

Yeshiva University, Cardozo School of Law

LARC @ Cardozo Law

---

Cardozo Law Review de•novo

Scholarship

---

2017

## Local Police Entanglement with Immigration Enforcement in Georgia

Azadeh Shahshahani  
*Project South*

Follow this and additional works at: <https://larc.cardozo.yu.edu/de-novo>



Part of the [Law Commons](#)

---

### Recommended Citation

Shahshahani, Azadeh, "Local Police Entanglement with Immigration Enforcement in Georgia" (2017).  
*Cardozo Law Review de•novo*. 52.  
<https://larc.cardozo.yu.edu/de-novo/52>

This Article is brought to you for free and open access by the Scholarship at LARC @ Cardozo Law. It has been accepted for inclusion in Cardozo Law Review de•novo by an authorized administrator of LARC @ Cardozo Law. For more information, please contact [christine.george@yu.edu](mailto:christine.george@yu.edu), [ingrid.mattson@yu.edu](mailto:ingrid.mattson@yu.edu).

CARDOZO LAW REVIEW  
*de•novo*

LOCAL POLICE ENTANGLEMENT WITH  
IMMIGRATION ENFORCEMENT IN GEORGIA

*Azadeh Shahshahani*<sup>†</sup>

TABLE OF CONTENTS

INTRODUCTION .....	105
I. SECTION 287(G).....	106
II. HOUSE BILL 87 .....	111
III. SECURE COMMUNITIES .....	113
IV. PRIORITY ENFORCEMENT PROGRAM .....	116
CONCLUSION .....	118

INTRODUCTION

The federal government has encouraged local police to assist in apprehending, detaining, and removing undocumented immigrants living in the United States ever since the 1980s. State governments, by

---

<sup>†</sup> Azadeh Shahshahani is the Legal and Advocacy Director with Project South. She is a past president of the National Lawyers Guild and previously directed the National Security/Immigrants’ Rights Project at the ACLU of Georgia. She is the editor of two reports on 287(g) in Georgia and a co-author of the report “Prejudice, Policing, and Public Safety: The Impact of Immigration Hyper-Enforcement in the State of Georgia” published in July 2014. She is also the author of the chapter “Immigration and Racial Profiling” in the 3rd and 4th editions of the book *Cultural Issues in Criminal Defense* published in August 2010 and June 2015, respectively. The author wishes to thank John Folkerth, Lauren Schenkel, and Christina Zeidan for their research help with this article.

themselves, do not have the authority to directly regulate immigrants' presence or immigration; that power belongs to the federal government pursuant to Article I, Section 8 of the U.S. Constitution's Commerce Clause, among other sources. However, federal officials have permitted—sometimes even coerced—states to “cooperate” in reporting undocumented immigrants and aiding in “identification, apprehension, detention, or removal” of these immigrants.<sup>1</sup>

As a practical matter, this cooperation appears not to have been limited in its scope because of the way the entanglement operates. The various mechanisms used in support of immigration enforcement objectives are damaging to the communities in which they operate. Racial profiling, a marked violation of the protections afforded by the U.S. Constitution, is one such common mechanism that local police employ to achieve federally-guided immigration objectives. Moreover, local police entanglement of this kind wastes resources and hinders police efforts to effectively protect local communities because of the lost trust between immigrants and the police.

The following sections of this Article detail the types of police involvement and the associated impact that these immigration enforcement objectives have on local communities. Prime examples of programs that operate (or used to operate) specifically within the State of Georgia include: Section 287(g), Secure Communities, and the Priority Enforcement Program.

## I. SECTION 287(G)

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) established the guiding principles of Section 287(g) programming in 1996.<sup>2</sup> Section 287(g), as incorporated within the Immigration National Act (INA) and amended by the Homeland Security Act of 2002, grants the U.S. Immigrations and Customs Enforcement (ICE) agency the power to enter into Memoranda of Understanding (MOUs) with state and local enforcement agencies so that local police may perform specific immigration enforcement functions.<sup>3</sup> The specific enforcement functions are limited to those set within the Standard Operating Procedure (SOP) of each MOU between ICE and the individual state entity or county. Authorized local personnel responsibilities include, but are not limited to: interrogating any person detained; serving warrants of arrest for immigration

---

<sup>1</sup> 8 U.S.C. § 1357(g)(10)(B) (2012).

<sup>2</sup> *Id.* at § 1357(g).

<sup>3</sup> *Id.*

violations; administering oaths and taking evidence; preparing charging documents; and detaining and transporting arrested immigrants to ICE-approved detention facilities. The power to enter into these agreements stems from the Secretary of Homeland Security's ability to delegate such authority to ICE. Currently, four jurisdictions in Georgia, namely Cobb, Gwinnett, Whitfield, and Hall, operate under an MOU.

Although the program was initially intended to combat violent crime and felonies, such as gang activity and drug trafficking, Section 287(g) has instead undermined public safety. Immigrant communities are now more hesitant to report crimes because of concerns regarding deportation. According to both the Major Cities Chiefs Association and the Police Foundation, participants in the 287(g) program are harming, rather than helping, community policing efforts.<sup>4</sup> In Georgia, the impact has been felt most acutely in Cobb County, Gwinnett County, Hall County, and Whitfield County—all of which, as stated above, have agreed to comply with ICE's 287(g) terms of engagement.

The American Civil Liberties Union (ACLU) Foundation of Georgia in 2009 documented this trend in a report titled: *Terror and Isolation in Cobb: How Unchecked Police Power Under 287(g) Has Torn Families Apart and Threatened Public Safety*.<sup>5</sup> The report included interviews with ten community members affected by the program as well as community advocates and attorneys based in Cobb County.<sup>6</sup>

For immigrants living in Cobb County, Section 287(g) has not only decreased willingness to report crimes, but also increased the levels of community mistrust in law enforcement officials. For instance, one community member named Joanna mentioned that she had to put out a fire in her kitchen by herself because she was afraid to call 911.<sup>7</sup> Joanna's commentary highlights the amount of fear and mistrust many of her fellow immigrants' experience, even when they, themselves, are the victims. The Latin American Association's Director of Policy and Advocacy, David Shaefer, echoed similar concerns in a recent hearing in Gwinnett County, stating that the program "may lead to under reporting of crimes for fear that those who contact the Sheriff's Office may" be deported.<sup>8</sup> The 287(g) program contributes to diminished

---

<sup>4</sup> DANYELLE SOLOMON, TOM JAWETZ, & SANAM MALIK, CTR. FOR AM. PROGRESS, THE NEGATIVE CONSEQUENCES OF ENTANGLING LOCAL POLICING AND IMMIGRATION ENFORCEMENT (2017), <https://cdn.americanprogress.org/content/uploads/2017/03/20140134/LawEnforcementSanctuary-brief.pdf>.

<sup>5</sup> AM. CIVIL LIBERTIES UNION FOUND. OF GA., TERROR AND ISOLATION IN COBB: HOW UNCHECKED POLICE POWER UNDER 287(G) HAS TORN FAMILIES APART AND THREATENED PUBLIC SAFETY (Azadeh Shahshahani ed. 2009), <https://www.aclu.org/other/terror-and-isolation-cobb-how-unchecked-police-power-under-287g-has-torn-families-apart-and>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 11.

<sup>8</sup> Curt Yeomans, *Commissioners Approve Immigration Detainment Agreement Amid*

public safety for all Georgia residents.

The 287(g) program further hinders local law enforcement's ability to combat violent crimes and other related felonies. Local officials must instead reallocate their limited financial resources towards the MOU objectives. In Gwinnett County, the current MOU (in effect as of June 2016)<sup>9</sup> indicates that Gwinnett is responsible for all expenses, such as salaries, benefits, etc., of the personnel participating under the terms of the MOU.<sup>10</sup> The Gwinnett County Sheriff's Department must also provide, at no cost to ICE, an office within the department from which ICE supervisory employees may work.<sup>11</sup> Additionally, the Sheriff's Department will be held responsible and will bear any costs of its participating personnel with regard to expenses incurred by reason of death, injury, or incidents giving rise to liability.<sup>12</sup>

In Cobb County, immigrants disappear into detention for violations such as having a broken tail light or tinted windows on their car. Between 2008 and the beginning of 2012, 6,274 individuals were held on detainer for ICE in Cobb County.<sup>13</sup> Out of those held on detainer, 4,538 had not been convicted of any crime.<sup>14</sup> Since 2009, Gwinnett County has held 13,346 people on detainer for ICE pursuant to 287(g), according to the Sheriff's Office website.<sup>15</sup> Of those, approximately half (6,788 people) were detained for traffic violations and some for only driver's license violations.<sup>16</sup>

The program has also historically promoted and served as a justification for racial profiling and human rights violations, even though some MOUs, such as Gwinnett's, require that local enforcement "show an ability to meet and deal with people of differing backgrounds and behaviors."<sup>17</sup> Nonetheless, as Schaefer noted, in Gwinnett County "287(g) is undermining public trust in law enforcement . . . especially in

---

*Opposition*, GWINNETT DAILY POST (June 21, 2016), [http://www.gwinnettdaily.com/local/crime/commissioners-approve-immigration-detainment-agreement-amid-opposition/article\\_934a7096-e757-5738-9225-5471c451b08c.html](http://www.gwinnettdaily.com/local/crime/commissioners-approve-immigration-detainment-agreement-amid-opposition/article_934a7096-e757-5738-9225-5471c451b08c.html).

<sup>9</sup> Memorandum of Agreement between the U.S. Dep't of Homeland Sec., Gwinnett Cty. Sheriff's Dep't & ICE, (June 30, 2016), [https://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r\\_287ggwinnetcountyso.pdf](https://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287ggwinnetcountyso.pdf) [hereinafter MOU].

<sup>10</sup> Per discussion with national experts, local sheriffs' offices elsewhere also typically have to pay all expenses of the personnel carrying out the tasks under the MOU.

<sup>11</sup> MOU, *supra* note 9.

<sup>12</sup> *Id.*

<sup>13</sup> Transactional Recs. Access Clearinghouse (TRAC) Immigration, *Who Are the Targets of ICE Detainers?*, TRAC REPORTS, INC. (Feb. 20, 2013), <http://trac.syr.edu/immigration/reports/310>.

<sup>14</sup> *Id.*

<sup>15</sup> Yeomans, *supra* note 8.

<sup>16</sup> *Id.*

<sup>17</sup> MOU, *supra* note 9, at 2.

the Latin American community.”<sup>18</sup>

There is no meaningful check in place to ensure that local law enforcement does not abuse 287(g)’s program protocols. A U.S. Government Accountability Office investigation in 2009 found ICE was not exercising proper oversight over local or state agencies.<sup>19</sup> The Office of the Inspector General (OIG) also issued a report in 2010 highlighting the targeting of community members who have not committed any crimes. Less than ten percent of those sampled by OIG were ICE “Level 1” offenders.<sup>20</sup> Almost half had no involvement in crimes of violence, drug offenses, or property crimes.<sup>21</sup>

The practice of law enforcement agencies targeting low level offenders and non-offenders raises concern over the use of racial profiling in the implementation of 287(g). In Georgia, for example, both Gwinnett and Cobb counties have had many documented instances of racial profiling by officers in the implementation of 287(g) agreements.<sup>22</sup> Reports from these counties have found “‘that police officers are targeting immigrants and people of color for stops, searches, and interrogations,’ under the guise of traffic violations.”<sup>23</sup> The OIG also documented other problems, such as a lack of state and local supervision as well as a lack of sufficient training.<sup>24</sup>

Compounding the 287(g) problem is the fact that Georgia does not have any state legislation banning racial profiling or mandating accountability or transparency for law enforcement.<sup>25</sup> Georgia has deported thousands of people and separated countless families in the process. Statistics from a 2014 report by the ACLU of Georgia, the Georgia Latino Alliance for Human Rights, and other groups echoed

<sup>18</sup> Yeomans, *supra* note 8.

<sup>19</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-109, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (2009), <http://www.gao.gov/new.items/d09109.pdf>.

<sup>20</sup> OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., THE PERFORMANCE OF 287(G) AGREEMENTS (2010), [https://www.oig.dhs.gov/assets/Mgmt/OIG\\_10-63\\_Mar10.pdf](https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf).

<sup>21</sup> *Id.*

<sup>22</sup> Letter from Azadeh Shahshahani, Nat’l Sec./Immigrants’ Rights Project Dir., Am. Civil Liberties Union of Ga., to the U.S. Dep’t of Homeland Sec. (Aug. 24, 2010), [https://www.acluga.org/sites/default/files/287g\\_dhs\\_complaint.pdf](https://www.acluga.org/sites/default/files/287g_dhs_complaint.pdf).

<sup>23</sup> *Id.* at 2.

<sup>24</sup> Memorandum from Deborah L. Outten-Mills, Acting Assistant Inspector Gen. for Inspections, to Timothy Moynihan, Assistant Dir., Office of Prof’l Responsibility for Immigration and Customs Enf’t (Sept. 25, 2012), [https://www.oig.dhs.gov/assets/Mgmt/2012/OIG\\_12-130\\_Sep12.pdf](https://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-130_Sep12.pdf).

<sup>25</sup> *But see* Ga. Code Ann § 17-5-100(d) (2016) (“A peace officer shall not consider race, color, or national origin in implementing the requirements of this Code section except to the extent permitted by the Constitutions of Georgia and of the United States.”). § 17-5-100 pertains to investigating immigration status. *See id.* The provision quoted is not a ban on racial profiling in law enforcement activities generally, and it can be easily ignored because it includes no enforcement mechanism. Thus, it does not mandate accountability or transparency.

this conclusion, noting that in Georgia, between 2007 and 2013, ICE took custody of 11,421 undocumented spouses of U.S. citizens and some 40,000 children witnessed their parents being taken into custody due to their undocumented status.<sup>26</sup> In the context of these statistics, Schafer encouraged Gwinnett County officials to answer the question: “And how much good does it do us to be taking parents out of families when we’ve got a situation where these families are already struggling to make a living when we’re effectively taking the wage earner out of the home?”<sup>27</sup>

Many members of the community mirror this sentiment in finding that 287(g) is “separating families. It is undermining trust in the community.”<sup>28</sup> Between 2006 and April 2012, federal officials deported 14,831 people via the 287(g) program.<sup>29</sup> Unsurprisingly, Georgia ranks high based on the total number of deportations as compared to other U.S. states.<sup>30</sup>

Participation in the 287(g) program in Georgia and across the United States can be expected to increase with President Trump prioritizing expansion of the program in a January 2017 executive order.<sup>31</sup> The Trump administration considers the 287(g) program to be “a highly successful force multiplier” and alleges that the program led to identification of 402,000 removable persons from January 2006 to September 2015, “primarily through encounters at local jails.”<sup>32</sup> The Director of ICE and Commissioner of U.S. Customs and Border Protection are authorized to engage with law enforcement jurisdictions that are willing and qualified to enter into 287(g) agreements.<sup>33</sup> The Director and Commissioner are to take into account the capabilities and resources of the jurisdictions and structure an agreement that “employs the most effective enforcement model for that jurisdiction.”<sup>34</sup> This

---

26 AM. CIVIL LIBERTIES UNION FOUND. OF GA. ET AL., PREJUDICE, POLICING AND PUBLIC SAFETY: THE IMPACT OF IMMIGRATION HYPER-ENFORCEMENT IN THE STATE OF GEORGIA (2014), [http://www.law.nyu.edu/sites/default/files/upload\\_documents/Prejudice\\_Policing\\_Public%20Safety.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/Prejudice_Policing_Public%20Safety.pdf) [hereinafter PREJUDICE, POLICING AND PUBLIC SAFETY].

27 Yeomans, *supra* note 8.

28 *Id.*

29 Jeremy Redmon, *Georgia Highly Active in Deportations*, ATLANTA J.-CONST. (Apr. 8, 2012), <http://www.ajc.com/news/news/local/georgia-highly-active-in-deportations/nQSRk>.

30 *Id.*

31 See Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

32 See Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, Customs and Border Prot., et al. 4 (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf).

33 *Id.*

34 *Id.*

includes jail enforcement and taking advantage of other state services.<sup>35</sup> This renewed focus on Section 287(g) can be expected to drain state and local resources and result in further deterioration of community trust in local police.

## II. HOUSE BILL 87

In 2011, Georgia Governor Nathan Deal signed Georgia's Illegal Immigration Reform and Enforcement Act, House Bill (HB) 87.<sup>36</sup> The bill authorizes Georgia law enforcement to ask about immigration status when questioning suspects during criminal investigations.<sup>37</sup> More specifically, HB 87 allows police to inquire whether an individual has appropriate immigration or citizenship papers and to determine the protocols for how to investigate a suspected individual (the "show me your papers" provision).<sup>38</sup> Civil rights groups challenged the legislation before implementation, arguing that HB 87 violated constitutional rights and promoted the use of racial profiling. Many activists compared HB 87 to Arizona's "Show Me Your Papers" legislation. In effect, HB 87 compels Georgia residents to carry identification with them at all times.

Not only does HB 87 empower police officials to determine who they seek to question regarding citizenship or immigration status, but it permits them to determine the type of information that will suffice to prove a suspect's identity. This process by its very nature invites the racial profiling of residents who appear foreign.

In this way, HB 87 violates the Constitution's Fourteenth Amendment, which provides equal protection and due process for all. When civil rights groups challenged HB 87 in court, Judge Thomas Thrash for the Northern District of Georgia quickly ruled in favor of enjoining key provisions, including the "Show Me Your Papers" provision. However, on appeal, the Eleventh Circuit Court of Appeals reversed the lower court's decision by lifting the temporary injunction. The court however acknowledged HB 87's potential for abuse, especially with regard to the "Show Me Your Papers" provision.

After the bill signing, Governor Nathan Deal said that "[t]his legislation is a responsible step forward in the absence of federal action . . . . Illegal immigration places an incredible burden on Georgia taxpayers."<sup>39</sup> In reality though, HB 87 has done significant harm to

---

<sup>35</sup> *Id.* at 4–5.

<sup>36</sup> H.R. 87, 151st Gen Assemb., Reg. Sess. (Ga. 2011).

<sup>37</sup> *See id.*

<sup>38</sup> *See id.*

<sup>39</sup> Gustavo Valdes, *Georgia Governor Signs Controversial Anti-Illegal Immigration Law*, CNN (May 13, 2011 4:42 PM), <http://www.cnn.com/2011/US/05/13/georgia.immigration.law/>



Georgia residents by way of impacting the local economy. Georgia farmers have historically relied on the immigrant workforce. According to the Georgia Fruit and Vegetable Growers Association, HB 87 posed the risk of a loss of approximately \$391 million and 3,260 jobs over the long-run.<sup>40</sup> This devastating loss includes not only those members of the Georgia community who actually farm the land, transport, and sell produce, and run the business, but also those Georgia residents who purchase groceries from their local market or grocery store.

The Valdosta Daily Times echoed similar sentiments with its editorial titled *Solving the Farm Crisis*:

Maybe this should have been prepared for, with farmers' input. Maybe the state should have discussed the ramifications with those directly affected. Maybe the immigration issue is not as easy as 'send them home,' but is a far more complex one in that maybe Georgia needs them, relies on them, and cannot successfully support the state's No. 1 economic engine without them.<sup>41</sup>

The cost associated with HB 87 is not limited to the monetary impact; the bill has had an equally costly social impact. After Georgia passed HB 87, the ACLU of Georgia and the Georgia Latino Alliance for Human Rights (GLAHR) held forums across the state. These forums took place during the Summer of 2011 until the Spring of 2012, and included a focus group of twenty-two individuals answering questions revolving around community fear and mistrust because of HB 87's passage. The responses to various questions showcase just how detrimental HB 87 was to the community within its first year of implementation. For instance, ten members of the group responded that they no longer felt safe in their communities; another fourteen members responded that they avoided certain areas of the community due to police surveillance and harassment; and another eight indicated that they avoided calling enforcement officials due to concerns over their immigration status.

Until it is repealed, House Bill 87 will continue to damage Georgia communities by inhibiting a safe environment for all.

---

index.html.

<sup>40</sup> Azadeh Shahshahani, *HB 87 Negatively Impacts Georgia Economy and Reputation*, HUFFINGTON POST, [http://www.huffingtonpost.com/azadeh-shahshahani/georgia-immigration-policy\\_b\\_1528987.html](http://www.huffingtonpost.com/azadeh-shahshahani/georgia-immigration-policy_b_1528987.html) (last updated July 21, 2012).

<sup>41</sup> *Solving the Farm Crisis*, THE VALDOSTA DAILY TIMES (June 16, 2011), [http://www.valdostadailytimes.com/opinion/solving-the-farm-crisis/article\\_00ac0c13-1f1d-5aac-b5e4-a005c4fc30cd.html](http://www.valdostadailytimes.com/opinion/solving-the-farm-crisis/article_00ac0c13-1f1d-5aac-b5e4-a005c4fc30cd.html).

## III. SECURE COMMUNITIES

The Secure Communities program first went into effect statewide on December 6, 2011. The program permits local or state police to fingerprint an arrested individual, and then share that information with the Department of Homeland Security (DHS) to ascertain the individual's immigration history.<sup>42</sup> Once local police arrest and book an individual for a criminal violation, they submit the individual's fingerprints to the FBI for criminal history and warrant checks.<sup>43</sup> The program licenses this same biometric data to be sent to ICE from the FBI to determine if the individual is a "high-risk" or priority for removal from the United States.<sup>44</sup> Outcry over the program led to its dismantling and replacement in 2014, but President Trump authorized its return in a January 2017 executive order.<sup>45</sup> The discussion below details the events that led to Secure Communities' demise and the consequences brought about while it was in effect.

In practice, the Secure Communities program encourages law enforcement officials to arrest foreign-born individuals for any reason whatsoever, including traffic infractions, regardless of prior criminal history (e.g., no criminal history). Additionally, there have been reports of racial profiling used by the officers in making these stops. According to a 2014 NBC News report, "immigrants have described being asked for ID, then handcuffed and fingerprinted, while walking on the street, standing in their front yard, or driving through checkpoints".<sup>46</sup> Latino U.S. citizens have reported being stopped to be fingerprinted, only to be let go once their fingerprints reveal their citizenship. According to the data ICE released in November 2009, of the 113,000 non-citizens identified during the program's first year of implementation, more than 101,000 (or close to ninety percent) were never charged with or convicted of dangerous crimes.<sup>47</sup> Out of those detained, an alarming five percent were actually U.S. citizens, testifying to the inaccuracy and incompleteness of DHS's databases.<sup>48</sup>

The program was also profoundly susceptible to abuse and racial

---

<sup>42</sup> See *Secure Communities*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/secure-communities>.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.*

<sup>45</sup> See Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 § 10(a) (Jan. 25, 2017).

<sup>46</sup> Hannah Rappleye & Lisa Riordan Seville, *Does High-Tech Dragnet to Deport Immigrants Go Too Far?*, NBC NEWS (Feb. 28, 2014), <http://www.nbcnews.com/news/investigations/does-high-tech-dragnet-deport-immigrants-go-too-far-n40306>.

<sup>47</sup> Azadeh Shahshahani, *ICE's Misplaced Priorities: The Numbers Speak for Themselves and the Stories Cry out for Justice*, HUFFINGTON POST (July 7, 2010), [http://www.huffingtonpost.com/azadeh-shahshahani/ices-misplaced-priorities\\_b\\_567536.html](http://www.huffingtonpost.com/azadeh-shahshahani/ices-misplaced-priorities_b_567536.html).

<sup>48</sup> *Id.*

profiling, similar to the misguided 287(g) program. In a 2012 report entitled *Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters*, DHS asserted that "State governments mandating that state or local law enforcement officers inquire into the immigration status of a specified group or category of individuals" was impermissible.<sup>49</sup> However, local police officers or sheriff's deputies could still arrest an individual simply to bring him or her to the attention of immigration officials. This lack of oversight created an unacceptably high risk for the unlawful use of racial profiling against individuals of certain nationalities.

In response, more than 350 localities across the country challenged the program by passing resolutions and putting in place policies to limit cooperation with ICE in the implementation of Secure Communities. Three counties in Georgia, including Fulton County, joined the challenge. In September 2014, the Fulton County Board of Commissioners moved to limit the county's compliance with ICE "detainer" requests, which sought to hold a jailed immigrant beyond the standard time allotment so that federal officials could investigate the individual's immigration status before release.<sup>50</sup>

The Commissioners were right to question the practice. Federal court decisions made it clear that local law enforcement agencies that detained individuals on the sole authority of an ICE detainer request violated the Fourth Amendment, unless there was evidence of probable cause to justify the detention.<sup>51</sup> Since detaining someone for ICE

---

49 U.S. DEP'T OF HOMELAND SEC., GUIDANCE ON STATE AND LOCAL GOVERNMENTS' ASSISTANCE IN IMMIGRATION ENFORCEMENT AND RELATED MATTERS 14, <https://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf> (last updated July 16, 2015).

50 Jeremy Redmon, *Fulton Commissioners Urge Sheriff to Stop Cooperating with ICE*, ATLANTA J.-CONST. (Sept. 3, 2014), <http://www.ajc.com/news/news/state-regional-govt-politics/fulton-commissioners-urge-sheriff-to-stop-cooperat/nhFdW>.

51 See, e.g., *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at \*11 (D. Ore. Apr. 11, 2014) (holding that county violated the Fourth Amendment by relying on an ICE detainer that did not provide probable cause regarding removability); *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 29 (D.R.I. 2014) (concluding that detention pursuant to an immigration detainer "for purposes of mere investigation is not permitted"); see also *Moreno v. Napolitano*, No. 11-C-5452, 2014 WL 4814776 (N.D. Ill. Sept. 29, 2014) (denying judgment on the pleadings to the government on plaintiffs' claim that ICE's detainer procedures violate probable cause requirements); *Gonzalez v. Immigration and Customs Enforcement*, No. CV-13-04416 BRO (FFMx), 2014 WL 12605368, at \*7 (C.D. Cal. July 28, 2014) (granting the government's motion to dismiss, but allowing plaintiffs to file an amended complaint and noting that plaintiffs "have sufficiently pleaded that Defendants exceeded their authorized power" by issuing "immigration detainers without probable cause resulting in unlawful detention"); *Villars v. Kubiatuski*, No. 12-CV-4586, 2014 WL 1795631, at \*10 (N.D. Ill. May 5, 2014) (rejecting dismissal of Fourth Amendment claims concerning an ICE detainer issued "without probable cause that Villars committed a violation of immigration laws"); *Galarza v. Szalczyk*, No. 10-cv-06815, 2012 WL 1080020, at \*14-15 (E.D. Penn. Mar. 30, 2012) (denying qualified immunity to immigration officials for unlawful detention on an immigration detainer issued without probable

constitutes a new arrest, there must be probable cause of a new offense.<sup>52</sup> ICE detainers, by themselves, do not provide a constitutionally valid basis for local law enforcement officers to detain individuals beyond release from state custody. The courts also ruled that local authorities need not comply with ICE detainer requests.<sup>53</sup>

Moreover, involvement of local police in immigration enforcement has been shown to actually harm public safety. Two law professors at the University of Chicago and New York University conducted a study and found that Secure Communities had zero effect on the crime rate.<sup>54</sup> Secure Communities instead alienated community members from local police; it made them afraid to report crime and cooperate with investigations. In short, the program precipitated an environment where all were in fact less safe.

The Georgia-specific study<sup>55</sup> referred to above also revealed troubling patterns in the implementation of Secure Communities. From 2007 to 2013, ICE detainers in Georgia rose from seventy-five in 2007 to 12,952 through June 2013.<sup>56</sup> Moreover, 96.4 percent of those targeted in 2013 were of “dark or medium complexion,” up from 66.7 percent in 2007.<sup>57</sup> In comparison, from 2007 to 2013, ICE placed an immigration hold on only 1.6 percent of individuals with fair or light complexions.<sup>58</sup> This report and others have documented the chilling effect this program has had on people’s confidence in the police with regard to racial profiling and the safety risk associated with so many residents living in fear of deportation.

The resolution by Fulton officials asking the sheriff to limit compliance with ICE detainers was a good first step to ensure that public safety remains the priority. However, the positive impact of moves such as this, without continued advocacy, is sure to be stymied by the return of Secure Communities.

---

cause); *Uroza v. Salt Lake City*, No. 2:11CV713DAK, 2013 WL 653968, at \*6–7 (D. Utah Feb. 21, 2013) (denying dismissal on qualified immunity grounds where plaintiff claimed to have been held on an immigration detainer issued without probable cause). *Cf. Makowski v. United States*, 27 F.Supp.3d 901, 918 (N.D. Ill. 2014) (concluding that plaintiff stated a plausible false imprisonment claim against the United States where he was held on a detainer without probable cause).

<sup>52</sup> See *supra* note 51.

<sup>53</sup> See, e.g., *Galarza v. Szalczyk*, 745 F.3d 634, 636 (3d Cir. 2014) (holding that immigration detainers are permissive).

<sup>54</sup> Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & ECON. 937 (2014).

<sup>55</sup> PREJUDICE, POLICING AND PUBLIC SAFETY, *supra* note 26.

<sup>56</sup> *Id.* at 10.

<sup>57</sup> *Id.* at 14.

<sup>58</sup> *Id.*

## IV. PRIORITY ENFORCEMENT PROGRAM

When the Department of Homeland Security decided to discontinue Secure Communities, it replaced it with the Priority Enforcement Program (PEP).<sup>59</sup> Former DHS Secretary Jeh Johnson issued this change in a Memorandum titled *Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants*.<sup>60</sup> According to the Memorandum, PEP's purpose was to permit state and local law enforcement agencies to transfer individuals who were in local custody and were otherwise about to be released to DHS custody.<sup>61</sup>

If ICE desired to take action against the arrested individual, then an ICE officer was required to submit a notification request to local police upon receipt of the identifying fingerprint. This notification requested that the local jail notify ICE officials prior to releasing the individual named in the request.<sup>62</sup> ICE could also request that the local jail hold the individual longer so that ICE may transport them to their facility. This process worked the same way as Secure Communities did.

A proposed agreement from 2015 between Fulton County and ICE sought to further expand PEP's scope to include stationing federal immigration agents at the Fulton County jail.<sup>63</sup> The Southern Poverty Law Center uncovered the Memorandum of Understanding through an open records request.<sup>64</sup>

The agreement is inconsistent with how the department previously represented the Priority Enforcement Program to states. The proposal would require the Fulton Sheriff to: allow the ICE Liaison Officer to work at the Fulton County Jail Monday through Friday; provide a work area for the ICE officer to perform ICE functions; and offer copies of supporting documentation, such as police reports, judgments, conviction records, etc., when available.<sup>65</sup> Having ICE officials present at the jails provides a particular concern, since it can lead to the officials using

---

<sup>59</sup> Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf't, et al., *Secure Communities* (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf).

<sup>60</sup> Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf't, et al., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

<sup>61</sup> *Id.*

<sup>62</sup> *Life Under "PEP-Comm,"* IMMIGR. LEGAL RESOURCE CTR., [https://www.ilrc.org/sites/default/files/resources/life\\_under\\_pepcomm\\_2016\\_update.pdf](https://www.ilrc.org/sites/default/files/resources/life_under_pepcomm_2016_update.pdf) (last updated 2016).

<sup>63</sup> Elise Foley, *An Immigration Agent Could Be Placed in Georgia Jail, to Activists' Dismay*, HUFFINGTON POST (Oct. 5, 2015), [http://www.huffingtonpost.com/entry/ice-agent-georgia-jail\\_us\\_5612db2be4b0af3706e1bf30](http://www.huffingtonpost.com/entry/ice-agent-georgia-jail_us_5612db2be4b0af3706e1bf30).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

deceptive tactics, such as coercion, misinformation, or threats, to induce immigrants to give up their rights.<sup>66</sup> A California case titled *Lopez-Venegas v Johnson* illustrates this concern, in that Ms. Lopez-Venegas was coerced into giving up her right to see a judge after immigration officials threatened that her autistic son would be detained if she did not sign a voluntary return form giving up her right.<sup>67</sup>

Agreement to this Memorandum would reverse the progress made by the 2014 resolution. As mentioned previously, Fulton County officials passed the resolution as a mechanism to limit the Sheriff's compliance with ICE detainer requests. The belief was that this progress would be a good first step to ensure public safety. However, this newly-proposed Memorandum would set Georgia's immigrant communities back.

Georgia Latino Alliance for Human Rights' Executive Director, Adelina Nicholls, has been vocal regarding the effect PEP has had on Georgia residents: "We defeat Secure Communities nationally and now we have to defeat Priorities Enforcement Program . . . . We are finding that what they are saying in guidelines and in policy is not what is happening in the real world."<sup>68</sup> According to Ms. Nicholls, ICE has been moving more quickly than ever to detain and deport immigrants.

A recent study has shed further light on PEP. This report,<sup>69</sup> which relies on analysis from government records aggregated from the first two months of the federal fiscal year (FY) 2016, shows that ICE officials are issuing detainer requests for people without a criminal record "at a slightly higher rate than before."<sup>70</sup> More specifically, nearly half of the detainer requests to date in FY 2016 "target individuals who have no criminal record" or background.<sup>71</sup> Only twenty-five percent were found to have committed a Level 1 crime.<sup>72</sup> The government was thus not directing its efforts toward detaining high-risk individuals through PEP as claimed, but instead appears to be focusing on low-risk

---

<sup>66</sup> *Families Separated by Coercive Immigration Practices May Be Reunited in U.S.*, AM. C.L. UNION (Feb. 26, 2015), <https://www.aclu.org/news/families-separated-coercive-immigration-practices-may-be-reunited-us>.

<sup>67</sup> *Id.*; see also First Amended Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus, *Lopez-Venegas v. Johnson* (No. 2:13-cv-03972-JAK-PLA), 2013 WL 5997007 (C.D. Cal. Oct. 2, 2013).

<sup>68</sup> Foley, *supra* note 63.

<sup>69</sup> The report was issued by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, and used case-by-case information to develop conclusions surrounding the Priority Enforcement Program.

<sup>70</sup> Renee Feltz, *Half of Immigrants Held in US 'Priority' Program Have No Criminal Conviction*, THE GUARDIAN (Aug. 11, 2016), [https://www.theguardian.com/us-news/2016/aug/11/us-immigration-detainees-criminal-background?CMP=Share\\_AndroidApp\\_Gmail](https://www.theguardian.com/us-news/2016/aug/11/us-immigration-detainees-criminal-background?CMP=Share_AndroidApp_Gmail).

<sup>71</sup> TRAC Immigration, *Reforms of ICE Detainer Program Largely Ignored by Field Officers*, TRAC REPORTS, INC. (Aug. 9, 2016), <http://trac.syr.edu/immigration/reports/432>.

<sup>72</sup> *Id.*

convictions for drunk driving, miscellaneous assault, and simple traffic violations.

The report also showcases how nearly eighty percent of detainees still requested that the individual be detained “beyond the[] normal period,” leaving the counties to bear all the risk of liability as well as the costs of detention.<sup>73</sup> This is the case even though a major reform introduced by Secretary Johnson as part of PEP was for ICE officials to request “notices” instead of extended detainees or holds.<sup>74</sup> Secretary Johnson’s reform initiatives therefore did not impact the day-to-day operations of ICE officials in the field. PEP still targeted people who had not committed any crimes, continued to incentivize racial profiling, further entangled local law enforcement with ICE, and allowed for detention that is non-compliant with the Fourth Amendment.<sup>75</sup>

PEP stood as nothing more than a redux of Secure Communities, and, at its core, re-integrated federal and local law enforcement for the express purpose of immigration tracking and deportation. Though PEP has been terminated, the return of Secure Communities threatens to exacerbate mistrust for authorities, continue to tear apart families, and further compromise community safety.

#### CONCLUSION

Under Trump, the priority memo has been officially rescinded.<sup>76</sup> All “criminal aliens” are prioritized under the new enforcement scheme.<sup>77</sup> In addition, expedited removal proceedings will be initiated against immigrants incarcerated in federal, state, and local correctional facilities “[t]o the maximum extent possible.”<sup>78</sup> The effects of these ramped up enforcement efforts remain to be seen, but if the past is any indication, these efforts will leave communities divided, stretched thin, and insecure.

---

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Priority Enforcement Program: Why ‘PEP’ Doesn’t Fix S-Comm’s Failings*, NAT’L IMMIGR. L. CTR. (June 2015), <https://www.nilc.org/issues/immigration-enforcement/pepnotafix>.

<sup>76</sup> Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs and Border Prot., et al., *Enforcement of the Immigration Laws to Serve the National Interest 2* (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf).

<sup>77</sup> *Id.* at 3.

<sup>78</sup> *Id.*