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*A journal of
legal theory
and practice
“to the end
that human
rights shall
be more
sacred than
property
interests.”*

—Preamble, NLG
Constitution



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Introduction

The devolution of immigration enforcement is threatening to undermine the Fourth Amendment protections that protect all individuals from government intrusion and the trust that communities invest in local law enforcement—the very trust that provides the local law enforcement legitimacy. Section 287(g) of the United States Code authorizes the United States Department of Homeland Security to enter into agreements with state and local law enforcement agencies, permitting designated officers to perform immigration law enforcement functions, pursuant to a Memorandum of Agreement (MOA).¹

In June 2007, New Haven, Connecticut became the first city in the nation to issue municipal identification cards to undocumented immigrants in order to give them better access to city services and to help the police protect them from crime.² In August 2008, Hartford’s Court of Common Council passed an immigration ordinance that bars local law enforcement from inquiring about immigration status and prohibits other city employees from asking anyone seeking services about their immigration status.³ In response to Hartford’s ordinance, Mayor Eddie Perez stated,

First and foremost, there is zero tolerance for crime in the City of Hartford. We need everyone to cooperate with the police to report criminal activity. It is and has been the policy of this administration not to penalize people who come forward with information to help make the city safer.⁴

About forty-five miles east of Hartford and twenty-six miles north of New Haven, another Connecticut mayor has a very different view regarding the nature of the relationship between local law enforcement and city residents. In 2006, in the town of Danbury, Connecticut, nearly a dozen undocumented immigrants were arrested at Kennedy Park during a raid organized by the Immigration and Customs Enforcement (ICE) agency with local police assistance.⁵ This incident is only one of the many attempts of the city of Danbury to systematically ostracize and harass the minority community.⁶ The events culminated in October 2009, when Danbury became the first city in Connecticut to adopt § 287(g).

To detain a person legally, a police officer must have at least a reasonable suspicion of criminal activity.⁷ The Fourth Amendment to the United States

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Constitution and Article One, sections 7 and 9 of the Connecticut Constitution grant individuals the right to be secure from unreasonable searches and seizures.⁸ The Connecticut Constitution affords even greater protection against unreasonable searches and seizures than does the Fourth Amendment.⁹ So why did Danbury adopt this policy and how does this affect the larger U.S. population? This article will answer those questions.

All persons within the United States, regardless of immigration status, are entitled to due process and equal protection under the law.¹⁰ The unavailability of the Fourth Amendment protection to immigrants is known as the “immigrant exception” to the Fourth Amendment.¹¹ Scholarship to date has detailed the various ways in which immigrants are treated as exceptions to criminal procedure and constitutional law.¹² The law’s construction of an undocumented immigrant exception implicates the Fourth Amendment doctrines of consent, reasonable expectation of privacy, pretextual stops, and administrative searches, while it provides no recourse. This article will examine the ways localities are now changing the relationship of police and the public by turning local law enforcement officers into immigration police.

SB 1070, a recent anti-immigration law passed by the Arizona state legislature in April 2010 is an example of how local and state laws are seeking to make the mere presence of undocumented immigrants in certain spaces illegal.¹³ The Arizona law is seen as the toughest law of its kind in the United States. However, § 287(g) is operating in the same manner. The Arizona law allows police to detain people on the suspicion that they are illegal immigrants, forbids citizens from employing day laborers, and makes it illegal for anyone to transport an undocumented immigrant, even a family member, anywhere in the state.¹⁴

This bill was passed despite a Congressional inquiry into Arizona Sheriff Joe Arpaio’s infamous anti-immigrant policies.¹⁵ On February 23, 2009, House Democrats wrote a letter to Attorney General Holder and Secretary Napolitano addressing the conduct of Sheriff Arpaio.¹⁶ The letter reveals that reports from the affected communities in Arizona show that “accepted notions of probable cause” have been replaced by an analysis based solely on “brown skin and Spanish accents.”¹⁷ This type of law eviscerates any expectations of privacy among a whole segment of the U.S. population.¹⁸

Historically, public perceptions of immigrants are more positive than perceptions of criminal offenders.¹⁹ More recently, the expanding scope of government power over noncitizens has resulted in the advent of “cimmigration” law,²⁰ the intersection between criminal law and immigration law.²¹ However, in a groundbreaking 2006 article on cimmigration in 2006, Juliet Stumpf recognized that this vision is in transition.²² We are no longer in transition—we are there.

Currently, the undocumented immigrant is at a greater disadvantage in the criminal justice system than a defendant accused of murder.²³ Constitutional protections available to criminal defendants are not available to undocumented immigrants.²⁴ The implementation of 287(g) agreements further deprive undocumented immigrants of constitutional protection, particularly under the Fourth Amendment. For example, having naturalization papers, even if born in the United States, does not keep one free from intrusion. Section 287(g) expands the power of local law enforcement beyond the already broad discretion already afforded to them.

This paper will discuss this expansion of police authority and its effects on the local community, which not only risk violations of the right to privacy, but also foster fear and distrust of local law enforcement, and essentially undermines the role of local law enforcement officials as public servants. This shift jeopardizes the public welfare as community members may be discouraged from reporting crimes, attending school or work,²⁵ or even shopping at the supermarket.

This paper will expand upon existing analyses of the immigrant exception to the Fourth Amendment and discuss how the assistance of local law enforcement officers to federal immigration officers affects members of the immigrant community, both documented and undocumented. Part I will discuss the adoption and implementation of 287(g). Part II will discuss how 287(g) undermines the rule announced in *Terry v. Ohio*²⁶ and resembles a return to vagrancy law. The analysis will include how the adoption of 287(g) in Danbury, Connecticut is inconsistent with current Connecticut Supreme Court decisions interpreting the protections of the Fourth Amendment. Part III will discuss how 287(g) undermines the role of local law enforcement officers in public services and fosters distrust among members of the community. Part IV will discuss modest policy recommendations and encourage Danbury, Connecticut to repeal 287(g) authority. Since 287(g) undermines *Terry* and subverts the reasonable suspicion requirement, local law enforcement officers can virtually stop anyone, anytime, and anywhere.²⁷

I. Implementation of 287(g)

Nuts and bolts of 287(g)

There are provisions in federal law that give state and local law enforcement the authority to assist federal officers in immigration enforcement under certain circumstances. Section 287(g) of the Immigration and Nationality Act (INA)²⁸ was enacted in 1996 to enhance state and local law enforcement cooperation and communication with federal immigration authorities, thereby multiplying the ICE forces. As noted above, § 287(g) grants broad authority to state and local officers in immigration enforcement.²⁹ This provision was enacted by

section 133 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and it authorizes the federal government 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 immigration 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 that State or political subdivision and to the extent consistent with State and local law.³⁰

The IIRIRA, effective September 30, 1996, added 287(g) to the Immigration and Nationality Act, which authorized the performance of immigration officer functions by state officers and employees.³¹ Specifically, 287(g) authorized the secretary of Homeland Security to enter into agreements with state and local law enforcement agencies pursuant to a MOA.³² The MOA permitted designated officers to perform immigration law enforcement functions provided that the local law enforcement officers receive appropriate training and function under the supervision of sworn United States Immigration and Customs Enforcement (ICE) officers.³³ ICE is the largest investigative agency of Homeland Security and is responsible for enforcing federal immigration laws.³⁴ Furthermore, ICE operates the largest detention system in the country. During fiscal year 2008, ICE supervised a total of 378,582 aliens from 221 countries, with 58 percent from Mexico, 27 percent from Central American nations, and 4 percent from the Caribbean.³⁵ The majority of immigrant detentions result from arrests in the San Antonio (9 percent), Houston (8 percent), Atlanta (7 percent), Miami (7 percent), Los Angeles (6 percent), New Orleans (6 percent), New York (6 percent), and Phoenix (5 percent) field offices.³⁶

A state or locality must follow several steps before entering into a 287(g) agreement. The agreement must be in writing³⁷ and include a certification that the state or local employees “have received adequate training regarding the enforcement of relevant Federal Immigration laws.”³⁸ It must also set forth who has the supervisory responsibility for each authorized state or local immigration enforcement official and the specific scope of his or her duties.³⁹ Additionally, a state or local entity must pay the salary of each such state or local immigration enforcement official.⁴⁰

State or local agencies can voluntarily contact Homeland Security and create a MOA that is specific to the responsibilities and procedures appropriate to the state or local agency’s needs.⁴¹ The MOA outlines the purpose of the agreement, the statutory authority permitting the memorandum, and the scope of the functions that the Department of Justice (DOJ) authorizes the state and local officers to perform.⁴² Under all MOAs, designated state and local officers are authorized “to perform the function of an immigration of-

ficer in relation to the investigation, apprehension, or detention of aliens in the United States (including transportation of such aliens across State lines to detention centers).⁴³ State and local patrol officers, detectives, investigators and correctional officers who work in conjunction with ICE receive necessary resources and authority to pursue investigations relating to violent crimes, human smuggling, gang or organized crime activity, sexual-related offenses, narcotics smuggling and money laundering; and support in more remote geographical locations.⁴⁴

287(g) in action

Since January 2006, the 287(g) program is credited with identifying more than 110,000 potentially removable aliens nationwide—mostly at local jails.⁴⁵ From January 2009 to date, 287(g)-trained local officers are credited with the removal of approximately 24,000 aliens nationwide and have identified 48 percent more criminal aliens than during the same period in 2008.⁴⁶ More than 1,101 officers have been trained and certified through the program under seventy-one active MOAs.⁴⁷

Though agreements under 287(g) have been authorized since the 1996 amendments to the Immigration and Nationality Act, local governments have only recently begun entering into agreements with ICE.⁴⁸ The Florida Department of Law Enforcement was the first jurisdiction in the nation to enter into a 287(g) agreement on July 2, 2002.⁴⁹ At the time of writing, the most recent jurisdiction to enter into a 287(g) agreement was the City of Mesa Police Department in Arizona on November 19, 2009.⁵⁰

There are sixty-six mutually signed agreements as of January 5, 2010.⁵¹ The jurisdictions are split with one group (twenty seven) adopting the “jail enforcement model” (or “detention model”) and another group (twenty seven) adopting the “task force model.”⁵² Twelve jurisdictions dually adopted both the jail enforcement and task force model.⁵³ There are five active MOAs and one new MOA pending “good faith” negotiations as of January 1, 2010, all of which adopt the jail enforcement model.⁵⁴

287(g) comes to Danbury, Connecticut

The most current ICE Fact Sheet states that designated Danbury officers were in 287(g) training and were due to graduate January 29, 2010.⁵⁵ ICE offers a four-week training program at the Federal Law Enforcement Training Center (FLETC) ICE Academy (ICEA) in Charleston, South Carolina, conducted by certified instructors.⁵⁶ Currently, two detectives are deputized but lack the appropriate equipment to begin utilizing their authority under 287(g).

In January of 2009, the Government Accountability Office, the investigative arm of the U.S. Congress, issued a report criticizing the ICE partnership

program.⁵⁷ The Danbury Agreement is an example of the standardized MOA that Homeland Security constructed in response to this critique.⁵⁸ Specifically, the Danbury Agreement was signed on October 15, 2009, the day before ICE announced the standardized 287(g) agreements in a press release.⁵⁹ Since the Danbury Agreement is one of the standardized 287(g) agreements, it can be used as a basis of analyzing other jurisdictions that have adopted the standardized 287(g) agreement after October 16, 2009.

As mentioned above, there are two models of section 287(g) agreements that have developed thus far: the “jail enforcement model” and the “task force model.”⁶⁰ The Danbury Agreement institutes the “task force model.”⁶¹ This means that participating Danbury Police Department personnel will exercise their immigration-related authorities during the course of criminal investigations involving aliens encountered within the Danbury Police Department’s jurisdiction or as directed by the Special Agent in Charge (SAC).⁶² In contrast to the detention model, where 287(g) authority is triggered only after conviction, the task force model gives local law enforcement officers discretion to invoke 287(g) authority at any time in the course of criminal investigations.⁶³

This is not to say that the Danbury Police Department authority goes unfettered in the text of the agreement. Appendix D of the MOA prioritizes the categories of aliens who are a priority for arrest and detention.⁶⁴ Level 1, which consists of aliens who have been convicted of or arrested for major drug offenses and/or violent offenses such as murder, manslaughter, rape, robbery and kidnapping, is given the highest priority. A conviction is not required to detain an individual; an arrest, which requires another fairly low standard of probable cause, is sufficient. Level 2 priority, which consists of aliens who have been convicted of or arrested for minor drug offenses and/or mainly property offenses such as burglary, larceny, fraud, and money laundering, is the next highest priority. Level 3 priority consists of aliens who have been convicted of or arrested for other offenses. This can include simple misdemeanors, such as loitering. Despite the textual limitations, the Danbury Agreement contains a catch-all provision that leaves the decision to apprehend an individual at the complete discretion of ICE. “ICE will assume custody of an alien . . . when the ICE Office of Detention and Removal Operations (“DRO”) Field Officer Director (“FOD”) or his designee decides on a case-by-case basis to assume custody of an alien”⁶⁵ The amount of discretion is immense and creates a high potential for searches, seizures, and arrests based on entirely subjective observations.

Even minor interactions with police may lead an undocumented alien to be seized. Although the Danbury Agreement specifies the types of aliens to whom resources should be prioritized, this does not preclude local law en-

forcement officers from invoking their 287(g) authority for a minor offense, such as a motor vehicle infraction.⁶⁶ Pursuant to 8 U.S.C. § 1357(a), an immigration officer has the power to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States.⁶⁷ The term “alien” means any person not a citizen or national of the United States.⁶⁸ An immigration officer also has the authority to make warrantless arrests for offenses occurring in the officer’s presence.⁶⁹ Since under 287(g) the Danbury Police Department is essentially composed of deputized immigration officers, they adopt these broad, discretionary powers.

II. Legal concerns with 287(g)

287(g) undermines the *Terry* Doctrine and subverts the “reasonable and articulable suspicion” test

Fourth Amendment violations in the immigration context will be difficult to establish under current Fourth Amendment doctrine.⁷⁰ Under state and federal constitutions, police may detain an individual for investigative purposes, even in the absence of probable cause, if the officer has a “reasonable and articulable suspicion” the individual is engaged or about to engage in criminal activity.⁷¹ The “reasonable and articulable suspicion” standard in Connecticut mirrors that of *Terry*.⁷² The Connecticut Supreme Court has declared: “Reasonable and articulable suspicion is an objective standard that focuses not on the actual state of mind of the police officer, but on whether a reasonable person, having the information available to and known by the police, would have had that level of suspicion.”⁷³

In *State v. Trine*, the Connecticut Supreme Court stated that “the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”⁷⁴ Because such a stop involves a temporary restraint of a person’s freedom to walk away, it constitutes a “seizure” within the meaning of the Fourth and Fourteenth Amendments to the United States Constitution.⁷⁵ The purpose of an investigatory stop is to maintain the status quo for a brief period of time to allow the police to investigate the circumstances that gave rise to the suspicion of criminal wrongdoing.⁷⁶

Currently, local law enforcement officers have broad discretion in questioning and detaining an individual suspected of an immigration violation. This is the result of the United States Supreme Court case *Muehler v. Mena*.⁷⁷ In *Mena*, the Court reversed the Ninth Circuit on the issue of questioning individuals about their immigration status, and held that there is no requirement of particularized reasonable suspicion for purposes of inquiring into citizenship status.⁷⁸ The Court reasoned that “mere police questioning does not constitute a seizure.”⁷⁹

Expansion of power

Section 287(g) expands the current power of local law enforcement beyond the already broad discretion afforded to them in *Mena*. In *Mena*, the police officers were armed with a criminal search warrant based on probable cause.⁸⁰ The law enforcement officers categorized the detention as a “brief investigatory detention” used to secure the premises during execution of the warrant.⁸¹ The Court agreed and held that the detention of *Mena* in handcuffs for two to three hours during the search was reasonable and did not violate the Fourth Amendment.⁸² For these reasons, *Mena* diminishes a noncitizen’s expectation of privacy in the Fourth Amendment.

Illustration of a “brief investigatory detention” under 287(g)

If operating under 287(g), the officers in *Mena* would have had another instrument at their disposal. Under 287(g), law enforcement officers have access to information found in ICE’s Enforcement Case Tracking System (ENFORCE) and can quickly gain information about the individual just by providing his or her name.⁸³ The federal database will reveal to the officer whether this person is here “legally” or “illegally.” After the local law enforcement officer wields its already broad power to question individuals, an officer acting under 287(g) can apprehend the individual based on the information found through ENFORCE, without any further justification. In short, under the guise of a “brief investigatory detention,” local law enforcement officers acting pursuant to 287(g) may ask questions where the answers may directly incriminate a noncitizen.⁸⁴ The method of investigation allowable under 287(g) is similar to “fishing for criminal activity,” which the United States Supreme Court found problematic in other contexts.⁸⁵ *Mena*, in conjunction with 287(g), drives us into a place where citizens and noncitizens do not have a reasonable expectation of privacy.⁸⁶

It is generally not permitted to use race and ethnicity as the sole factor in establishing a reasonable suspicion.⁸⁷ To the detriment of minorities and people with “brown” skin, this directly contradicts how race and ethnicity are relevant in the immigration context.⁸⁸ In terms of Fourth Amendment protections, however, the Supreme Court has permitted an immigration agent to rely on national origin and ethnicity as a factor in making a stop.⁸⁹ Since local law enforcement officials under 287(g) have authority under criminal law and federal immigration law, 287(g) operates to give officers a free pass to profile based on ethnicity. Local law enforcement officials can put on their “immigration agent” cap to stop and detain individuals without a reasonable suspicion, solely on the basis of the color of their skin. This assists in the procurement of probable cause that the officer would not otherwise be able to avail him or herself of under the Fourth Amendment or the Connecticut

Constitution. In this manner, 287(g) undermines *Terry* and gives full discretion to local law enforcement officers to stop anyone, at any time, for any reason.

Next, the local law enforcement officer can put back on his or her “criminal law enforcement officer” cap to briefly detain and question an individual, whether citizen or noncitizen, once a reasonable suspicion is established. The “brief investigatory detention” may assist in the procurement of probable cause to arrest. There are already many exceptions to the Fourth Amendment that are applicable to United States citizens. For example, if an individual is a citizen, the plain view,⁹⁰ consent,⁹¹ or good faith⁹² exceptions to the warrant requirement will undoubtedly assist the officer in procuring probable cause for the arrest.⁹³ If an individual is a noncitizen, all of the above apply, but additionally, his or her name, when run through a federal database,⁹⁴ will indicate an “illegal” status and removal proceedings will ensue.⁹⁵ Another difference in the application of the Fourth Amendment to noncitizens lies within the exclusionary rule⁹⁶ which states that evidence found in violation of the Fourth Amendment may not be used in criminal prosecutions in state courts or federal courts.⁹⁷ The purpose of the exclusionary rule “is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”⁹⁸ The exclusionary rule does not apply in removal proceedings. As a result, the conduct of local law enforcement in the enforcement of federal immigration law goes virtually unchecked.

Scholars have pointed out that it is still unclear whether the defendant in *Mena* could have been compelled to answer the questions if she had refused to answer.⁹⁹ In nonconsensual interactions, the Court requires reasonable suspicion to compel a person to disclose his or her identity.¹⁰⁰ Since the Court does not require an independent reasonable suspicion in order to question an individual about immigration status in his or her home, it is not likely that the Court will offer suspected immigrants this additional safeguard during nonconsensual interactions. In the criminal law context, an interrogation while in custody is considered so inherently coercive, it requires the reading of *Miranda* rights.¹⁰¹ It therefore must follow that compelling a person to answer questions regarding identity, especially in the immigration context where the answer can be a *per se* violation of the law, is likewise inherently coercive and should also require an independent justification.

287(g) undermines the *Terry* doctrine in the same manner as *Mena*

Although *Mena* concerns questioning during detention in the home pursuant to a criminal arrest warrant and *Miranda* concerns questioning while in custody, both doctrines seek to provide procedural safeguards to ensure that the individual is accorded his right not to be compelled to incriminate himself. Under *Terry*, a brief investigatory stop is not considered custody. However, un-

der 287(g), a local law enforcement officer can easily turn a routine traffic stop into custody by invoking their 287(g) authority and using an administrative warrant. Even if the Court decides to overrule *Mena* or interpret it narrowly, the actions allowed under 287(g) will still be allowed. ICE's administrative warrants do not require immigrants to answer the door or allow entry.¹⁰² It is likely that under 287(g), local law enforcement officials will soon have this power based on an "ethnicity-by-ethnicity basis."

Under 287(g), local law enforcement officials can now take advantage of the broad authority to question and apprehend (pursuant to an administrative warrant under the Immigration and Nationality Act) as well as the broad authority to question and arrest (pursuant to *Mena*).

Restrictions do exist for federal immigration officers when making warrantless arrests for civil deportation. For example, 8 U.S.C. § 1357(a)(2) requires a reasonable belief by the arresting officer that the alien is illegally in the United States and likely to escape before a warrant can be obtained for the alien's arrest. However, the language of the statute plainly invites profiling based on national origin and ethnicity. The "reasonable belief" standard is easily met because national origin and ethnicity is a convenient "tip-off" to an immigration violation. In this manner, 287(g) exempts jurisdictions from the probable cause to arrest standard and as a result local law enforcement officials are not deterred from police misconduct.

Various ICE Fact Sheets claim that 287(g)-trained officers are focused on identifying and processing criminal aliens for removal and investigating criminal immigration violations; they cannot randomly ask for a person's immigration status or conduct immigration raids.¹⁰³ This statement is plainly inconsistent with the statutory authority granted to local law enforcement after being deputized under 287(g). Pursuant to 287(g), local law enforcement officers will have the authority of an immigration officer who has the power without a warrant to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States.¹⁰⁴ However, if local law enforcement officials are already armed with this power to question regarding immigration status under *Mena*, the question arises, what other authority does 287(g) provide?

Section 287(g) allows local law enforcement officials to supplant the reasonable suspicion standard with a far more lenient standard based on factors such as foreign appearance, language and identity documents, and even the refusal to answer questions.¹⁰⁵ With high incidence and opportunity for racial profiling, the inevitable result is the detention of noncriminal aliens. In the immigration context this routine questioning is critical to a finding of a violation of the law.

Inconsistency with trends in Connecticut regarding Fourth Amendment protections

Section 287(g) is particularly problematic in a state such as Connecticut because the “reasonable and articulable suspicion” standard essentially mirrors that of *Terry*. An example of a Connecticut Supreme Court case will illustrate how the “reasonable and articulable suspicion” standard will be eroded. In *State v. Donahue*, the defendant parked his vehicle in a vacant parking lot of the French Club, a private social club closed for the evening.¹⁰⁶ At that time, Officer Lynch activated his flashers, radioed the defendant’s license plate number to the Colchester barracks and learned that the vehicle was neither reported stolen nor were there any outstanding warrants.¹⁰⁷ Upon receiving the information, Officer Lynch exited the vehicle and approached the defendant’s vehicle for his license and registration.¹⁰⁸ Next, the defendant rolled down his window when he saw Officer Lynch at his driver’s side window.¹⁰⁹ The officer detected alcohol on the defendant’s breath and, after the defendant failed a field sobriety test, Lynch arrested him for operating a motor vehicle while under the influence of intoxicating liquor in violation of Connecticut General Statutes § 14-227a.¹¹⁰ The Connecticut Supreme Court found that Officer Lynch was not justified in stopping the defendant due to an increase in crime in the area.¹¹¹ Conversely, this method of profiling is expressly allowed of immigration agents under *United States v. Brignoni-Ponce*¹¹² and does not amount to a reasonable suspicion as required by *Terry*.

In reaching its conclusion in *Donahue*, the Connecticut Supreme Court considered and rejected an argument made in *State v. Oquendo*.¹¹³ In *Oquendo*, the Court held that the officer’s detention of the defendant was not justified when the officer’s suspicions were based on the following factors: the clothing worn by the defendant; the increased crime rate in the area in which the defendant was walking; the fact that the officer knew the defendant’s companion was a recent arrestee for larceny and burglary; and the officer’s “hunch” that the defendant was about to commit a crime.¹¹⁴ Those factors were considered insufficient to make the officer’s stop of the defendant “constitutionally reasonable.”¹¹⁵ The factors that make the stop constitutionally unreasonable in *Oquendo* are the very factors that a local law enforcement officer can specifically rely upon when determining whether to question an individual regarding his or her immigration status.

Not only does an undocumented individual lack the protection of the Fourth Amendment, but he or she has the resources of the federal government, *vis-à-vis* local law enforcement, to reckon with. Despite lower civil standards of investigation permitted in immigration enforcement, immigration agents work side-by-side with criminal law enforcement officers such as state and local police under 287(g).¹¹⁶ Under 287(g), ICE can leverage the criminal

justice system in its favor while local law enforcement officials subvert the “reasonable and articulable suspicion” requirement of *Terry*. This expansion, in conjunction with the United States Supreme Court’s willingness to grant broad discretion to immigration agents, results in the dilution of the Fourth Amendment for everyone.

A return to vagrancy

Section 287(g) invites profiling based on ethnicity and results in virtually unfettered police power, such as a return to vagrancy law pre-*Terry*. In common law, vagrancy was defined as wandering or going about from place to place by an idle person who has no lawful visible means of support, and who subsists on charity and does not work for a living although he or she is able so to do.¹¹⁷ Vagrancy laws were drafted broadly as to give the police authority to stop or arrest those they were interested in questioning or arresting.¹¹⁸ Probable cause was very easily established. By the time *Terry* was decided in 1968, courts were invalidating vagrancy and loitering laws,¹¹⁹ leaving a lot of searches and seizures subject to a “serious” probable cause standard where previously there was none.¹²⁰ After the decision in *Terry*, scholars were arguing that investigative techniques authorized by *Terry* should prevail over more offensive authority given to police officers, such as vagrancy statutes used as a means of arresting and prosecuting suspicious persons.¹²¹

The broad discretion of local law enforcement to question individuals under 287(g) is similar to the excessive authority given to police officers under the vagrancy statutes. *Terry* represents the first time the court system faced the question of how to harness street policing and make the police behave reasonably on the ground.¹²² 287(g) represents a return to vagrancy law because it subverts these aforementioned objectives of *Terry*. The adoption of 287(g) agreements by local jurisdictions increases the power of police on the street, and legitimizes unreasonable behavior, such as profiling based on ethnicity.

III. Distrust and fear among the community—a public hazard

The anti-immigrant sentiment has a treacherous history. In 2008, the Danbury City Council passed an ordinance banning “repetitive outdoor group activities.”¹²³ The effect of this ordinance was to shut down the Ecuadorian community’s neighborhood volleyball games, one of the primary venues for community gatherings in the spring and summer.

Where fear and distrust began in Danbury, Connecticut

The moment for localized immigration enforcement began in April 2005, when Mayor Mark Boughton deputized Connecticut state police to enforce federal immigration law.¹²⁴ In June 2005, more than a thousand immigrants marched down Main Street, Danbury, Connecticut in protest. Despite Mayor

Boughton's failure to secure authority for the civil enforcement of immigration laws, on September 19, 2006, the Danbury Police Department instigated an undercover sting operation in which the Danbury Police Department officers, with the knowing and willing assistance of ICE, used extraordinary deception to arrest a group of Latino day-laborers who had gathered at Kennedy Park in the center of downtown Danbury.¹²⁵ In September 2007, the eleven undocumented immigrants who came to be known as the "Danbury 11" filed a civil rights lawsuit against the City of Danbury alleging illegal civil immigration arrests without probable cause and impermissible discriminatory law enforcement in violation of the Fourth Amendment.¹²⁶ In October 2007, Danbury's proposed partnership with ICE under program 287(g) was presented to the Common Council by council president Joseph Cavo.¹²⁷ Amidst the chants of hundreds of protesters outside of the Danbury City Hall, on February 6, 2008, the Danbury Common Council voted 19–2 to approve the 287(g) agreement.¹²⁸ In January 2009, U.S. Department of Homeland Security Secretary Janet Napolitano vowed to review all immigration programs. In August 2009, Danbury's application to the ICE partnership was approved.¹²⁹

Danbury was likely attracted to the implementation of a 287(g) agreement because these agreements have not yet been subject to a legal challenge, whereas some other types of local ordinances regulating immigrants have been found unconstitutional.¹³⁰ As mentioned above, the Danbury 11 suit addresses possible constitutional violations by Danbury police officers before the 287(g) agreement. Was the 287(g) agreement entered upon to legitimize actions that would have previously been rendered unconstitutional? The Danbury 11 suit was initiated immediately after Danbury became the first city in Connecticut to enter into such agreement. It did not take long after the suit was filed for the town to enter into an agreement with ICE to give their local officers federal authority.

A free pass to profile based on ethnicity

Section 287(g) legitimizes inquiry into one's immigration status. Specifically, the potential for racial profiling—"the practice of targeting individuals for police or security detention based on their race or ethnicity in the belief that certain minority groups are more likely to engage in unlawful behavior"¹³¹—is reason enough to question to adoption of a 287(g) agreement.

The Connecticut Supreme Court has spoken out against the "insidious specter of 'profiling.'"¹³² In *State v. Donahue*, Justice Norcott, writing for the majority, stated that

As defined in the racial context, 'profiling' has come to refer to the practice of 'singl[ing] out black and Hispanic drivers based on ostensible traffic violations and subject[ing] them to criminal searches.' . . . [T]he concern that is identi-

fied in the context of racial profiling is . . . that the constitutional rights of the defendant are violated as a result of a police stop predicated on no reasonable and articulable suspicion.¹³³

National origin and ethnicity are a convenient “tip-off” that will lead an officer to “reasonably believe” an individual is in the United States illegally.¹³⁴ Other factors may be uncovered after questioning ensues, but the initial “tip-off” to an immigration violation is the result of profiling based on ethnicity without a reasonable and articulable suspicion.

Writing a dissent in *Fishbein v. Kozlowski*, Justice Berdon points out that the majority bypasses the concern about racial profiling by contending that the only consequence of a police officer stopping a citizen is an administrative hearing that may result in the suspension of her operator’s license.¹³⁵ In Danbury, the stakes are far greater than suspension of a license. The likely consequence of a police officer conducting a routine traffic stop (punishable by a nominal fine/infraction) is deportation. Any alien arrested for any reason may not be released into the community, but rather is turned over to ICE for removal proceedings.¹³⁶

Section 287(g) also flies in the face of the Connecticut legislative policy prohibiting racial profiling as enacted in Public Acts 1999, No. 99-198.¹³⁷ The legislative policy provides in relevant part the following:

Section 1 . . . (a) For the purposes of this section, ‘racial profiling’ means the detention, interdiction or other disparate treatment of an individual *solely* on the basis of the racial or ethnic status of such individual. (b) No member of the Division of State Police within the Department of Public Safety, a municipal police department or any other law enforcement agency shall engage in racial profiling. The detention of an individual based on any noncriminal factor or combination of noncriminal factors is inconsistent with this policy. (c) The race or ethnicity of an individual shall not be the *sole factor* in determining the existence of probable cause to place in custody or arrest an individual or in constituting a reasonable and articulable suspicion that an offense has been or is being committed so as to justify the detention of an individual or the investigatory stop of a motor vehicle . . .¹³⁸

The Connecticut legislature clearly stated that race or national origin may not be the sole factor in finding a reasonable and articulable suspicion or probable cause. In contrast, local law enforcement officers acting as “immigrant agents” pursuant to 287(g) are statutorily permitted to use race or national origin as a factor in making this finding.¹³⁹

III. Effects on all community members

The only direct mention of immigration in the Constitution is the Naturalization Clause.¹⁴⁰ Since the founding of the United States, the federal

government, with the support of the Supreme Court, has exercised the power to regulate noncitizens and remove them from the country.¹⁴¹

As mentioned above, the Danbury agreement constitutes the task force model, whereby field duty law enforcement officers incorporate their immigration enforcement as part of the performance of their normal field duties. In essence, local law enforcement officers are deputized by ICE to undertake immigration enforcement responsibilities in addition to their regular responsibilities. With their immigration enforcement authority, local officers participating under a 287(g) agreement have the same power as immigration officers “to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States.”¹⁴² Some argue that local law enforcement officers cannot cover this ground and must be utilized solely for the protection of society.

In Danbury, not only must citizens and noncitizens now worry about the enhanced authority of local law enforcement to enforce federal immigration law (civil) but they can also worry about immigration agents utilizing 287(g) to target noncitizens with criminal convictions. Immigration agents can indirectly take advantage of local law enforcement authorities under the local criminal justice system. The adoption of 287(g) distorts all constitutional limitations on government invasions of privacy.

Section 287(g) gives local law enforcement the power to question someone on the street. Since Danbury follows the officer model, an arrest or conviction is unnecessary to trigger the inquiry. A routine traffic stop or “suspicious” individual conduct that the officers encounter during the course of their regular field duties can trigger 287(g) authority.¹⁴³ The reasons why officers choose to act upon certain conduct and against particular individuals during regular field duties is completely subjective. As mentioned above, interrogation relating to one’s identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.¹⁴⁴ This is done under the guise of a criminal violation which may be fabricated or pretextual. The Public Act frowns upon the detention of an individual based on any noncriminal factor but 287(g) gives civil law enforcement authority to local law enforcement.

We may learn little about the Danbury Agreement and its effects. The Agreement does not require the Danbury Police Department to provide statistical or arrest data to Homeland Security.¹⁴⁵ These circumstances leave nothing and no one to test the efficacy of this program. For purposes of this analysis, the actions of Danbury Police Department officers before the 287(g) agreement and a report from the Police Foundation is instructive.¹⁴⁶ Law enforcement executives, public officials, and scholars seeking information on this topic have largely relied on media accounts, anecdotal information, and reports by advocacy groups.

In May 2009, the Police Foundation issued a 256-page report entitled “The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties.”¹⁴⁷ This national project brought together law enforcement executives, policy makers, elected officials, scholars, and community representatives in a series of focus groups across the country and at a national conference in Washington to collaboratively examine the implications of local law enforcement of immigration laws.¹⁴⁸ The report is generally critical of the 287(g) program due to the negative overall impact on public safety.¹⁴⁹ The report states that police executives have felt torn between a desire to be helpful and cooperative with federal immigration authorities and a concern that their participation in immigration enforcement efforts will undo the gains they have achieved through community oriented policing practices, which are directed at gaining the trust and cooperation of all members of the communities they serve.¹⁵⁰

In addition to concerns over a possible increase in police misconduct, the Police Foundation report voices a concern over the impact on law enforcement budgets and resources and the high possibility of error given the complexity of immigration law.¹⁵¹ As of this writing, the Danbury Police Department has not been in the program long enough to report on the implementation experience and the effects on the community. However, the minimal training requirements are informative. It is well known that U.S. immigration law is a complex civil system. It often involves not simply detaining someone without probable cause for several hours (which is deplorable), but also deportation. When a jurisdiction enters into a MOA with Homeland Security under 287(g), the local law enforcement officers should receive extensive training concerning proper arrest procedures for civil immigration violations.¹⁵² Furthermore, ICE should ensure that all enforcement programs have proper oversight and safeguards to protect against racial and religious profiling and other human rights violations.¹⁵³ Unless and until these issues are resolved, all programs that enforce immigration law through state and local criminal justice systems should be suspended.

ICE oversight or overlooked: the road to public hazard

Immigration control has traditionally been exclusively a federal responsibility, in contrast to the traditional state responsibility for crime control.¹⁵⁴ On April 2, 2009, the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law (“Subcommittee on Immigration”) and the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties (“Subcommittee on the Constitution”) held a joint hearing regarding the “Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws.” The subcommittee hearing was

chaired by Rep. Zoe Lofgren (D-Cal.) of the Subcommittee on Immigration, who stated that if Congress is committed to protecting public safety, victims of crime, and civil rights, then it is required to examine the effects of state and local law enforcement of immigration law.¹⁵⁵

The Department of Homeland Security justifies the 287(g) program by arguing that state and local law enforcement play a critical role in protecting our homeland because they are often the first responders when there is an incident or attack against the United States.¹⁵⁶ It alleges that during the course of daily duties, local law enforcement officers often encounter foreign-born criminals and immigration law violators who may pose a threat to national security or public safety.¹⁵⁷

These justifications are flawed for two reasons. First, many of the detainees have no criminal record, were not engaging in criminal behavior at the time of the stop (to justify the seizure), and have not been convicted of a crime. Furthermore, many aliens are released from custody and deported when no criminal charges are brought. Are U.S. citizens willing to give up their Fourth Amendment right to privacy on the off chance that a person of color stopped by the police is a terrorist? The overwhelming majority of the people most brutally affected by this policy are not a threat to national security.¹⁵⁸

Second, a recent report by the Government Accountability Office points out that while ICE officials claim that the main objective of the 287(g) program is to enhance the safety and security of communities by addressing serious criminal activity committed by aliens, this goal has not been achieved in practice.¹⁵⁹ The report found that ICE has not documented this objective in program-related materials consistent with internal control standards.¹⁶⁰ As a result, local law enforcement officials can use their 287(g) authority to process aliens for removal who have committed minor crimes, such as carrying an open container of alcohol. Mayor Mark Boughton of Danbury asserted in a local newspaper, “I think there is a general understanding that if you are not breaking the law, then you shouldn’t have an issue. . . [o]f course, there are going to be some misconceptions, but I can assure you cops will not be stopping people on the streets at random demanding proper identification.”¹⁶¹ The defendants arrested in the Danbury 11 case, however, were not engaged in criminal behavior; they were standing in Kennedy Park in Danbury looking for work. In practice, the demand for proper identification is the first step that officers take when performing a routine investigation. However, if the Danbury Police Department officers are not trained to address only serious criminal activity committed by aliens, what Mayor Boughton asserts is not going to happen is instead destined to happen.

Competing goals—civil immigration law and local criminal justice

The lower civil standards of investigation coupled with the discretionary power of local enforcement to investigate “suspicious” or “criminal” acts in the course of duty is not only lethal to our system of justice and denies undocumented workers all constitutional protections, but also leads to poor public safety practices.¹⁶² This mixture of immigration and criminal enforcement creates a gray area of procedural protections where an individual may be prosecuted for both civil and criminal offenses.¹⁶³ As a result, community members are left uncertain as to what rights they have available to them.

In an October 16, 2009 press release, ICE Assistant Secretary Morton stated, “[t]hese [287(g)] partnerships are an essential tool for law enforcement to identify and remove dangerous criminal aliens from local communities.” Under the law, immigration proceedings are civil proceedings and immigration detention is not punishment.¹⁶⁴ ICE does not have the authority to detain aliens for a criminal violation. Conveniently, now local law enforcement officials do. While aliens are apprehended by local law enforcement, ICE is involved in the arrest of most deportable immigrants, as the majority of cases involve aliens encountered when they are in criminal custody.¹⁶⁵ These findings are not consistent with the goals expressed by Homeland Security in countless press releases, as well as by Mayor Boughton.

IV. Policy recommendations

First, other states and localities must be warned of the negative effects of 287(g) on all members of the community. Section 287(g) fosters distrust in the community and operates as a step backward in the United States Civil Rights movement. In her article, “Federalism, Deportation, and Crime Victims Afraid to Call the Police,” Orde F. Kittrie, an Associate Professor at Arizona State University College of Law, proposes a statutory model to alleviate the deportation-versus-crime-reporting predicament. Professor Kittrie proposes to expand the existing special visa categories to cover all unauthorized aliens who are victims of or witnesses to any felony.¹⁶⁶ Although the article recognized the inefficiencies of implementing such an expansion, the proposal is useful to open a debate and inform states and localities of the impact on crime reporting.¹⁶⁷

Second, in Connecticut, where 287(g) authority is contrary to Connecticut Supreme Court interpretations of the Fourth Amendment, 287(g) is especially inappropriate. The Danbury Police Department has not been in the program long enough to report on the implementation experience and the effects on the community. Danbury, Connecticut should repeal 287(g) authority before the citizens feel its ill effects.

Lastly, 287(g) has not yet been subject to a legal challenge. I recommend that the citizens of states or localities that have adopted 287(g) change this fact.

Conclusion

Section 287(g) is inconsistent with the trends in Connecticut regarding Fourth Amendment protections. Specifically, adoption of 287(g) in Connecticut is inconsistent with the Connecticut Supreme Court's interpretation of Fourth Amendment rights and the efforts of Connecticut cities to provide greater protections to undocumented immigrants with public safety in mind.

Many questions remain unanswered. For example, how is racial profiling going to be tracked or how will the efficacy of this program be assessed to ensure Constitutional rights are not being violated in the implementation of 287(g)? The sense of mistrust in the community and lack of training and resources creates a hostile environment with grave potential for public hazard.

Although ICE has no criminal detention authority,¹⁶⁸ local law enforcement does. Under 287(g), local law enforcement agents are cross-deputized to enforce immigration laws. ICE authority coupled with local law enforcement pursuant to 287(g) is a dangerous symbiotic relationship that has the potential to regularly result in grave constitutional violations. In Danbury, Connecticut, a deputized local law enforcement officer can stop a citizen and ask questions in the normal course of duty, not requiring probable cause or even a reasonable suspicion. Since September 11, 2001, it seems that society is not prepared to recognize an "alien's" right to this expectation. The negative assumptions and stereotypes combined with a sense of fear have reversed decades of social progress. The Supreme Court of the United States famously stated that "the Fourth Amendment protects people, not places."¹⁶⁹ In theory, this may be true. In practice, it is anything but.

NOTES

1. Immigration and Nationality Act §287(g), 8 U.S.C. § 1357(g) (2006).
2. Jennifer Medina, *New Haven Approves Program To Issue Illegal Immigrants IDs*, N.Y. TIMES, June 5, 2007, at B6.
3. Hartford, Connecticut, Municipal Code, Ch. 2 Art. XXI (July 23, 2008), available at <http://www.hartford.gov/government/Town&CityClerk/Proposed%20Ordinances/immigration%20status.htm>. Sec. 2-929 of the Hartford Municipal Code states, "No employee of the City of Hartford shall inquire about or disclose confidential information as defined in §2-926 or other personal or private attributes except when either required by law or when this information is necessary to the provision of the City service in question." *Id.* § 2-926.
4. Mayor Eddie Perez, Media Statement, April 18, 2008, at <http://www.hartford.gov/news/PR031808Immigrationordinance.pdf> (last visited Feb. 12, 2011).
5. Dirk Perrefort, *A City Divided*, NORWALK CITIZEN, August 31, 2009, available at <http://www.norwalkcitizenonline.com/default/article/A-city-divided-1710.php>.

6. See discussion *infra*, Part III. The State of Connecticut has an estimated 3,504,809 people. The population of Danbury, Connecticut is 79, 285. The U.S. Census 2000 indicates that 15.8% of the Danbury population are persons of Hispanic or Latino origin and 20.7% of the Danbury population are foreign born. U.S. Census Bureau, State and County Quick Facts, Danbury Connecticut. <http://quickfacts.census.gov/qfd/states/09/0918430.html> (last visited Feb. 11, 2011).
7. Terry v. Ohio, 392 U.S. 1, 31 (1968) (stating that a reasonable suspicion must be supported by facts and circumstances that would lead a person of caution to believe that criminal activity is afoot).
8. U.S. CONST. amend. IV; Conn. CONST. art. I, §§ 7, 9. See Mapp v. Ohio, 367 U.S. 643, 656 (1961); Weeks v. United States, 232 U.S. 383, 390 (1914); State v. Geisler, 222 Conn. 672, 682 (1992). The Fourth Amendment is enforceable against the states through the Fourteenth Amendment. Kerr v. California, 374 U.S. 23, 30 (1963).
9. See State v. Donahue, 251 Conn. 636, 644 (1999) (holding that a nighttime investigatory stop of defendant's vehicle in vacant parking lot in increased crime area was not justified); State v. Barton, 219 Conn. 529, 547 (1991) ("As we have observed in the past, federal constitutional and statutory law 'establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights' . . ." (quoting Cologne v. Westfarms Associates, 192 Conn. 48, 57 (1984))).
10. The Fourth Amendment of the United States Constitution states,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

See M. Isabel Medina, *Exploring the Use of the Word "Citizen" in Writings on the Fourth Amendment*, 83 IND. L.J. 1557, 1558 (2008) (discussing the practice in judicial opinions and commentary on the Fourth Amendment of using the word "citizen" when referring to the rights secured by the Amendment).
11. See, e.g., Kevin Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 716-28 (2000) (discussing how exceptions to Fourth Amendment protections for immigrants harms Latinos/as and other nonwhites); Alfredo Mirande, *Is There a "Mexican Exception" to the Fourth Amendment?*, 55 FLA. L. REV. 365, 368 (2003) (identifying the lack of Fourth Amendment protections for persons of Mexican ancestry).
12. See, e.g., Raquel Aldana, *Of Katz and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081 (2008); David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration*, 41 U.C. DAVIS L. REV. 1137 (2008); Mirandé, *supra* note 11.
13. S.B. 1070, 49th Leg., 2nd Reg. Sess. (Ariz. 2010).
14. *Id.*
15. Interpreter Releases, *House Democrats Call for Inquiry into Sheriff Joe Arpaio's Tactics*, 86 NO. 8 INTERPRETER RELEASES 597, February 23, 2009.
16. *Id.* The U.S. Department of Justice has commenced an investigation into the Maricopa County Sheriff's Office regarding alleged patterns or practices of discriminatory police practices and unconstitutional searches and seizures as well as allegations of national origin discrimination. *Id.*

17. *Id.*
18. This is yet another way in which noncitizens have less constitutional protections available to them than do incarcerated individuals.
19. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U.L. REV. 367, 396 (2006)
20. Juliet Stumpf, *The Implausible Alien: Iqbal and the Influence of Immigration Law*, 14 LEWIS & CLARK L. REV. 231 (2010)
21. See CrImmigration, <http://www.crimmigration.com> (last visited May 7, 2010); see also, Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM L. REV. SIDEBAR 135, 136 n.1 (2009).
22. Stumpf, *supra* note 19, at 396.
23. See discussion *infra* Part II.
24. Prisoners have a lower privacy expectation than non-incarcerated individuals. Immigrants are deemed to have an even lower privacy expectation because they are “criminals” and in this country “illegally.”
25. See Thomas L. Friedman, *America’s Real Dream Team*, N.Y. TIMES, (March 21, 2010) (revealing that the majority of the forty finalists in the 2010 Intel Science Talent Search came from immigrant families). “I think keeping a constant flow of legal immigrants into our country—whether they wear blue collars or lab coats—is the key to keeping us ahead of China.” *Id.*
26. 392 U.S. 1 (1968). In *Terry*, the Supreme Court held that police may briefly detain a person whom they reasonably suspect is involved in criminal activity. This detainment is known as a “Terry stop.” The Court also held that police may do a limited search of the suspect’s outer garments for weapons if they have a reasonable and articulable suspicion that the person detained may be “armed and dangerous.” When a search for weapons is authorized, the procedure is known as a “Terry frisk.”
27. This paper will not discuss undocumented immigrants’ lack of constitutional protections in the context of workplace raids. See Aldana, *supra* note 12, at 1118-21 (examining privacy rights for noncitizens in the context of immigration raids in peoples’ homes and the workplace).
28. Immigration and Nationality Act §287(g), 8 U.S.C. § 1357(g) (2006).
29. 8 U.S.C. § 1357(g).
30. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 133, 10 Stat. 3009 (Sept. 30, 1996).
31. 8 U.S.C. § 1357(g); see also U.S. Immigration and Customs Enforcement, U.S. Dept. of Homeland Sec., Fact Sheets: Section 287(g), Immigration and Nationality Act; Delegation of Immigration Authority (June 22, 2007), available at <http://www.ice.gov/pi/news/factsheets/070622factsheet287gprogover.htm> [hereinafter ICE Fact Sheet June 22, 2007].
32. Although the focus of this article is 287(g) authority, it is worth noting that in addition to § 287(g), the Attorney General authorized state and local law enforcement to perform immigration functions during a period of declared “mass influx of aliens.” 8 U.S.C. § 110 (g)(10)(2009). The statute defines a “mass influx of aliens” as “aliens arriving off the coast or near a land border of the United States.” *Id.* The rule fails to quantify the basis for a declaration of a mass influx.
33. 8 U.S.C. § 1357(g).
34. ICE Fact Sheet June 22, 2007, *supra* note 31.

35. U.S. Immigration and Customs Enforcement, U.S. Dept. of Homeland Sec., Immigration Detention Overview and Recommendations (October 6, 2009), http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf. [hereinafter Detention Overview]
36. *Id.*
37. Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g)(1) (2006).
38. 8 U.S.C. § 1357(g)(2).
39. 8 U.S.C. § 1357(g)(5).
40. 8 U.S.C. § 1357(g)(1). Although the State or locality pays the salary of the officer, the officer is considered to be acting under color of Federal authority. (“[A]n officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.”) 8 U.S.C. § 1357(g)(8).
41. Nothing in section 287(g) shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection. 8 U.S.C. § 1357(g)(9).
42. *E.g.*, Danbury, Connecticut’s Memorandum of Understanding with the Department of Homeland Security, at 1 (Oct. 15, 2009), *available at* http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gdanbury101509.pdf [hereinafter Danbury Agreement].
43. 8 U.S.C. § 1357 (g)(1). The MOA establishes the qualifications and nomination procedures for officers to be selected for the program, the training and certification procedures and guidelines, and the allocation of financial responsibility for the program. *E.g.*, Danbury Agreement, *supra* note 42, at 3. The federal government pays for the training and training materials, but the state and local jurisdictions are responsible for personnel expenses, including, but not limited to, salaries and benefits, local transportation, and official issue material. *Id.* at 5. The MOA also explains the scope of ICE supervision, required review and evaluation of the program, and liability and responsibilities under 287(g). *Id.* at 6-7. It lists federal, state, and local points of contact, and requires the state and local jurisdiction and ICE to communicate with the community and coordinate media releases. *Id.* at 9, at 21, app. D. Finally, there must be a complaint procedure in place, providing individuals the option to report misconduct by participating personnel, with regard to activities undertaken under the authority of the MOA. *Id.* at 13, app. B. *See also* U.S. Immigration and Customs Enforcement, U.S. Dept. of Homeland Sec., Fact Sheets: Section 287(g), Immigration and Nationality Act; Delegation of Immigration Authority (January 21, 2010), *available at* http://www.ice.gov/doclib/pi/news/factsheets/section287_g-1.pdf [hereinafter ICE Fact Sheet January 21, 2010].
44. ICE Fact Sheet June 22, 2007, *supra* note 31.
45. ICE Fact Sheet January 21, 2010, *supra* note 43.
46. U.S. Immigration and Customs Enforcement, U.S. Dept. of Homeland Sec., News Release (October 16, 2009), *available at* <http://www.ice.gov/pi/nr/0910/091016washingtondc.htm> [hereinafter ICE News Release October 16, 2009]; *see also* Law Enforcement News Center, *at* <http://www.lenewscenter.com/2009/10/ice-announces-standardized-287g-agreements/>.
47. ICE Fact Sheet January 21, 2010, *supra* note 43.
48. ICE Fact Sheet January 21, 2010, *supra* note 43; *see* Jason G. Idilbi, Recent Development, *Local Enforcement of Federal Immigration Law: Should North*

- Carolina Communities Implement 287(g) Authority?*, 86 N. C. L. REV. 1710, 1716 n.21 (2008).
49. Florida adopted the task force model. For an in-depth discussion of Florida's MOA see Carrie L. Arnold, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 125-27 (2007).
50. ICE Fact Sheet January 21, 2010, *supra* note 43.
51. *Id.*
52. *Id.* Jurisdictions adopting the "jail enforcement model" include Etowah County Sheriff's Office, AL; Maricopa County Sheriff's Office, AR; Arizona Department of Corrections, AR; San Bernardino County Sheriff's Office, CA; El Paso County Sheriff's Office, CO; Delaware Department of Corrections, DE; Jacksonville Sheriff's Office, FL; Whitefield County Sheriff's Office, GA; Cobb County Sheriff's Office, GA; Gwinnett County Sheriff's Office, GA; Las Vegas Metropolitan Police Department, NV; Hudson County Department of Corrections, NH; Monmouth County Sheriff's Office, NH; Cabarrus County Sheriff's Office, NC; Gaston County Sheriff's Office, NC; Mecklenburg County Sheriff's Office, NC; Wake County Sheriff's Office, NC; Alamance County Sheriff's Office, NC; Henderson County Sheriff's Office, NC; Charleston County Sheriff's Office, SC; York County Sheriff's Office, SC; Davidson County Sheriff's Office, TN; Carrollton Police Department, TX; Harris County Sheriff's Office, TX; Washington County Sheriff's Office, UT; Weber County Sheriff's Office, UT; Prince William-Manassas Adult Detention Center, VA. The jurisdictions adopting the "task enforce model" include Alabama Department of Public Safety, AL; Rogers Police Department, AR; City of Springdale Police Department, AR; City of Mesa Police Department, AR; Florence Police Department, AR; Arizona Department of Public Safety, AR; City of Phoenix Police Department, AR; Colorado Department of Public Safety, CO; City of Danbury Police Department, CT; Bay County Sheriff's Office, FL; Florida Department of Law Enforcement, FL; Georgia Department of Public Safety, GA; Minnesota Department of Public Safety, MN; Missouri State Highway Patrol, MO; Hudson City Police Department, NH; Durham Police Department, NC; Guilford County Sheriff's Office, NC; Rhode Island State Police, RI; Beaufort County Sheriff's Office, SC; Tennessee Highway Patrol/Department of Safety, TN; Farmers Branch Police Department, TX; Herndon Police Department, VA; Loudoun County Sheriff's Office, VA; Manassas Police Department, VA; Prince William County Police Department, VA; Prince William County Sheriff's Office, VA. *Id.*
53. *Id.* The twelve jurisdiction adopting both the "jail enforcement model" and the "task force model" include Benton County Sheriff's Office, AR; Washington County Sheriff's Office, AR; Pima County Sheriff's Office, AR; Pinal County Sheriff's Office, AR; Yavapai County Sheriff's Office, Collier County Sheriff's Office, FL; Hall County Sheriff's Office, GA; Frederick County Sheriff's Office, MD; Butler County Sheriff's Office, OH; Tulsa County Sheriff's Office, OK; Rockingham County Sheriff's Office, VA; Shenandoah County Sheriff's Office, VA. *Id.*
54. *Id.* Active MOAs pending "good faith" negotiations include Los Angeles County Sheriff's Office, CA; Orange County Sheriff's Office, CA; Riverside County Sheriff's Office, CA; Massachusetts Department of Corrections, MA; New Mexico Department of Corrections, NM. New MOAs pending "good faith" negotiations include Rhode Island Department of Corrections, RI. *Id.*
55. ICE Fact Sheet January 21, 2010, *supra* note 43.
56. *Id.*

57. U.S. Government Accountability Office, REPORT TO CONGRESSIONAL REQUESTERS, BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (Jan. 2009), *available at* <http://www.gao.gov/new.items/d09109.pdf> [hereinafter GAO Report]. The report was generated as a response to Congressional requesters. *Id.*
 58. In the press release dated October 16, 2009 Assistant Secretary Morton stated, “[s]tandardizing these agreements allows us to better use the resources and capabilities of our law enforcement partners, facilitates accountability and ensures that all participating jurisdictions are following uniform standards throughout the country.” ICE News Release October 16, 2009, *supra* note 46.
 59. *Id.* Six jurisdictions, including Danbury, Connecticut, signed the new standardized agreement on October 15, 2009. *Id.* Within a month from that event, three more jurisdictions followed suit. *See* ICE Fact Sheet January 21, 2010, *supra* note 43.
 60. *See* Idilbi, *supra* note 48, at 1718-19 (2008) (discussing these two models).
 61. Danbury Agreement, *supra* note 42, at 17, app D. In the Task Force model setting, all contact with the media involving investigations conducted by Task Force Officers under this MOA will be done pursuant to ICE policy. The MOA identifies points of contact for ICE. *Id.* at 16, app. C.
 62. *Id.*
 63. This includes the power and authority to interview any person reasonably believed to be an alien. “Reasonably believed” is a very low standard.
 64. Danbury Agreement, *supra* note 42, at 17, app D.
 65. Danbury Agreement, *supra* note 42, at 2. An immigration officer under 287(g) has the authority to apprehend despite no criminal activity. *See* discussion *infra* Part II. Although 287(g) is focused on criminal aliens, not all aliens encountered through these programs have criminal convictions. *See* Detention Overview, *supra* note 35.
 66. *See generally* Harris, *supra* note 12.
 67. Immigration and Nationality Act §287(g), 8 U.S.C. § 1357(g) (2006).
 68. 8 U.S.C. § 1101(a)(3) (2009). The term “alien” does not include foreign nationals who have become naturalized U.S. citizens. *Id.*
 69. Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357 (a)(5)(A)(2006).
 70. Aldana, *supra* note 12, at 1096–1097.
 71. Terry v. Ohio, 392 U.S. 1, 21 (1968).
- Under the Fourth Amendment to the United States Constitution, and under article first, § 7, and article first, § 9, of the Connecticut Constitution, a police officer may briefly detain an individual for investigative purposes if the officer has a reasonable and articulable suspicion that the individual has committed or is about to commit a crime.
- Id.* (internal citations omitted); State v. Lamme, 216 Conn. 172, 184 (1990) (“Under both the federal and state constitutions, police may detain an individual for investigative purposes if there is a reasonable and articulable suspicion that the individual is engaged in or about to engage in criminal activity.”); State v. Groomes, 232 Conn. 455, 472 (1995) (stating defendant’s flight could be considered in determining whether there was reasonable and articulable basis for suspicion where defendant began to flee before the police attempted to stop him).
72. State v. Oquendo, 223 Conn. 635, 654 (1992).
 In determining whether the detention was justified in a given case, a court must consider if [b]ased upon the whole picture the detaining officers [had] a particular-

ized and objective basis for suspecting the particular person stopped of criminal activity. . . [A] court reviewing the legality of a stop must therefore examine the specific information available to the police officer at the time of the initial intrusion and any rational inferences to be derived therefrom . . . [T]hese standards, which mirror those set forth by the United States Supreme Court in *Terry v. Ohio*, with regard to fourth amendment analysis, govern the legality of investigatory detentions under article first, §§ 7 and 9 of our state constitution.

Id. (citations omitted; internal quotation marks omitted.).

73. *State v. Trine*, 236 Conn. 216, 224-225 (1996)
74. *State v. Wilkins*, 240 Conn. 489, 496 (1997) (*quoting* *State v. Gant*, 231 Conn. 43, 65 (1994)).
75. *State v. Martin*, 2 Conn.App. 605, 611 (1984), *cert. denied*, 195 Conn. 802 (1985)
76. *State v. Anderson*, 24 Conn. App 438, 441, *cert. denied*, 219 Conn. 903 (1991).
77. *Muehler v. Mena*, 544 U.S. 93 (2005).
78. *Id.* at 95. *See also* Aldana, *supra* note 12, at 1118-21 (2008) (discussing *Muehler v. Mena* in greater detail).
79. *Mena*, 544 U.S. at 102 (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)).
80. *Id.* at 96.
81. *Id.* at 94-95.
82. *Id.* at 101-102.
83. ENFORCE is the principal system used by ICE for processing administrative arrests, booking, and removal of persons encountered during immigration and law enforcement investigations and operations. United States Department of Homeland Security, PRIVACY IMPACT ASSESSMENT FOR THE ENFORCEMENT INTEGRATED DATABASE (“EID”), January 14, 2010, http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_ice_eid.pdf (last visited Jan. 24, 2011) [hereinafter ENFORCE].
84. Writing a dissent in *Hiibel*, Justice Breyer asked, if requesting an individual’s name or identification is deemed acceptable, what will be the next step and the next erosion of a constitutionally guaranteed right? Will police be allowed then to request license numbers or address and compel individuals to answer? *Hiibel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177, 198 (2004). Justice Breyer noted, “answers to any of these questions, or may not, incriminate, depending on the circumstances.” *Id.* at 199. *See, e.g.*, Michael D. Treacy, *Hiibel v. Sixth Judicial District Court of Nevada: Is a Suspect’s Refusal to Identify Himself Protected by the Fifth Amendment?*, 40 NEW ENG. L. REV. 897 (2006).
85. Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 708 (2009) (“Searching the homes of welfare applicants, and drug testing welfare recipients, is nothing but fishing for wrongdoing.”).
86. *Id.* at 708 n.298.
87. The Supreme Court in Connecticut takes this is a step further and concluded in *State v. Donahue* that nighttime investigatory stop of defendant’s vehicle in vacant parking lot in increased crime area was not justified. *State v. Oquendo*, 223 Conn. 635, 648-49 (1992).
88. Although this paper focuses on profiling based on a Latino ethnicity, I would like to acknowledge that 287(g) affects the Muslim population as well. *See* John Tehranian, *Compulsory Whiteness: Towards a Middle Eastern Legal Scholarship*, 82 IND. L. J. 1 (2007) (discussing how the state’s racial fiction fosters an invisibility that enables

- perpetuation and expansion of discriminatory conduct, both privately and by the state, against individuals of Middle Eastern descent).
89. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) (finding that while use of a person's ancestry is a relevant factor in finding reasonable suspicion, standing alone, it would not be sufficient).
 90. *See Arizona v. Hicks*, 480 U.S. 321, 324 (1987) (holding "that in certain circumstances a warrantless seizure by police of an item that comes within plain view during their lawful search of a private area may be reasonable under the Fourth Amendment.") relying on *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).
 91. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (holding that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the 4th and 14th Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied). Note that the State need not prove that the one giving permission to search knew that he had a right to withhold his consent. *Id.*
 92. *United States v. Leon*, 468 U.S. 897 (1984) (holding that a law enforcement officer's reliance on magistrate's determination of probable cause was objectively reasonable and application of the extreme sanction of exclusion is inappropriate).
 93. The United States Supreme Court has most frequently held that warrantless searches are presumptively unreasonable, see, e.g., *Katz v. United States*, 389 U.S. 347, 357 (1967); *Payton v. New York*, 445 U.S. 573, 583 (1980), but has also found a plethora of exceptions to presumptive unreasonableness, see, e.g., *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 534—539 (1967) (administrative searches); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298 (1967) (exigent circumstances); *Chimel v. California*, 395 U.S. 752, 762—763 (1969) (searches incident to arrest); *United States v. Biswell*, 406 U.S. 311, 315—317 (1972) (searches of "pervasively regulated" businesses); *Almeida-Sanchez v. U.S.*, 413 U.S. 266, 272 (1973) (border searches); *United States v. Ross*, 456 U.S. 798, 800 (1982) (automobile searches); *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983) (inventory searches); *California v. Carney*, 471 U.S. 386, 390—394 (1985) (mobile home searches).
 94. *See ENFORCE supra* note 83.
 95. *See, e.g., Chacón, supra* note 21, at 137 n.3 (citing Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law"*, 29 N.C. J. INT'L L. & COM. REG. 639, 653 (2004) ("After the criminal justice system has completed its work, the removal system begins.")).
 96. The exclusionary rule was not broadly enforced at the state level until 1961 in the landmark United States Supreme Court case *Mapp v. Ohio*. *See, e.g., Wolf v. Colorado*, 338 U.S. 25, 47 (1949) (Rutledge, J., dissenting) (rejecting the Court's conception of the exclusionary rule), *aff'g* 187 P.2d 926 (Colo. 1947), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961) ("Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise.").
 97. *Mapp*, 367 U.S. at 656 (holding that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court).
 98. *Mapp*, 367 U.S. at 643 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).
 99. *Aldana, supra* note 12, at 1120. In *Mena*, the Court held that "the officers did not need a reasonable suspicion to ask Mena for her name, date and place of birth, or

- immigration status” and did not address whether Mena would be required to answer. *Muehler v. Mena*, 544 U.S. 93, 102 (2005).
100. Aldana, *supra* note 12, at 1120; *see, e.g.*, *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt County*, 542 U.S. 177, 181-83 (2004).
 101. *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that interrogation accompanied by custody is so likely to be coercive that the defendant must be warned of his right not to talk to police and to have assistance of counsel before and during any questioning).
 102. Aldana, *supra* note 12, at 1119.
 103. Interpreter Releases, ICE Discusses Delegation of Immigration Authority to State and Local Entities under the 287(g) Program, 84 NO. 38 Interpreter Releases 2273, October 1, 2007 [hereinafter Interpreter Releases October 1, 2007].
 104. Immigration and Nationality Act §287(g), 8 U.S.C. § 1357(g)(1).
 105. *See* Aldana, *supra* note 12, at 1121 n.246 (citing *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (refusing to cooperate can be one of several factors to establish reasonable suspicion)).
 106. *State v. Donahue*, 251 Conn. 636, 640-41 (1999).
 107. *Id.* at 641.
 108. *Id.* At this moment in the fact pattern, the first distinction of a 287(g) jurisdiction arises. If you are unlucky enough to be in Danbury, Connecticut, the officer acting under 287(g) authority can run the driver’s name through a federal database and take the driver into custody if he or she is unable to produce a valid identification. Information that is not per se incriminating to a citizen is lethal to a noncitizen.
 109. *Id.*
 110. *Id.*
 111. *Id.* at 641.
 112. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975).
 113. *State v. Oquendo*, 223 Conn. 635 (1992).
 114. *Id.* at 641.
 115. *Id.* at 657. “A history of past criminal activity in a locality does not justify suspension of the constitutional rights of everyone, or anyone, who may subsequently be in that locality.” *Id.* at 655 n.11. Similarly, in *Donahue*, the state argued that the following five factors produced a reasonable suspicion that the defendant was engaged or about to engage in criminal activity: (1) he was driving in a deserted area late at night; (2) he made an abrupt turn into the parking lot; (3) he pulled into an empty, unlit parking lot of an establishment that had closed for the evening; (4) his vehicle was in an area that had experienced a rise in criminal activity; and (5) his behavior was “consistent with the type of behavior that often preceded the criminal activity Lynch was out on patrol investigating.” The Court in *Donahue* disagreed and concluded that, “[a]s in *Oquendo*, the officer did not have a reasonable and articulable suspicion.” *Id.* at 649. The Court was unpersuaded that the totality of circumstances in this case reach the level of a reasonable suspicion found in Connecticut precedents.
 116. Yafang Deng, *When Procedure Equals Justice: Facing the Pressing Constitutional Needs of a Criminalized Immigration System*, 42 COLUM. J.L. & SOC. PROBS. 261, 272 (2008).
 117. 77 Am. Jur. 2d Vagrancy and Related Offenses § 1 (March 2010) (citing *Parshall v. State*, 62 Tex. Crim. 177, 138 S.W. 759 (1911)).
 118. William J. Stuntz, *Terry’s Impossibility*, 72 ST. JOHN’S L. REV. 1213, 1216 (Summer/Fall 1998); *see, e.g.*, Caleb Foote, *Vagrancy-Type Law and its Administration*, 104 U. PA. L. REV. 603 (1956) (analyzing the history, theory and purposes of vagrancy-type

- laws); *see also* William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960) (emphasizing the connection between vagrancy law and the arrest power).
119. *See, e.g.*, the decisions in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) and its progeny striking down vagrancy statutes on void-for-vagueness grounds.
 120. William J. Stuntz, *Local Policing After the Terror*, YALE LAW JOURNAL (June, 2002).
 121. Heather Winter, *Resurrecting the "Dead Hand" of the Common Law Rule of 1789: Why Is in Jeopardy*, 42 NO. 5 CRIM. LAW BULLETIN ART 1 n.33 (citing Wayne LaFave, "Street Encounters" and the Constitution: *Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 39, 46 (1968)).
 122. Stuntz, *supra* note 118, at 1217.
 123. Mark Langlois, *Danbury Spikes Volleyball Court*, THE NEWS TIMES, July 29, 2005, available at <http://www.ctpost.com/default/article/Danbury-spikes-volleyball-court-53498.php>.
 124. Nina Berstein, *Challenge in Connecticut Over Immigrants' Arrest*, NY TIMES, September 26, 2007, available at <http://www.nytimes.com/2007/09/26/nyregion/26daylabor.html>. Gov. M. Jodi Rell refused to pursue that proposal. *Id.* *See also* Barrera et al v. Boughton, Second Amended Complaint, October 1, 2009, 2009 WL 4274953 (D. Conn.) ("Mayor Boughton very publicly, and unsuccessfully, sought such a written agreement in Connecticut in 2005).
 125. Barrera et al v. Boughton, Second Amended Complaint, October 1, 2009, 2009 WL 4274953 (D. Conn.).
 126. *Id.*
 127. Perrefort, *supra* note 5.
 128. JT.S. Mallonga, *Danbury approves police tie-up with ICE*, Voices that must be heard, February 29, 2008, Edition 312: 12 March 2008. http://www.indypressny.org/nycma/voices/312/news/news_4/ (last visited Jan. 18, 2011).
 129. Danbury Agreement, *supra* note 42, at 11. The MOA in Danbury (the "Danbury Agreement") sets forth the following: 1) the functions of an immigration officer that Homeland Security is authorizing the participating Danbury Police Department personnel to perform; 2) the duration of the authority conveyed; 3) the supervisory requirements, including the requirement that participating Danbury Police Department personnel are subject to ICE supervision while performing immigration-related duties pursuant to the agreement; and 4) program information or data that the Danbury Police Department is required to collect as part of the operation of the program. For the purposes of the Danbury Agreement, ICE officers will provide supervision for participating Danbury Police Department personnel only as to immigration enforcement and/or immigration investigative functions as authorized in the agreement. *Id.* at 6.
 130. *See* Idilbi, *supra* note 48, at 1714 n.7 (2008) (discussing *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007)). The City of Hazelton, Pennsylvania, attempted to regulate the presence and employment of undocumented aliens through the *Illegal Immigration and Relief Act Ordinance*, Hazelton, Pa., 2006-18 (July 13, 2006), as amended by the *Tenant Registration Ordinance*, Hazelton, Pa., 2006-13 (Aug. 15, 2006) and the *Official English Ordinance*, Hazelton, Pa., 2006-19 (Sept. 21, 2006).
 131. KATHERINE A. NEUMANN, CRIMINAL JUSTICE AND LAW ENFORCEMENT ISSUES 37 (2002).
 132. *State v. Donahue*, 251 Conn. 636, 648 (1999).
 133. *Id.* at 648-49 n.11; *see also* *Fishbein v. Kozlowski*, 252 Conn. 38, 58 n.5 (1999).

134. See discussion *supra* Part II.B.
135. Kozlowski, 252 Conn. at 51, 58-59.
136. Interpreter Releases October 1, 2007, *supra* note 103.
137. Public Act No. 99-198, Substitute Senate Bill No. 1282, Approved June 28, 1999.
138. *Id.*
139. See text and accompanying notes *supra* Part II.A.
140. The Naturalization Clause states that “Congress shall have the Power to establish a uniform Rule of Naturalization.” U.S. Const. art. I, §8, cl. 4. See also Deng, *supra* note 116, at 274.
141. See *id.* at 274 n.70.
142. See Immigration and Nationality Act §287(g), 8 U.S.C. § 1357(a)(1) (2006).
143. The potential for profiling is especially high in a routine traffic stop. Connecticut Supreme Court Justice Berdon states in a dissent:

I am concerned about the overzealous police officer who readily acts on subjective rather than reasonable suspicions. Unfortunately, the majority fails to face the reality that Connecticut law enforcement officials continue to use racial and other types of profiling. Minorities who live in Connecticut and those who pay attention to news reports cannot help but come to this conclusion. Although those officers who do not live up to their oath by indulging in such subjective practices are probably few in number, their impact on justice and the quality of life for minority residents is enormous.

Fishbein v. Kozlowski, 252 Conn. 38, 58 n.6 (1999) (statute's probable-cause-to-arrest requirement, coupled with provision for administrative hearing, afforded driver all constitutional protection to which he was entitled).
144. I.N.S. v. Delgado, 466 U.S. 210 (1984) (holding that questioning of individual workers at a factory did not amount to a seizure or detention for Fourth Amendment purposes).
145. The Office of Investigations (“OI”) is responsible for investigating a range of issues that may threaten national security. The Office of Investigations has twenty-six Special Agents in Charge (“SACs”) of principal field offices throughout the United States. Immigration and Customs Enforcement, <http://www.ice.gov/about/investigations/contact.htm#top> (last visited Feb. 11, 2011). The Danbury Police Department is in the geographical boundary of the SAC office in Boston, Massachusetts. Danbury Agreement, *supra* note 42, at 7. The Special Agents in Charge specify the supervisory and other administrative responsibilities in accompanying agreed-upon standard operating procedure and ensures compliance with the terms of the MOA. *Id.* at 6, 9.
146. See text and accompanying notes, *supra* Part III.A.
147. Anita Khashu, Police Foundation, *The Role of Local Police: Striking a Balance Between Immigration Enforcement*, April 2009, available at <http://policefoundation.org/strikingabalance/> [hereinafter Police Foundation Report]. See also Interpreter Releases, *Report and Analysis of Immigration and Nationality Law*, 86 NO. 21 Interpreter Releases 1505 (May 22, 2009).
148. Interpreter Releases, *Report and analysis of immigration and nationality law*, 86 NO. 21 Interpreter Releases 1505 (May 22, 2009).
149. The Danbury Agreement specifies that participating Danbury Police Department personnel will provide an opportunity for subjects with limited English language proficiency to request an interpreter. Danbury Agreement, *supra* note 42, at 8. This provision may address concerns over the victimization and exploitation of immigrants.

150. Police Foundation Report, *supra* note 147.
151. *Id.*
152. April McKenzie, Commentary, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration laws Since 9/11*, 55 ALA. L. REV. 1149, 1162 (2004). In this paper I am contesting the validity and efficacy of 287(g) agreements as a whole, whether addressing serious or minor criminal activity or civil violations.
153. “Participating officers in the 287(g) program must meet the following requirements: U.S. citizenship; current background investigation completed; task force officers must have a minimum one year experience in law enforcement that includes experience in interviewing witnesses, interrogating subjects providing constitutional rights warnings, obtaining statements, and executing search and seizure warrants; jail enforcement officers must have experience supervising incarcerated individuals; and no disciplinary actions pending.” ICE Fact Sheet January 21, 2010, *supra* note 43.
154. Stumpf, *supra* note 19, at 395.
155. *Id.*
156. ICE Fact Sheet January 21, 2010, *supra* note 43.
157. *Id.*
158. See McKenzie, *supra* note 152, at 1162 (“Terrorists who intend on committing acts like America witnessed on September 11th often have the resources and intelligence to maintain proper immigration status. Instead, this policy is targeting the restaurant worker, orange grove farmer, hotel bellhop, or otherwise law-abiding undocumented alien.”).
159. GAO Report, *supra* note 57.
160. *Id.*
161. Everton Bailey, Jr., *Illegal Immigrants Fleeing Danbury Due to Economy, Pressure*, THE HOUR, August 16, 2009, available at <http://www.thehour.com/story/473498>.
162. See text and accompanying notes *supra* Introduction.
163. Deng, *supra* note 116, at 272.
164. *Zadvydas v. Davis*, 533 U.S. 678, 609 (2001).
165. See Detention Overview, *supra* note 35. As reported by the Department of Homeland Security, using information gathered by Dr. Dora Schriro, the Director of the Office of Detention Policy and Planning, of the aliens apprehended by an arresting authority, twelve percent were apprehended by the Office of State and Local Coordination pursuant to 287(g). *Id.* The percentage is based on FY 2009 Average Daily Population (ADP) of June 30, 2009. *Id.* The total number of aliens apprehended by a local arresting authority, as opposed to apprehended by ICE, was 369,482. *Id.* In 2009, the number of non-criminal book-ins exceeded criminal book-ins. Non-criminal book-ins consisted of sixty-five percent (29,159) of total book-ins (44,692). *Id.* Implied in these numbers is the tendency of local law enforcement officers to assist in the apprehension of members of the community without a reasonable suspicion or probable cause to arrest or convict. Furthermore, ICE is unable to detain these immigrants due to a lack of resources and detention space. Laurel R. Boatright, Student Note, “*Clear Eye for the State Guy*”: *Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement*, 84 TEX. L.REV. 1633, 1634 n.13 (2006). The increased lack of detention facilities should deter ICE from pursuing new 287(g) agreements with state and local jurisdictions.

- 166. Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1503 (2006).
- 167. *Id.*
- 168. See Detention Overview, *supra* note 35.
- 169. Katz v. U.S., 389 U.S. 347, 352 (1967)

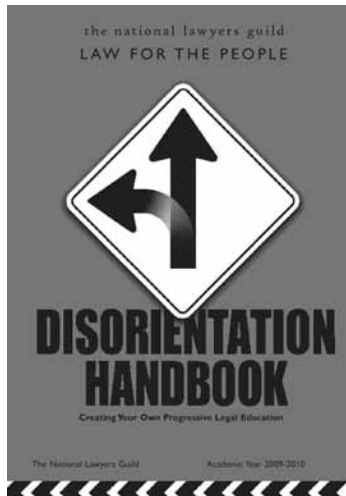


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Jan Susler

**NATIONAL LAWYERS GUILD
INTERNATIONAL COMMITTEE
PRESENTATION TO THE UNITED NATIONS
DECOLONIZATION COMMITTEE HEARINGS
ON PUERTO RICO, JUNE 20, 2011**

The National Lawyers Guild was founded in 1937 as an alternative to the American Bar Association, which did not admit people of color. The National Lawyers Guild is the oldest and largest public interest/human rights bar organization in the United States. With headquarters in New York, it has chapters in every state. From its founding, the National Lawyers Guild has maintained an internationalist perspective, with international work a critical focus for the Guild. Its International Committee has organized delegations to many countries throughout the world, and Guild members are involved in international organizations such as the International Association for Democratic Lawyers and the American Association of Jurists. Presently, active subcommittees exist for Cuba, the Middle East, Korea, Haiti, Palestine, Iran, Puerto Rico, and other nations. Guild members, including myself, have a long history of defending activists in the Puerto Rican independence movement.

I. Status

The Obama administration has joined the ranks of successive U.S. administrations which ignore the provisions of international law which this Honorable Committee has year after year conscientiously applied to the colonial case of Puerto Rico.¹ In March of this year, the U.S. President's Task Force on Puerto Rico's Status — of which there is not a single Puerto Rican member — issued a report² with recommendations proposing methods for purportedly resolving the status question, acknowledging that “status remains of overwhelming importance to the people of Puerto Rico,”³ but nowhere expressly acknowledging the colonial status or the application of international law. The report suggests convening a plebiscite process, polling the people of Puerto Rico regarding available status options of statehood, independence, free association and commonwealth. However, there is a significant potential for the elimination of the independence option. Although more than half the population lives in the United States, the Task Force suggests that “only residents of Puerto Rico should be eligible to vote in any plebiscite.”⁴ The report, moreover, does acknowledge that it is the U.S. Congress that will ultimately determine the resolution of the status.⁵

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The report also addresses multiple insertions of increasing U.S. programs into Puerto Rico, from the economy to education to labor, from health care to the environment to law enforcement, in a barely veiled attempt to increase the nation's dependency on the United States.⁶

Last week, President Obama made a four-hour stop in Puerto Rico, the first U.S. president in 50 years to visit the island nation.⁷ He encountered mass demonstrations comprised of diverse groups,⁸ with placards and banners reading "Obama, Go Home!"⁹ and calling for an end to U.S. colonial control, independence, and the release of the Puerto Rican political prisoners, particularly Oscar López Rivera.¹⁰ "Obama can't talk about freedom while he has Oscar and the others in prison," was a theme echoed by the people.¹¹

While the White House claimed that the trip was related to furthering the goals of the Task Force,¹² the visit was seen as a transparent attempt to woo the many Puerto Rican voters who now reside in the U.S.,¹³ including in the hotly contested state of Florida in the upcoming 2012 U.S. presidential election,¹⁴ as the people of Puerto Rico cannot vote for president. More than half of Mr. Obama's time on the island was spent raising over \$1 million for his re-election campaign.¹⁵ It was clear to the Puerto Rican people that "neither Obama nor his recent predecessors recognize that the Puerto Rican political case is a colonial problem."¹⁶

II. The ongoing crisis of colonialism

The economy of the colony, one of the few economies in the world with negative growth,¹⁷ and among slowest growing in the world,¹⁸ cannot support the population.¹⁹ Unemployment is at its highest in two decades,²⁰ higher than any state in the U.S.²¹ There is an unprecedented exodus, being called "a brain drain,"²² leading to the startling statistic that now more than half the Puerto Rican population lives outside the island,²³ and the vicious cycle of difficulty in building an economy when much talent is seduced away by the lack of job opportunities on the island and the perception of increased job opportunities in the U.S.²⁴

With lack of control over its own borders, Puerto Rico has been unable to stem the unstaunched flow of drugs, which has led to a second, underground economy and related crime, as well as a staggering murder rate: as of June 9, there had been 491 murders this year alone; if the murder rate continues, there will be 1,000 murders this year, making it the most deadly in Puerto Rico's history.²⁵

In this context, in the past year, the human rights crisis on the island has burgeoned. The superintendent of Police, a former U.S. agent of the Federal Bureau of Investigation (FBI), has overseen and applauded the unending wave

of violent attacks on people protesting the policies of the colonial administration,²⁶ particularly on striking students at the University of Puerto Rico.²⁷

Police violence has attracted the attention and condemnation of Amnesty International in London,²⁸ and even the U.S. Department of Justice is investigating.²⁹

The colonial administration has taken measures to ensure that the courts of the colony are hostile to anything but the administration's partisan line, leaving most litigants without an impartial judicial forum in which to challenge such human rights violations.

The colonial administration packed the Supreme Court, increasing the number of justices from seven to nine, in a transparently partisan effort, accelerating the nomination and confirmation process.³⁰ The expansion, which supposedly responded to the court's workload, was largely seen as an excuse and has been criticized as unnecessary and a power grab by the governor's pro-statehood party,³¹ with the criteria for appointment favoring strong pro-statehood credentials over legal and judicial experience.³² The court-packing was only one part of a broader plan, which included legislation to gut the judicial appellate process, fast-tracking appeals directly to the partisan higher court, often bypassing the intermediate appellate courts.

The U.S. federal court in Puerto Rico has been a full partner in ratifying the rampant violations of human rights, with the case against the Puerto Rico Bar Association as a foremost example, where the court blatantly assisted disaffected pro-statehood partisans' attempts to not only dismantle the venerable institution,³³ but to try to seize the building which serves as its headquarters as well as a cultural center,³⁴ and in the course of which the federal court held in contempt and jailed the president for educating his constituency about the lawsuit.³⁵

The public university system has been taken over by partisan politics. The colonial administration expanded the board of trustees with four fast-tracked appointees and named a commission to restructure the university with members openly hostile to its existence.³⁶ The administration has also imposed tuition hikes and curricular changes which undermine university autonomy and the role of the university as a forum for open discussion of issues of concern to the people of Puerto Rico.

The labor movement continues to be under attack by the colonial administration's adoption of anti-labor measures, never having redressed the dismissal of some 30,000 public workers, the abrogation of collective bargaining agreements in the public sector, or the creation of "public-private alliances" as part of the privatization of essential public services, with the resultant hardship for workers in Puerto Rico. Labor union protests of these draconian

measures have been met with indifference in some instances and with violent repression at other times.

The history of criminalizing the independence movement continues unabated.³⁷ The head of the FBI office in San Juan was recently promoted to an administrative position in FBI headquarters, a move attributed to the “disarticulation” during his watch of the clandestine pro-independence group The Macheteros, including the 2005 assassination of Filiberto Ojeda Ríos, the 2008 arrest of alleged Machetero Avelino González Claudio, and the 2011 arrest of alleged Machetero Norberto González Claudio.³⁸

III. Political prisoners

This year has been historically significant for Puerto Rico’s political prisoners held in United States prisons. The sole remaining political prisoner of the group arrested in the 1980s is Oscar López Rivera, who has the unenviable distinction of having served 30 years in prison, despite the fact that he was not convicted of harming anyone or taking a life. López, 68 years old, and serving a sentence of 70 years, has a release date of 2023.³⁹ In a politically punitive move, the U.S. Parole Commission recently refused his parole bid, erroneously asserting that his release would promote disrespect for the law. The decision ignored the express will of the Puerto Rican people and those who believe in justice and human rights, counting tens of thousands of voices across the political spectrum who have uniformly supported his immediate release. The Commission ignored the evidence establishing that he met all the criteria for parole and also ignored its own rules in the process. Among these many ignored voices are this venerable body, members of the United States Congress and many state legislatures of the various states; the city councils and county boards of many locales in the U.S. and Puerto Rico; the mayors of many towns in the U.S. and Puerto Rico, including the Association of Mayors of Puerto Rico; bar associations including the Puerto Rico Bar Association, the National Lawyers Guild and the American Association of Jurists; clergy and religious organizations, including the Ecumenical Coalition representing every religious denomination in Puerto Rico; the National Latino Congreso, human rights advocates, academics, students, artists, community organizations, and workers.

The Commission also flouted President Clinton’s 1999 determination that Oscar’s sentence was disproportionately lengthy and that he should be released in September of 2009. The Commission ignored the fact that Oscar’s co-defendants released as a result of the 1999 Clinton clemency are productive, law-abiding citizens, fully integrated into civil society. Finally, the Commission ignored its own July 2010 order to release Oscar’s last remaining imprisoned co-defendant Carlos Alberto Torres.

Avelino González Claudio, a 68 year old man with Parkinson's Disease, has served 3 years of his 7 year prison sentence and is scheduled for release in 2012.⁴⁰ His brother, Norberto González Claudio, 65, was apprehended last month after 25 years in clandestinity.⁴¹ He awaits trial in federal court in Connecticut, facing 275 years for the same charges as his brother and many former political prisoners, accused of belonging to the Ejército Boricua Popular—Macheteros, a pro-independence clandestine force which expropriated over \$7 million from a Wells Fargo Depot in 1983, the proceeds to finance their struggle for independence.⁴²

They remain strong in spirit, their commitment to the independence of their nation undaunted, in spite of adversity, particularly buoyed by the mass demonstrations of support for their release during the U.S. president's recent visit to the island.⁴³

IV. Environment

Two examples suffice to demonstrate the need for self-determination. The island of Vieques, a U.S. Superfund site, has been shamefully left to abandon after 60 years of military occupation polluted its land, air and water and consequently gravely damaged the health of the people and their economy.⁴⁴ Yet in the face of this shameful abandon, the U.S. makes promises it does not fulfill and suggestions without remedial action.⁴⁵

A \$450 million 92-mile gas pipeline, which the colonial administration euphemistically calls "the Green Way," is another pending environmental disaster, to run across the island, threatening the safety and health of the people and the environment along the entire path, without public participation, in violation of all the rules, and replete with allegations of corruption.⁴⁶ The project has generated massive public opposition.⁴⁷ The role of United States agencies is suspect.⁴⁸

V. Conclusion

The National Lawyers Guild International Committee, incorporating the requests sought by other presenters before this Honorable Committee, urges the adoption of a resolution calling for the General Assembly to consider the case of Puerto Rico; and calling on the government of the United States to:

1. Immediately cease the brutality, criminalization and harassment of, and attacks on, the Puerto Rican Independence Movement, the students, and all those who exercise their fundamental rights to expression and association;
2. Immediately release Puerto Rican political prisoners: Oscar López Rivera, who has served more than 30 years in U.S. custody, and Avelino González Claudio and Norberto González Claudio;

3. Identify and hold criminally liable all those responsible for the assassination of Filiberto Ojeda Ríos (2005), Santiago Mari Pesquera (1976), Carlos Muñiz Varela (1979), and other militants of the Puerto Rican independence movement;
4. Withdraw the FBI, the U.S. court, and all other U.S. police, repressive and military forces from Puerto Rico;
5. Withdraw from Vieques, formally return legal property of the land to the people of Vieques, cease detonating unexploded ordnance, completely clean up the pollution left by the U.S. Navy's 60-year occupation through the use of proven, environmentally friendly clean-up methods, and compensate the people of Vieques for the damage to their health done to them by the same;
6. Cease and desist from the application of the death penalty in Puerto Rico;
7. Ensure the right to quality public higher education;
8. Formally commit to negotiate in good faith with the people of Puerto Rico a solution to the colonial condition; and recognize the proposals that emanate from a Constitutional Assembly, initiated by the people of Puerto Rico, such as that called for by the Puerto Rico Bar Association, as the true expression of the aspirations of the people of Puerto Rico, and respond to them accordingly.

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Arnold Kawano

BOOK REVIEW: *THE COLOR OF LAW*

Steve Babson, Dave Riddle and David Elsila, *The Color of Law: Ernie Goodman, Detroit, and the Struggle for Labor and Civil Rights*, Detroit: Wayne State University Press, 2010. 576 pages. \$24.95.

Law as religion

In the Middle Ages, the church sanctioned the rule of feudal monarchs by providing ideological support for the enforcement of the feudal economic system by threatening ostracism and persecution for any dissent. With the rise of the merchant and industrialist classes and the demise of the feudal economic system, courts of law replaced the church and its feudal hierarchy as the source of social ideology and morality. Today, in capitalist countries, courts of law sanction capitalist rule by providing ideological support and justification for the enforcement of the capitalist economic system.¹

To disguise their ideological role, people are taught that courts impartially interpret and apply immutable, God-given or natural laws and principles. In fact, courts are merely entrusted by governments to interpret and enforce human-created laws that keep them in power. Eighteenth century political economist Adam Smith recognized this:

Laws and government may be considered in this and indeed in every case a combination of the rich to oppress the poor, and preserve to themselves the inequality of the goods which would otherwise be soon destroyed by the attacks of the poor, who if not hindered by the government would soon reduce the others to equality with themselves by open violence.²

United States' courts interpret the Constitution, treaties and laws so as to support the continuation of its capitalist economic system. The interpretation of these laws changes ever so slightly as the economic system evolves and develops in ways as necessary to perpetuate the capitalist system.

In 1937, a group of heretical lawyers broke from the social and legal ideology holding sway over the American Bar Association, which did not permit African-American lawyers to join and whose members opposed the New Deal programs of President Franklin Delano Roosevelt. The heretics formed the

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National Lawyers Guild, the first integrated national bar association in the country. One of the founding members was Ernest Goodman, whose life and accomplishments are chronicled in this admiring biography that affectionately refers to him throughout as Ernie, which is also how he was known to generations of Guild members. By the time he helped to organize the Guild, Goodman had not only parted from the fold of the legal establishment regarding racial discrimination, he had also, like many of his co-founders, converted to atheism³ and socialism.

The color of law

The title of this book is a play on words. The phrase “under color of law” has come to refer to illegal conduct by a government official that has the appearance of legality by virtue of being performed by a police officer, prosecutor, judge or other government official. For example, when police arrest peaceful workers picketing for better working conditions on the premise that the mere act of picketing is disturbing the peace, the police lend the “color of law” to suppression of dissent against corporate exploitation. Goodman not only fought these practices by defending the workers illegally arrested, but he helped to change the “color of law” by establishing the first integrated law firm in Detroit in 1951 and through his representation of civil rights workers and recruitment of many other attorneys to help in this effort as a leading member and then president of the National Lawyers Guild (1964 to 1967).

In addition to being a biography of Goodman, because he played an important role in the leading progressive struggles of his time, this book is also a history of the working class movement in Detroit; the development of labor law under the fledgling National Labor Relations Board; the founding of the National Lawyers Guild and its role under Goodman’s leadership in the civil rights movement’s Freedom Summers of the mid-1960s; and the Attica prison rebellion, police massacre, and prisoner legal defense. During his participation in each of these struggles, Goodman and his colleagues were under FBI surveillance and subject to counter tactics of various sorts by secret government agents. This book includes important historical lessons regarding government and non-government ideological opposition that will be useful to lawyers and non-lawyers who wish to fight the same good fight that Goodman devoted his life to.

There is a long list of notable personalities that color this biography, such as Goodman’s mentor, socialist attorney Maurice Sugar; Goodman’s African-American law partner and future jurist and congressman, George Crockett, Jr.; Guild attorney Ann Fagan Ginger, who was denied a position at Sugar’s all male firm upon graduating law school; Guild executive board member and congressman John Conyers, Jr.; young attorney and future congresswoman

Bella Abzug; and red-scared NAACP Legal Defense Fund executive director and Guild opponent, Jack Greenberg.

Like all books of substance, in recounting the life of a socialist political activist in a capitalist society, this biography raises more issues than can be discussed in a manageable book review. As Goodman confronts each social issue and legal battle, a perceptive reader will want to do further research to understand the political environment and ideological issues in more depth. In this review, I have selected four topics for further discussion and exploration:

1. Control of speech;
2. The National Lawyers Guild, the Communist Party and Japanese-American incarceration during World War II;
3. Labor law and the suppression of the working class; and
4. Government and anti-communist subversion of the left.

Control of speech: legal speak, free speech and responsible speech

Although the authors state that they did not intend to write a hagiography, if one is sympathetic to the causes and people that Goodman represented it would be difficult to write a biography that did not express admiration for the number of socially progressive cases he handled, his courtroom skill, and his boundless energy.⁴ One reason Goodman once gave for his drive was to make up for all the wasted time he spent as a lawyer before he became a socialist.

But for all his drive, Goodman never took time to write a memoir or otherwise give a written account of his work or his political views. He did, however, record a series of oral histories that the authors accessed, along with his personal papers and correspondence stored at Wayne State University. These materials are exhaustively referenced by footnotes. But not enough Goodman in the first person, in his own voice, is quoted. For this reason – and because the authors do not analyze Goodman’s life and works from a socialist viewpoint⁵—the reader is left to wonder if a political biography of Goodman is yet to be written that would disclose a more theoretical side not presented in this account, or if Goodman lacked a theoretical footing for his work.

Other than through the clients he represented and their court cases, there is no discussion about what being a socialist meant to Goodman. However, even when other openly socialist lawyers have written memoirs, there has often been an absence of political theory and analysis.⁶ This is due to at least two factors. The first applies to most leftists in the U.S., namely, the proclivity for action and practice over theoretical grounding and intellectual reflection.⁷ The second applies more particularly to lawyers: a reluctance to make statements in opposition to the capitalist system of private accumulation of profit, capital and property.

The reason for this reluctance is that the socialist litigator who wants to free his or her client from an illegal arrest is required to use arguments found in the same Constitution and the Bill of Rights that supports the economic and political system that led to the illegal arrest in the first place. Rather than pointing out the need for a new constitution to the public outside the courtroom, socialist lawyers often use the unfortunate shorthand of calling for a defense of the Constitution and Bill of Rights because that is an acceptable argument in front of the court. At times Goodman himself opposed making this distinction: “We can’t both talk about the Constitution as if it had no value and at the same time say we are demanding our constitutional rights.”⁸

According to the authors, almost to the end of his career, Goodman opposed using progressive political statements in his court presentations. He was interested in gaining freedom for his clients who were arrested in violation of a previous court interpretation of the Bill of Rights so that they could return to their organizing work. Goodman understood that judges and most juries would not release his clients based on a socialist analysis of capitalist exploitation and injustices of the capitalist system. In his last major defense case—wherein he defended Attica prisoners accused of murdering prison guard hostages—Goodman relaxed this opposition because he was not the sole defense attorney and because of the ideological progress he helped create in the country through his civil rights work.

So there’s the rub. The church of the court demands faithful arguments based on the Constitution and Bill of Rights in the courthouse even if the priestly lawyer is a heretic in the confessional booth. Indeed, the Anglo-American common law system that dictates court decisions be based on precedent ensures that any anti-capitalist heresy will fall on deaf ears in the church of the court. When coupled with a lack of theoretical analysis of this hegemony, socialist lawyers, their clients, and the authors of this book are easily confused about such issues as freedom of speech.

In 1943 Goodman asked U.S. Attorney General Biddle to suppress the publication of a fascist newspaper that called for the mass deportation of Jews and the use of sterilization as a solution for minority “problems.” The newspaper was published by Gerald L.K. Smith, a demagogic white supremacist and Detroit radio broadcaster. Goodman was certain that the paper and broadcasts contributed to the outbreaks of racial violence in Detroit that led to U.S. Army troops patrolling Detroit streets. Biddle did not act on Goodman’s request.

The authors state that Biddle was a committed civil libertarian and cite as an example his supposed opposition to the government incarceration of Japanese-Americans during World War II. Apparently, the authors were unaware that the Attorney General’s office suppressed evidence in the 1943 and

1944 Supreme Court cases of *Hirabayashi v. United States*,⁹ *Yasui v. United States*,¹⁰ and *Korematsu v. United States*¹¹ that upheld the constitutionality of the mass incarceration. The Attorney General's office did not disclose to the defense or the court evidence such as Department of Justice reports that showed no disloyal actions by Japanese-Americans and recommendations by J. Edgar Hoover and the Secretary of the Navy against incarceration.¹² When these actions were uncovered nearly forty years later, the convictions of Hirabayashi, Yasui and Korematsu were overturned but the constitutionality of the incarceration remains. The authors state that Biddle, not Goodman, made the stronger defense of free speech and speculate that "Biddle held to the view that the best way to counter un-American speech, however defined, was counter-speech, not suppression."

By criticizing Goodman's statement in terms of First Amendment freedom of speech, the authors pray at the altar of the Bill of Rights without recognizing that the speech we have in this country is free to the capitalist but not to the working class and poor, most clearly expressed by the Supreme Court recently in *Citizens United v. Federal Election Commission*¹³ and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.¹⁴

Furthermore, the freedom of speech that a socialist fights for is not freedom to spread lies or bigotry but freedom to speak for social justice. To the extent that libertarians defend freedom of hate speech directed at oppressed groups, they support the capitalist objectives of dividing and exploiting the working class.

What confuses this issue are the arguments by socialist attorneys for "freedom of speech" in the abstract in court documents and oral arguments before the court. What may seem like an argument for freedom of speech in all its forms, including hate speech, when made in these contexts is really tailoring a defense of certain conduct that can be justified by the court in terms of the Constitution and legal precedents. Would the distinctions about types of speech and their consequences that are made in the preceding paragraph be understood or accepted by jurists? Unlikely. Therefore the socialist lawyer who wants to gain freedom for his or her client will use the expedient arguments that can be understood and accepted by the courts. The church of the court only recognizes recitations of the scriptures rather than arguments based on political and economic reality.

In a reversal of his 1943 request to U.S. Attorney General Biddle, Goodman urged the Lawyers Guild to oppose proceedings of the House Committee on Un-American Activities (HUAC) investigating the Ku Klux Klan and other right wing organizations. In line with Goodman's newly found libertarianism, the Guild executive board issued a statement condemning "any general

investigation of the membership or activities of the Klan . . . conducted for the purpose of exposure” because such an investigation “cannot fail to undermine and destroy fundamental rights of opinion, expression, and association.” At the altar of capitalist law, the authors applaud Goodman’s “appreciation for the Bill of Rights and the unfettered arena for contending views.”¹⁵ If only views opposing hate speech were truly unfettered in a capitalist society! The unimaginative appeal to legal consistency in opposing the HUAC investigation into the Klan is similar to calling for the disbandment of the police force because of police abuses of power rather than calling for an end to such abuses with the realization that ending such abuses will ultimately require a change in the control of the police under a new social order.

The argument that hate speech is best combatted by counter-speech does not take into consideration two countervailing factors. First, the economic and political consequences of hate speech that undermine unity among, and undercut gains by, the working class as a whole by maintaining an underclass are not addressed in the liberal counter speech of mainstream media. These consequences will not be addressed in the mass media until the working class has control of the means to disseminate information on a mass basis. Therefore, counter-speech to hate speech under a class system is by definition unequal and less powerful and hate speech that is ineffectively opposed perpetuates the status quo of capitalist exploitation by keeping the working class divided.

Second, hate speech directed at discriminated-against groups causes and perpetuates the psychological oppression of the targets of hate speech¹⁶ and results in fear of physical violence by hooligans if hate speech is opposed or resisted. The targets of hate speech know that police protection against violence will only come after the initial blows if at all. This psychological oppression leads to economic harm as targets of hate speech leave or avoid places where they encounter hate speech such as schools, jobs and neighborhoods. Thus, the protection of hate speech and its implicit threat of violence has a disproportionate effect in repressing progressive counter-speech and consequently serves to protect and perpetuate the capitalist status quo.

In the opinion of this reviewer, the left should end its utopian call for freedom of speech in the absolute under capitalism. Instead, the left should call for freedom to speak for social justice and distinguish the argument for free speech advocated in court and the type of responsible speech we seek in our society.¹⁷ And the left should dispel the notion that we can have true freedom of speech so long as the ruling class owns the means of communication and its distribution together with its hegemonic control of the educational system. By failing to analyze the issue of free speech in the context of the surrounding political economy, tolerance of hate speech becomes tolerance of repression of the target group.¹⁸

Goodman—from repo man to principled socialist; the Communist Party, the Guild and Japanese American incarceration during World War II

Upon graduation from an evening law school program in Detroit¹⁹ at the age of twenty-two, Goodman went into private practice and was soon representing small businesses repossessing furniture and jewelry in the wake of the Crash of 1929. He recognized that the predatory lending practices of that period particularly victimized the black community and he began to hate his law practice. By 1935, his practice collapsed and he began working for a state committee revising workmen's (now workers') compensation laws. He was once again confronted by the injustice of the capitalist legal system: "I began to see that working people were being screwed out of their claims for injuries and disease caused by their work."

It was also in 1935 that Goodman would meet Maurice Sugar, who was a candidate for judge in Detroit's Recorder's Court. Goodman was electrified by Sugar's political analysis. Sugar was fifteen years older than Goodman and had been a member of the Socialist Party of America, an active supporter of its presidential candidate, Eugene V. Debs, and was imprisoned and disbarred for refusing to register for the draft during World War I. By the time Goodman and Sugar met, Sugar had been readmitted to the Michigan bar and was no longer a member of the Socialist Party. Shortly after their initial meeting, Goodman would become an associate in Sugar's law firm.

Although they would often be allied with members of the Communist Party of the United States (CPUSA) in civil rights and workers' organizations outside the courtroom and in defending CPUSA members against Red Squad arrests, neither would join the CPUSA.²⁰ Because Goodman was not beholden to the centralism of the CPUSA that was, in turn, directed by the Moscow-based Communist International (Comintern or the Third International), he could take a principled stand as general counsel and spokesman for the Detroit-based Civil Rights Federation in condemning the federal prosecution of leaders of Teamster Local 544 in Minneapolis under the newly adopted Smith Act.²¹

All twenty-eight defendants were members of the Socialist Workers Party (SWP), which was aligned with the ideology of Leon Trotsky, former head of the Red Army, and not the Stalinist ideology followed by members of the CPUSA and the Comintern. After the Nazi invasion of the USSR in June 1941, the CPUSA advocated a no-strike pledge among workers in the U.S. Opposing this position, the SWP advocated for continued worker militancy and strikes. The CPUSA thus supported the indictments and prosecution of the labor leaders despite the fact that the Smith Act was aimed at communists. Over the objections of Communist Party members who belonged to the Civil

Rights Federation, Goodman and the Federation publicly opposed the witch-hunt. Beginning in 1949 prosecutions under the Smith Act would be directed at members of the CPUSA.

Eighteen of the defendants were found guilty of violating the Smith Act based on public statements and communist literature, rather than actual acts of violence, and were sentenced to prison terms of 12 and 16 months on December 8, 1941. Because the sentencing took place the day after Pearl Harbor was attacked, few people took notice.

While Goodman took a principled stand against prosecutions under the Smith Act despite the party line of the CPUSA, his position with regard to the U.S. government's incarceration of 120,000 persons of Japanese ancestry after Roosevelt's issuance of Executive Order 9066 on February 19, 1942 is curiously not mentioned, even though the authors refer to the presidential order and mass incarceration.²² It is hard to believe that Goodman, as a leading member of the National Lawyers Guild, was not aware of the incarceration at least by 1943 when four test cases²³ challenging the curfew, evacuation, and incarceration under the E.O. 9066 were working their way through lower courts on the way to the U.S. Supreme Court. In fact, the president of the Guild between 1940 and 1948, Robert Kenny, played a major role in supporting the evacuation and incarceration and in the November 1942 issue of the *Lawyer's Guild Review* an article belittled the incarceration as "a minor item in the heaping quota of human misery which has been produced by the current war."²⁴

Because this biography of Goodman provides much useful information about the history of the National Lawyers Guild, it will join with Ginger and Tobin's history of the Guild²⁵ and Rabinowitz's memoir²⁶ as references for Guild history. For this reason, I find it regrettable that the failure of the National Lawyers Guild to condemn the incarceration and to support the legal challenges to the incarceration are not discussed in this biography and given only one sentence in the history by Ginger and Tobin.²⁷

The story behind this failure of the Guild (as well as the American Civil Liberties Union) is described in *Justice at War* by Peter Irons.²⁸ Three factors are described by Irons and other sources:

1. While president of the Guild, Kenny was elected in 1942 as the California Attorney General and took office in January 1943. Even though he was a Democrat, Kenny was friendly with Earl Warren, his Republican predecessor as the state attorney general, and the two had worked together on political issues.²⁹ Warren, later appointed by President Eisenhower to be Chief Justice of the Supreme Court, was elected as governor of California during the same election in 1942

by campaigning for the removal of people of Japanese descent from California and secured the vote of white farm owners.³⁰ As California Attorney General, Kenny supported Warren and signed amicus briefs in support of the evacuation. In a breach of legal ethics, Kenny filed these briefs supporting the War Department knowing that they had been written by the War Department.³¹

2. The CPUSA members and fellow travelers in the Guild pledged complete support for Roosevelt and the American-Soviet alliance. To reinforce its pledge, between December 8 and 9, 1941, the CPUSA expelled all members of Japanese descent (as well as any non-Japanese spouse) by order of its general secretary, Earl Browder.³² Although Browder would later be condemned for being a “revisionist” by the CPUSA, the racist expulsion and support of the incarceration are never described in party histories.³³
3. Government attorneys formed a large bloc of Guild membership and they also supported Roosevelt’s E.O. 9066 and the rationale that the evacuation and incarceration were required for wartime security.

I would add a fourth factor that has lasting significance for attorneys and activists who are working for progressive change, whether as members of the Guild or independently. I would contend that the basis of this failure on the part of the Guild and the CPUSA was the lack of sound ideological grounding by its members. Although blame can be pointed to Kenny, president of the Guild, or to Browder, CPUSA general secretary, what about the other members of the Guild or the CPUSA or most other leftists? Why wasn’t there any dissent? Guild and CPUSA members followed same racist ideology that was expressed by the popular writer and professed socialist Jack London several decades earlier.. When questioned by socialists about his public and widely published vehemence against Asians and Asian-Americans, Jack London replied “What the devil! I am first of all a white man and only then a socialist.”³⁴

Just as the statement by London and the support of the incarceration by the CPUSA cannot in the least be deemed socialist, the stance of the Guild cannot in the least be deemed progressive. The penchant for action over careful ideological grounding for taking sound action led to support for the racist evacuation and incarceration of 120,000 people of Japanese descent, most of which were U.S. citizens by birth. The pope issued a decree (E.O. 9066) and the legal priests genuflected rather than seeking to understand the economic and political interests being served by the decree.

Over a decade later, this biography vividly describes how Goodman would take a more independent stance than some of his communist colleagues in the Guild with respect to racial issues. Goodman successfully pushed the Guild to

make defense of civil rights volunteers a central task of the organization during the Freedom Summers of 1963 and 1964. Some of his colleagues hesitated believing that such a position was putting racial issues ahead of economic, working class issues rather than understanding that the issues are inextricably linked. Goodman became president of the Guild during this period and the account of his years as president and the issues and opposition he faced on these issues will interest all activists.

Labor law and the suppression of the working class

When Goodman joined the law firm of Maurice Sugar, he soon began to represent the left-wing of the labor movement both as an attorney and as a member of the Civil Rights Federation, a Detroit-based coalition of union activists, Farmer-Laborites, ministers, lawyers, community organizers, and communists and socialists. The biography describes Goodman's rise to a leadership position in the Federation as general counsel. Sugar and Goodman would align with unions that joined the Congress of Industrial Organizations (CIO) formed by John L. Lewis of the United Mine Workers, as opposed to the conservative unions of the American Federation of Labor (AFL). In 1939, Sugar became general counsel of the United Auto Workers (UAW-CIO) and he appointed Goodman to be one of three associate general counsels.

As the country moved to the right following the end of World War II and began the Cold War in earnest, Walter Reuther, who had praised the USSR following a visit before the War, became head of the UAW in 1947 and purged the union leadership of leftists and fired Sugar and his firm as counsel. Goodman turned his attention to working on civil rights cases, establishing the first integrated law partnership in Detroit with future congressman and judge George Crockett and defending members of the CPUSA who had now become targets of the Smith Act that they had supported as a weapon against the Socialist Workers Party in 1941.

The authors do not discuss the larger ideological issue as to why the once militant unions succumbed to the Cold War red scare outlook fostered by the federal government. On a superficial level, it could be said that Reuther and the other labor leaders were reluctant to give up the material gains they had achieved under the threat of government persecution of communists and communist sympathizers. This reviewer believes that three additional factors bear additional consideration and investigation: (1) the inability of socialist union members inside and outside the CPUSA to unite to push the unions further left; (2) the failure by union leftists to recognize the limitations of using labor law to make significant social change; and (3) the success of government agents inside the unions in preventing unity among leftists and in

promoting strategies such as legal challenges that do not challenge the basic exploitative nature of capitalism.

The first factor is a topic too complicated to be discussed in this article and, together with the other two related factors, it remains as a major obstacle to progressive organizing today.³⁵

With respect to the second factor, in his work *The Values and Assumptions of American Labor Law*,³⁶ law professor James B. Atleson³⁷ examined labor cases to conclude that these hidden assumptions underlie labor law decisions:

The continuity of production must be maintained.³⁸

Employees, unless controlled, will act irresponsibly.³⁹

Employees, clearly the junior partners in the labor-management partnership, owe a measure of respect and deference to their employers.⁴⁰

Although sometimes called the “common enterprise,” the workplace is the property of the employer. Private property interests are superior to employee interests in communication and organization.⁴¹

Employees cannot be full partners in the enterprise because such an arrangement would interfere with inherent and exclusive managerial rights of employers.⁴²

Thus labor case law and its statutes are designed to protect private capital investment and the freedom to move capital at will. The continuity of production and management control is given a higher priority than the health and safety of employees.

It is easy to see that by substituting the word “employees” with “working class people” in the list of assumptions above, these same values and assumptions apply to all other areas of law in the U.S. Therefore, when representing unions and workers to win better working conditions and wages, it is important for socialist lawyers to be clear that the legal victory they are seeking will not be a means to end the exploitative system of capitalism, but also a means for developing class solidarity and gaining an additional margin of breathing room for further working class organizing.

The third factor of government subversion of the left is discussed in the concluding section of this review.

Government and anti-communist subversion of the Left

From time to time in the biography, the authors cite various FBI reports about Goodman dating back to 1940. Since these reports are in Goodman’s personal archives according to the author’s footnotes, I presume that Goodman obtained these records from the FBI himself under a Freedom of Information Act (FOIA) request.

In May 1940, an informant reported that Goodman “is reported to be of good moral character and temperate in personal habits. He has a substantial

income and appears to be living conservatively within his means.” The Detroit Red Squad reported to the FBI that Goodman “has a habit of shrugging his shoulders ‘like Sugar does,’ smokes a pipe ‘like Sugar does,’ and is just as active as Sugar is in all subversive organizations.”⁴³

The biography briefly describes the infiltration of the National Lawyers Guild by the FBI and an attempt by an informant and agent to steer the Guild away from active civil rights work in the South in the 1960s. The authors refer to an article by Goodman in a Guild publication⁴⁴ as the source of this information. The book would have benefited by including such works by Goodman as appendices.

Another notable incident of FBI infiltration took place when Goodman was defending one of the Attica prisoners following the police massacre on September 13, 1971 at the Attica Correctional Facility in Attica, New York. A volunteer member of the Attica legal defense team, Mary Jo Cook, confessed to being an FBI informant at a press conference in New York City in 1975.

According to a U.S. Senate committee investigating government surveillance of civilians, Cook was hired in June 1973 by the FBI field office in Buffalo, New York to infiltrate the Buffalo chapter of the Vietnam Veterans Against the War. Cook testified before the Senate committee that her role was to gather information such as mailing lists and names of meeting participants as well as play a “moderating” force. She also testified that she ended up reporting on groups such as the United Church of Christ, the American Civil Liberties Union and the National Lawyers Guild. In November 1974, Cook quit her position when she concluded that the groups she was reporting on were engaged in lawful political activity and the FBI refused to assure her that the people she reported on would not be adversely affected.⁴⁵ What is not known is whether there were additional agents who did not quit their positions. Having multiple undisclosed agents working in the same organization is a common technique for intelligence agencies.⁴⁶ Cook’s press conference may have served as a cover for the agents that remained undisclosed.

Surveillance, diluting militant demands in the name of moderation, sowing discord, disunity, and suspicion by government infiltrators and provoking self-destructive adventurism by agent provocateurs have been practiced by government agents since early times. Victor Serge documented how the Russian tsars made a science of these techniques based on documents captured after the Russian revolution.⁴⁷ More recently, Fordham Law professor Brian Glick has documented the use of these techniques by the FBI and other governmental agencies.⁴⁸ A two-year investigation by *The Washington Post* revealed that as of 2010, some 1,271 government organizations and 1,931 private companies work on programs related to counterterrorism, homeland

security and intelligence in about 10,000 locations across the United States.⁴⁹ More material is available on the internet and in congressional reports.⁵⁰

These techniques have been used against political opposition groups of all types, including labor unions. Although not discussed in this biography, the infiltration of labor unions by paid government agents no doubt supported the anti-Communist shift and consolidation of power by the former socialist and toolmaker UAW president Walter Reuther.

In discussing the freedom to speak for social justice, the incarceration of Japanese Americans during World War II, the barrier to substantive change through legal reform, and government infiltration and surveillance, there is a common theme: the government as representative of the ruling class will stop at nothing to protect the private ownership of the means of production, whether through the control of speech, including the freedom of hate speech, government suppression of evidence and infiltration of law organizations and defense teams, control of labor and labor unions, and outright subterfuge of political groups. Until the left comes to grips with these realities and is willing to resist these measures with a sound ideological basis and disciplined organizations, oppression and exploitation of the working class will remain the law of the land under the color of law.

NOTES

1. For an expanded presentation *see* Frederick Engels & Karl Kautsky, *Lawyers' Socialism*, in KARL MARX AND FREDERICK ENGELS, 26 COLLECTED WORKS 597 (1990).
2. Adam Smith, *Lectures On Jurisprudence*, in GLASGOW EDITION OF THE WORKS AND CORRESPONDENCE OF ADAM SMITH (R.L. Meek, D.D. Raphael, & P.G. Stein, eds. 1982).
3. In 1911, when Goodman was five years old, his family relocated from his birthplace in Saginaw, Michigan to the Jewish ghetto in Detroit. There, he attended public school, Hebrew school and received home tutoring in religious education by a rabbi. Reportedly, when Goodman was 17 or 18, he witnessed to his utter shock and disbelief his father and uncle eating non-kosher food outside their homes and away from their religiously observant wives. This revelation contributed to Goodman's questioning of the religious precepts he had been inculcated with since birth and he became an atheist shortly thereafter.
4. Our times seems to require disclosure of what some (especially a spouse or partner) may perceive as a personal weakness in order to add authenticity or objectivity to a biographical account. Conforming to this practice, the authors devote a few paragraphs to an extramarital affair that Goodman maintained for an unknown number of years. Information about Goodman's companion is scant and the description of her big city New York background and socialist grounding and knowledge serves as a vague accusation or excuse but appears to be gratuitous conjecture. This part of Goodman's life appears to have had no bearing on his professional practice or political outlook, and mention could have been consigned to a footnote or left out altogether. Certainly this would have been omitted if Goodman's lifelong wife, Freda Goodman, were alive at the publication of this biography.

5. The authors are sympathetic to the political cases and causes with which Goodman was involved but the authors approach their subject in an academic manner and avoid any economic or political analysis and do not provide a straightforward disclosure of their own political beliefs. The authors attribute the cause of the Great Crash of 1929 as follows: "Mass production had finally outrun the limited purchasing power of the working majority, and when sales flattened, employers cut their payrolls and panicked investors sold their overvalued stock." STEVE BABSON, DAVE RIDDLE, & DAVID ELSILA, *THE COLOR OF LAW: ERNIE GOODMAN, DETROIT, AND THE STRUGGLE FOR LABOR AND CIVIL RIGHTS* 28 (2010). This underconsumption analysis is sympathetic to the plight of the working class but can lend support to a Marxian analysis of the Great Crash and Depression, as well as the analysis of proto-Keynesians such as Waddill Catchings and William Trufant Foster, and later John Maynard Keynes and his progeny. In fairness to the authors, it should be pointed out that Marxists have yet to produce a thorough analysis of the causes of the Great Depression partially due to the lack of hard economic data for the period leading up to the Great Depression and partially due to poor grounding in theory. *See generally* note 7, *infra*.
6. *See e.g.* JOHN J. ABT & MICHAEL MYERSON, *ADVOCATE AND ACTIVIST: MEMOIRS OF AN AMERICAN COMMUNIST LAWYER* (1993); BENJAMIN J. DAVIS, *COMMUNIST COUNCILMAN FROM HARLEM: AUTOBIOGRAPHICAL NOTES WRITTEN IN A FEDERAL PENITENTIARY* (1969); VICTOR RABINOWITZ, *UNREPENTANT LEFTIST: A LAWYER'S MEMOIR* (1996); and MICHAEL STEVEN SMITH, *NOTEBOOK OF A SIXTIES LAWYER: AN UNREPENTANT MEMOIR AND SELECTED WRITINGS* (1992).
7. This view is supported by ABT & MYERSON, *supra* note 6, at 42-43:

For Americans, as a nation, theory has never been a strong suit. We are a practical people, used to getting things done. Claims to the contrary notwithstanding, the same could be said for the Communist party. This was a strength, but also a weakness. The failure to articulate a theory of, say, the state and the New Deal, in part accounts for relying instead on a "line," a stated policy, which was always changing as circumstances changed.
8. BABSON ET AL., *supra* note 5, at 391.
9. 320 U.S. 81 (1943); *but see* *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) (vacating conviction of Hirabayashi for violating exclusion imposed under Executive Order 9066, reversing the lower court upholding of conviction of Hirabayashi for violating curfew). The Circuit Court opinion gives an extensive description of suppression of evidence by the Department of War to conceal the racist basis as opposed to military necessity for the curfew and exclusion orders of Lt. Gen. John L. DeWitt, the Commanding General of the Western Defense Command. The constitutionality of President F.D. Roosevelt's Executive Order 9066 was not overturned.
10. 320 U.S. 115 (1943); *but see* *Yasui v. United States*, 772 F.2d 1496 (9th Cir. 1985) (dismissing the conviction of Yasui and dismissing petition for writ of *coram nobis* request of the government; appeal by Yasui of dismissal of petition denied on procedural grounds; constitutionality of E.O. 9066 authorizing curfew and incarceration of Japanese Americans was not overturned). Yasui died before he could take further legal action.
11. 323 U.S. 214 (1944); *but see* *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (conviction of Korematsu voided under a writ of *coram nobis* due to wrongful suppression of evidence; constitutionality of E.O. 9066 authorizing curfew and incarceration of Japanese Americans was not overturned).

12. My constitutional law professor at Columbia Law School, Herbert Wechsler, played a major role as an Assistant Attorney General in the suppression of this evidence. Although the suppression of evidence by the Department of Justice and his major role was not discovered until the *coram nobis* cases discussed in notes 9, 10 and 11, *supra*, a decade after I studied under Wechsler, I knew he played a supporting role in the incarceration of my Japanese American citizen parents and permanent resident maternal grandparents during World War II. When the Supreme Court cases of *Hirabayashi*, *Yasui*, and *Korematsu* came up for discussion during class, I asked Wechsler whether in hindsight he would repeat his role in supporting the incarceration. After a long pause, Wechsler calmly said that he would, because more people would have been harmed if another person were in his position! With an otherwise spectacularly unexceptional law school performance, I am best known to my classmates for replying that I found such an argument disingenuous and pointing out that his actions contributed to the incarceration of my parents and grandparents and then gathering my books and storming out class in front of the revered “liberal” Columbia Law School constitutional law scholar. In my own hindsight, I regret later accepting an academic achievement recognition as a Harlan Fiske Stone Scholar at the end of that same school year since Stone had been the Chief Justice presiding over those three incarceration cases and the author of the opinions in *Hirabayashi* and *Yasui*. What countless insults and brainwashing attempts the powerless must endure to get an “education.”
13. 129 S.Ct. 2893 (2009).
14. 131 S.Ct. 1672 (2011)
15. BABSON ET AL., *supra* note 5, at 220.
16. See MARY J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO, & KIMBERLÈ WILLIAMS CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).
17. See, e.g. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX) (Dec. 21, 1965; *entry into force* Jan. 4, 1969), Article 4:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

18. See Herbert Marcuse, *Repressive Tolerance*, in ROBERT PAUL WOLFF, BARRINGTON MOORE, JR., & HERBERT MARCUSE, *A CRITIQUE OF PURE TOLERANCE* 95-137 (1969).
19. Goodman initially attended an evening program at the Detroit College of Law before transferring to another evening program at the Detroit City College of Law. It is not mentioned in the book that the Detroit College of Law became affiliated with Michigan State University in 1995 and changed its name to Michigan State University School of Law in 2004. The Detroit City College of Law with the other affiliated colleges was renamed Wayne University in 1933 and subsequently Wayne State University in 1956.
20. The FBI files on Goodman reviewed by the authors concur. In contrast, ABT, *supra*, DAVIS, *supra*, and RABINOWITZ, *supra*, openly declared having been members of the CPUSA in their respective memoirs.
21. Alien Registration Act, 18 U.S.C. §2385 (1940). The Smith Act took its name from its sponsor Congressman Howard W. Smith of Virginia, a Democrat and leader of an anti-labor bloc of congressmen. The Act, signed into law by President Roosevelt in 1940 and still effective, set criminal penalties for advocating the overthrow or destruction of any government in the United States by force or violence and required the registration of all non-citizen adult residents. The case against the Teamster local leaders commenced in June 1941. The case was the first prosecution under the Smith Act and was initiated shortly after the local switched affiliation from the AFL to the CIO to the consternation of the AFL Teamsters International president, Dan Tobin. Tobin was also president of the Democratic Party's National Labor Committee and called for federal action against the local that was known for its leadership of the 1934 general strike in Minneapolis.
22. There was economic method to this racist madness because white farmers were eager to eliminate competition from Japanese farmers who had converted some of the poorest lands along the West Coast into successful farms. See *infra* note 30.
23. *Hirabayashi*, 320 U.S. 81; *Yasui*, 320 U.S. 115; *Korematsu*, 323 U.S. 214; Ex parte *Endo*, 323 U.S. 283 (1944).
24. Charles Gordon, *Status of Enemy Nationals in the United States*, 2 LAW. GUILD REV. 9, 16 (1942).
25. THE NATIONAL LAWYERS GUILD: FROM ROOSEVELT THROUGH REAGAN (Ann Fagan Ginger & Eugene M. Tobin, Eds. 1988).
26. RABINOWITZ, *supra*, note 6.
27. Ginger & Tobin, *supra*, note 25.
28. PETER IRONS, *JUSTICE AT WAR* 180-81 (1993) (with respect to the Guild). Although two of the defendants were represented by attorneys affiliated with the ACLU, the national board of the ACLU supported the incarceration and in a breach of professional ethics prevented the U.S. Supreme Court cases from including constitutional challenges. *Id.*, at ix, 168-80.
29. Manuscript of interview of Robert W. Kenny by Amelia R. Fry, October 16, 1969, tape 1, side 1, Earl Warren: Fellow Constitutional Officers: Oral History Transcript and related material, 1969-1979, University of California – Berkeley (1979) available at http://www.archive.org/stream/warrenfellowconst00earlrich/warrenfellowconst00earlrich_djvu.txt.
30. See REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED*, 96-98 (1982) and ROGER DANIELS, *CONCENTRATION CAMPS U.S.A.: JAPANESE AMERICANS AND WORLD WAR II*, 75-

- 77 (1971) for descriptions of Warren’s vociferous support of removal of Japanese from California. According to the California Farm Bureau “Japanese farmers were responsible for 40 percent of all vegetables grown in the state, including nearly 100 percent of all tomatoes, celery, strawberries and peppers. . . . [T]he Farm Security Administration, charged with confiscating or selling Japanese land holdings, said FSA field agents had registered 6000 farms totaling approximately 200,000 acres.” Harvest.html, The Virtual Museum of the City of San Francisco, at <http://www.sfmuseum.org/hist9/harvest.html> (last visited Aug. 10, 2011).
31. IRONS, *supra* note 28, at 180-181.
 32. KARL G. YONEDA, GANBATTE: SIXTY-YEAR STRUGGLE OF A KIBEI WORKER 115-116 (1983).
 33. *See, e.g.* WILLIAM Z. FOSTER, HISTORY OF THE COMMUNIST PARTY OF THE UNITED STATES (1952). Foster had been general secretary of the CPUSA before Browder and succeeded again to that position after Browder’s ouster from the party.
 34. PHILIP S. FONER, JACK LONDON: AMERICAN REBEL 59 (1964); FRANK S. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE 13 (2002).
 35. *See* BILL FLETCHER JR. & FERNANDO GAPASIN, SOLIDARITY DIVIDED: THE CRISIS IN ORGANIZED LABOR AND A NEW PATH TOWARD SOCIAL JUSTICE (2009).
 36. JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983).
 37. Professor of Law, State University of New York, Buffalo.
 38. ATLESON, *supra* note 36, at 7.
 39. *Id.* at 7.
 40. *Id.* at 8.
 41. *Id.* at 8.
 42. *Id.* at 9.
 43. BABSON, ET AL., *supra* note 5, at 78.
 44. *Id.* at 516 n.16. Ernest Goodman, *The NLG, the FBI and the Civil Rights Movement: 1964 – A Year of Decision*, 38 GUILD PRAC. 1 (1981).
 45. Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Book III, Final Report, S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, April 23 (under authority of the order of April 14), 1976 [hereinafter Intelligence Reports].
 46. *See* Serge, *infra* note 47.
 47. VICTOR SERGE, WHAT EVERY RADICAL SHOULD KNOW ABOUT STATE REPRESSION: A GUIDE FOR ACTIVISTS (2005).
 48. BRIAN GLICK, WAR AT HOME: COVERT ACTION AGAINST U.S. ACTIVISTS AND WHAT WE CAN DO ABOUT IT (1989).
 49. Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST, July 19, 2010, available at <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/print/>.
 50. *See* Intelligence Reports, *supra* note 45.



Marjorie Cohn

A FREE PASS FOR TORTURERS

“Nobody’s above the law,” President Barack Obama declared in 2009, as Congress contemplated an investigation of torture authorized by the Bush administration. But Mr. Obama has failed to honor those words. His Justice Department proclaimed its intention to grant a free pass to Bush officials and their lawyers who constructed a regime of torture and abuse. Attorney General Eric H. Holder Jr. announced on June 30 that his office will investigate only two instances of detainee mistreatment. He said the department “has determined that an expanded criminal investigation of the remaining matters is not warranted.” Holder has granted impunity to those who authorized, provided legal cover, and carried out the “remaining matters.”

Both of the incidents that Holder has agreed to investigate involved egregious treatment and both resulted in death. In one case, Gul Rahman froze to death in 2002 after being stripped and shackled to a cold cement floor in a secret American prison in Afghanistan known as the Salt Pit. The other man, Manadel al-Jamadi, died in 2003 at Abu Ghraib prison in Iraq. He was suspended from the ceiling by his wrists, which were bound behind his back. Tony Diaz, an MP who witnessed al-Jamadi’s torture, reported that blood gushed from his mouth like “a faucet had turned on” when al-Jamadi was lowered to the ground. These two deaths should be investigated and those responsible punished in accordance with the law.

But the investigation must have a much broader scope. More than 100 detainees have died in U.S. custody, many from torture. And untold numbers were subjected to torture and cruel treatment in violation of U.S. and international law. Gen. Barry McCaffrey said, “We tortured people unmercifully. We probably murdered dozens of them during the course of that, both the armed forces and the C.I.A.”

Detainees were put in stress positions, including being chained to the floor, slammed against walls, placed into small boxes with insects, subjected to extremely cold and hot temperatures as well as diet manipulation, blaring music, and threats against themselves and their families.

At least three men were waterboarded, a technique that makes the subject feel as though he is drowning. Pursuant to the Bush administration’s efforts to create a link between Saddam Hussein and Al-Qaeda, Khalid Sheikh Mo-

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ammed was waterboarded 183 times. Abu Zubaydah received this treatment on 83 occasions.

American law has long recognized that waterboarding constitutes torture. The United States prosecuted Japanese military leaders for torture based on waterboarding after World War II. The Geneva Conventions and the U.S. War Crimes Act make torture punishable as a war crime.

Lawyers in the Bush Justice Department's Office of Legal Counsel, including John Yoo and Jay Bybee, wrote the torture memos. They redefined torture much more narrowly than the Convention against Torture and the War Crimes Act, knowing interrogators would follow their advice. They also created elaborate justifications for torture and abuse, notwithstanding the absolute prohibition of torture in our law. When the United States ratified the Convention against Torture, it became part of U.S. law under the Constitution's Supremacy Clause. The convention says, "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

George W. Bush, Dick Cheney and Yoo have all said they participated in the decision to waterboard and would do it again. Thus, they have admitted the commission of war crimes.

Maj. Gen. Anthony Taguba, who directed the investigation of mistreatment at Abu Ghraib, wrote, "there is no longer any doubt as to whether the [Bush] administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account."

Taguba's question has been answered. None of those lawyers or officials will be brought to justice. Outgoing C.I.A. Director Leon Panetta said, "We are now finally about to close this chapter of our agency's history." Ominously, David Petraeus, incoming C.I.A. Director, told Congress there might be circumstances in which a return to "enhanced interrogation" is warranted. That means torture may well continue during Obama's tenure. This is unacceptable.

Not only is torture illegal; it doesn't work and it makes people outside the U.S. resent us even more. High-level interrogators such as F.B.I. agent Ali Soufan have said the most valuable intelligence was obtained using traditional, humane interrogation methods. Former F.B.I. agent Dan Coleman agrees. "Brutalization doesn't work," he said. "Besides that, you lose your soul."



Marjorie Cohn

PRISONERS STRIKE AGAINST TORTURE IN CALIFORNIA PRISONS

The torture of prisoners in U.S. custody isn't confined to foreign countries. Since July 1, inmates at California's Pelican Bay State Prison have been on a hunger strike to protest torturous conditions in the Security Housing Unit (SHU) there. Prisoners have been held for years in solitary confinement, which can amount to torture. Nearly 7,000 inmates throughout California's prison system have refused food in solidarity with the Pelican Bay prisoners.

Inmates in the SHU are confined to their cells for 22 ½ hours a day, mostly for administrative convenience. They are released for only one hour to walk in a small area with high walls. The cells in the SHU are 8 feet by 10 feet with no windows. Fluorescent lights are often kept on 24 hours per day.

Solitary confinement can lead to hallucinations, catatonia and even suicide, particularly in mentally ill prisoners. It is considered torture, as journalist Lance Tapley explains in his chapter on American Supermax prisons in *The United States and Torture: Interrogation, Incarceration, and Abuse*.

The Commission on Safety and Abuse in America's Prisons (CSAAP), which is headed by a former U.S. attorney general and a former chief judge of the U.S. Court of Appeals, found: "People who pose no real threat to anyone and also those who are mentally ill are languishing for months or years in high-security units." The commission also stated, "In some places, the environment is so severe that people end up completely isolated, confined in constantly bright or constantly dim spaces without any meaningful contact – torturous condition that are proven to cause mental deterioration."

Prisoners in other California prisons have reported that medications, including those for high blood pressure and other serious conditions, are being withheld from prisoners on strike. "The situation is grave and urgent," according to Carol Strickman, a lawyer for the Prisoner Hunger Strike Solidarity coalition. "We are fighting to prevent a lot of deaths at Pelican Bay. The CDCR [California Department of Corrections and Rehabilitation] needs to negotiate with these prisoners, and honor the request of the strike leaders to have access to outside mediators to ensure that any negotiations are in good faith."

One of the hunger strike demands is an end to the "debriefing process" at Pelican Bay. Prisoners are forced to name themselves or others as gang members as a condition of access to food or release from isolation. Naming

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others as gang members itself amounts to a death sentence due to retaliation by other prisoners.

In May, the U.S. Supreme Court upheld a lower court ruling that incarceration in California prisons constitutes unconstitutional cruel and unusual punishment.



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 - Income \$20,000-\$25,000: \$75-100
 - Income \$25,000-\$30,000: \$100-165
 - Income \$30,000-\$40,000: \$165-220
 - Income \$40,000-\$50,000: \$220-275
 - Income \$50,000-\$75,000: \$275-325
 - Income \$76,000-\$100,000: \$375-450
 - Income over \$100,000: \$500+

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LETTER TO THE GREEK EMBASSY

Friday, July 1, 2011

Dear Sir or Madam:

I am writing on behalf of the National Lawyers Guild and our several thousand members to protest the heavy-handed and inexcusable actions by the Greek government in preventing the Audacity of Hope to sail to Gaza. While we understand the intense pressure that can be brought to bear by the United States government and the particularly difficult situation that Greece finds itself in today, that cannot be an excuse for a lack of principle on so important an issue as the decades-long illegal occupation and siege of Gaza. You can be assured that millions of Americans oppose Israel's actions and will stand by Greece if it resists US pressure.

If, on the other hand, you are not subject to such pressure and have made the independent decision to keep the boat from leaving, we call on you, in the strongest possible terms, to reconsider. The entire flotilla has taken great care to insure that no one participating will engage in any act of violence. It offers no threat to Israel other than as a means of exposing the bankruptcy, illegality and inhumanity of its policies towards the Palestinian people. The Lawyers Guild has consistently opposed American presidential administrations that have betrayed principle with their unquestioning support of everything Israel does and we do not wish to add the Greek government to the list.

I note as well that our organization has not reached the conclusions it has without considerable discussion and research. We have sent several delegations to Palestine to investigate conditions there. Most recently, a delegation visited Gaza immediately after Operation Cast Lead and produced a damning report documenting Israeli attacks on civilians and even United Nations facilities. We stand behind the courageous passengers on the Audacity of Hope and believe that people—and governments—of good will everywhere should do the same.

The National Lawyers Guild was founded in 1937 as the country's first integrated national bar association. For nearly three quarters of a century, we have defended and supported all those struggling for human rights and dignity. Today, the demand for justice for the Palestinian people is a critical battleground in that struggle. We call on Greece to join it by the simple act of allowing the boat to leave on its journey.

David Gespass
President
National Lawyers Guild

Living primarily on the west coast, Chinese immigrants were a core part of the labor force that built the transcontinental railroad in the mid-nineteenth century and were often hired as miners during the early days of the California Gold Rush. But after the track had been laid and pay dirt became scarce, frustration and bigotry began to bubble up among the white majority, ultimately taking the form of legislation (the Chinese Exclusion Act of 1882 and its progeny) that severely restricted Chinese immigration and denied virtually any judicial review over the government's decisions to deny entry or deport Chinese immigrants. Two Supreme Court cases (*Lem Moon Sing v. U.S.*¹ and *U.S. v. Ju Toy*²) affirmed the constitutionality of statutes that dramatically limited the right of soon-to-be-deported Chinese immigrants to habeas corpus, the most basic procedural right our system of justice affords.

After President McKinley was assassinated by Leon Czolgosz, the son of Polish immigrants drawn to anarchism by the speeches of Russian-born immigrant Emma Goldman, Congress expanded the powers of government over non-citizens living in America by passing the Alien Immigration Act of 1903 (aka the Anarchist Exclusion Act) as part of an effort to rid the nation of politically active and charismatic foreigners capable of radicalizing their fellow immigrants. Section 38 of this law imposed a political litmus test on all incoming immigrants by barring entry to anyone “who is disbelieves in, or who is opposed to, all organized government.” The law was amended in 1918 and became the basis for the countless arrests, detentions and deportations without due process that occurred during the Red Scare of 1919–1920.

The two traditional streams of xenophobic hysteria, fear of a foreign ideology (this time Islamic extremism) and scapegoating immigrant labor during an unemployment crisis (this time Latinos) have splashed together into a bubbling cauldron during the present episode of anti-immigrant reaction. Ms. Tonucci's article explains how our current laws, especially the Immigration and Nationality Act Section 287(g), which allows local law enforcement to work in tandem with the federal government to arrest and deport immigrants, are creating a climate of racialized fear and authoritarianism in local communities. Ms. Tonucci illustrates her point by focusing on the city of Danbury, Connecticut, which, under Section 287(g) has recently agreed to share immigration enforcement duties with the federal government. It did not take the people of Danbury long to feel the effects of this arrangement.

Imperialism is Thrasymachus's ethical teaching from Book One of Plato's Republic—that might equals right—applied to foreign affairs. Too often our Supreme Court has ignored what's right and instead given its imprimatur to the mighty. In 1898 the U.S. invaded Puerto Rico, defeated the Spanish colonial army, and has maintained its own colonial domination of the island

ever since. Shortly after the Spanish-American War the Supreme Court heard the *Insular Cases*, a sequence of cases spread out over a period of three years (1901-1904) dealing with, among other things, the issue of whether the Constitution would “follow the flag” into U.S. colonial territories or whether Congress could, in some instances, act extra-constitutionally in its regulation of “insular areas” like Puerto Rico. In *Downes v. Bidwell*³ the Court granted Congress such extraordinary powers. In 1980 the Court ruled in *Harris v. Rosario*⁴ that Congress has the power to issue fewer benefits under the Aid to Families with Dependent Children Program to American citizens living in Puerto Rico than to citizens living in the 50 states, the Fifth Amendment’s Due Process Clause notwithstanding. These cases and others recognize a vast imperial power resembling the “plenary power” doctrine the Court has afforded Congress to regulate life on Indian reservations.⁵ The next feature in this issue, a transcription of Jan Susler’s June 20, 2011 presentation to the United Nations Decolonization Committee Hearings, explains the need for a free and independent Puerto Rico in light of the ongoing problems caused by U.S. colonial rule.

In this issue’s book review Arnold Kawano analyzes a recently published biography of legendary Detroit civil rights attorney and former Guild President Ernie Goodman, *The Color of Law* by Steve Babson, Dave Riddle, and David Elsila. It is followed by a trio of short pieces—updates really—on two issues of continuing concern to Guild members, the torture of prisoners under U.S. control and human rights in Gaza. The first two pieces, “Free Pass for Torturers” and “Prisoners Strike against Torture in California Prisons,” are written by the Guild’s immediate past president, Marjorie Cohn, whose recent work has established her as one of the nation’s preeminent authorities on issues of torture and human rights. The last piece is a recently written letter by Guild President David Gespass to the Greek Embassy protesting the Greek blockade that prevented the Audacity of Hope, an American ship that is part of an international flotilla containing anti-occupation activists, from reaching Gaza.

—Nathan Goetting, *Editor in Chief*

NOTES

1. 158 U.S. 538 (1895).
2. 198 U.S. 253 (1905).
3. 182 U.S. 244 (1901).
4. 446 U.S. 651 (1980).
5. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), for an extreme application of the plenary power doctrine.



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