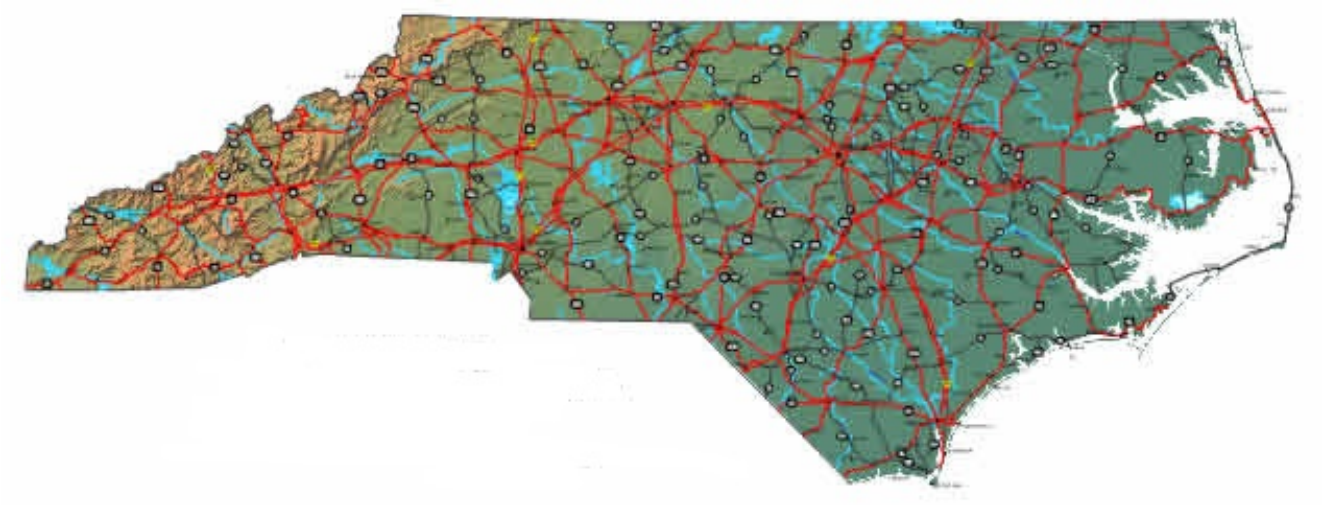
A Legal Advocacy Guide to Building Integrated Communities in North Carolina



Primary AUTHORS:
Stacey Allred
Ashley Morrison
Scott Silvers
Vanessa Smart
Supervising Faculty, Deborah M. Weissman

With assistance from:
Ashley Klein
Elizabeth Ligon

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Introduction to the Briefing Book

In recent years, the distribution of immigrant groups across the United States has shifted significantly.[1] The southeastern United States have seen a marked increase in immigration, especially from Latin American countries, and these immigrants have also increasingly decided to settle outside of metropolitan areas where immigrants have historically tended to reside.[2] North Carolina, in particular, has seen a substantial increase in its immigrant population, and has one of the most rapidly increasing immigrant populations in the United States.[3] The 2010 census numbers revealed a 110 % growth in the Latino population, which now makes up 8.4 percent of the state's total population. Demographic markers suggest that the Latino population will continue to grow.[4]

North Carolina has felt the impact of this rapid increase in immigration. A report completed by the University of North Carolina's Kenan-Flagler School of Business explored some of the economic implications of increase Hispanic immigrant presence, finding that an increase in the population meant a substantial increase in healthcare, education and correctional expenditures. But as the report also notes, Hispanic labor is critical to industry in North Carolina, with the Hispanic workforce playing an essential role in meatpacking, textiles, agriculture and construction.[5] Immigrant presence has also had a socio-cultural impact, and the

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[1] Helen B. Marrow, *New Destinations and Immigrant Incorporation*, Perspectives on Politics 3:4 (Dec. 2005) 781, 781.
[2] *See* Marrow, *supra* note 1, at 781-783.
[3] *See, e.g.*, RAKESH KOCHHAR, ROBERTO SURO, SONYA TAFOYA, THE NEW LATINO SOUTH: THE CONTEXT AND CONSEQUENCES OF RAPID POPULATION GROWTH ii (The Pew Hispanic Center 2005), *available at* http://pewhispanic.org/files/reports/50.pdf.
[4] Julia Preston, *Births Outpace Immigration for Mexican-Americans Report Says*, N.Y. Times, July 15, 2011, at 15.
[5] *See generally*, JOHN KASARDA AND JAMES JOHNSON, JR., THE ECONOMIC IMPACT OF THE HISPANIC POPULATION ON NORTH CAROLINA (UNC Kenan-Flagler Business School 2006) , *available at*

response of North Carolina community members to changes has not always been a welcoming one.[6]

Across the country and in North Carolina specifically, programs have been put in place which can have a deteriorating effect on the relationships between immigrants and North Carolina communities. For example, North Carolina was the first state to implement county-level programs under the Immigration and Nationality Act Section 287(g), which authorize the U.S. Immigration and Customs Enforcement (ICE) to enter into agreements with local law enforcement agencies, whereby local law enforcement officers become authorized to enforce immigration law.[7] Today North Carolina is a model state for implementing the Secure Communities Program, pursuant to which the fingerprints of persons arrested in North Carolina are checked not only against Federal Bureau of Investigation (FBI) records but also against Department of Homeland Security (DHS) records in an effort to identify persons without current immigration status.[8]

> In light of the increasing immigrant population and establishment of these programs, integration of immigrants into North Carolina communities is a critical issue. North Carolina must offer local communities alternatives to existing immigration enforcement programs which can be both costly and divisive.

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http://www.ime.gob.mx/investigaciones/2006/estudios/migracion/economic_impact_hispanic_population_north_carolina.pdf.

[6] *See* MAI THI NGUYEN AND HANNAH GILL, THE 287(G) PROGRAM: THE COSTS AND CONSEQUENCES OF LOCAL IMMIGRATION ENFORCEMENT IN NORTH CAROLINA COMMUNITIES 3 (UNC Institute for Study of the Americas 2010), *available at* http://isa.unc.edu/migration/287g_report_final.pdf.

[7] *See generally*, NGUYEN AND GILL at *supra* note 6 (discussing the costs of the 287(g) program); AMERICAN CIVIL LIBERTIES UNION AND THE IMMIGRATION AND HUMAN RIGHTS POLICY CLINIC AT UNC SCHOOL OF LAW, THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS (UNC School of Law 2009), *available at* http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf (discussing the implementation and impact of the 287(g) program in North Carolina communities.

[8] *See* Immigration and Customs Enforcement, *Secure Communities*, U.S. Department of Homeland Security, (last visited May 4, 2011) http://www.ice.gov/secure_communities/.

The University of North Carolina has produced reports on the implementation of 287(g) in North Carolina which document its negative social, political and economic impacts. In addition to these local immigration enforcement programs, additional barriers to immigrant participation in the community include a lack of language-accessible information about the laws and regulations in North Carolina and a critical absence of members of the immigrant community in local and state decision making processes.[9]

> The goal of the Building Integrated Communities Project is to create and implement a comprehensive community integration plan with municipalities and immigrant communities. This includes increasing access to local government services by immigrants.

In light of the increasing immigrant population and establishment of these programs, integration of immigrants into North Carolina communities is a critical issue. North Carolina must offer local communities alternatives to existing immigration enforcement programs which can be both costly and divisive. Immigrant integration has been defined as "a dynamic, two way process in which newcomers and the receiving society work together to build secure, vibrant, and cohesive communities."[10] The benefits of successful immigrant integration into local communities are significant and can include a more vibrant and conscientious society which derives strength from its diversity, community revitalization efforts, increased productivity and economic growth, a more robust democracy with increased participation of local citizens in day-to-day governance, and increased security.[11]

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[9] *See, e.g.*, EMILY KIRBY, SARAH LONG, AND SONAL RAJA, AN ANALYSIS OF THE SYSTEMIC PROBLEMS REGARDING FOREIGN LANGUAGE INTERPRETATION IN THE NORTH CAROLINA COURT SYSTEMS AND POTENTIAL SOLUTIONS (UNC School of Law 2010), *available at* http://brennan.3cdn.net/8ea3a557a5c266e543_pwm6b023o.pdf (discussing language access issues in the context of court access).

[10] GRANTMAKERS CONCERNED WITH IMMIGRANTS AND REFUGEES, IMMIGRANT INTEGRATION TOOLKIT 25, *available at* http://www.gcir.org/system/files/25-32_imm_integr.pdf.

[11] *Id* at 12, *available at* http://www.gcir.org/system/files/09-16_exec_summ.pdf.

The Building Integrated Communities Project is part of an effort to meet the need for integration of North Carolina's immigrant population into its communities. The goal of the Building Integrated Communities Project is to mitigate the negative impacts of aggressive local immigration enforcement programs by facilitating immigrant integration in North Carolina. This goal can be achieved through the creation and implementation of community integration plans with local municipalities and immigrant communities and through efforts to increase immigrant access to local government services. It is the hope of the University of North Carolina School of Law's Immigration and Human Rights Policy Clinic (IHRP) that the Building Integrated Communities Project can serve as a model not only for other North Carolina integration efforts, but also for broader community integration efforts across the United States.

The Building Integrated Communities Project briefing book consists of both legal analyses and applied legal policy proposals which are intended to serve as resources for community integration efforts. Part One of this report, entitled "Making the Legal Argument for Integrated Communities: Immigrants in North Carolina," provides a legal foundation for mounting local integrated community efforts which is tailored to North Carolina municipalities. This Part seeks to answer the question of what municipalities in North Carolina must, can, and should do to facilitate community integration. The resources encompassed in this Part of the briefing book can be used to support potential litigation, the development of ordinances or other legislation, or to provide a foundation for policy advocacy in the realm of civil society.

Parts Two and Three of this report apply the legal concepts explored in Part One in the context of two discrete community integration efforts in which IHRC took part. Part Two, "Community Integration and Day Laborers in North Carolina," chronicles the challenges faced by day laborers in the Chapel Hill and Carrboro communities, and provides comprehensive

policy and legal analysis of potential solutions to these problems. Part Three, "Local Law Enforcement: A Vital Part of Community Integration," analyzes the complex relationship between immigrants and local law enforcement, including examining how local law enforcement should assist immigrant victims of domestic violence and how local police departments may be approached by the IHRC to discuss community policing policies. It is the intent of IHRC to engage in the policy projects described in Parts II and III in order to help further the abstract goals of the Building Integrated Communities Project, and also so that these discrete projects can serve as models in their own right, demonstrating proactive efforts which may be taken on behalf of immigrants and inspiring future efforts by the IHRC and other groups.

PART ONE: MAKING THE LEGAL ARGUMENT FOR INTEGRATED COMMUNITIES

Part One of this policy brief looks at the various legal principles that may be applied in advocating for community integration at the municipal level. The goal of this Part is to provide a foundation for advocates in achieving local legislative and policy reform. This Part outlines the legal and technical analysis for Integrated Communities, which proves the framework for advocates to demonstrate local authority to enact progressive policies. Section I addresses the law of municipal authority in North Carolina as it applies to municipalities' authority to enact ordinances benefiting the immigrant community. Section II analyzes local municipal power as it relates to constitutional and state law. Section III provides an overview of municipal initiatives that promote community integration. Section IV advocates for building integrated communities from a normative human rights standpoint.

I. A Focus on North Carolina and Municipal Authority: Where We Stand According to State Law and Principles

The goal of the Building Integrated Communities Project is to create and implement a comprehensive community integration plan with municipalities and immigrant communities. This includes increasing access to local government services by immigrants. Whether local governments have the authority to enact ordinances or otherwise provide access to services that would benefit the immigrant community requires a state-by-state legal analysis. Although municipal authority is derived from state law by the power vested in the states from the United States Constitution, it is important to begin this policy brief with a shaper characterization of where North Carolina falls with regard to municipal authority as this project focuses on specific issues involving North Carolina municipalities. This Section addresses the law of municipal authority in North Carolina which has been variously classified as a Dillon's Rule state and a Home Rule state and how such classification affects the goals of the Building Integrated Communities Project.

A. Dillon Rule v. Home Rule

The United States Constitution does not make any reference to local governments.[12] Local governments are created by the state and their powers are derived from the state.[13] Dillon's Rule is a rule of statutory construction used to determine whether a local government has the authority or power to take certain action.[14] Under Dillon's Rule, the authority of local governments is

[12] Frayda S. Bluestein, Do North Carolina Governments Need Home Rule?, 84 N.C.L.R. 1983, 1988 (2006).
[13] Jesse Richardson, *Dillon's Rule is From Mars, Home Rule is From Venus: Local Government Autonomy and the Rules of Statutory Construction* (Devoe Moore-Collins Institute Seminar: States as Facilitators or Obstructionists, Discussion Paper, 2010) available at http://collinsinstitute.fsu.edu/files/pdf/seminar-2010-02-25/FINAL%20PAPER-RICHARDSON.pdf. Their powers are granted through state charters, enabling legislation, and/or state constitutions.
[14] *Id.* at 2011; Clay L. Writ, Dillon's Rule, 24(8) Virginia Town and City 2 (1989) *available at* http://www.fairfaxcounty.gov/dmb/fcpos/dillon.pdf.

narrowly construed.[15] Accordingly local governments are limited to the powers: "necessarily or fairly implied or incident to the powers expressly granted; [and] those essential to the declared objects and purposes of the [local government], not simply convenient, but indispensable."[16] Under Dillon's Rule, there is a presumption that local governments do not possess the power to take action.[17] Thus, in states classified as Dillon Rule states, local government actions will be strictly limited to the powers conferred to them by state legislation.

In contrast to Dillon's Rule, local governments in Home Rule states may take any local action unless preempted by the state.[18] The majority of litigation concerning the Home Rule has raised the issue of preemption: whether the matter at hand is of state or local concern.[19] Home Rule authority, whether granted by the state constitution or by enabling legislation, is not absolute and is subject to judicial interpretation which sometimes can have "a narrowing impact on the scope of the home rule delegation."[20]

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[15] Bluestein *supra* note 12, at 1985; Writ, *supra* note 14, at 3. Dillon's Rule is named after Judge John F. Dillon, a 19th century Iowa Supreme Court Justice. Dillon's doctrine was developed in reaction to the corruption and inefficiency present in the local governments of his era and a small movement of individuals proclaiming that local government possessed inherent constitutional powers.

[16] Bluestein *supra* note 12, at 2011; Writ, *supra* note 14, at 2. At the same time that Judge Dillon set out his rule of statutory interpretation, Judge Thomas Cooley of the Michigan Supreme Court "presented a diametrically opposed view of state delegations of authority to local governments in his concurring opinion in People v. Hurlburt (1871)." In the opinion Cooley asserted the belief that "local governments hold the inherent right of self-governance," an increasingly popular notion at the time that led Judge Dillon to develop his doctrine in disagreement. Although years later Judge Cooley seemed to retreat partially from his opinion regarding local self-governance, his doctrine combined with the effects of the Dillon Rule in practice energized states to "[enact] constitutional amendments to protect the autonomy of local governments," and later became known as the Home Rule movement. *See* Jesse Richardson, et al., Is Home Rule the Answer? Clarifying the Influence of Dillon's Rule on Growth Management (Brookings Inst. Ctr. on Urban & Metro. Pol'y, Discussion Paper, Jan. 2003), available at http://www.brookings.edu/~/media/Files/rc/reports/2003/01metropolitanpolicy_jesse%20j%20%20richardson%20%20jr/dillonsrule.pdf.

[17] *Id.*

[18] Bluestein, *supra* note 12, at 1999.

[19] *Id.* at 1992. "Legal challenges in home rule states involve questions about: (1) whether a particular local law conflicts with state law; (2) whether local legislation overrides a state law on the same subject or whether state law preempts local law; and (3) whether the exercise of local authority involves a matter of local concern."

[20] *See* Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?* POPULAR GOVERNMENT 15, 16 (2006), available at http://www.sog.unc.edu/pubs/electronicversions/pg/pgfal06/article2.pdf ("home rule powers often are shaped by lists of specific delegations").

Grants of Home Rule authority have been classified based on the source of authority whether derived from the state constitution or enabling legislation.[21] The nature and extent of Home Rule authority granted may vary between cities and counties within the same state, with some Home Rule states having a combination of some or all types.[22] Home Rule states have been able to utilize this broad grant of authority to successfully support "controversial local initiatives."[23] This is particularly advantageous in the context of integrated communities, where certain immigrants' rights are considered controversial and are largely of a local nature.

It is important to understand how a state is classified in order to determine the breadth of local government powers and to ascertain the degree of municipal authority. The analysis is not always straightforward, however, and it is often difficult to predict whether a certain local action will be upheld.[24] The prevailing notion is that Dillon's Rule and the Home Rule are mutually exclusive. Moreover, some courts have held that Dillon's Rule is invalidated by the grant of Home Rule authority. Yet some states classified as Home Rule states seem to continue to apply a Dillon's Rule analysis in order to establish the parameters of local authority.[25]

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[21] Richardson, *supra* note 13, at 9. Constitutional home rule is considered to be of a "higher level" than legislative home rule "because the state legislature may not revoke or amend the authority granted by a constitutional provision [however the] legislature holds the power to alter, amend, or abrogate legislative home rule at any time." *Id*. Grants of Home Rule have also been categorized by the area of autonomy granted to local governments, including: 1) structural - granting local governments the autonomy to determine their form of government and internal organization; 2) functional - granting local governments autonomy regarding the functions they perform; 3) fiscal - granting local governments autonomy regarding "raising revenue, borrowing, and spending;" and 4) personnel - granting local governments autonomy regarding their employees.[21] *See Local Government Authority - Home Rule & Dillon's Rule*, National League of Cities available at http://www.nlc.org/about_cities/cities_101/153.aspx; Michael Libonati, Local Government (Rutgers Law Camden Center for State Constitutional Studies, Subnational Constitutions and Federalism: Design and Reform Papers) available at http://camlaw.rutgers.edu/statecon/subpapers/libonati1.pdf. *See also* Home Rule in America: A Fifty-State Handbook, Congressional Quarterly (2001) (for a chart classifying the types of home rule in the municipalities and counties of all fifty states) available at http://www.cas.sc.edu/poli/civiced/Reference%20Materials/US_home_rule.htm.

[22] *Id*.

[23] Bluestein, *supra* note 20, at 17.

[24] *Id*. at 20; Richardson, *supra* note 13, at 22.

[25] Bluestein, *supra* note 20, at 17; Professor Jesse Richardson argues that whether a state must be classified as either a Dillon's Rule state or a Home Rule state is a "false dichotomy," and explains that "the two doctrines often coexist with one another and neither implies any particular degree of local government autonomy." Richardson departs from

B. Interpreting the Rules (Dillon's Rule/Home Rule): North Carolina Statutory Changes and Case Law

North Carolina has been classified historically as a Dillon's Rule state.[26] Notwithstanding this long-standing classification,[27] both statutory developments and case interpretations have served to undermine any fixed identification. Section I D. below reviews statutory developments more fully. However, before undertaking a review of the statutory enactments as a source of authority regarding municipal power, it is important to review statutory and case law changes for purposes of understanding the complex nature of North Carolina's classification as either Home Rule or Dillon Rule.

With the enactment of North Carolina General Statutes (N.C.G.S.) sections 153A and 160A in the 1970's seemed to change North Carolina's classification as a Dillon Rule state.[28] Moreover, inconsistent and varying opinions regarding the Dillon Rule and Home Rule distinction are reflected in state court decisions as well as the scholarly treatment of the issue. Indeed, North Carolina is often cited as an example of a state in which it is difficult to ascertain which rule applies and to what extent local governments have authority to act.[29] For example, each statutory section includes a broad grant of

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this prevailing notion that the two rules are "polar opposites." He contends that the Dillon Rule versus Home Rule analysis is similar to the problem of comparing "apples to oranges," since the Dillon Rule is a statutory interpretation rule and Home Rule "generally refers to source and/or extent of delegation of authority from the state to the local governments." *See* Richardson, *supra* note 13, at 22-24.

[26] Bluestein *supra* note 12, at 1985.

[27] *Id.*

[28] N.C. GEN. STAT. §§ 153A, 160A (2011); Bluestein, *supra* note 12, at 2004; Bluestein, *supra* note 20, at 18; Richardson, *supra* note 13, at 20.

[29] *Id.;* Richardson, *supra* note 13, at 20. *See* generally Bluestein *supra* notes 12 and 20.

regulatory authority to North Carolina cities and counties, as well as a wide variety of specific statutes granting regulatory power in certain areas.[30] Additionally, each statutory section contains a "broad construction" provision which seemingly "clearly abolish[es] Dillon's Rule and mandate[s] a more liberal interpretation of authority to local governments in North Carolina," at least with regard to those grants of power provided by these enabling statutes.[31] N.C.G.S §160A-4, governing cities, states:

> Broad Construction. It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect; Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State.

Section 153A-4 includes similar language applying this broad construction statute to counties.[32]

As a result of this broad construction language, academics including Jesse Richardson of the faculty at Virginia Technical Institute and Frayda Bluestein of the University of North Carolina's School of Government argue that North Carolina is no longer a Dillon's Rule state.[33] Bluestein, however, also suggests that neither is North Carolina a Home Rule state, as it has no broad delegation as such, which is typical of Home Rule states.[34] Others now refer to North Carolina as a "modified Dillon Rule" state.[35] Faced with this theoretical uncertainty regarding the authority of local governments in North Carolina, one would look to the courts for a

[30] *Id.*
[31] Richardson, *supra* note 13, at 20.
[32] Bluestein, *supra* note 20, at 18.
[33] *See* generally Bluestein, *supra* note 12; Bluestein, *supra* note 20.
[34] Bluestein, *supra* note 12, at 1985; Bluestein, *supra* note 20, at 1.
[35] Home Rule in America *supra* note 21.

clarification based on judicial interpretation of the mentioned provisions. Unfortunately, North Carolina case law provides little clarification on the issue.

Initially, it appeared that the North Carolina judiciary acknowledged the shift from the more rigid Dillon's Rule interpretation to the more broad interpretation promulgated by the legislature.[36] In the 1980's the North Carolina Supreme Court and the United States District Court for the Eastern District of North Carolina upheld local ordinances imposing both new and increased fees created for the purpose of improving water treatment facilities.[37] Although neither court specifically addressed the rule of statutory interpretation to be used, they broadly interpreted the "Public Enterprise statute," N.C.G.S. §160A-314, to permit such ordinances.[38] The North Carolina Supreme Court specifically recognized the broad interpretation standard mandated by N.C.G.S. 160A-4 in *River Birch Associates v. City of Raleigh*, and upheld an ordinance requiring a conveyance of a recreation area to a homeowner's association in accordance with an approved plat for a subdivision.[39]

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[36] *Town of Spring Hope v. Bissette*, 305 N.C. 248, 287 S.E. 2d 851 (1982); *South Shell Investment v. Town of Wrightsville Beach*, 703 F. Supp. 1192 (1988). *See* also Dustin C. Read and Steven H. Ott, *Adequate Public Facilities Ordinances in North Carolina: A Legal Review* (University of North Carolina Charlotte, Working Paper, 2006) at 16 available at http://www.naiop.org/foundation/apfonclegal.pdf.

[37] *Id*. In *Town of Spring Hope*, the town enacted an ordinance increasing water and sewer rates to fund a new water treatment facility. The plaintiff in the case argued that this did not fit the strict language of the Public Enterprise statute N.C.G.S. §160A-314, under which the ordinance was enacted. It states that, "A city may establish . . . rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise. Schedules of rents, rates, fees, charges, and penalties may vary according to classes of service, and different schedules may be adopted for services provided outside the corporate limits of the city," (emphasis added). Despite the plaintiffs argument that "services provided" did not allow for fees for "services to be furnished," the court interpreted the statute broadly and permitted the fee increase. The court took it one step further in South Shell Investment, finding no distinction between the fee increase in Town of Spring Hope and the imposition of a new fee under the same Public Enterprise statute.

[38] *Id*.

[39] *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 388 S.E. 2d 538 (1990); Read and Ott, *supra* note 36, at 17. The statutory language at issue in this case states, "A subdivision control ordinance may provide ... for the dedication or reservation of recreation areas serving residents of the immediate neighborhood within the subdivision." The plaintiff argued that the conveyance of recreational land to the homeowner's association was neither a "dedication" or "reservation." The court agreed with the plaintiff that the conveyance at issue did not fit the technical definition of either, the opinion noted that drafters often use those terms without regard to the technical meaning and that provisions in §160A shall be broadly construed as mandated by §160A-4.

By 1994, the North Carolina Supreme Court appeared to have fully rejected the application of the Dillon's Rule in a case where a municipality imposed user fees for regulatory services.[40] The court addressed this issue specifically in *Homebuilders Association of Charlotte v. City of Charlotte* noting that:

> This statute makes it clear that the provisions of chapter 160A and of city charters shall be broadly construed and that grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect. We treat this language as a "legislative mandate that we are to construe in a broad fashion the provisions and grants of power contained in Chapter 160A" . . . Dillon's Rule suggests a narrow construction, allowing a municipal corporation only those powers "granted in express words, ... necessarily or fairly implied in or incident to the powers expressly granted, ... and those essential to the accomplishment of the declared objects and purposes of the corporation." . . . The City contends that the imposition of user fees should be upheld even under application of Dillon's Rule. We find it unnecessary to decide that question since we conclude that the proper rule of construction is the one set forth in the statute.[41]

The very same year that the Dillon's Rule "died" in *Homebuilders*, at least with respect to grants of authority under N.C.G.S. sections 160A-4 and 153A-4, the North Carolina Supreme Court issued another opinion that seemed to be at odds with its former ruling and used the Dillon Rule to determine that the city of High Point did not have the authority to institute a retirement policy for law enforcement officers that "went beyond the provisions of the statute governing

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[40] *Homebuilders Association of Charlotte, Inc. v. The City of Charlotte*, 336 N.C. 37, 442 S.E. 2d 45 (1994). The court upheld the imposition of fees although the city had no express authority to impose such fees. The court cited the "general ordinance making power of municipalities" in North Carolina, §160A-174(a), which states that "a city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances." The court disagreed with the plaintiff's argument that the existence of a specific statute, §160A-209, that "provide[s] a means by which to meet the costs of regulating development, i.e., levying of taxes," meant that the city did not have authority to impose fees under this general broad power. The court held that the specific statute contained no restricting language and the power to impose fees was not in conflict to any State law or public policy. In response to the plaintiff's argument that the court previously relied on traditional Dillon Rule analysis in two previous cases, the court ruled that neither case was determinative as "in neither case was N.C. GEN. STAT. § 160A-4 discussed or cited . . . and the issue of the interplay between Dillon's Rule of construction and N.C. GEN. STAT. § 160A-4 was, therefore, not addressed."

[41] 336 N.C. 37, 44.

benefits."[42] It is important to note that the enabling statute at issue in *Bowers v. City of High Point* was N.C.G.S. §143-166.41, not part of N.C.G.S. Chapter 160A which includes the broad rule of construction discussed previously.[43] It is possible that the Bowers court applied the traditional Dillon Rule based on an interpretation of the statutory language of N.C.G.S. §160A-4 to apply only to ordinances enacted under that chapter. However in its discussion of both rules the court never explicitly stated this.[44] The doctrine seemed to be resurrected again two years later by the North Carolina Court of Appeals decision *in Carteret County v. United Contractors of Kinston, Inc.*[45] The case involved the ability of counties to enter into binding arbitration agreements with contractors when the North Carolina General Statutes only expressly grant the authority to enter into contracts.[46] Although the final outcome would have been the same had the court used the appropriate broad rule of interpretation, the court upheld Carteret County's arbitration agreement under what the opinion called "the well-settled rule in [the] state," the Dillon Rule.[47] The court found that the ability to enter into arbitration agreements was "necessarily or fairly implied under Dillon's Rule," based on the statutory authority to enter into contracts.[48]

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[42] *Bowers v. City of High Point*, 339 N.C. 413, 451 S.E.2d 284 (1994); A. Fleming Bell, II, *Dillon's Rule Is Dead: Long Live Dillon's Rule!*, Local Government Law Bulletin No. 66 (1995) available at http://www.sog.unc.edu/pubs/electronicversions/pdfs/glb66.pdf.
[43] *Id*.
[44] Bell, *supra* note 42, at 6. The court never mentioned the *Homebuilders* case, decided only 8 months earlier. A. Fleming Bell, II, professor of public law and government at the University of North Carolina School of Government, offers both a narrow and broad reading of the Bowers case. He states, that a narrowing reading of the case demonstrates that "the court will not go out of its way to find express or implied statutory authority for a greater allowance [of local autonomy] if the plaintiffs themselves are unwilling to make the necessary case." Read broadly, he states, "Bowers seems to say that the strict interpretation of Dillon's Rule is alive and well in North Carolina, at least with respect to local government powers not mentioned in G.S. chapters 153A and 160A."
[45] *Carteret County v. United Contractors of Kinston*, 120 N.C. App. 336, 462 S.E.2d 816 (1995); Richardson, *supra* note 13, at 20.
[46] 120 N.C. App. 336.
[47] *Id.* at 340.
[48] *Id.* at 341.

Similarly the North Carolina Supreme Court's 1999 decision in *Smith Chapel Baptist Church v. City of Durham* demonstrates the judiciary's reluctance to depart from the Dillon Rule.[49] In this case, the court did not apply any rules of interpretation but rather relied strictly on the language of the "Public Enterprise statute," in striking down a Durham ordinance imposing fees on landowners for the purpose of financing its entire storm water program.[50] The court's strict application of the statute resulted its determination that the statute on point was not ambiguous, and as such did not require interpretation.[51] Commentators and dissenting Justice Frye, who wrote the *Homebuilders* opinion, "accuse the majority of reviving the [Dillon] doctrine."[52]

Despite the variance from *Homebuilders*, the precedent was not forgotten, and was used by the state appellate court in a 2005 case, *Bellsouth Telecommunications v. City of Laurinburg*, to hold that the municipality had the authority to operate a fiber optic system.[53] The court employed the broad construction statute to determine that the use of the fiber optic network fell under the grant of authority to operate a "cable television system."[54] Frayda Bluestein described

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[49] *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 517 S.E.2d 874 (1999).
[50] *Id.*
[51] *Id*. at 812. This case may be compared with the decisions discussed in note 31, as they involved the same enabling statute and the increase and creating of fees to fund a water system. However, since the decisions in Town of Spring Hope and South Shell Investment, the N.C. General Assembly amended §160A-314(a) to include the following provision, "Rates, fees, and charges imposed under this section may not exceed the city's cost of providing a stormwater and drainage system." N.C. GEN. STAT. § 160A-314(a1), para. 2 (emphasis added). The court held that "this statutory provision clearly and unambiguously mandates that the City may not exceed the cost of providing a stormwater and drainage system. Thus, under a plain reading of the statute, SWU fees are limited to the amount which is necessary for the City to maintain the stormwater and drainage system rather than the amount required to maintain a comprehensive SWQMP [Stormwater Quality Management Program] to meet the requirements of the WQA." The SWQMP in this case was a comprehensive program and the majority of the fees at issue were not used for maintaining the actual water and drainage systems, as the fees at issue in the Town of Spring Hope and South Shell Investment cases were.
[52] *Id.* at 819. In his dissent, Justice Frye reminded the court of the previous decision in Homebuilders and cited the specific language of §160A-4, the broad interpretation statute. Frye argued that as the city was obligated to comply with federal National Pollutant Discharge Elimination System, and that any ambiguity in the statue should be construed in the city's favor, as "reasonably necessary or expedient" to the power granted by the enabling statutes authorizing cities to charge fees to create, improve, maintain, operate, etc. their public enterprises.
[53] *Bellsouth Telecomms. v. City of Laurinburg*, 168 N.C. App. 75, 606 S.E.2d 721 (2005).
[54] *Id.* This precise language is listed in the statutory definition of public enterprises. N.C.G.S § 160A-311(7).

the *Laurinburg* ruling as "a valiant effort by the state's appellate court finally to bury Dillon's rule and to reconcile prior seemingly inconsistent rulings under a unifying standard for judicial review."[55] The *Laurinburg* court posited that prior decisions that seemingly strayed from the *Homebuilder*s ruling and reverted to the Dillon rule actually conducted a "plain meaning" analysis of statutes that were unambiguous, and that:

> [t]he narrow Dillon's Rule of statutory construction . . . has been replaced by N.C. Gen. Stat. § 160A-4's mandate that the language of Chapter 160A be construed in favor of extending powers to a municipality where there is an ambiguity in the authorizing language, or the powers clearly authorized reasonably necessitate 'additional and supplementary powers' 'to carry them into execution and effect.[56]

This same language is cited in a more recent case concerning a Durham ordinance that sought to impose "school impact fees" on persons constructing new residences within the county.[57] Although the court ultimately ruled that the ordinance was unauthorized, it agreed that the broad interpretation was the appropriate standard to apply.[58] The court then cited the *Bowers* decision in ruling that "where the plain meaning of the statute is without ambiguity, it 'must be enforced as written," and applied the broad interpretation standard only to the ambiguous more encompassing statutes relied on as authority to enact the ordinance.[59]

North Carolina's on and off again relationship with the Dillon Rule has evolved into a new system of review for municipal authority. When a statute is unambiguous, Dillon Rule or "plain meaning" analysis will apply.[60] In the case of ambiguous statutes, the broad interpretation standard applies, at this point, only officially to the enabling statutes listed in N.C. G. S. Chapters

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[55] Bluestein, *supra* note 20, at 20.
[56] 168 N.C. App. 75, 82.
[57] *Durham Land Owners Ass'n v. County of Durham*, 177 N.C. App. 629, 630 S.E.2d 200 (2006).
[58] *Id.* at 203. The court stated, "[t]hough not without nuances and distinguishing factors, we find Homebuilders, Bowers, and Smith Chapel to be consistent statements of the law and in accord with N.C. GEN. STAT. § 160A-4," then quoted the above language from the Laurinburg case.
[59] *Id.* at 204.
[60] *Id.; Bowers*, 339 N.C. 413, 451 S.E.2d 284. Bluestein, *supra* note 20, at 21; Bell, *supra* note 42, at 4.

160A and 153A.[61] Although North Carolina law has evolved to provide local governments with more authority, the shifting characterizations of the two rules in court decisions have resulted in a lack of predictability when issues of municipal authority are at stake. Prof. Jesse Richardson remarks that, "Dillon's Rule and home rule perplex even North Carolina appellate court justices."[62] However, although it is not a Home Rule state, Frayda Bluestein concludes that the local governments of North Carolina have been delegated powers substantially equivalent to and in some cases greater than those enjoyed by local governments in states with Home Rule.[63]

C. Local power under the North Carolina Constitution

The N.C. Constitution grants the state legislature broad control over municipal activity,[64] but it also establishes rights, which are guaranteed to all persons in the state of North Carolina. This subsection looks first at the delegation of power under the N.C. Constitution, then at the provisions of the N.C. Constitution related to local acts and the concept of local acts as a means of passing municipality or county-specific legislation, and finally at the rights guaranteed by the N.C. Constitution.

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[61] *See* note 31. *See* also Bluestein, *supra* note 20, at 21. "As currently written, the directive for broad construction relates only to powers granted in those chapters and in local acts, including local charters. In reality, local government authority can be found in many important provisions outside the basic city and county statutes. Although the legislature may not intend to extend the broad-construction language to some delegations, such as the authority to levy taxes, there is no logical basis for concluding that the standard should not apply to police power regulations that are authorized in other chapters." Bluestein proposes that the legislature should revise the broad interpretation statute to apply to these other areas.

[62] Richardson, *supra* note 13, at 21.

[63] Bluestein, *supra* note 20, at 17. Consistent with Bluestein's conclusion, Richardson states that "the term 'home rule' has acquired an almost talismanic aura over the years and often, inaccurately, connotes almost total freedom of local government from state control." Recall that grants of home rule can be very specific and limiting. For this reason Richardson concludes that, "only one type of home rule, a rule of statutory construction that assumes that local governments hold the authority to act unless denied by the state legislature, may fairly be compared to Dillon's Rule." Richardson, *supra* note 13, at 12, 25.

[64] *See* Bell, *supra* note 42, at 2.

While some of the provisions of the N.C. Constitution relate to the power of local government, most provisions reserve the power to the General Assembly, the state's legislating body, to enact local government provisions or restrict local government actions.[65] N.C. Constitution Article VII, Section 2 states that "[t]he General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise provided by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable."[66] Thus, under the N.C. Constitution, the General Assembly is free to create and eliminate municipal entities as it so chooses.[67]

> Local governments of North Carolina have been delegated powers substantially equivalent to and in some cases greater than those enjoyed by local governments in states with Home Rule.

1. Delegation of power under the North Carolina Constitution

Although the N. C. Constitution does not grant express power to municipalities to take action concerning matters of interest within their jurisdictions, the Constitution does delegate municipal power by authorizing the General Assembly to enact laws that will empower municipalities to legislate within select areas.[68]

Perhaps the best examples of these kinds of authorizing provisions can be found in Article V, which authorizes the General Assembly to establish state finance law and also grants the legislature the right to delegate limited authority to municipalities.[69] Furthermore, Article V, Section 2, paragraph 4 permits the General Assembly to grant municipalities the authority to levy

[65] *See* Bluestein, *supra* note 20, at 17.
[66] N.C. CONST. Art. VII, § 2 (2010).
[67] *See* Bell, *supra* note 42, at 2.
[68] *See* N.C. CONST. Art. VII, § 2 (2010), *supra* note 66.
[69] *Id.*

tax with the approval of more than fifty percent of voters in the municipality.[70] Similarly limiting provisions may be found in Article V with respect to local debt[71] and local project development financing.[72] As with the constitutional provisions concerning taxation, neither of these provisions grants any actual power to municipalities, but instead both authorize the General Assembly to take action empowering municipalities in these areas. Additionally, Article V, Section 7 states "[n]o money shall be drawn from the treasury of any county, city or town, or other unit of local government except by authority of law."[73]

2. Local Acts

Although municipalities are given narrow express power in the N.C. Constitution, there is no explicit authority for municipalities to act independently of enabling state legislation. Instead, the authority for municipalities to take action is found in the North Carolina Constitution. Under the Constitution, the General Assembly has the ability to pass "local acts." These acts can include local legislation "[r]elating to health, sanitation, and the abatement of nuisances;" "[a]uthorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets or alleys;" "[r]elating to ferries or bridges;" "[e]recting new townships, or changing township lines, or establishing or changing the lines of school districts;" "[r]emitting fines, penalties and forfeitures, or refunding moneys legally paid into the public treasuring;" "[r]egulating labor, trade, mining or manufacturing;" and "[g]ranting a divorce or securing alimony in any individual case" among others.[74] However, Article II, Section 25, paragraph 4 states that "[t]he General Assembly may enact *general laws* regulating the matters set out in this

[70] Art V, § 2, para. 4-5.
[71] Art 5, § 4.
[72] Art 5, § 14.
[73] Art V, § 7.
[74] *Id.*

Section"[75] Article XIV, Section 3 prevents the General Assembly from singling out a particular local municipality and establishes a constitutional principal that the local municipalities should be treated equally.[76]

The issue of whether an act is "local" has arisen in many court cases in North Carolina. A "local law" has been defined as one that "discriminates between different localities without any real, proper, or reasonable basis or necessity . . ."[77] But, the "[m]ere fact that a statute applies only to certain units of local government does not by itself render the statute a prohibited local act; only if statutory classification is unreasonable or underinclusive will statute be voided as a prohibited local act."[78]

The test applied by North Carolina courts in determining whether a statute is "local" or "general" is the "reasonable classification" test. North Carolina courts look to whether a law "operates uniformly on all the members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law."[79] The reasonable classification test reserves certain areas for regulation by local ordinances and also serves to ensure that the General Assembly will treat the various municipalities within the state equally.

Article I of the N.C. Constitution sets out many of the same or similar guarantees that appear in the U.S. Constitution, and which control the action of municipalities.

[75] *Id.* § 25, para. 4 (emphasis added).
[76] Art. XIV, § 3 ("Whenever the General Assembly is directed or authorized by this Constitution to enact general laws, or general laws uniformly applicable throughout the State, or general laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, no special or local act shall be enacted concerning the subject matter directed or authorized to be accomplished by general or uniformly applicable laws, and every amendment or repeal of any law relating to such subject matter shall also be general and uniform in its effect throughout the State.").
[77] *City of Asheville v. State*, 192 N.C. App. 1, 665 S.E.2d 103 (2008), appeal dismissed, rev. denied 672 S.E.2d 685.
[78] *Adams v. North Carolina Dept. of Natural and Economic Resources*, 249 S.E.2d 402, 295 N.C. 683 (1978).
[79] *Id.* To satisfy the reasonable classification test the classification must: 1) "be reasonable and germane to the law," (2) "be based on a reasonable and tangible distinction and operate the same on all parts of the state under the same conditions and circumstances," and (3) "not be arbitrary or capricious."[79] *See id.*

While the General Assembly is not permitted to pass local acts in the areas prohibited by the state constitution, it may pass general legislation applicable to all municipalities. These provisions *do not* prohibit local governments from passing legislation consistent with the police power which has been delegated to them by the state.[80] In effect, they carve out areas of the law wherein the municipalities themselves may have a constitutionally protected power to independently regulate themselves, without interference by the state legislature; that is, provided that the General Assembly chooses to empower them by enacting general statutes in these areas which delegate them authority.

Local acts themselves are an important part of the law governing a municipality. Municipal governments in North Carolina can ask the state legislature to pass local acts in areas where the municipality is unclear whether or not it has the authority to act.[81] Municipalities can request local acts of the state legislature in areas not prohibited by the N.C. Constitution, to modify general state law by giving a municipality or municipalities unique authority, or to create exceptions for certain municipalities.[82] Municipalities can also request local acts to validate local government action.[83] Local acts are introduced in the legislature like other bills, with certain exceptions.[84] They do not go to the governor for approval and are subject to other small differences in procedure. In general, so long as requested local acts are consistent with the N.C.

[80] *See State v. Smith*, 143 S.E.2d 293, 265 NC 173 (1965). For an illustrative example, *see also Southern Blasting Services, Inc. v. Wilkes County*, N.C. 162 F.Supp.2d 455 (2001), aff'd 288 F.3d 584 (holding that a state statute delegating to counties the authority to regulate explosive substances was not a "local law" because it conferred this authority uniformly on all counties).
[81] *See* Bluestein, *supra* note 20, at 18-19.
[82] Frayda Bluestein, What is a Local Act? NC LOCAL GOVERNMENT LAW BLOG, Apr. 6, 2010, http://sogweb.sog.unc.edu/blogs/localgovt/?p=2163.
[83] *Id.*
[84] *Id.*

Constitution and non-controversial, the North Carolina state legislature generally grants "courtesy" to local governments and passes local acts.[85]

3. Individual rights under the N.C. Constitution

Because municipal governments are granted very little authority through the N.C. Constitution, the N.C. Constitution is of limited use in demonstrating to municipalities the power they have to enact immigrant-friendly legislation. However, it also bears mention that Article I of the N.C. Constitution sets out many of the same or similar guarantees that appear in the U.S. Constitution, and which control the action of municipalities. For example, the protections of the First Amendment of the U.S. Constitution are echoed in North Carolina's constitution, Article I, Sections 12-14.[86] The substantive and procedural due process rights of the Fourteenth and Fifth amendment's of the U.S. Constitution are also found in Section 1 of the state constitution, which states: "[w]e hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."[87] The N.C. Constitution also creates a fundamental right "to the privilege of education" and places a duty on the state to ensure that this right is protected.[88] Article I, Section 19 further establishes the due process guarantees which are also in the Fourteenth Amendment of the U.S. Constitution, and also states that "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion or national origin."[89]

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[85] *Id.*
[86] N.C. CONST. Art. I, § 12 (Right of assembly and petition); § 13 (Religious liberty); §14 (Freedom of speech and press).
[87] Art I, § 1.
[88] *Id.* § 15.
[89] *Id.* § 19.

Finally, Article I, Section 36 states: "[t]he enumeration of rights in this Article shall not be construed to impair or deny others retained by the people."[90]

D. Municipal Charters

> The flexibility created by the inconsistencies of the North Carolina courts allows local authorities some power to create Integrated Communities.

Municipalities in North Carolina must also act consistently with their municipal charters. "Municipal charters are the constitutions of municipal corporations, defining their powers and structures."[91] A municipality is organized as a municipal corporation, similar to a private corporation for business purposes. It is a legal fiction which can own property, form contracts, sue and be sued.[92] Municipalities are incorporated as cities and towns by the General Assembly.[93] Incorporation is the process by which these entities receive state charters, which legally recognize their existence.[94]

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[90] *Id.*, § 36.
[91] John Teaford, *Municipal Charters*, COMMUNITY ENVIRONMENT LEGAL DEFENSE FUND (last accessed Apr. 3, 2011) *available at* http://www.celdf.org/downloads/Municipal%20Charters%20-%20Jon%20C.%20Teaford.pdf.
[92] *See* GORDON WITAKER, LOCAL GOVERNMENT IN NORTH CAROLINA 15 (3d. Ed. 2009).
[93] *Id.* For more information about the elements of a municipal charter, *see* Appendix
[94] *Id.* A community that wishes to incorporate must meet certain requirements, such as possessing a permanent population of at least 100 persons, and a permanent or seasonal population density of at least 250 persons per square mile; at least 40 percent of the community must be under urban development; proponents must secure the signatures of at least fifteen percent of voting residents residing in the area in question on a petition, and the community must demonstrate that it will be able to meet tax obligations. *See* DAVID LAWRENCE AND KARA MILLONZI, INCORPORATION OF A NORTH CAROLINA TOWN 8 (3d. Ed. 2007), *available at* http://www.sog.unc.edu/pubs/electronicversions/pdfs/incorporation07.pdf. If a community wishes to incorporate, this matter is first submitted by the North Carolina General Assembly to the Joint Commission on Municipal Incorporations, established under the North Carolina General Statutes, Chapter 120. *Id.* at 7. Based on the Joint Commission's recommendation, the North Carolina General Assembly will vote and determine whether or not to incorporate the community into a municipality. *Id.* at 7-9. In instances where the prospective municipality is located close to an existing municipality, a two-thirds majority of the General Assembly is required to approve incorporation, pursuant to N.C. CONST., Art. VII, § 1. At the discretion of the General Assembly, in some instances the decision will also be submitted to the voting residents of the prospective municipality by referendum. LAWRENCE at 9.

E. North Carolina Statutory Development on Municipal Authority

As noted above in Section I. B, statutory developments have served to undermine North Carolina's historic classification as a Dillon Rule state. It is important to understand the statutory developments on their own, particularly as set out in N.C.G.S. Section 160A which governs the actions of municipalities.[95] Section 160A-4 broadly grants municipal power and states "the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect."[96] This is limited with the caveat: "Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State .[97] In practice, this statute means that in North Carolina, interpretation of whether municipal action is consistent with the General Assembly's legislative intent is necessary only if a statute is ambiguous; when a statute is either unambiguous, or there is no relevant grant of power at all, North Carolina courts should honor this grant or lack of grant of power.[98]

Statutes under N.C.G.S. Section 160A Article 8 address the ordinance-making power of North Carolina municipalities. 160A-174(a) states broadly:. "A city may b[y] ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or

[95] *See* N.C. GEN. STAT. § 160A. N.C.G.S. § 153A is a similar body of statutory law governing counties. These statutes were re-written in the 1970s. See A. Fleming Bell, II, The Police Power, County and Municipal Government in North Carolina 5 (UNC-Chapel Hill Sch. of Gov't 2007) available at http://www.sog.unc.edu/pubs/cmg/cmg04.pdf.
[96] N.C. GEN. STAT. § 160A-4.
[97] Id. See also § 153A-4 as to counties.
[98] *See Durham Land Owners Association v. County of Durham*, 177 N.C. App. ___, 630 S.E.2d 200, 203-04 (2006), stay denied, 360 N.C. 532, 633 S.E.2d 469 (2006), disc. Review denied, 360 N.C. 532, 633 S.E.2d 678 (2006), 2006 WL 1735193 (N.C.), as discussed in Bell, *supra* note 42, at 4.

welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances."[99]

The exceptions to NCGS §160A-174, listed under 160A-174(b) are the following:

(b) A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or federal law when:

(1) The ordinance infringes a liberty guaranteed to the people by the State or federal Constitution;

(2) The ordinance makes unlawful an act, omission or condition which is expressly made lawful by State or federal law;

(3) The ordinance makes lawful an act, omission, or condition which is expressly made unlawful by State or federal law;

(4) The ordinance purports to regulate a subject that cities are expressly forbidden to regulate by State or federal law;

(5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation;

(6) The elements of an offense defined by a city ordinance are identical to the elements of an offense defined by State or federal law.[100]

Moreover, "The fact that a State or federal law, standing alone, makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition."[101] N.C.G.S. 160A-175 also grants municipalities the power to enforce its ordinances.[102]

N.C.G.S. 160A-177 clarifies that the enumeration of powers to regulate in Article 8 and elsewhere are not meant "to be exclusive or a limiting factor upon the general authority to adopt

[99] N.C. GEN. STAT. § 160A-174(a).
[100] § 160A-174(b).
[101] *Id*.
[102] § 160A-175.

ordinances conferred on cities by G.S. 160A-174.[103] Section 160A frequently expressly delegates grants of legislative authority to municipalities.

N.C.G.S. 160A contains numerous provisions which often legislate the minutia of the day-to-day management of a municipality. When express detail about how a delegation of power should be carried out is given, municipalities are expected to follow the language of that statute, rather than relying on the general ordinance-making powers set out by 160A-174(a).[104]

As is codified in N.C.G.S. 160A-174(b), North Carolina municipalities are also subject to preemption, not only by federal, but also by state law.[105] Even when there is no explicit state statute that governs a particular area of the law, if a state's regulators scheme is so comprehensive that there is clear legislative intent to "occupy the field," local ordinances cannot be enacted.[106] In the context of a community integration project, it is critical to understand how this preemption limits the action that municipalities can take.

It should be noted that, a local ordinance "cannot prohibit exactly the same conduct that is prohibited by state law."[107] The North Carolina Supreme Court held in *State v. Langston* that a "general grant of power, such as a mere authority to make by-laws, or to make by-laws for the good government of the place, and the like, should not be held to confer authority upon the [municipal] corporation to make an ordinance punishing an act" which has been made punishable as a criminal act, for example, by State law.[108] However, it is also important to

[103] § 160-177.
[104] See, e.g., Bell, *supra* note 42, at 6.
[105] See N.C. GEN. STAT. § 160A-174(b). See also discussion in Bell, *supra* note 42, at 7-8.
[106] N.C. GEN. STAT. § 160A-174(b). See also Bell, *supra* note 42, at 8.
[107] Bell, *supra* note 42, at 9.
[108] *State v. Langston*, 88 N.C. 692 (1883), as discussed in Bell, *supra* note 42, at 9.

remember that there is precedent to suggest that ordinances may impose higher standards of conduct.[109]

The state's statutory development is illustrative of the North Carolina's continued shifting between the Dillon Rule and the Home rule. The flexibility created by the inconsistencies of the North Carolina courts allows local authorities some power to create Integrated Communities.

F. Conclusion

Despite the lack of precise clarity as to North Carolina's classification as a Dillon Rule or Home Rule state and the unpredictability of the North Carolina judiciary regarding cases of municipal authority, municipalities have broad flexibility to act to integrate immigrants into the community. The series of cases outlined in this report provide guidance for local governments considering enacting new ordinances for that purpose. As a matter of practical strategy, new ordinances in North Carolina should be enacted in such a way to avoid Dillon rule analysis, should they ever be challenged in the courts. While the *Bowers* court never explicitly held that the broad interpretation statutes included in N.C.G.S. Chapters 153A and 160A were limited to ordinances enacted under those chapters, the court's ultimate ruling and the plain language of the provisions appears to limit the use of the standard.[110] And although there is a call to "clarify the scope and applicability of the broad-construction approach," and to extend its use more broadly outside of the mentioned chapters and without the threshold of ambiguity, local governments should try when possible to utilize the enabling statutes provided in these chapters as authority to

[109] N.C. GEN. STAT. § 160A-174(b). *See also State v. Tenore*, 280 N.C. 238, 245, 185 S.E.2d 644, 649 (1972).
[110] See *supra* note 44.

enact community integration related ordinances unless the proposed ordinance falls unquestionably within the plain language of a specific statute.[111]

Both Chapter 153A and 160A contain several specific enabling statutes and broad delegations of authority.[112] N.C.G.S. §153A-121(a) states that "[a] county may by ordinance, define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county; and may define and abate nuisances."[113] The statute pertaining to cities, N.C.G.S. §160A-174(a), contains almost identical language.[114] If there is no enabling statute on point, local governments should try to structure the proposed ordinance to fall under these general provisions. Doing so is ideal, as these provisions are those most likely to be held as ambiguous by the courts due to their vague and encompassing language. Recall that ambiguity is required to get past Dillon Rule interpretation in North Carolina.[115] Local governments should still look for any more specific statute that is sufficiently related to the ultimate goal of the ordinance, as the city of Laurinburg did with their fiber optic system.[116] It is important, however, to be cautious that if relying on a more specific statute under Chapters 153A and 160A, a court might determine that "the statute has a 'clear meaning," and thus

Municipalities have broad flexibility to act to integrate immigrants into the community

[111] See note 61 (Bluestein's proposals to the state legislature to expand the application of the broad interpretation statutes).
[112] N.C. GEN. STAT. § 153A, 160A. *See also* Bell *supra* note 42.
[113] § 153A-121(a). *See also* Bell, *supra* note 42.
[114] § 160A-174(a). *See also* Bell, *supra* note 42.
[115] *See* text accompanying *supra* note 60.
[116] 168 N.C. App. 75.

there is no room for expansion or interpretation by a municipality.[117] However, even if a statute within these chapters is sufficiently specific, as long as it does not contain restrictive language and is not preempted by state law or public policy, a local government can make the argument that a broad construction should be applied.[118]

As made apparent by N.C.G.S. Chapters 160A and 153A and the discussed case law, North Carolina is no longer a traditional Dillon Rule state. There is enough flexibility within North Carolina's current modified system of statutory interpretation regarding municipality, and within the governing statutes to empower local municipalities to act. With knowledge of the law in this area and with careful craftsmanship, municipalities should utilize their authority to enact local laws that will benefit community integration and benefit immigrants.

II. North Carolina Municipalities under Federal and International Law: Progressive Mandates for Community Integration of Immigrants and the Duty to Uphold Them

Though North Carolina is arguably not a "Dillon's Rule" state,[119] and North Carolina's municipalities have been delegated relatively broad discretion by the North Carolina legislature to "exercise the powers, duties, privileges and immunities conferred upon them by law,"[120] municipal law not only subject to state law but is generally subordinate to and preempted by federal law these laws come into conflict. Municipalities in North Carolina must act consistently

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[117] Bell, *supra* note 42, at 6.
[118] *See supra* note 40, regarding the Homebuilders decision.
[119] *See* Bluestein, *supra* note 20, at 19. *See also supra* Part I, Section I, which provides a comprehensive explanation of the state of the Dillon's Rule in North Carolina.
[120] *See* N.C. GEN. STAT. § 160A-4:

> It is the policy of the General Assembly that the cities of this State should have adequate authority to exercise the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably expedient to carry them into execution and effect . . .

Id. *See also* N.C. GEN. STAT. § 153A-4 as to counties.

with the United States Constitution and federal law. They must abide by the applicable decisions of federal courts. Moreover, international legal principles apply to municipalities.

Section II builds on the preceding Section by reviewing in some detail the different bodies of law that frame the parameters of law within which municipalities have the power to act, focusing on the U.S. Constitution, and international law. Understanding both the floor and ceiling established by these bodies of law is useful. Advocates for community integration can sometimes argue that unfavorable municipal law does not rise to the level of the minimum standards established by superior law, or alternatively, that it oversteps limitations. In other instances, advocates may be able to demonstrate that desired municipal action which would aid community integration falls within the realm that municipalities are authorized to act, or even that such action is necessary to satisfy the minimum standards established by superior law.

> Municipalities should utilize their authority to enact local laws that will benefit community integration and benefit immigrants.

Subsection A of this Section discusses the limiting impact of the U.S. Constitution and federal preemption on municipal law in North Carolina.[121] Subsection B briefly examines international legal norms that have direct bearing on the treatment of immigrants by municipalities.

A. The U.S. Constitution and Federal Preemption

The U.S. Constitution is silent on the existence of local governments. In the U.S. Supreme Court decision *Hunter v. City of Pittsburg*, the Court stated that "the number, nature, and duration of powers conferred upon these [municipal] corporations and the territory over

[121] At the time of the publication of this policy brief, the U.S. Supreme Court is considering the case of *Arizona et al., v. United States*, No. 11-182 (2012) , the holding in which may change much of what has previously been understood with regard to preemption and immigration law.

which they shall be exercised rests in the absolute discretion of the state . . .” and that the destruction or abolition of municipal power “may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body . . . may do as it will, unrestrained by any provision of the Constitution of the United States.”[122] While municipalities are not empowered by the U.S. Constitution, they *are* subject to it, and any action that a municipality takes must be constitutionally permissible. Municipal action can be and has been challenged on constitutionality grounds.[123] At most, a municipal government is a creation of state government, and therefore it can do no more than a state can do, within the confines of the U.S. Constitution. Certain rights apply to all persons residing within the United States regardless of their status. In the past fifty years, the U.S. Supreme Court has overturned local ordinances as unconstitutional under the Commerce Clause[124] for violation of the First Amendment,[125] and for violation of the Fourteenth Amendment.[126]

1. Commerce Clause

Municipal ordinances may violate the Commerce Clause by unjustifiably discriminating against residents from other localities or states in interstate commerce. For example, in *Edwards v. Service Machine and Shipbuilding Corp.*[127] an ordinance which required non-local job seekers

[122] *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907). *See* analysis of this case in Bluestein, *supra* note 20, at 15-16. *See also* Bluestein, *supra* note 12, at 1984.
[123] *See State Constitutional and Statutory Provisions and Municipal Ordinances Held Unconstitutional or Held to be Preempted by Federal Law* (1789-2002), *available at* http://www.gpoaccess.gov/constitution/pdf2002/047.pdf (providing a comprehensive list of all U.S. Supreme Court cases holding state statutes and municipal ordinances unconstitutional or preempted, and briefly explaining the grounds).
[124] U.S. CONST. Art. 1, § 8, cl. 3.
[125] U.S. CONST. Amend. I.
[126] Amend. XIV.
[127] 449 U.S. 913 (1980).

to obtain identification cards, provide fingerprints and a photograph, and pay a special fee, was invalidated on Commerce Clause grounds.[128]

In the context of community integration and the immigrant community, the U.S. Constitution's delegation of the power to regulate interstate commerce to Congress and the scope to which this power has expanded is significant. Under the Commerce Clause, Congress has enacted comprehensive legislation which protects the rights of workers, such as the Fair Labor Standards Act[129] and Title VII.[130] Moreover, Congress has regulated discrimination based on race, gender, and ethnicity in places of business which engage in interstate commerce.[131] As discussed subsequently, municipalities cannot enact ordinances which subvert the objectives of existing federal laws under the doctrine of preemption. Under Commerce Clause-enacted federal legislation, municipalities cannot pass laws which take away federally-mandated protections for workers in the workplace, or which permit businesses to discriminate on the basis of race or ethnicity. However, in many cases it may be constitutionally permissible for states and municipalities to enact legislation which creates greater protections than those established by such federal laws. If a state or locality's legislation is in conflict with federal legislation concerning workers, the law most favorable to the worker may be found to prevail.[132]

Municipalities in North Carolina must act consistently with the United States Constitution and federal law.

[128] *Id.*
[129] 29 U.S.C. 201, et seq. (2010) (Fair Labor Standards Act).
[130] 42 U.S.C. § 2000e [2] et seq.
[131] *See e.g.,* *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (upholding the Civil Rights Act of 1964 as constitutional because the motel in question served interstate travelers).
[132] *See, e.g.* CARLSON, EMPLOYMENT LAW 265 (2nd ed. 2009) (discussing in context of FLSA).

2. First Amendment

The First Amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[133] As the First Amendment is applied to the states and local governments through the Due Process Clause of the Fourteenth Amendment,[134] municipalities may not enact legislation which violates any part of this amendment.

In formulating First Amendment arguments in the context of community integration on behalf of the immigrant community, it is important first to establish that First Amendment rights are applicable to the immigrant population. There is substantial judicial precedent to suggest that the First Amendment applies to undocumented as well as documented immigrants.[135] Moreover, in *Plyer v. Doe,* the Court established that "even aliens whose presence in this country is unlawful have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."[136] Thus it may be argued that the use of "persons" both here and in the plain language of the First Amendment renders the First Amendment applicable to undocumented persons present in the United States.[137]

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[133] U.S. CONST. Amend. I.
[134] *See, e.g.,* *Gitlow v. New York*, 268 U.S. 652 (1925).
[135] The U.S. Supreme Court has expressly established that First Amendment protections apply to documented immigrants. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 598 n. 5 (1953). *See* also, Will Johnson, *The Time, Place, and Manner of Survival: An Analysis of Day Laborers and First Amendment Limits on State Action to Exclude*, 9 First Amend. L. Rev. 675 (2011).
[136] *Plyer v. Doe*, 457 U.S. 202, 210 (1982).
[137] *See* Johnson, *supra* note 135, at 681 (citing *American-Arab Anti-Discrimination Comm. V. Reno*, 70 F.3d 1045, 1063-64 (9th Cir. 1995), rev'd on other grounds, 525 U.S. 471 (1999)). "The Supreme Court has consistently distinguished between aliens in the United States and those seeking to enter from outside the country, and has accorded to aliens living in the United States those protections of the Bill of Rights that are not, by the text of the Constitution, restricted to citizens." *Reno*, 70 F.3d at 1063-64. Johnson also notes that the cases he discusses in his analysis all establish that undocumented persons are entitled to first amendment protections. *See* Johnson, *supra* note 1355. *See also Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 607 F.3d 1178, 1183 (2010) (finding that at least one of the plaintiff organizations had standing, in which case there was no need to address the standing of other organizations or persons).

The First Amendment provides a useful tool, then, in that it guards activities which this population may engage in from being prohibited by municipal law. One application of this is discussed subsequently in Part Two of this policy brief, with respect to the First Amendment constitutionality of municipal ordinances regulating day laborers who gather in a particular location to seek employment.[138]

3. Fourteenth Amendment

Like the Commerce Clause, the Fourteenth Amendment is another substantial source of congressional authority.[139] The Fourteenth Amendment states that no state may "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[140] The Due Process Clause of the Fourteenth Amendment has been the vehicle for applying the majority of the enumerated rights in the Bill of Rights to the states, and in turn to municipal governments.[141] It has formed the foundation for federal courts in considering whether state and municipal legislation comes under scrutiny for violating due process or equal protection.[142]

Fourteenth Amendment protections can come into play in the context of community integration and the immigrant community. As discussed in Subsection A(2) above, the U.S. Supreme Court has recognized that the Due Process Clause applies to "all 'persons' within the United States, including aliens," and regardless of status.[143] The level of scrutiny under substantive Due Process review would necessarily depend on the right in question. Under Equal

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[138] *See infra* Part Two of this briefing book, discussing the Carrboro-Chapel Hill project with day laborers.
[139] *See* Kenneth Thomas, *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power* CRS R30315 (Feb. 1 2008), *available at* http://www.fas.org/sgp/crs/misc/RL30315.pdf.
[140] US CONST. Amend. XIV.
[141] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 99-100, 365-518 (2d Ed. 2005).
[142] *See* Thomas, *supra* note 139, at 10.
[143] *See Plyer v. Doe*, 457 U.S. 202 (1982). *See also See also* Kate M. Manuel, *et. al, State and Local Restrictions on Employing, Renting Property to, or Providing Services for Unauthorized Aliens: Legal Issues and Recent Judicial Developments*, CRS RL 34345 (Dec 20, 2010), at 6.

Protection review, the level of scrutiny would depend upon the nature of the classification, however ordinances which discriminate based on race or national origin, or which inherently call for race based discrimination would likely be subject to "strict scrutiny." In *Plyer v. Doe,* the U.S. Supreme Court established that the Equal Protection Clause also applies to immigrants, regardless of status.[144] The U.S. Supreme Court held that undocumented immigrants were not a "suspect class," and that the right to education was not a fundamental right.[145] Nevertheless, the court applied an *intermediate* level of scrutiny, rather than rational basis review, holding that excluding unauthorized immigrant children from public school was not substantively related to a legitimate state interest.[146] It remains unclear what standard would apply to the analysis of ordinances which discriminate against undocumented persons in every instance, but Due Process and Equal Protection considerations are relevant when determining the validity of ordinances concerning employment, housing, benefits, law enforcement, and many other areas.

> In formulating First Amendment arguments in the context of community integration on behalf of the immigrant community, it is important first to establish that First Amendment rights are applicable to the immigrant population.

In April 2010, the Arizona legislature passed the Support Our Law Enforcement and Safe Neighborhoods Act, known nationally as SB 1070.[147] Some of the most controversial provisions

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[144] *See Plyer*, 457 U.S. at 210.
[145] *Id.*
[146] *Id.* at 230.
[147] *Support Our Law Enforcement and Safe Neighborhoods Act*, SB 1070. This act was signed by Arizona governor Jan Brewer in April 2010, but the most controversial provisions of the bill were prevented from going into effect by a preliminary injunction issued by U.S. District Judge Susan Bolton. *See* Preliminary Injunction, United States v. Arizona, No. CV 10-1413-PHX-SRB (District Court of AZ). *See also* Randal C. Archibold, *Judge Blocks Arizona's Immigration Law*, WASHINGTON POST, July 28, 2010, A1, *available at* http://www.nytimes.com/2010/07/29/us/29arizona.html. As noted above, the U.S. Supreme Court is currently considering various challenges related to the law. *See supra* note 121.

of the bill would have required state and local law enforcement officers to inquire about immigration status during any lawful stop, detention, or arrest, authorized police to make warrantless arrests of persons they believed to be removable, criminalized the failure to carry proper immigration documents, and made it unlawful for workers to get into cars impeding traffic, and criminalized the act of stopping to hire day laborers.[148] The most controversial portions of the bill were prevented from going into effect by a preliminary injunction issued by U.S. District Judge Susan Bolton.[149] However, similar legislation is being proposed in legislatures across the country, and these legislative attempts to control immigration raise serious Due Process and Equal Protection concerns. The outcome of these types of state laws is currently being determined by the U.S Supreme Court in its review of the U.S. government's challenge to Arizona's anti-immigration laws and the subsequent challenges that will follow by other groups that have filed suit to enjoin SB1070.[150]

4. Preemption Doctrine and Regulation of Immigration

Article VI, Section 2 of the U.S. Constitution establishes that the Constitution, federal law, and treaties are the "supreme Law of the Land,"[151] and in effect, these laws preempt any action taken by state and local governments.[152] "States cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."[153] Preemption of state action by the federal government may be expressly stated in the enacting legislation (express preemption), determined to exist by a

[148] *Id.*
[149] *Id.*
[150] *See supra* 121.
[151] U.S. CONST. Art. VI, § 2.
[152] *See* Manuel, *supra* note 143, at 4.
[153] *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941)).

court of law (field preemption), or it may occur when state or local action directly conflicts with or contradicts the purpose of a federal legislative scheme (conflict preemption).[154]

> Certain rights should apply to all human beings by virtue of their humanity, regardless of their status or citizenship to a particular country.

The doctrine of preemption is important in understanding the limits of a municipality because desired municipal action may be preempted by existing federal law or it may violate the intention of Congress in choosing not to legislate in a particular area. In the context of community integration and the immigrant community, the preemption doctrine is particularly important when considering the power of a municipality with respect to United States immigration law. Article I, Section 8 of the U.S. Constitution grants Congress the "authority to regulate Naturalization."[155] The U.S. Supreme Court has interpreted this to mean a broader exclusive power to regulate *all* immigration.[156] Proponents of the state-and municipal-based approaches argue that the Tenth Amendment[157] grants the states the power to act if the federal government does not.[158]

The Arizona legislature's S.B.1070 is an example of a piece of legislation that raises serious preemption issues. The law in fact copies some of the wording of certain immigration statutes, but goes far beyond what Congress has mandated in its enacted immigration

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[154] *Id.*
[155] U.S. CONST. Art. 1, § 8.
[156] *See, e.g., Hampton v. Mow Sun Wong* 426 U.S. 88 (1976).
[157] U.S. CONST. Amend. X.
[158] *See, e.g.,* James Edwards, *Ever heard of federalism?* CENTER FOR IMMIGRATION STUDIES (May 20, 2010), available at http://www.cis.org/edwards/federalism-arizona2.

legislation.[159] Federal laws such as I.N.A. Section 287(g), which establish partnerships in immigration enforcement between the state and federal governments, are much more limited in scope than S.B. 1070, and ostensibly leave ultimate determination of immigration status and removal decisions to the federal government.[160] However, it is possible that even the 287(g) program may be implemented in such a way by localities so as to trigger preemption issues, if not other constitutional violations. In the context of community integration, state and local legislation can be analyzed to determine whether it would be preempted by federal immigration law, an analysis that will turn on the U.S. Supreme Court's decision in *Arizona v. United States*.[161]

B. Fundamental Human Rights Considerations under International Law

The "moral underpinnings" of the relationship between immigrant rights and human rights have long been recognized by scholars and commentators who have invoked spiritual texts that have underscored the basic principles of humanity that require protection of "the alien" as a matter of human dignity.[162] Certain rights should apply to all human beings by virtue of their humanity, regardless of their status or citizenship to a particular country. As noted above in Section II A, the U.S. Constitution supports this premise as dos Supreme Court decisions.

In addition to constitutional law, the value our society places on human rights is also manifested by the international treaties the United States has supported, by way of signing, ratifying, and effectively binding itself to those treaties. For example, the United States has

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[159] *See Q and A Guide to State Immigration Laws*, Immigration Policy Center, *available at* http://www.immigrationpolicy.org/special-reports/qa-guide-state-immigration-laws.
[160] *Id.* INA § 287(g). 8 U.S.C. § 1357(g) (2010).
[161] *See supra* note 121.
[162] David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37, Colum. Hum. Rts. L. Rev. 627, 627 (2006) (citing H. Freedman, ed., Jeremiah, *Hebrew Text & English Translation with an Introduction and Commentary*, 52 (1949)). "The alien was to be protected, not because he was a member of one's family, clan, or religious community; but because he was a human being. In the alien, therefore, man discovered the idea of humanity."

signed and ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[163] The provisions of these treaties are not always directly enforceable in U.S. courts, but by ratifying these treaties the United States has arguably bound itself to them under the Supremacy Clause and has acknowledged the importance of their underlying values.[164]

The ICCPR declares, in part:

> **Article 9**
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> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> **Article 10**
>
> 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.[165]

The language of the ICCPR sets forth a number of rights and protections for all persons, irrespective of their immigration status. All persons, including undocumented immigrants, are given the right to a judicial review of the decision to detain and freedom from lengthy

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[163] *State and Local Human Rights Agencies: Recommendations for Advancing Opportunity and Equality Through an International Human Rights Framework*, 4 (Columbia Law School, Columbia Human Rights Institute, International Association of Official Human Rights Agencies, NY, N.Y.) (2009).

[164] *Id*. (citing U.S. Const. art. VI, cl. 2.; *Medellin v. Texas*, 128 S. Ct. 1346 (2008)). In addition the Vienna Convention on the Law of Treaties requires states to refrain from acts which would defeat the object and purpose of a treaty which it has obligated itself to uphold. U.N. Human Rights Comm., *Third Period Report of the United States of America*, U.N. Doc. CCPR/C/USA/Q/3/Annex 1 (Oct. 21, 2005) (containing the second and third periodic reports of the United States).

[165] International Covenant on Civil and Political Rights art. 9 & 10, March 23, 1976, 999 U.N.T.S. 171. *See also* Appendix I: Provisions of the International Covenant on Civil and Political Rights Relevant to Immigrant Rights.

detention.[166] In addition, all persons are given the right to humane conditions if they are detained. Every person has, "[t]he right to be treated with humanity and respect while in detention, freedom from cruel and inhumane or degrading treatment, and the right to be housed separately from convicted persons."[167]

In addition the ICERD states:

> **Article 1**
>
> 1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[168]

While forbidding the discrimination based on national or ethnic origin and guaranteeing human rights and fundamental freedoms to everyone, the ICERD also mandates that each country must prohibit and affirmatively act, by all appropriate means, to end racial discrimination by any persons, group or organization.[169] The ICERD also declares that each country shall take, "measures to ensure the adequate development and

> To the extent that people are not recognized as members of the community where they live, the community policies that fail to promulgate such integration may be dangerously close to the equivalent of political and social tyranny.

[166] *Immigration Detention and the Rights of Migrants* (The Advocates for Human Rights, Minneapolis, M.N.), Dec. 2010, 1.
[167] *Id*.
[168] International Convention on the Elimination of All Forms of Racial Discrimination, art. 1-2 & 5-6, Jan. 4, 1969, 660 U.N.T.S. 195.
[169] *Id*. at art. 2.e.

protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms."[170] All countries bound by the treaty must assure that everyone within the jurisdiction of the country has effective protection and remedies against any acts of racial discrimination which violates human rights and fundamental freedoms conveyed by the treaty.[171] In addition to the rights noted above, the ICERD also guarantees several rights, including the right to freedom of movement and residence within the border of the country, the right to public health, medical care, social security, and social services, and the right of access to any place or service intended for use by the general public.[172]

Although the Convention does not apply to distinctions, exclusions, or restrictions made between citizens and non-citizens, discrimination does not have to be strictly based on race for the treaty to apply; rather, the enforcing committee will determine whether a state action is effectively discriminatory by, "[looking] to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin."[173] This means that while governments may enact laws and adopt policies which distinguish between citizens and non-citizens, if the effect of those laws or policies has a disproportionate impact against one particular race or ethnic group involving the above-referenced human rights, then the government may be found to be in violation of the Convention.

In addition, the Universal Declaration of Human Rights, which the United States voted to adopt, states that, "All human beings are born free and equal in dignity and rights."[174] It declares

[170] *Id*. at art. 2.2.
[171] *Id*. at art. 6.
[172] *Id* at art. 5. *See also* Appendix II: Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination Relevant to Immigrant Rights.
[173] *Id*. at art. 1.2. *But see* CERD General Recommendation No. 14: Definition of discrimination (Art. 1, par. 1), UN OHCHR, May 22, 1993.
[174] Universal Declaration of Human Rights, art. 1, December 10, 1948, G.A. res. 217 A (III).

that everyone, regardless of race, national origin, or jurisdictional or international status of the country or territory to which a person belongs, is entitled to the rights specified within.[175] Those rights include, equal protection under the law, freedom from arbitrary arrest, freedom from arbitrary interference with privacy, family, and home, and the right to seek and enjoy in other countries asylum from persecution.[176]

Unfortunately, several United States policies violate the rights and protections that these treaties and declarations set forth, and often these violations disproportionately impact Hispanics. Yet, although the United States does not always comply with its human rights obligations (and even sometimes affirmatively violates some terms), these principles remain as viable human rights standards.[177]

The discussion above makes clear that the United States Constitution, Supreme Court case law, and international treaties and law all dictate that every person within the United States, regardless of their country of birth or citizenship, should be afforded fundamental human rights and dignity. These principles stand as guides for local governments that are also morally, if not legally compelled to adopt ordinances or avoid laws to assure that immigrants are afforded all protections found in these bodies of law. For a democracy to operate justly, the rights offered within should "be open, and equally open, to all those men and women who live within [a political community's] territory…and are subject to local law."[178] To the extent that people are not recognized as members of the community where they live, the community policies that fail to

[175] *Id*. at art. 2.
[176] *Id*. at art. 7, 9, 12, 14.
[177] The right to judicial review is often denied to people in immigration detention—U.S. law imposes mandatory detention and a hearing before an immigration judge for certain immigrants. *See* The Advocates for Human Rights, *supra* note 388, at 1. Included in the category of cases which U.S. law mandates detention without judicial review are asylum seekers and non-citizens convicted of certain crimes.
[178] Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, Theoretical Inquires in Law, 8, 393 (citing Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, 59 (1983)).

promulgate such integration may be dangerously close to the equivalent of political and social tyranny.[179] In the end it is one's membership in a community and status as a human being that morally requires constitutional protections and government benefits.[180] Or in other words:

> Whatever their legal status, individuals who live in a society over an extended period of time become members of that society, as their lives intertwine with the lives of others there. These human bonds provide the basic contours of the rights that a state must guarantee; they cannot be regarded as a matter of political discretion.[181]

C. Conclusion

Section II of Part One of this report has provided a survey of the provisions under the U.S. Constitution which frame the window within which municipalities may act, and which, in certain instances may be used to protect the immigrant community or create minimum requirements for municipalities in the community integration context. It has demonstrated that there is a fundamental duty to guarantee human rights considerations under federal and international law. This Section should not be viewed, however, as an exhaustive list of provisions under with immigrant-unfriendly municipal action may be challenged or immigrant-friendly action may be protected. Instead it has been intended to serve as a resource for advocacy to be viewed in conjunction with the more specific analysis of the Dillon's rule and its relationship with North Carolina municipal power.

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[179] *Id*.
[180] *See* Jason H. Lee, *Unlawful Status as a Constitutional Irrelevancy: The Equal Protection Rights of Illegal Immigrants*, Golden State U.L. Rev., 38, at 30 (2008).
[181] *Id*. at 31 (citing Joseph H. Carens, *On Belonging: What We Owe People Who Stay*, Boston Rev., 2005, at 1, available at http://bostonreview.net/Br30.3/carens.html).

III. Using Local Law to Further Community Integration

The legal principles discussed above can and must be molded into policy and practice to assist with the project of Community Integration. This section describes some examples of how the laws described in Sections I and II may be applied. As the immigrant population in the United States continues to grow, and immigrants move into nontraditional destination cities causing municipalities to react to the demographic changes in their communities.[182] Some municipalities have resisted this change and have reacted by passing ordinances that make life more difficult for immigrants in their communities.[183] Other municipalities throughout the United States are using their ordinance-making powers to pass progressive, immigrant-friendly ordinances.[184] These ordinances "help newly arrived immigrants to get settled in their new communities; reduce their risk of being exploited by unscrupulous employers; give them access to social services; promote social integration; and generate an overall climate of trust, respect, and welcoming."[185]

> Everyone, regardless of race, national origin, or jurisdictional or international status of the country or territory to which a person belongs, is entitled to the rights specified within.

[182] *See* CENTER ON WISCONSIN STRATEGY, CITIES AND IMMIGRATION: LOCAL POLICIES FOR IMMIGRANT-FRIENDLY CITIES 1-4 (2008) [hereinafter CITIES AND IMMIGRATION].
[183] *See Id.* at 7 ("Some cities have proposed and some have passed ordinances expressing anti-immigrant sentiments, such as fining employers who hire undocumented immigrants; prohibiting companies from getting business permits if they employed or helped illegal immigrants within the past five years; making English the city government's official language; denying housing to undocumented people; and banning immigrants' access to city-provided social services.").
[184] *Id.*
[185] *Id.*

Subsection A of this section expands on two types of ordinances that are being enacted by municipalities throughout the country in order to promote the integration of immigrants into their new communities. Ordinances that allow for the use of municipal I.D. cards and ordinances that limit local enforcement of federal immigration law allow immigrants to prosper in their communities and in turn benefit the communities as a whole.[186] Subsection B of this section reviews the establishment or expansion of local advisory commissions and councils to improve communication between local governments and immigrant residents. Through the use of commissions or councils, local governments are able to be more in touch with the specific concerns of immigrant residents, allowing the governments to shape legislation to meet the needs of their immigrant populations.[187] Subsection C highlights, by way of example, progressive community integration efforts in Durham, North Carolina. Subsection D concludes that there are a variety of ways for municipalities in North Carolina to take action on behalf of immigrant residents.

Initiatives such as issuing municipal identification cards or accepting the matricula consular as a valid form of identification not only provide concrete benefits to the immigrant community; the initiatives also enfranchise immigrants symbolically, making them feel more included in their new communities.

A. Local Laws that Promote Community Integration

This section will focus specifically on local laws that have been established that promote community integration. Both the identification initiatives and the limits placed on local law enforcement promote community integration.

[186] *Id.* at 9.
[187] *See generally,* MUNICIPAL ACTION FOR IMMIGRANT INTEGRATION, NATIONAL LEAGUE OF CITIES, IMMIGRANT AFFAIRS COMMITTEES & COUNCILS (2009) [hereinafter IMMIGRANT AFFAIRS].

1. Municipal Identification Initiatives

The City of New Haven, Connecticut, became the first city to issue municipal identification cards (I.D cards) in 2007.[188] These types of cards are available to all residents, regardless of immigration status.[189] The Community Services Administrator of New Haven described the need for I.D. cards:

> The lack of acceptable forms of identification currently prevents many city residents from participating in local commerce or other forms of civic engagement (e.g. obtaining a library card or opening a bank account). A municipal I.D. card will enable them to do so. The populations that will likely benefit the most from this identification are young children, elderly citizens, students and immigrants (both documented and undocumented).[190]

Municipal I.D. cards benefit the immigrant population and promote general public safety.[191] The cards allow people to open bank accounts and securely safeguard their money.[192] Cards issued to children may include emergency contact information in case they are lost or hurt.[193] The I.D. cards provide elderly residents who may no longer have a driver's license with proof of identification to access city services.[194] The "Elm City Resident Card" issued by the City of New Haven provides more than just a form of identification.

> In addition to serving as an identification card, the Elm City Resident Card will have multiple uses, including 1) serving as a library card; 2) providing access to municipal services and sites including the public beach (free), the golf course (resident discount) [and] the city dump; 3) offering a *Parcxmart* debit card component, which allows the user to load up to $150 to the card to be used to pay for parking meters and for goods and services at approximately 50 participating stores.[195]

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[188] CITY OF NEW HAVEN, NEW HAVEN'S ELM CITY RESIDENT CARDS – FACT SHEET (2003), http://www.cityofnewhaven.com/pdf_whatsnew/municipalidfactsheet.pdf.
[189] *Id.* at 1.
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.* at 2.

Other cities have issued municipal I.D. cards to ensure that all city residents have access to public services and facilities. San Francisco passed a municipal identification ordinance in 2007.[196] The ordinance allows a person who provides proof of identity and residency[197] in San Francisco to receive an identification card which serves as a valid form of identification for all city entities.[198] In addition to providing access to city services such as libraries and parks, the San Francisco I.D. card also allows residents to list medical conditions and allergies on the card, provides discounts to participating businesses, and allows residents to open accounts at participating banks.[199]

There are a variety of ways for municipalities in North Carolina to take action on behalf of immigrant residents

Municipal identification cards have been the object of legal challenges, albeit unsuccessful. In 2008, a group of citizens of San Francisco brought a lawsuit against the City and County of San Francisco, alleging that the identification ordinance was "an illegal expenditure of public funds and a regulation of immigration that is preempted by the California and United States Constitutions."[200] The citizens claimed that the City was "inducing or knowingly influencing illegal aliens' course of conduct whereby such aliens choose to continue to reside in San Francisco in violation of the law."[201] The San Francisco Superior Court

[196] SAN FRANCISCO, CAL., CODE § 95.2 (2007)
[197] *See* § 95.2(c).
[198] § 95.2(f). ("When requiring members of the public to provide identification or proof of residency in the City, each City department and any Entity That Receives City Funds shall accept a Municipal Identification Card as valid identification and as valid proof of residency in the City, unless such City department or Entity has reasonable grounds for determining that the card is counterfeit, altered, or improperly issued to the card holder, or that the individual presenting the card is not the individual to whom it was issued.").
[199] *City & County of San Francisco: SF City ID Card,*, OFFICE OF THE COUNTY CLERK, http://www.sfgov2.org/index.aspx?page=110 (last visited May 1, 2011).
[200] Petition for Peremptory Writ of Mandamus; Complaint for Injunctive and Declaratory Relief at ¶1, *Langfeld, et al. v. City and County of San Francisco et al., No. 08-508341*, (Cal. Super. Ct. May 13, 2008).
[201] *Id.* at ¶ 29.

dismissed the case on November 19, 2008, and entered judgment in favor of the City.[202] The ACLU Immigrants' Rights Project, in commenting on the ruling, observed that the ruling "sends a message that cities do not violate the immigration laws by enacting immigration status-neutral programs for the benefit of all of their community members."[203]

Municipalities have also passed ordinances that allow the matricula consular, a document issued by the Mexican consulate, to be accepted as a valid form of identification.[204] These ordinances, though not providing for a city-issued ID, allow immigrants who obtain a matricula consular access to city services. Initiatives such as issuing municipal identification cards or accepting the matricula consular as a valid form of identification not only provide concrete benefits to the immigrant community; the initiatives also enfranchise immigrants symbolically, making them feel more included in their new communities.

Municipal I.D. cards benefit the immigrant population and promote general public safety.

[202] Judgment of Dismissal, *Langfeld, et al. v. City and County of San Francisco et al*., No. 08-508341, (Cal. Super. Ct. Nov.19, 2008).

[203] *Legal Victory for Municipal ID Ordinance*, ACLU OF NORTHERN CALIFORNIA, Oct. 14, 2008, http://www.aclunc.org/news/press_releases/legal_victory_for_municipal_id_ordinance.shtml.(statement of Jennifer Chang Newell, staff attorney).

[204] *See e.g.*, ST. PAUL, MINN. CODE §44.02(a)(4)(2004) ("Where presentation of a state driver's license is customarily accepted as adequate evidence of identity, presentation of a photo identity document issued by the person's nation of origin, such as a driver's license, passport, or matricula consular (consulate-issued document), or of a photo identity document issued by any Minnesota county, shall not subject the person to an inquiry into the person's immigration status. This paragraph does not apply to I-9 forms."); Atlanta, Ga. Ord. 04-0-0772 (May 3, 2004), *available at* http://citycouncil.atlantaga.gov/2004/Minutes/..%5CIMAGES%5CAdopted%5C0503%5C04O0772.pdf ("[T]he City of Atlanta recognizes the Matricula Consular, issued by the Mexican government, as sufficient and valid identification for any City of Atlanta government transaction where establishing a positive identification is required."). Similarly, the city of Durham, NC passed a resolution to accept the *matricula* consular, Ray Gronberg, *Council OKs matricula consular resolution*, HERALD SUN, Nov. 15, 2010, *available at* http://www.heraldsun.com/view/full_story/10325992/article-Council-OKs-matricula-consular-resolution?instance=main_article.

2. Municipal Initiatives Limiting Local Enforcement of Immigration Laws

Recently, municipalities throughout the United States have passed ordinances opposed to local enforcement of federal immigration laws.[205] Generally, these ordinances "prohibit their resources and institutions from being used to enforce civil immigration law and make it as difficult as possible for agency officials to share information on people's immigration status with the federal government."[206] The cities that have passed such ordinances recognize the problems associated with local immigration enforcement, including increased distrust of the police, racial profiling, and civil rights violations.[207] Cities also hope to better provide for their residents' general welfare with such ordinances. In cities that collaborate with Immigration and Customs Enforcement (ICE), "immigrants may avoid using city services or calling city agencies, including public schools, fire departments, and emergency ambulance services."[208] Municipalities that act to restrict local immigration enforcement hope to encourage all residents to use city services when they need them, without fearing that there will be consequences because of their immigration status.[209]

Municipalities have been limiting local immigration enforcement for decades.[210] In 1979, Los Angeles, California, was the first city to prohibit local enforcement of federal

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[205] *See* CITIES AND IMMIGRATION, *supra* note 182, at 10-13. For a comprehensive list of local policies, see NATIONAL IMMIGRATION LAW CENTER, LAWS, RESOLUTIONS AND POLICIES INSTITUTED ACROSS THE U.S. LIMITING ENFORCEMENT OF IMMIGRATION LAWS BY STATE AND LOCAL AUTHORITIES (2008).
[206] CITIES AND IMMIGRATION, *supra* note 182, at 7.
[207] *Id*, at 10.
[208] *Id*.
[209] *See* NATIONAL EMPLOYMENT LAW PROJECT, TREND: LOCAL EFFORTS TO ENCOURAGE IMMIGRANTS TO ACCESS ESSENTIAL SOCIAL SERVICES AND COOPERATE WITH THE POLICE WITHOUT FEAR OF IMMIGRATION CONSEQUENCES 1 (2003), *available at* http://nelp.3cdn.net/8df199babb0a4c2a14_4sm6bxl1y.pdf [hereinafter LOCAL EFFORTS].
[210] Cities have promoted policies limiting the enforcement of immigration laws through different initiatives, including ordinances, resolutions, executive orders, and police directives. The method a city chooses is often dependent on the political climate in the particular community.

immigration law with the issuance of Special Order 40, a police directive.[211] Takoma Park, Maryland; Chicago, Illinois; San Francisco, California; and New York, New York followed Los Angeles, passing ordinances or issuing executive orders prohibiting city employees from collecting or sharing information about the immigration status of residents with federal immigration authorities and prohibiting the use of any city personnel or resources to enforce immigration law.[212] The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), enacted in 1996, outlawed bans on sharing information with the federal government, but cities have complied with IIRIRA by forbidding city employees from gathering information about immigration status "unless required by law."[213] Other cities responded to IIRIRA by including immigration status as protected information in provisions of privacy policies.[214] In New York City, this was accomplished by Mayor Michael Bloomberg through the issuance of Executive Order 41, a "City-Wide Privacy Policy," which prevented city workers from asking about residents' immigration status when they sought city services.[215]

The most common provisions in city ordinances that limit local immigration enforcement are those that prohibit city employees from inquiring into immigration status,[216] prohibit

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[211] CITIES AND IMMIGRATION, *supra* note 182, at 11 ("SO 40 establishes that 'officers shall not initiate police action with the objective of discovering the alien status of a person' and 'shall not arrest nor book persons for' illegal entry.").

[212] *Id*. The Takoma Park ordinance was passed in 1985, while Chicago, San Francisco, and New York passed ordinances or issued executive orders in 1989. *Id.*

[213] *Id.* ("Section 642(a) of IIRIRA establishes that cities cannot prohibit agencies or officials from exchanging information about people's citizenship or immigration status with the federal government, but it does not require them to collect such information and says nothing about prohibiting its collection."); *Immigration Law Enforcement by State and Local Police*, BACKGROUNDER, Aug. 2007, at 3-4. "However, this provision did not address local policies that prohibit police and other employees from *inquiring about* the immigration status of persons with whom they come in contact." *Id.* at 4.

[214] *See* LOCAL EFFORTS, *supra* note 209.

[215] *Id.* at 1-2.

[216] *See, e.g.*, PORTLAND, ME. CODE § 2-21(a). (2006) ("Unless otherwise required by law or by court order, no city police officer or employee shall inquire into the immigration status of any person, or engage in activities for the purpose of ascertaining the immigration status of any person."); DETROIT, MICH. CODE § 27-9-4 (2007) ("(a) A public servant, who is a police officer (1)Shall not solicit information concerning immigration status for the purpose

profiling by the police on the basis of immigration status,[217] and limit the enforcement of civil immigration laws.[218] The city of Hartford, Connecticut, enacted a progressive and expansive ordinance limiting local immigration enforcement in 2008.[219] The ordinance makes all city services available to all residents of Hartford, regardless of immigration status.[220] It also prohibits Hartford police officers from inquiring about a person's immigration status unless it is necessary for a criminal investigation.[221] The police may not inquire about the immigration

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of ascertaining a person's compliance with federal immigration law; or (2) Shall not solicit information concerning immigration status from a person who is seeking police services, or is a victim, or is a witness"); MINNEAPOLIS, MINN. CODE § 19.30(1) (2003) ("Public safety officials shall not undertake any law enforcement action for the purpose of detecting the presence of undocumented persons, or to verify immigration status, including but not limited to questioning any person or persons about their immigration status."); SEATTLE, WASH. CODE § 4.18.015(A)(2003) ("Notwithstanding Seattle Municipal Code Section 4.18.010, unless otherwise required by law or by court order, no Seattle City officer or employee shall inquire into the immigration status of any person, or engage in activities designed to ascertain the immigration status of any person.").

[217] *See, e.g.* DETROIT, MICH. CODE § 27-9-3 (2008) ("A public servant, who is a police officer, shall not exercise differential treatment of individuals in rendering police services based on a person's appearance, ethnicity, immigration status, manner of dress, national origin, physical characteristics, race, religious beliefs, or sexual orientation, or gender identity or expression. A public servant, who is a police officer, shall not base reasonable suspicion for an investigative detention, probable cause for an arrest, or any other police action, on a person's appearance, ethnicity, immigration status, manner of dress, national origin, physical characteristics, race, religious beliefs, sexual orientation, or gender identity or expression.").

[218] *See, e.g.*, MINNEAPOLIS, MINN. CODE § 19.30(3) (2003) ("Public safety officials shall not question, arrest or detain any person for violations of federal civil immigration laws except when immigration status is an element of the crime or when enforcing 8 U.S.C.1324(c)."). Other cities have expressed disdain for the 287(g) program and Secured Communities.

[219] *See* HARTFORD, CONN. CODE §§ 2.925-2.929 (2008).

[220] § 2-927 ("(a) Any service provided by a City of Hartford department shall be made available to residents, regardless of immigration status, unless such agency is required by Federal law to deny eligibility for such service to residents because of their immigration status. (b) Every City of Hartford department shall encourage residents, regardless of immigration status, to make use of all City services provided by City departments for which residents are not denied eligibility by Federal law as it relates to their immigration status. (c) Referrals to medical or social service agencies will be made in the same manner for all residents, without regard to immigration status. (d) Nothing in this section shall be construed to prohibit any employee of the City of Hartford from cooperating with federal immigration authorities as required by law.").

[221] § 2-928 ("(a)Hartford police officers shall not inquire about a person's immigration status unless such an inquiry is necessary to an investigation involving criminal activity as defined in § 2-926 above. (b) Hartford police shall not inquire about the immigration status of crime victims, witnesses, or others who call, approach or are interviewed the Hartford Police Department. (c) No person shall be detained solely on the belief that he or she is not present legally in the United States, or that he or she has committed a civil immigration violation. There is no general obligation for a police officer to contact Immigration and Customs Enforcement regarding any person. (d) Hartford police officers shall not make arrests or detain individuals based on administrative warrants for removal entered by ICE into the National Crime Information Center database, including administrative immigration warrants for persons with outstanding removal, deportation or exclusion orders. Enforcement of the civil provisions of United States immigration law is the responsibility of Federal immigration officials. (e)The Hartford Police Department shall

status of crime victims, witnesses, or others who approach the police, and the police may not detain a person based on their immigration status or for a civil immigration violation.[222] The ordinance states that "[e]nforcement of the civil provisions of United States immigration law is the responsibility of Federal immigration officials," and it prohibits city police officers from making arrests based on ICE administrative warrants.[223] Additionally, the ordinance provides that immigration status is considered confidential information,[224] and prohibits city employees from inquiring about or disclosing such information.[225]

> The most common provisions in city ordinances that limit local immigration enforcement are those that prohibit city employees from inquiring into immigration status,[1] prohibit profiling by the police on the basis of immigration status,[1] and limit the enforcement of civil immigration laws.

The National Immigration Law Center (NILC) has drafted sample language for city ordinances to limit local immigration enforcement.[226] The NILC suggests that cities include provisions establishing equal access to city services,[227] limiting enforcement of civil immigration laws,[228] prohibiting the

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conduct necessary training and education to ensure that its officers are knowledgeable about provisions set forth in this policy. (f) Nothing in this section shall be construed to prohibit any Hartford police officer from cooperating with federal immigration authorities as required by law.").

[222] § 2-928(b) and (c).

[223] § 2-928(d).

[224] § 2-926 ("*Confidential information* means any information obtained and maintained by a City agency relating to an individual's sexual orientation, status as a victim of domestic violence, status as a victim of sexual assault, status as a crime witness, receipt of public assistance, or immigration status, and shall include all information contained in any individual's income tax records.").

[225] § 2-929 ("No employee of the City of Hartford shall inquire about or disclose confidential information as defined in §2-926 or other personal or private attributes except when either required by law or when this information is necessary to the provision of the City service in question.").

[226] *See* NATIONAL IMMIGRATION LAW CENTER, SAMPLE LANGUAGE FOR POLICIES LIMITING THE ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL AUTHORITIES (2004), *available at* http://www.nilc.org/immlawpolicy/LocalLaw/sample%20policy_intro%20brief_nov%202004.pdf [hereinafter SAMPLE LANGUAGE].

[227] *Id.* at 4-5.

[228] *Id.* at 5.

singling out of individuals based on immigration status,[229] protecting immigrant victims and witnesses,[230] and creating general disclosure policies protecting confidential information.[231] The Hartford ordinance discussed above contains many of these provisions.[232] Each of these suggested provisions contribute to the broader policy goals of the ordinance. By passing such an ordinance, a city aims to gain the trust of its immigrant community by limiting local enforcement of federal immigration laws and to promote the general welfare of its immigrant residents by providing equal access to city services.[233]

B. Mayoral Advisory Boards and Immigrant Affairs Offices as Tools for Community Integration

It is important for local governments and their leaders to be connected to local immigrant populations in order to become aware of their concerns, which are often unique to those of other residents. While large cities may have the resources to create a specific office focused on immigrant issues, smaller cities can establish volunteer committees, commissions, or councils dedicated to integrating immigrants into the community.[234] The National League of Cities promotes such practices, finding that "[e]stablishing a committee, commission, or council is one of the most direct and effective methods for mayors and local officials to work with their communities and promote a spirit of collaboration and understanding with their immigrant populations."[235] Advisory commissions also promote diversity, culture, and tolerance within communities. While the ultimate goal of all municipal advisory offices or commissions will be

[229] *Id.* at 5.
[230] *Id.* at 5-6.
[231] *Id.* at 6-7.
[232] *See* HARTFORD, CONN. CODE §§ 2.925-2.929 (2008).
[233] *See* SAMPLE LANGUAGE, *supra* note 226, at 6.
[234] *See* IMMIGRANT AFFAIRS, *supra* note 187, at 1.
[235] *Id.*

to integrate immigrants into their new communities, structures and initiatives will vary in each municipality depending on available resources and population demographics.

Advisory offices or commissions may focus on a municipality's immigrant community as a whole. For example, the Mayor's Office of Immigrant and Refugee Affairs (MOIRA) in Houston was established with the goal of integrating immigrants, who make up twenty-eight percent of the city's population, into the community.[236] MOIRA works to educate immigrants about their rights and the city services available to them and acts as a liaison between immigrant communities and the government.[237] Similarly, in New York City, the mission of the Mayor's Office of Immigration Affairs (MOIA) is to promote "the well-being of immigrant communities by recommending policies and programs that facilitate successful integration of immigrant New Yorkers into the civic, economic, and cultural life of the City."[238] The MOIA connects immigrants with local organizations and also assists government agencies in reaching immigrant communities.[239]

> It is important for local governments and their leaders to be connected to local immigrant populations in order to become aware of their concerns, which are often unique to those of other residents.

Advisory commissions may also be established to meet the needs of a specific immigrant population. For example, the Mayor's Commission on African and Caribbean Immigrant Affairs

[236] MUNICIPAL ACTION FOR IMMIGRANT INTEGRATION, THE NATIONAL LEAGUE OF CITIES, INNOVATIONS IN IMMIGRANT INTEGRATION: 20 CITIES, 20 GOOD PRACTICES 42 (2010)[hereinafter INNOVATIONS].
[237] *Id; MOIRA Home Page,* MAYOR'S OFFICE OF IMMIGRANT AND REFUGEE AFFAIRS, http://www.houstontx.gov/moira/ (last visited May 2, 2011).
[238] *About MOIA,* MAYOR'S OFFICE OF IMMIGRANT AFFAIRS, http://www.nyc.gov/html/imm/html/about/about.shtml (last visited May 2, 2011).
[239] *Id.*

was created in Philadelphia in 2005 to help integrate African and Caribbean Immigrants into the community.[240] Over 200,000 people of Caribbean and African descent reside in Philadelphia, many of whom immigrated to Philadelphia in the 1980s and 1990s as refugees and political asylees.[241] The Commission assists immigrants in accessing city services and promotes cultural activities in the city.[242] Through cultural events, immigrants are able to carry on African traditions and also expose other community members to their heritage.[243]

C. An Example of a N.C Municipality: Incorporating Community Integration Initiatives Through Local Law

The city of Durham, North Carolina has promoted community integration through a number of initiatives. The city was recently recognized in the The National League of Cities Report, *Innovations in Immigrant Integration: 20 Cities, 20 Good Practices,* for the Mayor's Hispanic Latino Initiative.[244] The Mayor's Hispanic Latino Initiative (MHLI) began in 2002 in response to the number of violent crimes being committed against Hispanic residents.[245] The MHLI was initiated to strengthen the relationship between the Hispanic community, the city government, and the police.[246] The overall goal of the initiative is to "ensure that

> Municipalities in North Carolina can promote community integration through ordinances and initiatives that provide immigrants with access to city services and limit local enforcement of immigration law

[240] *See* IMMIGRANT AFFAIRS, *supra* note 187, at 2.
[241] *See Commission Genesis,* MAYOR'S COMMISSION ON AFRICAN AND CARIBBEAN IMMIGRANT AFFAIRS, http://www.africancaribbeanaffairs.org/Commissiongenesis.html (last visited May 2, 2011).
[242] *See About Us,* MAYOR'S COMMISSION ON AFRICAN AND CARIBBEAN IMMIGRANT AFFAIRS, http://www.africancaribbeanaffairs.org/about.html (last visited May 2, 2011).
[243] *See* INNOVATIONS, *supra* note 236, at 15-16.
[244] *Id.* at 11-12.
[245] *Id.* at 11.
[246] *Id.*

the Hispanic community has access to the full range of City services," is informed of city laws and policies, and has a voice in the government.[247] As part of the MHLI, Durham Police became more active in Hispanic neighborhoods in order to deter crime and also to improve relations between the police and the Hispanic community.[248] As a result of the initiative, the number of Spanish-speaking city employees and police officers has increased, crimes committed against Hispanics have decreased, and information on a range of issues has been distributed throughout the Hispanic community.[249]

In 2003, the Durham City Council adopted a Resolution "Supporting the Rights of Persons Regardless of Immigration Status."[250] As part of the resolution, Durham incorporated immigration status into its confidentiality policy, stating that "[unless otherwise required] no Durham City officer or employee, during the course and scope of their employment, shall inquire into the immigration status of any person, or engage in activities designed to ascertain the immigration status of any person." [251] This language is similar to that of ordinances discussed above in Section III.A.2. that seek to limit local enforcement of immigration law.[252] In 2010, the Durham City Council passed a resolution recognizing the matricula consular as a valid form of identification with regard to the police department.[253] The resolution was supported by the

[247] *Mayor's Hispanic Latino Initiative*, CITY OF DURHAM, NORTH CAROLINA, http://www.durhamnc.gov/departments/relations/hispanic.cfm (last visited May 2, 2011).
[248] *See* INNOVATIONS, *supra* note 236, at 15-16; *Mayor's Hispanic Latino Initiative*, CITY OF DURHAM, NORTH CAROLINA, http://www.durhamnc.gov/departments/relations/hispanic.cfm (last visited May 2, 2011).
[249] *Mayor's Hispanic Latino Initiative*, CITY OF DURHAM, NORTH CAROLINA, http://www.durhamnc.gov/departments/relations/hispanic.cfm (last visited May 2, 2011).
[250] LOCAL EFFORTS, *supra* note 209, at 3.
[251] LOCAL EFFORTS, *supra* note 209, at 3; Minutes, Durham, N.C. City Council (Oct. 20, 2003), http://www.ci.durham.nc.us/agendas/minutes/cc_minutes_10_20_03.pdf.
[252] *See supra* III.A. 2.
[253] Ray Gronberg, *Council OKs matricula consular resolution*, HERALD SUN, Nov. 15, 2010, *available at* http://www.heraldsun.com/view/full_story/10325992/article-Council-OKs-matricula-consular-resolution?instance=main_article.

Durham Police Department, and the Police Chief stated that acceptance of the matricula helps "to garner trust from the community."[254]

The Durham Police Department has also been conscious of its relationship with the immigrant community in its implementation of the 287(g) Program. A report by the Latino Migration Project at the University of North Carolina found that the Durham Police Department "is focused on identifying and punishing serious criminals rather than using the program as an anti-immigration tool."[255] Only one officer in the Durham Police Department has received training to enforce 287(g) and is thus designated to implement the program. The officer is only notified in cases where an individual is charged with a serious crime[256] and does not have proper identification.[257] Unlike other 287(g) communities where immigrants are often processed for immigration action as a consequence of infractions or low-level misdemeanors, all of the individuals who have been processed through the 287(g) Program in Durham were charged with felonies or violent crimes. [258] The Police Department has worked to assure members of the immigrant community that it will not use 287(g) as a deportation tool,[259] so as not the damage the relationship the Police Department has formed with the Hispanic community through the Mayor's Hispanic Latino Initiative.

In 2003, the Durham City Council adopted a Resolution "Supporting the Rights of Persons Regardless of Immigration Status.

[254] *Id.*
[255] NGUYEN & GILL, *supra* note 40 (2010).
[256] Serious crimes include: "homicide, aggravated assault, armed robbery, identity theft, possession of an illegal firearm, or other gang related activity." *Id.*
[257] *Id.*
[258] *Id.* at 41.
[259] *Id.* at 41.

D. Conclusion

Municipalities in North Carolina can promote community integration through ordinances and initiatives that provide immigrants with access to city services and limit local enforcement of immigration law. By establishing immigrant advisory offices or commissions, North Carolina governments can learn of the specific challenges faced by immigrants in their communities and structure legislation to fit their needs. Durham is one North Carolina city that has promoted community integration through progressive initiatives. Municipalities may implement community integration policies through ordinances, resolutions and executive orders. If a municipality in North Carolina is unclear as to whether it has the authority to enact a certain ordinance, it may ask the state legislature to enact a local act, as discussed above in Section II.B.2.

IV. North Carolina Municipalities: The Case for Integrated Communities

Why should municipalities want to help the immigrant populations in their jurisdictions? The most direct way of answering this question is to simply evaluate the positives and negatives of pro-immigration policy. Immigration has been an integral part of America's success and history. Indeed, the country has been and continues to be a country of immigrants.[260] Immigrants are generally law abiding residents who positively impact the economy and strengthen their local communities.[261] It would be morally unjust to accept and enjoy the benefits of immigration on one hand and shun the immigration community on the other. But community integration should be the goal of all communities not just because of the benefits our society enjoys as a result, but because immigrants are entitled to constitutional and human rights.

[260] *See infra* Section B. 1. Lessons from American History,.
[261] *See infra* Section A. Myths About Immigrants. *See also infra* Section B. 2. North Carolina: Evidence of the Benefits of Immigrants in Our Communities.

Immigrants are owed these rights and protections not on the basis of their immigration status, but by virtue of them being human.

A. Myths about Immigrants and their Impact on Communities

In order to accurately weigh all the variables and arguments for integrated communities, we must first address some commonly believed myths about the immigrant population. Only after dispelling these myths can we ascertain how beneficial the immigrant community and pro-immigration policies are to our communities. There has been a substantial amount of research that has examined these myths; the Henry J. Kaiser Family Foundation, Cato Institute, and American Civil Liberties Union are among many groups which have thoroughly researched many common beliefs about immigrants. The following table is a compilation and analysis of many of those findings. The paragraphs following the table describe the details behind the myths and the actual facts concerning U.S. immigrants.

Myths	Facts
1. Most Immigrants are Undocumented Aliens	• In 2005 it was estimated that around 69% of the 37 million immigrants in the United States were either U.S. citizens or legal non-citizens.[262]
2. Most Immigrants Receive Social Welfare Benefits	• Health care spending on immigrants is approximately half that of U.S. citizens.[263] • Immigrants without status often pay Social Security taxes while being barred from receiving Social Security benefits.[264]
3. Most Immigrants Do Not Pay Taxes	• On average every immigrant and his or her children will pay $80,000 more in taxes than they will receive in government services during their lifetime.[265]
4. Immigrants Bring Crimes to Our Communities	• Among men age 18-39 (the vast majority of the U.S. prison population) native-born men were five times more likely to be incarcerated than their immigrant counterparts.[266] • "Crime in the United States is not "caused" or even aggravated by immigrants, regardless of their legal status."[267]
5. Immigrants Take Away Jobs from U.S. Citizens	• U.S.-born worker employment is not significantly affected by immigration, with estimates never statistically different from zero.[268] • Immigration actually has a positive long-term effect on U.S.-born workers' income.[269]

[262] *The Kaiser Commission on Medicaid and the Uninsured*, (The Henry J. Kaiser Family Foundation, Menlo Park, C.A.), March 2008, at 4.
[263] *Common Myths About Undocumented Immigrants* (National Council of La Raza, Washington D.C.) 2006 at 1 (citing. Sarita A. Mohanty, Steffie Woodhandler, et al., *Health Care Expenditures of immigrants in the United States: A Nationally Representative Analysis*, American Journal of Public Health, 95, August 2005.)
[264] *See infra* Myth #3: Most immigrants do not pay taxes.
[265] *Cato Handbook for Congress: Policy Recommendations for the 108th Congress*, (Cato Institute, Washington D.C.) 2003, at 632, *hereinafter* Cato Institute.
[266] *Immigrants and Crime: Are they Connected?*, (Immigration Policy Center, Washington D.C.), Dec. 2010, at 2.
[267] *Id*. at 1
[268] Giovanni Peri, *The Effect of Immigrants on U.S. Employment and Productivity* (Federal Reserve Bank of San Francisco, San Francisco, C.A.) August 30, 2010, from: http://www.frbsf.org/publications/economics/letter/2010/el2010-26.html (last visited April 20, 2011).
[269] *Id*. "Over the long run, however, a net inflow of immigrants equal to 1% of employment increases income per worker by 0.6% to 0.9% . This implies that total immigration to the United States from 1990 to 2007 was associated with 6.6% to 9.9% increase in real income per worker."

1. Myth: Most Immigrants are Undocumented Aliens

Actually the great majority of immigrants in the United States have permission to be in the country. In 2005 it was estimated that around 69% of the 37 million immigrants in the United States were either U.S. citizens or legal non-citizens.[270] Therefore, most immigrants in any given community are likely to be U.S. citizens, legal residents, or guests of the United States who have been given permission to stay in the country. As such, municipalities should naturally be eager to assist immigrant groups to further strengthen the community and fulfill its duties to its residents. When a municipality fails to support, welcome, or promote the integration of its immigrant population, it is shunning a group that largely consists of U.S. citizens and permanent residents—a group that is not going anywhere. Municipalities would be wise to take steps towards community integration and subsequently a more harmonious, productive community.

2. Myth: Most Immigrants Receive Social Welfare Benefits

Statistics actually show that immigrants receive less social benefits than the general public**.** In fact, it has been estimated that health care spending immigrants is approximately half that of U.S. citizens.[271] Part of the reason for this is that many immigrants, regardless of legal status, are barred from receiving social benefits. For example, a legal permanent resident who has lived in the United States for less than five years usually is barred from receiving Medicaid or State Children's Health Insurance Program benefits, which are government programs specifically designed to provide health coverage for adults and children who have do not have

[270] *The Kaiser Commission supra* note 262, at 4.
[271] *Common Myths, supra* note 263, at 1 (citing. Sarita A. Mohanty, Steffie Woodhandler, et al., *Health Care Expenditures of immigrants in the United States: A nationally Representative Analysis,* American Journal of Public Health, 95, August 2005.)

the means to buy private insurance.[272] Immigrants without status are generally barred from enrolling in most federal public benefit programs, such as Medicaid, Medicare, the Children's Health Insurance Program, Temporary Assistance for Needy Families, Foster Care, Adoption Assistance, and the Low-Income Home Energy Assistance Program—all programs designated to help the poor and needy.[273]

In addition, immigrants without status often pay Social Security taxes while being barred from receiving Social Security benefits.[274] And although many immigrants are not eligible to receive benefits from social programs, the Social Security Administration has found that the cost of maintaining these programs becomes less as the number of immigrants in our country rises. "The cost of [Social Security and Medicare] decreases with increasing rates of immigration because immigration occurs at relatively young ages, thereby increasing the number of [workers contributing to the programs] [relative to] the number of beneficiaries."[275]

The few immigrants who are entitled to social benefits may not even utilize them. Many immigrants do not know about the programs or their eligibility, and they might have trouble effectively applying for benefits because they are limited by their ability to speak or write English. Approximately eight percent of the U.S. population speaks English less than very well, and these people face obstacles when applying for or communicating with a health care provider without language assistance.[276] Although the Department of Justice has issued guidance for improving language assistance to comply with Title VI of the Civil Rights Act, many federal agencies remain delinquent in taking reasonable steps to assure meaningful access to federally

[272] The Henry J. Kaiser Family Foundation, *supra* note 262, at 6.
[273] Tanya Broder & Jonthan Blazer, *Overview of immigrant Eligibility for Federal Programs*, National Immigration Law Center, April 2010, 2-3 (citing Welfare law § 401 (8 U.S.C. § 611)).
[274] *See infra* Myth #3: Most immigrants do not pay taxes, 59-60.
[275] *Cato Handbook supra* note 265, at 632.
[276] Tanya Broder & Jonthan Blazer, *supra* note 273, at 7.

funded services. [277] These language barriers prevent many limited English speaking immigrants from accessing services to which they might be otherwise entitled.

With government health care spending on the rise, there has also been a growing concern that immigrants are creating a burden on the health care system and negatively impacting the health care citizens receive. Aside from concerns that immigrants are receiving benefits from social programs, some worry that the use of emergency room services by immigrants is a major drain on the country's health care resources. The federal Emergency Medical Treatment and Active Labor Act (EMTALA) requires most hospitals with emergency-room services to treat anyone regardless of citizenship or ability to pay.[278] It has been argued that as result of EMTALA hospitals must absorb more than $200 million in unreimbursed costs and that some emergency rooms have been forced to shut down mainly due to providing services to immigrants.[279] However, immigrants are actually less likely to go to the emergency room than U.S. citizens. A study has shown that only about 13% of immigrant adults visit the emergency room in the span of a year, while about 20% of U.S. citizen adults go to the emergency room at least once a year.[280]

3. Myth: Most Immigrants Do Not Pay Taxes

While many immigrants do not receive social benefits, they do contribute to such federal programs as well as support their local communities by paying taxes. The National Academy of Sciences found that on average every immigrant and his or her children will pay $80,000 more in

[277] *Id*.
[278] 42 U.S.C. § 13955dd (2010).
[279] The American Resistance Foundation, *Health Care*, http://www.theamericanresistance.com/issues/health_care.html (last visited April 2, 2011).
[280] The Henry J. Kaiser Family Foundation, *supra* note 262 , at 8.

taxes than they will receive in government services during their lifetime.[281] Simply put, that is a net gain for the federal and local governments of $80,000 per immigrant. For immigrants with college degrees that number jumps to $198,000.[282]

The same study found that immigration in the United States produces a positive gain of about $10 billion each year for U.S. citizens as a result of tax contributions by immigrants.[283] That number has surely increased since the study was conducted in 1997. In addition the Social Security Administration has reported that it has approximately $420 billion in funds taken from the earnings of immigrants who are not entitled to benefits.[284] That number has also certainly climbed since the report was issued in 2004. Immigrants strongly support the federal, state, and local governments by paying their taxes, even when they are barred from reaping the benefits that their citizen counterparts enjoy. It is not only wrong to not recognize their contribution, but it is also dangerous. Without the support of immigrants, the federal government and local communities alike would be vulnerable to an economic collapse.

4. Myth: Immigrants Bring Crimes to Our Communities

Several studies have repeatedly shown that the immigrant communities in our country account for less crime than the general public. For example, one study showed that among men age 18-39 (the vast majority of the U.S. prison population) native-born men were five times more likely to be incarcerated than their immigrant counterparts.[285] The study also showed that in California, the state with the highest undocumented and documented alien population, native-

[281] Cato Institute, *supra* note 265.
[282] *Id*.
[283] *Id*.
[284] *Common Myths*, *supra* note 263, at 1.
[285] *Immigrants and Crime*, *supra* note 266, at 2.

born men age 18-39 were eleven more times likely to be incarcerated than immigrants in the same age group.[286]

Other studies have supported these findings and have shown that "crime in the United States is not "caused" or even aggravated by immigrants, regardless of their legal status."[287] One such study found that during the past thirty years, incarceration rates among young men were lowest for immigrants regardless of ethnicity. This was especially the case for Mexicans, Salvadorans, and Guatemalans, who account for a large portion of the immigrants without status in the United States.[288]

> However, despite the fear and hostility they faced, immigrants have continued to succeed and prosper in the communities they live in.

Studies in North Carolina have found similar results. From 1997 through 2006, North Carolina's Hispanic population grew 158.7%, while the non-Hispanic population grew to 14.77%. During this same time period, statewide violent and property crime fell.[289] North Carolina counties with higher Hispanic growth actually had lower crime rates than those with lower Hispanic growth rates.[290]

Another North Carolina study concerned with the relationship between crime and immigrant populations noted the lack of correlation between crimes and immigrant community growth and concluded that immigrants who choose to migrate to the United States are, "more

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[286] *Id*.
[287] *Id*. at 1
[288] Lindsay Haddix, *Immigration and Crime in North Carolina: Beyond the Rhetoric* (University of North Carolina at Chapel Hill Department of City and Regional Planning, Chapel Hill, NC) Spring 2008, 1 (citing Rumbaut, Rubén G. Rumbaut & Walter A. Ewing, *The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates Among Native and Foreign-born Men*, American Immigration Law Foundation, 2007. From http://www.ailf.org/ipc/special_report/sr_022107.pdf).
[289] *Id*.
[290] *Id*.

ambitious, driven, and hard-working than the general population, thus, are less likely to be involved in criminal behavior." In addition, "[Immigrants] are also less prone to commit crime and become incarcerated because their primary purpose for migrating is to build a better life for themselves (and their families), whether it be through employment education or other productive means."[291]

The study correctly points out that most immigrants have absolutely no desire or inclination to break the law--on the contrary, they are eager to stay out of any trouble as they pursue new economic and educational opportunities in the United States. In addition, undocumented aliens have even more reason to not commit crimes because of the risk and fear of deportation.[292] As with any group of people, there are some within the group that may commit crimes, but statistically crime should be less of a concern within the immigrant population than with other groups.

5. Myth: Immigrants Take Away Jobs from U.S. Citizens

There is a commonly held belief that immigrants negatively affect U.S.-born workers by taking jobs and causing wages to be reduced. Some economists have supported this belief. Harvard professor George Borjas estimated that between 1980 and 2000 immigrants may have reduced the earnings of U.S.-born workers by 3 to 4 percent, with a larger negative impact

[291] Nguyen & Gill, *supra* note 6, (citing Kristin F. Butcher & Anne M. Piehl, *Why are Immigrants' Incarceration Rates so Low? Evidence on Selective Immigration, Deterrence, and Deportation*, NBER Working Paper No. 13229. Cambridge, Massachusetts: National Bureau of Economic Research, 2007.)

[292] *Immigrants and Crime*, *supra* note 266, at 1.

among high school dropouts.[293] Other labor economists estimate that the negative impact is lower, while others estimate the impact is negligible. [294]

However, immigrants actually tend to fill jobs that are in demand because U.S. citizens will not or cannot fill those jobs; thus, immigrants are actually filling a very real need in the U.S. job market—a need that wouldn't be filled otherwise. As a result, immigrants are disproportionately represented in many high-skilled professions such as medicine and computer science as well as in fields such as hotels, domestic service, and construction.[295] By meeting the demand for these jobs, immigrants give a large boost to the economy. A 2007 White House economic report estimated that immigrants account for approximately an additional $37 billion in the U.S. gross domestic product each year.[296] The report stated that immigrants provide this increase in productivity each year by increasing the labor force, complementing the U.S. citizen workforce, and stimulating investment by adding to the labor pool.[297]

Another study revealed that overall immigration does not crowd out U.S.-born workers in either the short-term or long-term.[298] The data showed that U.S.-born worker employment is not significantly affected by immigration, with estimates never statistically different from zero.[299] The study concluded that this is because U.S.-born workers and immigrants typically take different occupations and are not competing for the same jobs. "Among less-educated workers, [U.S.-born workers] tend to have jobs in manufacturing or mining, while immigrants tend to

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[293] Sejal Zota, *Immigrants in North Carolina: A Fact Sheet*, The UNC School of Government, Oct. 2010, at 7 (citing George J. Borjas, *Increasing the Supply of Labor through Immigration: Assessing the Impact on Native-Born Workers* (Washing, DC: Center for Immigration Studies, 2004)).
[294] *Id*. (citing David Card, *Is the New Immigration Really So Bad?*, Economic Journal, 115 (2005): F300-F323.)
[295] Cato Institute, *supra* note 265, at 632.
[296] Zota, *supra* note 293, at 6 (citing The White House, Council of Economic Advisors, *Immigration's Economic Impact* (Washington, DC: Council of Economic Advisors, The White House, June 20, 2007), www.whitehouse.gov/cea/cea_immigration_062007.html).
[297] *Id*.
[298] Peri, *supra* note 268.
[299] *Id*.

have jobs in personal services and agriculture. Among-more educated workers, [U.S.-born workers] tend to work as managers, teachers, and nurses, while immigrants tend to work as engineers, scientists, and doctors."[300] However, data did show that immigration has a positive long-term effect on U.S.-born workers' income.[301] From 1990 through 2007, the flow of immigrants into the workforce resulted in approximately $5,100 in additional yearly income for the average U.S. worker.[302] In addition, there seems to be a causal relationship between high immigration and low unemployment in the country. For example, during the late 1990's when there was a relatively high amount of immigration in the United States unemployment fell below 4 percent.[303]

B. The Fruits of an Integrated Community

1. Lessons from American History

The United States has greatly benefited from its proud history of immigration. America is commonly referred to as "a nation of immigrants" and has taken in an almost continuous migration of immigrants during its entire existence.[304] This history of immigration has made the country what it is today: a strong, diverse nation rich with multiple cultures, beliefs, and traditions. Everywhere they go immigrants strengthen and build up their local communities, and a study of American history reflects that.

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[300] *Id*.
[301] *Id*. "Over the long run, however, a net inflow of immigrants equal to 1% of employment increases income per worker by 0.6% to 0.9% . This implies that total immigration to the United States from 1990 to 2007 was associated with 6.6% to 9.9% increase in real income per worker."
[302] *Id*.
[303] Cato Institute, *supra* note 265, at 632.
[304] Rudolph J. Vecoli, *The Significance of Immigration in American History*, Business Forum, 10, 15 (1985). "From the earliest Spanish settlements in Florida and Southern California, colonists and immigrants have been drawn or transported to this New World…[even Native Americans] were the descendants of migrants who crossed a land bridge from Asia to the western hemisphere. For almost four hundred years, from the English settler in Jamestown to the latest arrivals from Southeast Asia, a procession of humanity in all its varied forms and hues has been coming to this "Promised Land."

There have been several periods of mass migration in the United States. One of the first was from the 1820s through the 1880s. During that time, approximately 15 million immigrants, many from England, Scandinavia, and Central Europe entered the United States.[305] These immigrants, much like modern day immigrants, filled a very important role in the national economy. The United States was growing and it required a labor force to continue and sustain that growth. Demand for immigration labor had sky rocketed due to the rise of the port of New York, the beginnings of the industrial development in New England, and the need for settlement in the American Midwest.[306] It was during this time, which later would be called "The Industrial Revolution," that the United States transitioned into a world power.

From 1880 to 1924 an additional 25 million more immigrants, primarily from Southern and Eastern Europe, migrated to the United States. During the early 1900s, as many as one million immigrants arrived annually.[307] These immigrants played an important role in the shift to an urban industrial economy. Immigrants were over-represented as peddlers, merchants, and laborers in urban areas.[308] "Immigrants and their children were the majority of workers in the garment sweatshops of New York, the coal fields of Pennsylvania, and the stockyards of Chicago."[309] Major cities in the United States were largely immigrant cities, and by 1900 populations in cities such as New York, Chicago, Boston, Cleveland, San Francisco, and Detroit were approximately three quarters immigrants and their children.[310] During this time of growth,

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[305] Hasia Diner, *Immigration and U.S. History*, eJournal USA, http://www.america.gov/st/peopleplace-english/2008/February/20080307112004ebyessedo0.1716272.html (last visited April 14, 2011).
[306] *Id*.
[307] Charles Hirschman, *The Impact of Immigration on American Society: Looking Backward to the Future*, Border Battles: The U.S. Immigration Debates (Social Science Research Council, NYC, N.Y.), July 28, 2006, 1 from: http://borderbattles.ssrc.org/Hirschman/ (last visited April 13, 2011).
[308] *Id*. at 2.
[309] *Id*.
[310] *Id*. (citing Campbell Gibson & Kay Jung, *Historical Census Statistics on the Foreign Born Population of the United States: 1850 to 2000*, Population Division Working Paper No. 81. Washington, DC: U.S. Bureau of the

"[t]he rapidly expanding industrial economy of the North and Midwest drew disproportionately on immigrant labor from 1880 to 1920."[311]

Despite the correlation between high immigration periods and the country's growth and prosperity, many fear that today's immigrants are a threat to society and harmful to the economy. This phenomenon is not new. As sociology professor Charles Hirschman explains:

> Each new wave of immigration to the United States has met with some degree of hostility and popular fears that immigrants will harm American society or will not conform to the prevailing "American way of life." In 1751, Benjamin Franklin complained about the "Palatine Boors" who were trying to Germanize the province of Pennsylvania and refused to learn English. Throughout the 19th century, Irish and German Americans, especially Catholics, were not considered to be fully American in terms of culture or status by old stock Americans. In May 1844, there were three days of rioting in Kensington, an Irish suburb of Philadelphia, which culminated in the burning of two Catholic churches and other property. This case was one incident of many during the 1840s and 1850s—the heyday of the "Know Nothing Movement"—when Catholic churches and convents were destroyed and priests were attacked by Protestant mobs.[312]

However, despite the fear and hostility they faced, immigrants have continued to succeed and prosper in the communities they live in. Approximately 60 million people, more than one fifth of the population in the United States, are immigrants or the children of immigrants.[313] For most of these people, "immigration policy is not an abstract ideology but a means of family reunification and an affirmation that they part of the "American dream."[314] Local governments should embrace pro-immigrant policies that protect and uphold the rights of these people. They take jobs that others do not want, they pay taxes and contribute to social welfare programs that

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Census (2006); Niles Carpenter, *Immigrants and Their Children*, Census Monograph. Washington, DC: Government Printing Office, 27 (1927)).

[311] *Id*.

[312] *Id*. at 1 (citing Thomas J. Archdeacon, *Becoming American: An Ethnic History*, New York: The Free Press, pp.20 and 81, (1983); Roger Daniels, *Coming to America: A History of Immigration and Ethnicity in American Life*, New York: Harper Perennial, pp.267-268 (1991)).

[313] *Id*.

[314] *Id*.

they are often barred from participating in, and time and time again they have proven to be a key component of America's success story.[315]

2. North Carolina: Evidence of the Benefits of Immigrants in Our Communities

North Carolina is a modern day of example of the positive influence immigrants bring to their communities. The foreign-born part of North Carolina's population has risen dramatically in the past twenty years. This portion of the state population rose from 1.7% in 1990, to 5.3% in 2000, to 7.0% in 2008.[316] Now nearly one-in-ten North Carolinians are Latino or Asian.[317] They are in general people who uphold the law and regulations in their respective communities.[318]

> It would be morally unjust to accept and enjoy the benefits of immigration on one hand and shun the immigration community on the other. But community integration should be the goal of all communities not just because of the benefits our society enjoys as a result, but because immigrants are entitled to constitutional and human rights. Immigrants are owed these rights and protections not on the basis of their immigration status, but by virtue of them being human.

As a result of the growing immigrant community, the local economy has become stronger and new jobs have been created. The Hispanic labor force in the state has supported and made economically competitive entire industries such as, meatpacking, agriculture, and textiles.[319] As of 2008, immigrants comprised of 9.1% of the state's

[315] *See supra* Section A. 2. Most Immigrants Receive Social Welfare Benefits, 58-60; A. 3. Most Immigrants Do Not Pay Taxes, p.60-61; Section A. 5. Immigrants Take Away Jobs from U.S. Citizens, p.62-64.

[316] *New Americans in the Tar Heel State* (Immigration Policy Center, Washington, D.C.), August 2009, http://www.immigrationpolicy.org/just-facts/new-americans-tar-heel-state (last visited April 14, 2011).
[317] *Id*.
[318] *See* Nguyen & Gill, *supra* note 6.
[319] *Id*. at 4 (citing Karen D. Johnson-Webb, *Employer Recruitment and Hispanic Labor Migration: North Carolina Urban Areas at the End of the Millennium*, The Professional Geographer, 54(3): 406-421 (2002)).

workforce, and immigrants without status comprised of 5.3% of the state's workforce. If only the immigrants without status were removed, the state would lose an estimated $14.5 billion in economic activity, $6.4 billion in gross state product, and approximately 101,414 jobs, even when taking into account adequate market adjustment time.[320]

Due to the immigrant population, additional jobs in industries, such as real estate and mortgage finance, are created because of the ripple effect that immigrants have on the state economy.[321] In 2002, the last year for which data is available, North Carolina's 13,695 Asian-owned businesses had sales and receipts of $3.5 billion and employed 32,759 people, and the state's 9,043 Hispanic-owned businesses had sales and receipts of $1.8 billion and employed 11,615 people.[322] More recently, spending by Hispanics alone has generated approximately 89,600 spin-off jobs, $2.4 billion labor income, and $455 million in state tax revenue.[323] And the purchasing power of immigrants living in the state continues to rise. In 2009 the purchasing power of North Carolina's Latinos totaled $12.8 billion, an increase of 1,424.0% since 1990, and the Asian buying power totaled $6.0 billion, an increase of 724.2% since 1990.[324] North Carolina residents also enjoy lower costs of goods and services as a result of cheaper Hispanic

[320] Immigration Policy Center, *New Americans in the Tar Heel State*, *supra* note 363 (citing *An Essential Resource: An Analysis of the Economic Impact of Undocumented Workers on Business Activity in the US with Estimated Effects by State and by Industry* (The Perryman Group, Waco, T.X.), April 2008, http://americansforimmigrationreform.com/files/Impact_of_the_Undocumented_Workforce.pdf#page=69.)
[321] Nguyen & Gill, *supra* note 6, at 4.
[322] Immigration Policy Center, *New Americans in the Tar Heel State*, *supra* note 363.
[323] *Id*. (citing John D. Kasarda & James H. Johnson, Jr., *The Economic Impact of the Hispanic Population on the State of North Carolina* (Kenan-Flagler Business School, The University of North Carolina at Chapel Hill, Chapel Hill, N.C.), January 2006, http://www.kenan-flagler.unc.edu/assets/documents/2006_KenanInstitute_HispanicStudy.pdf#page=35.)
[324] *Id*. (citing Jeffrey M. Humphreys, *The multicultural economy 2009*, Georgia Business and Economic Conditions, 69, 1-16 (2009)).

labor.[325] These facts should not be surprising given the history of immigration America—North Carolina and its municipalities are simply experiencing the natural benefits of immigration.

Municipalities out of self-interest and for moral reasons should enact ordinances and adopt policies, which reflect an appreciation for the country's immigration past and for all contributing members of society, regardless of status or citizenship. By doing so, local governments would be operating in harmony with the position that George Washington, the country's first president, took when he said, "…America is open to receive not only the opulent and respectable stranger, but the oppressed and persecuted of all nations and religions, whom we shall welcome to participate in all of our rights and privileges, if by decency and propriety of conduct they appear to merit the enjoyment."[326]

> Studies in North Carolina have found similar results. From 1997 through 2006, North Carolina's Hispanic population grew 158.7%, while the non-Hispanic population grew to 14.77%. During this same time period, statewide violent and property crime fell. North Carolina counties with higher Hispanic growth actually had lower crime rates than those with lower Hispanic growth rates.

C. Conclusion

Immigrants are an essential part of our society. They continue to be, as they have been throughout the history of our country, a positive influence on the national and local economy. Immigrants regularly fill the needs of our economy by taking jobs that U.S. citizens do not want or do not qualify for, and at the same time they pay taxes and support welfare programs for which they often do not qualify as benefit recipients. In

[325] Nguyen & Gill, *supra* note 6, at 4. (citing J. Kasarda & J. Johnson, *The Economic Impact of the Hispanic Population in the State of North Carolina,* (Frank Hawkins Kenan Institute of Private Enterprise, Chapel Hill, NC), 2006.)

[326] Marcie Hutchinson, *Securing the Borders: Debating Immigration Policy in U.S. History*, OAH Magazine of History, 23, 49 (Oct 2009) (citing George Washington, Address to the Members of the Volunteer Association of Ireland, December 2, 1783).

addition, immigrants are generally law abiding residents who have risked their personal possessions and future to establish a new life in the United States. Unfortunately, there are several myths about immigrants and the impact they have in our communities, and these myths contribute to the prejudice that immigrants often face. Municipalities have a moral obligation to not only welcome immigrants but protect their constitutional and human rights. As such, community integration should be the goal of all communities, as it benefits all residents within the community, promotes harmony and safety, and provides a necessary protection of rights, to which immigrants are entitled.

PART TWO: APPLICATION—COMMUNITY INTEGRATION AND IMMIGRANT DAY LABORERS IN NORTH CAROLINA

Part Two applies the principles of community integration to a discrete group, the day laborer population in Carrboro and Chapel Hill, North Carolina. Although the day laborer population is not comprised solely of immigrant workers, as a subpopulation of day laborers they are more vulnerable to exploitation. Through meetings with interested organizations, local leaders, and members of the day laborer population, the IHRP clinic identified legal issues relevant to the integration of the immigrant day laborer population into the Carrboro/ Chapel Hill community. This Part provides an analysis of those issues and the ways in which the municipalities of Carrboro and Chapel Hill may respond to the needs of day laborers. Section I introduces the day laborer population, the hardships they commonly face generally with a particular focus on immigrant workers, and municipal reactions to their presence

> Almost ninety-eight percent of day laborers are male, and a majority are immigrants from Mexico or Central America.

in communities. Section I also introduces day labor issues in Carrboro and Chapel Hill. Section II discusses the particular ways to defend the rights of day laborers including an overview of the now rescinded "Carrboro ordinance" affecting day laborer rights, and wage theft remedies including civil and criminal processes. Section III analyzes the legal questions pertaining to the development of a workers' center and section IV examines recent developments to establish a workers' center in Carrboro.

Given the informal and unpredictable nature of their employment, day laborers are especially vulnerable to exploitation by employers.

I. Immigrant Day Laborers in the United States: Who They Are and the Problems They Face

A. Who are Day Laborers?

Close to 117,600 workers seek employment as day laborers every day in the United States.[327] Day laborers are workers who solicit temporary employment at formal and informal hiring sites throughout the United States.[328] Employers, usually construction contractors or homeowners, visit these sites and negotiate with day laborers over employment terms, including job tasks, wages, and hours.[329] Employers typically hire day laborers to work in construction, landscaping, painting, roofing, or drywall installation.[330] The majority of day laborers seek employment at informal hiring sites, such as in front of business and home improvement stores or on street corners.[331] About one-fifth of the

[327] ABEL VALENZUELA, JR. ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES 4 (2006), *available at* http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf.
[328] Amy Pritchard, *"We Are Your Neighbors": How Communities Can Best Address a Growing Day-Labor Workforce*, 7 SEATTLE J. FOR SOC. JUST. 371, 373 (2008).
[329] VALENZUELA, JR. ET AL., *supra* note 327, at 1, 9; Pritchard, *supra* note 328, at 373.
[330] VALENZUELA, JR. ET AL., *supra* note 327, at ii.
[331] *See, e.g., id.* at 4; Pritchard, *supra* note 328, at 373. The National Day Labor Survey found that 79% of day laborers solicit work at informal hiring sites. VALENZUELA, JR. ET AL., *supra* note 327, at 4.

day laborer population looks for employment at formal day-labor worker centers.[332] Almost ninety-eight percent of day laborers are male, and a majority are immigrants from Mexico or Central America.[333] Day labor provides immigrants who have recently arrived to the United States with a source of income and allows them to form relationships with other workers and employers and to gain skills.[334] Day labor is also a source of income for unemployed workers while they look for permanent employment.[335] The day labor market is one that is constantly changing, due to the nature of the work and fluctuations in the number of workers seeking employment in the market each day.[336] Day laborers are at-will employees, with no guarantees of continued employment when they are hired.[337] Even when day laborers are able to obtain extended employment with an employer, they face a number of challenges, including low wages, hazardous work, and exploitation by employers.[338]

B. Immigrant Day Laborers and Community Integration

1. Hardships Experienced by Day Laborers

Day laborers are a population that would especially benefit from municipal community integration efforts. These workers often find themselves marginalized in their communities and lack the financial and social resources that many other community members take for granted. The incomes of day laborers are often unpredictable and vary seasonally.[339] Scholars who have studied day laborers' wages found that their income fluctuated between "good months" and" bad months." One report found that "even in cases where day laborers have many more good months

[332] VALENZUELA, JR. ET AL., *supra* note 327, at 4.
[333] *Id.* at 17.
[334] *Id.* at 20.
[335] *Id.* at 20.
[336] *See Id.* at 6.
[337] *Id.*
[338] Pritchard, *supra* note 328, at 373.
[339] VALENZUELA, JR. ET AL., *supra* note 327, at 9-12, 20.

than bad months, it will be unlikely that their annual earnings will exceed $15,000, keeping most workers in this market at or below the federal poverty threshold."[340] Because of their economic situation, day laborers are more willing to work dangerous jobs than other workers.[341] As a result, they suffer from high rates of on-the-job injuries.[342] When they are injured, they often do not seek medical care, usually because they are denied workers' compensation coverage by employers and cannot afford to pay the costs on their own.[343] In addition to the problem of poverty-level wages, day laborers face other hardships related to the nature of their employment.

> Without access to resources that explain their employment rights in Spanish or their native language, Spanish-speaking day laborers will not know that they can take action to claim unpaid wages.

Given the informal and unpredictable nature of their employment, day laborers are especially vulnerable to exploitation by employers. Day laborers report that wage theft is commonplace.[344] Day laborers are also frequently the victims of workplace abuses. They are denied breaks, forced to work longer than agreed, and some have been threatened or even assaulted by employers.[345] As noted above, undocumented immigrants make up a large segment of the day laborer population, and

[340] *Id.* at 12.
[341] *Id.*
[342] *Id.*
[343] *Id.* at 13 (finding, based on survey results, that just 6% of day laborers had their medical expenses covered by their employer's workers' compensation insurance).
[344] *Id.* at 14-15.
[345] *Id.* at 14 ("Wage theft is just one type of employer abuse endured by day laborers. During the two months prior to being surveyed, 44 percent of day laborers were denied food, water and breaks; 32 percent worked more hours than agreed to with the employer; 28 percent were insulted or threatened by the employer; and 27 percent were abandoned at the worksite by an employer. Finally, 18 percent of day laborers were subjected to violence by their employer during this time period.").

these workers are even more likely to be exploited by employers.[346] Employers often openly violate the rights of undocumented day labors because undocumented immigrants are not likely to seek recourse.[347] While day laborers generally are hesitant to report employment violations because of their economic situations, undocumented immigrants are even less likely to report violations, both because they may not know how to report them, or because they fear their immigration status being exposed.[348] Employers often threaten to turn workers over to immigration officials when they attempt to exercise their rights.[349] Municipalities are in a position to improve the welfare of day laborers. Unfortunately, some municipalities have exacerbated the hardships faced by day laborers through initiatives that seek to drive day laborer populations out of their communities.[350] In contrast, there are other towns and cities that affirmatively seek to integrate day laborers into the community and improve their quality of life, to the benefit of local economies.[351]

2. Municipal Responses to Day Laborers

a. Hostile Responses

Some municipalities, fueled by anti-immigrant sentiment, have passed ordinances that seek to limit or completely prohibit day laborers from congregating in public spaces. Such ordinances include anti-solicitation ordinances that prohibit day laborers from soliciting employment on public property.[352] Other ordinances sanction employers that hire undocumented

[346] *Id.* at 17, 22.
[347] *Id.* at 22.
[348] *Id.* at 22, Pritchard, *supra* note 328, at 384.
[349] VALENZUELA, JR. ET AL., *supra* note 327, at 22.
[350] *See infra* Section I.B.2.a.
[351] *See infra* Section I.B.2.b.
[352] For further discussion of anti-solicitation ordinances and the constitutionality of such ordinances, *see* Pritchard, *supra* note 328, at 386-92 and Johnson, *supra* note 135, at 681-682.

workers.[353] These ordinances that seek to limit the activities of day laborers are often a reflection of tension within the city over undocumented immigration.[354] Monica Varsanyi, who studied such ordinances in the Phoenix, Arizona area, refers to such policies as "immigration policing 'through the back door.'"[355] The day laborer population is targeted because it is "often the most visible manifestation of 'illegal immigration' at the local scale. . . [and] a ready focal point for local frustrations over unauthorized immigration…"[356] In passing these ordinances, cities hope to encourage day laborers, many who have recently immigrated to the United States, to move elsewhere, rather than recognize their rights as residents and encourage their integration into the local community.[357]

b. Progressive Responses

Other municipalities have recognized that day laborers are residents of their communities who are in need of more protection, and these municipalities have worked to improve day laborers' quality of life. One way in which cities have addressed the day labor issue is by establishing or supporting the establishment of formal worker centers.[358] Day labor worker centers are often established through alliances between community organizations and local governments.[359] The worker centers provide a safe place for day laborers to seek work, as well as a place where labor standards can be monitored and workers, particularly immigrant workers, can be informed of their rights.[360] Experts on the day labor situation in the United States have

[353] *See* Pritchard, *supra* note 328, at 392-94.
[354] *See* Monica W. Varsanyi, *Immigration Policing Through the Backdoor: City Ordinances, the "Right to the City," and the Exclusion of Undocumented Day Laborers*, 29 URBAN GEOGRAPHY 29, 32 (2008).
[355] *Id.*
[356] *Id.* at 32.
[357] *Id.* at 30.
[358] *See infra* Section C.2. for an overview of day labor worker centers and an analysis of worker centers in the context of the IHRP project.
[359] VALENZUELA, JR. ET AL., *supra* note 327, at 6-7.
[360] *Id.* at 7-8, 22-23.

called worker centers the "most comprehensive response to the workplace abuses that day laborers endure."[361] Cities have also addressed the frequent employment abuses faced by day laborers by increasing the civil penalties for wage theft, passing criminal wage theft ordinances, and strengthening the enforcement of existing employment laws.[362]

C. The Immigrant Day Laborer Situation in Carrboro and Chapel Hill, North Carolina

There is a specific need for advocacy on behalf of the day laborer population in Chapel Hill and Carrboro, North Carolina. Dozens of day laborers have solicited employment on a certain corner in Carrboro for years. The corner is across from the Abbey Court apartment complex, a neighborhood where many immigrants and day laborers live. The corner is an informal hiring site that is known throughout the community, among both workers and employers. Many of the employers who hire workers at the site transport the day laborers to work sites in Chapel Hill. Recently, in response to complaints by some members of the community, the Carrboro Board of Alderman passed an anti-lingering ordinance

> One way in which cities have addressed the day labor issue is by establishing or supporting the establishment of formal worker centers.

[361] *Id.* at 23.
[362] *See* NATIONAL EMPLOYMENT LAW PROJECT, WINNING WAGE JUSTICE: AN ADVOCATE'S GUIDE TO STATE AND CITY POLICIES TO FIGHT WAGE THEFT (2011 (providing recommendations for advocates working to protect low-wage workers and suggestions for reform at the state and local level) , [hereinafter NELP GUIDE]), available at http://nelp.3cdn.net/4fd24202008c596117_oxm6bglbn.pdf.

that prohibited loitering at the corner between 11:00 A.M. and 5:00 A.M.[363] In passing the ordinance, the Board of Alderman cited problems that neighbors and police viewed as related to the congregation of day laborers on the corner, such as littering, public consumption of alcohol, and public urination.[364] A task force of community groups and leaders formed in response to the ordinance and other violations of the day laborers' rights.

The goal of the task force is to address concerns about the welfare of the day laborers who solicit employment in Carrboro. The task force has focused on the actions of employers in the area and the responses of the municipalities to the situation. Members of the task force include Orange County Justice United in Community Effort ("Justice United"),[365] the Carrboro and Chapel Hill Human Rights Center,[366] El Centro Hispano,[367] the Southern Coalition for Social Justice,[368] Durham Technical Community College, the mayors of both Carrboro and Chapel Hill, and the Chapel Hill Chamber of Commerce. The task force has met to discuss such issues as the creation of a workers center, the passage of a wage-theft ordinance, and the elimination of the anti-lingering ordinance. The task force is a classic community integration model, with representatives from the government, concerned community groups, and the day

[363] CARRBORO, N.C., TOWN CODE § 5-20 (2007). See Section III for a discussion of the ordinance's background and an analysis of the constitutionality of the ordinance.
[364] § 5-20(a)(3).
[365] Justice United is an organization of faith-based groups that focuses on social justice issues in Orange County, North Carolina. *See Orange County Justice United in Community Effort: About*, ORANGE COUNTY JUSTICE UNITED IN COMMUNITY EFFORT, http://ocjusticeunited.org/Orange_County_Justice_United_in_Community_Effort:About (last visited May 1, 2011).
[366] The Carrboro and Chapel Hill Human Rights Center is an organization based in the Abbey Court apartment complex that advocates on behalf members of the Abbey Court community and organizes community members in the promotion of human rights. *See About the HRC*, THE CARRBORO AND CHAPEL HILL HUMAN RIGHTS CENTER, http://www.humanrightscities.org/about_us.html (last visited May 1, 2011).
[367] El Centro Hispano is a nonprofit organization that offers services and programs to the Latino community through its offices in Durham and Carrboro, North Carolina. *See Mission*, EL CENTRO HISPANO, ,http://www.elcentronc.org/ingles/Mission.html (last visited May 1, 2011).
[368] The Southern Coalition for Social Justice is a nonprofit organization that "promotes justice by empowering minority and low-income communities to defend and advance their political, social and economic rights." *See About SCSJ*, SOUTHERN COALITION FOR SOCIAL JUSTICE, http://www.southerncoalition.org/about (last visited May 1, 2011).

laborer population working together to address the needs of day laborers and to integrate day laborers into the Carrboro and Chapel Hill community. The IHRP Clinic has joined this task force to further the community integration goals of the groups involved through legal research and advocacy.

II. Defending the Rights of Day Laborers: Challenges and Legal Solutions

In order to successfully develop Integrated Communities, municipal leaders and individuals must be willing to defend the civil and human rights of the immigrants living in the community. Laws like the Carrboro Ordinance, described below and now rescinded, are examples of measures that marginalize and harm the immigrant community. Community integration requires municipalities and advocates to actively defend the rights of immigrants as well as to enact affirmative ordinances and policies that promote integration. By identifying priority issues for the immigrant community (day laborers being one of the most important groups), municipalities and immigrant advocates can demonstrate their commitment to working toward community integration.

The two issues highlighted in this section describe of the most pressing problems facing integrated communities: day labor laws and wage theft.

A. The Carrboro Ordinance and the Legal Challenges

1. Background

In November 2007, the Carrboro Board of Alderman passed an "anti-lingering" ordinance targeting the corner of Davie Road and Jones Ferry Road, outside of the Abbey Court Apartment complex. The ordinance was aimed at preventing day laborers and others from congregating at the corner, which is known to be an unofficial pickup area for employers seeking

to hire day laborers. The ordinance effectively prevents day laborers from seeking employment at the corner between 11:00 a.m. and 5:00 a.m. The ordinance states

> Except as provided herein, no person may stand, sit, recline, linger, or otherwise remain within the area designated in subsection (d) between the hours of 11:00 a.m. and 5:00 a.m. This prohibition shall not apply to persons occupying motor vehicles, riding on bicycles, walking, or otherwise moving through such area, while such persons are actually engaged in the process of moving from a point outside such area, through such area, to another point outside such area.[369]

The ordinance was passed in response to complaints by neighbors and police that the gathering of people at the corner was contributing to a number of problems. The problems are listed in section (a)(3) of the ordinance and include littering, public consumption of alcohol, public urination and defecation, and trespassing.[370] The town found these problems to be "threats to the public health, safety, and welfare"[371] and believed they "would be greatly reduced or eliminated"[372] through compliance with the ordinance. The town also found that these problems were less prevalent in the morning and instituted the time restraint because "these problems tend to occur after 11:00 a.m. when individuals who are not looking for work gather in this area."[373]

There is a specific need for advocacy on behalf of the day laborer population in Chapel Hill and Carrboro, North Carolina.

In September 2007, while the Board of Alderman was considering the ordinance, the Town, through legal counsel, solicited input from the American Civil Liberties Union

[369] CARRBORO, N.C., TOWN CODE § 5-20 (2007).
[370] § 5-20(a)(3).
[371] § 5-20(b).
[372] § 5-20(a)(3).
[373] § 5-20(a)(2).

(ACLU).[374] After reviewing the proposed ordinance, the ACLU of North Carolina urged the Board to revise the ordinance, stating that it would likely be found unconstitutional."[375] The Board of Alderman held a public hearing concerning the ordinance on October 23, 2007. At the hearing, one Alderman Coleman asked for further legal review with regard to the concerns raised in the ACLU's letter.[376] On November 20, 2007, at a meeting of the Board of Alderman, Carrboro's town counsel stated that he believed the ordinance was "legally defensible."[377] The Board of Alderman passed the ordinance with a vote of four to one at the meeting, despite the advice given by the ACLU and the statements of Mark Dorosin, senior managing attorney for the UNC Center for Civil Rights and a professor at UNC School of Law, that the ordinance was suspect and bad public policy.[378] Only one Alderman opposed the ordinance because he believed it unfairly targeted immigrants.[379] But on November 22, 2011 the Carrboro Board of Aldermen voted unanimously to rescind the law.[380] One board member noted that, "[f]or a community that has focused on progressive thinking and action, we must do better than this ordinance."[381] The repeal came after the board received a letter from the Southern Coalition for Social Justice with support from various groups and individuals, and informed by research conducted by the IHRP clinic, informing them that the law was

[374] Letter from Michael Brough, Town Attorney for Carrboro, N.C., to Katy Parker, Legal Director for ACLU of N.C. (Sept. 19, 2007).
[375] Letter from Sarah Preston, Legislative Coordinator for ACLU of N.C. and Katy Parker, Legal Director for ACLU of N.C., to Michael Brough, Town Attorney for Carrboro, N.C. (Oct. 22, 2007).
[376] Minutes, Carrboro Board of Aldermen 2 (Oct. 23, 1007), http://www.ci.carrboro.nc.us/BoA/Minutes/2007/10_23_2007.pdf.
[377] Minutes, Carrboro Board of Aldermen 14 (Nov. 20, 2007), http://www.ci.carrboro.nc.us/BoA/Minutes/2007/11_20_2007.pdf.
[378] *Id*.
[379] Kirk Ross, *Town passes anti-lingering ordinance*, THE CARRBORO CITIZEN, Nov. 29, 2007, *available at* http://www.carrborocitizen.com/main/2007/11/29/town-passes-anti-lingering-ordinance/ (noting objections to the ordinance by Alderman John Herrera).
[380] *See* Susan Dickson, *Carrboro repeals anti-lingering law*, THE CARRBORO CITIZEN (Nov. 23, 2011), http://www.carrborocitizen.com/main/2011/11/23/carrboro-repeals-anti-lingering-law/.
[381] *See id*.

"overbroad and vague" and therefore in violation of the U.S. Constitution.[382] Although some citizens still support the ordinance, many agree that the repeal is "a start to a better future for our community."[383]

2. The Basis for the Legal Challenges to the Carrboro Ordinance

Although the ordinance was repealed, it is useful to demonstrate the reasons for its unconstitutionality, particularly in the event that a similar ordinance were to be considered by another municipality in North Carolina.

The anti-lingering ordinance was vulnerable to a challenge that it was unconstitutionally vague, in violation of the Due Process Clause of the Fourteenth Amendment.[384] A law is impermissibly vague if "it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests."[385] When considering whether a law is unconstitutionally vague, courts will consider whether the ordinance provides fair notice of prohibited conduct and whether the ordinance encourages arbitrary or discriminatory enforcement by the police.[386] The Carrboro ordinance failed to provide fair notice to the residents of Carrboro and also failed to establish sufficient standards for police enforcement. For

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[382] *Id*.
[383] *See* Florence Bryan, *Carrboro's repeal of anti-lingering ordinance sees mixed reaction from residents*, THE DAILY TAR HEEL (Nov. 29, 2011), http://www.dailytarheel.com/index.php/article/2011/11/carrboros_antilingering_repeal_sees_mixed_reaction.
[384] *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . .").
[385] *City of Chi. v. Morales*, 527 U.S. 41, 52 (1999) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).
[386] *See, e.g.*, *Morales*, 527 U.S. at 56 ("Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement."); *Kolender*, 461 U.S. at 357 ("As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.").

these reasons, the ordinance would have likely been found to be invalid on its face if challenged and was therefore repealed by the Board of Aldermen.

a. Fair Notice Requirement

The first question is whether the ordinance provides fair notice to the public. In determining whether a law provides fair notice, courts consider whether an ordinary person would understand what conduct is prohibited.[387] Specifically, with regard to the Carrboro ordinance, the question was whether a person of ordinary intelligence would understand how to comply with the ordinance. The prohibited conduct was set out in section (c) of the ordinance: "no person may stand, sit, recline, linger, or otherwise remain within the area designated in subsection (d) between the hours of 11:00 a.m. and 5:00 a.m."[388] The ordinance did not apply to "persons occupying motor vehicles, riding on bicycles, walking, or otherwise moving through such area, while such persons are actually engaged in the process of moving from a point outside such area, through such area, to another point outside such area."[389] While a person of ordinary intelligence would understand what it means to "stand, sit, recline, linger, or otherwise remain within the area," the meaning of the provision that reads "engaged in the process of moving" cannot be readily ascertained so as to advise an individual if her conduct is in violation of the ordinance. An ordinary person who believes they are "actually engaged in the process of moving" but pausing in the area to rest or for other reasons could be considered in violation of the ordinance. Also, based on the language of the ordinance, it was not clear whether a person

[387] *See, e.g, Morales*, 527 U.S. at 58 ("[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law."); *Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 498 (1982) (quoting *Grayned*, 408 U.S. at 108 ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.").
[388] CARRBORO, N.C., TOWN CODE § 5-20(c) (2007).
[389] *Id.*

waiting at one of the bus stops within the area covered by the ordinance would fall under the exception as a person "otherwise moving through such area" or as a person lingering in violation of the ordinance. For these reasons, the ordinance is subject to a constitutional challenge for vagueness on its face by failing to provide fair notice of prohibited conduct in accordance with the Due Process Clause of the Fourteenth Amendment.[390]

b. Ordinance Encourages Discriminatory/Arbitrary Enforcement

The second consideration for vagueness is whether a law authorizes or encourages discriminatory or arbitrary enforcement.[391] In determining whether a law encourages arbitrary or discriminatory enforcement, courts consider how much discretion is given to the police.[392] In *Grayned v. City of Rockford,*[393] the Supreme Court held that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."[394] The Supreme Court has held that loitering ordinances are unconstitutional when they do not establish clear standards for the police, thus allowing police total discretion.[395] The Carrboro ordinance gave complete discretion to police. It provided minimal guidance for the police in determining whether someone is remaining in the area in violation of the ordinance. It left it to the police to decide whether someone is "lingering" at the corner or is "engaged in the

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[390] *See, e.g. Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 165-68 (1972) (finding vagrancy ordinance to be unconstitutionally vague); Giaccio v. Pennsylvania, 382 U.S. 399, 402-403 (1966) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . ."); *State v. Mello*, __ N.C. App. __, 684 S.E.2d 477, 482 (2009) (finding loitering ordinance "fails to define what type of conduct violates this provision, and leaves ordinary persons uncertain on how to adhere to the law").

[391] *Supra* note 387.

[392] *See, e.g., Morales*, 527 U.S. at 61-64 (upholding the Supreme Court of Illinois' finding that the loitering ordinance afforded too much discretion to the police); *Kolender v. Lawson*, 461 U.S. 352, 360-61 (1983) (finding police had full discretion in determining whether a citizen had complied with an identification requirement); *Papachristou* , 405 U.S. at 169-171 (1972) (finding vagrancy statute unconstitutional).

[393] *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

[394] *Id.* at 108.

[395] *See, e.g., Morales*, 527 U.S. at 64; *Kolender*, 461 U.S. at 360-61.

process of moving." Given the ordinance's background, it was likely that officers would have been more likely to find that men who appear to be day laborers are unlawfully remaining in the area. Because the majority of day laborers who solicit employment in the area are Latino males, the ordinance likely encouraged discriminatory enforcement against them.

Additionally, because the ordinance did not require any proof of criminal intent, it authorized arbitrary enforcement.[396] Under the ordinance, Carrboro police could have found anyone remaining in the designated area to be in violation of the ordinance, regardless of whether he or she is engaged in otherwise innocent or protected conduct. [397] There was no requirement for the police act because they believed someone was acting with a certain unlawful purpose. State courts have "uniformly invalidated" loitering ordinances that do not include a mens rea requirement because such ordinances authorize arbitrary deprivations of liberty without due process.[398]

3. Ordinance was Void for Overbreadth

A court would have likely found Carrboro's ordinance to be overbroad. The Supreme Court held in *Grayned* that a law may be "'overbroad' if in its reach it prohibits constitutionally protected conduct."[399] Recently, the North Carolina Court of Appeals found a Winston Salem, North Carolina, loitering ordinance that made it "unlawful for a person to remain or wander about in a public place under circumstances manifesting the purpose to engage in a violation of

[396] *See Morales*, 527 U.S. at 58.
[397] *See Hoffman Estates v. Flipside, Hoffman Estates*, Inc., 455 U.S. 489, 499 (1982) ("Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.").
[398] *Morales*, 527 U.S. at 58.
[399] *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972).

the North Carolina Controlled Substances Act" to be overbroad.[400] In *State v. Mello*, the Court of Appeals held that, "[a] law is impermissibly overbroad if it deters a substantial amount of constitutionally protected conduct while purporting to criminalize unprotected activities."[401] The Court of Appeals also held that "[l]egislative enactments that encompass a substantial amount of constitutionally protected activity will be invalidated even if the statute has a legitimate application."[402] The Carrboro ordinance would likely have been invalidated under this analysis because of the extent to which it prohibits conduct that is protected under both the First and Fourteenth Amendments. Similar to the ordinance found unconstitutional in *Mello*, the Carrboro ordinance "does not require proof of specific criminal intent" and "criminaliz[es] constitutionally permissible conduct."[403] Because there is no mens rea requirement, "anyone who engages in the conduct listed in [the ordinance] is deemed to possess the requisite intent to engage in [the prohibited] activity, regardless of his or her actual purpose."[404]

The Carrboro anti-lingering ordinance had "a sufficiently substantial impact on conduct protected by the First Amendment"[405] It prohibited any form of assembly, association, or expression that would involve sitting, standing, or lingering in the designated area between 11:00 A.M. and 5:00 A.M. In addition to infringing on First Amendment rights, the ordinance interfered with Fourteenth Amendment liberties. In *City of Chi. v. Morales*, the Supreme Court reiterated that loitering for innocent purposes is a protected liberty under the Fourteenth Amendment.[406] Additionally, the Court of Appeals of North Carolina has held that "[m]ere

[400] *See State v. Mello*, __ N.C. App. __, 684 S.E.2d 477 (2009); aff'd 364 N.C. 421, 700 S.E.2d 224 (2010).
[401] *Mello*, 684 S.E.2d at 479-80 (citing *Hoffman*, 455 U.S. at 494).
[402] *Id.* at 480 (citing *Houston v. Hill*, 482 U.S. 451, 459 (1987)).
[403] *Id.* at 480-81.
[404] *Id.*
[405] *City of Chi. v. Morales*, 527 U.S. 41, 52 (1999).
[406] *Id.* at 53.

presence in a public place cannot constitute a crime."[407] More recently, the Ninth Circuit Court of Appeals in *Comite de Jornaleros v. City of Redondo Beach*,[408] the U.S. District Court Northern District of Alabama in *U.S. v. State of Alabama*,[409] and the U.S. District Court for the District of Arizona in *Friendly House, et al. v. Michael B. Whiting, et al.*,[410] determined that these types of ordinances violated the First Amendment of the U.S. Constitution. These cases and the legal arguments described above demonstrate that he Carrboro ordinance "sweep[s] unnecessarily broadly into areas of protected freedoms"[411] by outlawing any extended presence in the area between 11:00 A.M. and 5:00 A.M.

4. Conclusion

A court would likely have found the Carrboro anti-lingering ordinance to be invalid on its face if it had been challenged before it was repealed. The law was unconstitutionally vague in that failed to provide fair notice and gives too much discretion to police to determine whether a person is acting in violation of the ordinance. There is no *mens rea* requirement, allowing for liberty deprivations without due process. The Carrboro ordinance was also overbroad, unconstitutionally interfering with both First and Fourteenth Amendment rights.

B. Wage Theft and the Day Laborer Population

Day laborers, and in particular immigrant day laborers, have been found to be vulnerable to exploitation and abuse. Their employment rights are often violated by employers, particularly in the form of wage theft.[412] The National Day Labor Survey ("the Survey") found that nearly half of all day laborers had recently been completely denied payment for work performed and

[407] *State v. Evans*, 73 N.C. App. 214, 217, 326 S.E.2d 303, 306 (1985).
[408] 657 F.3d 936 (9th Cir. 2011); *cert. den.* __S.Ct. __, 2012 WL 538394 (Mem) U.S.,2012, February 21, 2012
[409] 813 F. Supp 2d. 1282 (N.D. Ala. 2011).
[410] __F. Supp. 2nd __(2012), 2012 WL 671674 (D. Ariz., 2012).
[411] *Id*.
[412] Pritchard, *supra* note 328, at 384.

nearly half had recently been underpaid by employers.[413] The authors of a report on the circumstances of day laborers, *On the Corner: Day Labor in the United States,* analyzed the survey and concluded that "wage theft is a routine aspect of day-labor work."[414] In this report, Abel Valenzuela, an expert on day labor in the United States and the Director of UCLA's Center for the Study of Urban Poverty, together with his coauthors, note the instability and insecurity of the work of day laborers, as well as the vulnerability of the day laborer population. They found that:

> a significant segment of the employer base feels free to blatantly disregard U.S. labor laws and workers' rights. Yet these employers are able to continually hire day laborers because workers are in dire need of employment and because many day laborers believe that avenues for the enforcement of labor and employment laws are effectively closed to them. This belief is reinforced by the general climate of hostility that exists towards day laborers in many parts of the country.[415]

Day laborers often do not take action against employers who fail to compensate them for their work for a number of reasons. Day laborers may be unaware of their right to claim wages; limited English proficiency may create a barrier to obtaining relief; workers may fear that their undocumented status will be discovered; and cultural norms may make some day laborers hesitant to report employers because of the stigma attached to being victimized at their workplace.[416] Subsection A of this Section discusses the civil remedies available to day laborers who are victims of wage theft and issues day laborers face in exercising their rights. Subsection B of this Section discusses potential criminal law protections against wage theft.

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[413] VALENZUELA, JR. ET AL., *supra* note 327, at 14 (time period was two months prior to being surveyed).
[414] *Id.*
[415] *Id.*
[416] *See* Pritchard, *supra* note 328, at 384.

1. Civil Remedies for Day Laborers

a. The Fair Labor Standards Act (FLSA)

The Fair Labor Standards Act[417] (FLSA) establishes federal minimum wage and overtime standards. The United States Department of Labor (USDOL) enforces the FLSA "without regard to whether an employee is documented or undocumented."[418] The USDOL requires employers who are subject to the FLSA to "pay day laborers at least the applicable minimum wage for all hours worked regardless of whether the worker is paid by the hour, the day, or at a piece rate."[419] The USDOL has emphasized that "[e]mployers must pay day laborers for all work performed whether or not the employer approves the work in advance."[420]

Although the majority of U.S. employees are covered by the FLSA, many day laborers remain outside the purview of the statute.[421] Most employees working for small construction companies that employ a large percentage of day laborers are not covered by the FLSA.[422] A USDOL factsheet states that "[a] business in the construction industry must have two or more employees and have an annual gross sales volume of $500,000 or more to be subject to the FLSA."[423] Although a day laborer's employer may not be subject to the FLSA, a day laborer

[417] The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2011). Employees covered by FLSA must be paid a minimum of $7.25 per hour and must be paid at least one and a half times their normal pay rates for overtime hours.
[418] U.S. DEP'T OF LABOR, FACT SHEET #48: APPLICATION OF U.S. LABOR LAWS TO IMMIGRANT WORKERS: EFFECT OF *HOFFMAN PLASTICS* DECISION ON LAWS ENFORCED BY THE WAGE AND HOUR DIVISION (2008), http://www.dol.gov/wecanhelp/whdfs48.pdf [hereinafter FACT SHEET #48].
[419] U.S. DEP'T OF LABOR, FACT SHEET #61: DAY LABORERS UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2009), http://www.dol.gov/whd/regs/compliance/whdfs61.pdf [hereinafter FACT SHEET #61].
[420] *Id*.
[421] *See* WAGE AND HOUR DIV, U.S. DEP'T OF LABOR, HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT, 2-3 (2010), http://www.dol.gov/whd/regs/compliance/wh1282.pdf [hereinafter REFERENCE GUIDE]. Generally, employees of businesses with over $500,000 gross sales per year or individual employees whose work is linked to interstate commerce are covered by FLSA. *Id.*
[422] *See* U.S. DEP'T OF LABOR, FACT SHEET #1: THE CONSTRUCTION INDUSTRY UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2008), http://www.dol.gov/whd/regs/compliance/whdfs1.pdf [hereinafter FACT SHEET #1].
[423] *Id*. at 1. *See also* 29 U.S.C. § 203(s)(1)(a) (2011) (definition of "Enterprise engaged in commerce or in the production of goods for commerce").

who works for a small construction company is individually covered by the FLSA if his work is related to interstate commerce.[424]

> A significant segment of the employer base feels free to blatantly disregard U.S. labor laws and workers' rights. Yet these employers are able to continually hire day laborers because workers are in dire need of employment and because many day laborers believe that avenues for the enforcement of labor and employment laws are effectively closed to them. This belief is reinforced by the general climate of hostility that exists towards day laborers in many parts of the country.

Many day laborers are hired by homeowners to complete tasks in and around their homes.[425] These workers may fall under the FLSA category of domestic service workers. Day laborers who work in domestic service are covered "if they receive at least $1,700 in 2009 in cash wages from one employer in a calendar year, or if they work a total of more than eight hours a week for one or more employers ."[426] Domestic service, defined in the Code of Federal Regulations, "refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed."[427] Domestic services workers include "employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use."[428] In summary, if a day laborer is hired directly by a private homeowner to do domestic service work, and the work meets either the wage or

[424] FACT SHEET #1, *supra* note 422, at 1 ("Any person who works on or otherwise handles goods that are moving in interstate commerce or who works on the expansion of existing facilities of commerce is individually subject to the protection of the FLSA and the current minimum wage and overtime pay requirements, regardless of the sales volume of the employer.").
[425] *See* VALENZUELA, JR. ET AL., *supra* note 327, at 9.
[426] U.S. DEP'T OF LABOR , WAGES AND HOURS WORKED: MINIMUM WAGE AND OVERTIME PAY (2009), http://www.dol.gov/compliance/guide/minwage.htm [hereinafter WAGES AND HOURS WORKED].
[427] 29 CFR § 552.3 (2011).
[428] *Id.*

hour requirements under the FLSA for domestic service, he or she is covered under the FLSA.[429] Day laborers who are employed by landscaping companies are not considered domestic service workers under the FLSA.[430]

The FLSA is enforced by the USDOL's Wage and Hour Division (WHD).[431] Employees may file a complaint with the WHD or file a private suit in federal court in order to recover back pay and liquidated damages from employers.[432] Employees are entitled to liquidated damages equal to the amount of back pay recovered.[433] There is a two year statute of limitations for recovering back pay, unless there is a willful violation by an employer.[434] In cases of willful violations, the statute of limitations is three years.[435]

b. North Carolina Law

The North Carolina Wage and Hour Act (WHA)[436] establishes minimum wage and overtime requirements[437] for employers and requires employers to "pay every employee all wages and tips accruing to the employee on the regular payday."[438] It also requires employers to notify employees "at the time of hiring, of the promised wages and the day and place for

[429] *See* 29 U.S.C. § 206(f).
[430] 29 CFR § 552.107 (2011) ("Persons who mow lawns and perform other yard work in a neighborhood community generally provide their own equipment, set their own work schedule and occasionally hire other individuals. Such persons will be recognized as independent contractors who are not covered by the Act as domestic service employees. On the other hand, gardeners and yardmen employed primarily by one household are not usually independent contractors.").
[431] *See Wage and Hour Division (WHD): About WHD*, U.S. DEPARTMENT OF LABOR, http://www.dol.gov/whd/ (last visited May 1, 2011).
[432] *See* REFERENCE GUIDE, *supra* note 421, at 17. ("(1) WHD may supervise payment of back wages. (2) The Secretary of Labor may bring suit for back wages and an equal amount as liquidated damages. (3) An employee may file a private suit for back pay and an equal amount as liquidated damages, plus attorney's fees and court costs. (4) The Secretary of Labor may obtain an injunction to restrain any person from violating the FLSA, including the unlawful withholding of proper minimum wage and overtime pay."). *See also* 29 U.S.C. § 216(b)-(c).
[433] *See* REFERENCE GUIDE, *supra* note 421, at 17. *See also* 29 U,S.C.§ 216(b)-(c).
[434] *See* REFERENCE GUIDE, *supra* note 421, at 17.
[435] *Id.*
[436] N.C. GEN. STAT § 95-25.1 et. seq. (2011).
[437] § 95-25.3 (minimum wage), § 95-25.4 (overtime).
[438] § 95-25.6.

payment"[439] and establishes other wage notification requirements.[440] The WHA applies to all North Carolina businesses that are not subject to the FLSA.[441] The wage payment provisions "cover all employees in North Carolina except those employed in federal, state or local government."[442] Because many day laborers are not employed by enterprises that may not be covered under the FLSA, the WHA is an important source of recourse for day laborers in North Carolina seeking to claim unpaid wages.[443]

Employers who violate the WHA are liable to employees "in the amount of their unpaid minimum wages, their unpaid overtime compensation, or their unpaid amounts due under [the wage payment provisions], as the case may be, plus interest."[444] Unlike the FLSA, which only allows employees to claim unpaid minimum wages and unpaid overtime,[445] the WHA allows employees to recover "promised wages."[446] Promised wages include the forms of compensation listed under N.C. Gen. Stat. § 95-25.2(16): "sick pay, vacation pay, severance pay, commissions, bonuses, and other amounts promised when the employer has a policy or a practice of making

[439] § 95-25.1(1).
[440] § 95-25.1.
[441] WAGE AND HOUR BUREAU, N.C. DEP'T OF LABOR, WAGE AND HOUR PACKET iii (2010), http://www.nclabor.com/wh/Wage_Hour_Act_Packet.pdf [hereinafter WAGE AND HOUR PACKET]; 13 N.C. ADMIN. CODE 12 .0501(a) (2011) ("G.S. 95-25.14(a)(1) provides an exemption from the minimum wage, overtime, youth employment and related record keeping requirements of the Wage and Hour Act for any person employed in an "enterprise" as defined by the F.L.S.A. Persons who are not employed by an "enterprise", but who are subject to the F.L.S.A. because they are engaged in commerce or in the production of goods for commerce are subject to both the F.L.S.A. and the Wage and Hour Act, unless otherwise exempted.").
[442] WAGE AND HOUR PACKET, *supra* note 441, at iii.
[443] *See* 13 N.C. ADMIN. CODE 12 .0501(a) (2011).
[444] N.C. GEN. STAT. § 95-25.22(a) (2011).
[445] 29 U.S.C.§ 216(b)-(c)(2011).
[446] *See Promised Wages Including Benefits*, N.C. DEP'T OF LABOR, http://www.nclabor.com/wh/fact%20sheets/promisedwages.htm (last visited May 1, 2011).

such payments."[447] As under the FLSA, employees are entitled to recover "liquidated damages in an amount equal to the amount found to be due."[448]

Employees who wish to recover unpaid wages from an employer may file a complaint with the North Carolina Department of Labor's Wage and Hour Bureau (WHB) or may file a private action in court.[449] An employee may not file a complaint with the North Carolina Department of Labor (NCDOL) if he or she has already pursued the matter in court, or if his claim is less than fifty dollars.[450] An employee may pursue an action in court after filing a complaint with the NCDOL if the NCDOL is not able resolve his complaint.[451]

c. The Employee/ Independent Contractor Distinction

In order to be covered by either the FLSA or the WHA, a day laborer must be considered an "employee" under the statutes.[452] It is in the interest of an employer to classify a worker as an independent contractor rather than an employee because independent contractors receive fewer protections under law. The North Carolina legislature incorporated the language of the FLSA in the WHA. Both the FLSA and the WHA define employee as "any individual employed by an employer,"[453] and define employ as "to suffer or permit to work."[454] Under the North Carolina Administrative Code, the NCDOL must defer to federal interpretations in interpreting the

[447] Scope of Promised Wages, 13 N.C. ADMIN. CODE 12.0803 (2011).
[448] § 95-25.22(a)(1).
[449] *How to File a Wage Complaint*, N.C. DEP'T OF LABOR, http://www.nclabor.com/wh/fact%20sheets/wagecomplaint.htm (last visited May 1, 2011).
[450] *Id*.
[451] *Id*.
[452] *See Employment Relationship under the Fair Labor Standards Act (FLSA) and under the North Carolina Wage and Hour Act (WHA)*, N.C. DEP'T OF LABOR, http://www.nclabor.com/wh/fact%20sheets/erfs.htm (last visited May 1, 2011) [hereinafter *Employment Relationship*].
[453] 29 U.S.C. § 203(e)(1)(2011); N.C. GEN. STAT. § 95-25.2 (4).
[454] 29 U.S.C. § 203(g); N.C. GEN. STAT § 95-25.2 (3).

WHA.[455] Courts therefore conduct the same analysis in determining whether an employment relationship exists under either the FLSA or the WHA.[456]

The Supreme Court has developed a multifactor test that considers "economic realities" in determining whether a worker is an employer or an employee under the FLSA and other federal employment statutes.[457] Generally, courts consider the following factors in determining whether an employment relationship exists:

> (1) the extent to which the services in question are an integral part of the "employer's" business; (2) the amount of the "employee's" investment in facilities and equipment; (3) the nature and degree of control retained or exercised by the "employer"; (4) the "employee's" opportunities for profit or loss; (5) the amount of initiative, skill, judgment or foresight required for the success of the claimed independent enterprise; and (6) the permanency and duration of the relationship.[458]

Each day laborer's employment experience is unique from another, but most work under the direction and control of their employers and complete work that is "an integral part of the employer's business." They often work for an hourly rate, and they do not have an opportunity to make a profit or loss. Some are unskilled and many work for the same employer for an extended period of time.[459] For these reasons, the economic realities test will usually weigh in favor of classifying day laborers as employees under the FLSA and

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[455] 13 N.C. ADMIN. CODE 12 .0103(2011) **("**Where the legislature has adopted the language or terminology of the Fair Labor Standards Act (F.L.S.A.) for the purpose of facilitating and simplifying compliance by employers with both the federal and state labor laws, or has incorporated a federal act by reference, the Department of Labor will look to the judicial and administrative interpretations and rulings established under the federal law as a guide for interpreting the North Carolina law. Such federal interpretations will therefore be considered persuasive and will carry great weight as a guide to the meaning of the North Carolina provisions and will be controlling for enforcement purposes.").

[456] *See Employment Relationship*, *supra* note 452.

[457] *See, e.g., Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

[458] Debra T. Landis, *Determination of "independent contractor" and "employee" status for purposes of § 3(e)(1) of the Fair Labor Standards Act (29 U.S.C.A. § 203(e)(1))*, 51 A.L.R. FED. 702, *2 (West 2011).

[459] *See* VALENZUELA, JR. ET AL., *supra* note 327, at 9.

the WHA.[460] It would be more difficult for a day laborer who has specialized skills and provides his own tools to argue that he is an employee rather than an independent contractor.[461]

d. Current Avenues for Claiming Wages

i. North Carolina Department of Labor

The Wage and Hour Bureau (WHB) of the NCDOL takes wage complaint information through its call center.[462] Jim Taylor, director of the WHB, has acknowledged that day laborers may qualify for relief as employees under the WHA, that the Department of Labor considers the immigration status of complainants irrelevant, and that the lack of status is not a bar to enforcing rights under the statute.[463] Despite the stated policies of the NCDOL toward immigrant complainants, limited resources and staff prevent the NCDOL from responding adequately to the claims of day laborers. Since 2003, the NCDOL has received an average of around 95,000 calls per year.[464] In 2010, the WHB opened 5,647 cases and recovered wages from 2,248 workers without litigation.[465] Although not everyone who initially contacts the WHB concerning an employment issue qualifies for relief under WHA, the statistics in the NCDOL's *2010 Annual Report* show that an employee's chance of having his or her wage dispute resolved by the

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[460] *See, e.g., Employment Relationship, supra* note 452 (outlining the factors considered by the Supreme Court in determining whether an employment relationship exists under the FLSA).
[461] *Id.*
[462] The number for the call center is 1-800-NC-LABOR (1-800-625-2267). *See How to File a Wage Complaint, supra* note 449.
[463] Julian March, *Group asks Carrboro aldermen to criminalize 'wage theft*,' THE CHAPEL HILL NEWS, Jan.24, 2010, http://www.chapelhillnews.com/2010/01/24/54798/group-asks-carrboro-aldermen-to.html ("[Taylor] said a temporary worker may be considered an employee if the supervisor takes them to a job site, tells them when to arrive and leave, and what jobs to work on.").
[464] N.C. DEP'T OF LABOR, 2010 ANNUAL REPORT 14 (2010), http://www.nclabor.com/news/2010_Annual_Report.pdf [hereinafter 2010 ANNUAL REPORT].
[465] *Id.* at 14-15.

NCDOL is very slim.[466] Compared to other North Carolina residents, day laborers are even less likely to receive relief from the NCDOL because of the informal nature of the relationship between day laborers and their employers. It is more difficult for day laborers to be able to provide employer contact information to the WHB, and day laborers are less likely to have documentation of promises made by employers.

> The North Carolina Wage and Hour Act (WHA) establishes minimum wage and overtime requirements for employers and requires employers to "pay every employee all wages and tips accruing to the employee on the regular payday."

Five individuals collect information in the WHB call center, and only two of these individuals speak Spanish.[467] While the NCDOL website provides extensive resources in Spanish about workplace safety and health, there is only one document in Spanish related to the WHB that summarizes the WHB and the WHA.[468] The document has not been updated with the current minimum wage.[469] There is no mention of the right to file a complaint in the WHB document, and there are no Spanish resources on the website describing the procedure for filing a wage and hour complaint. Many day laborers have recently immigrated to North Carolina and are not familiar with their employment rights. Without access to resources that explain their employment rights in Spanish or their native language, Spanish-speaking day laborers will not know that they can take action to claim unpaid wages.

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[466] *Id.*
[467] *Id.* at 14.
[468] *See Oficina de Pagos y Horas*, N.C. DEP'T OF LABOR, http://www.nclabor.com/spanish_site/Rights%20and%20Responsibilities/span_wageandhour.pdf (last visited May 1, 2011).
[469] The current minimum wage in North Carolina is $7.25. The Spanish document lists $6.55.

ii. Federal Remedies: U.S. Department of Labor or Suit

Workers protected by the FLSA may file an administrative complaint with the U.S. Department of Labor's (US DOL) Wage and Hour Division or file a private suit in federal court to recover back pay and liquidated damages from employers.[470] The US DOL sets out guidance for federal enforcement under FLSA and notes that all employees of certain businesses whose "workers engaged in interstate commerce, producing goods for interstate commerce, or handling, selling, or otherwise working on goods or materials that have been moved in or produced for such commerce by any person, are covered by the FLSA."[471] The Act also includes recordkeeping regulations that mandate employers to keep records on wages, hours, and other specified items.

iii. Small Claims Court

Day laborers who choose to file a private action against an employer for unpaid wages will likely do so pro se in small claims court. Small claims courts are generally less formal than District Courts and Superior Courts.[472] Small claims courts in North Carolina handle civil disputes involving less than five thousand dollars, and cases are decided by magistrates.[473] Forms and procedures for small claims courts are uniform throughout the state.[474] Complaint forms are only available in English. The Wake County Small Claims Court website states that "[t]he Clerk's Office may not instruct you

[470] *See Handy Reference Guide to the Fair Labor Standards Act*, 17 (2010). A worker may not file suit, however, if she has accepted back wages under the supervision of the Wage and Hour Division, or if the Secretary of Labor has already filed a lawsuit to recover such wages. *Id.* http://www.dol.gov/whd/regs/compliance/hrg.htm
[471] *Id.*
[472] *Civil Division: Small Claims Court*, WAKE COUNTY CLERK OF COURT, http://web.co.wake.nc.us/courts/smallclaims.html (last visited May 1, 2011).
[473] *Id.*
[474] *See How to File a Wage Complaint*, *supra* note 449.

on how to fill out these forms,"[475] and the Mecklenburg County Small Claims Court website directs visitors who want additional information about small claims court to the Legal Aid of North Carolina's "Guide to Small Claims Court."[476] Legal Aid's guide is available in Spanish, and it gives directions in Spanish for filling out the English complaint forms.[477] The North Carolina Bar Association published a bulletin in both English and Spanish that outlines how to file for unpaid wages in small claims court and also outlines the court procedures.[478] There is only a limited amount of guidance available for English-speakers to assist them in filing a complaint and pursuing an action in small claims court, and even less information is available for Spanish speakers.

> The absence of interpreters in small claims courts prevents day laborers from adequately representing themselves and presenting their full cases to the court.

Even if a day laborer is able to inform himself of small claims procedures, the nature of the day labor employment relationship can hinder his ability to properly file a complaint. Often, day laborers do not know their employers' full names or addresses. They must know this information in order to file a complaint.[479] Day laborers who work for businesses must know whether or not they are employed by a

[475] *Civil Division: Small Claims Court*, *supra* note 472.
[476] *About Small Claims Court*, THE NORTH CAROLINA COURT SYSTEM, http://www.nccourts.org/Courts/Trial/SClaims/Default.asp (last visited May 1, 2011).
[477] *Una Guia Para El Tribunal de Reclamos Menores*, LEGAL AID OF NORTH CAROLINA, http://www.legalaidnc.org/public/learn/publications/Small_Claims_Court_ESPANOL/default.aspx (last visited May 1, 2011).
[478] NORTH CAROLINA BAR ASSOCIATION, MAKING SURE YOU GET PAID: HOW TO ENFORCE YOUR RIGHTS TO YOUR WAGES, http://www.lawhelp.org/documents/264571Making%20Sure%20You%20Get%20Paid.pdf?stateabbrev=/NC/.
[479] *A Guide to Small Claims Court: Chapter 2 -If You Are the Plaintiff-How to File Your Claim*, LEGAL AID OF NORTH CAROLINA http://www.legalaidnc.org/public/learn/publications/small_claims_court/Small_Claims_Chapter_2.aspx (last visited May 1, 2011).

registered corporation.[480] If a day laborer is suing a registered corporation, he must know the correct name of the corporate entity as required by the complaint form.[481] In order to fill out the complaint form and summons, a day laborer may have to contact the Secretary of State or a Register of Deeds in order to obtain necessary information.[482]

A day laborer who is able to successfully file a complaint faces even more obstacles in obtaining unpaid wages. Small claims courts do not provide interpreters. If a day laborer seeks unpaid wages in small claims court but does not speak English, he will have to provide his own interpreter or go through the trial without one. If he is able to argue his case and obtains a judgment in his favor, his employer may refuse to pay it.[483] Day laborers are often unaware of how to enforce judgments and as a result, they may leave small claims court without receiving the wages they are owed, even if they receive a judgment in their favor.

e. Making Wage Theft Remedies More Accessible to Day Laborers

The day laborer population is one that is hesitant to come forward and challenge employer abuses. Without access to information about their rights under state and federal law and the steps to take in asserting their rights, day laborers will continue to be exploited by employers. Because the majority of day laborers are Latino, this group would benefit from greater access to Spanish language resources on how to claim unpaid wages. A large portion of residents in North Carolina would also benefit from the publication of such information in

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[480] *Id.*
[481] *Id.*
[482] *A Guide to Small Claims Court: Appendix*, LEGAL AID OF NORTH CAROLINA, http://www.legalaidnc.org/public/learn/publications/small_claims_court/Small_Claims_Appendix.aspx#BusinessesasDefendents (last visited May 1, 2011).
[483] *Id.*

Spanish. The Hispanic population in North Carolina continues to grow and is currently estimated at around 800,000 people, or eleven percent of the state's population.[484] Both day laborers and members of the Hispanic community who are limited English proficient should be informed of their rights as employees in the U.S. and have the same opportunity to file complaints with the WHB or pursue actions in small claims court without language preventing access to these channels.

The absence of interpreters in small claims courts prevents day laborers from adequately representing themselves and presenting their full cases to the court. The interpreter issue is a problem throughout the North Carolina civil court system. North Carolina does not recognize the right to a court interpreter in civil cases. The IRHP Clinic recently published a report on the problems surrounding the inadequate provision of interpreters in North Carolina courts.[485] The report found that North Carolina's interpreter program failed to meet national standards, did not provide limited English proficient individuals with meaningful access to courts, and raised constitutional concerns.[486] It also found that North Carolina's court interpretation system violated Title VI of the 1964 Civil Rights Act.[487] Without interpreters available to limited English proficient individuals, the court system will not reach an ideal level efficiency or provide limited English proficient individuals equal access to justice.

[484] Jon Ostendorff, *Jobs, climate help North Carolina's 18.5% Census jump*, USA TODAY (Mar. 3, 2011), http://www.usatoday.com/news/nation/census/2011-03-02-north-carolina-census_N.htm.
[485] IMMIGRATION AND HUMAN RIGHTS POLICY CLINIC, UNC SCHOOL OF LAW, AN ANALYSIS OF THE SYSTEMIC PROBLEMS REGARDING FOREIGN LANGUAGE INTERPRETATION IN THE NORTH CAROLINA COURT SYSTEM AND POTENTIAL SOLUTIONS (2010).
[486] *See id.*
[487] *See id.*

f. What Municipalities Can Do to Help Day Laborers With Civil Claims For Wages

Municipalities can help improve the conditions of day laborers through both legislative initiatives and community outreach programs that focus on the wage theft problem. Municipalities may deter employers from committing wage theft with harsher civil penalties, the criminalization of wage theft, or stronger enforcement of already existing laws. Municipalities may bring deficiencies in the claims process to the attention of state employment agencies, lobbying on behalf of their residents and highlighting the injustices suffered by day laborers. Municipalities have the ability to make information about employment rights and wage theft remedies more accessible to the day laborer community by forming alliances with local organizations that provide services to immigrants and low-income workers. Also, as discussed below in Section V, a municipality may support the day laborer community through the creation of a day labor worker center. Worker centers promote employer accountability and provide a place for advocacy and education.

> The day laborer population is one that is hesitant to come forward and challenge employer abuses. Without access to information about their rights under state and federal law and the steps to take in asserting their rights, day laborers will continue to be exploited by employers.

2. Criminalizing Wage Theft in North Carolina

Nonpayment of wages is stealing,[488] and as discussed in the previous Subsection, nearly half of all day laborers have been victimized by wage theft.[489] In the context of the community

[488] NELP GUIDE, *supra* note 362, citing Rita J. Verga, "An Advocate's Toolkit: Using Criminal 'Theft of Service' Laws To Enforce Workers' Right to be Paid," 8 N.Y. City L. Rev. 283 (2005

integration project, one solution that coalition members and IHRC have considered is the possibility of criminalizing wage theft. While at the municipal level, within the framework of North Carolina municipal law, criminalizing wage theft does present some challenges, it is an important solution to consider. This Subsection explores the research question: Can and Should Wage Theft be criminalized in North Carolina? First, this Subsection considers arguments for and against criminalization of wage theft. Second, this Subsection examines existing state legislation which could possibly be used to apply criminal charges to employers who commit wage theft. Finally, this Subsection takes an analytical look at the possibility of criminalizing wage theft in North Carolina municipalities by enacting a municipal ordinance, and also briefly considers other alternatives for criminalizing or heightening punishment of wage theft at the municipal and state levels.

a. Advantages and Considerations to Criminalizing Wage Theft

While criminalizing wage theft does have some drawbacks that should be considered, on the whole, criminalization of wage theft can have benefits for day laborers, government, and the community. The National Employment Law Project [NELP] resource for advocates discussed in Section II suggests a variety of strategies which may be used to combat wage theft.[490] In its discussion on laws criminalizing wage theft, NELP emphasizes that criminalizing wage theft can help to change employer behavior.[491] It can also raise public awareness of wage theft as a serious problem. Enforcement of wage theft laws can be accomplished through partnerships with law enforcement officers who come to realize through carrying out their law enforcement

[489] *See* ABEL VALENZUELA, JR. ET AL., *supra* note 327, at 14 (finding that 49% of day laborers reported at least one instance of unpaid wages and 48% reported at least one instance of being underpaid from the agreed upon wages).
[490] *See generally*, NELP GUIDE, *supra* note 362.
[491] NELP GUIDE, *supra* note 362.

duties that punishing dishonest employers is part of their responsibility to protect the community.[492] Finally, it can be a source of revenue for governments.[493] Not only can violators be assessed fines,[494] but also, criminalizing wage theft can help to curb employment tax avoidance.[495] A study in New York found that bringing employers into compliance with wage laws would bring $427 million of revenue to the state for this reason.[496]

As NELP points out, there are other considerations and implications in pursuit of criminalizing or heightening the criminal penalties for wage theft. For example, law enforcement officers and prosecutors must be willing participants in the effort.[497] Furthermore, criminalizing wage theft does not give workers a way to recover wages or other damages from the employer, and workers are not in the position to bring criminal actions against employers; that decision is left to prosecutors.[498] Finally, not all legislators are ready to accept that wage theft is a crime so encouraging legislators at either the state or local level to enact criminalizing legislation can present difficulty if this is the case.[499]

b. Existing North Carolina Legislation that could potentially criminalize wage theft

While North Carolina law does not expressly criminalize wage theft, the North Carolina Wage and Hour Act does impose criminal penalties for certain egregious employer action, and

[492] *Id.* at 34-35.
[493] *Id.* at 35.
[494] *Id.* at 34.
[495] *Id.* at 35.
[496] *Id.* (citing Amy Traub and Andrew Friedman, "Workers Deserved to be Paid," Albany Times Union, April 5, 2010, available at http://www.drummajorinstitute.org/library/article.php?ID=7387, accessed December 10, 2010).
[497] NELP GUIDE, *supra* note 362, at 34-35.
[498] *Id.*
[499] *Id.*

the North Carolina false pretenses statute can also be interpreted to criminalize the behavior which constitutes wage theft.

In its guide, NELP offers suggestions for waging a campaign to criminalize wage theft that function at the state level and do not necessarily apply to municipalities.[500] According to NELP, North Carolina is among the 33 states which already "have criminal penalties for unpaid wages in their state wage and hour laws."[501] However, in North Carolina, the general "unpaid wages" recovery provision does not include criminal provisions. As discussed in the preceding Subsection, the North Carolina Wage and Hour Act is codified at N.C. General Statute Section 95, Article 2A.[502] Under Section 95-25.22, entitled Recovery of Unpaid Wages, employers who violate N.C. Wage and Hour laws related to minimum wage, overtime, and wage payment are "liable to the employee . . . in the amount" unpaid, plus interest.[503] Additionally "liquidated damages" may be recovered in some instances where the employer fails to demonstrate that violation was in good faith,[504] and attorneys' fees may also be awarded.[505]

In the preceding paragraph of the Act, Section 95-25.21, entitled "Illegal Acts," it is a Class 2 misdemeanor for "any person to interfere unduly with, hinder, or delay the Commissioner or any authorized representative in the performance of official duties or refuse to give the Commissioner or his authorized representative any information required for the enforcement" of the N.C. Wage and Hour laws.[506] Moreover, it is also a Class 2 misdemeanor for "any person to make any statement or report, or keep or file any record pursuant to this

[500] *Id.* at 34.
[501] NELP GUIDE, *supra* note 362, at 35.
[502] N.C. GEN. STAT. § 95-25.
[503] § 95-25.22(a).
[504] § 95-25.22(a1).
[505] § 95-25.22(d).
[506] § 95-95.21(a), (c).

Article or regulations issued thereunder, knowing such statement, report, or record to be false in a material respect."[507] Thus, while failure to pay wages in violation of the N.C. Wage and Hour laws is not a crime, affirmative acts of deception, such as keeping false records of employees' hours, could be a criminal act. Failure to keep records, however, is not expressly included in the language of this statute.

Another statute under which criminal sanctions in North Carolina could theoretically apply in the circumstances of wage theft is N.C. General Statute 14-100, which prohibits obtaining property by false pretenses.[508] Under this statute, persons who:

> knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such . . . thing of value . . . shall be guilty of a felony.[509]

The elements of this crime are "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another."[510] Of these, it appears that the most difficult element to prove would be the intent of the employer in the case of wage theft to deceive the employee. First, in the case of wage theft, applying this statute, the employer must *know* the offer of payment being made to the prospective to be false at the time this representation is made, and further, the statement must be communicated with actual intent to deceive the worker.[511] This intent can be inferred through circumstantial evidence,[512] including the conduct of

[507] § 95-95.21 (b), (c).
[508] N.C. GEN. STAT. § 14-100.
[509] § 14-100(a).
[510] *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980); *State v. Parker*, 254 N.C. 268, 284, 552 S.E.2d 885, 897 (2001).
[511] *See, e.g., Parker*, 354 N.C. 268, 553 S.E.2d 885.
[512] *See State v. Bennett*, 84 N.C. App. 689, 691, 353 S.E.2d 690, 692 (1987).

the accused, events surrounding the alleged criminal activity.[513] Nevertheless, the standard is high. For example, in the N.C. appellate case *State v. Bennett*, an insurance agent who was not licensed to sell insurance for a particular company, who took payment for the policy, then had a co-worker who *was* licensed to sell this particular insurance process the policy payment, lacked the requisite intent for her actions to rise to the level of a crime under the false representations statute.[514] By this standard, it seems that if an employer did have the intent to pay a day laborer eventually, even if not at the agreed upon time or in the agreed upon manner, that employer would likewise lack the requisite intent.

In the context of wage theft, demonstrating an employer's pattern of failure to pay day laborers could be a way to establish necessary intent. Evidence that the defendant has committed other crimes, or crimes not charged, but chargeable, is admissible when that evidence "tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission."[515] For example, in a case against defendants who offered to sell wholesale items to a convenience store at substantially below the regular cost, evidence from other storeowners that the defendants had behaved similarly was admissible to show criminal intent.[516] Likewise, multiple day laborers could testify as to a particular employer's failure to pay workers to this end.

One North Carolina case which actually involves false pretense in the context of employment is *State v. Hines.*[517] In this case, Ralph Hines, employee of the Wilson Bonding Company and the State Treasurer of the North Carolina Association of Professional Bondsmen, offered a position to Karen Etheridge under the false pretenses

[513] *Id.*
[514] *Id.*
[515] *State v. Wilburn*, 57 N.C. App, 40, 45, 290 S.E.2d 782, 785 (1982).
[516] *Id.*
[517] 36 N.C. App. 33, 243 S.E.2d 782 (1978).

that Etheridge was to be employed by the state of North Carolina.[518] Hines also wrote a check to Ethridge to pay for services she had performed, and this check was returned for insufficient funds; however, the false pretenses of the state employment, rather than the check which bounced, formed the basis for the criminal charges under the false pretense statute.[519] Still, *State v. Hines* demonstrates that it is possible to prosecute someone under N.C.G.S. 14-100 for false statements regarding another person's employment to obtain valuable services from that person.

In sum, it does seem possible to apply the false pretense statute to prosecute individuals who hire workers, receive benefits from these workers, and then refuse to pay them, for obtaining this service by false pretenses. However the heightened requirement for intent may make this statute challenging to prove in the case of day laborers and wage theft.

c. Enacting Legislation Criminalizing Wage Theft

Municipal ordinances that include criminal sanctions with respect to wage theft are not without precedent. NELP's guide cites recent efforts by advocates in New Orleans to pass local legislation which would require police to issue summons against employers in wage theft cases and provide protection to workers against retaliation.[520] In discussing the current general trend to attack wage theft problem at the local level, NELP's guide suggests considering a number of issues:

> Some questions that coalitions should consider in exploring the feasibility of a local wage theft ordinance campaign include: Have cities in my state historically had the legal authority to enact ordinances that punish theft? Is there a risk that

[518] *Id.*
[519] *Id.*
[520] NELP GUIDE, *supra* note 362, at 35-36.

> the state legislature might attempt to step in and block an ordinance if one were enacted? What level of staffing does the city government have, and could it realistically implement a new law that gave it authority to punish wage theft?[521]

In the context of a criminal wage theft ordinance, the answers to these questions for North Carolina municipalities shed light on the challenges to enacting a municipal ordinance as a solution for day laborers who are victims of wage theft. This determination requires reflection on the legal analysis explored in Part One of this project concerning the extent and nature of municipal authority in North Carolina to enact local ordinances.[522] As discussed in Part One of this project, municipalities in North Carolina do not have unlimited ordinance-making powers, but they do have power to act that arguably exceeds that of traditional Dillon's Rule states.[523]

Under N.C. General Statute Section 160A-174(a), municipalities in North Carolina are granted a general ordinance making power.[524] This statute states: "[a] city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions detrimental to the health, safety or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances."[525] However, Section 160A-174(b) provides certain exceptions, including that municipalities are prohibited from making an ordinance if "(5) The ordinance purports to regulate a field for which a state or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme

[521] *Id.* at 15.
[522] *See supra* Part I. *See also* Bluestein ,*supra* note 20, and Bluestein, *supra* note 12.
[523] *See supra* Part I, Section I.
[524] N.C. GEN. STAT. § 160A-174(a).
[525] § 160A-174.

to the exclusion of local regulation,"[526] or if "(6) The elements of an offense defined by a city ordinance are identical to the elements of an offense defined State or federal law."[527]

It seems reasonable that the passing an ordinance criminalizing wage theft would "define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety or welfare" of a municipality's citizens, consistent with Section 160A-174(a).[528] As discussed previously in Part Two, wage theft threatens many different members of a community, including the workers who are victims, as well as employers who *do* pay day laborers, and, indirectly, workers whose wages are driven down due to wage theft. The challenge here is to overcome the two exceptions referenced in the statute.

As discussed in NELP's guide, legislation punishing wage theft could be written in two different ways: first such legislation could establish wage theft as a crime under penal code, including an element of intent. [529] Alternatively, it could impose harsher penalties for nonpayment of wages, without the inclusion of an element of intent.[530] Under the first alternative, the ordinance would have to be crafted so that it would not be deemed as duplicative of the obtaining property by false pretenses criminal statute under N.C. General Statutes 14-100, discussed previously.[531] One might argue that given the

[526] § 160A-174(b)(5).
[527] § 160A-174(b)(5), (6).
[528] § 160A-174(a).
[529] NELP GUIDE, *supra* note 362, at 34.
[530] *Id*.
[531] N.C. GEN. STAT. § 14-100. Many states have "theft of services" statutes which essentially criminalize the elements of wage theft. *See, e.g.*, 18 Pa. Cons. Stat. § 3926. However, it is worth noting that under the Pennsylvania statute, tying the act of wage theft to the statute is much less difficult, and that the element of intent may be more readily applied. *Id.* Under Pennsylvania law, "absconding" without paying someone who has delivered a service gives "rise to the presumption that the service was obtained by deception as to intent to pay." § 3926(a)(4). *See also*, NJ Crim. Code § 2C:20-8 (same). No such presumption exists under North Carolina law.

previously discussed difficulties making the false pretenses statute work for wage theft, an ordinance which expressly criminalized wage theft would not be duplicative.

Additionally, such an ordinance would have to be drafted so that it was not deemed "to regulate a field for which a state or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme" because the N.C. Wage and Hour Act clearly provides civil law remedies, including additional damages when failure to pay is in bad faith, and criminal penalties in the case of fraudulent recordkeeping or deceitful behavior under investigation.[532] Advocates would need to demonstrate the differences between the Wage and Hour Act's criminal provisions and the elements involved in wage theft, and that due to the difficulty in making a typical wage theft case fit within the intended criminalized conduct under the false pretenses statute, this area has not been foreclosed for municipal criminalization by ordinance. These challenges are not insignificant and would require precise legislative drafting and political will.[533]

Turning to the second alternative, an ordinance enacting harsher penalties for simple nonpayment of wages without adding an element of intent might be a possible approach, but without a *mens rea* element it may be difficult to establish criminal-level penalties by municipal ordinance. This kind of ordinance might face challenges under N.C. General Statute Section 160A-174(b)(5) and (b)(6) because of the existence comprehensive North Carolina statutory scheme under the N.C. Wage and Hour Act, and

[532] *See* N.C. GEN. STAT. § 95-25.21-22. See also previous discussion about applicability of N.C. Wage and Hour Laws in this Subsection, and Subsection B of Section IV.
[533] Even if a criminal ordinance could be enacted, a criminal element of intent similar to that under North Carolina's false pretenses statute, even in the context more specifically directed at nonpayment of wages, would set a standard that would be difficult to prove in most cases.

because the elements for non-payment of wages could be viewed as duplicative of N.C. General Statute Section 95-25.22.[534] However, N.C. General Statute Section 160A-174(b) concludes by stating "[t]he fact that a State or federal law, standing alone, makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition."[535]

In interpreting this statute, the North Carolina Supreme Court has held that an ordinance may not create a "new and independent framework for litigation."[536] Thus, an ordinance adding criminal penalties to the provisions of N.C. General Statute 95-25.22 or otherwise substantially changing the punitive structure of the N.C. Wage and Hour Act would have to be consistent with the existing framework. However, under the N.C. Wage and Hour Act, there are already criminal penalties in place for some employer actions, so one might argue that this creates a precedent for criminal sanctions in the context of an otherwise civil employment law scheme.

Alternatively, as discussed in the Subsection B of Section IV, a civil ordinance could be enacted that heightened civil penalties in some way, such as by imposing higher punitive damage levels. If the goal is to scare employers into compliance with employment law concerning wage payment, an ordinance which simply increases punitive damages without the possible threat of jail time and law enforcement

[534] *See* N.C. GEN. STAT. § 95-25.22.
[535] N.C. GEN. STAT. § 160A-174(b).
[536] *See* Williams v. Blue Cross Blue Shield of North Carolina, 357 N.C. 170, 581 S.E.2d 415 (2003) (holding that an employment discrimination ordinance which gave citizens subpoena power and the right to sue in the absence of a finding by the county human rights commission, and the right to seek an injunction against an employer and recover backpay, compensatory and punitive damages went beyond requiring a higher standard of conduct, substantially exceeding the leeway permitted) ; *see also,* Greene v. City of Winston-Salem, 213 S.E.2d 231, 287 N.C. 66 (1975), in which an ordinance enacted by a city requiring sprinkler systems in high-rise buildings, where the state had not made that unlawful, did not fall within the intended meaning of N.C. GEN. STAT. § 160A-174(b), allowing municipalities to impose higher standards of conduct than the state).

involvement may simply not have enough teeth to achieve this objective, but it could still be a step in the right direction. Additional possibilities could include passing state statutory law expressly criminalizing wage theft or amending the N.C. Wage and Hour statute to add additional criminal provisions, passing state law heightening civil remedies in wage theft cases, or using test cases to challenge existing law and determine the bounds of the false pretenses statute.

Enacting a municipal ordinance that criminalizes wage theft requires consideration of many challenges, skilled legislative drafting and political will. But the effort to create such an ordinance in the context of a community integration project may have positive effects. Existing law in North Carolina does not completely foreclose the possibility of enacting this kind of an ordinance. Thus, the argument that criminalizing wage theft may be one potential solution should be considered, along with other ideas. Bringing the idea out can help not only to test and expand the boundaries of municipal power, but also to popularize the idea of wage theft as a crime in the media, and build public support for state legislation that could criminalize or enact sharper penalties for actions by employers that constitute wage theft.

C. Worker Centers as a Possible Wage Theft Solution: A Legal Analysis

This Section looks specifically at a day labor worker center as a potential solution to the wage theft problem and other problems faced by day laborers in Carrboro and Chapel Hill. Subsection A of this Section first provides a brief overview of the worker center phenomenon in the United States and a cursory look at the services which worker centers are capable of providing, the successes of the centers in affecting positive change for day laborers and other low

income immigrant workers, and finally the demonstrated weaknesses of worker centers. Subsection B of this Section discusses the specific components which a proposed worker center in Carrboro might include and how this could provide benefit to the day laborer community. Subsection C of this Section briefly examines concerns raised by and on behalf of the day laborers as well as concerns raised by community leadership of Carrboro and Chapel Hill, in the context of leading studies on worker centers in the United States. Finally, Subsection D of this Section responds to the question: "How do worker centers comply with the Immigration Reform and Control Act (IRCA)?"

1. An Overview of the Worker Center Phenomenon in the United States

In recent years, workers centers have emerged in cities and towns throughout the United States as strategic locations for low-wage workers to organize.[537] In 2006, Janice Fine published a comprehensive book on the worker center phenomenon, entitled *Worker Centers: Organizing Communities at the Edge of the Dream,* which looks in depth at the successes and struggles of a number of worker centers across the U.S.[538] For the purpose of her cross-country case study, Fine has defined worker centers as "community-based and community-led organizations that engage in a combination of service, advocacy, and organizing to provide support to low wage workers."[539] The majority of these centers work specifically with immigrants.[540] This Subsection looks at the worker center phenomenon, first summarizing the variety of services that worker centers can provide in light of the research done by Fine and other scholars, and second,

[537] JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 5 (2006). "Worker centers have emerged as central components of the immigrant community infrastructure, and, in the combination of services, advocacy and organizing they undertake, are playing a unique role in helping immigrants navigate the worlds of work and legal rights in the United States. They are gateway organizations that are meeting immigrant workers where they are and providing them with a wealth of information and training." *Id.* Worker centers "have grown from five centers in 1992 to at least 139 in over 80 U.S. cities, towns and rural areas across 32 states." Fine, *supra* note 537, at 1.
[538] *See generally,* FINE, *supra* note 537.
[539] *Id.* at 3.
[540] *Id.* (stating that 122 of the 143 centers she identified worked with immigrants).

examining the advantages of and challenges faced by worker centers which function as hiring halls.

a. Services Provided by Worker Centers

Worker centers are capable of delivering a variety of services and opportunities to the immigrant population which would otherwise be unavailable, and they can also unify the voices of the worker community for the purposes of improving worker conditions.[541] Among other services, worker centers can provide legal clinics,[542] a platform for impact litigation and lobbying,[543] ESL and other classes, job training,[544] health services,[545] and in some instances other services, like check wiring, emergency lending,[546] and, as is the case at CASA de Maryland, identity cards which members of the worker center can present to local banks, schools and police officers.[547]

Worker centers can also provide an excellent vehicle for community integration. When they function well, worker centers can provide a voice to the worker community, and can negotiate to affect positive change for these workers by partnering with other organizations nationally and working locally with community officials on specific goals.[548] Fine cites many specific

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[541] *Id.*, at 2, 5. Worker centers are actually an ideal platform for a broader reform agenda, since work is the "locus" of immigrant life, and thus the problems immigrants experience generally revolve around this. *Id.* at 11.
[542] *See id.* at 74-87
[543] *See id.* at 88-90
[544] *See id.* at 91-92
[545] *See id.* at 92-93
[546] *See id.* at 93.
[547] *Id.*, at 235.
[548] *Id.*, at 181.

> At the centers themselves, immigration and employment struggles are almost always intertwined. When local residents, businesses or municipalities move to restrict day laborers from seeking employment, or police make arrest at shape up sites, references to them as "illegal aliens" or claims about their immigration status are always a major part of the public conversation. As the debate on immigration reform becomes more contentious, centers are often called on as the local spokespersons of a pro-immigrant point of view, speaking in opposition to anti-immigrant policies and practices and discussing the unfairness of the current immigration system.

Id. "This establishes a foundation on which a local campaign of support for federal immigration reform, and one that draws support beyond the 'usual suspects,' can be launched." *Id.*

successes which worker centers have had. One kind of success is that worker centers have been able to improve relationships with specific employers. For example, the Garment Worker Center successfully targeted clothing retailer Forever 21 and ultimately won a law suit on behalf of workers. As a result, numerous employees were able to receive paid back wages and the company agreed to improve work conditions.[549] Likewise, the Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) was ultimately able to improve hiring conditions for day laborers by working with the City Councilor of L.A to pressure Home Depot into forming a partnership with the city.[550] As a result of media attention and negotiations, a hiring hall was constructed in the Home Depot parking lot, and CHIRLA continues to negotiate with Home Depot about possibilities for similar, broader, nation-wide day laborer worker center partnerships.[551]

When day laborers and their advocates work closely with local political figures, they can often produce positive results.[552] In Omaha, Nebraska, Omaha Together One Community (OTOC) worked together with a state Republican leader, Governor Mike Johanns, who agreed to investigate the meat packing industry in the area.[553] When his investigators uncovered seriously unsafe working conditions and realized that workers were too intimidated to report these issues, Governor Johanns established a Workers' Bill of Rights for Nebraska and required all workplaces to post this Bill of Rights. Moreover, he created a new position in the Nebraska state department of labor called "meatpacking industry workers rights coordinator."[554] Similarly, a

[549] *Id.*, at 103-106.
[550] *See id.* at 107-109.
[551] *See id.*
[552] *See id.* at 162. Partnering with local and state government, it is possible for worker centers to develop partnerships in powerful cases "to ensure that existing labor and employment laws and regulations are fully and fairly enforced to the benefit of low-wage workers." *Id.*
[553] *See id.* at 162-63.
[554] *See id.* However, ultimately few reports for Bill of Rights violations were pursued by the Nebraska Department of Labor. *See id.*

day laborers organization in Houston, TX partnered with Richard Shaw, the secretary-treasurer of Harris County Central Labor Council, and put together a research report on wage theft for the Equal Employment Opportunity Commission (EEOC) entitled "Houston's Dirty Little Secret." A successfully waged media war earned the support of the Houston mayor, who established a formal Office of Immigrant and Refugee Affairs, funded the creation of three day labor worker center cites in Houston, and helped to establish Justice and Equality in the Workplace (JEWP), a program intended to establish a "one stop grievance procedure" for day laborers that functioned successfully and produced important results.[555]

One common element of most worker centers is an empowering organizational structure.[556] Fine considers the importance of organizational structure as a critical factor in creating leaders within the immigrant worker community and thus as one of the greatest strengths of the worker center phenomenon.[557] Most worker centers have established formal membership procedures,[558] many have a volunteerism component,[559] and approximately 48% have some kind of system for dues.[560] Moreover, centers have complex networks for leadership, such as committees and internally-elected boards which run the centers.[561] These systems vary as appreciably as the centers themselves.[562] Centers frequently make hiring decisions from within, drawing from the ranks of the workers.[563] One unique strategy implemented by the large Los Angeles worker

[555] *See id*., at 169-70.
[556] *See id.* at 202. A major goal of worker centers is "identifying and developing activists and organizational leaders from within the ranks of low-wage immigrant workers." *Id.*
[557] *Id.* at 248-49.
[558] *See id.* at 208-209. 203- Fine believes structures are necessary for the success of worker centers, providing venues for participation at different levels for members and fostering strong cores of active participants. *Id.* at 203. Participation is sometimes optional and sometimes mandatory, varying by organization. *Id.* at 203-204.
[559] *Id.* at 210.
[560] *Id.* at 219-220. While 48% of centers have some kind of dues, the systems for dues are often on a continuum and vary appreciably as well. *Id.* Fine observes that dues are not usually a central component to funding the worker centers, but exist more to develop a sense that the workers own their own organizations. *Id.* at 221.
[561] *See* FINE, *supra* note 537, at 202-204.
[562] *See id.*
[563] *See id.* at 211-217.

center network IDEPSCA is to select day laborers from within the worker centers' ranks and to provide funding for these individuals to become licensed construction contractors. These contractors, in turn, are then able to hire other day laborers from the working center, and do so on more fair terms than other contractors.[564]

b. Advantages and Challenges of Worker Centers as Hiring Halls

Within Fine's definition of worker centers, not all worker centers are day labor worker centers, and many worker centers are not coupled with hiring halls.[565] Fine distinguishes between worker centers in general and day labor working centers, hiring halls and shape up sites, which have an employer/employee matching component.[566] Likewise, in Amy Pritchard's article on day laborers, "'We are your Neighbors': How Communities Can Best Address a Growing Day-Labor Workforce," hiring halls are distinguished from worker centers as two distinct community entities, while Pritchard observes that hiring halls are "typically housed by workers' centers."[567] Pritchard states that as of January 2006, there were sixty-three formal day-laborer centers.[568]

Day labor worker centers that also function as hiring halls or shape up sites can have positive results for day laborers. They can help to raise the wages for these workers by setting center minimum wages.[569] They can also help to address the problem of wage theft, by requiring

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[564] *See id.* at 115
[565] *See id.* at 112-115. "Attempting to organize day laborers has led a number of worker centers to press for the formation of day laborer hiring halls." *Id.* at 113.
[566] *See id.* at 112-115.
[567] Pritchard, *supra* note 328, at 398. "Specifically. the development of two different types of community centers has provided instrumental resources and protections to immigrant workers, in general, and day laborers, in particular. The first are workers' centers, which are usually nonprofit community service organizations offering a variety of services to day laborers. The second are hiring halls, typically housed by workers' centers, which are specifically designed to provide a formal hiring process for day laborers and offer resources to protect workers from exploitation." *Id.*
[568] *Id.*
[569] *See* FINE, *supra* note 537, at 112 ("Most important, they [day labor worker centers] have been able to establish minimum wages at the shape-up sites and day laborer worker centers where day laborers gather daily to seek

employers and workers to sign contracts or by recording employer information.[570] Moreover, they can help to improve day laborers' self-image.[571] Day labor worker centers can also provide a benefit to the community by getting workers off the corner, by resolving issues that are commonly complained about by community members with respect to day laborers, such as littering, public urination, and traffic hazards.[572] Also, offensive behavior that may occur at informal day labor hiring sites can be controlled and addressed at a formal site such as a day labor worker center.[573]

However Fine recognizes and other scholars criticize the limitations of worker centers' effectiveness as hiring halls.[574] Day labor worker centers must employ some kind of procedure for determining who gets a job, and this is often accomplished through a lottery system or a waiting list, with separate lists of workers who have specific skill sets.[575] The democratic structure of worker centers can also empower the workers to decide for themselves how selection will work. Inevitably, however, some workers will not get jobs at the day labor center and some

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work."). However, "most [day labor worker centers] found that before they could move into organizing proactively for a minimum wage, they first had to wage defensive campaigns to stop the harassment of day laborers." *Id.*

[570] *See* Pritchard, *supra* note 328, at 398. *See also* Arturo Gonzales, *Day Labor in the Golden State*, 3-3 California Economic Policy, 13-14 (noting that these centers can help prevent wage theft and can also help to enforce safety standards on employers).

[571] *See* FINE, *supra* note 537, at 113. Raul Anorve, executive director of IDEPSCA, remarked, "With the day labor centers, we've been able to move up their [day laborers'] expectations of themselves to have some dignity about what they're worth in this society and have some pride behind it." CHIRLA of California waged a campaign to raise the self-image of its day laborers. *Id.* The organization's campaign, "somos jornaleros" [we are day laborers] involved day laborer parades in various communities. *Id.*

[572] *See id.* at 398-99. "For example, in order to address littering and public urination concerns, hiring halls have trash receptacles and restroom facilities. Similarly, traffic disturbances can be regulated at a hiring hall by designating an area where drivers can park in order to negotiate hiring arrangements."

[573] *Id.* at 399.

[574] *Id.* at 112-115. *See also* Pritchard, *supra* note 328, at 399 ("While formal day-labor hiring halls may be an appealing option for communities, some day laborers report mixed experiences with the site"); Gonzales, *supra* note 570, at 3 ("[I]t has not been clear whether these centers are as attractive to key market participants—workers and employers—as informal, open-air hiring sites."); Greg W. Kettles, *Day Labor Markets and Public Space,* 78 UMKC L. REV. 139 (("The strategy of shelter similarly misunderstands the advantages offered by the street to day laborers. Like those who in earlier advocated sheltering the homeless and helping them find work, advocates of sheltering day laborers exhibit good intentions. But they risk turning street entrepreneurs into dependents.").

[575] *See* FINE, *supra* note 537, at 114.

workers will choose not to utilize the hiring sites, instead taking their chances on the streets.[576] Their willingness to accept lower wages can undermine the hiring site, or even cause it to fail.[577] Moreover, this situation can cause a rift in the day laborer population. A comprehensive report on worker centers in California, "Day Labor in the Golden State," found that more workers in California get work on the streets than at the worker centers regardless of the number of hiring sites.[578] This problem is compounded when there are fewer jobs, and workers will feel that their chances of employment are improved by waiting in the street rather than in the center.[579] Worker centers are uncomfortable with using coercive behavior to get workers into centers,[580] though communities on a national scale have often paired funding of worker centers with enactment of coercive ordinances which prohibit solicitation of employment anywhere but the centers, hiring halls, or shape up sites.[581] As previously discussed, such ordinances not only raise constitutionality issues, but also unfairly punish workers who do not use the centers. A related strategy discussed by Fine is to legally compel the contractors, rather than the workers, to

[576] *See id.* ("One of the major problems IDEPSCA and CHIRLA face is that some workers prefer to stand out on nearby street corners and offer to work for less, instead of coming into the day laborer worker centers.").
[577] *See id.* "When workers stand out in the streets offering to go to work for less money, it undercuts the minimum wage that has been set at the centers." *Id.* Pablo Alvarado of the Pasadena CHIRLA organization stated that organizers were considering relocating the center closer to where the workers currently seek jobs, because they are not using the center. *Id.*
[578] Gonzales, *supra* note 570, at 2.
[579] *See* FINE, *supra* note 537, at 114 ("Some people feel that in the streets they have more chances.").
[580] *Id.* at 115.
[581] *See* Pritchard, *supra* note 328, at 399 (discussing how day labor worker centers can coexist with such statutes, and might be most appropriate for communities with opposition to the more informal outdoor day labor market); *see also infra* Section V, Subsection D, discussing *Garcia v. Dicterow* and *Town of Herndon v. Thomas*, both cases concerning communities with worker centers that coexisted with ordinances limiting where workers could solicit work.

come to day labor worker centers.[582] Again, however, such a strategy has raised similar First Amendment constitutionality issues in some jurisdictions.[583]

While some have called into question the effectiveness of day labor worker centers as hiring halls, in "Day Labor Markets and Public Space," Greg Kettles, law professor, argues that the use of "shelter" in the context of day laborers is itself a harmful and coercive measure which unnecessarily hampers the market of day laborers, and instead of empowering them, takes power from them. [584] He bases his argument on both economic and historic principles[585] and postulates that day labor worker centers hamper these "street entrepreneurs" by forcing reliance on day labor worker centers and adding unnecessarily arduous steps to formalize employment process which are undesirable to both worker and employer.[586] He insinuates that the workers are capable of self-policing against wage theft, and that the use of centers to this end is not necessary.[587] He further argues that the market exists on the sidewalk because that is where the worker and the employer know to find each other, and, in essence, that the community should

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[582] *See* FINE, *supra* note 537, at 115. The Workplace Project, in Freeport, on Long Island is an example of this. Police officers would go out a few times a year and warn contractors to seek day laborers at the day labor worker centers rather than on the street corners, or ticket them for violations. *Id.*

[583] *See, e.g., Town of Herndon v. Thomas*, 2007 Va. Cir. LEXIS 161 (Va. Cir. Aug. 29, 2007), which is discussed in great detail under the IRCA analysis, a case in which the Virginia circuit court overturned an ordinance penalizing employers who sought day laborers on the street, on First Amendment grounds.

[584] Kettles, *supra* note 574, at 35.

> Most day laborers do not use work centers, many of them even when they have an opportunity to do so. One reason is the loss of control over work task and employer. Day laborers on the street occasionally refuse work—especially from employers with a reputation for dishonesty. The method of assigning jobs on a first come first served used by many centers induces day laborers to go to work earlier than they would have felt necessary had they been seeking work on the street. At one Los Angeles, California day labor center, the sign-in list is made available each morning at 6:30 a.m. For some day laborers, going to a work center would "feel more like a job." Some day laborers left jobs in the formal economy to escape mistreatment by their employers. Having won some control over their lives, these street entrepreneurs are not eager to give it up.

Id.

[585] He discusses the economic principles behind the formation of a "market," the market of day laborers being in the street, and he explores the history of workers in the streets, discussing hobo work culture as historical evidence to suggest that the day labor street market will exist with or without undocumented immigrants.

[586] *Id.*

[587] *Id.*

come to accept that, and that such an arrangement has broader social benefits.[588] Ultimately, he concludes that instead of trying to shelter day laborers, communities should let the informal day labor market continue as is.

A final weakness which nearly all worker centers face, but which can be compounded in the case of worker centers coupled with hiring halls is the problem of funding.[589] Operating on meager budgets and attempting to steer tremendous agendas, worker centers can become spread thin.[590] Funding can often come from local and state governments, however accepting such funding can place a burden on the organization to adhere to governments' preferences for the use of funds.[591] In his critique of sheltering workers, Kettles also criticizes the cost of a day labor worker center both to set up and to maintain.[592]

Notwithstanding their weaknesses, workers centers "are uniquely situated to facilitate a dialogue among community stakeholders to ensure that the best solution is found."[593] As Fine argues, workers centers are "succeeding at providing an ongoing vehicle for collective voice to workers at the very bottom of the wage scale."[594] In embarking on the development of a worker center in Carrboro, it is important to recognize the ways in which worker centers have succeeded, while remaining carefully mindful, in particular, of the criticism toward day labor

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[588] *See generally, id.*
[589] *See* FINE, *supra* note 537, at 217 (finding that 51% of all worker centers operate on annual income of $250,000 or less, and only 9% have income greater than $500,000 per year).
[590] *See generally, id.* at 217-223.
[591] *See id.* at 219.

> Angelica Salas, executive director of CHIRLA, also cautioned about the organizational compromises involved with contracting with government to deliver a service, as is the case with the organization's operation of day laborer centers for the City of Los Angeles. "Although the city councilors always understood our interest in developing the leadership skills of day laborers and working with them to organize for better treatment, we were repeatedly reprimanded by city administrators for integrating these activities into our work at the day laborer centers."

Id.
[592] *See* Kettles, *supra* note 574, at 9.
[593] Pritchard, *supra* note 328, at 399-400.
[594] FINE, *supra* note 537, at 266.

worker centers which provide a forum for day laborers and employers to meet and make employment arrangements, and the weaknesses inherent in these kinds of centers.

2. How do Worker Centers comply with the Immigration Reform and Control Act (IRCA)?

How do Worker Centers comply with the Immigration Reform and Control Act (IRCA)? This is an important threshold question in the development of support for and establishment of a worker center which is consistent with federal law.

a. Overview of Legal Analytical Framework

The Immigration Reform and Control Act of 1986 (IRCA) is a series of federal law provisions intended to deter unlawful immigration. IRCA stipulated legalization for certain unlawfully present immigrants. The statute also included important anti-discrimination provisions to prevent employers from discriminating against lawfully present employees on the basis of national origin, and for authorized employees, citizenship status in most positions of work, and punish employers who do so.[595] But IRCA also tightened border controls and made it unlawful for employers to *knowingly hire undocumented workers,* imposing a duty on employers to check employment status of most perspective employees.[596] 8 U.S.C. Section 1324a(1) [Immigration and Nationality Act (I.N.A.) Section 274A(a)(1)] states: "[i]t is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States -- (A) an alien knowing the alien is an authorized alien . . . or (B) an individual without complying with the requirements of subsection (b)."[597] Subsection (b)

[595] Immigration Reform and Control Act, 8 U.S.C. § 1324b.
[596] *See* USCIS, *Immigration Reform and Control Act of 1986* (under USCIS Glossary) (last accessed Mar. 7, 2011) http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD&vgnextoid=04a295c4f635f010VgnVCM1000000ecd190aRCRD.
[597] 8 U.S.C. § 1324a(1) (2010).

describes the recordkeeping requirements for employers, including acceptable forms of documentation which perspective employees can use to prove work authorization.[598] Failure of an employer to comply with IRCA can result in civil fines[599] or even criminal sanctions.[600]

Though IRCA places a substantial burden on employers to assure the legal employment status of employees, this burden does not extend to every work-based relationship, and it does not extend *beyond* employers, those who "recruit or refer for a fee," or their agents. The burden on employers established by IRCA does not extend to not-for-profit worker centers that assist workers in finding day labor or other positions, nor does it implicate the municipality in which such a worker center operates, even in instances where the municipality uses taxpayer funds to finance the facility's existence.

As a preliminary matter, Subsection D(2) considers the meaning of "employee" within IRCA's implementing regulations.[601] Employers are not required by IRCA to verify worker status in every hiring relationship, and many day laborer/employer relationships are excluded from the IRCA record keeping requirements by IRCA's implementing regulations.[602] Subsection D(3) examines the meaning of "employer" for the purposes of IRCA and maintains that not-for-profit worker centers are not "employers," and they do not "hire," "recruit for a fee" or "refer for a fee."[603] Therefore, they are under no duty to inquire about employment status of day laborers who utilize these centers. Subsection D(4) surveys existing case law concerning whether a municipality can be the agent of a worker center, or can be in violation of IRCA for using taxpayer revenue to fund a worker center for day laborers, and argues that a municipality

[598] *Id.* § 1324a(b).
[599] *Id.* § 1234a(e)(4)(2).
[600] *Id.* § 1234a(f)(1).
[601] *See* 8 C.F.R. § 274a(1)(f) (2010).
[602] *See generally id.* § 274a.
[603] *See generally id.* § 274a(1)(c-j).

cannot be implicated by IRCA for merely funding and endorsing a worker center site. Subsections D(3) and D(4) consider in some detail two cases in which the same organization, Judicial Watch, with viewpoints antithetical to immigrant day laborers, sought to challenge municipality-funded worker centers by bringing lawsuits on behalf of taxpayers against the municipalities and alleging IRCA violations. *Karunakarum v. Town of Herndon,*[604] decided in the Fairfax County Circuit Court of the state of Virginia in 2006, concerns the well-publicized and controversial creation of a worker center in Herndon, VA. In this published decision, the court held that the taxpayers of Herndon had standing to challenge the center, calling for more briefing on the substantive questions of the case.[605] In *Garcia v. Dicterow,*[606] an unpublished decision in the Court of Appeal, Fourth District, Division 3 of California, the court held that the municipality of Laguna Beach did not violate IRCA by paying for a worker center with taxpayer funds.[607] Finally, Subsection D(5) of this Section briefly considers and dismisses the other arguments advanced in the Judicial Watch cases, that the operation of day labor centers violates federal laws regarding the harboring of unlawfully present persons, that it constitutes "aiding and abetting" unlawful immigration in violation of the Immigration and Nationality Act (I.N.A.) and that it violates the "Dillon Rule"[608] for the same reasons advanced in these cases.[609]

[604] 70 Va. Cir. 208 (2006).
[605] *See id. See also infra* Subsections D(3)-(5) for a comprehensive discussion of the case and its relevance. Ultimately no further action was taken in this case.
[606] 2008 WL 5050358 (unpublished, decided Nov. 26, 2008).
[607] As far as can be determined, these two cases are the "leading" authority on the matter, however noting *leading* with great hesitancy, since neither case has any real precedential value for North Carolina. However a search included comprehensive examination of all cases on Westlaw and Lexis with any bearing for day laborers, worker centers, IRCA, undocumented employment and so on. Further, these two cases are the only two cases cited by the secondary sources relied on. It is tentatively theorized that standing may provide a barrier to challenging the existence of non-tax-funded worker centers.
[608] For a discussion on the Dillon Rule and its meaning in North Carolina, *see supra* Part I, Section I of this report. *See also*, Bluestein, *supra* note 20; Bluestein, *supra* note 12.
[609] *See infra* Subsection D(5).

b. Employers are not required by IRCA to verify worker status in every hiring relationship

Although studies have shown that most day laborers in the United States lack work authorization,[610] it is *not illegal* in all instances under IRCA for an employer to hire a worker without verifying employment authorization.[611] In certain instances, the circumstances of the hiring or nature of the work that day laborers are recruited for may not impose a duty on the person hiring them to check for employment authorization status. Under IRCA's implementing regulations, the term "hire" refers to "the actual commencement of employment of an employee for wages or other remuneration."[612] "Employee" means "an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors . . . or those engaged in casual domestic employment . . ."[613]

8 C.F.R. Section 274a(1)(j)carves out the exception to IRCA's production of documentation requirements for those meeting the definition of an "independent contractor."[614] The term “independent contractor” is not expressly defined by the regulations, but is generally interpreted under common law meaning and Internal Revenue Service guidelines. Whether an individual is an “employee” or an “independent contractor” turns on the circumstances of the working relationship, including behavioral control (degree of instruction and training given), financial control (investment in one’s own work, who pays for on the job expenses, and “opportunity for profit and loss”) and the relationship of the parties (employment benefits and

[610] *See, e.g.*, VALENZUELA, JR. ET AL., *supra* note 327, at iii (UCLA 2006), *available at* http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf (reporting that approximately 75 percent of day laborers are undocumented).
[611] *See* Pritchard, *supra* note 328, at 382.
[612] 8 C.F.R. § 274a(1)(c) (2010).
[613] *Id.* § 274a(1)(f).
[614] *Id.* § 274a(1)(j).

existence of contracts, though contracts alone are not controlling).[615] While many day labor employees are incorrectly characterized by employers as independent contractors, in order to exempt these employers from having to comply with the Fair Labor Standards Act and other employment law, it *is* still conceivable that some day laborers would be independent contractors under this distinction.[616] In addition to the "independent contractor" exemption, 8 C.F.R. Section 274a(1)(h) exempts "casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent" from the definition of employment.[617] A nationwide study conducted by UCLA in 2006 found that approximately forty-nine [49] percent of day laborers are employed by homeowners or renters, while forty-three [43] percent are employed by contractors.[618] It is unclear how often day laborers would fall under the casual employment exception to IRCA, but apparent that the argument could be made.

Pritchard writes, "[t]hus, an employer is not required to verify the employment authorization of a day laborer he or she hires to help with short-term tasks such as yard cleanup or as an independent contractor to replace an ill full-time employee."[619] While such an argument could help to facilitate the legitimacy of persons without work authorization gaining employment, from an advocacy standpoint making the case that an undocumented person is either an independent contractor or a casual worker can have other negative consequences, in terms of potentially rendering that individual exempt from certain federal and state employment

[615] *See, e.g.,* Internal Revenue Service, IRS Publication 1779: *Independent Contractor or Employee* . . . (2008), *available at* http://www.irs.gov/pub/irs-pdf/p1779.pdf, for a good explanation of factors that contribute to the independent contractor/employee determination.
[616] Because the independent contractor/employee determination generally turns on the matter of control (often referred to as the "Economic Realities Test"), it is not uncommon for employers to incorrectly characterize workers as independent contractors to gain exemption from worker's compensation, Fair Labor Standards Act (FLSA) and other laws. *See, e.g.,* Overtime Law Blog, *Companies Slash Payrolls by Calling Workers Independent Contractors* (Feb. 12, 2010), http://flsaovertimelaw.com/2010/02/12/companies-slash-payrolls-by-calling-workers-independent-contractors-costly-to-irs-and-states-la-times-reports/. *See also* discussion related to independent contractor/employee distinction under Section IV of Part II of this report.
[617] 8 C.F.R. § 274a(1)(h).
[618] VALENZUELA, JR. ET AL., *supra* note 327, at ii.
[619] Pritchard, *supra* note 328, at 382.

law protection.[620] Moreover, it is important to note, notwithstanding the regulations, that under the express language of IRCA, employers may not use these two exemptions as means of circumventing the document production requirements--8 U.S.C. Section 1324a(a)(4) clarifies that a person using labor under contract will still be in violation of IRCA if he or she *knows* that the laborer is an unauthorized alien.[621]

Some states and municipalities have attempted to enact legislation which extends the burden of verifying employment authorization to employment relationships expressly excluded by IRCA's implementing regulations, namely independent contractors and casual employees. State and municipal legislation imposing a higher burden of production of employment verification documents on employers may be subject to federal preemption. Under 8 U.S.C. Section 1324a(h)(2), "[t]he provisions of this section preempt any state or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ or recruit or refer for a fee for employment, unauthorized aliens."[622] Under the precedential U.S. Supreme Court decision, *De Canas v. Bica*, the U.S. Supreme Court established a three-part test for determining whether a local immigration law is unconstitutional, and such a law would be preempted if one of the three following requirements was met: "(1) Congress has manifested an express intent to preempt any state law; (2) Congress has intended to completely occupy the filed in which the law attempts to regulate; or (3) the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[623] "State and local measures could potentially be found to be unconstitutional on conflict preemption grounds [the third ground] if their requirements can be characterized as

[620] *See supra* note 616.
[621] 8 U.S.C. § 1324a(a)(4).
[622] *Id.* § 1324a(h)(2).
[623] Pritchard, *supra* note 328, at 392 (citing De Canas v. Bica, 424 U.S. 351 (1976)).

inconsistent or incompatible with federal law."[624] Preemption challenges have been brought successfully against statutes that extend production requirements to the hiring of independent contractors and domestic workers in both the third and tenth circuits.[625]

c. Not-for-Profit Worker Centers are not "Employers" and do not "hire," "refer for a fee" or "recruit for a fee" within the meaning of IRCA

8 U.S.C. Section 1324a(b) establishes the employment verification system required "in the case of a person or entity hiring, recruiting or referring an individual for employment."[626] Neither IRCA nor its implementing regulations give any mention to affirmative obligations of not-for-profit employment centers.[627] "Employer" under IRCA's implementing regulations is defined as "a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration . . ."[628] Under IRCA, "[o]nly employers need to verify status, while state employment agencies, for instance, have the option not to check work

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[624] Congressional Research Service Report 34345, *State and Local Restrictions on Employing, Renting Property to, or Providing Services for Unauthorized Aliens: Legal Issues and Recent Judicial Developments* (2010) 10.
[625] *See, e.g.,* Chamber of Commerce of the United States of Am. V. Edmondson, 594 F.3d 742, 769-70 (10th Cir. 2010) (holding that an Oklahoma statutes requiring verification by persons hiring independent contractors or domestic workers was inconsistent with federal law and overturning it on preemption grounds); Lozano v. City of Hazelton, 620 F.3d 170, 216 (3d Cir. 2010) (same). *But see Gray v. City of Valley Park, Missouri,* 2008 U.S. Dist. LEXIS 7238, at *45 (holding a local ordinance that imposed verification requirements on persons hiring independent contractors to be valid and reasoning that excluding "independent contractors" from the definition of "employees" constitutes an unreasonable interpretation of IRCA, notwithstanding the definition of "employee" which expressly excludes "independent contractors" in the regulation under 8 C.F.R. § 274a(1)(f)). *See Id.*, at 11 (discussing these cases); Mark S. Grube, *Preemption of Local Regulations Beyond* Lozano v. City of Hazelton: *Reconciling Local Enforcement with Federal Immigration Policy,* 95 CORNELL L. REV. 391 (discussing in great detail the differences in reasoning between the *Lozano* and *Hazelton* courts, and the *Hazelton* court's rejection of the *Lozano* decision).
[626] 8 U.S.C. § 1324a(b).
[627] *See* 8 U.S.C. § 1324a; 8 C.F.R. § 274a(2). *See also* Margaret Hobbins, *The Day Labor Debate: Small Town U.S.A. Takes on Federal Immigration Law Regarding Undocumented Workers,* THE MODERN AMERICAN (American U. 2006) 12, *available at* http://www.wcl.american.edu/modernamerican/documents/4-MargaretHobbins.pdf?rd=1 (making an argument that the Fairfax County Circuit Court should dismiss Judicial Watch's complaint against the Town of Herndon).
[628] 8 C.F.R. § 274a(1)(g).

eligibility."[629] Under the regulations, the term "hire" refers to "the actual commencement of employment of an employee for wages or other remuneration" which occurs "when a person or entity uses a contract, subcontract, or exchange . . . to obtain the labor of an alien in the United States, knowing that the alien is an unauthorized alien."[630] The phrase, "refer for a fee" means:

> the act of sending or directing a person or transmitting documentation or information to another, directly or indirectly, with the intent of obtaining employment in the United States for such person, for remuneration whether on a retainer or contingency basis; however, this term does not include union hiring halls that refer union members or non-union individuals who pay union membership dues.[631]

"Recruit for a fee" means "the act of soliciting a person, directly or indirectly, and referring that person to another with the intent of obtaining employment for that person, for remuneration, whether on a retainer or contingency basis; however, this term does not include union members or non-union individuals who pay union membership dues."[632]

Not-for-profit worker centers are not employers within the meaning of IRCA, and such centers do not "hire," "refer for a fee" or "recruit for a fee" as defined by the implementing regulations. A not-for-profit worker center does not meet the definition of an employer under 8 C.F.R. Section 274(a)(1)(g) because the worker does not provide any service or labor to the center in exchange for any payment or remuneration; it merely provides a forum for employers and day laborers to safely meet.[633] Further, the not-for-profit worker center does not "hire" the prospective worker; indeed, workers centers clearly inform perspective employers that the employer is the "hirer" of the worker, and day laborers negotiate wages and other arrangements

[629] Hobbins, *supra* note 627, (citing 8 C.F.R. § 274a(2), "giving agencies a choice to verify and certify workers' immigration status for employers").
[630] 8 C.F.R. § 274a(1)(c).
[631] *Id.* § 274a(1)(d).
[632] *Id.* § 274a(1)(e).
[633] *See, e.g.*, Hobbins, *supra* note 627, at 12.

independently in worker centers.[634] As the Ninth Circuit court held in *Jenkins v. Immigration and Naturalization Service,* the time when a "hire" occurs is when the worker commences labor, which would not be at a worker center.[635]

Not-for-profit worker centers should not be viewed as "agents" of employers, because the employees and volunteers that run them are not authorized to act on behalf of potential employers.[636] In fact, worker centers often act against the interests of some employers of day laborers in that they record employers' contact information and the agreements between workers and employers as to wages and hours, deterring employers from wage theft or unjustly low wages.[637]

The activities of worker centers also do not amount to the other employment activities prohibited by IRCA; not-for-profit worker centers do not "refer for a fee" or "recruit for a fee" within the meaning of IRCA's implementing regulations.[638] Not-for-profit organizations do not solicit, and by their very definition, they operate without returning a profit.[639] While it is true that some centers do collect dues from their workers, or even charge nominal fees for use of the center's facilities, these funds are put back into the centers. In many cases, dues and fees are not mandatory and day laborers can volunteer at the centers in lieu of paying the fees. Furthermore,

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[634] *See, e.g.*, Casa of Maryland, Frequently Asked Questions, http://www.casademaryland.org/storage/documents/FAQEmployment.pdf (discussing procedures, including negotiating pay rates with skilled workers, and signing written agreements between employers and workers, and stating "CASA does not screen workers or check references"); First Workers' Day Labor Center (Austin, Texas), Program Overview, http://www.ci.austin.tx.uc/health/day_labor_request.cfm ("Hourly rates and job specifics or requirements are negotiated between employers and workers").

[635] *See Jenkins v. Immigration and Naturalization Service*, 108 F.3d 195, 198 (9th Cir. 1997). *See also* interpretation of *Jenkins* in Hobbins, *supra* note 627, at 13.

[636] *See, e.g.*, Hobbins, *supra* note 627, at 12 (raising this argument in the context of the Herndon worker center).

[637] *Id.* at 13.

[638] S*ee* Casa of Maryland, *supra* note 634 ("CASA does not charge employers or workers fees for our services. As facilitators, our role is to provide a meeting place for workers and employers."); First Workers', *supra* note 634 ("There is no paperwork for employers to fill out and no fee charged to anyone for this service.")

[639] *See* Hobbins, *supra* note 627, at 13. (discussing the Hernon center, "The Center does not fall into either of these related employment categories because: (1) the Center is a non-profit organization and does not receive remuneration from either the workers or the employers; (2) the Center does not send people or documentation to employers; and (3) the Center does not solicit workers.").

many of these centers are governed from within, by the workers themselves, who set fee schedules and determine how they should be used.[640] In essence, no remuneration is derived from the centers' role in facilitating the meeting between employers and day laborers.

The exemption of union hiring halls from the requirements of IRCA provides additional support for the position that not-for-profit worker centers are likewise exempt, even worker centers that charge membership dues, because union hiring halls charging dues are similarly not considered employers or engaged in "recruitment or referral for a fee" under the statute.[641] In the wake of implementation of IRCA, many unions reacted to the legislation with strong opposition, "arguing that because they are not 'commercial ventures' they should not be bound by the same requirements as the employers."[642] In response to the strong voice of unions advancing this argument, Congress expressly excluded union hiring halls from IRCA production requirements.[643] There is a great deal of fluidity between workers centers and unions; workers centers can grow to function like unions, and engage in collective bargaining with employers, and unions and workers centers that do not function as unions can also work closely together.[644]

In 2006, proposed federal legislation sought to extend the duty to check documentation status to not-for-profit worker centers, however, fortunately for worker centers, this legislation

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[640] *See, e.g.,* FINE, *supra* note 537, at 112-113 (discussing internal management structure of hiring hall worker centers) and 219-223 (discussing dues in worker centers). *See also Garcia,* 2008 WL (deciding in favor of the City of Laguna Beach, which provided public funds in support of a worker center, in spite of the center's decision to charge workers a one dollar daily fee which would be refunded to workers who did not get employment on any given day).

[641] 8 C.F.R. § 274a(1)(d), (e).

[642] Rachel Feltman, *Undocumented Workers in the United States: Legal, Political and Social Effects,* 7 RICH. J. GLOBAL L. & BUS. 65, 71 (2008) (citing Gerald Morales & Rebecca Winterscheidt, *Immigration Reform and Control Act of 1986 - An Overview,* 3 Lab. Law. 717, 717 (1987)) .

[643] *See id. See also* General Accounting Office, Immigration Reform: Status of Implementing Employer Sanctions After One Year 13 (Nov. 5, 1987) (GAO Report). The implementing regulations clarify this exclusion. 8 C.F.R. §§ 274a(1)(d), (e).

[644] For more, *see* Feltman, *supra* note 642, at 70-75; Pritchard, *supra* note 328, at 401-404; FINE, *supra* note 537, at 120-156.

did not pass.[645] That Congress identified this as an area *not legislated* by IRCA underscores the argument that IRCA does not apply to not-for-profit worker centers, and that it was not Congress's intent for it to apply in a not-for-profit worker center context.

As discussed in Subsection D(2), some states and municipalities have sought to enact legislation to extend requirements under IRCA,[646] and at least one state, Arizona, has sought to shut down day labor centers by statute.[647] It is currently unclear how state laws or local ordinances prohibiting or restricting worker centers would fair under a preemption challenge, as laws prohibiting or restricting worker centers have scarcely been challenged in United States courtrooms.[648] A 2010 Congressional Research Service (CRS) report on this topic suggests "state or local regulations prohibiting *or* establishing day labor centers would, on their face, appear to raise fewer preemption issues [than legislation that expanded or limited IRCA's employment verification requirements]."[649] The CRS report maintains that restrictions on the operation of worker centers "could plausibly be characterized as targeting 'essentially local problems' and tailored to 'combat effectively the perceived evils,'" such that they satisfy the preemption test established by *De Canas.*[650] Moreover, these laws are less likely to be preempted because they fall in zones that are traditionally within states' police powers, such as employment and zoning.[651] However, as the CRS report points out, "[r]estrictions upon day

[645] H.R. 4437. *See also* Pritchard, *supra* note 328, at 388-89 ("This bill would have kept undocumented immigrants from utilizing the services of formal day-labor centers, thus pushing them to informal hiring sites and decreasing the resources available to them to ensure their workplace rights are protected.").
[646] *See id*. at 400. *See also supra* Subsection D(2).
[647] *See* Pritchard, *supra* note 328, at 200 (discussing Arizona bill H.R. 2592, 47th Leg., 1st Reg. Sess. (Ariz. 2005)).
[648] As discussed in the introduction, this report has only identified two cases which consider the legitimacy of not-for-profit worker centers in any context. *See Garcia*, 2008 WL 5050358; *Karunakarum*, 70 Va. Cir. 208 (both considering the legality of taxpayer funding to support the existence of such centers, and challenging municipalities on these grounds).
[649] Congressional Research Service Report 34345, *supra* note 624, at 13.
[650] *Id*. at 14.
[651] *Id*.

labor centers . . . could also raise other constitutional issues . . . such as infringement of the rights to freedom of speech and association provided for in the First Amendment."[652]

A case from the town of Herndon, VA bears further discussion here. As discussed in the introduction to this segment of this report, the *Karunakarum*[653] decision, decided in the Fairfax County Circuit Court of Virginia, concerned a worker center in Herndon, VA, in which the court granted Herndon taxpayers standing to challenge the center's existence. In the town of Herndon, VA after the *Karunakarum* decision granted standing to the taxpayers of Herndon to challenge the town for funding the worker center, political pressure caused a number of political figures to lose office.[654] New community leadership was reconsidering requiring the worker center to request employment authorization information, and banning undocumented workers from the site.[655] In *Town of Herndon v. Thomas,*[656] a separate and related challenge under the First Amendment of the U.S. Constitution was made by an employer ticketed for soliciting a day laborer, in contravention of a local ordinance in Herndon prohibiting such conduct.[657] The Herndon non-solicitation ordinance was held to be unconstitutional as violating the First Amendment, and further, the court rejected the town's argument that the worker center constituted a "reasonable alternative," holding that a worker center that was not universally open to all persons, regardless of immigration status, would violate the Fourteenth Amendment of the Constitution.[658]

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[652] *Id. See also* Johnson, *supra* note 135.
[653] *Karunakarum,* 70 Va. Cir. 208, 2006 WL 408389 (Va.Cir.Ct.)0 Va. Cir. 208.
[654] *See* Pritchard, *supra* note 328, at 371-372.
[655] *Id.*
[656] 2007 Va. Cir. LEXIS 161 (Va. Cir. Aug. 29, 2007).
[657] The ordinance and the plans for the worker center had been conceived of as part of the same plan, as a compromise.
[658] *Id.* at 17-18. *See also* Pritchard, *supra* note 328, at 372 (citing Bill Turque, *Herndon to Shut Down Center for Day Laborers,* WASH. POST, Sept. 6, 2007, at A1).

Although neither party continued litigation of *Karunakaum*, ultimately the Virginia Court's decision in *Town of Herndon v. Thomas* was the death knell for the Herndon worker center, which closed its doors instead of agreeing to continue to serve undocumented and documented persons alike.[659] The case is important, not only because it in some ways constitutes a victory for worker centers in that it justifies assisting all day laborers without any duty to verify employment status, but also because the broader story emphasizes that litigation alone will not sustain a worker center, and that true community backing and support is necessary for such a center's success. The story underscores the importance of the development of a worker center that coexists with protected freedom of day laborers to solicit work from the street. [660]

d. Municipalities are neither "employers" nor "agents of employers" within the meaning of IRCA, and therefore should not be required to verify the employment authorization of day laborers at worker centers within a municipality, even if the municipalities fund such worker centers

Both cases introduced in earlier portions of this memo, *Karunakarum* and *Garcia,* are challenges brought by Judicial Watch on behalf of taxpayers against municipalities who fund worker centers through taxes. However neither of these cases was decided against the municipality; in *Karunakarum,* after the Virginia court granted standing to the plaintiffs, neither party moved forward,[661] and in *Garcia,* the court decided in favor of the municipality of Laguna Beach.[662] Because the *Karunakarum* case was never decided, this analysis will focus on the

[659] *See id.*
[660] *See also,* Johnson, *supra* note 135.
[661] *Karunakarum,* 70 Va. Cir. 208. *See also* Judicial Watch, *Judicial Watch Victory: Herndon Illegal Alien Day Labor Site Closed!* (last visited Mar. 7, 2011), http://www.judicialwatch.org/herndon-illegal-immigrant-center.
[662] *Garcia,* 2008 WL 5050358, at 1.

court's holding in *Garcia*, but it bears mention that this unpublished decision has no precedential value in North Carolina courts.

The City of Laguna Beach created a worker center in conjunction with the adoption of an ordinance that prohibited the solicitation of employment anywhere other than the center.[663] The center is located on publicly owned land. The center also paid monthly rent and indemnified the California Department of Transportation for losses that might occur pertaining to the use of the land.[664] The city used taxpayer money to make improvements, including the installation of portable toilets, a water fountain, a drive way, and landscaping in the area.[665] The city provided enough funding to the non-profit organization which ran the center to complete an office structure and to provide for two employees to run the center (more than $200,000 at the time of the action).[666] The nonprofit organization asked employers to pay a five dollar fee per visit for using the Center, but employers were permitted to use the center even if they did not pay.[667] It also required day laborers to pay one dollar per day to use the center, but the dollar was refunded if the laborer did not find employment that day.[668] An "unspoken agreement" existed at the time the center was created that the city would not call INS.[669] Finally, the city police department had posted guidelines and printed handouts in Spanish and English which stated:

> The Laguna Beach Police Department wants to help you find work. We need your assistance and cooperation in helping us to keep this area [a] safe place to be hired by contractors, homeowners and others. [¶] ... [¶] The City of Laguna Beach wants you and your family and friends to be a part of the community and to enjoy

[663] *See id.*
[664] *See id.*
[665] *See id.*
[666] *See id.*
[667] *See id.* at 2.
[668] *Garcia*, 2008 WL 5050358, at 2.
[669] *Id.* The enforcement arm of Immigration and Nationality Service (INS) has now been replaced by Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE), both organized under the Department of Homeland Security (DHS), established by the Bush administration after September 11, 2001.

> a healthy quality of life.... We want to help you find work so that you can stay here or send money to your loved ones back home.[670]

The court held that, notwithstanding the signs, funding, and other elements of control present, the plaintiffs failed to show that the City of Laguna's expenditures to maintain the worker center were in violation of IRCA, because the city did not "refer unauthorized aliens for employment for a fee" and was not an agent of the worker center. [671] Employing common law agency analysis, the court reasoned that the city could not be the agent of the worker center because it did not have any control over any decisions concerning the management of the center and it did not retain any legal right to control the center.[672] In making this decision, the court did not rely on the fact that the city had also enacted a non-solicitation ordinance.[673]

e. Brief Discussion of Other Arguments Overturned in *Garcia* and *Karunakarum*

In both *Garcia* and *Karunakarum,* Judicial Watch advanced various other arguments that the use of municipal funds toward the worker centers violated federal, state and local law. The responses to these arguments are discussed below:

i. Municipalities are not harboring undocumented immigrants by encouraging or inducing them to come to, enter or reside in the United States.

First, plaintiffs alleged that in both *Karunakarum* and *Garcia,* defendants violated the U.S.C. Section 1324(a)91)(A)(iv) by harboring undocumented immigrants by "encouraging or

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[670] *Id.*
[671] *See id.* at 3-4.
[672] *Id.* at 4 ("But plaintiffs provide no evidences the City has any legal right to control South County [the non-profit organization responsible for running the center]").
[673] *See generally, id.*

inducing them" to come to the United States.[674] In *U.S. v. Oloyede,* a case involving individuals who sold fraudulent documents and immigration papers to undocumented aliens, the Fourth Circuit held that defendants were encouraging aliens to live in the United States illegally.[675] Plaintiffs in *Karunakarum* and *Garcia* sought to apply this case to the municipalities concerned and argued that the two cases were analogous, or that the acts committed by the municipalities in these cases were more egregious.[676] In *Garcia,* the court held that the defendants in *Oloyede* "did more than simply help illegal aliens find employment" by selling false documents, and held that the conduct of the worker center in question did not rise to the level of "encouraging" illegal immigration.[677] Moreover, plaintiffs failed to name any single illegal alien who obtained employment through the center.[678] Finally, the existence of 8 U.S.C. Section 1324a, which specifically covers employment and referral for employment of undocumented aliens is a misdemeanor statute. By contrast, the harboring statute is a felony statute that imposes prison terms ranging from five years to life. Thus the court relied on *U.S. v. Moreno-Duque* and held "'we cannot say that Congress intended the incongruous result of treating some employers as felons, and others as misdemeanants' for the same conduct."[679]

Garcia also dismantles an argument made by plaintiffs in the alternative that the city aided and abetted the worker center in violation of 8 U.S.C. Section 1324(a)(1)(A)(v)(II). The court held that the city did not meet the requisite intent requirement of committing the underlying substantive offense.[680]

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[674] 8 U.S.C. § 1324(a)(1)(A)(iv) (2010).
[675] United States v. Oloyede , 982 F.2d 133 (4th Cir. 1992). *See also* Hobbins, *supra* note 627, at 13.
[676] *See Garcia,* 2008 WL 5050358, at *5-*6. *See also* discussion of *Olyede* argument in Hobbins, *supra* note 627, at 13.
[677] *Id.* at 6.
[678] *Id.*
[679] *Id.* (citing U.S. v. Moreno-Duque 718 F.Supp. 254, 259 (D. Vt. 1989).
[680] *Id.* at 7 (discussing 8 U.S.C. § 1324(a)(1)(A)(v)(II) and the elements for this offense as set out in U.S. v. Gaskins, 849 F.2d 454, 459 (1988).

ii. Municipalities are not violating the Welfare Reform Act by using taxpayer funds to finance a worker center.

Under 8 U.S.C. Section 1621, undocumented immigrants are generally ineligible to receive any "local public benefit."[681] Plaintiffs alleged violation of this federal statute in both *Karunakarum* and *Garcia.* In *Karunakarum,* the defendants argued that this Section did not apply because of the exemption in the statute for welfare that is "necessary for the protection of life or safety,"[682] because the funding of a worker center is necessary to protect the life and safety of workers and community residents.[683] In *Garcia,* the court held that this statute was inapplicable because plaintiffs had failed to establish that an agency relationship existed between the worker center and the city, as discussed in the previous Subsection.[684]

iii. The federal preemption doctrine does not preempt a municipality from establishing a worker center.

[681] 8 U.S.C. § 1621(a). "(a) In general: Notwithstanding any other provision of law and except as provided in subsections (b) and (d) of this section, an alien who is not— (1) a qualified alien (as defined in section 1641 of this title), (2) a nonimmigrant under the Immigration and Nationality Act [8 U.S.C. 1101 et seq.], or (3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C. 1182 (d)(5)] for less than one year, is not eligible for any State or local public benefit (as defined in subsection (c) of this section)." *Id.*
[682] *See* exceptions under 8 U.S.C. 1621(b), including "(4) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (A) deliver in-kind services at the community level, including through public or private nonprofit agencies; (B) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (C) are necessary for the protection of life or safety."
[683] *See* Hobbins, *supra* note 627, at 13.
[684] *Garcia,* 2008 WL 5050358, at 7.

In *Garcia,* plaintiffs sought to argue that a locality would be preempted from creating a worker center because it "frustrate[s] a federal law."[685] The court held that plaintiffs overstated the preemption doctrine, which applies only to laws and regulations of a jurisdiction, not to that state or municipality's actions.[686]

iv. The creation and funding of a worker center does not violate the Dillon Rule in Virginia.

The court's decision in *Karunakarum* states the Dillon Rule, as interpreted by Virginia courts, "provides that municipal corporations possess and can exercise three kinds of powers: a) those expressly granted by the General Assembly; b) those necessarily or fairly implied; and c) those that are essential and indispensable."[687] Although the court's reasoning is not specifically noted in the decision, it declined to consider the Dillon rule challenge, which suggests that the city's decision to establish a worker center fell within these three kinds of permissible powers which do not implicate the Dillon's rule.[688]

v. Conclusion

In conclusion, because neither not-for-profit worker centers nor municipalities are "employers" within the meaning of IRCA, because they do not "hire," "refer for a fee" or "recruit for a fee," and because their actions do not rise to the level of an agent of an employer within the meaning of IRCA, not-for-profit worker centers are not required to verify work authorization of day laborers or others seeking work which take advantage of these centers'

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[685] *Id.*
[686] *Id.* (citing Smiley v. Citibank, 11 Cal. 4th 138, 147 (1995)).
[687] *Karunakarum*, 70 Va. Cir. 208 (citing Norton v. Danville, 268 Va. 402, 408 n.3 (2004).
[688] *Id.*

services. Thus, IRCA should not present a legal hurdle to the establishment of a day laborer worker center including a hiring hall component in Chapel Hill, Carrboro, or any other North Carolina municipality.

3. Overview of Plans for a Day Labor Worker Center in Carrboro

A number of community groups have advocated for the development of a day labor worker center in Carrboro in order to provide a safe place for employers and day laborers to negotiate, as an institution to guard against wage theft, and as a forum for the development of other services. At a meeting with municipal leadership from Carrboro and Chapel Hill present, representatives of several of these groups explained a vision for a day labor worker center.

Community organization members explained that the worker center would benefit everyone; it would improve day laborers' standard of living and wages, it would give structure to the employment relationship and security of the hiring process to the benefit of employers, and finally it would lend to improved relationships between the police and day laborers, and between the community at large and the day laborer population, by getting many of these workers off the street. The ideal worker center would have the following characteristics: it would be safe, organized, accessible and centralized. It would be a place where day laborers could seek employment during hours that benefitted both workers and employers. It would provide basic amenities to day laborers—a place to sit, access to water, a restroom, and a more comfortable environment in general. There would be some staff, at least one permanent employee, who would be able to handle a waitlist procedure, the telephone, and other basic administration. The center would rely on day laborer input, and the day laborers would take responsibility for their own decision-making. Minimum wage payment would be enforced, possibly through the use of

written contracts. A database system could record worker and employer information so that both parties could have some idea with whom they were contracting and employers could select employees based on special qualifications and skills, if desired.

A plan for a worker center would involve community. For example, the Chamber of Commerce could help by moving employers from the streets to the center, and by advertising the availability of labor at the center. The center would require financial support from Carrboro and Chapel Hill for the costs of rent, a permanent staff person, and other start up expenses. The ultimate goal would be to build a sustainable center and tap into other funds, but there would still be continued costs.[689] The city could assist by examining and possibly revising at public transportation schedules to ensure that the worker center would be accessible to day laborers in Abbey Court and other areas of Chapel Hill and Carrboro. A partnership between the center and Durham Technical Community College to offer training and other educational resources could be part of the plan as well. Finally, the center could partner with legal entities in the community to address the legal issues involved in setting up a center, as well as the potential to serve as a site where legal issues related to employment could be addressed.

a. Concerns about a Day Labor Worker Center in Carrboro and Chapel Hill

The vision of a day laborer worker center introduced at the task force meeting with municipal leadership present is undoubtedly a long range vision. Though other parties generally support at least the notion of some kind of worker center existing in Carrboro, concerns have been voiced both by different groups with respect to the form that the center will take. Some of the concerns are summarized as follows:

[689] It was noted that the average start up cost of a worker center is between $60,000 and $200,000.

i. Community Concerns Voiced with respect to Day Laborers

Concerns raised about the interests of day laborers themselves echo some of the sentiments expressed in Greg Kettle's "Day Labor Markets and Public Space," including questions about how the job selection process will be fair, and how a day laborer worker center would coexist with day laborers who prefer a street entrepreneurship method for soliciting work.[690] Concerns were also expressed about public transportation needs and the ease with which day laborers can get to a worker center. Finally strong concerns were voiced that protections for the workers who want to stay on the corner should also be a goal, rather than an approach that combines the creation of a worker center with harsher municipal legislation geared toward street labor solicitation.

ii. Concerns Voiced by Municipal Leaders

Concerns were voiced that public opposition to a workers center might develop. Municipal leaders also felt that leadership from the county government would be important to assure success and that county officials should be incorporated into the process. Issues with compliance with federal law of a day laborer worker center in the area of work authorization were also raised. These concerns are addressed in the previous Subsection C. 2. In conjunction with these concerns, municipal leaders echoed the concerns of the Human Rights Center about the advisability of formalizing the process of finding day labor work. Finally, municipal leaders

[690] *See generally,* Kettles, *supra* note 574.

asked whether this center should be open for everyone rather than just day laborers in order to address the needs of the economy.

b. Next Steps

As a result of coalition meeting with municipal leaders, and ongoing conversations about the need for a workers center, the Human Rights Center of Carrboro announced its plan to open a Day Laborer Center close to Abbey Court and the current location where workers wait for work on the corner. The proposed Workers Center will also be a Community Center and will offer classes for workers through mid afternoon. It will also offer after-school programs, as well as programs open to adults. The Human Rights Center has steadily moved forward with plans for the Center, has close relationships with the immigrant day laborer community and immigrant families in Carrboro, and has a history of consistent dedication and perseverance with regard to social justice issues as they affect this population. It is expected that because of such constant attention and efforts, a workers center in Carrboro will become a successful reality.

PART THREE: LOCAL LAW ENFORCEMENT: A VITAL PART OF COMMUNITY INTEGRATION

As mentioned in the previous section, concurrent with preparing this briefing book the UNC Immigration and Human Rights Policy Clinic (IHRP) explored two practical projects that serve to accomplish the goals of building integrated communities. The second of the two projects relates to local law enforcement, and the vital role these agencies play in furtherance of community integration. The IHRP conducted research relating to the obstacles that prevent local law enforcement from developing working with immigrant communities, as well as the principles of community policing principles and examples of how such principles have been implemented. The IHRP also considered the ways that immigration law and policy have exacerbated the criminal victimization of immigrants, and how law enforcement's conformity to, and cooperation with federal immigration law, specifically the Violence Against Women's Act's (VAWA) immigration-related remedies may provide for more effective community policing and ultimately serve community integration goals. The IHRP met and worked with non-profit legal organizations serving the immigrant population generally in North Carolina, as well as an immigrant support organization serving the local South Asian immigrant population in Wake County, North Carolina, and a non-profit providing support to immigrant victims of domestic violence in Wake County. The purpose of working together with these groups was to combine our particular strengths and experience and to begin communication with a local police department in North Carolina to discuss the role of law enforcement and community policing to better serve the interests of law enforcement and the local immigrant. Because the U visa remedy (part of VAWA) demonstrates the intersection between immigrants and law

enforcement, the IHRP decided to specifically focus on the promises and problems in connection with the U visa process.

I. Community Policing: Immigrants and Community Integration

It should come as no surprise that there are special challenges for law enforcement when interacting with immigrant communities. Misunderstandings and mistakes are bound to happen when dealing with residents who speak English as a second language or do not speak English at all. The differences in culture and values only add to the complexity of the relationship between law enforcement and immigrants. Often immigrants come from a country where local law enforcement is corrupt and cannot be trusted. In order to appreciate and understand the application of community policing strategies, the recurring problems that occur between law enforcement and immigrant communities should first be examined.

A. Law Enforcement: Unique Challenges

1. Language Barriers

At least one nationwide study has shown that cultural misunderstandings and language barriers cause immigrants to access public safety services less often than native-born citizens.[691] As noted earlier in this report, nearly eight percent of the U.S. population speaks English less than very well.[692] That group consists mainly of immigrants who live in linguistic isolation in their homes. According to the Public Policy Institute of California, approximately 31% of

[691] *Building Strong Police-Immigrant Community Relations: Lessons from a New York City Project,* (Vera Institute of Justice, New York, N.Y.), August 2005, at 3.
[692] Broder & Blazer, *supra* note 273, at 7.

immigrant homes have no one over the age of 13 who can speak English "very well."[693] For those immigrants who do speak English well, the great majority speak English as a second language. This presents a challenge for police officers, especially because the nature of their work often puts them in tense and sensitive situations where accurate communication is a necessity. If an officer is proficient in the native language of the immigrant, accurate communication can still be a problem if the officer is less than fully bilingual and bicultural and is limited to providing a literal translation of what is being said. The following example illustrates the complexities in communication:

Spanish: El hombre del pelo chino dijo que lo había hecho para pagar una droga.

Literal translation: The man with the Chinese hair said he had done it to pay off a drug.

Correct translation: The curly-haired man said he had done it to pay off a debt.[694]

It is not hard to imagine how a mistake in communication with the above example would lead to drastically different results; without an accurate interpretation, the police might pursue a Chinese man in connection with drugs although the speaker referenced a curly-haired man about a personal debt.

2. Lack of Trust

Negative perceptions of law enforcement create additional challenges for police officers when engaging the immigrant community. Reasons for the wide distrust of law enforcement among immigrants vary from bad personal experiences with local police to rumors and stories about police that are shared within the immigrant community. For example, in New York City

[693] *English Proficiency of Immigrants*, (Public Policy Institute of California, San Francisco, C.A.), June 2008, at 1.
[694] Haydee Claus, *Court Interpreting: Complexities and Misunderstandings*, Alaska Justice Forum, 1997, http://justice.uaa.alaska.edu/forum/13/4winter1997/a_interp.html (last visited April 2, 2011).

an account about a police encounter with an Arab-American circulated in the Arab-American community. According to the story the Arab-American man tackled and held to the ground an arsonist trying to burn down a synagogue. When the police arrived they learned that the Arab-American was without status. He was subsequently taken into custody and deported. As the New York police report put it: "The intended moral on the street was clear: avoid all contact with police."[695] Additionally, some immigrants simply distrust police because of their experiences with the police in their home country where police corruption, repression, and violence may be common.[696] Whatever the reason, the fact is that a distrust of law enforcement among immigrants is a fairly ubiquitous phenomenon throughout the United States.

3. Fear of Law Enforcement

In addition to the lack of trust for law enforcement, many immigrants have an active fear of the police. Many of the same reasons some immigrants do not trust law enforcement are the same reasons they fear the police. Some immigrants have had encounters with law enforcement in the United States or in their home country that make them fear the police. Some immigrants fear that no matter what they do, the police will either not understand them or unfairly blame them for a crime they did not commit. Undocumented immigrants have the additional fear of being deported; thus, undocumented immigrants have a reason to fear any interaction with law enforcement regardless of their perception of the police.

For example, in New York City, a victim who was stabbed and required 34 stitches across the chest refused to report a crime out of a fear of being deported.[697] In another incident a victim was found curled up at the front of a house of a community organizer because he was

[695] Vera Institute of Justice, *supra* note 691, at 9.
[696] *Id*. at 3.
[697] *Id*. at 1.

afraid of going to the emergency room out of fear that the hospital staff would turn him over to immigration authorities.[698]

Regardless of the reason an immigrant may have a fear of the police, the result is an absolute desire to avoid all contact with law enforcement despite the consequences. This limits the opportunities for positive interaction between the immigrant community and local law enforcement, and as a result negative perceptions of law enforcement largely remain unchanged. But perhaps more importantly for purposes of community safety, immigrants are much less likely to report crimes or seek help because they fear contact with law enforcement. As a result criminals go unpunished and neighborhoods become more dangerous. And because immigrants have a reputation for being reluctant to contact police, immigrants are often targeted by criminals.[699] At a meeting held by the Department of Justice on community policing a community representative described how the immigrant community in his area was victimized by serious crimes, including murder and rape.[700] The representative explained that although some members of the immigrant community could identify individuals who were committing crimes, they would not share that information or otherwise come forward because they feared that their immigration status would be questioned. [701]

B. Complex Solutions

Many police departments across the country have implemented various policies and strategies that address the unique challenges associated with law enforcement and immigrant

[698] *Id*.
[699] *Policing in New Immigrant Communities* (U.S. Department of Justice, Office of Community Oriented Policing Services, Washington D.C.), June 2009, 4. *See also Enhancing Community Policing with Immigrant Populations: Recommendations from a Roundtable Meeting of Immigrant Advocates and Law Enforcement Leaders* (U.S. Department of Justice, Office of Community Oriented Policing Services, Washington D.C.), August 2008, 5.
[700] *Id*.
[701] *Id*.

community relationship. Of course there is no set of rules or policies that will fulfill the needs of every community, but the policies and strategies listed below are meant to serve as a list of ideas that can prove helpful for law enforcement in engaging the immigrant community. Each police department must consider the particular problems and the demographic makeup of its jurisdiction before selecting the combination of policies that would be most effective in its community.[702]

1. Special Units and Designated Officers for Immigrant Communities

An effective way to create opportunities for positive interaction with immigrants in the community is to assign specific police officers to certain communities of immigrants within the jurisdiction. These officers should spend the majority of their on duty time in the communities to which they are assigned. This is an excellent way of addressing the problems of mistrust and fear of the police. These specially assigned officers will be recognizable and have opportunities to positively interact with the community. As positive word spreads about these officers, immigrants may be more willing to approach the police and place trust in the officers. Officers will also be more aware of local conditions and problems.

In Chicago the police department divided the city into 279 police neighborhoods and assigned teams of officers to cover each neighborhood 24 hours a day, 7 days a week.[703] There were roving units sent around the city to respond to emergencies so team officers could stay within their assigned neighborhoods. These teams would usually attend monthly community

[702] Vera *Bridging the Language Divide: Promising Practices for Law Enforcement* (Vera Institute of Justice, New York, N.Y.), 2009, 9. For example the Storm Lake Police Department in Iowa developed two civilian Community Service Officer positions, one dedicated to providing services in Laotian, the other providing services in Spanish, because those were the two immigrant populations that had recently experienced large increases. In Nashville, where local clergy members play an important role, as with many other communities, the Metro Nashville Police Department determined a need for and began recruiting and training Spanish-speaking clergy who could deliver traumatic news to Spanish-speaking residents.

[703] *Community Policing and "The New Immigrants"* (U.S. Department of Justice, Office of Justice Programs, Washington, D.C.), July 2002, 5.

meetings which would provide an opportunity for residents to meet and exchange ideas with the assigned team members. During these meetings, thousands of residents were trained on their roles in the community policing scheme. In addition, the city of Chicago also created a special-request process so that officers could include other city agencies to address the various non-law enforcement related concerns of residents during their meetings. Officers that are assigned to a specific neighborhood should also participate in proactive outreach programs to show goodwill and establish relationships in the immigrant community.[704]

2. Diversifying the Police Force

The diversity of the community should be reflected in the makeup of the police department. Recruiting police officers from different backgrounds and cultures is an effective way to build trust with the immigrant community. Not only are police officers of the same nationality often better able to communicate with and understand immigrants, they are also likely to have connections in the community that will help in building trust and respect for local law enforcement. A diverse police force will also provide more multilingual officers who can be assigned as designated officers to a particular community. In addition, recruitment of individuals from immigrant populations does not have to be limited to sworn positions. Hiring immigrants

[704] U.S. Department of Justice, *Enhancing Community Policing with Immigrant Populations: Recommendations from a Roundtable Meeting of Immigrant Advocates and Law Enforcement Leaders*, *supra* note 699, at 13. "The community policing philosophy of long-term assignment of officers to specific neighborhoods or areas and the geographic deployment of officers to facilitate contact with residents should remain core practices for local law enforcement. Other creative outreach efforts, such as officers spending a day helping immigrant residents in their community remove graffiti, can have immediate, short- and long-term benefits. In addition to making physical improvements to the neighborhood, officers convey the message that local law enforcement wants to address crime in this particular community. Furthermore, those officers and residents who work on such an event become acquainted and can more easily call on one another in the future."

for both sworn and civilian positions within the law enforcement agency can generate goodwill between the agency and immigrant community.[705]

3. Cultural Training in the Police Department Curriculum

Every police officer should be given training about how best to engage immigrants and other residents who cannot speak English. As discussed earlier, police officers often find themselves in tense situations while carrying out their responsibilities. The ability to understand and accurately assess the situation is critical in many of these situations. Even when there is very little potential for violence, a simple misunderstanding could lead to strained community relations.

Cultural training should be tailored to the demographic composition of the community. If there is a large Cambodian community in the community, the police department should include in its cultural training the practices of Cambodians that are relevant to law enforcement concerns. For example, according to some experts Cambodians often keep their wallets in their socks, so they might reach for their socks when asked for a driver's license. The police officer might believe the Cambodian is reaching for a weapon.[706] Simple training adapted for the demographics of the local immigrant community can go a long way to preventing misunderstanding and accidents.[707]

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[705] U.S. Department of Justice, *Enhancing Community Policing with Immigrant Populations: Recommendations from a Roundtable Meeting of Immigrant Advocates and Law Enforcement Leaders*, *supra* note 699, at 7. *See also* Vera Institute of Justice, *supra* note702, at 9-10. Hiring civilians can be a good strategy when resources are limited. The Storm Lake Police Department in Iowa chose to develop two Community Service Officer staff positions to provide interpretation and translation, because attempting to hire bilingual sworn officers was difficult in the current environment and civilians who already spoke the needed languages were easier to recruit, hire and train.

[706] U.S. Department of Justice, *Community Policing and "The New Immigrants*," *supra* note 703.

[707] *Id*. at 9. It has been suggested that "rebranding" these cultural trainings and titling the course: "Maintaining Tactical Advantage" and avoiding titles such as "Cultural Diversity" will be more effective and more well received by police officers. *See also* U.S. Department of Justice, *Enhancing Community Policing with Immigrant*

Police agencies should also publicize the agency's mission and policies to uphold the rights of all people in its jurisdiction, regardless of nationality or immigration status.[708] These materials may encourage immigrants to contact law enforcement when needed, while they otherwise may have been reluctant.[709]

4. Engage the Immigrant Community

A central goal for police departments that want to improve relations with the immigrant community is to obtain their involvement with community policing. Immigrants, just like any other population, have a desire to create a safer community. Mutual distrust between law enforcement and immigrant groups can be overcome as they work together to achieve their shared aspiration of crime free streets.[710] As immigrants participate with law enforcement, trust may be established and the safety of neighborhoods may improve.[711] Such participation also gives immigrants an opportunity to voice their opinions and feel a part of the community.

Populations: Recommendations from a Roundtable Meeting of Immigrant Advocates and Law Enforcement Leaders, *supra* note 699, at 9. Police officers should be given encouragement and provided with incentives to enroll in basic language training courses in the dominant non-English languages of the locality. As long as the police officer has an appreciation for his lack of full language comprehension, just a fundamental grasp of a foreign language can be helpful for a police officer working in an immigrant neighborhood.

[708] *Id*. at 10.

[709] Interview with Dae Hyun Chang, President of the Raleigh Korean Association (January 24, 2011). Additionally, police agencies should create, translate into several languages, and distribute pamphlets or handbooks which explain local law enforcement practices and what to expect from interaction with the police. For example, Mr. Dae Hyun Chang, suggested these materials were needed to help immigrants adjust to life in America and avoid misunderstandings with local law enforcement. He said that many immigrants do not know that they are supposed to stay in the car when directed to pull over by a police officer. Having access to this type of information in their native language can help immigrants to stay calm and act in accordance with law enforcement policies during what can be a stressful situation.

[710] U.S. Department of Justice, *Enhancing Community Policing with Immigrant Populations: Recommendations from a Roundtable Meeting of Immigrant Advocates and Law Enforcement Leaders*, *supra* note 699, at 7.

[711] *Id*. Police leadership should also expect officers within the agency to take extra time to positively engage the immigrant community when such opportunities arise throughout the day. "Although finding time for such outreach is challenging, the payoff in reduced tension between immigrants and law enforcement is worth the commitment of time."

Agencies should seek out and create opportunities to educate immigrants about U.S. laws and encourage their input and participation.[712]

The New York City Police Department has recently targeted three immigrant groups (Arab-American, African, and Latin-American communities) to develop new strategies in community policing.[713] The New York Police Department held separate meetings with representatives with each group to share ideas and goals of the community policing project.[714] At first there was some skepticism on the part of the community members. But as the project went forward, relationships were established that allowed trust to develop between the groups. One of the community participants said, "My [initial] concern was that this was a post-9/11 strategy to identify immigrants. I was wrong. The NYPD's only concern was to better serve our community."[715] The New York Police Department report listed other positive responses such as the following:

> Another [community member] said, that after years of advocacy, she felt "listened to" by government officials for the first time. The simple act of asking for community input in itself seemed to [generate] good will and support. The police representatives [warmed] to the forums as well. An officer who had originally expressed doubts said afterward, for example, that he had learned things about the community that were helping him in his role as a community liaison.[716]

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[712] *Id*. at 14. Suggestions include: "Invite immigrant advocates to ride along with patrol officers so they can better understand officers' responsibilities, the nature of calls for service received, and the challenges officers encounter in policing immigrant communities. Some jurisdictions offer citizen academies to: familiarize interested residents about the role of law enforcement and services available; address law enforcement-related rumors and media reports; and solicit community support. These citizen academies, with the help of immigrant advocacy organizations, can be the model for immigrant academies that include an overview of U.S. laws, the U.S. judicial system, and related topics. Other settings in which to proactively reach out to immigrant populations are: Neighborhood Watch meetings; school and after-school programs and community recreation center activities; gatherings of faith-based organizations; English as a Second Language classes; and day labor employment sites. Finally, develop informational materials in the appropriate languages for distribution at these settings."
[713] Vera Institute of Justice, *supra* note 691, at 5.
[714] *Id.* at 6.
[715] *Id.* at 7.
[716] *Id.*

The New York Police Department was careful to select a wide range of immigrant community leaders to participate in meetings to establish the community policing initiative. The department was concerned with ensuring that community leaders fully represented the diverse immigrant groups.[717] In an effort to include all voices from within the community, the department contacted community-based social services, as well as religious organizations and political leaders, when searching for community representatives.[718] By reaching out to social services in the community for suggestions on "leaders" for immigrant groups, the New York Police Department was able to diversify the representation of the community and include representatives who had access to the most vulnerable and the most disengaged members of the community.[719]

> Community policing is more than simply enacting immigrant-friendly policies. It is subscribing to the idea that immigrants are members of the community who are entitled to police protection, assistance, and involvement in local policing efforts.

5. Create Policies Which Encourage Community Policing

Immigrants must be engaged for community policing to be effective. The local immigrant community should know their rights and feel comfortable contacting local law enforcement. In order for this to happen, police departments should adopt policies which encourage immigrants to participate in the process of law enforcement.

For example, the City of El Paso's Police Department established a Victim Services Unit to work with immigrants and inform them of their rights.[720] The police department, aware that

[717] *Id*. at 9.
[718] *Id*. at 10.
[719] *Id*. at 11.

immigrants who are victims of crime feel powerless to seek help or protection, has adopted the policy to not require victims of crimes to report their immigration status.[721] The Victims Services Unit also assists immigrant victims by informing and educating immigrants about their legal rights and the dignity and respect they deserve as victims.[722]

Law enforcement agencies should also partner with other government agencies that work with immigrants. Other government agencies are often in a position to encourage community policing policies and immigrants may be less suspicious of these agencies than law enforcement. For example, staff at the local health department can urge immigrant victims to report sexual assault and domestic violent crimes.[723] If the health department staff is armed with information reassuring the victims that law enforcement's interest in the crime is only to aid the victim and apprehend the perpetrator, then immigrants may be more willing to aid with the investigation and, if need be, testify at any related judicial proceedings. Working with other government agencies helps law enforcement with limited resources to establish contact with immigrants and spread the word of community policing policies.

6. Address Immigrant Concerns about Deportation

A police agency cannot successfully or effectively adopt community policing policies if it does not alleviate immigrants concerns of deportation. Many immigrants, even those who are documented, fear what effect interaction with the police may have with their immigration status. Since there is no federal law that dictates what immigrants can expect from local law

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[720] Ricardo Gambetta & Zivile Gedrimaite, National League of Cities, *Municipal Innovations in Immigrant Integration: 20 Cities, 20 Good Practices*, 2011, 9.
[721] *Id*. at 10.
[722] *Id.*
[723] U.S. Department of Justice, *Enhancing Community Policing with Immigrant Populations: Recommendations from a Roundtable Meeting of Immigrant Advocates and Law Enforcement Leaders*, *supra* note 699, at 8.

enforcement, there is no standard by which immigrants can rely on to ease their fear of the police. Some agencies may adopt a policy of not asking about immigration status; another agency may look into a resident's immigration status only in cases which involve certain crimes; while agencies in other jurisdictions may actively pursue immigration enforcement.[724] In order for police agencies to achieve a successful community policing relationship with immigrant groups, they should not adopt policies which blur the lines between local law enforcement and federal immigration agencies. They should also ensure that immigrants have accurate information about local law enforcement practices and ICE.[725] A roundtable of law enforcement leaders and immigration advocates, organized by the Department of Justice's Office of Community Oriented Policing Services and the National Sheriff's Association, offered the following suggestion:

> Immigrants, just like any other population, have a desire to create a safer community.

> Local law enforcement can work with immigrant advocates and ethnic media outlets to dispel rumors and reliably inform immigrant populations about: the policies of ICE; what situations trigger local law enforcement to contact ICE; and resources that may be available to assist immigrants and their families who are subject to ICE investigations, for example, U and T visas.[726]

C. Conclusion

Community policing is more than simply enacting immigrant-friendly policies. It is subscribing to the idea that immigrants are members of the community who are entitled to police protection, assistance, and involvement in local policing efforts. Any law enforcement policy which embodies this concept will be in accordance with community policing principles.

[724] *Id*. at 15-16.
[725] *Id*. at 16.
[726] *Id*.

Agencies across the country, from the New York City Police Department to the Storm Lake Police Department in Iowa, have implemented community policing policies according to the needs of their respective communities. As noted earlier, it is up to each police agency to look to the demographics of its jurisdiction and choose community policing strategies tailored to the local community. As police agencies implement these policies and positively engage immigrant communities, relations will improve and immigrants will be more likely to report violent crimes and assist police officers with investigations. Subsequently, police officers will find it easier to fulfill their duty and obligation to serve and protect all residents, including immigrants, within the community.

II. The Relationship between Local Law Enforcement and Immigrant Crime Victims

U.S. policies aimed at deterring undocumented immigration have led to the "development of an enormous, uniquely isolated and vulnerable population that criminals can prey on with impunity" as an "unintended consequence."[727] As mentioned previously, language barriers, negative perceptions or fear of police on behalf of the immigrant community have caused a disconnect leaving many immigrants in a situation where they are unlikely to report crimes. This is particularly true with respect to undocumented immigrants. This disconnect between the undocumented community and law enforcement is well-known, and unfortunately leads many undocumented individuals to fall victim to crimes as a result. Criminals that prey upon the undocumented immigrant population do so conscious of the fact that for their victim, reporting a crime carries with it the risk of exposing his or her undocumented status and the possible result of triggering deportation proceedings.

[727] Promoting U Visas With Local Officials, National Immigrant Family Violence Institute available at http://www.nifvi.org/Promoting%20U%20Visas%20with%20Local%20Officials.pdf.

A. Background on the Criminal Victimization of Immigrant Community

1. Immigrant Victims of Domestic Violence

Immigrant victims of domestic violence are perhaps one of the most vulnerable groups. Historically, pursuant to the doctrine of coverture, a wife took on the "legal identity" of her husband.[728] In terms of immigration status, this meant that a U.S. citizen or Lawful Permanent Resident (LPR) male spouse could control the immigrant status of his foreign born wife; however, a U.S. citizen or LPR female spouse did not possess the same control. [729] Her lack of control over her immigration status gave an extraordinary amount of power and control to her citizen or LPR spouse creating a grave potential for domination and abuse.[730]

Although the premises of the doctrine of coverture have been periodically removed over time from state law with respect to family law, tort law, contract law, and property law, the doctrine is perpetuated, however indirectly, in U.S. immigration law.[731] To understand how this is the case, one must first understand the process for obtaining legal status based on marriage. These processes impact women immigrants disproportionately due to the fact that more women

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[728] Leslye E. Orloff *et al*., Mandatory U-Visa Certification Unnecessarily Undermines the Violence Against Women Act's Immigration Protections and Its "Any Credible Evidence" Rules - A Call For Consistency, XI:II Geo. J. Gender & L., 619, 622.; Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 San Diego L. Rev. 593, 595 (1991). "Under the doctrine of coverture, a wife could not make a contract with her husband or with others. She could not engage in litigation. She could not sue or be sued without joining her husband. She could not sue her husband at all. She could not make a will. The personal property which a woman owned before marriage and that she acquired during the marriage became her husband's property. A husband had the use of his wife's real property during the marriage. If the marriage produced a child, the husband was entitled to the rents and profits of the wife's property during the husband's life. The husband was the sole guardian of the couple's children."

[729] *Id.*

[730] Calvo, *supra* note 728, at 613 (noting that the law gives so much power to the citizen or resident spouse that the alien spouse is faced with a Hobson's choice: either remain in an abusive relationship, or leave and confront deprivation of home, livelihood, and ability to promote a child's best interests").

[731] *Id.*, at 598. During the mid-nineteenth century states began to pass laws to remove coverture principles that were known as Married Women's Property Acts. "These laws afforded married women rights including: the right to joint custody of children; the right to sue and be sued; the right to contract; and the right to own and control real and personal property." Later, the women's movement of the 70's and 80's made similar progress in removing the premise of chastisement, a "subsidiary doctrine" of coverture permitting restrain his wife from "misbehavior" and punish her for it.

than men immigrant as spouses as well as the gender dynamics of domestic violence which result in more women than men being victimized.

In order for a noncitizen immigrant spouse to gain legal permanent residence based upon his or her marriage to a United States citizen or LPR, the qualifying citizen or LPR spouse (the petitioner/sponsor) must petition for the immigrant spouse (the beneficiary).[732] Despite eligibility to adjust status to lawful permanent residence as an immediate relative of a citizen, or as the spouse of a LPR, a beneficiary may not file a petition for immigration benefits for herself; instead she has the status of "beneficiary" of her husband's petition.[733] Until 1986, the immigrant spouse, if her husband had indeed filed the necessary paperwork for her, would obtain permanent residency after an interview with the Immigration and Naturalization Service (INS) (now reorganized as United States Citizenship and Information Services or USCIS) to determine that the marriage was valid and entered into in good faith.[734] However, the Immigration Marriage Fraud Amendments (IMFA) of 1986, enacted by Congress as an attempt to prevent fraudulent marriages for immigration benefits, further exacerbated the problem.[735]

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[732] James A. Jones, The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?, 24 Fla. St. U. L. Rev. 679, 681 (1997).

[733] *Id*. U.S. immigration considers parents, spouses, and children under the age of twenty-one to be "immediate relatives" for the purpose of family sponsored petitions. There is no quota restriction on the amount of individuals that fall within this category. Spouses of LPRs are assigned a preference category (second preference) and are subject to waiting periods as visas are limited by quota based upon preference. See 8 U.S.C. §§ 1151(b); 1153(a) (1994).

[734] Jones, *supra* note 732, at 681. On March 1, 2003, as a result of the Homeland Security Act of 2002 (Pub. L. No. 107–296, 116 Stat. 2135), the INS was dismantled and those duties previously carried out by the agency now fall under the three separate components of the Department of Homeland Security (DHS): the United States Citizenship and Immigration Service (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP). USCIS is now responsible for holding interviews in consideration of family petitions. See Our History, United States Citizenship and Immigration Service, available at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=e00c0b89284a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=e00c0b89284a3210VgnVCM100000b92ca60aRCRD. We will refer to the agency as the INS when describing acts and circumstances were in effect before the reorganization and USCIS when referring to circumstances after the reorganization, and INS/USCIS when referring to ongoing acts and circumstances that were and are applicable to both periods of agency organization.

[735] Pub. L. No. 99-639, 100 Stat. 3537; 8 U.S.C. §§ 1154, 1184, 1186a (1994); Orloff et al., *supra* note 728, at 623.; Jones, *supra* note 732, at 680.

Under the IMFA, family-sponsored immigrant spouses are presumed to have entered into marriage with the petitioner spouse fraudulently for the purpose of immigration benefits if qualifying marriage is less than two years old.[736] After the citizen or LPR petitioner initiates the process by filing for his or her immigrant spouse, and that initial petition is approved, the immigrant will receive lawful permanent resident status on a conditional basis for two years.[737] At any time during these two years INS/USCIS "can terminate the conditional status . . . if the marriage is determined to be a sham used to confer a beneficial immigration status upon the alien."[738] Within ninety days of the end of the two year period, the petitioner spouse may apply to remove the conditional status of their immigrant spouse.[739] Additionally, both the petitioner and beneficiary must attend an interview with INS/USCIS "to re-determine if the marriage is bona fide."[740] If the citizen or LPR spouse refuses to apply to remove the conditions, does not make a timely filing, or does not attend the interview with INS/USCIS, the immigrant spouse can be deported as a result.[741] Only after all these steps are taken, and the INS/USCIS adjudicator determines that the immigrant spouse entered into the marriage in good faith, will she obtain unconditional permanent residency.[742]

The protocol that creates a petitioner/beneficiary paradigm that excludes immigrant spouses from being able to file their own petitions but instead requires them to reply on their spouses, coupled with the IMFA's joint application and interview requirements create the unfortunate effect of "forc[ing] those spouses and children in abusive relationships to prolong the

[736] Orloff *et al*., *supra* note 728, at 623.
[737] Id.; Jones, *supra* note 732, at 682.
[738] Calvo, *supra* note 728, at 606-611
[739] *Id*.
[740] *Id*.
[741] *Id*.
[742] *Id*.

relationship in order to secure their permanent residency status and avoid deportation."[743] Although the IMFA permitted waiver of the joint application requirement in some circumstances, the immigrant beneficiary faced a difficult standard of proof and the ultimate decision fell to the discretion of the INS/USCIS.[744] In practice these waivers "were available only in very limited circumstances . . . [and] were not granted for immigrant women abused by their citizen or lawful permanent resident husbands."[745]

In recognition that the framework of the IMFA "aggravated already pernicious domestic situations for immigrant women by providing their assailants with control over whether they would be permitted to remain in the United States," Congress passed the Immigration Act of 1990, which created a "battered spouse waiver" to the joint application requirement.[746] Under this option an abused spouse must demonstrate that "the qualifying marriage was entered into in good faith . . . and during the marriage the alien spouse . . . was battered by or was the subject of extreme cruelty perpetrated by his or her" citizen or LPR spouse . . . and that failure to meet the joint application and interview requirement" was not his or her fault.[747] The Act also included a confidentiality provision aimed at protecting battered spouses from further abuse.[748] Although Congress intended for the battered spouse waiver to be granted broadly and did not limit the type

[743] *Id*. If the citizen or LPR spouse does not apply with the immigrant spouse or attend the interview, the immigrant spouse faces deportation proceedings.
[744] *See* 8 U.S.C.A. § 1186(a)(c)(4) amended by Pub. L. 101-649 § 701(a), 104 Stat. 4978; Orloff *et al*., *supra* note 728, at 623; Jones, *supra* note 732, at 685. To qualify for a waiver an immigrant beneficiary had to demonstrate that "extreme hardship would result from deportation, or that the marriage had been entered into in good faith, the marriage had been terminated by her for good cause, and she had not been at fault in failing to meet the requirements of the petition to remove the conditional status."
[745] Orloff *et al*., *supra* note 728, at 623.
[746] 8 U.S.C. § 1186a(c)(4)(C) (1994).; Orloff *et al*., *supra* note 728, at 624; Jones, *supra* note 732, at 686.
[747] *Supra*. This provision has also been referred to as the battered spouse/child waiver. In its entirety it includes the language "the alien spouse or child was battered" by the citizen or LPR "spouse or parent."
[748] Jones, *supra* note 732, at 688. The confidentiality provision imposed the requirement of a court order for the release of waiver related information. In addition to creating the battered spouse waiver, the Immigration Act of 1990 amended the hardship waiver provision of 8 U.S.C. § 1186a(c)(4) to remove the conditions that the marriage was terminated for good cause, and the immigrant spouse had to initiate the divorce. These conditions conflicted with state divorce laws, and permitted the abusive spouse to prevent the immigrant spouse from being eligible for the waiver by filing for divorce first.

of supporting evidence that could be used, the INS issued regulations limiting the type of evidence that may be used in applying for the waiver, "creat[ing] an approach that was not feasible for most battered immigrants."[749]

Significant barriers still existed for battered immigrant spouses after the Immigration Act of 1990. The battered spouse waiver only applied in a situation where the citizen or LPR abuser filed an initial petition for the immigrant spouse, giving that spouse conditional residency. This left several battered immigrants whose abusive spouses refused to file the initial I-130 as a means of control without relief, and mainly benefited those in relationships where this type of abusive and controlling behavior manifested later in time. Additionally, even those immigrant spouses initially awarded conditional status faced challenges in obtaining a waiver due to the high evidentiary standard and the waiver's discretionary nature.[750] Battered immigrant spouses remained particularly vulnerable, as the law still required them to depend on the abusive qualifying relative spouse to petition on their behalf for legal status in the United States.

These residual problems left by the IMFA and the Immigration Act of 1990 led Congress to enact the Violence Against Women Act (VAWA) of 1994.[751] The new legislation was enacted with the vision of "a nation with an engaged criminal justice system and coordinated

[749] *Id*.; Orloff *et al*., *supra* note 728, at 625. Legislative history suggests that "battering or extreme cruelty [could be proved by] evidence that included, for example, reports and affidavits from police, medical personnel, psychologists, school officials, and social services agencies." The INS regulations stated that these forms of evidence were acceptable to prove physical abuse (battery), but distinguished extreme cruelty, or mental abuse, declaring that "only an affidavit of a licensed mental health professional would suffice to meet the definition of extreme cruelty under the statute." This restrictive requirement created significant barriers for immigrant spouses in applying for a battered spouse waiver, as abused immigrant spouses do not generally have access to the financial resources necessary to obtain a professional mental health evaluation and "few mental health professionals had the requisite domestic violence training."

[750] Jones, *supra* note 732, at 688. An abusive spouse could also commit perjury with regard to the good faith marriage requirement still in place after the Act, leaving the spouse ineligible for a hardship waiver.

[751] Violent Crime Control and Law Enforcement Act of 1994; Title IV, Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); Orloff *et al*., *supra* note 728, at 625; Jones, *supra* note 732, at 691; Laura Carothers Graham, Relief for Battered Immigrants Under the Violence Against Women Act, 10 Del. L. Rev. 263, 265.

community responses."[752] Congress intended to remove the "obstacles inadvertently created" by previous immigration laws so that they could "no longer be used as a weapon by the abusive family member."[753] Specifically, VAWA of 1994 amended the Immigration and Naturalization Act (INA) to permit an abused spouse or child of a United States citizen or LPR to apply for status on their own behalf, (self-petition), without having to depend on their abusive relative.[754] Additionally, the statute provided additional relief to abused immigrant spouses already in deportation proceedings by making victims of battery or extreme cruelty eligible for suspension of deportation.[755] A VAWA self petitioner must submit proof demonstrating that he or she:

> (A) Is the spouse of a citizen or lawful permanent resident of the United States; (B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) or 203(a)(2)(A) of the Act based on that relationship; (C) Is residing in the United States; (D) Has resided in the United States with the citizen or lawful permanent resident spouse; (E) Has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage; . . . (F) Is a person of good moral character; (G) Is a person whose deportation would result in extreme hardship to himself, herself, or his or her child; and (H) Entered into the marriage to the citizen or lawful permanent resident in good faith.[756]

Additionally, VAWA of 1994 overruled the overreaching then INS regulations requiring an affidavit from a licensed mental health professional as proof of extreme cruelty.[757] Congress corrected INS's misinterpretation of the Immigration Act of 1990 by "mandat[ing] that the INS

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[752] The Violence Against Women Act: 10 Years of Progress and Moving Forward, The National Task Force to End Sexual and Domestic Violence Against Women, available at http://www.ncadv.org/files/OverviewFormatted1.pdf.
[753] Carothers Graham, *supra* note 751, at 265.
[754] *Id*.
[755] Jones, *supra* note 732, at 692. See also Carothers Graham, *supra* note 751, at FN 10-11. Suspension of Deportation is currently referred to as Cancellation of Removal as a result of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRAIRA). Under either name, a grant will stop deportation proceedings and give the petitioner lawful permanent resident status. "Unlike VAWA self-petitioners, . . . VAWA applicants for suspension of deportation or cancellation of removal must demonstrate three years of continuous physical presence in the United States and that departure from the United States would case extreme hardship."
[756] *See* 8 C.F.R. § 204.2(c)(1)(i) (1997).
[757] Orloff *et al*., *supra* note 728, at 626.

must accept "any credible evidence" in all VAWA and battered spouse waiver cases."[758] Congress recognized that access to evidence is a significant obstacle to domestic violence victims, especially undocumented immigrant victims, as abusers tend to control any important documents.[759]

The problem of access to necessary evidence is an area in which law enforcement officials can and should assist VAWA self-petitioners. Law enforcement provides an essential service to victims of domestic violence by responding to reports and becoming involved in cases. As mentioned, immigrant victims are less likely to report crimes to the police for various reasons. Victims of domestic violence who are highly dependent on a citizen spouse face unique challenges in their decision to contact law enforcement. When law enforcement responds to an incident of domestic violence involving a battered immigrant spouse it is important that the officer understand these unique circumstances, and assist the victim appropriately. The officer should be sure that the immigrant victim understands that law enforcement is present to assist them and should provide her with information regarding victim advocates and battered women shelters.

> The local immigrant community should know their rights and feel comfortable contacting local law enforcement.

[758] *Id*. With respect to the misinterpretation by INS of the intended evidentiary standard for the battered spouse waiver, the legislative history of Congress in enacting VAWA of 1994 states: "This [battered spouse waiver] regulation focuses the inquiry on the effect of the cruelty on the victim, rather than on the violent behavior of the abuser, and it may be discriminatory against non-English speaking individuals who have limited access to bilingual mental health professionals. This section overrides this regulation by directing the Attorney General to consider any credible evidence submitted in support of hardship waivers based on battering or extreme cruelty whether or not the evidence is supported by an evaluation by a licensed mental health professional." *Id*., quoting H.R. REP. NO. 103-395, at 38 (1993).

[759] *Id*. at 627. This standard was modeled after the more flexible evidentiary standards used in domestic violence and family law proceedings for similar reasons.

Many battered immigrant spouses are unaware of U.S. domestic violence law, and law enforcement or victim advocates working with law enforcement should be sure to relay that incidents of domestic violence are not tolerated, are taken seriously in the United States, and that the victim should not fear contacting law enforcement regardless of immigration status. Many of the evidentiary obstacles faced by VAWA self-petitioners may be solved through the regular course of a police investigation, without additional burden on a reporting or assisting officer. If an officer is made aware that an abuser has lawful permanent or citizen status during the investigation, arrest, or booking stage of a case, this should be documented and made available to the victim if requested. Any injuries to the victim should be carefully documented and photographed. Additionally, law enforcement officers involved in domestic violence cases regularly accompany the victim to the residence previously shared with the abuser so that she may safely collect any belongings. Reports should reflect the fact that the victim and the abuser shared a mutual residence, and victims should not be rushed but be encouraged to take their opportunity to any remove family photos, utility bills, and other personal items that will prove useful in their VAWA case that will become unattainable upon leaving the shared residence.

Within the years following the enactment of VAWA of 1994, it became obvious that lawmakers had only taken a small step towards addressing the criminal victimization of the undocumented immigrant population as a result or "unintended consequence" of United States immigration policy. Congress' previous legislation aimed at protecting undocumented immigrants from criminal activities was focused too narrowly, leaving several battered immigrants unprotected. A newsletter by the Department of Justice's Office of Community Oriented Policing Services (the COPS Office) illustrates this problem with reference to a specific case:

> Eva is married to a man who has assaulted her in the past—and now it has happened again. But this time she is even more frightened. She is about to have the couple's first baby and her husband has just threatened her once more, only this time he's said that if she reports him to the police, he will have her deported.

If Eva's abuser were not a United States citizen or LPR or had she been unmarried, she would not have been protected by prior VAWA legislation.

2. Domestic Violence and Beyond: Victimization of Immigrants in Other Realms

Congress recognized that U.S. immigration policy does not just "facilitate exploitation" by abusive USC or LPR spouses or parents, but also by boyfriends, non USC/LPR intimate partners and spouses as well as "employers, landlords . . . and other criminals."[760] As noted above, for an immigrant victim of domestic violence where the perpetrator is neither a USC or LPR husband or USC or LPR parent of her child, VAWA offers no remedy. Additionally, as discussed in the previous section, the common perception that immigrants are hesitant to contact law enforcement makes them particularly vulnerable to criminal activity.[761] Another case mentioned in the above mentioned COPS newsletter illustrates this dilemma:

> The owner of a small restaurant says he is concerned about one of his employees. The employee is undocumented and was robbed recently after leaving work one night. The owner says, "He's afraid to talk to the police and he has seen these guys before. These guys are going after people they know aren't from this country

[760] Victims of Trafficking and Violence Protection Act of 2000, Division B, Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified at 8 U.S.C. § 1101); (hereinafter "VAWA of 2000).; NIFVI, *supra* note 727, at 3. See also Carothers Graham, *supra* note 751, at 267; Jamie R. Abrams, The Dual Purposes of the U Visa Thwarted in a Legislative Duel, XXIX St. Louis Pub. L. Rev. 373, 378. Congress made findings as part of VAWA of 2000, and stated that "there are several groups of battered immigrant women and children who do not have access to the immigration protections of the Violence Against Women Act of 1994 which means that their abusers are virtually immune from prosecution because their victims can be deported as a result of action by their abusers and the Immigration and Naturalization Service cannot offer them protection no matter how compelling their case under existing law."

[761] *See supra* Section II

> because they figure they are walking ATMs. They always have cash on them—not credit cards or debit cards—cash."[762]

The case of the restaurant worker is not an unfamiliar one. In fact the National Association of Chiefs of Police stated that "criminals may believe immigrants tend to carry cash instead of relying upon bank accounts; therefore these immigrants are more likely to be targets of robberies…"[763] These victims that are specifically targeted for criminal activity because they are perceived to be undocumented immigrants also found no protection from VAWA of 1994. In response to this gap left by previous legislation, Congress created the U visa as part of the Violence Against Women Act of 2000.[764] Although the new visa remedy was embedded in legislation that focused on violence against women, the statute created protections for a broader group of immigrants vulnerable to other categories of crime and exploitation.

In creating the U visa, Congress specifically stated its purpose: "to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes . . . committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States."[765] Congress reasoned that "[p]roviding temporary legal status to aliens who have been severely victimized by criminal activity" would "facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status."[766] Accordingly, an additional purpose of the U visa is to

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[762] Sergeant Inspector Tony Flores and Rodolfo Estrada, The U Visa: An Important Tool for Community Policing, 4:1 The e-newsletter of the COPS Office (2011), available at http://www.cops.usdoj.gov/html/dispatch/01-2011/U-visa.asp.
[763] NIFVI, *supra* note 727, at 2 (quoting Police Chiefs Guide to Immigration Issues, International Association of Chiefs of Police 28 (2007) available at http://www.theiacp.org/Portals/0/pdfs/Publications/PoliceChiefsGuidetoImmigration.pdf.)
[764] VAWA of 2000, *supra* note 760.
[765] *Id*.; Orloff *et al*., *supra* note 728, at 634.
[766] *Id*.

"encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens."[767]

To be eligible for a U visa, a noncitizen must prove that he or she (1) has suffered substantial physical or mental abuse as a result of having been a victim of a qualifying crime; (2) possesses information concerning such criminal activity; (3) has been helpful, is being helpful, or is likely to be helpful in the investigation and prosecution of the crime; and (4) is the victim of a criminal activity that occurred within the United States or that violated U.S. law.[768] The statute contains a list of serious crimes that qualify under the U visa; however, this list is not exclusive and includes a catch-all provision for "any similar activity."[769] Although the visa category was created in 2000, implementing regulations were not issued until seven years later, when

> Congress recognized that U.S. immigration policy does not just "facilitate exploitation" by abusive USC or LPR spouses or parents, but also by boyfriends, non USC/LPR intimate partners and spouses as well as "employers, landlords . . . and other criminals."

[767] *Id.*

[768] INA § 101(a)(15)(U)(i), 8 U.S.C. § 1101(a)(15)(U)(i). See also Sameera Hafiz et al., Toolkit for Law Enforcement Use of the U-Visa, VERA Institute of Justice 5 available at http://www.vera.org/files/U-Visa-Law-Enforcement-Tool-Kit.pdf, and Sejal Zota, Law Enforcement's Role in U Visa Certification, Immigration Law Bulletin (UNC School of Government, Chapel Hill, N.C.), June 2009 at 2.

[769] Julie E. Dinnerstein, *The "New" and Exciting U: No Longer Just My Imaginary Friend, AILA Immigration & Nationality Law Handbook* 451 (2009), available at http://www.aila.org/content/fileviewer.aspx?docid=31996&linkid=223769. The list includes, "the crime, the criminal activity, or the attempt, conspiracy, or solicitation to commit the criminal activity involved one or more of the following acts: rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, or perjury." In cases where the crime committed does not fit one of these categories, an advocate should demonstrate similarities between the elements of that crime and one of the qualifying crimes as permissible under the catchall provision. This is often done in states that do not have a domestic violence statute but have an assault statute that would qualify as domestic violence based on the relationship of the perpetrator and victim.

the United States Customs and Immigration Service (USCIS) started accepting petitions for U visa status.[770] Prior to the regulations, individuals applied for interim relief under the statute and those who appeared to be eligible were granted deferred action.[771] Following the issuance of the regulations, those approved for a U visa obtain legal status for up to four years; at the conclusion of the third year, the U visa recipient may be eligible to apply to adjust status to lawful permanent residency.[772]

B. The U Visa and Community Policing: How Law Enforcement Can Help End the Victimization of Immigrants

The U visa has been a powerful tool for law enforcement officers who participate in community policing to overcome "the challenge of how to get undocumented immigrants to report or admit that they are victims of crime."[773] Law enforcement plays a critical role in the U visa process. The U visa regulations established the requirement that the noncitizen crime victim obtain certification verifying their helpfulness or cooperation in the investigation or prosecution of the crime.[774] By signing the I-918 Supplement B, the form required by USCIS, law enforcement or other designated officials are not making any immigration decisions, nor are they certifying any other element required for U visa relief other than the helpfulness of the victim.[775] However, if an official does not sign the certification, the immigrant victim is essentially denied

[770] *Id*. New Classification for Victims of Criminal Activity; Eligibility for ''U'' Nonimmigrant Status, 72 Fed. Reg. 53,014 (Sept. 17, 2007).
[771] *Id*. Those individuals that received interim relief were able to apply for employment authorization documents, and, may also apply for some types of public assistance in some states, for example, New York.
[772] Hafiz, *supra* note 768, at 6.
[773] Flores and Estrada, *supra* note 36.
[774] 72 Fed. Reg. 53,014; Zota, *supra* note 293, at 1; Hafiz, *supra* note 768, at 5; Abrams, *supra* note 760, at 382. The power to certify is not limited to law enforcement. Prosecutors and judges may also certify as to the helpfulness of the victim.
[775] Abrams, *supra* note 760, at 382.

any relief under the U visa statute.[776] For this reason, it is vital that officials eligible to sign the form and certify helpfulness be educated on the U visa and cooperate with its broad use to benefit both law enforcement in their community policing efforts, and to end the victimization of the immigrant community in their jurisdictions by helping to alleviate the fear immigrants experience when considering whether to report crimes. Congress recognized, by enacting the U visa with near unanimous support that undocumented immigrants should no longer be afraid to cooperate with local law enforcement, and that law enforcement agencies charged with the duty of policing these individuals should make use of the U visa through community policing efforts that would be assisted by this valuable tool.

Unfortunately, because the Department of Justice and the Department of Homeland Security have not been allocating sufficient funding to provide U visa training and assistance, law enforcement agencies are being educated on an ad hoc basis mainly by immigration attorneys and other victim advocates seeking certification on behalf of individual clients' behalves.[777] Although local practitioners have made significant efforts to educate law enforcement and advocate for the broad use of the U visa, this approach is at times ineffective because of the "ad hoc, alarmingly under-resourced, slow roll out of information," causing some local officials to develop opinions and policies that undermine the U visa before they are fully educated regarding its use and purpose.[778] Some local law enforcement agencies seemed to have completely dismissed the U visa.[779] Others have been hesitant to cooperate with certification because of perceptions of negative local opinion regarding immigrant benefits.[780] Commonly, an

[776] 8 U.S.C. § 1184(p) (2009).
[777] NIFVI, *supra* note 727, at 3.
[778] *Id*.
[779] *Id*., at 4. These dismissive agencies have the attitude that "I did not vote for that law."
[780] *Id*., at 5. The San Francisco Police Department at one point became nervous about the U visa "after the city's Sanctuary policy was attacked."

agency's improper denial to sign a U visa certification is based on a misunderstanding of the law. Helpfulness as described in the statute accounts for past, present, and potential future helpfulness.[781] The investigation of a case need not reach prosecution for the law enforcement agency to certify that the victim was helpful.[782] Misinterpretations of the helpfulness by law enforcement agencies unfortunately result in unfounded denials to certify in conflict with the intentions of Congress. Regardless of the reasoning or assumptions behind an agency's refusal to certify, once they are in place "it is extremely difficult for victim advocates . . . to overcome them."[783]

This problem is further exacerbated by the 2007 U visa regulations, issued by the Department of Homeland Security (DHS), "requiring that . . . the government official signing the I-918 Supplement B certification form must be an official with a supervisory role and must be specifically designated as a certifying official by that official's agency heads."[784] This "supervisory official certification requirement," is reminiscent of and equally problematic as the previously discussed INS regulation requiring an affidavit from a licensed mental health professional for immigrants seeking a battered spouse waiver.[785] This requirement halted U visa processing for a period of several months, and has caused law enforcement agencies to hesitate in signing U visa certifications, and in some cases to stop certifying altogether.[786] In reaction to

[781] *Supra* note 42.
[782] Zota, *supra* note 293, at 4.
[783] NIFVI, *supra* note 727, at 3.
[784] *Id*., at 6; Orloff *et al.*, *supra* note 728, at 636.
[785] *Id*. "The U-visa regulations have had the effect of directly undermining Congressional intent to facilitate the reporting of crimes, the fostering of better relationships between justice system officials and immigrant crime victims, the encouragement of law enforcement to better serve immigrant crime victims, the prosecution of crimes perpetrated against immigrants, and the furtherance of the humanitarian interests of the United States in protecting crime victims."
[786] *Id*. Prior to the 2007 regulations, the Lexington, Kentucky Police Department "received national recognition for its U-visa certification work." Only a few months after the issuance of the regulations the Lexington PD was issued an award from the National Network to End Violence Against Immigrant Women. Within a year, the agency stopped issuing certifications altogether because of the new regulations. This agency is not the only police department to stop issuing certifications as a result of these regulations.

this, there have been efforts to amend the U visa statute to remove the certification requirement and rather use the "any credible evidence" standard, which has applied to "all forms of crime-victim-related immigration relief since VAWA 1994."[787] Just as Congress enacted VAWA of 1994 to reinforce its broad evidentiary standard of "any credible evidence," and to overrule INS's narrowing regulations, it should do the same in reaction to DHS's overreaching U visa regulations requiring certification from the head of agency. Under the governing "any credible evidence" standard, the U visa certification should serve as primary evidence, and not as a threshold requirement for applicants, especially in light of the fact that many law enforcement agencies are uncooperative or simply not educated to the extent that their certification policies conform with the intent of Congress in creating the U visa.[788]

Despite the arguments for legislative reform, the current state of the law requires certification for U visa clients. When facing law enforcement agencies that do not broadly utilize the U visa, that make certification decisions based on a narrow interpretation of the U visa statute, or that have rejected it altogether, advocates "must . . . promote an innovative approach" to convince law enforcement officials of the many benefits of the visa, particularly that it "will help them fight crime."[789] Some advocates have "argue[d] that because law enforcement certification is required, law enforcement refusal to sign the I-918 Supplement B Certification of Helpfulness is malfeasance or incompetence."[790] Under this approach, advocates have sued local law enforcement, and others have taken to the media "to publicize a department's failure to enforce a federal victim rights law."[791] Although these methods may be appropriate for agencies

[787] *Id*. at 635.
[788] *Id*., at 64.
[789] NIFVI, *supra* note 727, at 4.
[790] *Id*.
[791] *Id*.

that have fully considered the U visa and flatly rejected to issue any certifications, for agencies that have not taken such a drastic stance, training and outreach are preferable.

In conducting a U visa training, advocates must convey the benefits of the U visa to convince law enforcement officials to certify the helpfulness of the immigrant victim and educate officials on what they may do to further assist U visa applicants. As mentioned in the previous subsection, officers should be sure to carefully document any injuries suffered by the victim with reports and photographs. If the officer has reason to know that the victim is suffering trauma or emotional harm, this should be reported. Law enforcement officials should inform victims of victim advocate services. As the purpose of the U visa is to protect victims as well as generate cooperation with investigation and prosecution of cases, officers should inform victims of their obligation to assist by providing statements and testifying in court, provide all necessary contact information, and explain the concept of the U visa so that victims are aware of their potential eligibility and may seek counsel.

C. Lessons Learned from Promoting the U Visa as a Tool for Community Integration: Working with Local Police Departments

As a practical application of the community integration project, the UNC Immigration and Human Rights Policy Clinic sought to organize a meeting with a N.C. local police department regarding community policing and the usefulness of the U visa. The experience of organizing and arranging this meeting has provided Clinic participants with valuable information about how to reach out to local law enforcement to promote the U visa as a community policing tool.

In general, it is preferable that advocates for U visa applicants develop relationships with local law enforcement agencies because of their role in signing the required certification and generally protecting and assisting crime victims. As mentioned, opinions regarding the U visa vary from agency to agency, as do policies with regard to the agency's designation of a certifying official. Moreover, policies regarding responses to crime affecting the immigrant community also vary depending on the department. Advocates should not just reach out to agencies with known or suspected negative attitudes and/or policies surrounding the use of the U visa, but also to agencies that clearly understand the law and use it broadly in their community policing efforts. As immigration law frequently changes, and trends in U visa adjudications shift, even legal practitioners find that they need to be re-educated on how to better serve immigrant crime victims. This point should be emphasized when approaching law enforcement agencies that have already undergone some sort of U visa orientation, or that have had requests to certify, and may believe that meeting with advocates will be inefficient and redundant.

> Although local practitioners have made significant efforts to educate law enforcement and advocate for the broad use of the U visa, this approach is at times ineffective because of the "ad hoc, alarmingly under-resourced, slow roll out of information," causing some local officials to develop opinions and policies that undermine the U visa before they are fully educated regarding its use and purpose.

When approaching law enforcement officials, advocate groups should include a broad range of voices of all interested parties who may best represent the needs of the immigrant community in any meeting with law enforcement and so that the officials involved in U visa cases can develop relationships with the individuals they will be working alongside in the greater effort to eliminate the criminal victimization of the immigrant population. These advocate

groups should include legal organizations that represent U visa clients, immigrant organizations or committees that represent the local immigrant community, victim advocate organizations such as domestic violence or rape crisis centers, and immigrant crime victims themselves.[792] Involving victim voices and stories in meetings with local law enforcement helps illustrate the reality of the problem of criminal victimization of immigrants within the local community or jurisdiction that the agency serves and protects. If possible, meetings should involve specific individuals that have received police assistance from the local law enforcement agency and who have received a U visa as a result of their cooperation. It is important that decision-making officials are able to appreciate the impact of their community policing efforts within the immigrant community in their area, and to recognize the realization of Congress' intent to increase the willingness of victims to expose themselves to police to cooperate and help eliminate crime in their community.

If specific immigrant crime victims are unavailable to present their stories as examples to promote the U visa, advocates may present on behalf of their clients. Additionally, in areas where the local law enforcement has a policy, whether explicit or perceived, against signing U visa certifications, there will not likely be a successful U visa applicant that has been served by the agency to involve in the meeting. In this scenario advocates should include stories of immigrant victims with lawful permanent residence that have benefited from local law enforcement efforts, or successful U visa applicants from nearby jurisdictions.

[792] The meeting with local police department was organized by the UNC Immigration and Human Rights Policy Clinic, with the support and participation of: Interact of Raleigh, NC, a non-profit agency that provides services to victims of domestic violence and rape/sexual assault in Wake County); Kiran, a multi-cultural, non-religious, community based, South Asian organization that supports domestic violence victims; the North Carolina Justice Center's Immigrants Legal Assistance Project, a non-profit organization that provides legal services to indigent clients throughout North Carolina in their immigrant cases, such as U visa cases; and Legal Aid of North Carolina's Battered Immigrant Project, also a North Carolina non-profit that provides legal services to local immigrant crime victims.

All involved organizations should sign onto a formal letter to the Chief, as the U visa regulations require certification from the head of agency or a designated official. Because of this requirement, the Chief is in the best position to know who should attend the proposed meeting, such as police attorneys, specific designated officials, and even patrolling officers likely to respond to crimes within the immigrant community. Organizers should attempt to meet with the Chief personally to discuss the goals of the proposed meeting and make personal contact with decision makers within the local law enforcement agency. Be sure to keep the time of the proposed meeting/discussion/presentation to a minimum, below an hour, out of respect for the valuable time of law enforcement officials. If the proposed meeting is accepted, the U visa law should be thoroughly explained with specific regard to the broad statutory definition of helpfulness. Discussions and presentations may be tailored specifically to the local area and the community population to benefit from a positive and broad U visa policy. The previously discussed suggestions regarding what law enforcement officials may do in their regular course of duty to better serve potential VAWA or U visa clients should be mentioned or incorporated. Handouts should be utilized for later reference including legal points, links to resources, as well as contact information for participating advocates. The ultimate point of the meeting should be to establish continuing relationships that will work towards the elimination of the criminal victimization of immigrants and to integrate the immigrant community within the local area.

D. Conclusion

Law enforcement officers face special challenges in their interactions with immigrant communities. Immigrants are likely to mistrust, fear, or have negative perceptions of law enforcement for a variety of reasons. U.S. immigration laws aimed at punishing unlawful presence and fighting marriage based immigration fraud have had the unfortunate consequence

of criminal victimization of the immigrant population. Congress has attempted to address this through specific legislation, most importantly through the Violence Against Women Act, and its subsequent reauthorizations. The policy behind creating crime related forms of immigration relief like the VAWA self-petition process and the U visa was to encourage immigrant crime victims to report crimes and to assist law enforcement in the investigation and eventual prosecution of such crimes to ultimately decrease the prevalence of victimization of the immigrant community. Law enforcement officials should shape agency policies to conform to the Congressional intent behind VAWA and the U visa. Advocates for immigrant victims should develop continuing relationships with local law enforcement agencies to promote VAWA and the U visa, and to work together towards the ultimate goal of building safe integrated communities.

Appendix I

Provisions of the International Covenant on Civil and Political Rights Relevant to Immigrant Rights

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons…

Appendix II

Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination Relevant to Immigrant Rights

Article 1

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to en sure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;
(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of

human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;
(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
(d) Other civil rights, in particular:
(i) The right to freedom of movement and residence within the border of the State;
(ii) The right to leave any country, including one's own, and to return to one's country;
(iii) The right to nationality;
(iv) The right to marriage and choice of spouse;
(v) The right to own property alone as well as in association with others;
(vi) The right to inherit;
(vii) The right to freedom of thought, conscience and religion;
(viii) The right to freedom of opinion and expression;
(ix) The right to freedom of peaceful assembly and association;
(e) Economic, social and cultural rights, in particular:
(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
(ii) The right to form and join trade unions;
(iii) The right to housing;
(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;
(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Appendix III

Dear Chief ,*

We are third year law students at the University of North Carolina School of Law working on a school project focused on immigrants and community integration. Part of the project focuses on community policing and how law enforcement and immigrants can work together to make communities safer and more pleasant to live in.

As part of this project, we would like to set up a meeting with you and those individuals in your department who you determine might affect policies and practices with regard to the immigrant community in XXXX. We would like to review with you community policing issues and how crime victims who are immigrants might obtain greater police protection and cooperate more effectively with your department. As you may know, some immigrant crime victims are eligible for what is called a U visa, which is a visa which is offered to victims of certain violent crimes. Although it is the U.S. Citizenship and Immigration Services that decides whether to grant a U visa, immigrants who cooperate with law enforcement agencies, for example, by calling the police to report a crime, or providing information about a criminal matter, or testifying in a criminal trial, or are otherwise helpful with the investigation of the crime may be eligible.

We would like to discuss the U visa because it embodies the concept of community policing: community residents and law enforcement working together to enforce the law and better the community. We think that the U visa is also of interest because it involves important government policy and law which can only be implemented if law enforcement agencies are willing to effectively process U visa certification requests if a crime victim is helpful to the criminal investigation.

We have chosen your Police Department because we have come to understand just how important you are in the lives of immigrants who are victims of violent crimes in your community. With the immigrant community in your community growing, integrated communities and community policing are concepts that are more important and relevant than ever.

We are very fortunate to be working on this project with several groups who provide aid and assistance to immigrant victims of violence. Those groups include Interact, Kiran, Legal Aid of North Carolina, and the North Carolina Justice Center. These groups hope to join us in our meeting with you and hope to present information from the victim's perspective about the importance of community policing and U visas.

We are grateful for the work that your police department does to protect immigrants and the entire community, and we look forward to working together to help make the community a better and safer community.

Sincerely,

- We have chosen not to identify the police department with whom we are working.