police officers from aiding INS officers). In a 1986 case arising out of a joint raid in Zillah, Washington, the Ninth Circuit held that INS officers were not entitled to qualified immunity based on the police chief's statement that a warrant existed where "[t]hey had a further duty to inquire as to the nature and scope of the warrant." Guerra v. Sutton, 783 F.2d 1371, 1375 (9th Cir. 1986). Finally, a Texas federal court rejected class action settlement agreements entered into between plaintiffs and local police agencies where the agreement exceeded limitations placed on cooperative efforts enunciated in INS policies. Cervantes v. Whitfield, 613 F.Supp. 1439, 1446 (D.C. Texas 1985). With the increasing frequency of one-time joint enforcement efforts in California and Texas is a corresponding rise in federal litigation based on joint raids in those states. The details brought out suggest that in many, if not most, of the joint efforts violate the INS training policies that prohibit joint operations only beneficial to the INS. Plaintiffs' counsel in most of these cases assert a Monell claim against the local police chief for the failure to "properly train [o]fficers regarding ... the legal limits of police authority to make arrests and carry out searches of those suspected of immigration law violations." Complaint at para. 41, Sanchez v.

Garza, Civil Action SA-93-CA-1030 (W.D.Texas 1993)(civil rights conspiracy lawsuit brought by nine individual plaintiffs against Georgetown Police Department and INS arising out of well planned massive joint residential raid on May 18, 1992). See also Mendoza v. City of Farmersville, Case No. CV-F-93-5789 (E.D. Cal. 1993)(During the early morning of November 5, 1992, City of Farmersville, CA police officers joined with INS and Border Patrol Agents from San Francisco to conduct a massive joint residential raid in Hispanic community. Fifty individual plaintiffs (including six minors) brought damages claims and claims for declaratory and injunctive relief against the City and the INS pursuant to 42 U.S.C. ?1983. None of the officers had warrants and because of the manner in which the homes were surrounded and the occupants intimidated, consent to the officers' and agents' entries was not voluntary. The only purpose of the raid was to interrogate and intimidate those inside the homes regarding their "papers" and immigration status. In some homes, police entered before the Border Patrol agents, demanding entry or pushing doors in. In others, they simply blocked exits and entrances while Spanish-speaking INS agents proceeded with questioning. In one instance, an officer ordered one plainitff down to the floor at gunpoint and demanded to see his immigration papers. In another, an occupant was escorted outside to his car with an officer on one side and an agent on the other in order to retrieve his "papers."

In most of the homes, no one was arrested or taken to INS detention for deportation. [Complaint for Damages, Injunctive and Declaratory Relief for Civil Rights Violations, 11/4/93].

In their Complaint, plaintiffs alleged that the Chief of Police conspired with INS agents in a pre-planned raid in which they singled out and entered residences known to be inhabited by persons of Hispanic ancestry. Plaintiffs also alleged that the City of Farmersville was liable for its failure to adequately supervise, train, discipline and control its police officers and that this failure was done with deliberate indifference to the plaintiffs' constitutional and statutory rights. Plaintiffs also alleged that the raids were conducted in violation of their fourth and fourteenth amendment. Plaintiffs sought a declaratory judgment and an injunction to prohibit the local police department from participating in any "joint operation ... involving the entry of dwellings, where no warrant has been obtained and where the INS has not independently established the nature and scope of the warrant to be executed for the purpose of ensuring that the raid in which the local police agency is participating is executed in a constitutional manner." [Complaint at page 40]

3. Cedillo-Perez v. Pat Adams, Civil Action No. 94-2461 (S.D. Texas 1994). On May 18, 1994, police officers from the Katy, Texas department joined with INS officers and Border Patrol Agents to conduct pre-planned joint residential raids and street sweeps

centered in the Hispanic community. Thirteen plaintiffs brought a 42 U.S.C. ?1983 civil rights class action lawsuit as well as individual damages suits against the Katy Police Department and the INS. [First Amended Complaint].

The Katy raids consisted of three separate fronts that occurred almost simultaneously: (1) A traffic checkpoint during which only drivers who appeared to be Hispanic were stopped and questionned regarding their immigration status; (2) police officers and INS agents questioned nearly all of the residents in a large apartment complex occupied mainly by Hispanics about their immigration status; (3) Katy police and INS officials raided a day labor site, questioning everyone [mostly Hispanics] about their immigration status. No warrants were obtained for any of the residences entered nor for any of the individuals arrested. [Plaintiffs' Memo in Support of Motion for Preliminary Injunction, 9/1/94].

According to the INS, Katy police had received complaints about suspected illegal aliens for over a year prior to the "operation." INS agents conducted surveillance of sites "where undocumented aliens appeared to be present in significant numbers," then proposed the operation to the Katy police. The Katy police force was to "assist in securing the areas to be targeted, provide security and back-up for the INS agents, and

handle any traffic problems." [Federal Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, page 2].

The INS apprehended 67 undocumented people, with 62 of them agreeing to return voluntarily to Mexico. It justified its actions based on the following rationales:

(1) Simply asking a person for identification does not implicate the Fourth Amendment unless a reasonable person would have believed that he was not free to leave. INS v. Delgado, 466 U.S. 210, 216 (1984); Zepeda v. INS, 753 F.2d 719, 731 (9th Cir. 1985)(unless the person is seized, questioning about immigration status "does not even require reasonable suspicion of alienage");

(2) INS agents need only reasonable, articulable grounds to believe a person is undocumented to stop the person briefly to determine his or her status. United States v. Brignoni-Prince, 422 U.S. 873, 884 (1975). The two significant factors considered in this case involved being in an area with high concentrations of undocumented aliens and exhibiting certain behaviors on being approached by an agent.

(3) Pursuant to 8 U.S.C. ?1357(a)(1), INS agents can, without a warrant, interrogate any person believed to be an alien as to his or her right to remain in the United States. Zepeda v. INS, 753 F.2d 719 (9th Cir. 1983)(warrantless arrest statutes give INS officers "as much authority as permissible under Fourth Amendment").

(4) It is a federal crime for a lawful permanent resident to be in public without documentation that establishes their legitimate immigration status. 8 U.S.C ?1304(e). Also a crime is simply entering the country "at a time or place other than as designated by immigration officers" which can consequently make illegal status a "criminal activity" which in turn will support a finding of reasonable suspicion to question the individual. United States v. Garcia, 942 F.2d 873, 877 (5th Cir. 1991). Even being in possession of a green card is not conclusive evidence of the person's right to be in the country because the person may lose his or her immigration status by engaging in criminal activity. Local 15, Warehouse & Officer Workers' Union v. NLRB, 795 F.2d 705 (9th Cir. 1986). However, as pointed out by plaintiffs, if a stop is not purely a consensual encounter, then the agent must have reasonable suspicion to justify the initial stop and demand to see documentation. [Plaintiffs' Reply to Defendants' Opposition at page 13].

(5) INS agents may arrest based on probable cause and turn out to be mistaken later, and in making their judgments about illegal presence, "officers are entitled to rely on their specialized training and knowledge when assessing the factual situation encountered." United States v. Head, 693 F.2d 353, 357 (5th Cir. 1982).

(6) Once they were at the "day labor" gathering sites, "INS

personnel and police officers observed behavior on the part of individuals who saw them coming which added to their grounds for believing the individuals to be illegal aliens [emphasis added]." [Federal Defendants' Brief at page 15].

(7) Although "Mexican" appearance alone is not sufficient to justify a stop, it is one of the factors which might give rise to the "specific, articulable facts" justifying a stop. United States v. Brignoni-Ponce, 422 U.S. 873, 886-887 (1975). Another factor is erratic or evasive behavior and yet another is "insider information" about illegal border crossings. Id. at 884-885. Where INS officers are trained, another factor could be "characteristic appearance" such as mode of dress and haircut. Id. at 885.

(8) During the pre-operation briefing session, a special INS agent told officers that the "behavior of the individual upon viewing or encountering agents of the INS" was the single most important factor "in shaping the belief that any individual was an undocumented alien." [Federal Defendants' Brief at page 22]. However, numerous federal courts (particularly the Ninth Circuit) have pointed out that such behavior even when combined with foreign-looking appearance does not justify a detention for questioning by INS agents. Orhorhaghe v. INS, F.3d (9th Cir. 1994); United States v. Mallides, 473 F.2d 859 (9th Cir. 1973) (failure to look at Border Patrol not a factor); Gonzales-

Rivera v. INS, F.3d (9th Cir. 1994) (blinking or not blinking not a factor).

(8) The local police department was not precluded from "assisting" the INS in the enforcement of the immigration laws where its "manpower and knowledge of the physical terrain is critical to an operation." [Federal Defendants' Brief at page 26]. Justice Department policy does not preclude joint operations with local police departments. The Police Department's purpose was to provide for general safety, to secure target areas and their neighborhoods and to control traffic. It did not undertake a mission to enforce immigration laws with no guidance from the agency entrusted by Congress to do so. Id. at page 28.

However, many of the plaintiffs asserted that they were initially stopped by Katy police officers who then proceeded to interrogate them about immigration status. [Plaintiffs' Reply to Defendants' Opposition at page 10]. In most cases, police did not understand the documentation they were shown and would then hold the person until the INS arrived. Id. at page 11. This situation was far different from the situation in U.S. v. Salinas-Calderon, 728 F.2d 1298 (10th Cir. 1984)(discussed above). In Katy, local officers stopped individual solely as "frontrunners" for the INS as interrogators about immigration status; they had no basis under state law to make the stops. Id. Because there was no legal basis for the initial stop, INS officers were not justified in

further detentions to review documents. Florida v. Ryer, 460 U.S. 491 (1983).

CONCLUSION

Local police officers have no authority to enforce the civil provisions of the INA and, given recent amendments to the statute and to the implementing regulations, a strong argument exists that they also have no authority to enforce the criminal provisions. If local police departments encourage officers to detain or arrest or stop persons solely for possible immigration violations, such departments are potentially liable for promoting unconstitutional arrest policies and for failure to train in the "labyrinth" of immigration law. As one judge stated with respect to the situation in California, the problem of local officer enforcement has to do with their near total lack of expertise combined with the dynamic nature of immigrant communities: "... [T]he authority to arrest in the hands of the unskilled is a danger. Even the tactics of the skilled, the INS agents, have captured the unflattering attention of Congress .... Illegal immigrants, naturally, normally live and work in areas populated by people of similar characteristics. The need for care and caution in setting down the proper rules for detention and arrest bear close scrutiny. People v. Barajas, 81 Cal.App.3d 999, 1018 (1978).

Further, when local police join with INS officers to engage in massive raids, the sole purpose of which is to arrest for civil

INA violations, the only pupose that local participation usually serves is to pave the way for the INS to get into residences and make arrests. If local police participate in such raids at all, their roles are legally limited to the backup function of maintaining crowd and traffic control. Where local police or sheriffs initiate involvement of the INS, such operations violate the Supremacy Clause.