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Sheriffs, State Troopers, and the Spillover Effects of Immigration Policing

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SHERIFFS, STATE TROOPERS, AND THE SPILLOVER EFFECTS OF IMMIGRATION POLICING

Huyen Pham & Pham Hoang Van*

As the Biden Administration decides whether to continue the 287(g) program (the controversial program deputizing local law enforcement officers to enforce federal immigration laws), our research shows that the program has broader negative effects on policing behavior than previously identified. To date, debate about the 287(g) program has focused exclusively on the policing behavior of law enforcement agencies like sheriff's offices that sign the agreements, and on concerns that these signatory local enforcement agencies ("LEAs") engage in racial profiling. Our research shows that the agreements also negatively affect the behavior of nearby, nonsignatory law enforcement agencies. Using 18 million traffic stops drawn from the Stanford Open Policing Project, we find that the agreements caused state troopers in North Carolina and South Carolina to stop Hispanic drivers more often than White drivers, in order to funnel them into the intensive immigration screening conducted by signatory LEAs at the shared jails. Because trooper agencies did not sign the agreements, statistical associations between the presence of agreements and the differential treatment of drivers by race are not contaminated by unobserved confounding factors. Our identification of these previously unnoticed spillover effects raises important policy questions about the program's impact and the adequacy of existing legal and administrative controls.

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INTRODUCTION

As the oldest and most visible form of local–federal cooperation in immigration enforcement, the program created by § 287(g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 has long been the focus of heated debate.¹ The 287(g) program deputizes local enforcement agencies (“LEAs”) like sheriff’s offices and police departments to enforce federal immigration laws. Proponents praise the program’s “force multiplier” effect, increasing the manpower available to enforce immigration laws.² Opponents criticize the program for targeting immigrants without criminal records for deportation (despite press releases to the contrary), for engaging in racial profiling of Hispanics and other groups associated with immigrants, and, as a result, destroying crucial trust between LEAs and immigrant communities.³ Disagreement about the program’s efficacy has led to wide swings in both the size and scope of the program during different presidential administrations. The first 287(g) agreement was signed during President George W. Bush’s Administration, and the program was slowly expanded during President Obama’s first term, reaching 78 agreements, before being whittled down to 40 agreements at the end of his second term.⁴ Consistent with his restrictionist immigration priorities, President Trump

1. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 287(g), 8 U.S.C. § 1357(g).

2. Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALBANY L. REV. 179 (2006).

3. See Laura Muñoz Lopez, *How 287(g) Agreements Harm Public Safety*, CTR. FOR AM. PROGRESS (May 8, 2018), <https://www.americanprogress.org/issues/immigration/news/2018/05/08/450439/287g-agreements-harm-public-safety/> [https://perma.cc/A8AD-BZQC]; Randy Capps et al., *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*, MIGRATION POL’Y INST. 1, 2–3 (2011), <https://www.migrationpolicy.org/research/delegation-and-divergence-287g-state-and-local-immigration-enforcement> [https://perma.cc/5ZCX-HW3S].

4. See THE IMMIGRANT CLIMATE INDEX fig.1, <https://vpham415.github.io/ICI/> (last visited Mar. 8, 2022).

greatly increased the 287(g) program to a historical high of 152 agreements⁵ and introduced a new model of agreement to appeal to more LEA partners.⁶ The number of active 287(g) agreements over time is detailed in Figure 1 below.

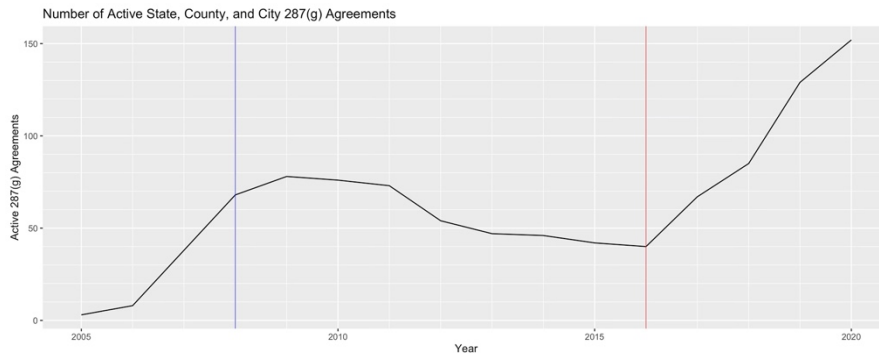


Figure 1. Number of active state, county, and city 287(g) agreements.

Now, President Biden is at a crossroads: he could continue to expand the program like the Trump Administration did, continue the program with reduced agreements and more restrictions like the Obama Administration did, or eliminate the program altogether. He has been pushed by different interest groups toward all these options.⁷ To make a good policy decision, the Biden Administration needs to have full and complete information about the program's effects, but, to date, the debates and analysis—including the arguments about force multiplication, overpolicing, and racial profiling—have focused solely on the policing behavior of signatory LEAs and its consequences.⁸

Our research demonstrates that the agreements also affect the policing behavior of nonsignatory LEAs, causing them to engage in the same racial profiling behavior attributed to signatory LEAs. Using the North Carolina State Highway Patrol and the South Carolina Highway Patrol as case studies, we analyzed approximately 18 million traffic stops made by these state troopers from 2000–2016; for this time period, neither state agency signed a 287(g) agreement but, crucially, used jail facilities operated by signatory LEAs, where intensive immigration screening occurred. Specifically, we found that the presence of the agreements caused the state troopers to stop Hispanics more often. An example of this effect is

5. *Id.*

6. The Trump Administration introduced the warrant service officer model in 2019. *See infra* notes 22, 29–30 and accompanying text.

7. *See, e.g.*, Sabrina Rodriguez, *House Dems Push DHS to Stop Working with Local Police on Immigration*, POLITICO (Feb. 12, 2021, 8:28 AM), <https://www.politico.com/news/2021/02/12/democrats-dhs-police-immigration-468825> [<https://perma.cc/6T95-M9DV>].

8. *See, e.g.*, Michael Coon, *Local Immigration Enforcement and Arrests of the Hispanic Population*, 5 J. ON MIGRATION & HUM. SEC. 645, 657, 663 (2017), <https://www.immigrationresearch.org/system/files/102-349-3-PB.pdf> [<https://perma.cc/W8NJ-UWDG>] (finding evidence of racial profiling by an LEA after it entered into a 287(g) agreement).

shown in Figure 2. The Mecklenburg County Sheriff's Office (North Carolina) signed a 287(g) agreement in February 2007; before this date, the number of trooper stops of Hispanics in Mecklenburg was similar to trooper stops of Hispanics in counties in North Carolina and South Carolina that never signed 287(g) agreements.⁹ After February 2007, however, the two trends diverged, with stops of Hispanic drivers in Mecklenburg increasing each month to all time highs. A similar pattern emerged in Charleston County (South Carolina), where the sheriff's office signed a 287(g) agreement in November 2009. Before this date, trooper stops of Hispanics in Charleston paralleled the number of stops in the counties that never signed 287(g) agreements, but shortly after the 287(g) was signed, active stops of Hispanics increased each month, even when they fell in "Never-287(g)" counties.

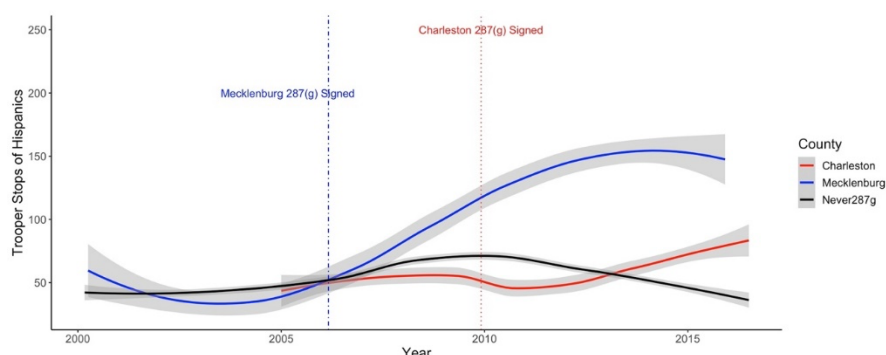


Figure 2. Monthly state trooper traffic stops of Hispanics in Mecklenburg County (North Carolina) and Charleston County (South Carolina) and the average monthly state trooper stops of Hispanics in counties that never signed a 287(g) agreement.

While stops increased, we also saw that arrest rates of Hispanics fell.¹⁰ These findings, taken together, support the conclusion that the state troopers engaged in racial profiling: the high incidence of initial stops of Hispanics are critical to funneling Hispanics into the intensive immigration screening processes provided by the 287(g) program, and the lower "hit rates" between stops and arrests are widely accepted as evidence of racial profiling by law enforcement agencies.¹¹

Our project makes important methodological and policy contributions. From a methodological perspective, by observing the policing behavior of state troopers who are not parties to the 287(g) agreements, our project strengthens the causal connection between 287(g) agreements and racial profiling. Other studies that looked only at the policing behavior of signatory LEAs cannot make similarly strong claims of causality because of possible confounding factors. For example, if the leadership of a county LEA—e.g., the sheriff—favors anti-immigrant policies, that leadership would likely push the county to sign a 287(g) agreement and also support any observed racial profiling by agents of that LEA. Thus, the underlying anti-

9. See *infra* Fig. 2.

10. The arrest rate is calculated as the number of arrests made after a traffic stop, divided by the number of stops in a county in a month.

11. See *infra* notes 146–149 and accompanying text.

immigrant policy direction confounds the analysis and makes it difficult to conclude that any observed racial profiling is in fact caused by the 287(g) agreement.¹² In our study, because the state troopers were not parties to the 287(g) agreements but would know whether such an agreement was active in the county where they patrolled, the observed statistical associations between the presence of 287(g) agreements and the differential treatment of drivers by race are, in fact, causal.

From a policy perspective, our findings demonstrate that 287(g) agreements have important and heretofore unexplored spillover effects on the policing behavior of nonsignatory LEAs. First, the force multiplier effect of the program may be even stronger than advocates estimated, as nonsignatory LEAs are joining signatory LEAs to enforce federal immigration laws. Like signatory LEAs, these nonsignatory LEAs are reallocating their resources—e.g., trooper time—to join in immigration enforcement efforts, but unlike signatory LEAs, their reallocation is happening without the controls of written agreements or formal reviews. Second, with nonsignatory LEAs also engaging in racial profiling, the pernicious effects of racial profiling created by the 287(g) program are likely more extensive than critics feared. From a civil rights perspective, the specter of racial profiling is particularly troubling because it threatens the constitutional rights of all those who are profiled, without regard to their actual immigration status.

Finally, our observed spillover effects suggest that, due to the interconnectedness of LEA operations, there is less political control over the 287(g) program than its formalized structure indicates. Formally, LEAs that want to participate in immigration enforcement efforts must apply, be approved by federal authorities, and sign a written agreement detailing their immigration-related duties. In this formal model, the 287(g) agreement is seen by advocates and critics as the gateway to perceived benefits and harms. Critics of the program understandably focus their efforts on lobbying signatory LEAs to terminate their agreements or lobbying potential signatory LEAs not to sign agreements in the first place. When reports of abuse within the program have emerged, reform efforts have focused exclusively on the form of the 287(g) agreement and the signatory LEAs. For example, after investigations by the Department of Justice (“DOJ”) found widespread racial profiling by the Maricopa County Sheriff’s Office (Arizona) and the Alamance County Sheriff’s Office (North Carolina), the Obama Administration responded by revoking those LEAs’ agreements.¹³ The baseline assumption then is that the 287(g) program is subject to political controls, exercised by elected officials who control entry into and exit from the program (at the federal level, by the President of the United States, and, at the local level, by LEA heads, often sheriffs who are elected in most jurisdictions). But our findings of spillover effects suggest

12. See *infra* Part III; note 152 and accompanying text.

13. Letter from Thomas E. Perez, Assistant U.S. Att’y Gen., U.S. Dep’t of Just., to Bill Montgomery, Cnty. Att’y, Maricopa Cnty. 2 (Dec. 15, 2011) https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf [<https://perma.cc/G3KN-ZEY5>] [hereinafter Investigation of the Maricopa County Sheriff’s Office]; Letter from Thomas E. Perez, Assistant U.S. Att’y Gen., U.S. Dep’t of Just., to Clyde B. Albright, Cnty. Att’y, Alamance Cnty. & Chuck Kitchen, Turrentine L. Firm 4–5 (Sept. 18, 2012), <http://www.justice.gov/iso/opa/resources/171201291812462488198.pdf> [<https://perma.cc/U83U-TUC8>] [hereinafter Investigation of the Alamance County Sheriff’s Office].

that existing political controls may be inadequate to counter abuses within the program. When nonsignatory LEAs engage in racial profiling, their bad behavior can't be curbed by simply revoking an agreement, changing agreement terms, or even by voting out a political official who makes decisions within the official 287(g) program. The inadequacies of existing political controls raise important questions about accountability within the 287(g) program structure.

Relatedly, the leadership of nonsignatory LEAs needs to be aware of these spillover effects. An LEA that chooses not to enter into a 287(g) agreement may do so for a variety of reasons: disagreeing with the mission of local–federal immigration cooperation, wanting to remain neutral on a very divisive issue, wanting to preserve trust with their immigrant communities, or having concerns about the fiscal and other costs of immigration cooperation. But given our observed spillover effects, an LEA's reasons for not signing a 287(g) agreement may be undermined if its rank-and-file officers are informally participating in immigration law enforcement. This discretionary participation, without the benefit of training or regulation, has important implications for LEA policies and for public safety. By highlighting this spillover effect, our project makes an important and novel contribution to the literature showing divergence between the 287(g) program as designed and as implemented.¹⁴

This Article proceeds in five parts. In Part I, we analyze the origins and operation of the 287(g) program, comparing the program with other forms of local–federal immigration cooperation. In Part II, we discuss our case studies of North Carolina and South Carolina, including information about the operation of the 287(g) program in these two states. In Part III, we explain our methodology, including our research design. Part IV analyzes our results, linking the results to relevant explanatory literature in the fields of policing and criminal procedure.

I. THE ORIGINS AND OPERATION OF THE 287(g) PROGRAM

To understand the significance of the 287(g) program, it's important to understand its legislative origins, its operating history, and how it compares to other forms of local–federal immigration cooperation. Section A highlights the uniqueness of the 287(g) program, a program that is formally structured to give LEAs extensive powers to enforce federal immigration laws and, at the same time, maintain federal control over that enforcement. As explained in Section B, however, the program in its 20+ years of operation has been controlled more by LEA priorities than federal ones, resulting in wide variation in how the program has been implemented. More troubling, there has been compelling evidence of racial profiling and other abuses by signatory LEAs, contradicting federal directives to abide by federal civil rights laws. Analysis of that racial profiling, described in Section C, is central to our study of the program's spillover effects.

A. *The Formal Structure of the 287(g) Program*

Authorized in 1996 as part of the omnibus Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), the 287(g) program authorizes the Department of Homeland Security to enter into agreements with a state or political

14. See *infra* Part I.

subdivision “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).”¹⁵ Section 287(g)(3) further specifies that in performing any delegated function, the LEA is “subject to the direction and supervision of the Attorney General.”¹⁶ Under the statutory terms, the LEA will continue to pay for the salaries of its participating officers, and those officers are required to undergo federal training on relevant federal immigration laws.¹⁷

Unlike other forms of local–federal cooperation, officers operating under the 287(g) program are not exercising their independent authority as local officers to enforce criminal laws; rather, they are deputized to act as *federal* officers to enforce immigration laws.¹⁸ The scope of that deputized authority depends on the specific agreement reached between Immigration and Customs Enforcement (“ICE”) and the signatory LEA. The public nature of these agreements, which are available on ICE’s website¹⁹ and are often publicized by ICE or the signatory LEA,²⁰ also distinguishes the 287(g) program from other forms of local–federal cooperation.²¹

In the program’s 20+ year history, four types of agreements have developed: the jailhouse model, the task force model, a hybrid of the jailhouse and task force models, and, most recently, the warrant service officer model.²² The most

15. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 287(g), 8 U.S.C. § 1357(g). The application process requires an interested LEA to complete a needs assessment, which is used to collect information about “immigration enforcement challenges” in the LEA’s community. *FOIA Documents Related to 287(g)*, IMMIGR. LEGAL RES. CTR. 1, 69–74 (2019), https://www.ilrc.org/sites/default/files/resources/ice_foia_287g_excerpts_-_complete_final_2.pdf [<https://perma.cc/6TV2-RWMM>]. The LEA must also obtain a support memo from the ICE field office director working on the LEA’s application and answer more questions, usually by email. *Id.* at 105–06, 179. Finally, the LEA must get a positive recommendation from the ICE Program Advisory Board. *Id.* at 123.

16. 8 U.S.C. § 1357(g)(3).

17. *Id.* § 1357(g)(2).

18. Huyen Pham, *287(g) Agreements in the Trump Era*, 75 WASH. & LEE L. REV. 1253, 1258 (2018).

19. U.S. IMMIGR. & CUSTOMS ENF’T, DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT, <https://www.ice.gov/287g#signed> MOA [<https://perma.cc/73MB-2BP6>] (last updated Mar. 4, 2022).

20. *See, e.g.*, U.S. IMMIGR. & CUSTOMS ENF’T, ICE ANNOUNCES 18 NEW 287(G) AGREEMENTS IN TEXAS (July 31, 2017), <https://www.ice.gov/news/releases/ice-announces-18-new-287g-agreements-texas> [<https://perma.cc/HEH8-J8ED>] (news release by ICE announcing new 287(g) agreements).

21. Many LEAs that cooperate with federal immigration law enforcement do so pursuant to unwritten policies that often require case-by-case decisions; indeed, they may keep their policies informal to avoid attracting attention, both from those who oppose the cooperation, as well as from those who may want more vigorous cooperation. DORIS M. PROVINE, MONICA W. VARSANYI, PAUL G. LEWIS & SCOTT H. DECKER, *POLICING IMMIGRANTS: LOCAL LAW ENFORCEMENT ON THE FRONT LINES* 6 (2016).

22. *The 287(g) Program: An Overview*, AM. IMMIGR. COUNCIL 1, 2 (Aug. 23, 2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_287g_program_an_overview.pdf [<https://perma.cc/9NBU-RBD2>].

popular and the most enduring model is the jailhouse model, also known as the jail enforcement model, where LEA officers exercise their delegated immigration functions on noncitizens who are arrested and detained on state or local criminal charges.²³ Typical duties for a jailhouse model agreement are conducting inquiries about an inmate's immigration status, communicating with ICE about immigrants in their custody, issuing ICE detainers, and transferring inmates to ICE custody.²⁴

With the task force model, deputized officers exercise their immigration powers during the course of their daily activities as patrol officers, detectives, or criminal investigators or in coordination with ICE in task force settings—e.g., working with ICE on a gang-focused task force.²⁵ Task force officers do not have to wait until a person has been arrested on separate charges; rather, they can interrogate noncitizens whom they encounter “on the beat.”²⁶ Typical duties for a task force agreement include inquiring into immigration status and issuing ICE detainers while in the field, issuing arrest warrants for immigration violations, and executing search warrants.²⁷ The hybrid model combines elements of the jailhouse and task force models, allowing immigration enforcement both on the streets and at the jails.²⁸

The most recent and the most limited model is the warrant service officer program, created by ICE in 2019 under the Trump Administration. The only duty that deputized LEA officers have under this model is to serve ICE administrative warrants and execute arrests on ICE's behalf.²⁹ So when the LEA detains the immigrant pursuant to that ICE warrant, ICE characterizes the LEA as exercising purely *federal* authority in an attempt to avoid the legal liabilities that have entangled some LEAs enforcing immigration detainers.³⁰

23. *Id.*

24. Capps et al., *supra* note 3, at 14.

25. *Id.* at 15.

26. *See id.*

27. *Id.*

28. *Id.*

29. U.S. IMMIGR. & CUSTOMS ENF'T, ICE LAUNCHES PROGRAM TO STRENGTHEN IMMIGRATION ENFORCEMENT (May 6, 2019), <https://www.ice.gov/news/releases/ice-launches-program-strengthen-immigration-enforcement> [<https://perma.cc/95TF-9FDY>]; *see also The 287(g) Program: An Overview*, *supra* note 22, at 2.

30. *See, e.g.,* Gonzales v. ICE, No. CV-13-04416, 2014 WL 12605368 (C.D. Cal. July 28, 2020), *rev'd and vacated*, 975 F.3d 788 (2020) (upholding a permanent injunction barring ICE from relying on a database of inaccurate, incomplete records to issue detainers); Miranda-Olivares v. Clackamas County, No. 3:12-cv-02317-ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014) (holding that plaintiff was entitled to summary judgment for a violation of her Fourth Amendment rights because she was held on an ICE detainer after she would otherwise have been released on bond); Morales v. Chadbourne, 996 F. Supp. 2d 19 (D.R.I. 2014), *aff'd*, 793 F.3d 208 (holding that the U.S. citizen plaintiff stated a viable Fourth Amendment claim against both ICE and Rhode Island officials because she was held for 24 hours on an ICE detainer). Critics charge that the warrant service officer program is also designed to circumvent sanctuary laws in some states that restrict the authority of LEAs to cooperate with federal immigration law enforcement. *See* Camilo Montoya-Galvez, *New ICE Program Lets Local Authorities "Disregard" Sanctuary Policies*, *Advocates Say*, CBS NEWS (May 7, 2019, 6:47 PM), <https://www.cbsnews.com/news/sanctuary-cities-immigrant-advocates-say-new->

Consistent across all these models are the requirements of ICE supervision and compliance with federal civil rights laws. As noted earlier, Congress built ICE supervision into the statutory language creating the 287(g) program.³¹ Language from signed agreements also reflects this requirement of federally controlled delegation:

- “[This Memorandum of Agreement (“MOA”)] sets forth with specificity the duration of the authority conveyed and the specific lines of authority, including the requirement that participating LEA personnel are subject to ICE supervision while performing immigration-related duties pursuant to this MOA.”³²
- “ICE retains sole discretion in determining how it will manage its limited resources and meet its mission requirements. To ensure resources are managed effectively, ICE requires the HCSO to also manage its resources dedicated to 287(g) authority under the MOA. To that end, the HCSO shall follow ICE’s civil immigration enforcement priorities.”³³

Additionally, the agreements include prohibitions against racial profiling and other civil rights violations:

- “Participating HCSO personnel are bound by all Federal civil rights laws, regulations, and guidance relating to non-discrimination, including the U.S. Department of Justice ‘Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity,’ dated December 2014, and Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000 et seq., which prohibits discrimination based upon race, color, national origin (including limited English proficiency) in any program or activity receiving Federal financial assistance.”³⁴

ice-program-allows-local-law-enforcement-to-circumvent-sanctuary/ [https://perma.cc/7VZX-UX9F]; Abigail Hauslohner, *ICE Gives Police Way to Work Around ‘Sanctuary’ Policies, Act as Immigration Officers*, WASH. POST (May 6, 2019, 5:38 PM), https://www.washingtonpost.com/immigration/ice-provides-local-police-a-way-to-work-around-sanctuary-policies-act-as-immigration-officers/2019/05/06/f651ff38-7029-11e9-9eb4-0828f5389013_story.html?utm_term=.2d2480d3e6e4 [https://perma.cc/F4NN-726H]; *see also* S.B. 54, 2017–2018 Leg. Reg. Sess. (Cal. 2017). To date, the liability of LEAs participating in the warrant service officer program and the legality of the program in sanctuary jurisdictions have not been challenged in court.

31. *See supra* notes 15–18 and accompanying text.

32. Memorandum of Agreement between U.S. Immigrations & Customs Enforcement and Pima County Sheriff’s Office 1 (Mar. 10, 2008), <https://www.ice.gov/doclib/287gMOA/pimacountysheriffsoffice.pdf> [https://perma.cc/N6LT-Y664].

33. Addendum to Extend Memorandum of Agreement between U.S. Immigration & Customs Enforcement and Hernando County Sheriff’s Office 16 (Feb. 27, 2018), https://www.ice.gov/doclib/287gMOA/287gJEM_HernandoCoF12018-02-27.pdf [https://perma.cc/4QHE-T74W].

34. *Id.* at 8.

On paper then, the 287(g) program emerges as a tightly controlled delegation, where the federal government delegates expansive powers to carefully screened LEAs through a detailed agreement and then continues to direct and supervise the LEAs' exercise of that power in a uniform manner. But as explained in Section B below, the program's actual operation has been more complicated. To understand this divergence, we are reminded of the importance of studying laws from the bottom, as they're implemented on the ground, rather than limiting ourselves to the laws as written in the books.³⁵

B. The 287(g) Program on the Ground

In its actual operation, the 287(g) program has diverged significantly from the formal structure outlined in federal statutes and in the formal agreements. Throughout its 20+ year history, the program has been controlled more by LEA priorities than federal ones, resulting in wide variation in how the program has been implemented. More troubling, there has been compelling evidence of racial profiling and other abuses by signatory LEAs, contradicting federal directives to abide by federal civil rights laws. This reported divergence by signatory LEAs provides important context for our observed spillover divergence, involving nonsignatory LEAs.

Though initially authorized by Congress in 1996, the first 287(g) agreement wasn't signed until 2002, when the State of Florida signed an agreement with the then-Immigration and Naturalization Service, empowering its newly created Regional Domestic Security Task Force to carry out limited immigration enforcement duties.³⁶ In the shadow of the 9/11 attacks, these duties were focused on terrorism threats, including the detainment of individuals apparently involved in "surveillance activities in sensitive locations" and the arrests of unauthorized immigrants working in restricted or secured areas of seaports, airports, and nuclear plants.³⁷ These early agreements, like Florida's, focused on immigrants who implicated national security concerns or had criminal records, consistent with the program's public goals.³⁸ In his July 2005 testimony before the Homeland Security subcommittee, Paul Kilcoyne, Deputy Assistant Director of ICE's Office of Investigations, assured Congress that the program would remain "focused on

35. See, e.g., Ines Valdez, *Punishment, Race, and the Organization of U.S. Immigration Exclusion*, 69 POL. RSCH. Q. 640 (2016) (focusing on particular disciplinary practice, as well as discourse, to understand how the threat of racialized immigrants is created).

36. Capps et al., *supra* note 3, at 9.

37. *The 287(g) Program: Ensuring the Integrity of America's Border System Through Federal-State Partnerships: Hearing Before the Subcomm. on Mgmt., Integration, and Oversight of the H. Comm. on Homeland Sec.*, 109th Cong. 16 (2005), <https://www.govinfo.gov/content/pkg/CHRG-109hhrhg28332/pdf/CHRG-109hhrhg28332.pdf> [<https://perma.cc/32D9-DWBL>] (statement of Paul M. Kilcoyne, Deputy Assistant Director, Office of Investigations, U.S. Immigration & Customs Enforcement).

38. *Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law: Hearing Before the Comm. on Homeland Sec. H. R.*, 111th Cong. 37–38 (2009), <https://www.govinfo.gov/content/pkg/CHRG-111hhrhg49374/pdf/CHRG-111hhrhg49374.pdf> [<https://perma.cc/5U2Z-6D8H>] (prepared statement of Muzaffar A. Chishti, Director of the Migration Policy Institute's office at New York University School of Law).

criminal organizations, those individuals who pose a threat to border security,” and not on “the landscape architect that had the broken headlight.”³⁹

As the 287(g) program expanded, however, many of the new LEAs brought their own enforcement agendas with them. In 2006, when three new agreements were signed, some signatory LEAs adopted a universal model of enforcement, with the goal of apprehending as many unauthorized immigrants as possible, regardless of their criminal records or dangerousness. Perhaps the most visible example of this universal enforcement model was the 287(g) agreement signed by Mecklenberg County in North Carolina. Based on Sheriff Jim Pendergraph’s statements, the county’s goal in signing the agreement was to apprehend as many unauthorized immigrants as possible, guided by the beliefs that these immigrants committed crimes and drained public resources.⁴⁰ The Mecklenberg agreement, which became a model for all new agreements signed from 2007–2009, provided in relevant part: “It is the intent of the parties that this agreement will result in enhanced capacity to deal with immigration violators in the County.”⁴¹

The increased popularity of the 287(g) agreements and the increased popularity of the universal enforcement model in particular meant that more and more immigrants were being processed for removal through the program. Between 2005 and 2010, 287(g) officers identified and screened 186,000 noncitizens for removal, with more than 100,000 of those screenings occurring between 2008 and 2010.⁴² Critics harshly condemned this expansion, arguing that in increasing the numbers of immigrants detained for screening, 287(g) jurisdictions were engaging in racial profiling without increasing public safety. In a 2009 letter to President Obama on behalf of 500+ organizations, Marielena Hincapie as executive director of the National Immigration Law Center urged the Obama Administration to terminate the program. “Racial profiling and other civil rights abuses by the local law enforcement agencies that have sought out 287(g) powers have compromised public safety, while doing nothing to solve the immigration crisis.”⁴³ Police organizations, like the Police Foundation, also criticized the program, concluding that the costs of participation outweigh the benefits “where there is no criminal nexus.”⁴⁴

39. *The 287(g) Program: Ensuring the Integrity of America’s Border System Through Federal-State Partnerships: Hearing Before the Subcomm. on Mgmt., Integration, and Oversight of the H. Comm. on Homeland Sec.*, 109th Cong. 34, 62 (2005), <https://www.govinfo.gov/content/pkg/CHRG-109hrg28332/pdf/CHRG-109hrg28332.pdf> [<https://perma.cc/32D9-DWBL>] (statement of Paul M. Kilcoyne, Deputy Assistant Director, Office of Investigations, U.S. Immigration & Customs Enforcement).

40. Capps et al., *supra* note 3, at 10.

41. Memorandum of Understanding between U.S. Immigration & Customs Enforcement and Mecklenburg County Sheriff’s Office 1 (Feb. 7, 2006), <https://www.ice.gov/doclib/287gMOA/mecklenburgcountysheriffsoffice.pdf> [<https://perma.cc/H9J6-4HYT>].

42. Capps et al., *supra* note 3, at 18.

43. Letter from Marielena Hincapie, Exec. Dir. of Nat’l Immigr. L. Ctr., to President Barack Obama 1 (Aug. 25, 2009) (on file with author).

44. This conclusion was based on findings from national focus groups that included local police and a survey of police chiefs. See ANITA KHASHU, POLICE FOUND., THE

In that same year, the General Accountability Office (“GAO”) issued a detailed review, concluding that the 287(g) program was operating without necessary federal controls.⁴⁵ Based on interviews of all LEAs participating in the program and information provided by these agencies and ICE, the GAO made three specific recommendations. First, the GAO found that the program’s lack of documented program objectives allowed some participating LEAs to use the program to process immigrants for minor crimes (like speeding), despite the program’s ostensible focus on addressing serious crimes.⁴⁶ Second, ICE needed to define the nature and scope of its supervision of participating LEAs; without those defining guidelines, ICE field officers varied widely in how they supervised LEAs, leading to wide variation in how the program was implemented.⁴⁷ Finally, though ICE required LEAs to collect and report program data, ICE in most cases did not specify the data to be collected or how it should be collected and reported. Lacking data, ICE could not know whether the program was achieving its objectives.⁴⁸ The GAO based its review on interviews of all subfederal agencies participating in the program and information provided by these agencies and ICE.⁴⁹

Rather than disband the program, the Obama Administration responded by trying to impose more federal controls over participating LEAs, as the GAO recommended. ICE required all new and continuing 287(g) agreements to use a template that articulated enforcement priorities for the program, focusing on “criminal aliens who pose the greatest threat to public safety or a danger to the community.”⁵⁰ The template also required LEA officers to ask on a case-by-case basis for ICE permission to conduct a 287(g) enforcement action, like interrogating and processing a person solely based on immigration violations.⁵¹ Finally, the template specified the type of information that ICE required and imposed obligations on the LEAs to provide that data.⁵² These new agreements, ICE claimed, would “promote[] consistency across the board to ensure that all of our state and local law enforcement partners are using the same standards” and “support[] local efforts to protect public safety by giving law enforcement the tools to identify and remove dangerous criminal aliens.”⁵³

ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES xii (2009), <https://www.policefoundation.org/wp-content/uploads/2015/07/Khashu-2009-The-Role-of-Local-Police.pdf> [<https://perma.cc/RR63-S3GD>] (highlighting the variance of immigration policies in response to historically high rates of immigration).

45. See U.S. GOV’T ACCOUNTABILITY OFF., IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 1, 23 (2009), <https://www.gao.gov/new.items/d09109.pdf> [<https://web.archive.org/web/20120202000106/https://www.gao.gov/new.items/d09109.pdf>] (highlighting the need for better oversight controls over programs authorizing local and state agencies to participate in immigration enforcement).

46. *Id.* at 4.

47. *Id.*

48. *Id.* at 5.

49. *Id.* at 2–3.

50. Capps et al., *supra* note 3, at 11–12.

51. *Id.* at 12.

52. *Id.*

53. *Id.* at n.6.

Did these reforms make any difference in the actual operation of the 287(g) program? An extensive review conducted by the Migration Policy Institute (“MPI”) in 2011 found that the reforms made very little difference in the program’s operations, as enforcement decisions about priorities continued to be made at the local level.⁵⁴ Specifically, half of the detainers issued through the 287(g) program were for people arrested for misdemeanors or traffic offenses, even though these offenses were not priority offenses under the 2009 template.⁵⁵ Why was the Obama Administration unable to change the direction of the program’s implementation? Part of the explanation is specific to the operation of the 287(g) program, and part of the explanation applies to subfederal enforcement of immigration laws more generally. Specific to the 287(g) program, the requirement of more ICE supervision did not affect enforcement decisions at the local level for two main reasons. First, ICE supervisors tended to sign off on all detainer requests, even those issued for immigrants with low priority crimes and traffic offenses.⁵⁶ Second, for the jailhouse model agreements, ICE supervision and the related immigration training did not extend to the officers making the initial arrests. “The lack of federal control over arresting officers,” MPI warned, “opens the door to racial profiling and pretextual arrests, especially in jurisdictions that place immigration detainers universally.”⁵⁷

The more general explanation is rooted in the power structure between the federal government and LEAs in these joint immigration enforcement endeavors. Nominally, it is the federal government that should be in control; as the exclusive holder of immigration powers, the federal government decides, after a screening process, which LEAs can join the 287(g) program and may receive its delegated powers. Yet as Mona Lynch describes in her case study of the Maricopa County Sheriff’s Office (Arizona), the LEA starts in a position of strength in this local–federal relationship.⁵⁸ The LEA, she explains, is an established bureaucracy with legitimacy, and it is the federal government that seeks the LEA’s help to carry out the federal mission of immigration enforcement.⁵⁹ “Put simply, [with the 287(g) program], local officers do not become federal agents; federal law becomes a new tool for local officers to use in their existing regimes.”⁶⁰

In the specific case of the Maricopa County Sheriff’s Office (“MCSO”), Sheriff Joe Arpaio used the 287(g) program to add another target—immigrants—to his agenda of extreme law enforcement. Elected in 1992, Sheriff Arpaio quickly created notoriety with his “tough on crime” policies; perhaps his most infamous creation was Tent City, an outdoor prison where prisoners lived in tents, were forced to wear pink underwear and to work on chain gangs, and endured extremely hot conditions. Arpaio described Tent City as a “concentration camp” and claimed that

54. *Id.* at 3.

55. *Id.* at 2.

56. *Id.*

57. *Id.*

58. Mona Lynch, *(Im)migration Penal Excess: Sheriff Joe Arpaio and the Case of Maricopa County, Arizona*, in *EXTREME PUNISHMENT: COMPARATIVE STUDIES IN DETENTION, INCARCERATION AND SOLITARY CONFINEMENT* 68, 75 (Keramet Reiter & Alexa Koenig eds., 2015).

59. *Id.*

60. *Id.*

its harsh conditions deterred people from committing crimes in Arizona.⁶¹ Arpaio turned his attention to immigration enforcement soon after the 2005 election of a fellow hardliner, Andrew Thomas, as Maricopa county attorney.⁶² Thomas and Arpaio teamed up to arrest and prosecute defendants under Arizona's new law that criminalized human smuggling. Arpaio created a Human Smuggling Unit ("HSU") of deputies and volunteers who sought out and arrested both smugglers and undocumented immigrants. During its first eight weeks of operation, the HSU arrested 146 people and detained them in Tent City.⁶³

The 287(g) agreement that Arpaio signed in 2007 expanded both the legal and geographical jurisdiction for his agenda of extreme immigration enforcement. The agreement gave the MCSO the authority to enforce federal immigration laws, not just Arizona's smuggling laws. Investigating immigration status became commonplace in all criminal investigations, and, critics charged, those criminal investigations were ramped up as a pretext to identify undocumented immigrants.⁶⁴ With this expanded legal authority, the MCSO also expanded the geographical reach of its immigration enforcement efforts. No longer limited to enforcing smuggling laws, the MCSO expanded its HSU to a newly renamed Illegal Immigration Interdiction Strike Force ("Triple I") and moved into more urban areas of the county, including the cities of Phoenix and Mesa.⁶⁵ The MCSO targeted neighborhoods and business areas with high concentrations of Latinos and other minorities, conducting multiple-day saturation patrols where Triple I members would stop hundreds of people, searching for undocumented immigrants.⁶⁶ Arrested immigrants were detained in Tent City. Sheriff Arpaio was clear from the onset that he would implement a universal model of enforcement through his 287(g) agreement: "Ours is an operation where we want to go after illegals, not the crime first We want to stop illegals coming into this country and put them in jail."⁶⁷

Though the extreme, publicity-seeking antics of Sheriff Arpaio may make the MCSO's 287(g) agreement seem like an outlier, the local-federal dynamic shown by the MCSO—where federal priorities are subsumed to local interests—was actually common throughout the 287(g) program. In its 2011 study, MPI found that the dominance of local interests was widespread in the 287(g) program, despite federal efforts to refocus the program on immigrants with serious criminal convictions. In the Southeast and Southwest, MPI found that growing immigrant communities pushed elected officials like sheriffs to pursue more rigorous immigration enforcement.⁶⁸ In particular, the MPI study noted that the universal enforcement model for the 287(g) program continued to be implemented in the

61. Maya Salam, *Last Inmates Leave Tent City, a Remnant of Joe Arpaio*, N.Y. TIMES (Oct. 11, 2017), <https://www.nytimes.com/2017/10/11/us/arpaio-tent-city-jail.html> [<https://perma.cc/X2DU-SQRS>].

62. Lynch, *supra* note 58, at 72.

63. *Id.*

64. *Id.* at 80–81.

65. *Id.*

66. *Id.*

67. *Id.* at 79.

68. Capps et al., *supra* note 3, at 3.

southeastern United States.⁶⁹ The case study of MCSO and the broader MPI study highlight the difficulties that the federal government has experienced when it tries to exert federal control over the 287(g) program.

C. Racial Profiling

One of the most troubling manifestations of localized power in the 287(g) program is the prevalence of racial profiling by participating LEAs, despite federal prohibitions to the contrary. In analyzing the phenomenon of racial profiling, we use this definition: “racial profiling is the use of racial or ethnic appearance by police as one factor, among others, to decide who is suspicious enough to attract police attention that may result in detention, questioning, a search, or other routine police action.”⁷⁰ Racial profiling, thus defined, has been documented throughout the 287(g) program, by both federal investigators and academic studies. For example, in his study of policing in Frederick County, Maryland, Michael Coon found that after the Frederick County Sheriff’s Office (“FCSO”) implemented its 287(g) program in 2008, it was arresting 11–13 more Hispanics per month than would be expected without the program.⁷¹ This finding was based on data compiled from FCSO’s individual arrest records from January 1, 2006 to December 31, 2013, using difference-in-difference estimates.⁷² FCSO arrests of whites and blacks during the same time period dropped significantly, suggesting that the office shifted its enforcement resources toward the Hispanic community.⁷³

The racial profiling practices of the MCSO have been previously discussed.⁷⁴ After the DOJ concluded that those practices were discriminatory and unconstitutional, ICE revoked MCSO’s 287(g) agreement in 2012. Similarly, ICE terminated its 287(g) agreement with the Alamance County Sheriff’s Office (“ACSO”) (North Carolina) in 2011, after a DOJ investigation found that the office had abused its 287(g) program.⁷⁵ Some of ACSO’s abuses included using its deputized immigration powers to locate checkpoints in majority Latino neighborhoods and treating stopped drivers differently based on their race.⁷⁶ In its investigations of both Maricopa County and Alamance County, the DOJ concluded

69. *Id.* at 2.

70. David A. Harris, *Racial Profiling*, 2 REFORMING CRIM. JUST. 117, 118 (2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/5_Reforming-Criminal-Justice_Vol_2_Racial-Profiling.pdf [<https://perma.cc/E22Q-C6K4>]. The DOJ has defined racial profiling in a narrower way: “any police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity.” Deborah Ramirez, Jack McDevitt & Amy Farrell, *A Resource Guide on Racial Profiling Data Collection Systems*, U.S. DEP’T OF JUST. 1, 3 (2000), <https://www.ojp.gov/pdffiles1/bja/184768.pdf> [<https://perma.cc/MA4Y-A792>].

71. Michael Coon, *Local Immigration Enforcement and Arrests of the Hispanic Population*, 5 J. ON MIGRATION & HUM. SEC. 645, 657 (2017), <https://www.immigrationresearch.org/system/files/102-349-3-PB.pdf> [<https://perma.cc/WR7Y-SNVJ>].

72. *Id.* at 651.

73. *Id.* at 656.

74. *See supra* notes 64–67 and accompanying text.

75. Investigation of the Alamance County Sheriff’s Office, *supra* note 13.

76. *Id.* at 3.

that the discrimination was intentional and rooted in the respective sheriffs' preexisting prejudices against Latinos.⁷⁷

Why does racial profiling occur in the 287(g) program? As explored in Section II.B, localized power is an important part of the explanation because it allows LEAs to assert their own priorities, even when those priorities clash with federal prohibitions and objectives.⁷⁸ But to have a more complete understanding of racial profiling in the context of the 287(g) program, we also need to drill down to the micro level and understand the arrest process, the relative lack of immigration training by arresting officers, and the different motives for the arrests that funnel immigrants into the 287(g) program. As Hiroshi Motomura explains, the initial decision to arrest for a criminal offense is the decision that matters the most in immigration enforcement because that arrest exposes the noncitizen to federal immigration enforcement. If ICE decides to place the noncitizen in removal proceedings, s/he is likely to be removed because there are so few avenues for relief, even if the original criminal charges are dismissed.⁷⁹ Simply stated, an immigration judge presiding over removal proceedings has few options to grant discretionary relief because of strict threshold eligibility requirements for that relief, including extremely demanding hardship standards.⁸⁰ By contrast, a law enforcement officer exercises great discretion in deciding whether to stop or arrest any particular individual. Some of the factors that the officer may consider include the characteristics of the suspect, the characteristics of the situation like the location, and the legal characteristics including the amount of evidence and the seriousness of the alleged offense.⁸¹

Given the broad discretion that arresting officers exercise, it is important to note that most of these officers receive little to no training on immigration law. The 287(g) program does provide some immigration training to the officers

77. *Id.*; Investigation of the Maricopa County Sheriff's Office, *supra* note 13.

78. A similar local–federal dynamic has been documented in the Criminal Alien Program (“CAP”), an umbrella program for several immigration enforcement initiatives within ICE. The core focus of CAP is to identify removable immigrants incarcerated in state and federal prisons and initiate removal proceedings against them. The cornerstone of these efforts are “jail status check” programs where ICE personnel, in cooperation with LEAs, screen jailed immigrants for immigration status. In a 2009 study of CAP as implemented by the Irving Police Department (“IPD”) (Texas), researchers at the Warren Institute (University of California, Berkeley) found that that the IPD dramatically increased its discretionary arrests of Hispanics for petty offenses, especially for minor traffic offenses. These arrests occurred despite CAP’s ostensible mandate to identify removable immigrants with serious criminal offenses. TREVOR GARDNER II & AARTI KOHLI, U.C. BERKELEY L. SCH.: WARREN INST., THE C.A.P. EFFECT: RACIAL PROFILING IN THE CRIMINAL ALIEN PROGRAM 1–2 (2009), https://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf [https://perma.cc/KK2A-PYQ9].

79. Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1851 (2011).

80. *Id.* at 1856.

81. *Police: Police Officer Behavior—Explaining Police Behavior*, L. LIBR. - AM. L. & LEGAL INFO., <https://law.jrank.org/pages/1676/Police-Police-Officer-Behavior-Explaining-police-behavior.html> [https://perma.cc/92AC-ZJ3P] (last visited Feb. 3, 2021).

designated by LEAs for deputization, but these officers make up only a small percentage of an LEA's officers.⁸² Moreover, except in limited circumstances, the officers who do receive the training are not the officers making the initial criminal arrests that funnel noncitizens into the program's screening processes. Under all 287(g) models except the task force model, the immigration work of the deputized officers is limited to screening those noncitizens who are arrested for separate criminal offenses.⁸³ Thus, assuming a division of labor between patrol and detention duties, the vast majority of officers making the initial stops and arrests (the nondeputized officers in the signatory LEA and, in our study, other officers outside of the LEA like state troopers) do not have any immigration training. Even the deputized officers within the LEA receive a much more abbreviated training, as compared with ICE officers. ICE officers are required to attend 22 weeks of basic training at the Federal Law Enforcement Training Center ("FLETC") in Glynco, Georgia, where they receive training on criminal investigation, immigration law, and firearms.⁸⁴ By contrast, local LEA officers implementing 287(g) duties receive only four weeks of FLETC training, teaching them how to access immigration databases, fill out immigration forms, and otherwise carry out the duties of an immigration officer.⁸⁵ Officers under the warrant service officer model receive even less training—an 8 hour, local, or online training by ICE-certified instructors.⁸⁶

Why is this lack of immigration training significant? Without training, critics argue that officers resort to stereotypes about who has legal immigration status. To counteract racial stereotyping, that training should include, at a minimum, information about the complexities of immigration law—e.g., the different categories of legal status, including nonimmigrant status. Effective training would also include information about implicit bias—e.g., how implicit bias may affect an officer's interpretation of ambiguous behavior, based on the race of the participants—and the impact of racial profiling on those who are profiled and the larger community. Officers also should be given training about possible litigation consequences of profiling.⁸⁷ Without adequate training, officers may see a Latino face as representing "illegality," in the same way that an African American face may

82. For example, the Charleston County Sheriff's Office in 2020 had 306 sworn deputies and 365 sworn detention deputies; only 10 of the detention deputies were certified to participate in the 287(g) program. Email from Karli Maratea, Paralegal, Pub. Info. Off., Charleston Cnty. Sheriff's Off., to Teresa Reyes-Flores, Rsch. Assistant, Tex. A&M Univ. Coll. of L. (Oct. 2, 2020, 1:22 PM) (on file with author).

83. The task force model, where deputized officers are authorized, was discontinued by the Obama Administration; the Trump Administration expressed support for reviving the task force model but did not sign any task force model agreements.

84. *Training for Immigration and Customs Enforcement Agents*, FEDERALLAWENFORCEMENT.ORG, <https://www.federalawenforcement.org/ice/ice-training/#:~:text=All%20new%20hires%20of%20ICE,continue%20as%20an%20ICE%20agent> [<https://perma.cc/J9HB-F62S>] (last visited Oct. 2, 2020).

85. *The 287(g) Program: An Overview*, *supra* note 22, at 3.

86. *Id.*

87. Christian Briggs, *The Reasonableness of a Race-Based Suspicion: The Fourth Amendment and the Costs and Benefits of Racial Profiling in Immigration Enforcement*, 88 S. CAL. L. REV. 379, 411 (2015).

evoke an expectation of “criminality.”⁸⁸ The lack of immigration training, layered on top of localized priorities favoring universal enforcement and the wide range of discretion that arresting officers exercise, create a perfect storm for racial profiling within the 287(g) program.

Beyond the structural factors that facilitate racial profiling, we also consider the “goal or objective”⁸⁹ of LEAs that participate in these practices. Any discussion of motive in the context of racial profiling is necessarily complex. We have to acknowledge that motives may be explicit, implicit, and even subconscious; that actors may have mixed motives for engaging in racial profiling; that the relevant unit of analysis may be individual arresting officers, their supervisors, or both; and, finally, that there may be official policies related to racial profiling, as well as informal, perhaps contradictory, practices within the same LEA. Recognizing the complexity of that context, this Section provides an overview of possible LEA motives for racial profiling.

One central motive for racial profiling is simply animus, either toward Latinos, immigrants generally, or both. The 287(g) activities of the Maricopa County Sheriff’s Office, under the direction of Sheriff Joe Arpaio, were clearly marred by animus toward both immigrants and Latinos. Arpaio’s aggressive use of his 287(g) powers to pursue an anti-immigrant agenda have been previously detailed;⁹⁰ the anti-Latino tenor of those efforts is further analyzed here. In its 2011 report, the DOJ concluded that through its 287(g) program, the MCSO and Sheriff Arpaio engaged in racial profiling of Latinos and unlawfully stopped, detained, and arrested Latinos, in violation of federal law.⁹¹ Among its most damning findings:

- Latino drivers were four to nine times more likely to be stopped for traffic violations than similarly situated non-Latino drivers;⁹²
- 20% of the stops made by the Human Smuggling Unit were made without reasonable suspicion or probable cause and almost all of these stops involved Latino drivers;⁹³
- Jail staff refused to accept inmate requests for basic services written in Spanish—e.g., to replace soiled bed sheets—and punished entire pods

88. Liana Maris Epstein & Phillip Atiba Goff, *Safety or Liberty?: The Bogus Trade-Off of Cross-Deputization Policy*, 11 ANALYSES SOC. ISSUES & PUB. POL’Y 314, 318 (2011) (stating that “[t]he association between Latino and undocumented immigration has the potential to become an automatic linkage. Just as Black faces have been shown to evoke expectations of criminality, it is possible that Latino faces will evoke expectations of ‘illegality’” (citations omitted)).

89. *Objective*, DICTIONARY.COM, <https://www.dictionary.com/browse/objective> (last visited Feb. 14, 2021) (defining “objective” as “something that one’s efforts or actions are intended to attain or accomplish; purpose; goal; target”).

90. See *supra* notes 61–69 and accompanying text.

91. Investigation of the Maricopa County Sheriff’s Office, *supra* note 13, at 2.

92. *Id.* at 6.

93. *Id.*

within the jail if one Latino inmate failed to understand a command given in English,⁹⁴ and

- MCSO deputies, supervisors, and detention officers frequently directed racial slurs at Latino detainees—e.g., “wetbacks,” “Mexican bitches,” and “stupid Mexicans”—and used county accounts to send email messages demeaning Latinos.⁹⁵

As the DOJ concluded, the actions of the MCSO and especially the discriminatory statements by MCSO staff were evidence of “a pervasive culture of discriminatory bias against Latinos at MCSO that reache[d] the highest levels of the agency.”⁹⁶

Beyond overt animus, participating LEAs may view racial profiling as an acceptable collateral consequence that furthers the larger agenda of law and order. Because unlawfully present immigrants are breaking the law, the use of racial profiling is tolerated (or even encouraged) by these LEAs as a means to the end of removing the immigrant lawbreakers. For example, Sheriff Donnie Harrison of Wake County (North Carolina) unapologetically used misdemeanor arrests to trigger the 287(g) screening process; comparing a 287(g) misdemeanor arrest to a box of Cracker Jacks, he said that sometimes a minor arrest could reveal a “prize,” if the arrestee was wanted for a more serious crime or for an immigration offense.⁹⁷ Following this thought process, the most logical targets for these misdemeanor sweeps are those who look “illegal.”⁹⁸ Similarly, in their study of the Davidson County Sheriff’s Office (“DCSO”) (Tennessee), Donato and Rodriguez suggest that the implementation of the 287(g) program itself can create “an ideology of anti-foreignness” among LEA officers.⁹⁹ Studying arrest reports collected before and after DCSO joined the 287(g) program, they found that deputies gave different reasons for their discretionary arrests after implementation, placing more emphasis on arrestees’ county of origin, language use, and legal status.¹⁰⁰

There are also compelling structural explanations for racial profiling. Professor Ian Haney López writes about “institutional racism,” where institutional actors replicate racist behaviors by following background scripts and paths that discriminate against minorities.¹⁰¹ These behaviors are not intentional, in that the actors would deny that they are motivated by racist impulses; yet these routinized behaviors “may well constitute the greatest source of ongoing harm to minority

94. *Id.* at 9–10.

95. *Id.* at 10–11.

96. *Id.* at 10.

97. Matthew Coleman, *The “Local” Migration State: The Site-Specific Devolution of Immigration Enforcement in the U.S. South*, 34 L. & POL’Y 159, 174 (2012).

98. Epstein & Goff, *supra* note 88, at 318.

99. Katharine Donato & Leslie Ann Rodriguez, *Police Arrests in a Time of Uncertainty: The Impact of 287(g) on Arrests in a New Immigrant Gateway*, 58 AM. BEHAV. SCIENTIST 1696, 1697 (2014).

100. *Id.*

101. Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1725 (2000).

communities.”¹⁰² Zooming in on the 287(g) program, Professor Amada Amenta in 2017 similarly found that organizational structures and behaviors account for the punitive outcomes of the 287(g) program, even when individual officers and the police bureaucracy are sympathetic to immigrant concerns. Based on her two-year study of the Davidson County Sheriff’s Office (Nashville, Tennessee) and its implementation of a 287(g) agreement, she observed a spillover dynamic similar to that analyzed in this Article, between the DCSO, which operates the county jails and signed the 287(g) agreement, and the Metropolitan Nashville Police Department (“MNPDP”), which provides law enforcement services for the city of Nashville and for the county.¹⁰³ Though the DCSO was the signatory LEA, the 287(g) agreement also had spillover effects on the policing behavior of the MNPDP. Both LEAs, she concluded, relied on overpolicing in their immigration enforcement efforts. MNPDP officers were socialized and incentivized to make investigatory police stops, and Latino communities provided “a reserve of citable and arrestable people.”¹⁰⁴ Officers who were inclined to punish immigrants could legally do so by arresting them and subjecting them to the 287(g) screening mechanisms; even “pro-immigrant” officers felt compelled to enforce the law and issued citations, which were financially onerous and provided a back door to future arrest if left unpaid.¹⁰⁵

These explanations for racial profiling, focusing on both individual actors and structural factors, are a crucial part of our analysis, because they show the discrepancies between the 287(g) program as it was designed and as it has been implemented. As described in this Part, important work has been done by other researchers, showing how racial profiling has manifested in the 287(g) program and offering explanations for this phenomenon. In Part II, we extend the analysis, showing through our case studies of North and South Carolina how 287(g) agreements can affect the policing behavior of neighboring LEAs which are not signatories to the agreements but utilize the same jail facilities. Our study underscores that to understand the full impact, and the full harm, of 287(g) agreements, we need to look beyond the formal terms and the formal parties to these agreements.

II. NORTH CAROLINA AND SOUTH CAROLINA AS CASE STUDIES

Our hypothesis is that the implementation of 287(g) agreements changes not only the policing behavior of signatory LEAs but also spills over to affect the policing behavior of neighboring LEAs that use the jails operated by the signatory LEAs. Knowing that the noncitizens they arrest will likely be screened rigorously for immigration status, officers working for a nonsignatory LEA are incentivized to engage in racial profiling—to stop and arrest those who look like immigrants. Our hypothesis necessarily incorporates analysis from Part I defining racial profiling and analyzing its causes within the 287(g) program, at the individual and structural levels.

102. *Id.* at 1723.

103. AMADA AMENTA, PROTECT, SERVE AND DEPORT: THE RISE OF POLICING AS IMMIGRATION ENFORCEMENT 154 (2017).

104. *Id.*

105. *Id.*

To test our hypothesis, we studied the stop and arrest data of state troopers in North Carolina and South Carolina from 2000 to 2016. We chose these project parameters for several reasons. First, we chose the time period to capture data both before and after the signing of 287(g) agreements.¹⁰⁶ Second, we chose North Carolina and South Carolina because, as explained below, many of their sheriff's offices were active participants in the 287(g) program. At the same time, neither state's highway patrol agency joined the program, giving us a natural law enforcement structure to study possible spillover effects.

As seen in Table 1 below, LEAs in both North and South Carolina were early and frequent participants in the 287(g) program, giving us a rich record of 287(g) activity. Mecklenburg County Sheriff's Office (North Carolina) signed a 287(g) agreement in 2006 and York County Sheriff's Office (South Carolina) signed an agreement in 2007, putting them squarely in the first wave of 287(g) agreements signed nationwide.¹⁰⁷ From 2008 to 2010, North Carolina had eight active agreements, the most of any state during the same time period. South Carolina wasn't far behind, with four active agreements from 2010 to 2013.¹⁰⁸

106. As noted earlier, the first 287(g) agreement was signed in 2002. *See supra* Section I.B.

107. We compiled a list of 287(g) agreements as part of our larger database of city, county, and state immigration laws and regulations from 2005 to the present. From this database we constructed the Immigrant Climate Index ("ICI"), a measure of regulation-induced climate for immigrants at the city, county, and state levels. *See* Huyen Pham & Pham Hoang Van, *Measuring the Climate for Immigrants: A State-by-State Analysis*, in STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY 21–29 (Carissa Byrne Hessick & Gabriel J. Chin eds., 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1986128 [<https://perma.cc/V4BA-KS2B>]. For the years 2005–2017, 108 counties entered into 287(g) agreements with the federal government. The counties spanned 25 states; nine of these states contained five or more counties that signed 287(g) agreements over this period. Huyen Pham & Pham Hoang Van, *The Immigrant Climate Index (ICI) Database* (on file with author).

108. Pham & Van, *The Immigrant Climate Index*, *supra* note 107.

Table 1. 287(g) Agreements

	Party	State	Type	Started	Ended
1	Mecklenburg County	NC	Jailhouse Enforcement	2006-02-27	2018-08-13
2	Alamance County	NC	Hybrid	2007-01-10	2012-09-18
3	Gaston County	NC	Jailhouse Enforcement	2007-02-27	2018-08-13
4	Cabarrus County	NC	Jailhouse Enforcement	2007-07-10	2018-08-13
5	City of Durham	NC	Task Force	2008-02-01	2012-10-15
6	Cumberland County	NC	Task Force	2008-06-25	2009-10-15
7	Henderson County	NC	Jailhouse Enforcement	2008-06-25	2018-08-13
8	Wake County	NC	Jailhouse Enforcement	2008-06-25	2018-08-13
9	Guilford County	NC	Task Force	2009-10-15	2010-10-01
10	Nash County	NC	Jailhouse Enforcement	2018-02-02	2018-08-13
11	York County	SC	Jailhouse Enforcement	2007-10-03	2018-08-13
12	Beaufort County	SC	Task Force	2009-10-15	2013-01-02
13	Charleston County	SC	Jailhouse Enforcement	2009-11-09	2018-08-13
14	Lexington County	SC	Jailhouse Enforcement	2010-08-19	2018-08-13
15	Horry County	SC	Jailhouse Enforcement	2017-06-30	2018-08-13

Others have written about the 287(g) program's impact in North Carolina, focusing primarily on the actions of signatory LEAs. Noting the status of North Carolina as a new Latino immigration destination, Arriaga described the 287(g) agreements as the response of local governments to a "racialized immigrant threat."¹⁰⁹ Nguyen and Gill calculated the fiscal costs incurred by North Carolina LEAs implementing 287(g) agreements and weighed those costs against the claimed benefits of the program.¹¹⁰ Looking at the arrest data of five participating LEAs, they found that 86.7% of the individuals booked through the program were charged with misdemeanors—e.g., traffic violations and driving while intoxicated charges—undercutting the program's claimed focus on serious crimes.¹¹¹ In his study of the 287(g) program implemented by the Wake County Sheriff's Office ("WCSO"),

109. Felicia Arriaga, *Relations Between the Public and Crimmigration Entities in North Carolina: A 287(g) Program Focus*, 3 SOCIO. RACE & ETHNICITY 417, 418 (2017).

110. See MAI THI NGUYEN & HANNAH GILL, *THE 287(G) PROGRAM: THE COSTS AND CONSEQUENCES OF LOCAL IMMIGRATION ENFORCEMENT IN NORTH CAROLINA COMMUNITIES* 46–48 (2010), https://migration.unc.edu/wp-content/uploads/sites/2/2019/10/287g_report_final.pdf [<https://perma.cc/8XCT-BEX2>].

111. *Id.* at 46.

Coleman observed a possible spillover effect, noting that neighboring, nonsignatory LEAs also had disproportionately high arrest rates for Latinos and that these nonsignatory LEAs processed their detainees through WCSO's jails.¹¹²

Like its northern neighbor, South Carolina also experienced rapid demographic change during the study period. The state's immigrant population has increased from fewer than 50,000 in 1990 to over 225,000 in August 2016, and it continues to grow.¹¹³ As noted earlier, its LEAs were also active participants in the 287(g) program, but there has been much less analysis of the program's impact in South Carolina. Discrete policy analysis of South Carolina's program is thin, limited mostly to media coverage of events related to specific agreements.¹¹⁴ Most recently, the South Carolina 287(g) program made headlines when newly elected Charleston County Sheriff Kristin Graziano ended the county's 287(g) agreement, following through on a central campaign promise.¹¹⁵

Beyond the active involvement of their signatory LEAs, North Carolina and South Carolina are good case studies because of the structure of their nonsignatory state trooper agencies. To date, neither state trooper agency—the North Carolina State Highway Patrol or the South Carolina Highway Patrol—has signed a 287(g) agreement, providing us with state-wide nonsignatory LEAs to study possible spillover effects. Both agencies share similar missions: primarily to enforce state traffic laws on state highways, with additional authority to enforce state criminal laws.¹¹⁶ In both agencies, state troopers are assigned to patrol in specific counties (North Carolina further requires its state troopers to live in the county of their assigned station).¹¹⁷ And because neither state trooper agency operates its own

112. Coleman, *supra* note 97, at 175–76.

113. NEW AM. ECON., RSCH. FUND, THE CONTRIBUTIONS OF NEW AMERICANS IN SOUTH CAROLINA 1 (2016) <https://research.newamericaneconomy.org/report/the-contributions-of-new-americans-in-south-carolina/> [<https://perma.cc/3HH8-B88K>].

114. See, e.g., Richard Fausset, *Immigration Case Ensnarers a Get-Tough Sheriff in South Carolina*, N.Y. TIMES (July 2, 2014), <https://www.nytimes.com/2014/07/03/us/james-metts-is-accused-of-accepting-bribes.html> [<https://perma.cc/FN34-4ZU4>] (reporting on sheriff in Lexington County who was charged with extortion for allegedly accepting bribes from individuals detained under the county's 287(g) agreement).

115. Sara Coello, *Charleston County Sheriff Kristin Graziano Cancels ICE's Deal with Jail*, POST & COURIER (Jan. 5, 2021), https://www.postandcourier.com/news/charleston-county-sheriff-kristin-graziano-cancels-ices-deal-with-jail/article_cdf4e9ec-4f89-11eb-bbe4-33f9452ec0ee.html [<https://perma.cc/9RD7-9D4S>].

116. See *About the State Highway Patrol*, N.C. DEP'T OF PUB. SAFETY, <https://www.ncdps.gov/our-organization/state-highway-patrol/about-state-highway-patrol> [<https://perma.cc/NTM5-Z2BC>] (last visited Jan. 26, 2020); *South Carolina Highway Patrol*, S.C. DEP'T OF PUB. SAFETY, <https://scdps.sc.gov/schp> [<https://perma.cc/V88D-PQ4X>] (last visited Jan. 26, 2020).

117. See Telephone Interview with Luke Harmon, Corporal, S.C. Highway Patrol (Feb. 26, 2019) [hereinafter Telephone Interview with Luke Harmon]; NORTH CAROLINA STATE HIGHWAY PATROL POLICY MANUAL 294 (2010), <https://digital.ncdr.gov/digital/collection/p249901coll22/id/183156> [<https://perma.cc/D3S5-Y37A>] (outlining the "Assignments, Transfers, Retirements, Resignations, and Residence Requirements").

jail facilities, those who are arrested by state troopers are processed by and detained in local county jails.¹¹⁸

These agency structures are important to our study because they provide the mechanisms for our proposed spillover effect. No data exist showing that state troopers know the 287(g) status of the county jail they use for their arrestees, but because of their agencies' structures, this knowledge can be reasonably assumed. First, the state troopers have localized jurisdiction and enforcement authority (they are assigned to patrol in a specific county and they use only the county jail of that specific county), so they are likely to be familiar with the jail's booking procedures. Second, the central authority delegated by a 287(g) agreement—to conduct intensive immigration screening as part of the booking process—lies at the intersection of the troopers' duties and the county jail's function; thus, it is very likely that state troopers who will interact with the 287(g)-deputized officers in charge of jail processing will know about the county's 287(g) status. Finally, the 287(g) agreements are publicly available and widely publicized. The agreements are posted on ICE's website, and because the 287(g) program is controversial, the decision by an LEA to sign or terminate an agreement will likely receive extensive local media coverage, increasing the possibility that state troopers will know about an agreement's status. Thus, troopers who know that a county has a 287(g) agreement may be incentivized to arrest more people who appear to be immigrants.

North Carolina and South Carolina also are good case studies because the arrest and stops data for both state trooper agencies for the years of interest are available in the Stanford Open Policing Project ("SOPP"). SOPP is a partnership between the Stanford Computational Journalism Lab and the Stanford Computational Policy Lab, and its data contain over 221 million stops by state patrol in 33 states.¹¹⁹ Race data for individual stops are available in 18 states; summary level data that contain racial information are available in two states.¹²⁰ For North Carolina and South Carolina, that data contain about 18 million traffic stops. For our county level analysis, we aggregate the number of traffic stops and arrests to the

118. When the South Carolina Highway Patrol makes arrests, detainees are processed and held in the county jails where they were arrested. Telephone Interview with Luke Harmon, *supra* note 117. In South Carolina, people are processed according to procedures of local jails. In 46 counties, those local jails are operated by county sheriffs; in Horry, Richland, and perhaps a few more counties, the local jails are operated by county governments, not sheriffs. Telephone Interview with Kelley Hughes, Captain, S.C. Highway Patrol (Feb. 26, 2019).

In North Carolina, any arrests Highway Patrol makes are held and prosecuted according to the structure of the local jurisdiction in which the arrest is made (usually the county jail and the district attorney's office), and the Highway Patrol works in cooperation with those local agencies to gather evidence and proceed with cases. NORTH CAROLINA STATE HIGHWAY PATROL POLICY MANUAL I.1 1–9 (2008); *see also Traffic Tickets: Who to Call*, N.C. DEP'T OF PUB. SAFETY, <https://www.ncdps.gov/our-organization/law-enforcement/state-highway-patrol/traffic-tickets> [<https://perma.cc/6XKP-GDLT>] (last visited Jan. 26, 2020).

119. Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV., 736, 737 (2020).

120. *See Data*, STAN.: OPEN POLICING PROJECT, <https://openpolicing.stanford.edu/data/> [<https://perma.cc/DY5F-35YR>] (last visited Feb. 26, 2021). *See generally* Pierson et al., *supra* note 119 (describing and analyzing the SOPP dataset).

county-month level, which we match to our 287(g) data.¹²¹ The matched data contain over 13,500 observations covering 146 counties for the period 2000–2016; 14 counties and one city signed 287(g) agreements in this period.¹²²

Table 2 shows some descriptive statistics of the data for counties that never sign a 287(g) agreement and those that would enter into such an agreement during our study period. The 287(g) counties are larger with an average population of 350,000 compared to 75,000 for the “Never-287(g)” counties. The two groups of counties have on average the same proportion of Whites (69%) and similar proportion of Blacks (23% and 25% respectively). The 287(g) counties have a slightly higher proportion of Hispanics (9% versus 6%), are richer (average 2010 median household income of \$60,000 versus \$47,000), and are more urban (average rurality of 17% compared to 63%). Consistent with the population and demographic differences, state troopers stop and arrest more drivers of each race each month in the 287(g) counties than in the “Never-287(g)” counties.

Table 2. Descriptive Statistics

	Never-287(g) Counties, N = 130 ^f	287(g) Counties, N = 13 ^f
Population 2010 Census	73,465.29 (75,654.05)	349,147.62 (268,055.96)
White	0.69 (0.18)	0.69 (0.13)
Black	0.25 (0.19)	0.23 (0.10)
Hispanic	0.06 (0.04)	0.09 (0.03)
Rural	0.63 (0.24)	0.17 (0.10)
Median Household Income 2010	46,908.98 (10,059.11)	59,221.46 (9,046.22)
Monthly State Trooper Traffic Stops	811.62 (779.27)	1,427.04 (774.33)
Stops of White Drivers	527.32 (538.81)	882.94 (571.08)
Stops of Black Drivers	222.93 (251.40)	416.46 (213.34)
Stops of Hispanic Drivers	43.95 (54.13)	88.99 (32.40)
Monthly State Trooper Traffic Arrests	15.41 (25.20)	28.21 (24.99)
Arrests of White Drivers	7.98 (13.79)	16.11 (16.56)
Arrests of Black Drivers	5.12 (8.67)	7.21 (5.35)
Arrests of Hispanic Drivers	2.13 (4.88)	4.47 (4.38)

^fN is the number of counties in the category. Values in each column are averages with standard deviation in parentheses. A higher standard deviation relative to the average occurs when the values take on a wider range across counties.

121. See *Data*, STAN.: OPEN POLICING PROJECT, <https://openpolicing.stanford.edu/data/> [<https://perma.cc/DY5F-35YR>] (last visited Feb. 26, 2021). See generally Pierson et al., *supra* note 119 (describing and analyzing the SOPP dataset).

122. See *Data*, STAN.: OPEN POLICING PROJECT, <https://openpolicing.stanford.edu/data/> [<https://perma.cc/DY5F-35YR>] (last visited Feb. 26, 2021). See generally Pierson et al., *supra* note 119 (describing and analyzing the SOPP dataset).

III. METHODOLOGY

To estimate the effect of 287(g) agreements on policing behavior we match data on the presence of a 287(g) agreement in a county in a particular month (hereafter, county-month) to traffic stop data from the SOPP. The merged panel data set contains information on a driver's race, whether the stop resulted in an arrest, and a binary indicator for 287(g) presence in the county at the time of the stop. These rich data allow us to use a difference-in-difference regression analysis to identify the effect the 287(g) had on observed policing behavior. The treatment observations are the county-months in which a 287(g) agreement was active, and the control observations are the county-months for counties without 287(g) agreements. Our estimate of the effect of 287(g) on possible racial profiling by police involves comparing the difference in traffic stops and arrest rates across races in counties with and without active 287(g) agreements. The formal specifications of these difference-in-difference regressions are given in Appendix A.

There are a number of methodological issues we must address to interpret observed statistical associations between the presence of 287(g) agreements and policing behavior as a causal effect of the 287(g) agreements on said behavior. First, the 287(g) agreements (the treatment) are not randomly assigned to counties. Counties deliberately choose to enter into these agreements to cooperate with federal immigration enforcement, so factors such as a county's preference for immigration enforcement might also predispose the county's agents to discriminate against drivers based on race.

Second, there might exist other policy treatments contemporaneous to the introduction of the 287(g) agreement that if omitted from the analysis could also bias our estimates. One such policy is the Secure Communities program that started its rollout in 2008. Secure Communities is an automated and mandatory information sharing program, which automatically notifies ICE when someone with an immigration record is booked through an LEA jail.¹²³ Rollout of Secure Communities in North Carolina began at the end of 2008; for South Carolina, the

123. When an LEA arrests and books a person, the LEA shares that person's fingerprints with the FBI, which does a criminal background check and sends those results to the arresting LEA. With the advent of Secure Communities, those fingerprints are also forwarded to the Department of Homeland Security ("DHS"), which compares the fingerprints against its immigration records in the Automated Biometric Identification System ("IDENT"). IDENT contains the immigration records of those who have interacted with DHS, through encounters directly related to immigration enforcement (like unauthorized immigrants apprehended at sea or at land borders and immigrants suspected of violating immigration laws) and encounters related to more benign immigration encounters (like noncitizens applying for U.S. visas or traveling to and from the U.S. and U.S. citizens applying for Global Entry and other similar programs). If a detained person's biometrics match with IDENT records, then both ICE and the arresting LEA are notified. Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & ECON. 937, 947 (2014).

rollout began at the end of 2010.¹²⁴ By September 2011, Secure Communities was operational in all 146 counties of these two states.¹²⁵

The two examples given above raise the problem of endogeneity,¹²⁶ which can lead to biased estimates of the effects of the 287(g) on traffic stops. The endogeneity in the first example is what is called “selection bias” while in the second example, the estimates could suffer from “omitted variable bias.” Our empirical methodology addresses these possible endogeneity issues the following ways.

- Our measured outcomes are traffic stops and arrests made by *state troopers* within a county or city limits, not stops and arrests by county or city police officers. Thus, the state actors generating the stop and arrest data are distinct from the county actors who decide to participate in the 287(g) program. To the extent that state trooper behavior reflects statewide prerogatives while county and city policy reflect local preferences, this separation mitigates the possible selection bias from endogeneity of policing behavior and a county’s 287(g) status.
- Because the 287(g) agreements were active in different counties at different times spread over a decade, and our units of observation are county-month stop and arrest rates or (at the finest level of disaggregation) at the individual traffic stop level, we can control for time-invariant differences across counties using county fixed effects and macro trends that affect all counties equally with year-month fixed effects. These fixed effects can control for the many unobserved factors that might be correlated with both 287(g) status and state trooper policing outcomes. The inclusion of the fixed effects variables thus mitigates the potential omitted-variable bias.
- The possible confounding effects of Secure Communities, mentioned earlier,¹²⁷ deserve special attention in our research design. In principle, if both a 287(g) agreement and Secure Communities were present in a county at the same time, we could not disentangle the effect of each measure on the behavior of the state trooper who is predisposed to engage in immigration enforcement. But because the introduction of Secure Communities in a county is public information, we can also

124. U.S. IMMIGR. & CUSTOMS ENF’T, IDENT/IAFIS INTEROPERABILITY MONTHLY STATISTICS THROUGH APRIL 30, 2011, at 1, 5–6 (May 23, 2011), <https://www.dropbox.com/s/7stjmsyzivricbh/SCommRollouts.pdf?dl=0> [<https://perma.cc/GJ86-FXYL>].

125. *Id.* at 20–24, 30–31.

126. Endogeneity occurs when an explanatory variable used in the model is correlated with the error term, which includes unexplained variance and measurement error. JEFFREY M. WOOLDRIDGE, *INTRODUCTORY ECONOMETRICS: A MODERN APPROACH* 854, 848 (5th ed. 2012). Endogeneity generally leads to estimates based on the model to be biased and inconsistent. *Id.* at 303. In our study, the potentially problematic explanatory variable is an indicator for whether a county has an active 287(g) agreement. The error term might include unobservable underlying preferences by the county both to enter a 287(g) agreement and to engage in racial profiling. Or the error term might include other programs, such as Secure Communities, that were present concurrently with a 287(g) agreement.

127. Miles & Cox, *supra* note 123 and accompanying text.

control for the presence of Secure Communities in a county explicitly. Including a Secure Communities indicator variable for a county-month addresses the potential bias that would have resulted had the variable been omitted from the analysis. In our data, we found enough variation to be able to identify the effect of the 287(g) program, as distinct from the effect of Secure Communities. Specifically, of the approximately 13,500 county-months in the sample:

- a) approximately 6,000 county-months did not have 287(g) agreements or Secure Communities,
- b) 6,000 did not have a 287(g) agreement but did have Secure Communities,
- c) approximately 250 had a 287(g) but did not have Secure Communities, and
- d) approximately 900 had both 287(g) and Secure Communities.

Thus, there is enough support in each of these four configurations to generate variation with which to separate the effects of the two programs. Indeed, in our results presented in Part IV, we find statistically significant effects of the 287(g) program even when controlling for the presence of Secure Communities.

As an additional exercise, we explore the effect of a 287(g) agreement on the probability that a driver of a certain race will be arrested relative to the probability that a White driver will be arrested. We estimate this effect from 18 million traffic stops in North Carolina and South Carolina between 2000 and 2016. This exercise can provide additional evidence of the effect of the 287(g) agreement on policing behavior using the full disaggregation of the SOPP traffic stop data. The formal specifications of the logistic regressions for this exercise are shown in Appendix A.

IV. RESULTS AND DISCUSSION

We find two main results. First, 287(g) agreements caused state troopers to stop more Hispanic and Black drivers relative to White drivers, and second, the agreements caused the rate of arrest after a traffic stop for Hispanic and Black drivers to fall relative to White drivers. As explained in more detail below, these results are consistent with our hypothesis that the 287(g) agreements incentivize state troopers patrolling in 287(g) counties to engage in racial profiling. Police have broad discretion over the decision to pull over a driver but less discretion over the decision to make an arrest. Troopers patrolling counties that have 287(g) agreements would generally be more inclined to participate in immigration enforcement and stop certain drivers because the possibility of arrest and incarceration lead to the jailhouse, where the intensive immigration screening occurs. But because the arrest decision is less discretionary, the rate of arrest will necessarily be lower if the number of stops increases in counties where troopers exhibit this immigration enforcement behavior.

Tables 3 and 4 present results from five different specifications of regressions with the number of traffic stops in a county-month as the dependent variable. The independent variables are indicators of a driver's race, an indicator for

when a county has an active 287(g) agreement in a particular month, and interactions of the indicators for race and 287(g). All regressions include county dummies and year-month dummies to control for time-invariant differences across counties and macro trends that affect all counties equally with year-month fixed effects. These fixed effects can control for the many unobserved factors that might be correlated with both 287(g) status and state trooper policing outcomes. The second column of Table 3 reports the ordinary least squares (“OLS”) regression as a baseline result with a log of the number of traffic stops as the outcome variable. Because the number of traffic stops is a count taking only positive integer values, we also apply the quasi-Poisson regression reported in the third column of Table 3 and in the second, third, and fourth columns of Table 4.¹²⁸ Also in Table 4, the result from each different specification of regression is reported in a separate column.

Table 3. Traffic Stops Regressions

	log(Stops) OLS	Stops Quasi-Poisson
Black	-0.993*** (0.009)	-0.847*** (0.005)
Hispanic	-2.622*** (0.009)	-2.435*** (0.010)
287(g) Active	0.112*** (0.030)	0.179*** (0.013)
Black*287	0.195*** (0.038)	0.102*** (0.017)
Hispanic*287	0.312*** (0.038)	0.086*** (0.033)
County Fixed Effects	✓	✓
Year Month Fixed Effects	✓	✓
Observations	67,112	67,112

Standard errors in parentheses. "White" is the omitted group. Log(Stops) is the dependent variable for the OLS regression. Stops is the dependent variable for the Quasi-Poisson regression.

* p < 0.1, ** p < 0.05, *** p < 0.0. The p value is the probability that estimate in the table was found randomly given no relationship exists between the variable and the dependent variable (log(Stops) and Stops). A lower p value means we are more confident of the numerical effect reported in the table.

128. OLS regression is the simplest method of regression and is usually the starting point of a regression analysis. We take log of the stops so that the estimated effects can be converted to percent changes easily. Because the stops data are counts which take only positive integer values, a quasi-Poisson regression is more appropriate. For quasi-Poisson regression, the dependent variable is restricted to positive integer values so we do not take the natural log because that transformation could generate fractions and negative values.

Table 4. Stops Quasi-Poisson Regressions with Secure Communities and Traffic Controls

	Stops 1	Stops 2	Stops 3
Black	-0.847*** (0.005)	-0.825*** (0.006)	-0.825*** (0.006)
Hispanic	-2.435*** (0.010)	-2.428*** (0.011)	-2.428*** (0.011)
287(g) Active	0.179*** (0.013)	0.236*** (0.015)	0.220*** (0.015)
Black*287	0.102*** (0.017)	0.080*** (0.017)	0.080*** (0.017)
Hispanic*287	0.086*** (0.033)	0.080** (0.033)	0.080** (0.033)
County Fixed Effects	✓	✓	✓
Year Month Fixed Effects	✓	✓	✓
County Traffic Control		✓	✓
Secure Communities Control			✓
Observations	67,112	56,160	56,160

Standard errors in parentheses. "White" is the omitted group.

* p < 0.1, ** p < 0.05, *** p < 0.0. The p value is the probability that estimate in the table was found randomly given no relationship exists between the variable and the dependent variable (Stops). A lower p value means we are more confident of the numerical effect reported in the table.

Together, the results reported in Tables 3 and 4 show three things. First, there are over twice as many traffic stops of Whites as there are Blacks and ten times as many stops of Whites than there are of Hispanics. These results are seen in the coefficient estimates on the Hispanic and Black indicator variables being negative and statistically significant in all regressions.¹²⁹ The magnitude of the estimates reflects the differences in driver populations across the different races in North and South Carolina.¹³⁰

129. The coefficient estimates from the quasi-Poisson regressions reported in Table 4 can be used to calculate differences in the number of stops for different categorical values of the variables. For example, consider the regression specification in the column labeled "Stops 2." The coefficient estimate on the "Black" categorical variable is -0.825. The "Black" categorical variable takes a value of 0 when the stops are of Whites and a value of 1 when the stops are of Blacks. Holding values of all other variables constant whose total contribution to the number of Stops we can represent as "Y."

"Stops of Whites" = $\exp(-0.825 \cdot 0 + Y) = \exp(Y)$;

"Stops of Blacks" = $\exp(-0.825 \cdot 1 + Y) = \exp(-0.825) \cdot \exp(Y)$;

"Stops of Whites"/"Stops of Blacks" = $1 / \exp(-.825) = 1/0.438 = 2.28$.

That is, White drivers are stopped 2.28 times more than Black drivers. Interpreting the coefficient estimates in the table would follow the same methodology.

130. North Carolina race and Hispanic origin percentages: White alone (70.6%); Black or African American alone (22.2%); two or more races (2.3%); Hispanic or Latino (9.8%); White alone, not Hispanic or Latino (62.6%). *North Carolina*, U.S. CENSUS BUREAU: QUICK FACTS, <https://www.census.gov/quickfacts/NC> [<https://perma.cc/PQ6B-8BML>] (last

Second, state troopers made more traffic stops in the 287(g) active county-months. Coefficient estimates on the 287(g) indicator are both statistically significant, 0.112 for the OLS and 0.179 for the quasi-Poisson regressions in Table 3, meaning that a county-month with an active 287(g) agreement has on average 12% and 20%,¹³¹ respectively, more traffic stops than a non-287(g) county-month.

Third, relative to White drivers, Hispanic and Black drivers were stopped by state troopers more often in county-months with active 287(g) agreements compared to county-months without. Because we control for county fixed effects and year-month fixed effects, this is strong evidence that the 287(g) caused state troopers to increase stops of Black and Hispanic drivers. The estimates of the coefficients on the interaction terms between 287(g) and the Hispanic and Black indicators are all positive and significant. For Blacks, the 287(g) effect was 0.195 (a 22% increase) for the OLS specification and 0.102 (an 11% increase) for the quasi-Poisson regression. For Hispanic drivers, the 287(g) effect was to increase state trooper stops by 37% in the OLS specification and 9% for the quasi-Poisson.¹³²

Figure 3 illustrates these statistical results graphically for two example counties. In Figure 3a, monthly stops of Hispanic drivers for Mecklenburg County are graphed along with the monthly average for counties that never signed 287(g) agreements (the control counties). Mecklenburg County signed a 287(g) agreement on February 7, 2006.¹³³ The two series tracked each other up to this event but diverged beginning in March 2006, one month after the 287(g) agreement was signed. While stops of Hispanic drivers in the control counties continued its trend, stops of Hispanic drivers in Mecklenburg continued climbing to new highs each month. To explore the possibility that these patterns are driven by some other event occurring around February 2006, Figure 3b shows the same series for Wake County and the control counties. Wake County signed a 287(g) agreement June 25, 2008, more than two years after Mecklenburg. While the control counties trended downward shortly after the signing of the 287(g) agreement in Wake, Wake County

visited Mar. 4, 2021). South Carolina race and Hispanic origin percentages: White alone (68.6%); Black or African American alone (27.0%); two or more races (2.0%); Hispanic or Latino (6.0%); White alone, not Hispanic or Latino (63.7%). *South Carolina*, U.S. CENSUS BUREAU: QUICK FACTS, <https://www.census.gov/quickfacts/SC> [<https://perma.cc/NL6D-2FBG>] (last visited Mar. 4, 2021).

131. The coefficient estimate of 0.112 is the difference in $\log(\text{Stops})$ of a county with an active 287(g) agreement and $\log(\text{Stops})$ of a county without. To convert this difference to a percent difference, we exponentiate the coefficient value and subtract 1. For example, $\exp(0.1122)-1 = 12\%$.

132. The OLS and quasi-Poisson regressions are two alternative methodologies that assume different functional forms appropriate to different assumptions about the process generating the data that we observe. The OLS regression is the simplest and most widely used; it is almost always done as a benchmark. As noted in the Appendix, because the stops data are counts that only take positive integer values, the quasi-Poisson specification is more appropriate.

133. Memorandum of Understanding between U.S. Immigration & Customs Enforcement and Mecklenburg County Sheriff's Office (Feb. 7, 2006), <https://www.ice.gov/doclib/287gMOA/mecklenburgcountysheriffsoffice.pdf> [<https://perma.cc/H9J6-4HYT>].

continued to trend upward after the signing date of its 287(g) agreement. Stops of Hispanic drivers continued to increase to new highs each month.

Using Wake County as an example, Figures 3b and 3c illustrate how the 287(g) agreement affected Hispanic drivers but not White drivers. As shown in Figure 3c, monthly stops of White drivers in Wake County and in the control counties follow a similar trend before and after the signing of the 287(g) agreement in Wake County. In Wake County, the signing date only affects Hispanic drivers, not White drivers (compare Figures 3b and 3c). And the change in the stops of Hispanic drivers occur after different signing dates in Mecklenburg and Wake counties (compare Figures 3a and 3b). Together, these are a graphical illustration of the results in Tables 2 and 3.

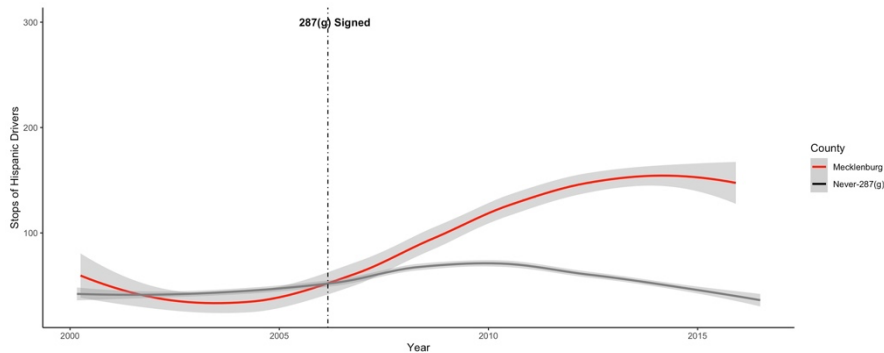


Figure 3a. Monthly traffic stops by state troopers of Hispanic drivers in Mecklenburg County (North Carolina) compared to “Never-287(g)” counties.

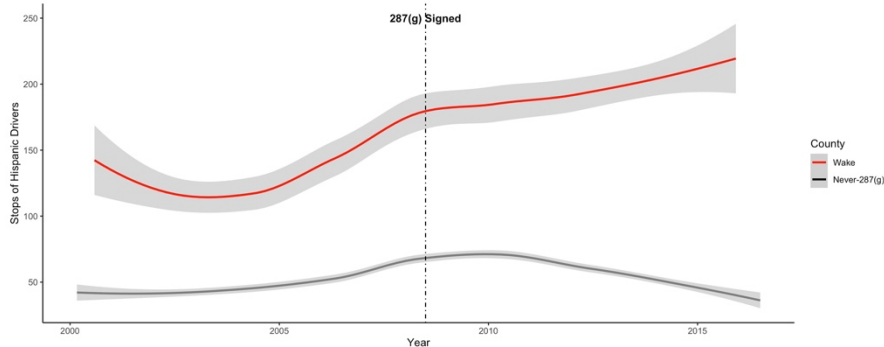


Figure 3b. Monthly traffic stops by state troopers of Hispanic drivers in Wake County (North Carolina) compared to “Never-287(g)” counties.

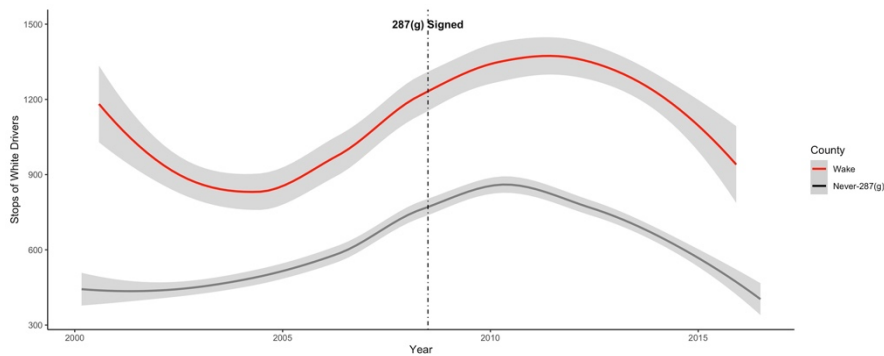


Figure 3c. Monthly traffic stops by state troopers of White drivers in Wake County (North Carolina) compared to “Never-287(g)” counties.

In the last two regressions reported in columns 3 and 4 in Table 4, we consider the possibility that a 287(g) agreement could affect the behavior of drivers by influencing the routes they take. For example, undocumented immigrants might avoid driving through a county with a 287(g) agreement, leaving a higher proportion of documented immigrant drivers through these counties. If this behavioral adjustment is present, the association between 287(g) and traffic stops could be coming through the effect on driver decisions, not state trooper policing. In the column labeled Stops 2, we present results from a quasi-Poisson regression where we also include a variable that is the average daily traffic flow in the county in a year as provided by the Departments of Transportation in North Carolina and South Carolina. This variable should pick up the statistical variation resulting from the change in driver behavior, leaving the coefficient estimate on the interaction terms between 287(g) and the Hispanic and Black indicators to capture the effect on state trooper policing behavior. Controlling for traffic flow also addresses the possibility that possible rapid increases in the immigrant population are associated with both the introduction of 287(g) agreements and the increases in stops of Hispanics and Blacks. While we do not have monthly population data, any substantive changes in population should show in traffic flows.

In these regressions that control for driver behavior, reported in the last two columns of Table 4, the estimates of the effects of the 287(g) on stops of Black and Hispanic drivers decreased slightly to about 8% and are statistically significant. Thus, the profiling of Hispanic and Black drivers by state troopers is still evident even after controlling for the possible effects of the 287(g) agreement on driver decisions.

As noted earlier, we also account for the possibility that the 287(g) agreement could be contemporaneous with the implementation of Secure Communities in a county, confounding the results.¹³⁴ In the column labeled Stops 3 in Table 4, we repeat the quasi-Poisson regression with an indicator for Secure Communities in a county-month to capture the effect of Secure Communities. The coefficient estimate on the interaction terms between 287(g) and the Hispanic and

134. See *supra* Part III; note 126 and accompanying text.

Black indicators (Stops 1) is unchanged by the inclusion of the Secure Communities indicator (Stops 3), remaining at about 8%.

We now turn to estimates of the effects of the 287(g) agreement on arrest rates, i.e., the fraction of stops that are followed by an arrest. As noted above, if state troopers are more aggressive in stopping minority drivers, then we expect the arrest rate to drop since arrest decisions are less discretionary than initial decisions to stop a driver. Table 5 presents results for quasi-Poisson regressions with the same regressors as in Table 4 but now with arrest rate as the outcome variable. In all counties at all months in our sample, Black and Hispanic drivers are, on average, arrested at a higher rate than Whites—0.4% higher for Blacks and 3.3% higher for Hispanics. Arrest rates in 287(g) active county-months as a whole for all groups are 0.3% higher than in non-287(g) county-months. Compared with non-287(g) county-months, however, the presence of the 287(g) agreement reduced the arrest rates by 1.2% for Hispanics relative to Whites and by 0.5% for Blacks relative to Whites; these reductions in arrests rates for the racial minority groups are consistent with our theories of funneling and increased police discretion described above.¹³⁵ The estimates are unchanged after we control for traffic flow and Secure Communities, suggesting that the observed profiling results from the 287(g) agreements affecting state troopers' policing decisions.

Table 5. County Arrest Rates OLS Regressions with Secure Communities and Traffic Controls.

	Arrest Rate 1	Arrest Rate 2	Arrest Rate 3
Black	0.004*** (0.001)	0.004*** (0.001)	0.004*** (0.001)
Hispanic	0.033*** (0.001)	0.033*** (0.001)	0.033*** (0.001)
287(g) Active	0.003* (0.002)	0.003* (0.002)	0.002 (0.002)
Black*287	-0.005** (0.002)	-0.005** (0.002)	-0.005** (0.002)
Hispanic*287	-0.012*** (0.002)	-0.012*** (0.002)	-0.012*** (0.002)
County Fixed Effects	✓	✓	✓
Year Month Fixed Effects	✓	✓	✓
County Traffic Control		✓	✓
Secure Communities Control			✓
Observations	56,160	56,160	56,160

Standard errors in parentheses. "White" is the omitted group. Dependent variable is the Arrest Rate calculated as the number of arrests divided by the number of stops.

* p < 0.1, ** p < 0.05, *** p < 0.0. The p value is the probability that estimate in the table was found randomly given no relationship exists between the variable and the dependent variable (Stops). A lower p value means we are more confident of the numerical effect reported in the table.

Finally, in Table 6, we present results of the logistic regressions where we estimate the odds of a driver being arrested after a traffic stop based on the driver's

135. See *supra* notes 79–89 and accompanying text.

race, whether the county-month has an active 287(g) agreement, and the interactions of the 287(g) with the driver-race indicators. In these regressions we continue to include county and year-month indicators to control for these fixed effects that could confound our estimates and also control for the effect of Secure Communities. This exercise exploits the full variation in all 18 million individual observations of traffic stops. The results corroborate the results of the county level regressions above on the policing behavior of state troopers.

In Table 6, the logit coefficient estimates for the Black and Hispanic indicators are 0.243 and 1.332 respectively, meaning that in all the counties over all months the odds of a Black driver being arrested are 28% higher than a White driver while the odds of a Hispanic driver being arrested are almost three times higher than a White driver. However, a 287(g) agreement lowered the odds of a Black driver being arrested relative to a White driver by about 27% and lowered those odds for a Hispanic driver by about 32%. These estimates are statistically significant. These driver-level results are consistent with the county level results of the 287(g) lowering the arrest rates for Blacks and Hispanics. Together with the results that the 287(g) increases stops of Blacks and Hispanics, these estimates suggest that state troopers are more aggressive in targeting Black and Hispanic drivers in counties with 287(g) agreements.

Table 6. Logistic Regressions for Driver Arrest After a Stop

	Model 1	Model 2
Black	0.243*** (0.00)	0.242*** (0.00)
Hispanic	1.332*** (0.01)	1.332*** (0.01)
287(g) Active	0.00259 (0.01)	0.00539 (0.01)
Black*287	-0.308*** (0.02)	-0.307*** (0.02)
Hispanic*287	-0.390*** (0.02)	-0.384*** (0.02)
County Fixed Effects	✓	✓
Year Month Fixed Effects	✓	✓
Secure Communities Control		✓
Observations	17,569,733	17,569,733

Standard errors in parentheses. "White" is the omitted group.

* p < 0.1, ** p < 0.05, *** p < 0.0. The p value is the probability that estimate in the table was found randomly given no relationship exists between the variable and the dependent variable (Stops). A lower p value means we are more confident of the numerical effect reported in the table.

To understand these results, we need to contextualize the differences between stops and arrests. For most law enforcement actions, stops are a necessary

precursor to arrests.¹³⁶ In our framework, the intensive screening for immigration status only occurs after a person is arrested and brought to the county jail; yet state troopers who are inclined to engage in racial profiling of Hispanics must first stop those Hispanic drivers. Our finding that the 287(g) agreements increases state trooper stops of Hispanic drivers (relative to White drivers) supports our hypothesis of racial profiling for immigration enforcement purposes. Our finding and our conclusion are consistent with other studies, finding racial bias in disparate rates of traffic stops by race.¹³⁷

The finding that 287(g) agreements also caused state troopers to stop more Black drivers (relative to White drivers) deserves separate analysis. Part of the explanation for this result may be the sizable numbers of Black immigrants living in the two states, particularly in North Carolina. Defined here as immigrants born outside of the United States to non-U.S. citizen parents and who identify as Black or African American in census surveys, Black immigrants in the U.S. tend to come from the Caribbean or Sub-Saharan Africa, with significant numbers also immigrating from Central and South America, the United Kingdom, and Canada.¹³⁸ In 2018, there were 72,385 Black immigrants in North Carolina, giving it the 16th largest state population of Black immigrants in the United States.¹³⁹ So if state troopers, particularly in North Carolina,¹⁴⁰ see Black drivers as potential immigrants, then the increased stops of Black drivers are consistent with our hypothesis of increased profiling related to immigration enforcement.

The increase in stops of Black drivers may also be explained as a phenomenon of increased policing discretion generally. Interviews with signatory LEA officers suggest that some view the agreements as a way to “fish” for more significant criminal activity, beyond the mission of immigration enforcement. In a 2009 interview, Sheriff Donnie Harrison of Wake County Sheriff’s Office (North Carolina) analogized the 287(g) screening process to stopping someone for speeding: “The initial thing is I have got you for speeding. You run the check in the car and through [the North Carolina Division of Criminal Investigation] and the NCIC [National Crime Information Center] and he is wanted . . . you feel good.”¹⁴¹ For state troopers patrolling in counties with 287(g) agreements then, the agreements

136. An exception would be when officers have obtained an arrest warrant for a specific person or persons and proceed directly to the arrest stage. See Sara J. Berman, *Arrest Warrants: What’s in Them, How Police Get Them*, NOLO, <https://www.nolo.com/legal-encyclopedia/arrest-warrants-how-when-police-get-them.html> [https://perma.cc/3KXT-HNF8] (last visited Mar. 17, 2021) (discussing what an arrest warrant is and how the police obtain an arrest warrant).

137. See Pierson et al., *supra* note 119, at 1 (based on an analysis of almost 100 million traffic stops across the country, finding that Black drivers were less likely to be stopped after sunset, suggesting bias in stop decisions).

138. NEW AM. ECON., RSCH. FUND, POWER OF THE PURSE: THE CONTRIBUTIONS OF BLACK IMMIGRANTS IN THE UNITED STATES (2020), <https://research.newamericaneconomy.org/report/black-immigrants-2020/> [https://perma.cc/B7LV-HYH8].

139. *Id.*

140. We did not find comparable information for Black immigrant populations in South Carolina. See *id.* (listing only the top 25 largest state populations of Black immigrants).

141. Coleman, *supra* note 97, at 174. Interestingly, Sheriff Harrison worked for the North Carolina State Highway Patrol before he was elected sheriff. *Id.* at 170.

may signal a perception of increased policing discretion generally. If so, then the increase in stops of Black drivers is a predictable result, because ample evidence shows that Blacks are disproportionately stopped in traffic stops by all types of law enforcement agencies.¹⁴²

The lower *arrest* rates of Hispanics and Blacks are also consistent with our hypothesis of racial profiling for several reasons. First, we may be observing a funneling effect: as stop rates for Hispanics and Blacks increased, fewer of those stops would merit arrests, causing a decrease in the arrest rates for these groups. A gap between a high stop rate and a lower arrest rate—the “hit rate”—has been recognized as an indicator of racial profiling in litigation, as well as numerous academic studies. This outcome test, originally proposed by economist Gary Becker, posits that even if minority drivers are more likely to engage in arrestable behavior—e.g., carrying contraband—the stopped minority drivers should still be found to have engaged in arrestable behavior at the same rate as searched Whites, in the absence of discrimination. If stops of minorities result in fewer arrests than stops of Whites, these lower arrest rates suggest that officers are applying a double standard, stopping minorities on the basis of less evidence.¹⁴³

In the landmark litigation challenging the New York City Police Department’s stop-and-frisk policy, the district court found that a low hit rate was persuasive evidence of racial profiling. Specifically, the court found that (1) within precincts and census tracts, Hispanics and Blacks were more likely than Whites to be stopped, even controlling for crime rates and other relevant variables, and (2) the odds that a stop would result in any further enforcement action like an arrest were lower when the person arrested was Black, rather than White.¹⁴⁴ “Together,” the court concluded, “these results show that blacks are likely targeted for stops based on a lesser degree of objectively founded suspicion than whites.”¹⁴⁵

Closer to home for this research project, researchers who analyzed 20 million traffic stops conducted by different LEAs in North Carolina (including the State Highway Patrol) also found compelling evidence of racial profiling.¹⁴⁶ These comprehensive stops data, which were required to be collected by state law, demonstrated that Blacks were consistently overpoliced while Whites were consistently under-policed.¹⁴⁷ The researchers found that Blacks were 95% more likely than Whites to be stopped by police and 115% more likely to be searched than Whites.¹⁴⁸ And particularly relevant to our funneling hypothesis, these researchers also found that officers had lower contraband “hit rates” for Blacks and Hispanics (33.28% and 21.9% respectively), as compared with Whites (35.71%).¹⁴⁹

142. See Pierson et al., *supra* note 119, at 737.

143. Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 J. POL. ECON. 385, 385–409 (1993).

144. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013).

145. *Id.* at 589.

146. FRANK R. BAUMGARTNER, DEREK A. EPP & KELSEY SHOUB, *SUSPECT CITIZENS: WHAT 20 MILLION TRAFFIC STOPS TELL US ABOUT POLICE AND RACE* (2018).

147. *Id.*

148. *Id.* at 76, 85.

149. *Id.* at 114–15.

Beyond a funneling effect, a second explanation for the lower arrest rates for Hispanics and Blacks is the higher legal standard required for arrests, as compared with stops. When a state trooper makes a stop, whether for a traffic violation or to investigate for an arrestable offense like driving under the influence (“DUI”), s/he only needs reasonable suspicion that the violation or offense has occurred. Reasonable suspicion is a “particularized and objective basis for suspecting the particular person stopped of criminal activity” and requires consideration of the “totality of the circumstances.”¹⁵⁰ While reasonable suspicion is more than a mere hunch, “the likelihood of criminal activity need not rise to the level required for probable cause.”¹⁵¹

Probable cause is required, however, when a state trooper makes an arrest—e.g., for DUI or drug possession. Though “incapable of precise definition or quantification into percentages,” the essence of probable cause is reasonableness: whether “a reasonable ground for belief of guilt” exists,¹⁵² whether the events leading up to the arrest constitute probable cause “viewed from the standpoint of an objectively reasonable police officer,”¹⁵³ or whether the facts available to a police officer would “warrant a [person] of reasonable caution” to believe that a crime has occurred or is occurring.¹⁵⁴ After a stop has been made then, a state trooper deciding whether to make an arrest faces a higher legal standard and a resulting reduction in their discretion. These structural constraints may also help to explain the reduction in rates of arrests for Blacks and Hispanics caused by 287(g) agreements.

CONCLUSION

Our project identifies important spillover effects of the 287(g) program. To sum up, we analyzed approximately 18 million traffic stops made by the North Carolina State Highway Patrol and the South Carolina Highway Patrol, from 2000 to 2016, and found evidence that 287(g) agreements caused state troopers to engage in racial profiling. Though neither state trooper agency signed a 287(g) agreement, individual state troopers patrolling in 287(g) jurisdictions knew that the county jails where they booked their arrestees employed immigration screening processes. That knowledge and the shared jail facilities, we argue, incentivized troopers to engage in racial profiling. In counties with active agreements, we found that troopers increased stops of Hispanics relative to Whites but decreased the rate of arrest of Hispanics after a stop, relative to Whites. Both of these findings taken together are evidence of racial profiling, because the increase in stops is necessary to funnel Hispanics into the intensive immigration screening processes provided by the 287(g) program and the lower “hit rates” between stops and arrests are widely accepted as evidence of racial profiling by LEAs.

What are the implications of these observed spillover effects? On one level, the spillover effects could just represent additional divergences between the 287(g) program as implemented and the program as designed. Existing analyses of the

150. *Navarette v. California*, 572 U.S. 393, 396–97 (2014) (citing *United States v. Cortez*, 449 U.S. 411, 417–18 (1981)).

151. *United States v. Arvizu*, 534 U.S. 266, 274 (2002).

152. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

153. *Id.* at 366.

154. *Florida v. Harris*, 568 U.S. 237, 243 (2013).

287(g) program have noted different divergences in the program's history; as explained in Part I, those divergences include the targeting of immigrants without serious criminal records, despite stated federal priorities that limited the program to deporting dangerous immigrants. Another divergence that is particularly relevant to our project is the evidence of racial profiling committed by signatory LEAs, again contravening the agreements that they signed with the federal government.

Zooming out however, we see that our observed spillover effects are qualitatively different. Our analysis highlights new players and a new dynamic to the 287(g) program, in which nearby, nonsignatory LEAs informally participate in immigration law enforcement without formal training in the nuances of immigration law and without federal regulation or control. Our project studied state trooper agencies in two states, but our observed effects are likely occurring in other contexts as well—e.g., a nonsignatory police department that uses the jails of a signatory sheriff's office. If these spillover effects are widespread, they raise important policy questions for the Biden Administration as it determines its course of action. First, what are the true impacts of the 287(g) program? If nonsignatory LEAs are joining immigration enforcement efforts through the 287(g) program, albeit in an unofficial manner, then the force multiplier effect of the program could be considerably larger than even advocates of the program estimate. Similarly, the instances of racial profiling that can be attributed to the program (even if indirectly) could also be considerably higher than what critics charge is being committed by signatory LEAs. Because of the civil rights implications, a higher incidence of racial profiling attributable to the 287(g) program is particularly troubling in any assessment of the program's efficacy.

Our observed spillover effects also raise important questions about the political controls that are supposed to exist in the 287(g) program. As detailed in Part I, the program was created by Congress with a formalized structure: LEAs that want to participate in the program must apply, be approved by federal authorities for participation, and then sign a written, public agreement that details their immigration-related duties and their federally imposed obligations under the program. And as we saw with the Maricopa County Sheriff's Office and the Alamance County Sheriff's office, the agreements can be revoked by the federal government when the signatory LEA violates their provisions. But with the spillover effect that we observed, nearby nonsignatory LEAs can join this federal mission of immigration enforcement without having to go through any formal screening process or worry about revocation of that participation. To be sure, the nonsignatory participation that we observed is far less extensive than even the most basic form of 287(g) model offered; yet even this limited participation is nowhere accounted for in the 287(g) program's formal operation. Instead of focusing solely on signatory LEAs and whether they sign or terminate agreements, opponents and proponents of the 287(g) program would do well to consider these possible spillover effects and to focus attention on the actions of nearby nonsignatory LEAs.

The leadership of nonsignatory LEAs also needs to be aware of possible spillover effects. A nonsignatory LEA may choose not to participate in the 287(g) program for various reasons: disagreement with the mission of local–federal immigration enforcement, desire to remain neutral on a very divisive issue, desire to preserve trust with their immigrant communities, or concerns about the fiscal and

other costs of immigration enforcement. But if the LEA's officers are informally participating in immigration law enforcement, those reasons for not signing may be undermined. For example, an LEA may have decided against signing a 287(g) agreement so that immigrants do not associate the LEA with immigration enforcement, thus protecting its relationship with local immigrant communities. But that message of community trust could be undermined if its officers are participating, even informally, in immigration enforcement. Furthermore, the participation by officers may also be reallocating the LEA's resources in terms of diverted officer time without approval or oversight by LEA supervisors, arguably weakening the LEA's ability to control its own resources. This discretionary participation, without the benefit of training or regulation, has important implications for the LEA's effectiveness and ultimately for public safety, implications that the Biden Administration must consider as it formulates its 287(g) policies.

APPENDIX A: REGRESSION SPECIFICATIONS

Our analysis of the effect of the 287(g) agreement on state trooper policing behavior is a set of regressions of the following general form:

$$y_{rct} = a \cdot Race_{rct} \cdot 287g_{ct} + 287g_{ct} + Race_{rct} + CountyDummies_c + YearMonthDummies_t + e_{rct}$$

where y_{rct} is an outcome variable representing either the number of traffic stops or rate of arrest after the stops of race group r within county c in month t . $Race_{rct}$ represents three binary variables taking a value of 1 if the stops or arrests denote Hispanics, Blacks, and Other respectively in county c and month t ; all three variables assume values of 0 if the observation denotes a stop or arrest of a White driver. $YearMonthDummies$ and $CountyDummies$ are binary variables capturing county and time fixed effects from unobserved factors at those levels that might influence stops or arrest rates and 287(g) status. The error term e_{rct} captures all other omitted factors that can affect stops or arrests and is assumed to have values that are independent across counties, months, and race groups.

The parameters of interest are denoted " a ," the coefficients on the terms of interaction between the 287(g) and the Race variables, and are a difference-in-difference estimates of the effect of 287(g) agreements on stops and arrests by state troopers of a racial group relative to stops and arrests of whites. As a baseline, we estimate this equation first using OLS regression with log of the number of traffic stops as the outcome variable. But because the number of traffic stops is a count variable taking only positive integer values, we more appropriately apply the quasi-Poisson regression in most of our estimations.

As a robustness exercise, we also estimate the effect of the 287(g) agreement on the probability of arrest after a stop for a driver of a particular race. This exercise allows us to engage the full variation in the 18 million traffic stops in North Carolina and South Carolina between 2005 and 2016. We estimate a logistic regression of the form:

$$\text{logit}(\text{Pr}[Arrest_{sct} = 1]) \text{Pr}[Arrest_{sct} = 1] =$$

$$\log \frac{\Pr[Arrest_{sct} = 1]}{1 - \Pr[Arrest_{sct} = 1]} = b \cdot Race_{rct} \cdot 287g_{ct} + 287g_{ct} + Race_{rct} + CountyDummies_c + YearMonthDummies_t + e_{rct}.$$

where $\Pr[Y]$ denotes the probability that event Y occurs.

The dependent variable in this regression is a dummy variable equal to 1 if a traffic stop s in county c in month t resulted in an arrest and equal to 0 otherwise. The independent variables are indicator variables for a Hispanic, Black or Other driver with the indicators all equal to 0 if the driver is White, an indicator equal to 1 if the county has an active 287(g) agreement in that month, and dummies for county and year-months which control for fixed effects. Again, our parameters of interest are denoted b , the coefficients on the interaction between the 287(g) indicator and the race indicators. These coefficients are interpreted as the effect of a 287(g) agreement on the odds that a driver of a certain race will be arrested relative to those of a White driver.