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Immigration Impacts on North Carolina

Popular Government

James Madison and other leaders in the American Revolution employed the term "popular government" to signify the ideal of a democratic, or "popular," government—a government, as Abraham Lincoln later put it, of the people, by the people, and for the people. In that spirit *Popular Government* offers research and analysis on state and local government in North Carolina and other issues of public concern. For, as Madison said, "A people who mean to be their own governors must arm themselves with the power which knowledge gives."

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POSTMASTER: Please send changes of address to Mark Jarrell, School of Government, CB# 3330 Knapp-Sanders Building, UNC at Chapel Hill, Chapel Hill, NC 27599-3330; telephone: 919.966.4155; fax: 919.962.2707; e-mail: jarrell@sog.unc.edu.

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Popular Government

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Over the last two decades, newcomers to North Carolina have included large numbers of immigrants from many countries, but particularly from Latin America and Asia. Immigration is generally regulated at the federal level, but its impact is increasingly felt at state and local levels. Ten years ago, *Popular Government* offered an in-depth examination of immigration (see the Fall 1999 issue). Much has changed since then, yet immigration still is a heated and complex topic, often at the forefront of governments' and citizens' concerns. This issue of *Popular Government* explores some of the ways in which state and local governments and communities have responded to North Carolina's growing immigrant population.

The articles address (1) the growing involvement of county sheriffs and other local law enforcement agencies in the enforcement of federal immigration law, and the costs and the benefits of that involvement; (2) local governments' authority to enact immigrations laws and policies, and the extent to which such measures run afoul of federal law; and (3) immigrants' access to primary, secondary, and higher education, and the corollary issue of teaching students—both U.S. citizens and immigrants—whose limited proficiency in English presents a barrier to their academic achievement.

We hope that these articles will assist local and state policy makers, administrators, and communities as they respond to the challenges and the opportunities posed by North Carolina's changing demographics.

—Sejal Zota and John B. Stephens, coeditors

School of Government Resources on Immigration

Resources focused primarily on issues of immigration law are available to assist state and local government officials, including judicial branch employees. Visit www.sog.unc.edu/programs/immigration, or contact Sejal Zota, immigration law specialist, at szota@sog.unc.edu or 919.843.8404. Among the resources on the website is a 2009 update of *Immigrants in North Carolina: A Fact Sheet*, which provides information on the size and the composition of North Carolina's immigrant population, and data on its economic impact.

Feature Articles

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These opening articles present different viewpoints on a controversial federal program that uses local law enforcement officials to help identify and deport suspected unauthorized immigrants. Edmond W. Caldwell Jr. describes the experience of several sheriffs and the support of the program by the North Carolina Sheriffs' Association. Hannah Gill, Mai Thi Nguyen, Katherine Lewis Parker, and Deborah Weissman express concerns and criticisms focusing on perceived legal and social effects of the program.

—The Editors

The North Carolina Sheriffs' Association's Perspective on the 287(g) Jail Enforcement Model

Edmond W. Caldwell Jr.

It is only a handful of short paragraphs in the federal statutes, but it is critically important to protecting the security of North Carolina and the nation. Named for its location in the Immigration and Nationality Act, the Section 287(g) program of U.S. Immigration and Customs Enforcement (ICE) allows local law enforcement agencies to assist ICE in removing from the country illegal aliens charged with crimes. The sheriffs in North Carolina whose counties participate in the jail enforcement model (JEM) of the program do not debate the broader issue of how the United States should handle illegal immigration. Their job is to enforce the law as it is written. For law enforcement authorities, 287(g) has made a big difference in the safety of seven counties in North Carolina and dozens more around the country.

"Regardless of your stance on immigration," said Sheriff Rick Davis of Henderson County, whose office

The author is executive vice president and general counsel, North Carolina Sheriffs' Association. Contact him at ecaldwell@ncsheriffs.net.

Legal and Social Perspectives on Local Enforcement of Immigration under the 287(g) Program

Hannah Gill, Mai Thi Nguyen, Katherine Lewis Parker, and Deborah Weissman

Throughout this country's history, Americans have been internally conflicted about their views on immigration. Many recognize that the United States' prosperity and geopolitical dominance have been built on the backs of immigrants. They also may have pride in their immigrant ancestors. Yet these same people sometimes hold anti-immigrant sentiments and are willing to pull up the drawbridge on those newly arriving to America's shores. Often they feel this way because the newer immigrants come from a different country, speak a different language, or are visibly different. Also, they blame new immigrants for taking away resources and creating competition in the labor market.

Gill is the assistant director of the Institute for the Study of the Americas and a research associate at the Center for Global Initiatives, UNC–Chapel Hill. Nguyen is an assistant professor in the Department of City and Regional Planning, UNC–Chapel Hill. Parker is the legal director of the ACLU of North Carolina Legal Foundation. Weissman is Reef C. Ivey II Distinguished Professor of Law and director of clinical programs, UNC–Chapel Hill School of Law. Contact them at hgill@email.unc.edu, mai@unc.edu, aclunclp@nc.rr.com, and weissman@email.unc.edu.

Jerry Wolford / Greensboro News & Record

At the turn of the twentieth century, darker-skinned Europeans and Chinese immigrants experienced strong resentment from lighter-skinned Europeans arriving earlier. Today, Latinos are the target of much anti-immigrant sentiment.

Anti-immigration sentiments are not new to this country, but what sets this period apart in American history is the "devolution" of immigration regulation—that is, the surrender to local authorities of some federal powers to regulate immigration. Since America's birth, the federal government has had sole authority to legislate on and regulate immigration. This exclusive authority was reinforced by the 1976 ruling in *DeCanas v. Bica*, in which Supreme Court Justice William J. Brennan wrote that the "[p]ower to regulate immigration is unquestionably exclusively a federal power."[1]

With the passage of Section 287(g) of the 1996 Immigration and Nationality Act, which allows local law enforcement agencies to detect, detain, and deport undocumented immigrants, local and state law enforcement agencies were granted authority to police immigration violations.[2] Although few law enforcement agencies adopted the 287(g) program at the time of its passage, the program became wildly popular a decade later because of political and economic circumstances in the nation. This article seeks to raise awareness of the 287(g) program's implementation in North Carolina, from both a legal and a social science standpoint. (For a description of other responsibilities of sheriff's offices in their interactions with the state's foreign-born population, see the sidebar on page 15.)

Background

Several pieces of legislation on immigration were circulated before the November 2006 congressional elections. Most notably, HR 4437 (or the Sensenbrenner bill), which contained a broad range of policies aimed at reforming immigration, sparked heated debate among politicians, the popular media, and the general public.[3] During the congressional election cycle, many candidates used immigration reform as a wedge issue to define their candidacies. With the economy spiraling downward, politicians blamed undocumented immigrants for the nation's economic and social woes and vowed to stem the tide of illegal immigration.[4]

The elections came and went, and a new Congress with a majority of Democrats was seated, but still federal immigration policy did not change. Frustrated with the inability of national legislators to reform immigration policy, and growing increasingly resentful of rising rates of undocumented immigration, voters and local elected officials wanted immediate action, even if they had to take matters into their own hands.

The City of Hazleton, Pennsylvania, exemplified these sentiments when it adopted the Illegal Immigration Relief Act (IIRA) in fall 2006.[5] In an attempt to push out undocumented immigrants, Hazleton's IIRA created stiff fines and penalties for individuals and organizations that provided them with services.[6] News of the IIRA spread, and hundreds

participates in the 287(g) program, "the reality is that crime accompanies any large-scale illegal immigration."[1]

In 1996 the federal government provided the authority and the funding for local law enforcement officers to be trained by ICE to determine immigration status so that ICE could begin possible deportation proceedings for people in the country illegally. Some people object to the new authority, but the bottom line is that it works to make communities safer. Since 2006, when the first North Carolina county signed on to the 287(g) JEM, the participating sheriff's offices have identified more than fifteen thousand people as suspected illegal aliens and referred them to ICE for a decision on deportation.

Sheriff's offices in Alamance, Cabarrus, Cumberland, Gaston, Henderson, Mecklenburg, and Wake counties participate in the JEM. In this model, sheriffs screen for illegal aliens only among people arrested and brought to the county's detention center. Sheriff Alan Cloninger of Gaston County, among the first four counties in North Carolina to sign on, considers the JEM "one of the fairest ways" to address the problem of illegal immigration "because no one is checked as to their alien status unless they are arrested," he said.[2]

Because citizens are divided in their views on U.S. immigration policy, North Carolina's participation in the 287(g) program has been the subject of heated debate. The program is one component under the ICE's ACCESS (Agreements of Cooperation in Communities to Enhance Safety and Security) umbrella of services and programs, which provides local law enforcement agencies with an opportunity to team with ICE to combat specific law enforcement challenges in their communities. Some have confused the sheriffs' involvement in the JEM with the Durham Police Department's participation in a 287(g) task force model.[3] By focusing on the sheriffs' participation in the 287(g) program, which is limited to the JEM, this article aims to correct many misconceptions and distortions of fact circulated by some who object to tenets of the 287(g) law.

(For a description of other responsibilities of sheriffs' offices in their interactions with the state's foreign-born population, see the sidebar on page 15.)

What Is 287(g)?

In 1996 the Illegal Immigration Reform and Immigrant Responsibility Act added Section 287(g) to the Immigration and Nationality Act. The section authorizes the secretary of the U.S. Department of Homeland Security (of which ICE is a part) to enter into agreements with state and local law enforcement agencies permitting designated officers to perform some functions of immigration law enforcement, provided that they receive appropriate training and that they operate under the supervision of ICE officers.

Section 287(g) came about because criminal activities are most effectively thwarted through a multiagency approach that encompasses federal, state, and local resources, skills, and expertise. State and local law enforcement officers play a critical role in protecting national security. They often are the first respon-

of copycat cities and counties around the country followed suit, passing varying elements of the IIRA.[7] The American Civil Liberties Union (ACLU), along with several other groups, sued the City of Hazleton in federal district court on the grounds that local anti-immigration ordinances, such as the IIRA, were unconstitutional.[8] In spring 2007, the district court ruled that the City of Hazleton, as a municipality, had no authority to regulate illegal immigration. Rather, harkening back to the *DeCanas* case, the court ruled that this responsibility should be left to the federal government.[9]

The lack of adequate oversight and transparency in 287(g) programs raises concerns about racial profiling.

The mounting legal bills owed by the City of Hazleton after its defeat in court most likely contributed to the dropoff in adoption of the IIRA by additional cities and by counties. Instead, local jurisdictions turned to 287(g). To date, sixty-three local law enforcement agencies around the country have partnered with U.S. Immigration and Customs Enforcement (ICE) to implement what is now commonly called the 287(g) program.[10] North Carolina jurisdictions have shown keen interest in the program, with eight localities already participating and dozens more in the application queue.[11]

In North Carolina, the support for the 287(g) program primarily comes from sheriffs and county commissioners, although the reasons for supporting the program appear to vary. Local law enforcement officials remark that their main interest in the program is to equip officers to identify undocumented immigrants who are criminals. They rationalize that this program is merely one additional tool that officers can use to fight crime. In particular, they consider the program to be a way to weed out terrorists and violent criminals.[12]

Interest in the 287(g) program among local government officials revolves around the belief that undocumented immigrants are taxing their school systems, hospitals, and prisons while not paying a fair share of taxes. They charge undocumented immigrants with using local resources, but not contributing to the local coffers, or at least not contributing enough to cover expenses.

Beyond their fiscal concerns, local government officials blame undocumented immigrants for a host of social ills in their communities, such as increased crime and lowered quality of life.[13] Although little empirical evidence exists to substantiate such claims, support for the 287(g) program in the North Carolina localities that have adopted it still is overwhelming.

The Mecklenburg County Sheriff's Office was the first to implement the program, in February 2006. Since then, seven other local authorities, including the Alamance, Cabarrus, Cumberland, Gaston, Henderson, and Wake County sheriff's offices and the Durham Police Department, have adopted it. Further, the statewide North Carolina Sheriffs' Association has partnered with ICE in

ders on the scene in an attack against the United States, and in the course of their daily duties, they frequently encounter foreign-born criminals and illegal aliens who pose a threat to national security or public safety.

The training provided to state and local law enforcement officers by ICE under the 287(g) program gives these cross-designated officers the necessary resources and authority to pursue immigration-status investigations relating to violent crimes and other felonies, such as human smuggling, gang activity, organized crime, sex-related offenses, narcotics smuggling, and money laundering. The counties participating in this partnership with ICE are eligible for increased resources and support from ICE to identify criminals who also are illegal aliens.

Counties working with ICE under authorization by 287(g) sign a memorandum of agreement (MOA) that defines the scope and the limitations of their authority. The MOA establishes the supervisory structure for the local officers working under the cross-designation and prescribes the agreed-on complaint process governing the officers' conduct during the life of the MOA. Under the statute, ICE supervises on site all cross-designated officers when they exercise their immigration authorities. The agreement must be signed by the ICE assistant secretary and the sheriff before officers trained under 287(g) may enforce immigration law.

Law enforcement personnel selected to participate in the 287(g) program must be U.S. citizens, pass a background investigation, have a minimum of two years' experience in their current position, and have no disciplinary actions pending against them. They complete a four-week training program conducted by certified instructors. The training underscores instruction that law enforcement officers already have received about the importance of avoiding racial or ethnic profiling.

Altogether, 287(g) programs in North Carolina have identified more than 15,000 suspected illegal aliens.

As of the end of 2008, sixty-seven local law enforcement agencies in twenty-three states had signed MOAs with ICE and sent officers for training.

How Do North Carolina Sheriffs Work under 287(g) Agreements?

Several steps must take place before someone can be incarcerated in North Carolina. First, the person must be arrested by a law enforcement officer in connection with the commission of a crime. Second, the person must appear before a magistrate, and the magistrate must find probable cause to believe that the person did commit a crime. Third, the magistrate must establish a bond for the person's release. If the person fails to post the bond, then the person is detained in the county jail.

Sheriff's office personnel (1) incarcerate, (2) investigate, and (3) inform. They do not have the authority to extradite

hopes of adopting the program throughout North Carolina. With such widespread interest in the program and with other new programs that allow law enforcement agencies to identify undocumented immigrants (for example, the Secure Communities program), North Carolina may be one of the first states to have a statewide immigrant-identification program implemented at the purely local level.[14]

The devolution of immigration enforcement through the 287(g) program has granted tremendous powers to local law enforcement agencies. But the lack of adequate oversight and transparency raises many concerns:

- Does the program effectively capture the "tough, hardened, repeat criminals" among the undocumented population, as argued by local law enforcement and ICE officials?
- Does the program divert local law enforcement agencies from other duties that are necessary to keep communities safe?
- Does the program actually serve to decrease the number of crimes reported by undocumented immigrants, thereby increasing their vulnerability to crime?
- Is the program cost-effective in fighting crime, or are there other, more cost-effective ways to do so?
- Does the program encourage racial profiling?
- Will the program encourage immigrants, both documented and undocumented, to leave these jurisdictions, thereby negatively affecting local businesses, the housing market, and the overall economic competitiveness of the state?

Legal Considerations

The 287(g) program presents a number of legal issues that implicate individual rights and affect communities. It has been more than two years since the inauguration of these programs in North Carolina. Sufficient time has passed to permit an evaluation of program compliance with federal and state legal obligations, as well as law enforcement agency compliance with the 287(g) memorandum of agreement (MOA) that governs the program.

Statutory Authority

In 1996 the U.S. Congress amended the Immigration and Nationality Act by adding Section 287(g), which authorizes the federal government to enter into agreements with local law enforcement agencies and to deputize local law enforcement officers to act as immigration officers in the course of their daily activities. Section 287(g) authorizes the attorney general to enter into a written agreement with a

> *State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immi-*

Jerry Wolford / Greensboro News & Record

gration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.[15]

Historically there has been a clear division between the enforcement of civil immigration laws and the enforcement of criminal immigration laws.[16] Civil violations of the Immigration and Nationality Act include being unlawfully present in the United States and working without proper employment authorization.[17] Criminal offenses include trafficking in humans, harboring undocumented immigrants, and, in the case of immigrants who were previously deported or excluded, reentering the United States.[18] Federal authorities have long held exclusive jurisdiction over regulation of civil immigration laws, whereas federal, state, and local authorities have had concurrent jurisdiction over enforcement of criminal immigration laws.[19] The written agreements under 287(g) effectively erase that line, enabling local law enforcement officers to enforce civil immigration law for the first time in history.

Compliance with Federal Law

Local law enforcement officers who have been deputized to enforce immigration laws pursuant to Section 287(g) of the Immigration and Nationality Act are required to "have knowledge of, and adhere to, Federal law" with regard to 287(g) functions.[20]

Equal Protection of the Law

The Equal Protection Clause of the Fourteenth Amendment extends its protection to all people within the jurisdiction of the United States and prohibits law enforcement agencies from stopping, detaining, or seizing people on the basis of racial characteristics.[21] That is, they may not engage in "racial profiling," defined as "the law enforcement practice of using race, national origin, or ethnicity as a salient basis for suspicion of criminal activity."[22]

Most 287(g) programs in North Carolina are "detention model programs" (sometimes called jail-enforcement model programs), meaning that officers trained under 287(g) are not authorized to check the immigration status of people unless they have been arrested on other charges and are detained in jail facilities.[23] Nevertheless, evidence from the 287(g) counties suggests that the existence of the program may be affecting how officers are enforcing the law "on the streets."

For example, criminal defense and immigration attorneys in 287(g) counties report that, before the 287(g) programs went into effect, their clients were rarely, if ever, arrested for driving with no license or driving with a revoked license. Further, anecdotal evidence suggests that license and driving-while-intoxicated checkpoints have increased considerably in 287(g) counties since the MOA went into effect.

wanted inmates to other states. Even those trained under 287(g) do not have the authority to deport inmates who are illegally in this country. They *incarcerate* people who have been arrested by a law enforcement officer and ordered by a magistrate to be detained in connection with criminal activity.

The county jail staff *conduct an investigation* to determine the identity of the criminal defendant and to learn whether the person has a prior criminal record or is wanted by another law enforcement agency, including ICE. If they determine that the person is wanted by another law enforcement agency, they *inform* the appropriate agency that the wanted person is incarcerated in the county jail.

The seven North Carolina counties now participating in the 287(g) JEM were among about twenty that applied to ICE. ICE selected a geographically diverse mix of counties that had adequate jail space. Each county's sheriff negotiated the MOA individually, and it was signed by the respective chairs of the board of county commissioners.

Mecklenburg County was the first jurisdiction in North Carolina to participate in the 287(g) program. At the National Sheriffs' Association's annual conference in 2005, Jim Pendergraph, who was then sheriff of Mecklenburg County, learned about the federal initiative. He talked with a California sheriff who had investigated the 287(g) JEM and was considering signing on with ICE to train some of his deputies. The California sheriff was very impressed by what he had learned about the success of the 287(g) JEM in identifying and deporting criminal illegal aliens.

When Sheriff Pendergraph returned to Mecklenburg County after the conference, he explored the possibility of providing 287(g) training to some of his officers. Mecklenburg County's detention center had processed an increasing number of offenders whom Sheriff Pendergraph suspected to be in the country illegally, but often by the time he received results from fingerprints that he sent to ICE, the offenders had been released.

The problem of criminal aliens was on the public's mind in 2005 because an illegal immigrant, driving while impaired and without a license, caused a car crash that killed Scott Gardner, a high school teacher in nearby Gaston County, and left Gardner's wife in a coma. The illegal alien had five previous convictions in the United States for driving while impaired. Representative Sue Myrick of North Carolina pushed hard in the U.S. Congress for passage of the Scott Gardner Act, which stipulated that any illegal alien convicted of driving while impaired would face automatic deportation. The bill passed in the House but not in the Senate.[4]

By mid-2006, Mecklenburg County had launched a 287(g) JEM. Sheriff Pendergraph sent twelve deputy sheriffs for ICE training. In 2007, the program's first full year of operation, 287(g) officers identified more than 2,200 illegal aliens among about 45,000 people arrested in Mecklenburg County. Those numbers held steady in 2008, said Julia Rush, director of communication for the Mecklenburg County Sheriff's Office.[5]

"Whenever you remove that many people convicted of a crime, that makes for a safer community," Rush noted.[6]

Consequently the tail may be wagging the dog. That is, rather than simply processing people who already are in the jails, officers in 287(g) counties are making the discretionary decision in many instances to arrest people instead of issuing them a citation, thereby increasing the number of people in the jails for processing.

Anecdotal evidence also suggests that this new tactic may be contributing to racial profiling in the field. Because officers are not permitted to engage in immigration enforcement on the streets, the general rule applies regarding the prohibition against law enforcement stopping, detaining, or seizing people on the basis of racial characteristics.[24] Nevertheless, residents in local communities where 287(g) programs are in effect have expressed concerns that some police officers are violating legal standards and engaging in racial profiling by stopping motorists who appear to be Latino.[25] Local residents and advocacy groups have raised concerns that under the guise of pretextual vehicle stops (stops in which officers detain people for a traffic offense because they actually are suspicious of the people's immigration status) and license and driving-while-intoxicated checkpoints, law enforcement officers appear to be targeting Latino-appearing people for minor traffic offenses.[26]

Evidence suggests that the 287(g) program may affect officers' enforcement of the law "on the streets."

The numbers coming out of 287(g) counties bear out this concern. For instance, data for Alamance and Mecklenburg counties reveal that the overwhelming number of people who have been stopped by police officers have been arrested for traffic offenses. The 2007 totals for the Alamance County 287(g) program show that, in 2007, of 662 people arrested and processed under 287(g), 302, or 45.6 percent, were arrested on a traffic stop, and 132, or 19.9 percent, were arrested for driving while intoxicated. Five hundred forty-six, or 82.5 percent, were charged with misdemeanors, and 116, or 17.5 percent, with felonies.[27] In Mecklenburg County, 1,028 of 1,545 undocumented immigrants arrested during the first nine months of the county's participation in the 287(g) program, or 66.5 percent, were stopped for some type of traffic violation.[28]

A study of arrest data in Davidson County, Tennessee, which also has entered into a detention model MOA, has revealed that the arrest rates for Latino defendants driving without a license more than doubled after the implementation of the 287(g) program.[29] Two explanations for this statistic are most likely: officers may have stopped more Latino drivers and therefore found more instances of driving without a license, or officers may have arrested more Latino drivers to allow the correction officers to check their status.

Similarly, as described earlier, North Carolina data for current 287(g) counties

The main advantage that Sheriff Pendergraph saw for Mecklenburg County in the 287(g) program was that it would provide immediate information on an inmate's immigration status. Not only does ICE provide training for local law enforcement officers, but also it provides participating counties with computers linked to the ICE database. Instead of waiting days or weeks for a fingerprint report to be sent back from ICE, Mecklenburg County detention officers can check the fingerprints against ICE's database themselves. They get information back in minutes.

"The 287(g) program establishes a record on 100 percent of the people who come into our facility," said Henderson County Sheriff Davis. "They either have fingerprints on file, or they don't. In the case where ICE doesn't have prints on file, the burden of proof is on the detainee to verify his or her identity. It is one of the rare times in U.S. law when the burden of proof is on the accused."[7]

ICE fingerprints everyone who applies for a visa to accept employment in the United States or for a "green card," which grants permanent-resident status and with it eligibility to be employed in the United States. If a detention officer checking an inmate's fingerprints against the ICE database finds no record, that flags the inmate as a possible illegal alien.

In a 287(g) facility, said Cabarrus County Sheriff Brad Riley, "every arrestee who comes into our facility is asked two questions: What's the country of your birth? And what country are you a citizen of?"[8] The ICE-trained officers attempt to verify the inmate's answers. If the information cannot be verified, the officers refer the inmate to ICE for determination of status and possible deportation. The 287(g) officers themselves may not authorize deportation orders, but they can refer illegal aliens to ICE for a determination process that might end in deportation by a federal immigration judge.

How Does 287(g) Compare with North Carolina State Law?

In 2007, North Carolina's General Assembly enacted Section 162-62 of the North Carolina General Statutes (hereinafter G.S.), effective January 1, 2008. G.S. 162-62 requires detention facility personnel in North Carolina to attempt to determine the U.S. residency status of any person brought to the facility and charged with a felony or an impaired-driving offense. Officers may check people's birth certificate, driver's license, and Social Security Number information to verify their identity. But the only guaranteed way of identifying people without such documentation is through fingerprints.

For facilities not operating under the 287(g) program, getting fingerprint reports back in a timely fashion—before detainees are released on bond or have served the time required to satisfy the charges—rarely happens. Even when detainees are confirmed to be illegal aliens, ICE often does not pick them up. Sending an officer to the facility to transport a single inmate is not cost-effective for ICE unless the inmate is wanted on very serious charges or the transporting officer can pick up several inmates in one trip.

show that an overwhelming number of people who are stopped by police officers in 287(g) counties are arrested for traffic offenses. To the extent that arrest rates for Latino drivers have increased significantly in these counties since they adopted 287(g), the statistics may support allegations of racial profiling.

In addition to quantitative data, qualitative evidence suggests discriminatory attitudes toward immigrants, as indicated by racially hostile comments about Latino immigrants made by some law enforcement agency personnel. Alamance County Sheriff Terry Johnson, in reference to Mexicans, stated, "Their values are a lot different—their morals—than what we have here. In Mexico, there's nothing wrong with having sex with a 12-, 13-year-old girl . . . . They do a lot of drinking down in Mexico."[30] Johnson County Sheriff Steve Bizzell recently vocalized his views about immigrants, stating that they are "'breeding like rabbits'" and they "'rape, rob and murder' American citizens." He also described Mexicans as "'trashy.'"[31] These race-based statements, made by strong proponents of the 287(g) program in North Carolina, contribute to concerns about the possibility that racial profiling is occurring in 287(g) counties.

To the extent that racial profiling is occurring under the 287(g) programs, it also violates Title VI of the Civil Rights Act of 1964, which states, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[32] Section 287(g) agencies receive financial assistance from the federal government and therefore must abide by the provisions of this act. They must not "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."[33]

Racially hostile comments made by some officers indicate discriminatory attitudes toward immigrants.

Racial profiling also violates U.S. Department of Justice guidelines developed "to ensure an end to racial profiling in law enforcement."[34] Those guidelines prohibit law enforcement officers from using race or ethnicity in making law enforcement decisions such as ordinary traffic stops.[35]

A report by the U.S. Government Accountability Office (GAO) released on March 4, 2009, validates the foregoing concerns. The GAO's report confirms that the 287(g) program is not being used to target dangerous criminals. Rather, "participating agencies are using their 287(g) authority to process for removal aliens who have committed minor crimes, such as carrying an open container of alcohol." Further, according to the GAO, a lack of documented program objectives may result in a "misuse of authority." Indeed, the GAO reported that "more than half of the 29 state and

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local law enforcement agencies . . . reviewed reported concerns members of their communities expressed about the 287(g) program, including concerns that law enforcement officers in the 287(g) program would be deporting removable aliens pursuant to minor traffic violations (e.g., speeding) and concerns about racial profiling."[36]

Application of Federal Immigration Laws

Immigration law is a complicated, ever-evolving, and specialized area of law and law enforcement.[37] The challenges inherent in allowing local law enforcement officers to undertake immigration enforcement, an area outside their expertise, were recognized in a recent article published by the International Association of Police Chiefs:

> *Addressing immigration violations such as illegal entry or remaining in the country without legal sanction would require specialized knowledge of the suspect's status and visa history and the complex civil and criminal aspects of the federal immigration law and their administration. This is different from identifying someone suspected of the type of criminal behavior that local officers are trained to detect. Whether or not a person is in fact remaining in the country in violation of federal civil regulations or criminal provisions is a determination best left to these agencies and the courts designed specifically to apply these laws and make such determinations after appropriate hearings and procedures. The local patrol officer is not in the best position to make these complex legal determinations.*[38]

The article's author further explained, "When local police have waded into immigration enforcement, it has often come with disastrous and expensive consequences."[39]

As examples from around the country demonstrate, local enforcement of immigration laws has resulted in detention and deportation of U.S. citizens.[40] Law enforcement experts predict more erroneous detentions and deportations if additional databases with various inaccuracies are created to "fight illegal immigration."[41]

North Carolina is not immune to these errors. Indeed, at a conference in Charlotte on the consequences of the 287(g) program, an immigration attorney recounted that a U.S. citizen client of his was wrongly detained in North Carolina while authorities were attempting to deport the client.[42] Other North Carolina attorneys have shared similar concerns about at least two more clients.[43]

A recent survey by the U.S. Government Accountability Office determined that ICE does not have adequate means to keep local officers updated on the changing nature of immigration law:

> *ICE does not have a mechanism to ensure the timely dissemination of legal developments to help ensure that officers make decisions in line with the most recent interpretations of immigration law. As a result, ICE officers are at risk of taking actions*

In contrast, officers in a 287(g) program must identify the citizenship status of every foreign-born person brought to the detention center, even those brought in on misdemeanor charges or traffic violations. To make that requirement feasible, ICE provides 287(g) facilities with computers and access to its database. Also, the facilities have an ICE officer on site to supervise the program, and he or she can cost-effectively transport inmates to hearings on their immigration status.

Cabarrus County Sheriff Riley, whose county was one of the first four North Carolina counties to sign on to the 287(g) program, said, "ICE is dealing with so many agencies, and they have to triage. Under 287(g), there is a 100 percent guarantee that the individuals will be processed."[9]

Has the 287(g) JEM Been Effective in North Carolina?

North Carolina sheriffs in the 287(g) JEM are satisfied with its efficacy. The program has been successful in addressing the problem of illegal aliens who commit crimes.

When Terry S. Johnson became sheriff of Alamance County in 2002, his 156-bed jail routinely held more than three hundred inmates. His deputies responded to as many as seven home invasions every week. Alamance County has a large Hispanic community, drawn to the area by agricultural job opportunities, the many construction jobs in the fast-growing Triangle, and jobs in meat-processing plants. In 2006, Sheriff Johnson talked to Sheriff Pendergraph, who had just gotten the 287(g) program up and running in Mecklenburg County.

"He said, 'It's the greatest thing I've ever done as sheriff,'" Johnson reported. "I thought he was trying to sell me, but I knew I had to do something. People were coming into jail under one name, and then two weeks later, the same people came in under another name, but the photographs were the same."[10]

The revolving-door practice of arrest and release tied up the court system, cost the taxpayers money through the increased need to hire court-appointed lawyers and Spanish-language interpreters, and multiplied the impact on the crime victims.

Sheriff Johnson negotiated a 287(g) agreement, and within the first months of operation in 2006, the program identified 519 illegal aliens. In 2007, its first full year, it identified 2,698 inmates as illegal aliens and transferred them to ICE for hearings. In 2008 that number jumped to 4,067.[11]

"What is so impressive to me is that our overall crime rate has dropped 19.5 percent," Sheriff Johnson said. "Because crime has come down, it has cut down on the number of calls we have to respond to. Our local inmate population has dropped tremendously. The almost daily reports of home invasions a few years ago dropped in 2008 to only one for the entire year."[12]

What Are the Program's Costs and Benefits in North Carolina?

ICE supplies the training, but local law enforcement agencies pay the salaries of their cross-trained officers. ICE provides

that do not support operational objectives and making removal decisions that do not reflect the most recent legal developments.[44]

Other Federal Laws

There are other areas of concern with regard to compliance with federal laws. Section 287(g) officers must comply with federal law governing criminal procedure, and this requires them to disclose information that may call into question the credibility of a particular witness who supplies information against a detainee, including, in some circumstances, officers' personnel files. However, undocumented immigrants often are hurried through the system without counsel and are encouraged, if not coerced, to sign voluntary agreements to depart from the United States within a prescribed period. These circumstances inhibit detainees from obtaining exculpatory information, particularly information related to officer misconduct and racial profiling.

Section 287(g) officers also must comply with the provisions of the Vienna Convention on Consular Relations. Pursuant to these provisions, officers must inform detained immigrants of their right to contact their consular office and to have their communications forwarded to the applicable consular officer in a timely manner.[45] Consular officers have the right to visit immigrants in detention and may arrange legal counsel for them.[46] Concerns have arisen that detainees may not always be informed of these rights.

People who think that their rights have been violated by 287(g) don't always know how to pursue their complaints.

Compliance with North Carolina Law

Racial profiling also violates the North Carolina Constitution. Article 1, Section 19, states, "No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin."[47] North Carolina courts have refused to countenance the targeting of Latinos by law enforcement agencies. In *State v. Villeda*, the trial court dismissed charges against a Latino defendant who demonstrated that his arrest was "motivated 'in part by [his] race or national origin'" in violation of Section 19.[48] The court considered the state trooper's discriminatory assertion "'Everyone knows that a [Latino] male buying liquor on a Friday or a Saturday night is probably already drunk,'" as well as his admission to patrolling a specific area "'for the purpose of looking for [Latino] males.'"[49] The trooper's citation history also was indicative of a practice of racial profiling: 71 percent of his citations had been filed against Latinos in an area where Latinos made up only 32 percent of the total population. The North Carolina Court of Appeals affirmed the trial court's decision to dismiss the charges against the defendant.[50]

North Carolina state agencies and the North Carolina General Assembly have joined with the courts in denouncing

access to its fingerprint database and pays for the computers and the network. ICE also pays for an on-site ICE agent to supervise the program at each 287(g) facility.

The 287(g) process requires extra personnel and some extra work to process people arrested. Sheriff's office personnel have to learn about the new equipment and procedures, and facility administrators must make sure that the computer network does not breach jail security, said Debbie Tanna, public information officer for the Cumberland County Sheriff's Office.[13]

North Carolina's General Assembly has realized the potential benefit of 287(g) to its communities and has granted funds to the North Carolina Sheriffs' Association for the past two years to help sheriffs combat illegal immigration. The association has used part of the funding to provide training and technical assistance to all sheriffs in complying with G.S. 162-62, to assist them in negotiating MOAs with ICE, and to reimburse counties for the overtime costs of covering shifts while deputies participate in the four-week ICE training course.

ICE has a joint federal-local working group called the executive steering committee. One critical goal of the committee is to coordinate the participation of interested North Carolina sheriffs in the ICE ACCESS program, particularly the 287(g) JEM, using current ICE resources and identifying ICE resources needed in the future to support the sheriffs of North Carolina.

Alamance County Sheriff Terry S. Johnson says that his county's overall crime rate has dropped nearly 20 percent since he introduced 287(g).

Some sheriff's offices are able to offset their 287(g) personnel costs with an ICE per diem for bed space when an inmate is held at the local facility after ICE accepts custody. Because the paperwork can be done on site at a 287(g) facility, ICE picks up the tab much sooner than if the county had to wait for an off-site ICE agent to travel to the facility.

Counties that are not part of the 287(g) program must nonetheless run their Illegal Alien Queries as required by G.S. 162-62 through the federal computers and report when they have an illegal alien in custody. Inmates deemed illegal aliens are turned over to ICE and transported by an ICE officer to the closest location where hearings on immigration status are held. Henderson County Sheriff Davis accepts detained illegal aliens from western counties. His 287(g) deputies are reimbursed by ICE for their time and mileage in transporting illegal aliens from nearby counties and housing them in the Henderson County detention facility.

"For ICE to send an officer out from the Charlotte office—that's an inefficient use of their time," he said.[14]

Sheriffs unanimously agree that the effort is worthwhile and beneficial to their counties.

"We're finding people who are wanted in other states and other counties," said Wake County Sheriff Donnie Harrison.

racial profiling. In the *Villeda* case, the court noted that the state trooper's questionable citation history had triggered an investigation by Internal Affairs.[51] Such an investigation itself suggested that racial profiling ought not to be tolerated by state agency regulations. The North Carolina General Assembly has attempted to eliminate racial profiling by enacting legislation that requires collection, correlation, and maintenance of information on traffic law enforcement.[52] The statute requires the North Carolina attorney general to establish within the Department of Justice a Division of Criminal Statistics. This division is mandated to collect, maintain, analyze, and disclose data related to racial profiling, including the race and the ethnicity of people stopped by law enforcement officers.

Compliance with the MOAs

The MOAs are binding contracts between local law enforcement agencies and ICE. These documents set out authority and obligations with regard to local enforcement of immigration law and contain a number of requirements that govern the implementation of the program. Local residents have expressed concerns that the terms are vague and that the program lacks sufficient oversight.[53] Recently the U.S. House of Representatives Appropriations Committee stated in a report that it "is concerned that ICE has not established adequate oversight of state and local law enforcement agencies that are delegated authority to enforce Federal immigration laws."[54] Following are some general concerns about the lack of adequate oversight in 287(g) counties in North Carolina.

The Complaint Process

MOAs contain a section that requires 287(g) programs to promulgate a complaint mechanism for people who believe that their rights have been violated.[55] Some information about the complaint process is included in the appendix to the MOA. However, many 287(g) programs have not released MOAs to the public or otherwise provided notice of the process. Some programs have been reluctant to release information about the process even after a request has been made. For example, the ACLU of North Carolina waited five months before the Alamance County Sheriff's Office responded to a public records request for the MOA appendixes. Although the sheriff's office now posts its MOA on its website in English, it does not appear to have any established complaint mechanism associated with its 287(g) program.[56] Whether any other 287(g) programs have created the required complaint mechanism is not known. If they have, the information has not been disseminated to the public.

Adherence to Civil Rights Standards and Provision of Interpretation Services

Another section of the MOAs sets forth applicable civil rights standards and requires an interpreter for people who do not speak English.[57] The MOAs do not, however, establish a process by which an interpreter may be obtained,

Jerry Wolford / Greensboro News & Record

or address how an affected person would be apprised of his or her rights to an interpreter. Anecdotal evidence suggests that not all people who are stopped by law enforcement officers in 287(g) counties are notified of their right to ask for an interpreter or are provided one.[58]

Required Steering Committee and Community Outreach

The MOAs also contain a section requiring the ICE assistant secretary and the head of the local law enforcement agency to establish a steering committee.[59] The steering committee is charged with monitoring compliance with the terms of the MOA, including the complaints filed against 287(g) programs. A first meeting of the steering committee is required no later than nine months after the initial group of participating personnel is certified by ICE to act as immigration officers.[60] Currently, local residents have no way of determining whether such a meeting has taken place, whether the committee has made any findings, and if so, what the substance of the findings is. In Alamance County, county commissioners and sheriff's officials have made an effort to communicate with concerned residents, but have rejected the involvement of community members other than law enforcement officials on a steering committee.

At least one 287(g) program (Alamance County) has been reluctant to commit to establishing a steering committee at all, much less one that includes a community member and holds meetings that are open to the public.[61] Furthermore, at the state level, a spokesperson for the North Carolina Sheriffs' Association recently informed the Joint Legislative Oversight Committee that the meetings of the executive steering committee established by ICE and the association are not open to the public. However, the association and the 287(g) counties receive state taxpayer money from the North Carolina General Assembly to support their 287(g) programs. Thus these committees should be considered to be "public bodies," and their steering committee meetings should be subject to North Carolina's open meetings law.[62]

Finally, the MOAs include a section providing that a 287(g) program "may, at its discretion, engage in community outreach with organizations interested in the MOA."[63] This requires 287(g) programs to exercise their discretion in good faith and to engage in discourse not only with organizations that are favorably disposed toward the program, but also to include communication with critics of the program. Without a steering committee composed of citizens representing a full spectrum of views, it is less likely that critics of the program will be able to engage in constructive discourse about the program.

Alamance County: A Case Study

Alamance County, which adopted the 287(g) program in 2007, provides a case study for analyzing how the impacts of 287(g) reach far beyond the undocu-

"We're getting criminals off the street that need to be gotten off the street."[15]

About thirty-five thousand people come through Wake County's detention facility every year. Sheriff Harrison expects between 10 and 15 percent to be of interest to ICE. Wake County initiated the 287(g) program in July 2008 and, in its first six months, sent more than nine hundred inmates to ICE for hearings on their immigration status. Sheriff Harrison has not noticed that the 287(g) program has freed up bed space—"We're always going to have criminals," he said—but he takes satisfaction in knowing that he's "not letting a child molester or murderer back on the street."[16]

Gaston County Sheriff Alan Cloninger volunteered for the 287(g) program in part to discourage settlement by criminal aliens who were fleeing from neighboring Mecklenburg County because of its 287(g) program. He had to create and fill three new positions to handle the extra workload. The expense was worthwhile, he said, because his officers can lodge the detainees and maintain the paperwork without having to wait for ICE to send an agent. In 2008, the jurisdiction's first full year as a 287(g) county, he sent more than four hundred inmates to ICE.[17]

"The savings that result could be a million things that aren't directly related to the sheriff's office: medical issues, department of social service issues, job openings," he said. "I believe it has saved the taxpayers money."[18]

Gaston County Sheriff Alan Cloninger believes that 287(g) has saved taxpayers money.

Why Has Community Opposition to the Program Arisen?

Despite 287(g)'s overwhelming support from sheriffs in all seven counties, some community members have raised concerns about the program's potential for targeting Hispanics, North Carolina's largest and fastest-growing immigrant population. According to a recent economic impact study, 7 percent of the state's population in 2004 was Hispanic, and Hispanics accounted for 27.5 percent of the state's population growth that year. Nearly 80 percent had migrated from another country or U.S. state.[19]

Laura Roselle, a political science professor at Elon University in Alamance County, is part of a vocal group of advocates for the Hispanic community. She is concerned about the potential for racial or ethnic profiling by law enforcement officers and the effect on those left behind when a family member is deported. She also worries that the fear of being deported may discourage Hispanics from contacting law enforcement for help, thus leaving them more vulnerable to becoming victims of crime.

"If people are afraid, they aren't going to come to this community," Roselle said. "For me, that's not fine. Diversity builds a community and an economy."[20]

Henderson County Sheriff Davis summed up community fears: "Some citizens think we can stop anyone who

mented immigrant population. Alamance County's Latino population of more than fourteen thousand people is among the fastest-growing in the state, and it includes mixed-status families of third-generation U.S. citizens, legal permanent residents, and undocumented immigrants.[64] Interviews with Alamance County residents since the inception of the 287(g) program illustrate the short- and long-term social costs of the program for Latino communities as well as the larger population.[65] These impacts include (1) the erosion of trust between law enforcement authorities and immigrant communities, (2) an increase in unreported crime, and (3) an increase in anti-immigrant sentiment in the general population.

The Alamance County Sheriff's Office initiated the 287(g) program in summer 2007. A general lack of transparency, and confusion about who would be targeted under the program, set the groundwork for controversy around the program and erosion of trust between law enforcement and local immigrants.[66] When 287(g) was presented to the public in 2006, sheriff's office personnel assured residents that they would be targeting for deportation people who commit violent crimes, as opposed to people who commit lesser infractions, like driving without a license.[67] Their assurances were supported by the language of the webpage of the U.S. Department of Homeland Security, which describes how the program gives local and state officers "necessary resources and authority to pursue investigations relating to violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling and money laundering."[68]

After the program began, however, it became clear that the majority of those being processed under the 287(g) program were not felons, but traffic offenders. The State Highway Patrol set up roadblocks to check licenses in places where Latinos shopped, lived, and worshipped. For example, of the more than 170 checkpoints that have been conducted in Alamance and Orange counties, about 30 have been conducted outside Buckhorn market on a Saturday or Sunday morning, when Latino shoppers arrive by the hundreds.[69] Police have arrested people at schools and libraries and during recreational events.[70] For example, in August 2008, five immigrants were arrested and later deported for fishing without a license on the Haw River.[71] Victims of crime also have been deported.[72] Given that the program was being carried out in a very different manner than the sheriff's office had promised the general public, trust between immigrants and law enforcement quickly disintegrated.

Evidence of the erosion of trust was immediately apparent. In summer 2007, Latino neighborhoods throughout the county shut down, and people closed themselves up in their houses and apartments, fearful that they or their family members would be deported. Health care providers at local clinics reported that patients were missing appointments or not bringing their children to appointments. On Webb Avenue and Graham

looks Hispanic and arrest and deport them," he said. "Of course, we can't do that. The Fourth Amendment to the Constitution is the barrier to that. Our government is based on minimal intrusion. Law enforcement officers must have a reason to arrest that person."[21]

The illegal aliens deported are not always Hispanic. Mecklenburg County has sent inmates from seventy countries to ICE.

Alamance County Sheriff Johnson countered profiling accusations with this comment: "The people we pick up self-identify. We don't tell them to violate the law or drink and drive. That is an individual choice that they have made to violate the law."[22]

Sheriff's deputies routinely receive training against profiling, whether or not they are part of the 287(g) program. Their initial law enforcement training and mandatory legal updates cover prohibitions against profiling. State law requires that officers record their reason for stopping someone for a traffic violation.[23] North Carolina legislation requires the State Bureau of Investigation to collect and maintain statistics on traffic law enforcement.[24] The statistics reveal the initial purpose of traffic stops by the driver's sex, race, and ethnicity, and by the type of violation. All these data are available on the website of the State Bureau of Investigation.[25]

In Cabarrus County, Sheriff Riley compares his arrest statistics every two weeks with those of the police chiefs in his county to make sure that his deputies are not pulling in a higher number of Hispanics for traffic violations than their counterparts in municipalities are. Riley also took a systematic approach to reaching out to Hispanics. He and Sergeant Keely Litaker, who coordinates the 287(g) program and is fluent in Spanish, met with leaders of the local Hispanic community to explain the 287(g) program and to reassure them that all crime victims could count on the sheriff's help, regardless of their immigration status. Once they had the trust of the Hispanic leaders, Riley and Litaker conducted educational meetings with church groups and other large groups of Hispanics to reiterate that only illegal aliens who committed crimes would be targeted by the 287(g) program.

Officers must record their reasons for stopping people for traffic violations. These data are available online by drivers' sex, race, ethnicity, and type of violation.

"We wanted buy-in from the community, so they would understand," Riley said. "If you are here doing the things American citizens are expected to do, then you're in no danger. If you are here selling dope and doing illegal things, you probably should move."[26]

Riley also opened the sheriff's office's doors to the media. He even educated some judges.

"We're trying to do it right," he said.[27] As a result, his county now has very little resistance to the 287(g) program.

Tanna, the public information officer in Cumberland County, also reached out to the local newspaper to educate

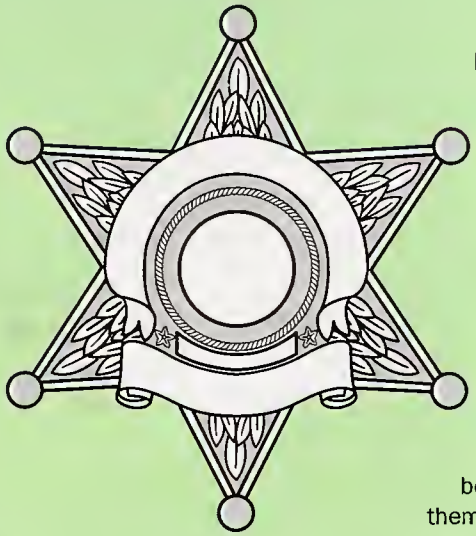
Hopedale Road, where there are more than forty Latino businesses, sidewalks emptied of people, and business slowed. An informal poll of fifteen businesses in Graham conducted in August 2007 revealed that all had lost significant revenue. The local resource center, Centro la Comunidad, normally full of activity, saw its client intake decrease. Distrust of the police was so strong that posters began to appear in public places throughout the county, warning Latinos to avoid law enforcement officers at all costs. Fear extended to the entire Latino community, creating a wide-reaching impact for the many county residents who live in families with some members who are undocumented, usually parents, and others who are U.S.–born citizens or legal permanent residents, usually children.[73]

The disintegration of the image of police as a protection for all people had a number of repercussions. New immigrants always have been easy targets for crime because of their vulnerability in low-security housing and their use of cash, a result of their limited access to financial institutions and savings accounts in which they can deposit wages earned. The perception that police were no longer protecting Latinos provided an additional incentive for criminals to target them. Further, one informant related that she had been turned away from a local police precinct in summer 2007 after reporting a crime, because she could not produce a valid driver's license. Of 25 Latinos interviewed between June 2007 and November 2008, 23 stated that they felt the 287(g) program had decreased their trust in law enforcement. The same number stated that they would hesitate before reporting crime.

The specter of deportation had a particularly negative impact on the children of immigrants, further illustrating how policies affect the entire community, not just undocumented people. An eighteen-year-old man interviewed in Mebane reported that he felt the need to carry a gun for self-protection. A woman whose fifteen-year-old son attended Graham High School voiced concern that the growing anti-immigrant climate had created incentives for her son to join a gang for protection. In July 2008, three children were stranded in a car on the shoulder of Interstate 85 in the middle of the night for eight hours when their mother was arrested by an Alamance County sheriff deputy for a traffic violation.[74] Tina Manning, lead English-as-a-second-language coordinator for the Alamance-Burlington School System, spoke of students' fear that their parents would be deported:

> *It has been a horrible experience. There are students whose parents have been taken away while they are at school. They get home and they're gone. It has had a heart-rending impact on children, even children born here. They are in fear that if they go home, another parent will have been taken away, or that they will be taken away. . . . It puts a stop to learning.*[75]

Other Responsibilities of Sheriff's Offices in Relation to the State's Foreign-Born Population



Sheriff's offices in all of North Carolina's counties—not just those participating in the 287(g) program—have additional responsibilities in their interactions with the state's foreign-born population. A state law (G.S. 162-62) that became effective on January 1, 2008, requires North Carolina's jailers to attempt to determine whether an inmate charged with a felony or an impaired-driving offense is a legal resident of the United States. As part of standard booking procedure, jailers now ask all inmates charged with those crimes if they are in the country legally. If, through questioning, a review of documentation, or both, jailers are unable to determine whether an inmate is a legal resident or citizen of the United States, they must, when possible, make an Illegal Alien Query to the Law Enforcement Support Center of U.S. Immigration and Customs Enforcement, a federal bureau.

Also, more than half of North Carolina counties (sixty-two in 2008) and the North Carolina Department of Correction have for several years inquired into inmates' legal status as part of their application for federal funds under the State Criminal Alien Assistance Program (SCAAP). SCAAP provides federal money to state and local governments to offset the costs of jailing certain undocumented criminal aliens. A county may apply for SCAAP reimbursement for foreign-born inmates who have no claim to U.S. citizenship if they (1) are undocumented or have failed to maintain their nonimmigrant status, (2) have been held in custody for four or more consecutive days, and (3) have been convicted of at least one felony or two misdemeanors. The U.S. Department of Justice uses a payment formula to determine the award amount. In 2008, Mecklenburg County received more than $1 million in SCAAP funds. Some counties contract with outside accounting firms to help them process their SCAAP applications, including cross-referencing jail rosters with nationwide criminal records to identify eligible inmates.

Further, thirteen North Carolina counties—initially Buncombe, Gaston, Henderson, and Wake counties, now also Cabarrus, Catawba, Cumberland, Duplin, Durham, Harnett, New Hanover, Orange, and Robeson counties—participate in a pilot program that takes advantage of the "full interoperability" of the federal government's biometric identification systems. As part of routine booking at most jails, fingerprints are checked against FBI records to determine a detainee's criminal history. Under the pilot program, sheriff's offices simultaneously check prints against U.S. Department of Homeland Security immigration records. The additional check helps officers verify identities of arrested people and uncover pending charges or "immigration detainers" ("holds" requiring jailers to notify federal officials before releasing an inmate) against them. The technology is part of Immigration and Customs Enforcement's Secure Communities plan for identifying and removing criminal aliens.

Another part of the Secure Communities plan took hold in North Carolina in 2008. The General Assembly enacted a version of the so-called Rapid REPAT (Removal of Eligible Parolees Accepted for Transfer) program (G.S. 148-64.1). Under the program, certain nonviolent criminal aliens may receive an early release from their state sentences if they have a final order of removal and they agree not to return to the United States. North Carolina now is one of a half-dozen states that have adopted a version of the law, which gives the state's Post-Release Supervision and Parole Commission discretionary authority to release eligible inmates to Immigration and Customs Enforcement for immediate deportation. The inmate must have been convicted of one of a handful of specifically enumerated nonviolent offenses (including driving while intoxicated) and must have served at least half of the minimum sentence imposed. If the released person ever is found to have returned to the United States unlawfully, he or she will be returned to the North Carolina Department of Correction to serve the remainder of his or her state sentence. Similar programs in effect in Arizona and New York over the past decade have saved those states millions of dollars in incarceration costs, according to Immigration and Customs Enforcement.

—James M. Markham

The author is a School faculty member specializing in criminal law and procedure, with a focus on the law of sentencing, corrections, and the conditions of confinement. Contact him at markham@sog.unc.edu.

the community on 287(g). "Many in the Hispanic community now understand what the program is trying to do: keep serious criminal offenders out of the U.S.," she said. "A lot of them feel that they are living in a much safer community. It's not a program to harass people."[28]

Are the Wrong People Getting Caught in the Net?

Sheriffs acknowledge that although the intent of the program is to rid the community of dangerous criminals, sometimes people convicted of less serious crimes also are deported. Occasionally those instances result from traffic stops in which an officer would have let off with a traffic ticket a U.S. citizen whose identity the officer could verify, but would arrest a suspected illegal alien whose identity the officer could not verify at the side of the road. North Carolina sheriffs working under 287(g) reported to ICE a total of 5,369 charges against 4,832 inmates turned over to the agency in 2008. Of those, 2,421 offenses, or 45 percent, involved serious criminal violations, including murder, assault, illegal drug offenses, theft, domestic violence, and trespass. Another 1,282, or 24 percent, involved driving while impaired, and 1,666, or 31 percent, involved violations of motor vehicle law.[29]

When an officer or a deputy stops someone—for example, for speeding—and that person does not have a driver's license in his or her possession, the officer has to attempt to determine the driver's identity, gauge the likelihood that the driver will show up in court, and ascertain the existence of any outstanding warrants for the driver. Drivers who are U.S. citizens are likely to have driver's license information available to the officer from the computer of the state's division of motor vehicles, and their records likely can be verified.

Detaining drivers who cannot produce a valid driver's license or identification card is protocol, not racial profiling.

"If we have determined who he is," Sheriff Riley said, "we can verify that he didn't just rob a bank. So we do not take him to the detention facility."[30] The drivers who have no valid identification and no driver's license are held because their identity and criminal history cannot be verified without fingerprints. "We're not just bringing them to jail because they speak broken English," he said.[31] This is not profiling but protocol.

Most people incarcerated in the county jail are incarcerated on the basis of criminal charges filed not by sheriff's deputies, but by various other law enforcement agents in the county, such as city police, State Highway Patrol troopers, State Bureau of Investigation agents, alcohol law enforcement agents, wildlife enforcement officers, and university police. Some people are incarcerated because a magistrate issued an arrest warrant (on a finding of probable cause that they committed a crime), the

As the 287(g) program continued, the rhetoric against immigrants and the authorization of local police to enforce immigration law spread to other community institutions, affecting treatment of immigrants in the workplace and neighborhoods. One woman who emigrated to Graham from El Salvador reported that she was fired in 2007 after working seven years at a textile company in Burlington. She related that after the 287(g) program was implemented, the atmosphere in the factory changed. Supervisors cut her hourly wages from $8.30 to $8.10 and revoked bathroom breaks.

Informants also described how their status increasingly became a leveraging tool in situations of conflict with community members. In one case, a Graham resident said that her landlord neglected to make necessary repairs in her apartment because of her immigration status, threatening to report her family to the police if they refused to pay rent.

Immigrants were not the only community members affected. County employees were targeted for their work with undocumented immigrants. In August 2008, law enforcement officials were tipped off by an undisclosed source that the county's medical director, Kathleen Shapley-Quinn, and nurse practitioner Karen Saxer were treating undocumented patients at a public health clinic and not revealing their real names to employers in notes excusing work absences. The two employees were suspended for weeks until a probe by the State Bureau of Investigation requested by the sheriff's department cleared them of wrongdoing, finding that they were "forced to follow conflicting directives from state and federal officials regarding the release of information about illegal immigrants" and had committed no crime.[6]

As informants have made clear, the 287(g) program has impacts outside the undocumented-immigrant community. For the thousands of Latinos born in Alamance County who own businesses and houses and no longer have any connections to Latin America, North Carolina is home. Given the permanence of Latino communities throughout the state, the social costs of the 287(g) program raise important questions about how communities should deal with the inevitability of demographic change and growing diversity. The marginalization of the Latino population by decreasing trust in law enforcement and growing anti-immigrant sentiment presents barriers to the formation of cohesive, integrated, and conflict-free communities.

Proposals for Improvement

The complexities of the 287(g) program and the difficulties in its implementation illustrate that it is an ineffective means of immigration enforcement. The federal government's reliance on local law enforcement to enforce immigration laws is a strong indication of a systemic problem. It points to the need for comprehensive immigration reform at the federal level that would allow local police and county sheriffs to return to their primary function of protecting

warrant was served, and they were then arrested by a deputy sheriff. A small percentage of people incarcerated in the county jail are arrested by deputy sheriffs for violations of criminal law that occurred in the deputy sheriffs' presence.

But even the less serious crimes can wreak hard consequences on the community, Wake County Sheriff Harrison said. A driver who cannot get a license cannot get automobile insurance, either, and if that speeding driver causes a serious accident, the victim and the taxpayers have to pay the costs.

"We've got to do our job; we feed everybody out of the same spoon," Sheriff Harrison explained. "Are we supposed to turn our heads and say, 'You're hard-working people; we're not going to charge you today'? Then tomorrow they kill somebody, and people say, 'Why didn't the sheriff charge them yesterday?'"[32]

The less serious offenses sometimes are precursors to more serious crimes. Sheriff Davis's files in Henderson County have examples from before 287(g) went into effect:

- An illegal alien with a history of convictions for assault on a woman was arrested following an incident of domestic violence. After serving his time, he was released to the community and then shot and killed his girlfriend and their son. Had the 287(g) program been in effect, he would have been deported after any one of the earlier assault charges.
- A Turkish student who overstayed his visa was arrested for speeding. After he was released to the community, he was rearrested, this time on a sex offense for taking indecent liberties with a child. Under the 287(g) program, he would have been sent back to Turkey after the speeding stop.

Conclusion

In North Carolina, sheriffs exercise their 287(g) authority only in detention facilities against criminals who self-select by breaking state laws. Criminal illegal aliens cost taxpayers money and crime victims heartache. By giving local law enforcement officers the ability to facilitate the removal of a segment of the criminal element, 287(g) programs make communities safer.

For people who are in the United States illegally and want to avoid the possibility of facing deportation proceedings, the solution is simple, according to Mecklenburg County's public information officer, Rush. "Our message has never changed. If you're doing things you shouldn't do and putting others in jeopardy, then we need to take a look," Rush said. "If you don't want to encounter the 287(g) program, don't commit a crime."[33]

Notes

1. Rick Davis (sheriff, Henderson County), interview by a North Carolina Sheriffs' Association representative, December 2008.
2. Alan Cloninger (sheriff, Gaston County), interview by a North Carolina Sheriffs' Association representative, December 2008.
3. Under a memorandum of agreement effective in 2008, ICE trained one Durham

their communities from crime. Until this reform occurs, 287(g) agreements should be limited to processing only the people convicted of felonies, in furtherance of the original intent of the statute. Also, the program must be counterbalanced by effective oversight, public transparency, and accountability. Further, there should be an independent evaluation to determine the program's costs and effectiveness as a crime-prevention and -detection tool. These reforms are urgently required: 287(g) is a situation worthy of concern to noncitizens and citizens alike.

Until comprehensive immigration reform is enacted, 287(g) should focus only on people convicted of felonies.

Good Governance, Transparency, and Conformity with the Law

Across the state, the 287(g) programs lack transparency. There is no provision for community input into the creation or the implementation of the MOAs. There are no community-protection mechanisms sufficiently embedded in the program to counterbalance the power that the program grants to contracted law enforcement authorities. Section 287(g) MOAs often are created without community notification or opportunity for public comment. Affected constituent groups rarely have the opportunity to discuss or debate the program with their elected officials before its implementation. As a result, contracts for the program have been negotiated without the protections inherent in and necessary to the democratic process.

The following recommendations would provide additional protections for basic rights in the implementation of 287(g).

Transparency

- Ensure the availability of the MOA in both English and Spanish, and detail the MOA's purpose and policy.
- Amend the complaint mechanism in the MOA to clarify the process and to provide notice of the right to file a complaint.
- Improve relations with the news media and other organizations.

Accountability

- Increase community participation in the program's implementation and oversight.
- Improve the performance of law enforcement personnel by (1) outlining designated functions of officers trained under the 287(g) program, (2) providing detailed guidelines for the nomination of personnel to be trained as 287(g) officers, (3) detailing and updating the training of personnel, (4) continuing to review certification and authorization of personnel in light of potential complaints filed, and (5) monitoring ICE supervision of personnel.
- Provide specific information on the process for selecting the steering

Police Department (DPD) officer to investigate certain federal immigration offenses. The officer remains a member of the DPD and can file detainers only for specified serious offenses: criminal gang activity; violent crimes, including but not limited to homicide, aggravated assault, armed robbery, and other similar crimes; production, sale, or distribution of forged identity documents, or identity theft; firearms offenses; offenses involving homeland security; and any felony that occurs within the jurisdiction of the DPD. Other immigration-related duties performed by the officer are (1) processing, preparing, and serving charging documents on aliens for removal and (2) presenting federal criminal cases to the U.S. Attorney's Office, Middle District of North Carolina, for egregious reentry and prohibited people in possession of firearms. M. Ray Taylor (captain, Durham Police Department), interview by John B. Stephens, March 4, 2009.

4. In the first session of the 109th Congress, Representative Myrick successfully added an amendment to the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (HR 4437), which passed the House in December 2005. The amendment was a bill, the Scott Gardner Act (HR 3776), that Myrick had introduced earlier in the session.

5. Julia Rush (director of communication, Mecklenburg County Sheriff's Office), interview by a North Carolina Sheriffs' Association representative, December 2008.

6. Ibid.

7. Davis, interview.

8. Brad Riley (sheriff, Cabarrus County), interview by a North Carolina Sheriffs' Association representative, December 2008.

9. Ibid.

10. Terry S. Johnson (sheriff, Alamance County), interview by a North Carolina Sheriffs' Association representative, December 2008.

11. Ibid.

12. Ibid.

13. Debbie Tanna (public information officer, Gaston County Sheriff's Office), interview by a North Carolina Sheriffs' Association representative, December 2008.

14. Davis, interview.

15. Donnie Harrison (sheriff, Wake County), interview by a North Carolina Sheriffs' Association representative, December 2008.

16. Ibid.

17. Cloninger, interview.

18. Ibid.

19. John D. Kasarda and James H. Johnson Jr., *The Economic Impact of the Hispanic Population on the State of North Carolina* (Chapel Hill, NC: Frank Hawkins Kenan Institute of Private Enterprise, University of North Carolina at Chapel Hill, 2006).

20. Laura Roselle (political science professor, Elon University), interview by a North Carolina Sheriffs' Association representative, December 2008.

21. Davis, interview.

22. Johnson, interview.

23. State v. Styles, No. 442A07 (N.C. December 10, 2007) (holding that "reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected"), www.aoc.state.nc.us/www/public/sc/opinions/2008/pdf/442-07-1.pdf.

24. G.S. 114-10.01.

25. North Carolina State Bureau of Investigation, www.ncsbi.gov.

26. Riley, interview.

27. Ibid.

28. Tanna, interview.

29. North Carolina Sheriffs' Association, Report to the chairs of the House and Senate Appropriations Committees and the chairs of the House and Senate Appropriations Subcommittees on Justice and Public Safety, on the operations and effectiveness of the Illegal Immigration Project, February 27, 2009.

30. Riley, interview.

31. Ibid.

32. Harrison, interview.

33. Rush, interview.

committee, ensure that it includes a broad range of community interests, and set forth the committee's required review of activities.

- Open the meetings of local steering committees and the North Carolina Sheriffs' Association's executive steering committee to the public.
- Increase information and participation for effective community outreach and input.
- Conform fully with the letter and the spirit of the law.
- Revise all current 287(g) programs and implement all new 287(g) programs to permit processing only of people convicted of felonies.
- Amend the guidelines for forwarding and reviewing complaints. Make information publicly available in both English and Spanish.
- Clarify what notice of civil rights standards must be given and how interpretation services will be provided.
- After modification of the MOA, update officer training to reflect the changes, indicate the availability of the MOA, and specify the duration and the circumstances of termination of the MOA.

The 287(g) program's effectiveness in preventing and detecting crime needs an independent evaluation.

Program Evaluation

In addition to recommending the preceding improvements in the program, we recommend that an organization not affiliated with local or state law enforcement agencies conduct an independent evaluation of the program as a crime-prevention and -detection tool. A cost-effectiveness analysis is one way to evaluate whether the resources allocated to the 287(g) program produce significant gains in securing the safety of communities or whether there are less expensive and more successful ways to address crime in immigrant communities. To date, we know of no such evaluation of the 287(g) program, nor were any research studies conducted in advance of the program's implementation to show that local immigration policing is effective at preventing crime or enforcing the law.

Notes

Parts of this article are drawn from a report entitled *The Policies and Politics of Local Immigration Enforcement Law*, coauthored by the UNC School of Law Immigration/ Human Rights Clinic (Katherine Bandy, Catherine Currie, Evelyn Griggs, Jill Hopman, Nicole Jones, Rashmi Kumar, Marty Rosenbluth, Christina Simpson, and Deborah Weissman) and the ACLU of North Carolina Legal Foundation (Rebecca C. Headen and Katherine Lewis Parker).

1. DeCanas v. Bica, 424 U.S. 351, 354 (1976).

2. 8 U.S.C. § 1357(g) (2008).

3. HR 4437, 109th Cong., 1st sess. (2005).

4. "Rein It In/Texas Legislators Should Weigh Illegal Immigrants' Economic Role—and Refuse to Fall into a Culture War," *Houston Chronicle*, January 7, 2007, www.chron.com/CDA/archives/archive.mpl?id=2007_4260758.

5. Hazelton, Pa., Illegal Immigration Relief Act, Ordinance 2006–18 (July 16, 2006), http://clearinghouse.wustl.edu/detail.php?id=5472.

6. Ibid.

7. For a short period, the Federation for American Immigration Reform tracked the number of local immigration policies proposed and adopted around the country. *See* www.fairus.org/site/PageServer?pagename=research_mar07nl12 for a description by IIRA author Joe Turner of the spread of IIRA to cities across the nation.

8. Lozano v. City of Hazelton, 496 F. Supp. 2d 477 (M.D. Pa. 2007).

9. Ibid.

10. For a list of current partners, go to www.ice.gov/partners/287g/Section287_g.htm.

11. Ibid. We asked both ICE and the North Carolina Sheriffs' Association for a list of the North Carolina localities that had applied to the program, but neither was willing or able to give one to us.

12. For details about the partnership between ICE and local law enforcement agencies, *see* www.ice.gov/partners/287g/Section287_g.htm.

13. A five-part series in the *Raleigh News & Observer* addresses local governments' concerns about the costs of undocumented immigration. The series can be found at www.newsobserver.com/1155/index.html.

14. This article does not address the Secure Communities program, a federal-state partnership through which local law enforcement agencies can confirm an arrestee's identity by entering his or her fingerprints into a database that coordinates information from federal agencies, such as the FBI and the U.S. Department of Homeland Security. The software also is connected with ICE. "Unlike the 287(g) program, this program does not give jailers the power to initiate deportation proceedings. Instead, ICE would place a detainer on the suspect, who would be picked up by immigration agents after the criminal case is disposed, said Barbara Gonzalez, ICE spokeswoman." Associated Press, "U.S. Fingerprint Database Program on the Way for N.C. Counties," *TheTimesNews.com*, January 23, 2009, www.thetimesnews.com/news/system_22013__article.html/program_immigration.html. However, we believe that because the programs seek the same goals, many of the problems that have resulted from 287(g), such as racial profiling at traffic checkpoints, also may emerge under the Secure Communities program. Veronica Gonzalez, "New Hanover Sheriff's Office Gets New Tool to ID Immigrants," *StarNewsOnline.com*, January 16, 2009, www.starnewsonline.com/article/20090116/ARTICLES/901160233?Title=New_Hanover_sheriff_s_office_gets_new_tool_to_ID_immigrants. Some communities already see the risks of 287(g) programs and have passed resolutions against local enforcement of immigration laws. *See, e.g.*, Robert Boyer, "Chatham Commissioners: We Don't Want 287(g)," *Burlington Time-News*, January 10, 2009, www.thetimesnews.com/news/county-21666-resolution-chatham.html (discussing resolutions adopted by Chatham and Orange counties to reject 287(g)).

15. 8 U.S.C. § 1357(g) (2008).

16. Assistance by State and Local Police in Apprehending Illegal Aliens, 1996 OLC LEXIS 76, www.usdoj.gov/olc/immstopo1a.htm.

17. Alison Siskin, *Immigration-Related Detention: Current Legislative Issues* (Washington, DC: Congressional Research Service, 2004), www.au.af.mil/au/awc/awcgate/crs/rl32369.pdf.

18. Ibid.; 8 U.S.C. §§ 1324(a), 1326 (2009).

19. 8 U.S.C. § 1326 (2009).

20. 8 U.S.C. § 1357(g)(2) (2009).

21. United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975); Whren v. United States, 517 U.S. 806, 813 (1996) (noting that "the Constitution prohibits selective enforcement of the law based on considerations such as race"). *See also* Melendres v. Arpaio, No. CV 07-02513-PHX-MHM (D. Ariz. filed July 16, 2008) (challenging Maricopa County (Arizona) Sheriff's Office's implementation of 287(g) program and alleging "a widespread pattern or practice of racial profiling and other racially and ethnically discriminatory treatment in an illegal, improper and unauthorized attempt to 'enforce' federal immigration laws against large numbers of Latino persons in Maricopa County without regard for actual citizenship or valid immigration status"). *Melendres*, No. CV 07-02513-PHX-MHM, at *3.

22. *Black's Law Dictionary* 1286 (8th ed. 2004).

23. The only current field-level MOA in North Carolina is that of the City of Durham. Under this kind of MOA, a designated officer is authorized to interrogate any person whom the officer believes to be an alien regarding his or her right to be or remain in the United States; to arrest without warrant any alien whom the officer believes to be in the United States in violation of the law and likely to escape before a warrant can be obtained; to serve warrants of arrest for immigration violations; to issue immigration detainers; and to detain and transport arrested aliens to ICE–approved detention centers.

24. In contrast, immigration officers are permitted to consider a person's race or ethnic appearance as one specific articulable fact that could be combined with reasonable inferences to create a reasonable suspicion that a person may be in the country illegally. However, race may not be the only factor considered. *Brignoni-Ponce*, 422 U.S. at 886–87.

25. The ACLU of North Carolina and other local organizations are receiving complaints that "license check" roadblocks and checkpoints have been set up by sheriff's deputies in areas frequented by the Latino community. Also, Buncombe County Sheriff Van Duncan has acknowledged statistics demonstrating that a significant number of people seized by police officers in 287(g) counties have been picked up for non-alcohol-related motor vehicle or traffic offenses. Robert McCarson, "Buncombe Sheriff Questions Appropriateness of Federal-Local Immigration Program," *La Voz Independiente*, October 17, 2008, www.lavozindependiente.com/news.php?nid=519.

26. Several years ago, in an effort to prevent racial profiling during traffic stops, the North Carolina General Assembly passed Section 114-10.01 of the North Carolina General Statutes (hereinafter G.S.), which provides that the North Carolina Division of Criminal Statistics shall collect, correlate, and maintain certain information regarding traffic law enforcement by law enforcement officers, including identifying characteristics of drivers stopped, such as race, ethnicity, age, and gender. However, although local law enforcement agencies are encouraged to report information under this statute, the statute provides no enforcement mechanism if they fail to report. Additionally, the statute does not apply to license or driving-while-intoxicated checkpoints, except when stops at such checkpoints result in a warning, a search, a seizure, or an arrest. Consequently this statute fails to address one of the main complaints arising in 287(g) counties, that racial profiling is occurring at license and driving-while-intoxicated checkpoints.

27. 2007 Annual Totals from Alamance County Sheriff's Office to ICE (on file with authors).

28. 2007 Annual Totals from Mecklenburg County Sheriff's Office to ICE (on file with authors). This number does not include the 314 people arrested for "other" violations.

29. "Arrests for No Drivers License by Ethnicity and Race: A Comparison of May–July 2006 to May–July 2007" (Tennessee Immigrant and Refugee Rights Coalition Report in Conjunction with Criminal Justice Planning, July 31, 2007), http://tirrc.bondwaresite.com/photos/File350.pdf.

30. Kristin Collins, "Sheriffs Help Feds Deport Illegal Aliens," *Raleigh News & Observer*, April 22, 2007, p. A1, www.newsobserver.com/news/immigration/story/566759.html; State v. Villeda, 165 N.C. App. 431, 434, 599 S.E.2d 62, 64 (2004). North Carolina State Trooper C. J. Carroll stated, "Mexicans drink a lot because they grew

up where the water isn't good." *Villeda,* 165 N.C. App. at 434, 599 S.E.2d at 64.

31. Kristin Collins, "Tolerance Wears Thin," *Raleigh News & Observer,* September 4, 2008, www.newsobserver.com/news/immigration/story/1209646.html. Also, describing an incident of drunk driving that resulted in the death of a young boy, Bizzell said that the child paid the "'ultimate price for another drunk Mexican.'" Sarah Ovaska, "Deportation Fear Fuels Flight," *Raleigh News & Observer,* June 12, 2008, www.newsobserver.com/news/immigration/story/1105229-p2.html.

32. 42 U.S.C. § 2000d (1964).

33. 34 C.F.R. § 100.3 (2000).

34. U.S. Department of Justice, Civil Rights Division, *Guidance Regarding the Use of Race by Law Enforcement Agencies* (Washington, DC: Civil Rights Division, U.S. Department of Justice, 2003), www.usdoj.gov/crt/split/documents/guidance_on_race.htm.

35. Ibid.

36. *See* U.S. Government Accountability Office, *Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws* (Washington, DC: U.S. Government Accountability Office, 2009), 4, 11, 6, www.gao.gov/new.items/d09109.pdf.

37. Craig E. Ferrell Jr., "Immigration Enforcement: Is It a Local Issue?" *Police Chief* 71, no. 2 (February 2004), http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=224&issue_id=22004.

38. Ibid.

39. Ibid.

40. In May 2007, Pedro Guzman, a developmentally disabled U.S. citizen from California, was mistakenly identified by 287(g) officers as a Mexican national and transferred to an ICE detention center, from which he was later deported. Daniel Hernandez, "Pedro Guzman's Return," *LA Weekly News,* August 7, 2007, www.laweekly.com/news/news/pedro-guzmans-return/16956/. Similarly Alicia Rodriguez, a U.S. citizen born in Texas, was detained when local police erroneously identified her as an undocumented alien who had been previously deported. Dianne Solís, "Immigration Raids Catch Citizens and Legal Residents," *Dallas Morning News,* May 11, 2008, www.dallasnews.com/sharedcontent/dws/news/nationworld/stories/051008dnnatraids.3c69dea.html. In November 2008, Jose Ledesma, a U.S. citizen, was released after being held for two months as officials tried to deport him. Sandra Hernandez, "U.S. Citizen Held by Immigration Officials Abruptly Released, Told Case Is Over," *Daily Journal,* November 5, 2008, p. 1, www.bibdaily.com/pdfs/ Ledesma2%2011-5-08.pdf. Guillermo Olivares Romero, a U.S. citizen, also was detained and twice deported to Mexico. Ibid.

41. Patrick McGee, "Texan Is Jailed as Illegal Immigrant," *Fort Worth Star-Telegram,* August 30, 2007, www.accessmylibrary.com/coms2/summary_0286-32757467_ITM.

42. Remarks made by member of audience at conference (Community Impacts of Local Policy Responses to Undocumented Immigration, UNC–Charlotte, June 14, 2008).

43. E-mail messages to Katherine Lewis Parker and Deborah Weissman, December 9, 2008 (on file with authors).

44. U.S. Government Accountability Office, *Immigration Enforcement: ICE Could Improve Controls to Help Guide Alien Removal Decision Making* (Washington, DC: U.S. Government Accountability Office, 2007), 2.

45. Medellin v. Dretke, 544 U.S. 660, 667 (2005) (Ginsburg, J., concurring) (noting that petitioner, a Mexican national, was not informed of rights accorded him under Vienna Convention on Consular Relations, which called for prompt notice of arrest to Mexican consul and opportunity for petitioner to seek consular advice and assistance).

46. Ibid.

47. N.C. CONST. art. 1, § 19.

48. State v. Villeda, 165 N.C. App. 431, 432, 439, 599 S.E.2d 62, 63, 67 (2004).

49. *Villeda,* 165 N.C. App. at 433, 599 S.E.2d at 64.

50. *Villeda,* 165 N.C. App. at 439, 599 S.E.2d at 64; *see also* State v. Ivey, 360 N.C. 562, 564, 633 S.E.2d 459, 461 (2006), *abrogated on other grounds* (noting that "this Court will not tolerate discriminatory application of the law based upon a citizen's race").

51. *Villeda,* 165 N.C. App. at 433–34, 599 S.E.2d at 64.

52. G.S. 114-10.

53. For instance, it appears that Alamance County has not formed a steering committee. Further, the Alamance County Sheriff's Office has no existing complaint mechanism. *See* "Answers to the Public Comments on the 287(g) Program from the September 15, 2008, Commissioners Meeting," www.alamance-nc.com/Alamance-NC/Departments/Commissioners/Answers+to+287(g)+Program+Questions.htm (hereinafter "Answers to the Public Comments").

54. House of Representatives, Committee on Appropriations, *Department of Homeland Security Appropriations Bill, 2009,* 110th Cong., 2d sess., H. Rep. 110-862 (2009), 55, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr862.110.pdf.

55. *See, e.g.,* Section XIV of the Wake County MOA and Section XII of the Alamance County MOA, as well as appendix B of all the MOAs. All MOAs appear to be identical with regard to this appendix, which sets forth the requirement for a complaint mechanism. Copies of all MOAs are on file with the authors.

56. *See* "Answers to the Public Comments."

57. *See, e.g.,* Section XI of the Alamance County MOA and Section XV of the Gaston County MOA.

58. *See, e.g.,* Kristin Collins, "Mom Arrested, Kids Left on I-85," *Raleigh News & Observer,* July 23, 2008, www.newsobserver.com/news/crime_safety/story/1150866.html (describing incident in which Alamance County Sheriff's deputies attempted to use woman's teenage daughter as interpreter).

59. *See, e.g.,* Section XIII of the Alamance County MOA and Section XVI of the Gaston County MOA.

60. Ibid.

61. *See* "Answers to the Public Comments." Additionally, even though the Alamance County Sheriff's Office has stated that community members would be included "[i]f the commissioners chose to form a [steering] committee," on December 1, 2008, Sheriff Terry Johnson advised a group of local residents that community members would not be included in any such committee.

62. News & Observer Pub. Co. v. Wake County Hosp. Sys., 55 N.C. App. 1, 9–11, 284 S.E.2d 542, 547–49 (1981) (holding that nonprofit hospital system constituted public body for purposes of public records law because of county commission control, review, and regulation; public funding; operation on leased county property; and operation pursuant to county agreement and bonds; and was therefore required to release terms of legal settlements); *see also* Craig D. Feiser, "Protecting the Public's Right to Know: The Debate over Privatization and Access to Government Information under State Law," *Florida State University Law Review* 27 (2000): 842–43 (describing analysis set forth in *News & Observer Pub. Co.* case as "totality of factors approach").

63. *See, e.g.,* Section XIV of the Alamance County MOA and Section XVII of the Gaston County MOA.

64. Pew Hispanic Center tabulations from the 2006 American Community Survey of the U.S. Census Bureau, www.census.gov/acs/www/index.html.

65. Research consisted of semistructured interviews with thirty informants (immigrants and nonimmigrants) living in Alamance County, conducted between May 2007 and November 2008. Informants were either targeted as key informants or selected randomly. Ten were undocumented, ten were legal permanent residents or citizens, five were native residents of the county, and five were professionals who work with immigrants.

66. Hannah Winkler and Keren Rivas, "Dispelling Myths: Immigration Part Two," *Burlington Times-News,* April 29, 2007,

www.thetimesnews.com/onset?id=1599&template=article.html.

67. Barry Smith, "Most Immigration Detainees Brought In on Minor Traffic Violations," *Burlington Times-News*, July 5, 2008, www.thetimesnews.com/articles/people-15271-charges-alamance.html.

68. ICE, fact sheet, "Delegation of Immigration Authority Section 287(g), Immigration and Nationality Act," September 6, 2007, www.ice.gov/pi/news/factsheets/070906factsheet287gprogover.htm.

69. Statistics submitted by the Office of the North Carolina State Highway Patrol to the North Carolina Civil Liberties Union, March 2009.

70. Micah Flores, "Students Charged with Setting Fire May Be Deported," *Burlington Times-News*, February 8, 2008, www.thetimesnews.com/news/fire-10229-sheriff-charged.html; Keren Rivas, "Parent Sees Profiling, Deputies Say They Are Following Up Gang Leads," *Burlington Times-News*, September 10, 2008, www.thetimesnews .com/news/say-17541-deputies-sees.html.

71. Keren Rivas, "Arrested on Fishing without a License Charge, Is It Unusual or Not?" *Burlington Times-News*, August 14, 2008, www.thetimesnews.com/news/arrested-16647-charge-fishing.html.

72. Michael D. Abernethy, "'Wild-Goose Chase' Lands Two in Jail," *Burlington Times-News*, February 16, 2008, www.thetimesnews.com/news/martinez-10498-jones-shooting.html.

73. A study by the Pew Hispanic Center found that roughly one-quarter of undocumented immigrants live in mixed-status families in the United States. *See* Jeffrey S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.* (Washington, DC: Pew Hispanic Center, 2006), http://pewhispanic.org/files/reports/61.pdf.

74. Collins, "Mom Arrested."

75. Tina Manning (lead English-as-a-second-language coordinator, Alamance-Burlington School System), interview by Hannah Gill, July 2008.

76. "Probe Finds No Wrongdoing at Alamance Agency," *Burlington Times-News*, August 19, 2008, www.news-record.com/content/2008/08/19/article/probe_finds_no_wrongdoing_at_alamance_agency.

Do State and Local Immigration Laws Violate Federal Law?

Sejal Zota

Faced with what they consider a lack of comprehensive immigration reform at the federal level, many states and localities are enacting their own immigration-related laws and ordinances. Many of these laws impose restrictions on unauthorized immigrants, while some aim to promote integration of immigrants into the society.[1] Such laws raise a number of constitutional issues, including whether federal law preempts them. What is the permissible scope of state and local action in this area?

There is no general answer to this question, for the analysis varies across different areas of regulation. This article explains general principles of preemption and provides an analytical framework for determining whether state and local laws relating to housing, employment, and public benefits may be preempted by federal law (and thus invalidated).[2] The article also briefly discusses free speech and civil rights laws that may be violated by laws establishing English as the official language. (For information on actions related to immigration already taken by local jurisdictions in North Carolina, see the sidebar on this page.)

To make the article relevant both to experts (such as county and city attorneys) and to administrators and officials with broader responsibilities, each section offers a detailed analysis of the kinds of laws that may be preempted by federal laws and a summary providing best guidance on the permissible scope of state and local action.

The law related to preemption is somewhat unsettled. Some cases address preemption with apparently inconsistent findings. The area is fraught with legal challenges, so lawmakers should work closely with their attorneys in crafting ordinances relating to immigrants.

The author, an attorney, is a School staff member specializing in immigration law. Contact her at szota@sog.unc.edu.

General Principles of Preemption

Under the Supremacy Clause of the U.S. Constitution, federal law is the supreme law of the land.[3] State and local governments are "preempted" from enacting legislation in areas in which Congress has asserted its exclusive authority or in areas that would conflict with federal legislation. In the immigration field, the U.S. Supreme Court has recognized three tests to determine whether federal law preempts a state or local law: (1) constitutional preemption, (2) field preemption, and

Summary of Actions on Immigration Concerns by North Carolina Local Jurisdictions

Services or Benefits Limited on the Basis of Immigration Status
Gaston County

Prohibition on Hiring of Unauthorized Immigrants by Public Employers, or by Contractors Working for the Government
Forsyth County
Gaston County

Establishment of English as the Official Language
Town of Landis (Rowan County)
Town of Southern Shores (Dare County)
Beaufort County
Cabarrus County
Dare County
Davidson County

Sources: Mai Thi Nguyen, "Anti-Immigration Ordinances in North Carolina: Ramifications for Local Governance and Planning," *Carolina Planning Journal* 32: 36–46 (2007); city and county clerks in the jurisdictions listed, e-mail exchanges and telephone conversations with John Stephens, February–March 2009; Davidson County Board of Commissioners, Minutes of the Meeting, November 14, 2006, www.co.davidson.nc.us/media/pdfs/32/4045.pdf; Gaston County Board of Commissioners, Minutes of the Meeting, November 9, 2006, www.co.gaston.nc.us/CountyCommission/minutes/2006/2006-11-09minutes.pdf; Lincoln County Board of Commissioners, Minutes of the Meeting, Monday, June 18, 2007, www.lincolncounty.org/archives/37/061807Min.pdf; "Resolution Outlining Compliance with the Federal Immigration Laws in County Recruitment, Hiring and Contracting Practices," Minutes of the October 23, 2006, Meeting of the Forsyth County Board of Commissioners, p. 1103376.

(3) conflict preemption.[4] Issues concerning each of the three types of preemption may arise when state and local governments enact laws related to immigration. A state or local law related to immigration that fails any one of these three tests is preempted by federal law and therefore unconstitutional and invalid.[5]

What is constitutional preemption? The U.S. Supreme Court has consistently ruled that the federal government has broad and exclusive power to regulate immigration.[6] A state or local law will be constitutionally preempted if it attempts to regulate immigration. Under this test, the relevant question is: Does the state or local law *regulate* immigration—does it make a determination of who should or should not be admitted into the country and the conditions under which a legal entrant may remain—or does it simply *pertain* to immigrants?[7] State and local laws that attempt to regulate immigration violate the Supremacy Clause of the U.S. Constitution and are therefore preempted by federal law, even in the absence of federal legislation.

What is field preemption? Even if the state or local law is not an impermissible regulation of immigration, it may be field preempted if it attempts to operate in a field already occupied by federal law, either expressly or impliedly. Under this test, the relevant question is: Did Congress intend a "complete ouster" of state power in the field of legislation?[8] Or did Congress intend for states to regulate in the area to the extent consistent with federal law? If Congress intended to occupy the field of regulation, then a local or state law will be preempted, even if it mirrors federal law. Often, looking at the statutory language or the legislative history of the federal law is necessary to make such a determination.

What is conflict preemption? Even if Congress has not occupied the field of regulation, a state or local law may be conflict preempted if it burdens or conflicts with federal law. A conflict exists if complying with both federal and state or local law is impossible.[9] A conflict also exists if the state or local law is an obstacle to the accomplishment and the execution of the full purposes and objectives of Congress in enacting the federal legislation.[10] Testing for conflict preemption requires an analysis of the specific provisions of the law at issue.

Preemption in the Context of Housing Laws

Some state and local governments have proposed or enacted laws that prohibit property owners from renting or leasing property to unauthorized immigrants, and penalize them for doing so. (Such laws are labeled "housing laws" in this article.) Some housing laws require property owners or landlords to determine the immigration status of potential renters. They have been challenged on federal preemption grounds. Are they preempted by federal law? Courts that have thus far examined such housing laws have found that they carry serious concerns of federal preemption.[11]

Are Housing Laws Constitutionally Preempted?

Are housing laws constitutionally preempted? That is, are they considered a regulation of immigration? The answer depends on how such laws are constructed. The authority to create standards determining a person's immigration status belongs exclusively to the federal government.[12] Thus any type of state or local law (including a housing law) that creates or adopts standards different from federal standards to classify immigrants as lawfully present or unlawfully present will probably be deemed a regulation of immigration and thus be preempted.[13]

For example, a housing law in Farmers Branch, Texas, was found to be an impermissible regulation of immigration. The law classified a tenant's immigration status on the basis of federal housing regulations (which outlined restrictions on federal housing subsidies to immigrants), instead of federal immigration law.[14] The court found that the standards adopted by the local law prohibited several classes of authorized immigrants—immigrants who *lawfully* reside in the United States but are ineligible for federal housing assistance, such as student

visa holders—from renting an apartment in Farmers Branch.

Further, any sort of state or local law that authorizes a local or state entity to make an independent assessment of a person's immigration status also may be deemed an impermissible regulation of immigration and preempted by federal immigration law.[15] Immigration law generally vests authority in the U.S. attorney general and the secretary of the U.S. Department of Homeland Security to administer and enforce all laws relating to immigration and naturalization, including determinations regarding a person's immigration status (though such determinations are subject to judicial review in many circumstances).[16]

For example, in the Farmers Branch case, the court suggested that the law also was preempted because it required private people and city officials to make independent judgments regarding the immigration status of potential renters, instead of verifying their status with federal authorities or under federal guidance.[17]

Are Housing Laws Field Preempted?

Housing laws that are not a regulation of immigration may still fail the test of field preemption.[18] The issue is whether such laws attempt to legislate in a field that is occupied by the federal government. Even if state and local laws are consistent with federal objectives, they may be preempted if Congress has occupied the field.

The federal government has established a system of laws, regulations, procedures, and administrative agencies to determine, subject to administrative and judicial review, whether and under what conditions a given person may enter, stay in, and work in the United States. The federal government has not imposed any sanctions on landlords for renting to unauthorized immigrants, but it does regulate and impose penalties on various forms of assistance to unauthorized immigrants, including "harboring" an unauthorized immigrant. Specifically, federal immigration law penalizes people who knowingly or recklessly "conceal, harbor, or shield from detection" any person not lawfully present in the United States.[19] Some courts have interpreted the scope of this provision broadly, finding it to cover the act of providing shelter to an unauthorized immigrant knowing or recklessly disregarding the immigrant's unauthorized status, regardless of whether shelter was provided surreptitiously.[20]

The federal immigration laws do not expressly preempt states and localities from imposing additional penalties on people who harbor or provide shelter to unauthorized immigrants. However, by legislating in this area, the federal government may nonetheless have occupied the field and preempted state or local laws that prohibit property owners from renting to unauthorized immigrants. It depends on whether or not Congress intended a complete ouster of state or local power. One court has found that a local law in Escondido, California, that penalized property owners who "harbor" (rent an apartment to) unauthorized immigrants raised serious concerns of field preemption.[21] In granting a temporary restraining order against the proposed law, the court found that the federal immigration laws proscribing harboring may occupy the field in which the local law attempted to legislate.[22]

Are Housing Laws Conflict Preempted?

Are housing laws conflict preempted? That is, do they conflict with federal law or stand as an obstacle to the accomplishment and the execution of the full purposes and objectives of Congress? What is a sufficient obstacle is determined by examining the federal statute and identifying its purpose and intended effects.[23] Conflict-preemption analysis also requires an examination of the particular provisions of the state or local law.

A housing law may conflict with provisions of federal immigration law if it prohibits certain immigrants who are legally authorized to work in the United States from residing in its jurisdiction. The federal government permits several categories of people to legally work and presumably live in the United States, even though they may be technically violating immigration laws. For example, a person who has filed an application for a green card or for asylum technically does not have a lawful immigration status until the application is granted, but may obtain interim permission to work in the United States while that application is pending.[24] One court has used this analysis to invalidate a local ordinance. The city of Hazleton, Pennsylvania, passed a law that in part prohibited property owners from renting a dwelling unit to an unlawfully present immigrant. A reviewing federal court found the housing provisions of the law in conflict with federal law and therefore preempted because the provisions denied housing in Hazleton to a number of people who were authorized to work and implicitly to remain in the United States under federal immigration laws.[25]

Even if a state or local law does not explicitly conflict with a specific provision of federal law, it still may be preempted under this analysis if it creates an obstacle to the accomplishment and the execution of the full purposes and objectives of Congress.[26] When Congress has enacted a federal policy, a state or local law imposing different sanctions or punishing different people for the same conduct may interfere with the objectives of Congress. Congress does not require landlords or others actively to ascertain the immigration status of potential tenants. State and local housing laws that do so and that implement their own enforcement mechanisms, sanctions, and interpretations may be viewed by a court as upsetting the balance struck by Congress regarding the reach of the federal harboring law and the applicability of its penalties.[27] Under such a view, state and local housing laws may be conflict preempted.

Summary of Impact on State and Local Housing Laws

Together, the three types of preemption analysis suggest the following impact on state and local housing laws: Reviewing courts have found that housing laws raise serious preemption issues and have struck them down. Whether any housing law would survive a preemption challenge is not clear because immigrant housing may be an area that state and local governments may not regulate or an area in which a housing law may inherently conflict with the reach and the purpose of federal immigration law. However, a housing law carries less risk of being invalidated on the basis of pre-

emption if it adopts the federal definitions of immigration status and requires verification of the immigration status of renters with federal authorities.

Preemption in the Context of Employment Laws

Some local and state governments have enacted laws that prohibit the hiring or the employment of unauthorized workers and penalize employers for doing so through a variety of sanctions. (Such laws are labeled "employment laws" in this article.) Some employment laws have been challenged on the grounds of federal preemption. Four recent cases have ruled on the legality of state laws in Arizona and Oklahoma and local laws in Hazleton, Pennsylvania, and Valley Park, Missouri.[28] The Hazleton decision suggests that almost any type of employment law regulating unauthorized workers is probably preempted by federal law, and the Oklahoma case suggests that certain types of employment laws are preempted. The Arizona and Valley Park cases, however, suggest that certain employment laws, depending on how they are constructed, may be valid under the Supremacy Clause. The Ninth Circuit Court of Appeals affirmed the ruling in the Arizona case, and federal appeals are pending in the other cases.[29]

Are Employment Laws Constitutionally Preempted?

Are employment laws constitutionally preempted? That is, are they considered a regulation of immigration? The U.S. Supreme Court has held that a state employment law was not a regulation of immigration because it did not determine "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[30] An employment law will probably not be considered a regulation of immigration as long as it adopts the federal government's standards to classify immigration status and requires verification of an employee's work authorization with federal authorities (see the earlier section titled "Are Housing Laws Constitutionally Preempted?").

For example, the federal district court in the Arizona case found that the state employment law was not a regulation of immigration because it adopted the federal government's classifications of immigration status and relied on the federal government's verification of a person's immigration status and employment authorization.[31]

Are Employment Laws Field Preempted?

Are employment laws field preempted? That is, do they attempt to legislate in a field that is occupied by the federal government, either expressly or impliedly? In 1986, Congress enacted the Immigration Reform and Control Act (IRCA).[32] IRCA prohibits the employment of unauthorized immigrants, while safeguarding against employment discrimination as the prohibition is enforced.[33] The law sets out a process for verifying work eligibility, and the penalties to employers include cease-and-desist orders, civil and criminal fines, and imprisonment.

IRCA also contains an express preemption clause: "the provisions of

this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."[34]

What effect does express preemption have? When a federal law contains an express preemption provision, states and localities may not regulate in the field covered by the provision even if their efforts complement or further federal objectives.[35] Thus IRCA's express preemption provision clearly preempts any state or local law that imposes criminal or civil sanctions (other than through licensing and similar laws) on employers of unauthorized immigrants. The Oklahoma court found that civil sanctions most likely include the penalties of an increased tax rate, a loss of contract, and civil liability, and that the regulation of unauthorized workers through such sanctions is expressly preempted by IRCA.[36]

States and localities may be able independently to regulate the employment of unauthorized workers through "licensing and similar laws" because of the specific exemption in the preemption clause. What types of licensing and similar laws are covered by the exception? The courts in the Arizona and Valley Park cases construed this exception broadly, indicating that states and localities may enact laws that deny or suspend the business licenses of employers who knowingly or intentionally employ unauthorized immigrants.[37] On review of the Arizona case, the Ninth Circuit Court of Appeals agreed that states and localities can enact such licensing laws.[38] The court in the Hazleton case, however, construed the provision narrowly, finding a similar business license law to be preempted.[39]

What effect does implied preemption have? Even if a licensing law related to the employment of unauthorized workers is not expressly preempted (as per the courts in the Arizona and Valley Park cases), such a law may be impliedly preempted by IRCA if Congress intended to occupy the field.

The U.S. Supreme Court has described IRCA as a "comprehensive scheme" that "made combating the employment of illegal aliens in the United States central to the policy of immigration law."[40] IRCA regulates every area of immigrant employment: categories of people who may be employed, categories of people who may not be employed, the punishment for employing unauthorized workers, and the appeals process. On the one hand, IRCA may be so comprehensive that any state or local law seeking to regulate workers on the basis of immigration status would duplicate the federal law or conflict with it.[41] The opposing argument is that, by enacting the specific exemption allowing some licensing regulations to exist, Congress did not intend to preempt the entire field of employment regulation of unauthorized workers.[42]

Are Employment Laws Conflict Preempted?

Are employment laws conflict preempted? As discussed earlier, state and local employment laws relating to unauthorized workers are expressly preempted by IRCA, with the exception of licensing laws. But a licensing law may be preempted if its specific provisions conflict with or burden the federal law.

Some local and state licensing laws contain provisions that may be inconsistent with those of IRCA—for example:

- A stricter standard of conduct, such as strict liability for employment of unauthorized workers (versus the federal law's prohibition of knowingly employing unauthorized workers)

- A new system of verifying work eligibility (versus the federal law's verification scheme, which places the responsibility on the employer)
- A requirement that all categories of employees be screened for work eligibility (versus the federal law's exemptions for some independent contractors and domestic workers)
- No employee right to appeal an eligibility determination (versus the federal law's employee right to appeal)
- No antidiscrimination provisions (versus the federal law's measures to prevent discrimination against legal immigrants)
- Creation of new remedies, such as a civil cause of action against violators of the law (versus no such remedy created by the federal law)

The three cases addressing these issues reached varying conclusions on whether such provisions resulted in conflict preemption. In the Hazleton case, the court found that because such types of employment provisions created a new system of verification, compliance, and enforcement, they conflicted with IRCA and were therefore preempted.[43] The court explained that although the federal and local laws shared a similar purpose—to deter the employment of unauthorized workers without overburdening employers and increasing discrimination—the local law struck a different balance between those interests. The courts in the Arizona and Valley Park cases reached a different result.[44] Both courts found that the proposed laws did not conflict with the objective of Congress—to regulate the employment of unauthorized workers—and that any differences with the federal law were insignificant.

Are laws that mandate the use of E-Verify conflict preempted? Several local and state licensing laws require the use of E-Verify (formerly known as Basic Pilot), an Internet-based system that allows employers to verify electronically the employment eligibility of their newly hired employees. E-Verify is a voluntary program operated by the U.S. Department of Homeland Security in partnership with the Social Security Administration. The Department of Homeland Security encourages the use of E-Verify but, by federal law, may not require employers to use it.[45] There are ongoing concerns about the accuracy of the program.[46]

Some local and state licensing laws have made the use of E-Verify mandatory for all businesses that are required to have a business license to operate in the jurisdiction. Are such laws preempted by the federal law that makes participation in the program voluntary?[47] Under the Hazleton court's analysis, such a provision conflicts with federal law.[48] However, the Arizona and Valley Park courts found no conflict. These courts reasoned that although E-Verify may not be made mandatory at the national level, there was no indication that Congress intended to prevent the states from requiring the use of the system in their licensing laws.[49] On appeal, the Ninth Circuit Court of Appeals affirmed that no conflict existed between the federal law and the Arizona state law that mandated use of E-Verify.[50]

Summary of Impact on State and Local Employment Laws

Together, the three types of preemption analysis suggest the following impact on state and local employment laws: Clearly a state or local law regulating the employment of unauthorized immigrants through criminal sanctions, fines, or other nonlicensing sanctions (such as an increased tax rate or loss of a contract) is preempted by federal law. A state or local law regulating the employment of unauthorized immigrants through licensing provisions may or may not be preempted by federal law. The existing case law is directly conflicting on the legality of such licensing laws. One case suggests that most licensing laws are probably preempted, and two cases suggest that licensing laws may be valid if they adopt federal immigration classifications, require verification of immigration status and work authorization with the federal government, and are consistent with the provisions of the federal law (IRCA) in significant respects.

Preemption in the Context of Public Benefit Laws

Some state and local governments have enacted laws setting out immigration eligibility rules for state and local public benefit programs, such as restricting or extending state-funded medical insurance to certain groups of immigrants. (Such laws are labeled "public benefit laws" in this article.) There has not been much litigation in this area, but public benefit laws are probably preempted if they diverge from the federal welfare law.

Are Public Benefit Laws Constitutionally Preempted?

Are public benefit laws constitutionally preempted? That is, are they considered a regulation of immigration? A public benefit law will probably not be considered a regulation of immigration as long as it specifically adopts federal standards to classify and verify the immigration status of applicants (see the earlier section titled "Are Housing Laws Constitutionally Preempted?").[51] One federal court has held that a public benefit law is not a regulation of immigration because it does not amount to a determination of who should or should not be admitted into the country.[52]

Are Public Benefit Laws Field Preempted?

Are public benefit laws field preempted? That is, do they attempt to legislate in a field that is occupied by the federal government? In 1996, Congress passed a federal welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act.[53] The law created a statutory scheme for determining and verifying immigrant eligibility for most federal, state, and local benefits. In the law, Congress expressly stated a national policy of restricting the availability of public benefits to immigrants.[54] The law defined the benefits covered, and it created two categories of immigrants for purposes of benefit eligibility: "qualified" and "not qualified." The law also specifically designated the limited types of legislative actions that states can take in the area of immigrant eligibility for federal, state, or local benefits.[55]

In striking down a state public benefit law in California, a federal court found that the federal welfare law occupied the field of regulation of public benefits to immigrants, but the court allowed for instances in which states have the right

to determine immigrant eligibility for state or local public benefits.[56]

Under that court's analysis, states and localities may take the following actions in this area:

- States and localities may directly implement the federal welfare law. For example, in California, the court found that the state was permitted to promulgate regulations implementing the federal welfare law.[57]
- The federal law specifically allows states to further *restrict* the eligibility of certain groups of *authorized* immigrants (certain "qualified" immigrants) for designated federal and state public benefits.[58] For example, Alabama, Mississippi, North Dakota, Ohio, Texas, and Virginia do not provide Medicaid to certain groups of eligible qualified immigrants (lawful permanent residents who entered the United States after August 22, 1996, and have completed the five-year waiting period).[59] However, a similar state law was struck down in Arizona on equal protection grounds.[60] Thus state laws that further restrict designated public benefits for certain qualified immigrants are not federally preempted, but may raise equal protection concerns.
- Under the federal law, unauthorized immigrants are ineligible to receive state or local public benefits with certain, limited exceptions. However, states may choose to *extend* state and local benefits to *unauthorized* immigrants by affirmatively enacting a state law that provides for such eligibility.[61] For example, Illinois, New York, and Washington have enacted laws to provide state-funded medical insurance to all children, including unauthorized immigrants.[62]

Are Public Benefit Laws Conflict Preempted?

Are public benefit laws conflict preempted? That is, is it impossible to comply with both federal and state or local law, or is the state or local law an obstacle to the accomplishment and the execution of the full purposes and objectives of Congress?

State or local laws that diverge from the 1996 federal welfare law by creating their own immigration classifications or eligibility schemes are most likely preempted by federal law. For example, in California, the court found certain provisions of the state law to be conflict preempted because they restricted benefits to somewhat different categories of people than the federal welfare law, and made compliance with both impossible.[63]

A state or local law that calls for broader restrictions than the federal law is probably preempted by the federal welfare law, as well. For example, in California, the court also found provisions of the state law to be conflict preempted because they called for broader restrictions on unauthorized immigrants than imposed by the federal law.[64] Specifically, the court found that the state law, which denied all benefits to unauthorized immigrants, conflicted with the federal law, which made certain limited benefits available to unauthorized immigrants, such as Emergency Medicaid.

Summary of Impact on State and Local Public Benefit Laws

Together, the three types of preemption analysis suggest the following impact on state and local public benefit laws: State or local laws that diverge from the federal welfare law by creating their own immigration classifications or eligibility schemes are likely preempted. Laws that create greater restrictions than the federal law (with the second exception mentioned later) are also likely preempted. States and localities are permitted to take the following legislative actions in the area of public benefits:

- States and localities may enact a regulation to directly implement the federal welfare law.
- States may enact a law to further *restrict* the eligibility of certain groups of *authorized* immigrants for designated federal and state public benefits (although such a law may violate the Equal Protection Clause).
- States may affirmatively enact a law to *extend* state and local benefits to *unauthorized* immigrants, even though they would be ineligible for most benefits under the federal law.

Official-English Laws

A number of state and local governments have proposed or enacted laws making English the official language of the jurisdiction (such laws are labeled "official-English laws" in this article). Some of these laws prohibit the use of languages other than English, though many do not. Such laws do not raise federal preemption issues, but may raise other legal issues.

First Amendment Concerns

An official-English law may raise First Amendment concerns if it prohibits the use of foreign languages. A number of

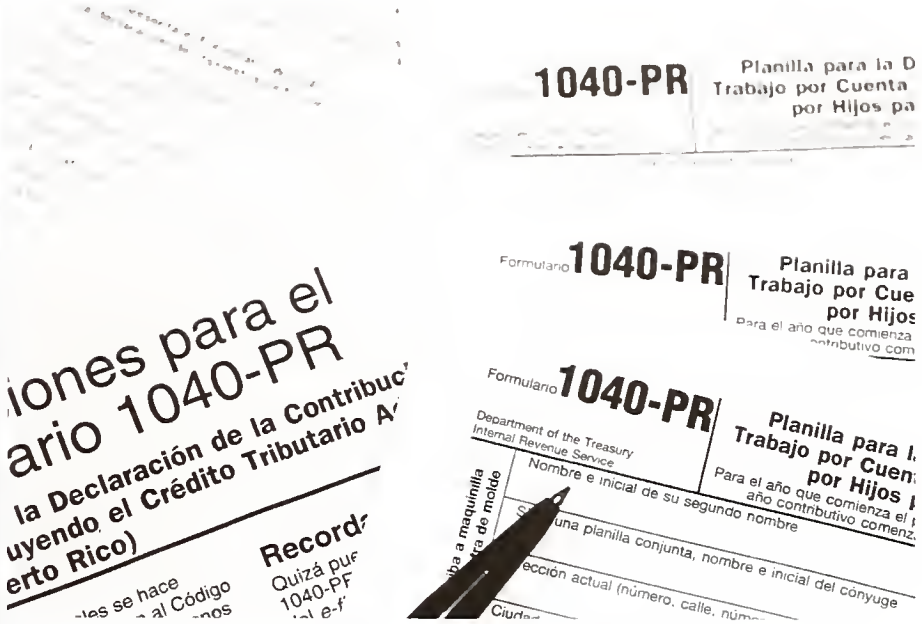
states have enacted official-English laws, including North Carolina.[65] A number of local governments across the United States also have enacted official-English laws, including the North Carolina counties of Beaufort, Cabarrus, Dare, and Davidson and the North Carolina towns of Landis and Southern Shores.[66] The content of these laws varies significantly. Some are simply statements that English is the state's or locality's official language, such as North Carolina's state law. Others designate English as the language of all official public documents, records, or meetings. A few laws have required that English be the only language used by government officials and employees in the course of all governmental actions, banning the use of other languages.[67] Laws in the last category have been struck down in Alaska, Oklahoma, and Arizona as violating the First Amendment rights of elected officials and public employees to communicate with their constituents and the public, and of non-English-speaking people to participate in and have access to government.[68] Official-English laws passed by local governments that ban the use of foreign languages also might be subject to legal challenge on state preemption grounds if exceptions are not made to comply with state law.[69]

Concerns about Discrimination on the Basis of National Origin

Certain official-English laws may raise concerns about discrimination on the basis of national origin under Title VI of the Civil Rights Act of 1964.[70] Title VI prohibits recipients of federal funding from discriminating against people on the basis of national origin, an obligation that includes providing reasonable language assistance to populations with limited English proficiency.[71] Official-English policies preventing agencies, programs, and services that receive federal funds from complying with these language-assistance requirements may violate Title VI.[72]

Summary of Impact on Official-English Laws

Together, these analyses suggest the following impact on official-English laws: An official-English law that bars the use of foreign languages in the course of governmental business may violate state and federal free speech laws. An official-English law is more likely to withstand a legal challenge if it does not restrict the use of foreign languages in the performance of government activity and if it is in compliance with federal and state laws, including the language-assistance requirements of Title VI.



Conclusion

North Carolina state and local government officials often question whether state and local laws relating to unauthorized immigrants are preempted or invalidated by federal law. There is no across-the-board answer to this question, for the analysis varies by area of regulation. This article provides an analytical framework for determining whether proposed or enacted state and local laws related to housing, employment, public benefits, education, and language policy are at risk of preemption. Future cases, including pending appeals in federal courts concerning regulation of immigrant housing and employment, may provide clearer direction.

Notes

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1. The term "laws" is used broadly in this article to describe state laws and local ordinances, resolutions, and policies. The term "unauthorized immigrant" is used to describe a person who is not lawfully present in the United States. *See generally* 8 U.S.C. § 1227(a)(1)(B) (2006); 8 C.F.R. § 103.12 (2008).

2. In this article, I focus on laws in these areas because they have been the subject of preemption challenges or appeared to be of particular interest to lawmakers in North Carolina. Such laws also may raise due process and equal protection concerns, but this article does not cover those areas of the law.

3. U.S. CONST. art. 6, cl. 2.

4. DeCanas v. Bica, 424 U.S. 351 (1976).

5. The U.S. Supreme Court has previously struck down state laws relating to immigrants on one or more of these preemption grounds. *See, e.g.*, Toll v. Moreno, 458 U.S. 1, 10 (1982) (invalidating state denial of resident tuition benefits to certain visa holders); Graham v. Richardson, 403 U.S. 365, 377–80 (1971) (invalidating state welfare restriction); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 418–20 (1948) (invalidating state denial of commercial fishing licenses); Hines v. Davidowitz, 312 U.S. 52, 62–68 (1941) (invalidating state alien-registration scheme).

6. *See, e.g.*, *DeCanas*, 424 U.S. at 354–55 ("Power to regulate immigration is unquestionably exclusively a federal power.").

7. *DeCanas*, 424 U.S. at 355.

8. *DeCanas*, 424 U.S. at 356–57.

9. *See* Michigan Canners & Freezers v. Agric. Mktg. and Bargaining Bd., 467 U.S. 461, 469 (1984); Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142–43 (1963).

10. *See* DeCanas v. Bica, 424 U.S. 351, 363 (1976).

11. *See, e.g.*, Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858 (N.D. Tex. 2008) (finding local housing law to be preempted and granting permanent injunction against its enforcement); Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (striking down local housing law on preemption grounds); Garrett v. City of Escondido, 465 F. Supp. 2d 1043 (S.D. Cal. 2006) (granting temporary restraining order against local housing law that raised serious concerns of federal preemption); *cf.* Reynolds v. City of Valley Park, Mo., No. 06-CC-3802 (St. Louis Cty. Cir. Ct. March 12, 2007) (finding that housing ordinance enacted by city of Valley Park was unlawful because it conflicted with state law).

12. *See* Plyler v. Doe, 457 U.S. 202, 225 (1982) ("The States enjoy no power with respect to the classification of aliens. This power is committed to the political branches of the Federal Government."); *see also* Equal Access Education v. Merten, 305 F. Supp. 2d 585, 602–03 (E.D. Va. 2004) (explaining that states cannot formulate their own standards for determining person's immigration status, which are "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain," and thus impermissible regulation of immigration).

13. *See, e.g.*, *Equal Access Education*, 305 F. Supp. 2d at 602–03 (finding that college admissions policy in Virginia might be invalid if, instead of adopting federal standards, it created and applied state standards to assess immigration status of college applicants); League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 768–70 (C.D. Cal. 1995) (invalidating state law provisions that created its own set of standards to classify immigration status of applicants).

14. *Villas at Parkside Partners*, 577 F. Supp. 2d at 868–71 (finding ordinance to be constitutionally preempted and permanently enjoining city from effectuating or enforcing it).

15. *See, e.g.*, *League of United Latin American Citizens*, 908 F. Supp. at 769 ("State agents are . . . . unauthorized to make independent determinations of immigration status . . . .; [such] determinations . . . . amount to immigration regulation").

16. *See generally* 8 U.S.C. § 1103 (2006).

17. Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858, 871–74 (N.D. Tex. 2008).

18. *See* Garrett v. City of Escondido, 465 F. Supp. 2d 1043 (S.D. Cal. 2006) (finding that although local housing ordinance was likely not regulation of immigration because it relied on federal immigration standards to classify immigration status of rental applicants, it might still be field preempted).

19. 8 U.S.C. § 1324(a)(1)(iii) (2006). Federal immigration law also penalizes related activities, including the bringing in, the transporting, and the encouragement or inducement of unauthorized immigrants to reside in the United States. 8 U.S.C. § 1324(a)(1)(A)(i)–(iv) (2006). Further, it is a criminal offense to aid or abet the commission of these offenses. 8 U.S.C. § 1324(a)(1)(A)(v) (2006).

20. *See, e.g.*, United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989) (finding that church official violated harboring provision when he invited unauthorized immigrant to stay in apartment behind his church); United States v. Rubio-Gonzalez, 674 F.2d 1067, 1072 (5th Cir. 1982) (indicating that harboring does not require any "trick or artifice"); United States v. Acosta de Evans, 531 F.2d 428, 430 (9th Cir. 1976) (finding defendant liable for providing unauthorized immigrants with apartment and defining "harboring" as "afford[ing] shelter," regardless of intent to avoid detection).

21. *Garrett*, 465 F. Supp. 2d at 1056.

22. The City of Escondido then agreed to a permanent injunction (entered on December 15, 2006) against enforcement of the ordinance.

23. *See* Crosby v. National Foreign Trade Council, 530 U.S. 363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.").

24. The federal government also may grant work authorization to certain people who may not have a lawful immigration status, but have permission to remain in the United States for humanitarian or equitable reasons. *See, e.g.*, 8 C.F.R. §§ 274a.12(c)(11), (14).

25. Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007). The court also found that Hazleton's requirement that city employees examine immigration documents and determine whether immigrants were lawfully present in the United States conflicted with federal law because only the federal government can determine conclusively who may remain in the United States through formal removal (deportation) hearings.

26. *See Crosby*, 530 U.S. at 378–80.

27. Congress has occasionally amended the statute to narrow or broaden its reach. For example, in 1952, Congress added a proviso that routine employment practices in hiring unauthorized immigrants are not considered harboring. In 1986, Congress removed that proviso. *See* United States v. Kim, 193 F.3d 567, 573–74 (2d Cir. 1999); United States v. Acosta de Evans, 531 F.2d 428, 430 (9th Cir. 1976).

28. Arizona Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036 (D. Ariz. 2008), *aff'd, rev'd sub nom.* Chicanos Por La Causa v. Napolitano, 544 F.3d 976 (9th Cir. 2008); Chamber of Commerce of the United States v. Henry, 2008 WL 2329164, ___ F. Supp. 2d ___ (W.D. Okla. June 4, 2008); Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007); Gray v. City of Valley Park, Mo., 2008 WL 294294, ___ F. Supp. 2d ___ (E.D. Mo. January 31, 2008).

29. *Chicanos Por La Causa*, 544 F.3d 976.

30. DeCanas v. Bica, 424 U.S. 351, 354–55 (1976).

31. *Arizona Contractors Ass'n*, 534 F. Supp. 2d at 1051–52; *see also Lozano*, 496 F. Supp. 2d at 524 n.45 (finding that, on basis of *DeCanas* Court's definition, employment ordinance was not regulation of immigration).

32. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (employer sanctions provisions codified at 8 U.S.C. § 1324a–1324c).

33. The law specifically prohibits the employment of "unauthorized" immigrants, who are neither admitted for permanent residence nor authorized under federal law to work in the United States. 8 U.S.C. § 1324a(h)(3) (2006) .

34. 8 U.S.C. § 1324a(h)(2)(2006).

35. *See, e.g.*, Morales v. TWA, 504 U.S. 374, 387 (1992) (stating that express preemption provision may displace "all state laws that fall within its sphere, even state laws that are consistent with [federal law's] substantive requirements").

36. Chamber of Commerce of the United States v. Henry, 2008 WL 2329164, ___ F. Supp. 2d ___ (W.D. Okla. June 4, 2008) (granting preliminary injunction against employment verification provisions of state law that are likely expressly preempted by federal law).

37. Arizona Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036, 1046–48 (D. Ariz. 2008), *aff'd, rev'd sub nom.* Chicanos Por La Causa v. Napolitano, 544 F.3d 976 (9th Cir. 2008); Gray v. City of Valley Park, Mo., 2008 WL 294294, at *10–12, ___ F. Supp. 2d, ___, ___ (E.D. Mo. January 31, 2008).

38. *Chicanos Por La Causa*, 544 F.3d at 983–85.

39. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 519–20 (M.D. Pa. 2007) (finding that Hazleton law on business-permit suspension did not fall into "licensing" exception and was pretext to regulate employment of unauthorized

workers locally, which is expressly preempted by IRCA).

40. Hoffman Plastic Compounds v. N.L.R.B., 535 U.S. 137, 147 (2002).

41. *See Lozano*, 496 F. Supp. 2d at 523 (finding that IRCA occupies field to exclusion of state or local laws regarding employment of unauthorized immigrants).

42. *Gray*, 2008 WL 294294, at *13, ___ F. Supp. 2d at ___ (finding that Congress's inclusion of provision allowing for some state licensing regulations clearly conflicts with intent to preempt entire field of employment regulation).

43. *Lozano*, 496 F. Supp. 2d at 525–29.

44. Arizona Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036, 1053 (D. Ariz. 2008) ("a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act . . ."); Gray v. City of Valley Park, Mo., 2008 WL 294294, at *13–19, ___ F. Supp. 2d, ___, ___ (E.D. Mo. January 31, 2008).

45. Pub. L. No. 104-208, § 402(a), 110 Stat. 3009, 3656 (1996) ("the Attorney General may not require any person or other entity to participate in [E-Verify].").

46. For example, in a September 2007 evaluation of the E-Verify program commissioned by the U.S. Department of Homeland Security, the evaluators concluded that "the database used for verification is still not sufficiently up to date to meet the [federal law] requirement for accurate verification, especially for naturalized citizens." *See* Westat, *Findings of the Web Basic Pilot Evaluation*, Report submitted to the U.S. Department of Homeland Security (Rockville, MD: Westat, 2007), www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf.

47. For a more detailed analysis regarding preemption of E-Verify laws, *see* Ben Stanley, "Preemption Issues Arising from State and Local Laws Mandating Use of the Federal E-Verify Program," *Public Servant* 6: 1–6 (March 2008).

48. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 526–27 (M.D. Pa. 2007).

49. *Arizona Contractors Ass'n*, 534 F. Supp. 2d at 1055–57; Gray v. City of Valley Park, Mo., 2008 WL 294294, at *17–19, ___ F. Supp. 2d, ___, ___ (E.D. Mo. January 31, 2008) ("The Court does not see Congress's decision not to make the program mandatory as restricting a state or local government's authority under the police powers.").

50. Chicanos Por La Causa v. Napolitano, 544 F.3d 976, 985–86 (9th Cir. 2008).

51. *See* League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 769 (C.D. Cal. 1995) (finding that certain provisions of state public benefit law amounted to regulation of immigration because law created its own, independent standards to classify and verify immigration status of applicants).

52. *League of United Latin American Citizens*, 997 F. Supp. at 1253.

53. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified at 8 U.S.C. §§ 1601 *et seq.* (2006)).

54. 8 U.S.C. § 1601 (2006).

55. 8 U.S.C. §§ 1612(b), 1621(d), 1622(a) (2006).

56. League of United Latin American Citizens v. Wilson, 997 F. Supp. 1244, 1253–55 (C.D. Cal. 1997) (finding that Congress had intended to displace state power in field with limited exceptions).

57. *League of United Latin American Citizens*, 997 F. Supp. at 1255.

58. 8 U.S.C. §§ 1612(b), 1622(a) (2006).

59. *See* National Immigration Law Center, "Overview of Immigrant Eligibility for Federal Programs, Table 1" (rev. March 2005), www.nilc.org/pubs/guideupdates/tbl1_ovrvw_fed_pgms_032505.pdf (excerpt from National Immigration Law Center, *Guide to Immigrant Eligibility for Federal Programs* (4th ed. Los Angeles, CA: National Immigration Law Center, 2002).

60. Kurti v. Maricopa County, 33 P.3d 499 (Ariz. Ct. App. 2001) (finding that state law that permanently restricted eligibility of qualified immigrants entering United States after August 22, 1996, for indigent health care benefits violated Equal Protection Clause of U.S. Constitution).

61. 8 U.S.C. § 1621(d) (2006).

62. *See* 215 ILL. COMP. STAT. 170 (2006) (All Kids, Illinois); N.Y. PUB. HEALTH LAW § 2511 (McKinney Supp. 2009) (Child Health Plus, New York); WASH. REV. CODE §§ 74.09.402, 74.09.470 (2008).

63. League of United Latin American Citizens v. Wilson, 997 F. Supp. at 1256–57 (C.D. Cal. 1997) (finding that state classification of "alien in the United States in violation of federal law" differed from federal classification of immigrant who is "not qualified").

64. *League of United Latin American Citizens*, 997 F. Supp. at 1257.

65. *See* Alaskans for a Common Language v. Kritz, 170 P.3d 183, 189 (Alaska 2007) ("There are now English-only laws in twenty-four states."); N.C. GEN. STAT. § 145-12(b) (1987) (hereinafter G.S.) (stating only, "English is the official language of the State of North Carolina.").

66. *See* Ruiz v. Hull, 957 P.2d 984, 994 (Ariz. 1998) (stating that "forty municipalities have official English statutes."); Jerry Allegood, "Not in English? Not in Our County, Beaufort Says," *Raleigh News & Observer*, February 18, 2007, www.newsobserver.com/front/story/544604.html; Cabarrus County Board of Commissioners, Minutes of the Meeting, January 22, 2007, www.cabarruscounty.us/Commissioners/archive/2007/minutes/BOC_minutes_jan222007.pdf; Dare County Board of Commissioners, Minutes of the Meeting, April 7, 2008, www.co.dare.nc.us/BOC/Minutes/ 2008/OM040708.pdf.; Davidson County Board of Commissioners, Minutes of the Meeting, November 14, 2006, www.co.davidson.nc.us/media/pdfs/32/4045.pdf.; Official English Resolution, Town of Landis (adopted on September 11, 2006) (on file with author); Resolution Declaring English as the Official Language of Southern Shores (adopted on April 22, 2008) (on file with author).

67. These laws generally provide for exceptions if use of a foreign language is required to ensure compliance with federal laws, such as federal voting laws.

68. *Alaskans for a Common Language*, 170 P.3d 183 (finding that portion of state law that required use of English by all government officers and employees in all government functions violated federal and state free-speech rights of government officers and employees and of citizens with limited English proficiency to petition their government); *In re* Initiative Petition No. 366, 46 P.3d 123 (Okla. 2002) (finding that proposed state law restricting all governmental communications to English language was unconstitutional on state free-speech grounds); *Ruiz*, 957 P.2d 984 (striking down, on First and Fourteenth amendment grounds, law that required all government officials and employees in Arizona to use only English during performance of all government duties).

69. *See generally, e.g., In re* Application of Melkonian, 85 N.C. App. 351, 355 S.E.2d 503 (1987) ("G.S. 160A-174 establishes . . . that local ordinances are preempted by North Carolina State law when local ordinances are not consistent with State law.").

70. 42 U.S.C. § 2000d (2006).

71. *See* Lau v. Nichols, 414 U.S. 563 (1974) (holding that public school system's failure to provide English-language instruction to Chinese students who did not speak English discriminated on basis of national origin, in violation of Title VI); *see also* Exec. Order No. 13166—Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50,121 (Aug. 16, 2000); Guidance to Federal Financial Assistance Recipients regarding Title VI Prohibition against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 18, 2002).

72. *See* Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination against Persons with Limited English Proficiency, 65 Fed. Reg. 50,123 (August 16, 2000). There are multiple sources of guidance, depending on the sources of the agency's funding. Most of the information is available at www.lep.gov.

Positions and Practices on Immigration: Choices for Local Governments

Lydian Altman

Increasingly in North Carolina and across the United States, people have stories to tell about how immigration has affected their lives. In a 2008 survey on immigration by the International City/County Management Association (ICMA), nearly half of the respondents indicated that their communities have experienced growth in immigrant populations.[1] Beyond creating pressure to provide services, this growth presents some particular challenges to service delivery because of language and cultural barriers and the difficulty of determining immigrants' legal status.[2] This article summarizes local governments' choices among positions and practices related to immigration.

Localities have responded to recent immigrants with a patchwork of efforts and no guiding vision for integrating them into the community.

In relation to the nation's population as a whole, the percentage of foreign-born people has skyrocketed in the last forty years. "At no other time in its history has the United States had a larger number of immigrants or more rapid growth in the foreign-born population."[3] Unlike previous waves of immigrants, the most recent immigrants are more likely to have come from developing countries in Africa, Asia, and Latin America than from Western or Eastern Europe.

In 2004, the percentage of North Carolina's population classified as Hispanic rose to 7.0 percent of the total population. Hispanics accounted for 27.5 percent of the state's population growth from 1990 to 2004, with most of the increase coming from Hispanics moving to North Carolina, either from other states or from other countries (as opposed to its coming from children born to Hispanics already here).[4]

The author is associate director of the School's Public Intersection Project, which brings people together to recognize shared concerns, improve their ways of working with one another across institutional boundaries, and act as partners to address community needs. Contact her at lydian@sog.unc.edu.

The absence of federal action has not stopped immigrants from influencing North Carolina communities profoundly and forcing local governments to develop policies, make decisions, and take action.

Given the sheer volume of immigrants who have arrived and the potential divisions created by major cultural differences, immigration issues are complicated and fraught with strong, personal connotations. As my high-school-age daughter reported to me after a discussion about immigration in her world history class, "I see so many sides of this. It's hard to know what the right feeling is, isn't it?"

Across the state, newspaper headlines and the evening news often tell stories that point out the differences between immigrants and long-time residents. These frequent examples remind North Carolinians that immigration issues are salient in their lives.

With so many facets to what can be a polarizing issue, it is no wonder that agreeing on a course of action is difficult. For myriad reasons, the federal government has not tackled immigration reform in any comprehensive or meaningful way. The absence of federal legislation and guidance has not stopped immigrants from coming to and influencing North Carolina communities in profound ways and forcing individual local governments to develop policies, make decisions, and take action.

Recognizing the growing importance of immigration to policy development at the local level, the ICMA sent its survey to more than five hundred local government administrators from across the United States. Administrators in forty-seven states responded, representing jurisdictions ranging in population from fewer than 120 people to more than 1.3 million.

The ICMA survey revealed that a community's response to its immigrant population probably has not been based on community dialogue or community consensus.[5] The result has been a patchwork of efforts, primarily in housing, schools, law enforcement, and social services, with a great potential for confusion among residents, conflicting approaches across municipal-county borders, and no overall guiding vision for integrating immigrants into America's communities.

Towns' and counties' motivations and values in choosing a particular response to the influx of immigrants vary. Local governments can choose from a spectrum of positions and practices (see Table 1). The purpose of the spectrum is to help leaders become informed and knowledgeable in their choices about actions, and to aid them in understanding the potential impacts of their choices on the long-run health, well-being, and image of their community. Readers should examine these potential positions and

Table 1. **Range of Potential Positions and Practices of Local Government**

	Anti-Immigrant	Neutral & Passive	Cohesive	Pro-Immigrant
Philosophy	Crackdown: Anti-immigrant policies with aggressive enforcement provisions	Do-nothing	Immigrant integration	Sanctuary: Priority on people's human rights rather than their legal status
Approach	Sets up polarization: long-term residents vs. immigrants		Does not require choice between long-term residents and newer immigrant interests, but does require deliberate action to protect everyone's interest	Ignores potential of tensions

	Protective	Neutral	Supportive
Practice	Establish English-only policies	Promote cultural competence	Support right to access services in native language
	Establish anti-immigrant policies with fines for landlords and employers	Provide referrals to nonprofits or religious groups	Provide materials in multiple languages
	Require reporting to ICE*	Host celebration of diversity	Provide incentives for bilingual staff
	Negotiate 287(g) MOAs or require ICE training†	Engage in strategic planning & economic development	Establish sanctuary communities
	Check immigration status for local services	Support entrepreneurs	Support or allow day laborers' centers
			Establish local immigrant services office

Source: Consolidated and adapted, by permission, from "The Dollars and Sense of Immigrant Integration for Local Government" (ICMA audioconference, January 15, 2009, Nadia Rubaii-Barrett, presenter).

*ICE = U.S. Immigration and Customs Enforcement.

†MOA = memorandum of agreement. ICE fact sheets on a variety of topics related to 287(g) can be found at www.ice.gov/pi/news/factsheets/section287_g.htm.

practices in the context of the other articles in this issue, which address key legal points about local government powers affecting immigration, access to education, and various government benefits and services.

Recognizing that many community leaders are interested in promoting community discussion and learning more about how some local governments have responded to their immigrant populations, ICMA has published a policy paper, *Immigration Reform: An Intergovernmental Imperative*. Drawing on experiences cited by local government administrators in the aforementioned survey and in follow-up interviews, the report offers four guiding principles and sixteen specific policy recommendations.

Notes

1. Nadia Rubaii-Barrett, *Immigration Reform: An Intergovernmental Imperative* (Washington, DC: ICMA, 2008), http://icma.org/upload/library/2009-03/{3195180C-53FF-4D96-9F97-38F89C1A31DC}.pdf.

2. "Almost all local government administrators (98%) indicated that they do not have any data on the number of legal versus illegal immigrants within their communities." Ibid., 18.

3. Ibid., 6.

4. John D. Kasarda and James H. Johnson Jr., *The Economic Impact of the Hispanic Population on the State of North Carolina* (Chapel Hill, NC: Kenan-Flagler Business School, University of North Carolina at Chapel Hill, 2006).

5. "Nearly two-thirds (62%) indicated that immigration is not an issue that is discussed in the community. Among the 27% who indicated that immigration was discussed often, two-thirds characterized it as a polarizing issue, and one-third indicated there was no widespread consensus about the issue." Rubaii-Barrett, *Immigration Reform*, 18.

Legal Requirements on Access to Elementary and Secondary Public Education for Children of Immigrants

Ingrid M. Johansen

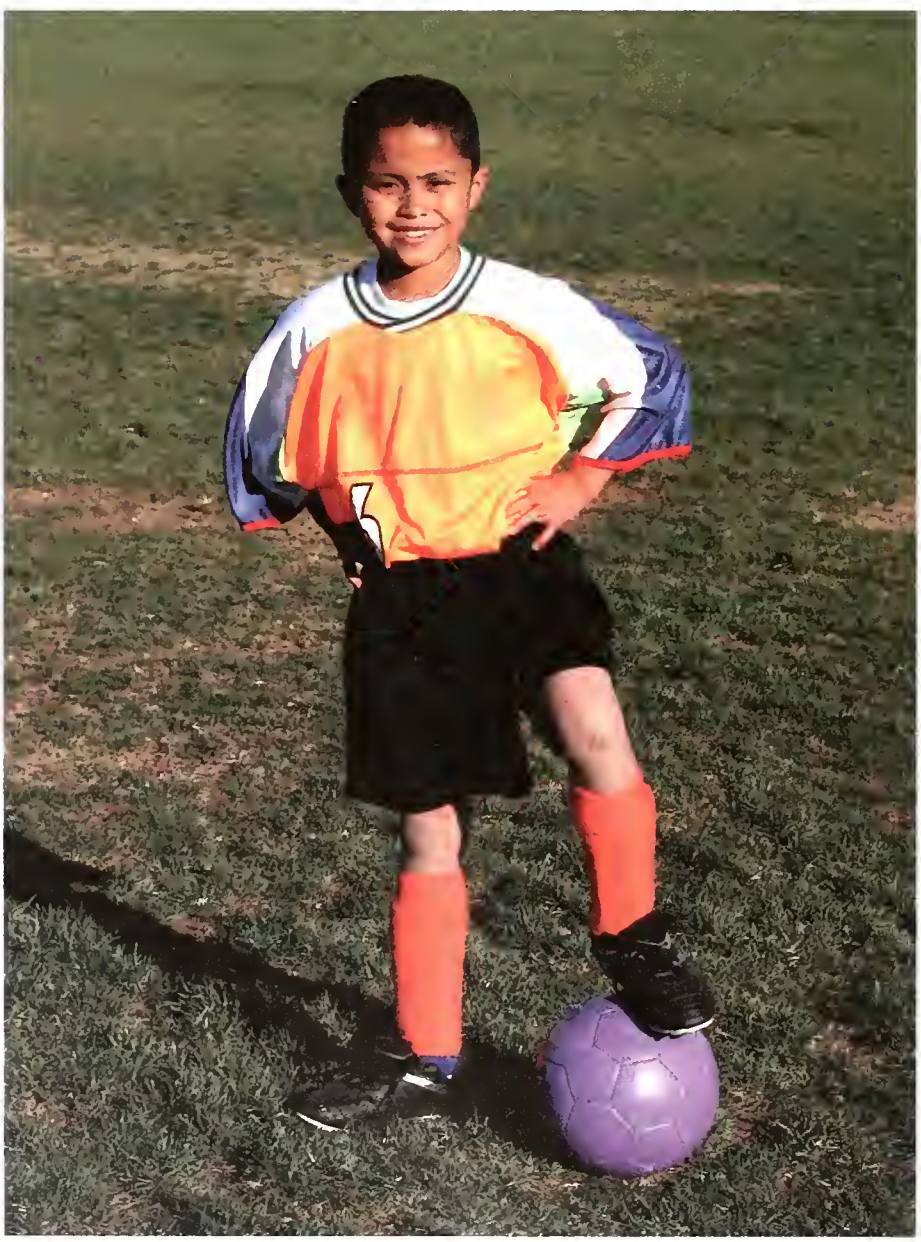
Although the right to education is not constitutionally guaranteed in the United States, any state that undertakes to provide public primary and secondary education must grant all resident children—*regardless of their immigration status*—equal access to that education.[1] The U.S. Supreme Court announced this principle in the 1982 case *Plyler v. Doe*, holding that the failure to offer to the children of undocumented immigrants educational opportunities equal to those offered to other resident children violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[2] Therefore, as concerns a state's duty to provide primary and secondary public education, there is no functional legal difference between documented and undocumented immigrants.

The author is a research fellow at the School of Government. Contact her at ijohansen@austin.rr.com.

The next, more difficult issue is: To what kind of education does equal access entitle all of a state's resident children? In other words, if the Equal Protection Clause guarantees them the right to go to school, what is the substance of that right, and whence does it come? This article addresses those issues. Clearly, allowing students who do not speak any English into the school, but then making no accommodation for their English-language deficit, is no access at all.

Even before the *Plyler* decision, another Supreme Court case had ordered public elementary and secondary schools to take appropriate action to provide to students with limited English proficiency (LEP) the instruction necessary to overcome language barriers and give them meaningful educational opportunities as compared with English-proficient students. The U.S. Supreme Court enunciated this right in the 1974 case *Lau v. Nichols*.[3] The federal Equal Educational Opportunity Act (EEOA) and Title VI of the Civil Rights Act subsequently codified the right.[4] Under these precedents, no educational entity receiving federal financial assistance may discriminate on the basis of race, national origin, or native language in providing students with a meaningful opportunity to participate in a public educational program.[5]

What is the substance of the Equal Protection Clause's guarantee of the right to go to school?



As is true in the field of education more broadly, the federal government largely has left decisions about what constitutes "appropriate action" in the context of language-learning programs to state and local educators. The fuzziness of the 1974 Supreme Court decision setting the appropriate-action standard led to litigation between LEP students and their families, and school districts. This litigation, combined with the federal government's delegation of educational methodology decisions to state and local officials, culminated in what has become (with some variations) a yardstick for federal courts nationwide in evaluating LEP programs. In *Castañeda v. Pickard*, Mexican-American LEP students challenged (among other things) the appropriateness of the action taken by their school district to help them overcome their language barriers.[6] In finding the subject program legally sufficient, the court created a three-prong framework for assessing LEP programs:

1. A district's LEP plan must be based on a sound educational theory that is supported by some qualified expert.
2. It must have sufficient resources and personnel to be implemented effectively.
3. After a period lengthy enough to give the plan a legitimate trial, the court must find that students are actually learning English and, to some extent, other subject-matter in the curriculum.

As the duty to provide LEP instruction has grown and the number of LEP students in the United States has dramatically increased, some states with relatively high numbers of immigrants have seen a backlash against language-learning programs.[7] Leaders of the backlash have used the *Castañeda* decision and its progeny to justify the passage of "English-only" initiatives.[8] Proponents of such initiatives assert that bilingual or multilingual education has proven a failure and produced a class of immi-

grants and children who are unable to lead successful lives in the United States because they cannot speak the language of the country in which they have chosen to live.[9] Opponents see the initiatives as cynical political attempts to overrule the *Plyler* and *Lau* cases on the ground if not in the courts, and as contrary to years of well-established research on how children learn languages and develop cognitively.[10]

California's Proposition 227, passed in 1998, is probably the most famous example of this recent approach to language learning: it provides for one year of "sheltered" English-immersion classes for LEP students (with some limited exceptions) and then requires all public school courses to be taught in English. Other states, including Arizona and Massachusetts, have passed similar initiatives.[11] Colorado and Oregon voters have rejected them.[12]

Although such initiatives seem to violate federal law requiring appropriate language assistance to LEP students, supporters argue—and some courts have agreed—that studies and expert opinions show that English immersion is a legally sufficient way to satisfy the EEOA.[13] However, just as many critics believe that the *Castañeda* standard has all but eviscerated the requirement that states provide equal educational opportunity to LEP students.[14] They argue that it allows fringe, unscientific, and invalid language-acquisition theories to be implemented with minimal research or expert study to back them up; that courts now operate under a standard of excessive deference to state and local educators; and that the trial-period requirement allows entire grades of students to pass through elementary school without either acquiring English-language skills or developing their cognitive abilities in other core areas such as reading and math.[15]

The passage in 2002 of the education reform package No Child Left Behind (NCLB) has somewhat altered the legal landscape for LEP students.[16] Intended to reduce wide and persistent achievement gaps between poor, minority, and LEP students, and high-achieving student groups, NCLB requires the establishment of standards and tests for English-language proficiency.[17] It also requires that LEP students show progress in core academic subjects. Although LEP students may take reading tests in their native languages for the first three years of their schooling, they must take math tests in English within their first year of public schooling and English-proficiency tests by their second year of public schooling, at the latest. Further, after the third year, they must take reading tests in English (with limited exceptions) and be held to the same standards as their English-proficient peers. NCLB requires data on the performance of LEP students (and other disadvantaged groups) to be tracked separately in order to assess how well LEP programs are serving their students. Poor performance by LEP students can lead to sanctions for schools that fail to improve.

Although encouraged by the renewed attention to LEP students and their needs,

some commentators have expressed concerns both about the structure of NCLB's standards and assessment procedures, and about characteristics unique to the LEP population that pose challenges to public school educators operating under NCLB.

Primary among the concerns about NCLB's testing requirements are the tests in English-language proficiency that LEP students must take by their second year in school and the presumption that by their third year of LEP services, these students will be prepared to undertake all their learning in English.[18] After years of research on bilingual education, experts have concluded that achieving academic fluency in a second language usually takes four to eight years.[19] For students whose English-language skills are still very limited, taking such a test can be psychologically harmful, causing anxiety, tears, and feelings of frustration and worthlessness.[20] Another concern is the validity of state tests for assessing English-language proficiency, a concern that even the federal government has voiced.[21]

Beyond practical and policy issues with NCLB itself, there are difficulties caused by the nature of LEP students as a group, or category. First, their sheer number has created an unprecedented demand for LEP programs.[22]

Also, immigrants and their children now are dispersing across the country, rather than remaining in a relatively small number of states (e.g., California, Florida, New York, and Texas) as they have in the past. As a result, many states and localities must create LEP programs but have little or no experience or expertise in developing them.[23]

Further, poverty rates among children of immigrants—especially among LEP children—have grown, and are continuing to grow, significantly.[24] Combined with increased residential segregation, the growth means that the majority of immigrants' children are being educated in high-LEP, low-income, urban schools, schools that are disproportionately failing to meet standards under NCLB and are suffering sanctions.[25]

Another issue that arises in this context is the potential for double- or triple-counting of assessment scores for LEP students because of their likely overlap with other NCLB–mandated reporting categories, including low-income and minority status.[26]

Finally, some fear that LEP students who are not able to make sufficient progress in English acquisition to meet state graduation standards will become discouraged and drop out, increasing the already dismal graduation rates for LEP students.[27] The fear is heightened by a provision in the federal Illegal Immigration Reform and Immigrant Responsibility Act that prohibits states from offering in-state tuition rates to undocumented immigrants seeking postsecondary education, unless the same benefit is provided to all U.S. citizens, regardless of residency.[28] (For more information, see the article on 46.)

Conclusion

In conclusion, the children of immigrants, documented or undocumented, are entitled to a public elementary and secondary education in the state where they reside. Once inside the schoolhouse door, they are entitled to instruction that will (1) give them an opportunity to obtain the educational benefits available to the rest of the school community and (2) enable them to achieve the same high standards that are required of English-proficient and native students under NCLB. Just what kinds of educational and language-learning programs are legally sufficient to satisfy these rights is still murky.

More guidance may be coming soon on two fronts, however. First, the U.S. Supreme Court has accepted, as a consolidated case, two related cases from Arizona, *Horne v. Flores* and *Speaker of the Arizona House of Representatives v. Flores*, on an expedited schedule.[29] The issue in the case is whether the EEOA trumps NCLB. The case, originated in 1992, challenged the adequacy of the LEP program in an Arizona school under the EEOA. In 2000 a federal court found that Arizona was not meeting its obligation to eliminate language barriers for LEP students and ordered the state to do so. In 2005 the state governor, believing that the legislature was not taking action adequate to address the federal court order, took the case back to court, and the court found that the legislature still had not met its obligations under the EEOA. However, by this time, NCLB had been passed, and the legislature argued that it had satisfied its LEP duties under this statute. Neither the federal trial court nor the Ninth Circuit Court of Appeals found the legislature's argument persuasive. However, some commentators (including the attorney for the LEP students and families) think that the U.S. Supreme Court would not have accepted the case for review unless it was going to overturn these lower court rulings.[30]

Second, NCLB is up for reauthorization. With a new president and a Democratic majority in the Congress, the likelihood of change is great. Given the other issues with which the new administration must deal, though, change is not likely to come before 2010. Forecasters predict that change will include beefed-up preschool education programs, increased federal funding, and more flexibility in how school and student performance are assessed.[31]

Notes

1. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
2. Plyler v. Doe, 457 U.S. 202 (1982).
3. Lau v. Nichols, 414 U.S. 563 (1974).
4. 20 U.S.C. § 1703 (1974); 42 U.S.C. §§ 2000d *et seq.* (2009).
5. The cases of Washington v. Davis, 426 U.S. 229 (1976), and University of California Regents v. Bakke, 438 U.S. 265 (1978), may have changed this standard. Although the language in the *Lau* opinion indicated that a showing of discriminatory effect was sufficient to establish a Title VI violation, language in the *Washington* and *Bakke* cases appears to have attached an intent requirement to a successful discrimination claim under Title VI.
6. Castañeda v. Pickard, 648 F.2d 989 (5th Cir. 1981).
7. Providing children of immigrants with equal access to public education is a much larger duty for public school systems today than it was in 1982, when the *Plyler* case was decided: In 1980 the number of immigrants (both legal and illegal) in the United States was estimated to be 14.1 million. In 2007 the number was estimated to be 37.9 million. Current estimates place the number of school-age children of immigrants at 10.8 million: this accounts for 20.2 percent of the nation's school-age population. (However, less than a quarter of these students are themselves

immigrants. Native-born children of immigrants are U.S. citizens.) Steven A. Camarota, *Immigrants in the United States, 2007: A Profile of America's Foreign-Born Population* (Washington, DC: Center for Immigration Studies, 2007), www.cis.org/articles/2007/back1007.html.

8. *See, e.g.*, Valeria G. v. Wilson, 12 F. Supp. 2d 1007 (1998); Teresa P. v. Berkeley Unified School Dist., 724 F. Supp. 698 (1989); Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030 (1987).

9. *See, e.g.*, Roselia Salinas, "All Children Can Learn to Speak English," *National Forum of Educational Administration and Supervision Journal* 23, no. 2, pp. 20–24 (2006–7).

10. *See, e.g.*, James Crawford, "The Decline of Bilingual Education: How to Reverse a Troubling Trend?" *International Multilingual Research Journal* 1, no. 1, pp. 33–37 (March 2007); Kevin R. Johnson and George A. Martinez, "Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education," *University of California at Davis Law Review* 3: 1247–63 (Summer 2000).

11. ARIZ. REV. STAT. §§ 15-751 *et seq.* (2009); MASS. GEN. LAWS ANN. pt. I, tit. XII, ch. 71A (2009).

12. Colorado Amendment 3, or "English for the Children of Colorado" Initiative, 2002; Oregon Ballot Measure 58, 2008.

13. *See, e.g., Valeria G.*, 12 F. Supp. 2d at 1007; Michael Bazeley, "English-Only Test Scores Up: Proposition 227: Teachers and Parents Debate Why Achievement Results Improved in the Wake of New Limits on Bilingual Education," *San Jose Mercury News*, December 26, 1999, p. 1.

14. *See, e.g.*, Stephen Krashen, "Skyrocketing Scores: An Urban Legend," *Educational Leadership* 62, no. 4, 37–39 (December 2004/January 2005); Kellie Rolstad, "Weighing the Evidence: A Meta-Analysis of Bilingual Education in Arizona," *Bilingual Research Journal* 29, no. 1, pp. 43–67 (Spring 2005).

15. *See, e.g.*, Eric Haas, "The Equal Educational Opportunity Act 30 Years Later: Time to Revisit 'Appropriate Action' for Assisting English Language Learners," *Journal of Law and Education* 34: 361–87 (2005).

16. 20 U.S.C. §§ 6301 *et seq.* (2009).

17. 20 U.S.C. at § 6301(1), (3).

18. 20 U.S.C. § 1111(b)(7) (2009).

19. *See, e.g.*, Salinas, "All Children Can Learn"; Mikyung Kim Wolf et al., "Issues in Assessing English Language Learners: English Language Proficiency Measures and Accommodation Uses," Report no. 731 (Los Angeles: National Center for Research on Evaluation, Standards, and Student Testing, 2008).

20. Wayne E. Wright and Daniel Choi, "The Impact of Language and High-Stakes Testing Policies on Elementary School English Language Learners in Arizona," *Education Policy Analysis Archives* 14, no. 13, pp. 1–75 (May 2006).

21. Cornelia M. Ashby, *No Child Left Behind Act: Education Assistance Could Help States Better Measure Progress of Students with Limited English Proficiency*, Testimony before the Subcommittee on Early Childhood, Elementary and Secondary Education, Committee on Education and Labor, House of Representatives (Washington, DC: U.S. Government Accountability Office, 2007), http://eric.ed.gov:80/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/28/06/72.pdf.

22. Randolph Capps et al., *The New Demography of America's Schools: Immigration and the No Child Left Behind Act* (Washington, DC: Urban Institute, 2008), www.urban.org/publications/311230.html.

23. Ibid.

24. Lorraine M. McDonnell and Paul T. Hill, *Newcomers in American Schools: Meeting the Educational Needs of Immigrant Youth* (Santa Monica, CA: Rand Program for Research on Immigration Policy, 1993), www.rand.org/pubs/monograph_reports/MR103/.

25. Capps et al., *New Demography*; McDonnell and Hill, *Newcomers*.

26. Capps et al., *New Demography*.

27. Ibid.

28. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-28, 110 Stat. 3009–546 (1996). Currently, ten states, including California and Texas, have nonetheless enacted laws offering undocumented immigrants in-state tuition rates under certain conditions. These provisions are legal, state officials argue, because immigration status is not a part of the in-state residency determination. Rather, in most cases, if a student has graduated from an in-state high school after a certain number of years in attendance, he or she qualifies as a state resident. Dawn Konet, *Unauthorized Youths and Higher Education: The Ongoing Debate* (Washington, DC: Migration Information Source, 2007), www.migrationinformation.org/Feature/display.cfm?ID=642.

The proposed Development, Relief, and Education for Alien Minors (DREAM) Act (S 2205, 110th Cong., 1st sess.) could change this state of affairs and provide these students with the opportunity to legalize their status in the United States (for more information about this act, see the article on page 46).

29. Horne v. Flores, No. 08-289 (U.S. filed August 29, 2008); Speaker of the Ariz. House of Representatives v. Flores, No. 08-294 (U.S. filed September 2, 2008). Brief synopses of the questions presented by these consolidated cases are available at www.abanet.org/publiced/preview/briefs/unscheduled.html#08294.

30. *See, e.g.*, Pat Kossan, "English Learning Case Hits High Court," *Arizona Republic*, January 10, 2009, www.azcentral.com/arizonarepublic/news/articles/2009/01/10/20090110ell0110.html.

31. Sara Mead, "It's Obama," Early Ed Watch Blog, November 5, 2008, www.newamerica.net/blog/early-ed-watch/2008/its-obama-8181.

Educating Immigrant Children in North Carolina: The State-Local Connection

To illustrate how the legal requirements for immigrant children (see the article on page 35) translate into the work of public schools in North Carolina, we offer two views. An administrator in the state's department of public instruction provides information about (1) instructional approaches with students who have been identified as "limited English proficient" (LEP), (2) allowable accommodations for test-taking, and (3) state-level standardized test scores. Two administrators with Chatham County Schools describe their system's approach to instruction and testing of LEP students.

Consistent with the federal standard of access to educational resources, the focus is on providing effective, cost-efficient ways to build LEP students' English proficiency for academic and career success. All immigrant students are not LEP. Many LEP students are U.S. citizens.

The main challenges for state educational authorities are to set standards for and compile results of statewide testing to track the progress of LEP students along with the progress of all students in North Carolina schools, and to assist local districts with information and professional development for LEP instruction. The main challenge for local districts is to choose an instructional approach that will help LEP students acquire academic English. In meeting this challenge, they administer the federal- and state-mandated tests and work with immigrant parents, nonprofit groups, and others.

—The Editors

State-Level Standards and Goals for LEP Achievement

Helga Fasciano

Even before the federal No Child Left Behind law, North Carolina required all school districts to serve LEP students. According to the October 1, 2008, head count, 118,712 students in North Carolina's public schools are identified as LEP. The total number of North Carolina public school students is approximately 1.45 million.

The key terms are defined as follows:

- LEP: any student who has sufficient difficulty speaking, reading, writing, or understanding the English language and whose difficulties may deny him or her the opportunity to learn successfully in classrooms where the language of instruction is English. North Carolina uses an English-language-proficiency assessment to identify students as LEP.
- English language learner (ELL): in North Carolina, another term for LEP.
- English as a second language (ESL): a type of program to help LEP students become proficient in English.

LEP is the term of choice in this article.

A number of models for working with LEP students are in use in North Carolina:

- The dual-language developmental bilingual program

The author is section chief, K–12 Program Areas, North Carolina Department of Public Instruction. Contact her at hfasciano@dpi.state.nc.us.

- The dual-language two-way immersion program
- The transitional bilingual education program
- ESL
- Content-based ESL
- Sheltered English instruction/ sheltered instruction observation protocol (SIOP)
- Newcomer services
- ESL co-teaching

For a summary of each program, see Table 1.

Students identified as LEP are permitted up to six accommodations on state-mandated tests:

- Testing in a separate room
- Scheduled extended time
- Multiple test sessions
- Reading of the test aloud in English by the test administrator (only possible on tests of skills other than reading)
- Reading of the test aloud by the student to himself or herself
- Use of an English/native-language dictionary or an electronic translator

Determined by student need, the accommodations are intended to provide equitable treatment for LEP students, based on the nature of the examination and the student's degree of English proficiency. Alternative assessments are available to North Carolina students who meet specific criteria, including some LEP students.

On most standardized-test measures of achievement, there is a gap between LEP students and other students. I offer two illustrations: the results of the end-of-grade mathematics test for grades 3–8, comparing all students with LEP students (see Table 2); and the results of the high school U.S. history examination (usually taken in tenth grade), comparing the aggregate scores of all students with the scores of LEP students (see Table 3). The number of LEP students taking this examination increased by more than 24 percent from the 2006–7 school year to the 2007–8 school year (from 2,225 to 2,765), yet the achievement level for the LEP group rose faster than the achievement level for all students taking the exam.

Of course, a variety of factors other than the school's program affect student achievement on these tests.

Detailed test results can be found on the North Carolina Department of Public Instruction website.[1] The information is organized by school district, by individual school, and by subgroups of students, for several academic years.

North Carolina schools address the achievement gap in a number of ways, including increased LEP services, use of varied language-instruction programs, extended-day programs, tutoring, and summer programs.

As the number of LEP students has increased in North Carolina, so have professional development opportunities for ESL and content teachers. The state continues to provide extensive training in sheltered instruction through the North Carolina SIOP model as well as through literacy instruction for LEP

Table 1. **LEP Approaches in North Carolina Public Schools**

Name of Approach	Language of Instruction	Key Features	Comments
		Programs Using Two Languages for Instruction	
Dual-Language Developmental Bilingual Program (Additive Bilingualism)	English and student's heritage language	Helps non-English-speakers learn English as well as maintain and improve their native- or heritage-language skills.	Students become bilingual, biliterate, and bicultural in a way that honors their need to identify and communicate with their heritage or home culture and mainstream culture in which they live and will work.
Dual-Language Two-Way Immersion Program (Additive Bilingualism)	English and another language	Consists of about 50% native English speakers and 50% native speakers of target language. Both groups of students become bilingual, biliterate, and bicultural.	Content instruction is provided in both English and target language.
Transitional Bilingual Education Program (Subtractive Bilingualism)	Student's primary (non-English) language and English, with focus on former	Is presented in LEP students' native language for at least 2 or 3 years, after which LEP students receive all-English instruction.	Primary purpose is to facilitate students' transition to all-English instructional program while giving them academic-subject instruction in native language to extent necessary.
		English-Language Instructional Programs	
		Extra content support in English and native language may occur.	
English as a Second Language (ESL)	English	Teaches English reading, writing, listening, and speaking skills to LEP students, using program of techniques, methodology, and special curriculum.	Instruction is in English with little use of students' native languages. It may occur in pull-out session or at scheduled class time.
Content-Based ESL	English	Uses instructional materials, learning tasks, and classroom techniques from academic content areas as vehicle for developing language, content, cognitive, and study skills.	Instruction is in English with little use of students' native languages. It may occur in pull-out session or at scheduled class time.
Sheltered English Instruction/Sheltered Instruction Observation Protocol (SIOP)	English	Adapts academic instruction in English to make it understandable to LEP students.	This approach can be implemented by content and ESL teachers in English language arts, mathematics, science, social studies, and other subjects.
Newcomer Services	English	Meets academic and transitional needs of newly arrived immigrants through separate, relatively self-contained educational interventions.	Students usually attend these programs for limited time before they enter ESL program. Services may be provided at special site or school site.
ESL Co-Teaching	English	Provides for shared, collaborative teacher planning time so that teachers can implement strategies that integrate language acquisition, literacy, and academic content at same time.	Caution: Co-teaching is not the same as supplying ESL teacher who enters class and assists individual students. It requires professional development for both teachers so that grade-level and developmentally appropriate teaching from both ESL and content teacher occurs.

Source: Compiled by Title III/ESL Office, North Carolina Department of Public Instruction.

students. North Carolina universities have addressed this growth by adding ESL certification programs. Today fourteen institutions offer such certification.

In 2008–9, North Carolina public schools changed the test that all LEP students must take to determine their English-language proficiency. The new North Carolina English-language-proficiency standards and resource guide are taken from a guide published by the World-Class Instructional Design and Assessment (WIDA) Consortium. North Carolina joined this consortium of nineteen states to participate in its comprehensive education system. The WIDA test in English-language proficiency was first implemented statewide in February–March 2009.

Table 2. **Percentage of Students Proficient on End-of-Grade Mathematics Test for Grades 3–8**

	2006–7 School Year	2007–8 School Year
All Students	66.4%	69.9%
LEP Students	45.7%	51.9%

Source: Drawn from, but not the same as, data available at North Carolina Department of Public Instruction, http://disag.ncpublicschools.org/2008/app/disag/disag-public.cgi.

Table 3. **Percentage of Students Proficient on End-of-Course U.S. History Examination**

	2006–7 School Year	2007–8 School Year
All Students	64.6%	66.5%
LEP Students	36.8%	44.4%

Source: Drawn from, but not the same as, data available at North Carolina Department of Public Instruction, http://disag.ncpublicschools.org/2008/app/disag/disag-public.cgi.

Note

1. North Carolina Department of Public Instruction, http://abcs.ncpublicschools.org/abcs/.

Overview of LEP Instruction in Chatham County Schools

Mary Lee Moore and Helen Atkins

Like many areas of North Carolina, Chatham County has experienced a large influx of Hispanic adults and their children. Most of them probably are recent immigrants with varied federally designated immigration statuses. Federal law prohibits schools from inquiring about immigration status. However, federal law requires public school systems to serve these immigrants regardless of their parents' status (see the article on page 35).

Most immigrants do not speak English as their primary language. Thus the primary interest of the Chatham County Schools (CCS) is to help LEP students learn the language and succeed in school.

This profile focuses on Hispanic LEP students. That designation does not cover all immigrants in CCS (or in other North Carolina school districts). Also, many of the Hispanic LEP students are U.S. citizens by virtue of birth or their parents' naturalization.

The Challenge of a Changing Student Population

The number of Hispanic students in CCS more than doubled from the 2000–2001 school year to the 2006–7 school year, from 817 to 1,642. This increase resulted in a change in the overall percentage of Hispanic students in the student population, from 11.75 percent of all CCS students to 21.71 percent.

The proportion of LEP students ranges widely across schools, however. At Virginia Cross Elementary School, LEP students (largely of Hispanic heritage) account for 321 of 490 students; at Bennett Elementary School, they account for 4 of 246.[1]

A New Assessment System in 2009

As well as providing new assessment procedures and levels of identification,

Moore is director of federal programs, English-language learners, library media services, and pre-K programs, and Atkins is ESL coordinator, Chatham County Schools. Contact them at mlmoore@chatham.k12.nc.us and hjones@chatham.k12.nc.us.

the WIDA Consortium's system (see the article on page 40) provides teachers and administrators with tools for designing curriculum, instruction, and assessments for LEP students. This change in testing and English-language-proficiency standards involves two K–12 tests in English-language proficiency. The first test is a screening assessment that is administered to students new to the district (or the state). The results are used to determine program eligibility, language proficiency, level of services, and classroom placement. The second test is administered to all LEP students in the spring. This test helps gauge a student's progress in English-language proficiency from one year to the next. It assesses four domains— reading, writing, listening, and speaking—and also measures academic language in science, math, and social studies.

The WIDA Consortium's system identifies a continuum of second-language acquisition. The process of acquiring a second language involves movement along the continuum, from Entering (Level 1) to Reaching (Level 6).[2]

Acquiring an additional language is a complex undertaking. LEP students are a diverse group. They vary in age; grade level; diagnosis, such as learning disabilities; linguistic and cultural backgrounds; and life and educational experiences.

Main Focus: Instruction in English

The overall CCS approach to teaching ESL stresses instruction in English. It uses a student's native language for clarification purposes but not as a means of primary instruction. CCS offers a Newcomers Program (K–12) taught by bilingual teachers. Much of the instruction is in English, and measurement of progress is in English, but the native language may be used at times to enable the students to understand rules and academic concepts better.[3]

CCS must follow North Carolina Department of Public Instruction stan-

Measuring the Progress of LEP Students in Chatham County

Annual measurable achievement objectives are based on LEP students achieving proficiency in English as measured by the Idea Proficiency Test (IPT) and on LEP students' results on grades 3–8 end-of-grade and 10th-grade comprehensive tests.

To meet the achievement objectives, a district must make three separate goals. The goals and the results for 2004–5 and 2005–6 were as follows:

- **Goal 1: Progress (% of LEP students who advance at least one proficiency level)**

2004–5	2005–6
Goal = 45.0%	Goal = 50.0%
CCS results = 74.2%	CCS results = 68.1%
State average = 81.0%	State average = 66.4%

- **Goal 2: Proficiency (% of LEP students who attain full proficiency within five years)**

2004–5	2005–6
Goal = 25.0%	Goal = 30.0%
CCS results = 47.9%	CCS results = 5.0%
State average = 53.3%*	State average = 10.3%

- **Goal 3: Average yearly progress (Did the districtwide LEP subgroup meet the state-set goals for average yearly progress goals?)**

2004–5	2005–6
Math 3–8: met	Math 3–8: met
Reading 3–8: did not meet	Reading 3–8: did not meet
Tenth-grade math: insufficient numbers	Tenth-grade math: met
Tenth-grade reading: insufficient numbers	Tenth-grade reading: did not meet

Source: North Carolina Department of Public Instruction, Accountability Services, unpublished data (2006), www.ncpublicschools.org/accountability.

*The North Carolina Department of Public Instruction changed the calculations for annual measurable achievement objectives in 2004–5, so the state and district numbers look askew.

Table 1. **Chatham County Schools Adequate Yearly Progress (AYP) Results, 2008**

School	Made AYP	Goals Met
Bennett Elementary	Yes	9/9 (100.0%)
Bonlee Elementary School	Yes	13/13 (100.0%)
Chatham Central High School	Yes	9/9 (100.0%)
Chatham Middle School	No	28/29 (96.6%)
Horton Middle School	No	13/17 (76.5%)
J. S. Waters Elementary School	Yes	13/13 (100.0%)
Jordan Matthews High School	No	16/17 (94.1%)
Moncure Elementary School	Yes	13/13 (100.0%)
North Chatham Elementary School	Yes	29/29 (100.0%)
Northwood High School	No	15/17 (88.2%)
Perry W. Harrison Elementary School	No	20/21 (95.2%)
Pittsboro Elementary School	No	14/17 (82.4%)
SAGE Academy*	—	—
Siler City Elementary School	No	16/21 (76.2%)
Silk Hope Elementary School	Yes	13/13 (100.0%)
Virginia Cross Elementary School	No	9/17 (52.9%)

Source: North Carolina Department of Public Instruction, http://ayp.ncpublicschools.org/2008/app/nclb/AypLeaSummary.cgi.

*Status is not yet available. Sage Academy, an alternative school, is labeled as a Special Evaluation School because it did not meet the membership requirement of forty students across the tested grade levels for reporting of AYP.

dards for students gaining proficiency in English. The state of North Carolina sets the guidelines with regard to students exiting from LEP status. In most cases, a student may exit from LEP status when he or she is able to work successfully and independently in mainstream classes and does not require ESL services. In some instances, however, a student (or his or her family) wishes to continue receiving services. If a child has exited from LEP status but shows a need for continued services, the ESL teacher will continue to serve him or her directly or on a consultative basis.[4]

A full description of the CCS approach for teaching ESL is available on the CCS website.[5]

LEP Student Achievement on Standardized Tests

On the basis of 2004–5 and 2005–6 results, CCS needed to develop a plan to boost LEP achievement, and submit it to the North Carolina Department of Public Instruction for review. Although many students were becoming more proficient in English, the scores were below the goals for full proficiency and for reading proficiency across several grades (see the sidebar on page 44).

The two CCS schools with the largest proportion of Hispanic students are "priority schools," meaning that fewer than 60 percent of their students are scoring at or above Achievement Level III. Six other CCS schools have not met the state-level goals for average yearly progress (AYP) on standardized tests. (For a summary of each CCS school and the number of AYP goals it has met, see Table 1.)

Other Challenges

Many immigrant students are in low-income households. The concentration of students from poor families, regardless of country of background, typically poses challenges for attendance, progress from grade to grade, and overall achievement in schools. Many programs in the school system

assist families experiencing financial challenges.

Approximately one-third of LEP students in CCS are defined as immigrants by federal guidelines. The parents of some immigrant students are migrant laborers, and the movement of the family creates challenges for consistent teaching and learning.

Over the past few years, the LEP population in CCS has been far less transient, for the most part, staying in the county. There still is a bit of movement across schools in the Siler City area, evidenced by the number of older LEP students who now are in CCS's middle and high schools. Middle and high school teachers who have not typically had English-language learners in their classrooms now are experiencing an increase in the number.

Notes

1. Chatham County Schools, http://ds1.chatham.k12.nc.us/profiles.nsf/profiles?OpenFrameSet.

2. For details, see Margo Gottlieb, M. Elizabeth Cranley, and Andrea R. Oliver, *The WIDA Consortium English Language Proficiency Standards and Resource Guide, 2007 Edition, Pre-Kindergarten through Grade 12* (Madison, WI: WIDA Consortium, 2007). A brochure on the guide is available at www.wida.us/ events/TESOL/ELP_Standards_4.08.pdf.

3. Chatham County Schools, Chatham County Schools ESL Program Guiding Principles, http://policy.chatham.k12.nc.us/mediawiki/index.php/ESL_Plan#Chatham_County_Schools_ESL_Program_Guiding_Principles.

4. Ibid.

5. Chatham County Schools, English as a Second Language Plan, 2007–8, http://policy.chatham.k12.nc.us/mediawiki/index.php/ESL_Plan

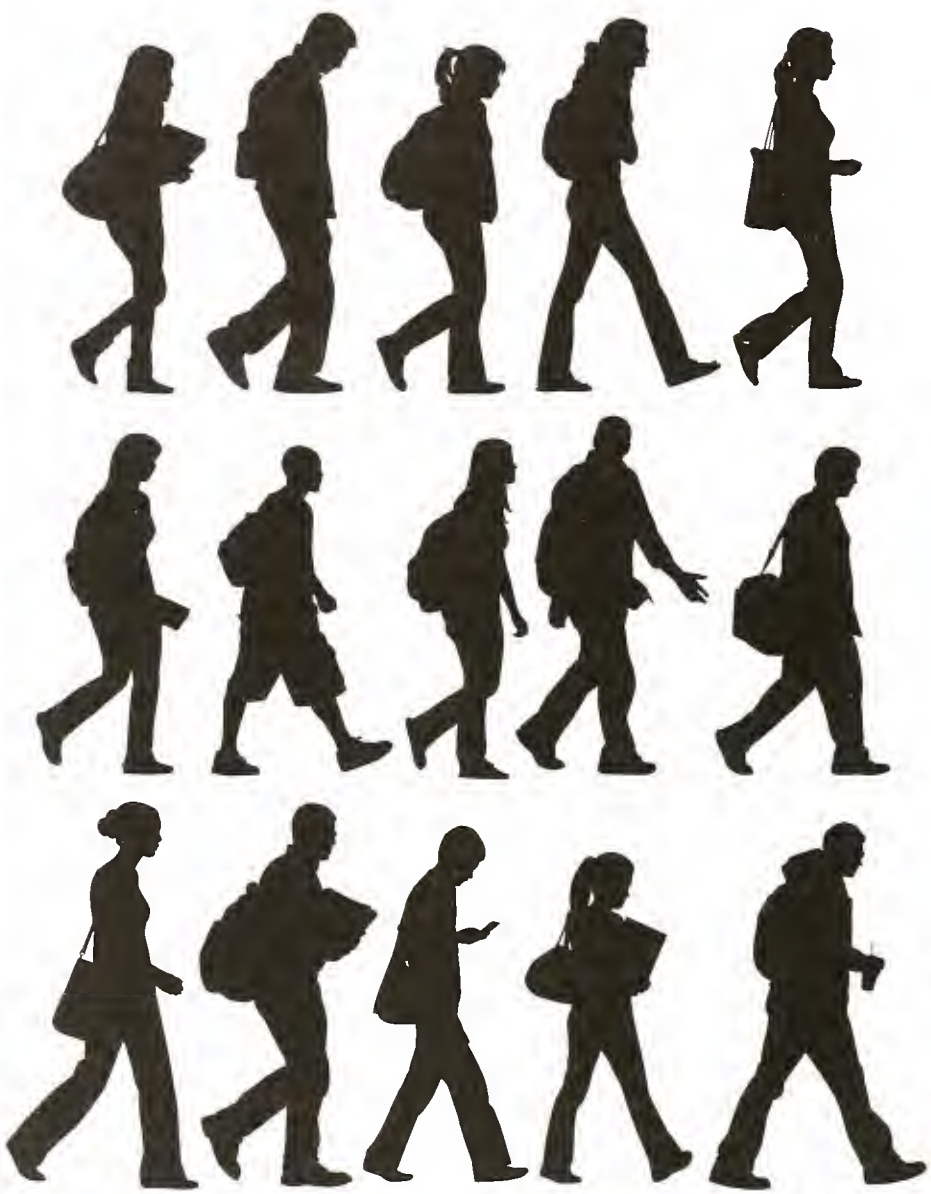
Unauthorized Immigrants' Access to Higher Education: Fifty States, Different Directions

Sejal Zota

Marcela Velasquez graduated with honors from Desert View High School.[1] She was ranked ninth in a class of 250; was involved in track, cross-country, and basketball; and wants to be a doctor. For years, she has dreamed of attending the University of Arizona. Yet, despite receiving an academic scholarship to the institution, she will not be enrolling. Marcela is the daughter of an unauthorized immigrant who brought her here when she was six years old.[2] As an unauthorized immigrant herself, Marcela may not use the scholarship to the University of Arizona or attend as an in-state student. She is ineligible for federal grants and loans, may not legally work to support herself while in college, and therefore cannot afford the nonresident tuition of nearly $15,000 per year.

Marcela is like thousands of other unauthorized high school graduates who face tremendous barriers to higher education each year because of the high cost and the negative prospects for employment. In North Carolina, an estimated fifteen hundred unauthorized immigrants graduate from high school each year.[3] These students have even fewer higher education options because, unlike their counterparts in many other states, they are currently barred from attending community college in the state.[4]

Higher education access and affordability have emerged as key issues in immigration debates across the nation. The Urban Institute estimates that each year about sixty-five thousand unauthorized immigrants who have lived in the United States for five years or longer graduate from high school.[5] Most of these students were brought to live in the United States as young children, having no choice in the matter. The primary issues with respect to higher education are whether unauthorized immigrants should be allowed to enroll in public colleges and universities and



The author, an attorney, is a School staff member specializing in immigration law. Contact her at szota@sog.unc.edu.

whether they may qualify for in-state tuition. To date, most state-level action has focused on qualifications for in-state tuition, without which most unauthorized immigrants are unable to afford higher education. Public opinion is deeply divided on such action.

The aim of this article is to put North Carolina higher education policies and possible changes in context. The article provides detailed information on federal laws and other states' laws and actions relating to immigrants' access to higher education. Specifically, it describes the federal law and pending legislation on provision of higher education benefits to unauthorized immigrants. It also surveys various state government actions in this area, focusing on whether unauthorized immigrants qualify for in-state tuition rates and for admission to public higher education institutions. The article then briefly examines the impact of existing laws allowing unauthorized immigrants to qualify for in-state tuition rates. Finally, it describes the recent history and the current status of unauthorized immigrants' access to the 16 universities in the University of North Carolina (UNC) system and the state's 58 community colleges.

Federal Law on Immigrants' Access to Higher Education

All children, regardless of their immigration status, are guaranteed access to K–12 public education under the 1982 U.S. Supreme Court decision, *Plyler v. Doe*.[6] The Court was in part concerned that denying children an education would punish them for the acts of their parents and perpetuate the formation of an underclass of citizens.

Once unauthorized immigrants graduate from high school, however, they are on their own. Obtaining higher education is difficult for several reasons. Federal law does not prohibit or require their admission to postsecondary institutions in the United States.[7] That decision is left to the individual states. Currently, public colleges and universities are inconsistent in their treatment of unauthorized immigrants, with a few schools nationwide denying admission to them.[8]

Even if they are able to gain admission, however, unauthorized immigrants often find it difficult to pay for higher education. Under the Higher Education Act of 1965, as amended, they are ineligible for federally funded financial aid.[9] In most instances, they also are ineligible for state financial aid. Further, as explained in the next section, in most states, they are ineligible for resident tuition rates. More broadly, as unauthorized immigrants, they are not legally allowed to work in the United States and are subject to deportation.

The Federal Restriction on State Provision of In-State Tuition Benefits to Unauthorized Immigrants

In 1996, Congress instituted a restriction on state provision of higher education benefits to unauthorized immigrants.[10] The law, codified as Section 1623 of the U.S. Code, prohibits states from providing a higher education benefit based on residency to unauthorized immigrants unless the same benefit is provided to all U.S. citizens, regardless of residency.[11] There is disagreement about the meaning of this provision, and no authoritative guidance is available in either the congressional report or federal regulations.[12] The prohibition is commonly understood to apply to the offering of in-state tuition rates to unauthorized immigrants.[13] The key issue in the current debate is whether states may offer in-state tuition rates to unauthorized immigrants, but not to all U.S. citizens, without violating Section 1623.

Ten states have passed laws offering in-state tuition rates to unauthorized immigrants. A few have faced court challenges.

This law has been interpreted in various ways, and ten states have passed laws offering in-state tuition rates to eligible unauthorized immigrants (referred to as "tuition benefit laws" in this article). For instance, California passed a law offering tuition at in-state rates to anyone who has attended high school in California for at least three years and has graduated, including unauthorized immigrants.[14] The states that have enacted such laws consider the provisions to be in compliance with Section 1623 because the criteria used to offer in-state rates—attendance and graduation from a state high school—are not based on state residency and apply to U.S. citizens as well.[15] In fact, in many of these states, *authorized* immigrants are beneficiaries of the laws. Opponents of the laws argue that such criteria essentially serve as a proxy for state residency and therefore violate Section 1623.

To date, two courts have considered the legality of tuition benefit laws. In a challenge to a Kansas law, the federal district court in Kansas dismissed a lawsuit brought by a group of out-of-state students, ruling that they lacked standing to sue.[16] The decision was upheld by the U.S. Court of Appeals for the Tenth Circuit, and the U.S. Supreme Court declined to review the federal court's ruling.[17]

In California, students paying nonresident tuition at the state's public colleges and universities filed a lawsuit arguing that the tuition benefit law violates federal law by providing in-state tuition to unauthorized immigrants while charging U.S. citizens out-of-state tuition rates. A state court found that the law does not violate federal law because it confers a benefit based not on state residency, but on high school attendance and graduation.[18] In September 2008, however, a California appeals court overruled that decision, finding California's eligibility requirements of high school attendance and graduation to be a *de facto* residency requirement and thus in violation of federal law.[19] California's supreme court has agreed to review the case, and a decision is expected later this year.

The DREAM Act

Repeatedly since 2001, Congress has considered legislation that would improve the opportunity for unauthorized immigrants to attend a college or a university. The Development, Relief, and Education for Alien Minors (DREAM) Act would restore the state option to determine residency for purposes of higher education benefits by repealing Section 1623.[20] It also would provide eligible unauthorized immigrants with

the opportunity to legalize their status in a two-stage process.

Specifically, the proposed legislation would provide *conditional* legal status for six years to students who were under the age of sixteen when they entered the country; had been physically present in the United States for at least five years; had earned a U.S. high school diploma or passed the General Educational Development (GED) test; and were of good moral character.[21] These students could obtain *permanent* resident status if they completed at least two years of higher education or military service within the six years.

Versions of the DREAM Act have been introduced in both the Senate and the House with bipartisan cosponsorship almost every year since 2001, but Congress has failed to pass the proposed legislation. It was made part of the Senate's Comprehensive Immigration Reform Acts of 2006 and 2007 but was not enacted. In 2007, North Carolina Senators Richard Burr and Elizabeth Dole both voted against advancing its consideration. In March of this year, bipartisan delegations in both the Senate and the House again introduced versions of the DREAM Act.[22] For the first time since it was introduced in 2001, the DREAM Act has the support of the House and Senate leadership, the relevant committee chairs, and President Barack Obama, who was an original sponsor of the legislation when he was in the Senate.[23]

Although passage of the DREAM Act would clarify states' rights to offer in-state tuition rates to unauthorized immigrants by eliminating Section 1623, and would resolve any legal challenges against existing tuition benefit laws, the legislation would not *require* states to offer in-state tuition rates to unauthorized immigrants. That decision still would be left to the individual states.

State Action on Unauthorized Immigrants and Higher Education Benefits

Over the last several years, a large number of states have considered legislation relating to unauthorized immigrants and higher education benefits.

Tuition Benefit Laws

At least thirty states have considered legislation to offer tuition at in-state rates to certain unauthorized immigrants, and ten of them passed such legislation between 2001 and 2006 (see Table 1).[24] These include both states with Democratic majorities and states with Republican majorities. In 2001, Texas was the first state to pass such a measure. It was followed in 2001–2 by California, Utah, and New York (in that order); in 2003 by Washington, Oklahoma, and Illinois (in that order); in 2004 by Kansas; in 2005 by New Mexico; and in 2006 by Nebraska.[25]

Table 1. **State Laws Granting In-State or Flat-Rate Tuition to Unauthorized Immigrants**

State	Year of Law	Access to In-State Tuition	Access to State Financial Aid	Law's High School Requirement*	Comments
California	2001	Yes	No	3 years	—
Illinois	2003	Yes	No	3 years	—
Kansas	2004	Yes	No	3 years	—
Minnesota	2007	No	No	None	Minnesota eliminated nonresident rates in a number of public colleges in 2007, allowing anyone to qualify for flat-rate tuition.
Nebraska	2006	Yes	No	3 years	—
New Mexico	2005	Yes	Yes	1 year	—
New York	2002	Yes	No	2 years	—
Oklahoma	2003	Yes	Yes	2 years	In 2007, Oklahoma ended its in-state tuition benefit and state financial assistance for unauthorized immigrants.
Texas	2001	Yes	Yes	3 years	—
Utah	2002	Yes	No	3 years	—
Washington	2003	Yes	No	3 years	—

Sources: Cal. Educ. Code § 68130.5 (West 2003); 110 Ill. Comp. Stat. Ann. 947/65.27 (West 2008); Kan. Stat. Ann. § 76-731a (Supp. 2008); HF 1063, 85th Leg. Sess., 2007–8 (Minn. 2007), www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H1063.2.html&session=ls85; Neb. Rev. Stat. 85-502 (2008); Act of April 8, 2005, ch. 348, 2005 N.M. Laws 3807; N.Y. Educ. Law § 355(2)(h)(8) (McKinney Supp. 2009); Okla. Stat. tit. 70 § 3242 (2008); Tex. Educ. Code Ann. §§ 54.051, 54.052, 54.055, 54.057, 54.060 (West 2006); Utah Code Ann. § 53b-8-106 (2006); Wash. Rev. Code Ann. § 28b.15.012 (2008); Rute Pinhel, *State Legislation Concerning In-State Tuition for Undocumented Immigrants* (Hartford, CT: Connecticut General Assembly Office of Legislative Research, 2008), www.cga.ct.gov/2008/rpt/2008-R-0178.htm; Alene Russell, *In-State Tuition for Undocumented Immigrants: States' Rights and Educational Opportunity*, A *Policy Matters* Higher Education Brief (Washington, DC: American Association of State Colleges and Universities, 2007), www.aascu.org/media/pm/pdf/in-state_tuition07.pdf.

*State laws offering in-state tuition rates to unauthorized immigrants generally require that students attend school in the state for one to three years and graduate from a high school in the state or pass a General Educational Development test. In all states except New Mexico, an unauthorized immigrant also must submit an affidavit promising to legalize his or her status as soon as he or she is eligible.

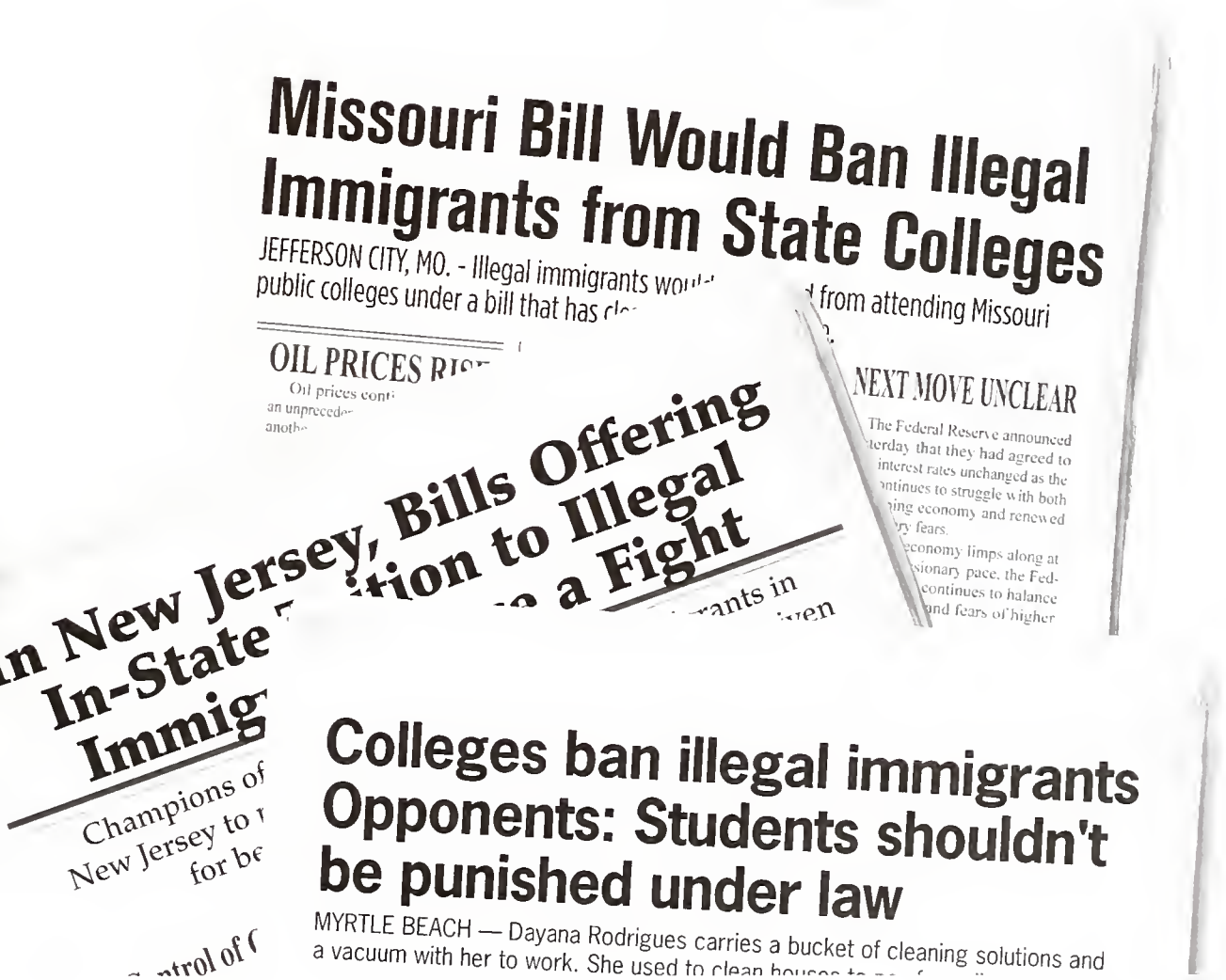
Laws offering resident tuition rates to unauthorized immigrants contain similar criteria for eligibility. The requirements are that students attend school in the state for one to three years, graduate from a high school in the state or pass a GED test, and apply to or enroll in a public college or university. An unauthorized student also must submit an affidavit promising to legalize his or her status as soon as he or she is eligible.

New Mexico, Oklahoma, and Texas also have enacted provisions making unauthorized immigrants eligible for state financial aid.[26] Legislatures in a few states, including Connecticut, Maryland, and Massachusetts, have passed laws offering tuition at in-state rates to unauthorized immigrants, only to have them vetoed by the governors. Many other states, including North Carolina, have considered similar legislation, but failed to pass it. Minnesota debated and resolved this issue by passing a law in 2007 that eliminated nonresident rates altogether in a number of institutions in its state college system, allowing anyone, regardless of state of residence or immigration status, to qualify for the same tuition.[27]

When state legislatures passed these tuition benefit laws, expectations were raised that Congress would pass the DREAM Act and thus provide a path to legalization for many unauthorized-immigrant graduates.[28] However, passage has not occurred. Instead, there has been increased public attention to and criticism of unauthorized immigration, in response to the government's failure to enact comprehensive immigration reform and a perceived lack of enforcement.

Some state legislators have responded to this criticism with attempts to restrict the access of unauthorized immigrants to higher education benefits. For example, several states, including North Carolina, have introduced legislation that would bar unauthorized immigrants from being offered in-state tuition rates. Even in states that have adopted tuition benefit laws, opponents are working to repeal them.[29]

In 2006, Arizona voters passed Proposition 300, which prohibits unauthorized immigrants from receiving in-state tuition rates or any other type of financial assistance at any public college or university.[30] In 2007, Oklahoma passed the Oklahoma Taxpayer and Citizen Protection Act, which ended its in-state tuition benefit, including financial aid, for students without lawful presence in the United States.[31] Colorado and Georgia also passed laws (in 2006 and 2008, respectively) barring unauthorized immigrants from receiving in-state tuition rates.[32] In Georgia, college presidents have the flexibility to offer



waivers for in-state tuition for up to 2 percent of their freshman enrollment, but the state's board of regents has advised them not to grant such waivers to unauthorized immigrants.

Admission to Public Colleges and Universities

The debate over immigrants' access to higher education has primarily focused on whether to charge them in-state tuition rates. Most states do not bar admission of unauthorized immigrants to postsecondary institutions, but individual college and university policies vary, according to the College Board.

In 2008, however, South Carolina became the first state explicitly to bar unauthorized immigrants from enrolling in its public colleges and universities.[33] In September 2008, the Alabama State Board of Education adopted a new policy denying unauthorized immigrants admission to Alabama's two-year community colleges.[34] North Carolina's State Board of Community Colleges is maintaining a ban on the enrollment of unauthorized immigrants while it conducts a comprehensive study of community college admission policies in other states and the associated costs. The UNC system of public universities, however, permits the admission of unauthorized immigrants as out-of-state students.

Arguments against and for Higher Education Benefits to Unauthorized Immigrants

Although bills providing higher education benefits to unauthorized immigrants continue to be supported by policy makers and constituents of state higher education systems in most states, public opinion remains deeply divided over such measures.[35] Opponents of tuition benefit laws and the DREAM Act argue that granting higher education benefits to unauthorized immigrants rewards lawbreakers and thereby undermines the U.S. immigration system.[36] In their view, making benefits available, especially legalizing them, will encourage more unauthorized immigration into the country. Opponents also object to using U.S. tax dollars to subsidize the education of people who are present in the United States in violation of law. They point out that tuition benefit laws could result in added cost to taxpayers or individual states.[37] Critics further argue that such laws channel educational resources away from native-born students by taking away enrollment slots in public colleges and universities from U.S. citizens.[38]

Proponents of tuition benefit laws and the DREAM Act argue that enabling unauthorized immigrants who graduate from high school to continue their education is both fair and in the U.S. national interest.[39] Proponents note that most unauthorized-immigrant students were brought to the United States at a very young age, had no choice in the matter, and should not be held responsible for their parents' decision to enter the country unlawfully.[40] Because almost all tuition benefit measures and the DREAM Act require students to seek legal status, supporters argue that the measures encourage responsible behavior and also provide a powerful incentive for completing high school.[41]

Regarding expense, proponents contend that giving students access to higher education has a positive long-term impact on states' and the nation's economic strength and competitiveness and saves money in the long run. They emphasize that without the prospect of in-state tuition rates and other financial aid, higher education would be out of reach for most unauthorized immigrants.[42] With more affordable tuition, supporters argue, college-going will increase, and student academic success will result in increased earnings, higher contributions to tax revenues, and reduced reliance on state expenditures such as health care, social services, and corrections.[43]

Impact of Tuition Benefit Laws

Measuring the impact of existing tuition benefit laws is difficult because most of them were enacted too recently to allow for meaningful collection of data about their effects. According to a December 2008 report by the Center for Policy Entrepreneurship (CPE), one of the few studies that have been released, many states have not yet analyzed the effects, and most statistics do not specifically track data for unauthorized immigrants.[44] The CPE report examines existing data and attempts to measure the impact of tuition benefit laws, while acknowledging the difficulty in doing so and the preliminary nature of the data. In sum, the report indicates that in the states with tuition benefit laws, statistics for unauthorized immigrants suggest that the laws have positively affected college enrollment and dropout rates, with minimal or no fiscal impact on the state.[45] However, because unauthorized

immigrants remain ineligible to legally work per federal law, tuition benefit laws appear to have had limited impact on their ability to obtain jobs after college graduation.

Effect on College Enrollment

A 2008 study published in the *Journal of Policy Analysis and Management* indicates that tuition benefit laws have had positive, but limited, effects on college enrollment by Mexican noncitizen students.[46] The study looked at data for Mexican noncitizen young adults who are eligible for in-state tuition in the ten states that offer such benefits to unauthorized immigrants, in order to approximate the results for the unauthorized immigrant population. Although this group has a high probability of being unauthorized, the data are imperfect because they do not include unauthorized immigrants of other national origins and may include authorized immigrants from Mexico.[47] Also, enrollment data specific to the unauthorized population are not available for all ten states because of how the data are tracked, but information is available for some states.

Tuition benefit laws have boosted college enrollment rates and may have reduced high school dropout rates.

In the four states that enacted tuition benefit laws prior to 2003—California (2001), New York (2002), Texas (2001), and Utah (2002)—college enrollment among Mexican noncitizen youth increased by only 1.2 percent from 1999 to 2002.[48] From 2002 to 2005, enrollment increased by 3.5 percent.[49] Although the increase in college enrollment among Mexican noncitizen youth is significant for that population, it is not dramatic enough to narrow the attainment gap between noncitizens and natives, according to the study.[50] So, although the impact of the tuition benefit laws may be significant for portions of the population and for individuals, college enrollment as a whole remains largely unaffected.

A 2005 review of tuition benefit laws by the *Boston Globe* also found a modest increase in enrollment by unauthorized immigrants.[51] The review reported that the University of California system enrolled 357 unauthorized immigrants in 2004–5.[52] Further, Kansas public colleges enrolled 221 unauthorized immigrants in 2005–6; the University of New Mexico system, 41 unauthorized immigrants in 2005–6, the first year the law was in effect; and Washington public institutions, 27 unauthorized immigrants in 2003–4.[53] According to the CPE report, Washington's enrollment of unauthorized immigrants increased to 314 in 2007–8.[54]

The Utah System for Higher Education reported that 182 unauthorized students were granted resident tuition rates in 2005–6 (more than double the 87 unauthorized students enrolled before the law's enactment in 2003).[55]

Of all ten states, Texas has seen the largest increase in enrollment since enacting its tuition benefit law in 2001. According to the Texas Higher Education Coordinating Board, students who benefited totaled 9,062 in 2007–8, out of 1.1 million students enrolled in Texas's public colleges and universities.[56] However, data indicate that many of the students who benefited from the Texas legislation were not unauthorized immigrants.[57] Because high school attendance and graduation are the main criteria in most states with tuition benefit laws, authorized immigrants, depending on their particular status, and U.S. citizens also may qualify for in-state tuition under some of these laws, whereas they otherwise would not. For example, in certain states, a U.S. citizen who once attended and graduated from a high school in the state, but has since moved out of the state, may qualify for in-state tuition under some tuition benefit laws, even though he or she no longer resides in the state.

Effect on Dropout Rates

Many education advocates have argued that because college costs are prohibitively high, many unauthorized immigrants lose hope for higher education and drop out before they complete high school. National dropout statistics indicate that Hispanic students were the most likely to drop out of school in 2004, doing so at a rate of 8.9 percent.[58] Specifically, that figure describes the percentage of youth ages 15–24 in the United States who dropped out of grades 10–12 in either public or private schools.[59]

The effect of tuition benefit laws on dropout rates is difficult to measure. States use various methods to calculate their dropout rates, and because the oldest tuition benefit laws were passed in 2001, little longitudinal data are available. Despite these challenges, however, initial assessments seem to indicate that tuition benefit laws may have slowed the dropout rates of unauthorized immigrants and closed the dropout-rate gap between Hispanic students and other students.[60]

Fiscal Impact

The CPE report concludes that there is no evidence that tuition benefit laws have had any negative fiscal impact in states that have enacted such legislation. When they passed tuition benefit legislation, most states included fiscal notes (documents detailing the bills' anticipated fiscal effects). A few states concluded that the fiscal impact of the legislation was unknown. Half of the states expected some loss of revenue, but because of the difference between out-of-state and in-state tuition rates, the loss would be offset by the enrollment of new students who would not otherwise be able to afford college.[61]

Effect on Work Eligibility

Although tuition benefit laws appear to have some positive effects, the effects do not extend to the workplace. In Texas, whose law has been in effect since 2001, many beneficiaries have graduated, but found themselves unable to obtain employment.[62] Trained as nurses and engineers, they are ready to join the workforce and make use of their postsecondary degrees, but by federal law they are ineligible to work. Without a change in the federal law that would allow these students to legalize their status and would authorize them to work, states and students cannot reap the full benefits of graduating unauthorized immigrants from public colleges and universities.

Access to Community Colleges and Public Universities in North Carolina

In North Carolina, no state law makes unauthorized immigrants eligible for in-state tuition rates. In 2005, HR 1183 was proposed for this purpose, but it met with great opposition. The bill would have offered in-state tuition rates to unauthorized immigrants who had attended North Carolina schools for at least four consecutive years, had graduated, and had been accepted to a state college or university.[63]

Although unauthorized immigrants are not eligible for in-state tuition rates, the UNC system permits admission of unauthorized immigrants who are graduates of high schools in the United States.[64] Unauthorized immigrants who apply must compete with out-of-state applicants, whose enrollment is capped annually at 18 percent for all UNC system schools.[65] Also, unauthorized immigrants are charged out-of-state tuition rates. In 2006–7, only 27 unauthorized immigrants were enrolled in the state's public universities, out of 200,000 students.[66] Although the UNC system has a uniform policy, private schools do not.

Unauthorized immigrants are not eligible for in-state tuition rates in North Carolina.

The North Carolina Community College System (NCCCS) has changed its admissions policy on unauthorized immigrants several times since 2001. In 2001, the system barred unauthorized immigrants from enrolling in degree programs, but placed no restriction on unauthorized-immigrant high school students taking classes or on unauthorized-immigrant adults taking non-college-level courses, including GED, Adult High School, English-as-a-second-language, and continuing education classes.[67]

In 2004 the system decided to allow each college to set its own admissions policy.[68] In 2007, as the result of a legal opinion, NCCCS changed its policy, requiring all colleges to admit students regardless of immigration status.[69]

More recently, in May 2008, NCCCS again prohibited unauthorized immigrants from enrolling in degree programs after the state Attorney General's Office advised that admitting unauthorized immigrants might violate federal law.[70] The U.S. Department of Homeland Security has since advised the state that federal law does not bar colleges from admitting unauthorized immigrants, and in July 2008 the North Carolina Attorney General's Office confirmed that there is no federal prohibition.[71]

In August 2008, NCCCS decided to maintain its admissions ban while it conducted a comprehensive study of the issue of enrolling unauthorized immigrants.[72] The study was released on April 16, 2009. According to the committee chair, the NCCCS Policy Committee will require several months to review the lengthy report and make policy recommendations to the board.[73] North Carolina's study of other states' community college admission policies stemmed in part from concerns raised by community college staff about the cost and the labor-intensive nature of confirming student citizenship.[74] According to NCCCS, a survey of the fifty-eight community colleges for the 2006–7 academic year indicated that 112 unauthorized immigrants were enrolled in North Carolina's community colleges, of a total of 297,000 students.[75] There are active legislative proposals before the North Carolina General Assembly as of this writing. Bills range from allowing the admission of unauthorized immigrants to the NCCCS, to prohibiting their admission.[76]

Conclusion

Higher education benefits available to unauthorized immigrants vary by state, and the states' policies in this area are evolving. North Carolina is one of three states that prohibit unauthorized immigrants from enrolling in its community colleges, aligning itself with Alabama and South Carolina on this issue. Most states do not bar unauthorized immigrants from enrolling in their public colleges and universities, allowing individual schools to make the decisions.

Like the majority of states, North Carolina does not provide in-state tuition benefits to unauthorized immigrants. Nine states currently offer in-state tuition rates to students, including unauthorized immigrants, on the basis of high school attendance and graduation from a high school in that state. Whether such laws violate federal law is unclear. The resolution of an ongoing challenge to a tuition benefit law in California is widely anticipated and likely to have implications in other states, though it will not be binding on those states.

At the federal level, many expect some kind of action in this area from the Obama administration and, with Democratic majorities in both houses, the new Congress.[77] If passed, the DREAM Act would clarify states' rights to offer in-state tuition benefits to unauthorized immigrants and give students an opportunity to legalize their status. Although the DREAM Act does not require states to offer resident tuition rates to unauthorized immigrants, the number of states doing so would likely increase, and such a law should resolve ongoing court challenges. It is unlikely that all states will move in a direction favorable to unauthorized students, for public opinion remains divided on these issues. In North Carolina's case, it still will be up to the state and the college systems to decide how to approach the situation of these high school graduates.

If Congress fails to pass the DREAM Act, educational opportunity for unauthorized immigrants is highly unlikely to improve. Without federal action, beneficiaries of tuition benefit laws may not legally work, per federal law. This prohibition is a major impediment and one of the driving forces behind tuition benefit laws. Without access to legal employment, unauthorized-immigrant students will be unable to increase their earnings, improve their quality of life, and make economic and social contributions to the states' and the nation's economic health and development.

Notes

1. Lourdes Medrano, "A Dream Deferred," *Arizona Daily Star*, May 28, 2006, www.azstarnet.com/sn/printDS/131157.

2. The term "unauthorized immigrant" is used in this article to describe a person

who is not lawfully present in the United States. *See generally* 8 U.S.C. § 1227(a)(1)(B) (2006); 8 C.F.R. § 103.12 (2008).

3. Janet Kier Lopez, *The DREAM Act* (Chapel Hill, NC: Learn NC, University of North Carolina at Chapel Hill, 2006), www.unc.edu/world/2007_Latin_Amer/Materials/The%20DREAM%20Act.pdf.

4. North Carolina Community College System, press release, "State Board of Community Colleges Approves Major Study of Immigration Issues, Maintains Current Enrollment Restrictions," August 15, 2008, www.nccc s.cc.nc.us/news_releases/undocumented_study_approved.htm.

5. Jeffrey S. Passel, *Further Demographic Information Relating to the DREAM Act* (Washington, DC: Urban Institute, 2003).

6. In Plyler v. Doe, 457 U.S. 202 (1982), the U.S. Supreme Court established that, under the Equal Protection Clause of the Fourteenth Amendment, public schools may not refuse to enroll or provide services to a person on the basis of his or her immigration status.

7. *See, e.g.*, Equal Access Education v. Merten, 305 F. Supp. 2d 585, 605 n.18 ("It is clear, therefore, that [the federal welfare law] does not consider mere admission or attendance at a public post-secondary institution to be a public benefit [restricted by federal law]"); letter from Jim Pendergraph, Executive Director, Office of State and Local Coordination, U.S. Department of Homeland Security, to Thomas J. Ziko, Special Deputy Attorney General, North Carolina Attorney General's Office, July 9, 2008, www.newsobserver.com/content/media/2008/7/25/20080725_homelandsecurityletter.pdf ("*[A]dmission* to public post-secondary educational institutions is not a public benefit [restricted] under the [federal welfare law] . . . . Therefore, the individual states must decide for themselves whether or not to admit illegal aliens into their public post-secondary institutions"); letter from J. B. Kelly, General Counsel, North Carolina Attorney General's Office, to Shante Martin, General Counsel, North Carolina Community College System, July 24, 2008, www.newsobserver.com/content/media/2008/7/25/20080725_immigrationdoc.pdf. (In accordance with the interpretation of the U.S. Department of Homeland Security, the North Carolina Department of Justice issued a letter advising community colleges that federal law does not prohibit the admission of unauthorized immigrants.)

8. National Immigration Law Center, *Basic Facts about In-State Tuition for Undocumented Immigrant Students* (Los Angeles: National Immigration Law Center, 2009), www.nilc.org/immlawpolicy/DREAM/instate-tuition-basicfacts-2009-02-23.pdf.

9. The 1965 Higher Education Act established legal residency as a requirement to receive financial aid, thereby making unauthorized immigrants ineligible for the largest source of aid available. Higher Education Act of 1965, Pub. L. No. 89–329, 20 U.S.C. §§ 1001 *et seq.* (2006).

10. 8 U.S.C. § 1623 (2006).

11. The entire provision reads, "Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident." 8 U.S.C. § 1623(a) (2006).

12. Andorra Bruno, *Unauthorized Alien Students: Issues and "DREAM Act" Legislation* (Washington, DC: Congressional Research Service, 2007).

13. There is no concern about authorized immigrants (persons with a lawful immigration status) being treated equivalently to U.S. citizens for in-state tuition purposes.

14. CAL. EDUC. CODE § 68130.5 (West 2003).

15. For example, the Utah attorney general issued an opinion in January 2006 determining that the Utah statute granting resident-tuition status to the state's undocumented college students is constitutional. Utah System of Higher Education, press release, "Attorney General Concludes Tuition Statute Is Valid," February 1, 2006, www.utahsbr.edu/PressRelease/PR_2006/PR_Feb_01_2006.pdf. *See also* Jobs for the Future, *Update: State Policies Regarding In-State Tuition for Undocumented Immigrants* (Boston: Jobs for the Future, 2007).

16. *See* Day v. Sebelius, 376 F. Supp. 2d 1022 (D. Kan. 2005), *aff'd sub nom.* Day v. Bond, 500 F.3d 1127 (10th Cir. 2007).

17. Day v. Bond, 500 F.3d at 1127, *cert. denied*, 128 S. Ct. 2987 (2008).

18. Martinez v. Regents of the Univ. of Cal., No. CV 05-2064, 2006 WL 2974303, at *3 (Cal. Super. Ct. October 4, 2006).

19. Martinez v. Regents of the Univ. of Cal., 83 Cal. Rptr. 3d 518 (Cal. Ct. App. 2008).

20. DREAM Act of 2009, S 729, American Dream Act, HR 1751, 11th Cong., 1st. sess. To retrieve a copy of either bill, go to http://thomas.loc.gov/and enter the bill number in the Search box.

21. "Good moral character" is essentially defined for immigration purposes as the absence of involvement in most criminal activity and of providing false testimony for the purpose of obtaining immigration benefits. For the full list of activities that bar a finding of good moral character, *see* 8 U.S.C. § 1101(f) (2006).

22. DREAM Act of 2009.

23. National Immigration Law Center, "House and Senate Introduce DREAM Act, a Measure to Address the Plight of Immigrant Students" (Los Angeles: National Immigration Law Center, March 26, 2008), www.nilc.org/immlawpolicy/DREAM/Dream011.htm.

24. Carl Krueger, "In-State Tuition for Undocumented Immigrants," ECS State Notes: Tuition and Fees, August 2006, www.ecs.org/clearinghouse/61/00/6100.htm.

25. TEX. EDUC. CODE ANN. §§ 54.051, 54.052, 54.055, 54.057, 54.060 (West 2006); CAL. EDUC. CODE § 68130.5 (West 2003); UTAH CODE ANN. § 53b-8-106 (2006); N.Y. EDUC. LAW § 355(2)(h)(8) (McKinney Supp. 2009); WASH. REV. CODE ANN. § 28b.15.012 (2008); OKLA. STAT. tit. 70 § 3242 (2008); 110 ILL. COMP. STAT. 947/65.27 (West 2008); KAN. STAT. ANN. § 76-731a (Supp. 2008); Act of April 8, 2005, ch. 348, 2005 N.M. Laws 3807; NEB. REV. STAT. 85-502 (2008). However, in 2007, Oklahoma repealed its tuition benefit law.

26. 2005 N.M. Laws 3807; OKLA. STAT. tit. 70 § 3242 (2008); TEX. EDUC. CODE ANN. §§ 54.051, 54.052, 54.055, 54.057, 54.060 (West 2006). Oklahoma has since repealed its provision.

27. HF 1063, 85th Leg. Sess., 2007–8 (Minn. 2007), www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H1063.2.html&session= ls85.

28. *See, e.g.*, Miriam Jordan, "Illegal Immigrants' New Lament: Have Degree, No Job," *Wall Street Journal*, April 26, 2005, http://online.wsj.com/public/article_print/SB111447898329816736-gip6k1HnYQd5iZhB6ekFZt9xOGI_20050525.html.

29. Alene Russell, *In-State Tuition for Undocumented Immigrants: States' Rights and Educational Opportunity*, A *Policy Matters* Higher Education Brief (Washington, DC: American Association of State Colleges and Universities, 2007), www.aascu.org/media/pm/pdf/in-state_tuition07.pdf.

30. Arizona Proposition 300 (2006), www.azsos.gov/election/2006/Info/PubPamphlet/english/prop300.htm.

31. Oklahoma Taxpayer and Citizen Protection Act, HB 1804, § 11, 51st Leg., 1st sess. (2007).

32. HR 06S-1023, 65th Gen. Assem., 1st spec. sess. (Colo. 2006), www.cdhs.state.co.us/ adad/PDFs/1023enr.pdf; GA. CODE ANN. § 20-3-66 (Supp. 2008), www.legis.state.ga.us/legis/2007_08/sum/sb492.htm.

33. S.C. CODE ANN. § 59-101-430 (2008).

34. Lisa Rossi, "Policing Immigration," *Community College Week*, November 16, 2008, www.ccweek.com/news/templates/template.aspx?articleid=746&zoneid=. The state board of education passed a new policy despite one board member's calls to delay action for more discussion and four of the nine members being absent. The policy, which takes effect in spring 2009, was passed on a 4–0 vote.

The new policy does not apply to public universities, however.

35. For example, the American Association of State Colleges and Universities, an association representing more than four hundred public colleges, universities, and systems of higher education throughout the United States, strongly supports passage of the DREAM Act so that states can regulate the tuition eligibility of unauthorized immigrants. Russell, *In-State Tuition.*

36. Bruno, *Unauthorized Alien Students.*

37. Ibid.

38. Neeraj Kaushal, "In-State Tuition for the Undocumented: Education Effects on Mexican Young Adults," *Journal of Policy Analysis and Management* 27: 771–92 (2008).

39. Bruno, *Unauthorized Alien Students.*

40. Ibid.

41. Russell, *In-State Tuition.*

42. Ibid.; Bruno, *Unauthorized Alien Students.*

43. Dawn Konet, *Unauthorized Youths and Higher Education: The Ongoing Debate* (Washington, DC: Migration Information Source, 2007), www.migrationinformation.org/Feature/display.cfm?ID=642; Antoniya Owens, "In-State Tuition Rates and Immigrants," *Communities and Banking,* Spring 2007, pp. 15–17, www.bos.frb.org/commdev/c&b/2007/spring/ article6.pdf; Russell, *In-State Tuition.*

For example, proponents point to a report by the Texas House Organization showing that not helping students attend college resulted in much greater costs to the state via prisons and the welfare system, and further contributed to an uneducated workforce. In 1986 an estimated eighty-six thousand students dropped out of Texas public schools, at a cost to the state of $17.2 billion. By 1998 the dropout rate had increased to almost 1.2 million, at an estimated cost of $319 billion due to "increased spending on social programs, higher rates of crimes and decreased opportunities for a higher quality of life." American Association of State Colleges and Universities, "Should Undocumented Immigrants Have Access to In-State Tuition?" *Policy Matters* 2, no. 6 (June 2005), www.aascu.org/policy_matters/pdf/v2n6.pdf.

44. Elise Keaton et al., *The Tuition Equity Effect: Measuring the Impact of Providing In-State Tuition Rates for Colorado's Undocumented High School Graduates* (Denver: Center for Policy Entrepreneurship, 2008), www.c-pe.org/documents/TuitionEquityReport2.pdf. The Center for Policy Entrepreneurship is a private, nonprofit, public policy research and advocacy organization that works to increase higher education opportunities for Colorado students, regardless of immigration or economic status, and conducts extensive research to measure attitudes and opinions on this issue.

45. Ibid. The report indicates that isolating effects on the unauthorized immigrant population is difficult, so analysts often use data for the foreign-born, Hispanic, or Mexican-heritage population to get approximate results.

46. Kaushal, "In-State Tuition"; Keaton et al., *Tuition Equity Effect.*

47. According to the Pew Hispanic Center, more than 80 percent of immigrants from Mexico are unauthorized. Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics*, Background Briefing Prepared for Task Force on Immigration and America's Future (Washington, DC: Pew Hispanic Center, 2005), http://pewhispanic.org/files/reports/46.pdf.

48. Kaushal, "In-State Tuition"; Keaton et al., *Tuition Equity Effect.*

49. Kaushal, "In-State Tuition"; Keaton et al., *Tuition Equity Effect.*

50. Kaushal, "In-State Tuition"; Keaton et al., *Tuition Equity Effect.*

51. Raphael Lewis, "In-State Tuition Not a Draw for Many Immigrants," *Boston Globe*, November 9, 2005, www.boston.com/news/education/higher/articles/2005/11/09/in_state_tuition_not_a_draw_for_many_immigrants/.

52. Statewide data for all California public colleges and universities were not available. Ibid.

53. Ibid.

54. Keaton et al., *Tuition Equity Effect.*

55. Jennifer Robinson, *In-State Tuition for Undocumented Students in Utah Policy Brief: February 13, 2007,* Policy Brief (Salt Lake City, UT: Center for Public Policy and Administration, University of Utah, 2007), www.cppa.utah.edu/publications/higher_ed/Policy_Brief_2_13_07_In-state_Tuition.pdf.

56. Texas Higher Education Coordinating Board, "Overview: Residency and In-State Tuition," June 2008, www.twu.edu/o-sl/Intercultural/HBandAffadavit.pdf.

57. Keaton et al., *Tuition Equity Effect.*

58. Ibid.

59. U.S. Department of Education, *Selected Findings: National Event Dropout Rates* (Washington, DC: National Center for Education Statistics, 2004).

60. Ibid.

61. Ibid.

62. Jordan, "Illegal Immigrants' New Lament."

63. HB 1183, 2005–6 Gen. Assem., reg. sess. (N.C. 2005), www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?BillID=H1183&Session=2005.

64. "Guidelines on the Admission of Undocumented Aliens," in *UNC Policy Manual*, § 700.1.4[G], www.northcarolina.edu/content.php/legal/policymanual/uncpolicymanual_700_1_4g.htm.

65. "Out-of-State Undergraduate Enrollment," in *UNC Policy Manual*, § 700.1.3, http://intranet.northcarolina.edu/docs/legal/policymanual/2007/700.1.3.pdf.

66. Jane Stancill and Kristin Collins, "Colleges to Bar Illegal Immigrants," *Raleigh News & Observer,* May 13, 2008, www.newsobserver.com/news/story/1070877.html.

67. Berenice Torres, "College Tuition and Unauthorized Immigrant Students," National Conference of State Legislatures, August 2008, www.ncsl.org/programs/educ/CollegeTuitionImmigrantStudent.htm; North Carolina Community College System, press release, "Community Colleges Change Practice on Illegal Immigrants," May 13, 2008, www.ncccs.cc.nc.us/news_releases/Illegal_051308.htm.

68. Berenice Torres, "College Tuition."

69. Ibid.

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at the School

Professorship Campaign to Honor Faculty Member David Lawrence

David M. Lawrence

David M. Lawrence, professor of public law and government, will retire in December 2009 after forty years on the School's faculty. To honor his many contributions to North Carolina, a campaign is under way to fund a David M. Lawrence Distinguished Professorship at the School. The campaign committee is chaired by Mac McCarley, Charlotte city attorney, and composed of local government officials and association and business leaders.

"Our goal is to raise $333,000, to be matched with $167,000 from the state, to create this new professorship," said McCarley. "We cannot think of a better or more appropriate way to honor David for the great work he has done over the years at the School of Government, and to help the School continue the kind of support he and others provide to all of us in local government."

Lawrence joined the School in 1968, when it was known as the Institute of Government. As part of his work in legal aspects of public finance, he has written on local government revenues, budgeting and fiscal control, and capital finance, publishing more than twenty books, some of which are considered required reading in government agencies. As part of his work in local government law, he has written an additional twenty books and countless chapters, articles, and bulletins on annexation, public records, open meetings, governing board procedures, and economic development.

The David M. Lawrence Distinguished Professorship will help provide resources to cultivate top-notch faculty who will apply their own expertise, creativity, and commitment in service to public officials in North Carolina. To fund the professorship, the campaign committee is seeking gifts from local government professional associations, law firms, businesses, and individuals that have worked with Lawrence. Gifts of any amount are welcome, and pledges may be paid over a period of up to three years.

"The School has had many great faculty members throughout its history," said Dean Michael R. Smith, "but the breadth and depth of David's knowledge about local government law is remarkable. He is the quintessential practical scholar—an excellent teacher, a great writer, and an insightful advisor."

To make a gift to the Lawrence Professorship, visit www.sog.unc.edu/development/lawrence.

Local Government Service Corps to Aid Twelve Communities

Twelve towns, chosen in geographic clusters, will participate in the North Carolina Local Government Service Corps: Drexel, Hildebran, and Rutherford College; Boonville, Cooleemee, and Dobson; Candor, Ellerbe, and Star; and Bolton, Navassa, and Northwest. The initiative, a partnership between the UNC–Chapel Hill School of Government and Appalachian State University, is designed to assist some of the most economically distressed communities in the state. The project is funded by a grant from the Golden LEAF Foundation. The North Carolina Rural Economic Development Center and the North Carolina League of Municipalities have been active in supporting the corps and shaping its development.

The pilot phase of the service corps project will deploy four recent graduates from three of the state's Master of Public Administration (MPA) programs to work as Golden LEAF management advisors with the selected communities. They will provide hands-on economic development and capacity-building assistance to the communities for two years, beginning in August 2009. Each cluster of communities has agreed to share the services of a management advisor and has defined specific pro-

Twelve North Carolina communities, located in the eight counties highlighted above, have been selected to work with the new North Carolina Local Government Service Corps' Golden LEAF management advisors.

jects or priorities to be addressed during the two-year period.

In addition, public officials in the host communities will receive scholarships to attend regional Essentials of Economic Development workshops offered by the School of Government in partnership with Appalachian State University and other universities.

Emily Williamson, Hildebran town council member and vice president for student development at Western Piedmont Community College, said, "The impact of our participation in the service corps program should be transformative. The elected officials and residents of Hildebran have invested in planning and strategies to assist in our community's economic recovery, and the skills that a professional manager can provide will enable our community to pursue and implement these strategies in ways we would not do otherwise."

The Golden LEAF management advisors are John Gowan from UNC–Chapel Hill, Elton Daniels from UNC–Wilmington, and Amanda Reid and Tyler Beardsley from Appalachian State University.

For more information about the Local Government Service Corps, contact project director Will Lambe at 919.966.4247 or whlambe@sog.unc.edu.

Graduates Leave MPA Program Well Prepared

Twenty-five students from the School of Government's Master of Public Administration (MPA) Program participated in graduation exercises on May 9 at the Knapp-Sanders Building. In his opening remarks, Dean Michael R. Smith assured the students that they are well prepared, saying, "You leave here with the commitment needed to make the kind of changes we need to see in the world."

Two graduating students received awards: Mary Tiger, the Deil Wright Capstone Paper Award for her capstone research on drought surcharges, and Duane Hampton, the Nanette V. Mengel Communications Award for his capstone presentation on municipal police working for private clients.

MPA alumni Sharon and Doug Rothwell gave the commencement address jointly. Sharon is vice president of corporate affairs for Masco Corporation, and Doug is president of Detroit Renaissance. Four years ago, they established the Rothwell Scholarship, which is awarded annually to an outstanding student in the MPA Program. "It is good to want to make the world a better place and help society," Sharon told the graduates. "A little idealism can prompt you to accomplish things others would not dare to attempt."

The full text of the MPA commencement address is available at www.mpa.unc.edu.

Monica Evans receives her hood from Dean Michael R. Smith (left) and Professor Gordon Whitaker at the MPA graduation ceremony on May 9, 2009.

Award Created to Honor Faculty Member John Rubin

John Rubin

The North Carolina Commission on Indigent Defense Services (IDS) has honored John Rubin, professor of public law and government, by creating an annual training award in his name. The Professor John Rubin Award for Extraordinary Contributions to IDS Training Programs will honor selected people who volunteer their time and effort to serve as trainers and who have done outstanding work on training programs for attorneys who represent indigent people.

Shelby attorney David R. Teddy, a partner in the firm of Teddy & Meekins, is the first recipient of the Rubin Award. Teddy is the current chair of North Carolina Advocates for Justice, a nonprofit, nonpartisan association dedicated to protecting the rights of individual North Carolinians through professional and community legal education.

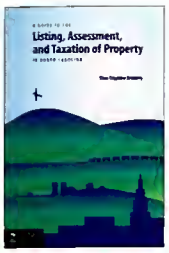
Rubin joined the School in 1991 and has written articles and books on criminal law, including the *North Carolina Defender Manual*. He also designs and teaches in numerous training programs each year for indigent defenders and is a frequent consultant to the Office of Indigent Defense Services.

Off the Press

Guide to the Listing, Assessment, and Taxation of Property in North Carolina

2009 • $50.00*

Shea Riggsbee Denning



The book provides a comprehensive guide to the laws and procedures governing the assessment of property for taxation by local governments in North Carolina, including in-depth discussion of the processes and schedules for listing property for taxation, appraising real property, and appealing property assessments. A detailed appendix sets forth the statutory ownership, use, and application requirements for property to be exempted or excluded from taxation. The detailed explanation of the procedural steps involved in the assessment process as well as the applicable legal standards for review of the assessor's determinations will benefit assessors, appraisers, other local government officials involved in administering the property tax, and, ultimately, the citizens for whom they work.

Planning Legislation in North Carolina

Twentieth edition, 2009 • $70.00*

David W. Owens

A single-volume collection of planning-related statutes, this publication is most frequently used by planners, elected officials, citizen board members, and others interested in land use, building, transportation, community and economic development, and natural resource protection. Statutes included are current through the 2008 session of the General Assembly.

North Carolina Legislation 2008: A Summary of Legislation in the 2008 General Assembly of Interest to North Carolina Public Officials

2009 • $50.00*

Edited by Christine B. Wunsche

This is a comprehensive summary of the General Assembly's enactments during the 2008 legislative session, written by School of Government faculty members who are experts in the fields affected by the new statutes. Link to a free PDF version at www.sog.unc.edu.

Employee Benefits Law for North Carolina Local Government Employers

2009 • $35.00*

Diane M. Juffras

This book discusses what federal and state law requires of public employers with respect to employee benefits and what authority North Carolina local government employers have in choosing, structuring, and changing benefits. Topics are retirement benefits, including retirement benefits for law enforcement officers; health insurance for current employees, including advice on how to avoid discriminating against employees on the basis of disability and age; retiree health insurance in light of Governmental Accounting Standards Board Statement No. 45; life and disability insurance; employee wellness programs; workers' compensation; and paid and unpaid leave, including sick, vacation, and family and medical leave.

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