

COMMENT

OUR SAFETY OR THEIR LIVES?

LEGISLATIVE CHANGES IMPACTING IMMIGRATION AND THE RISKS POSED TO IMMIGRANT WOMEN

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I. INTRODUCTION

In the months following the horrific September 11th terrorist attacks, Congress turned its attention from public mourning to how the tragedy occurred in the first place. One source of concern was that, of the nineteen hijackers responsible for the September 11th attacks, fifteen entered the U.S. legally on some form of temporary visa.¹ This fact raised nationwide concern about the presence of immigrants within the United States' borders and the dangers the current immigration system posed to public safety. For instance, Russ Bergeron, a spokesman for the now-defunct Immigration and Naturalization Services, opined that, "[t]he events of 9/11 have vividly illustrated to us the importance of closing . . . loopholes in procedures and remaining vigilant to the threat posed by terrorists."² Immigration laws came to be seen as inextricably connected to concerns about national security.

The government was not alone in its heightened concern about the connection between immigration and threats to national security. Just prior to the September 11th attacks, a June 2001 poll showed Americans evenly split on whether immigration should be kept at its present level or decreased.³ By

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1. Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11*, 25 B.C. THIRD WORLD L.J. 81, 94 (2005).

2. Michelle Mittelstadt, *Analysis shows how terrorists exploited INS loopholes Profiling failed; some used sham claims for marriage, asylum*, DALLAS MORNING NEWS, May 23, 2002, at 10A.

3. GEORGE GALLUP JR., THE GALLUP POLL: PUBLIC OPINION 2002 226 (2003). Of those polled, 42% believed immigration should be kept at its present level and 41% believed it should be decreased. *Id.*

October 2001, 58% of those surveyed said immigration should be decreased.⁴ While the percentage favoring decreased immigration has since declined, the percentage favoring more immigration is not back to its pre-September 11th level.⁵ Homeland Security Secretary Michael Chertoff summed up public sentiment by noting that “immigration has been around for at least 30 years as a public issue. But it has not, in my experience, received the fevered pitch of attention that it’s [sic] gotten in the last couple of years at any previous period of time.”⁶

This increased concern has not been limited merely to possible weaknesses in the nonimmigrant visa process, but instead has provoked calls for greater restrictions on immigrants in general.⁷ Chertoff declared that, after looking at the nation’s security issues posed by immigration, his department realized that “a sustained, system-based view of the problem of immigration” was required.

The problem of immigration . . . [is] not just a question of more boots on the ground, or more technology, or tougher enforcement in the interior, or changing the rules with respect to immigrant workers. It’s about all of those things. It’s about understanding the system as a comprehensive whole.⁸

In their zeal for reform, however, legislators and public officials are in danger of overlooking the effects such new laws have on immigrant⁹ women who are at risk of abuse and exploitation. As immigration policy debates continue to revolve around national security and economic concerns, the safety of immigrant women is an issue all too easily lost in the shuffle. While tighter immigration laws are designed to target potential terrorists, there is an unintentional, but severe impact on female immigrants who are often victimized by domestic violence, trafficking, and other crimes.

This article examines the ways in which laws created with the intention of promoting national security threaten the safety of individual immigrant women. Despite ongoing debates, large-scale immigration reform did not materialize in the 2006-2007 legislative session. However, smaller acts relating to immigration law have passed and additional minor reforms continue to show a

4. *Id.* at 227.

5. *Id.*

6. Michael Chertoff, Sec’y, Homeland Sec., Remarks at George Washington University, Protecting the Homeland: Meeting Challenges and Looking Forward (Dec. 14, 2006), available at <http://www.dhs.gov/xnews/speeches> (follow “Archives 2006” hyperlink; then follow “December 2006” hyperlink).

7. *See id.*

8. *Id.*

9. For purposes of this article, “immigrant” will be given its most expansive possible definition, including anyone residing (or attempting to reside) in the U.S. who is not a citizen. This includes legal permanent residents, long-term visa holders, undocumented immigrants, and applicants for refugee or asylum status.

strong likelihood of passing in the near future.¹⁰ Part II of this article explores the Clear Law Enforcement for Criminal Alien Removal Act (CLEAR Act), which would deputize local law enforcement officers to enforce federal immigration law. This section will demonstrate the risks this law poses for victims of domestic violence and trafficking. Part III examines the Real ID Act and its likely harmful impact on both domestic violence victims and women seeking asylum on gender-based claims of persecution. Part IV considers the likely troubling consequences for women of criminalizing unlawful presence in the U.S. as a felony or misdemeanor. Part V concludes with a brief look at what legislators can learn about crafting immigration policy in light of these concerns. This section recommends that legislators consider the unintended consequences of legislation as it impacts vulnerable immigrant populations and offers possible alternative state measures, which would avoid these risks.

II. DEPUTIZING LOCAL LAW ENFORCEMENT FOR FEDERAL IMMIGRATION LAW UNDER THE CLEAR ACT

Deputizing local law enforcement officers appears to be a logical step for legislators concerned with the more than ten million undocumented immigrants within the U.S.¹¹ The enforcement of federal immigration laws is currently the responsibility of the Bureau of Immigration and Customs Enforcement (ICE).¹² While charged with enforcing immigration laws, it is hindered by its small size as there are only 2,000 immigration field agents active in the U.S.¹³ Other statistics suggest that only 5,500 federal agents nationwide were available for immigration enforcement inside the U.S.¹⁴ Such unequal ratios of federal law officers to undocumented immigrants make large-scale enforcement of immigration laws an unrealistic expectation.

For legislators who favor stricter immigration laws,¹⁵ allowing local police to enforce federal immigration laws appears to make sense. While the training

10. See CLEAR Act of 2007, H.R. 842, 110th Cong. (2007); Real ID Act of 2005, Pub. L. No. 109-13, § 101, 119 Stat. 231 (2005).

11. MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2006 3 (2007), http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf. Statistics vary, as the undocumented population is difficult to assess, however, the Department of Homeland Security estimates a total of 11,550,000 undocumented immigrants residing in the U.S. *Id.*

12. A description of ICE functions is available at U.S. Immigration and Customs Enforcement, About Us, <http://www.ice.gov/about/operations.htm> (last visited Jan. 25, 2008).

13. April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149, 1150 (2003-2004).

14. Ricardo Alonso-Zaldivar, *Police May Join Hunt for Illegal Migrants*, L.A. TIMES, Nov. 11, 2003, at A1.

15. This suggestion is popular with representatives who oppose illegal immigration and advocate the strictest measures toward immigration and border control. For an idea of where different representatives fall, it is helpful to examine their rankings by different

programs for police will cost money, this would be a one-time investment, unlike hiring an additional federal agent who would need to be paid a salary for as long as he or she is working. Clearly, expanding the powers of current police officers would be cheaper than hiring more officers to ICE.

However, the legal implications and practical problems of deputizing state and local police officers to enforce federal immigration laws are considerable and worthy of attention. Despite the initial appeal of greater enforcement of immigration laws, laws such as the CLEAR Act pose problems for immigrant victims of crime, who are mostly women. These problems can be remedied, however, by active state involvement in guaranteeing safety to female immigrants.

A. *The Authority to Deputize Local Law Enforcement Officers*

Deputizing local police is a good policy choice only if it would have a positive impact on checking illegal immigration and stopping terrorism. The case of Mohamed Atta, one of the September 11th hijackers, is an excellent example of the potential effectiveness of police in stopping terrorists.¹⁶ Atta had been stopped twice for speeding in Florida months before the attack, at a time when police did not have access to immigration records.¹⁷ Kris W. Kobach, a former top counsel at the Justice Department, believes that if the arresting officer had had access to such immigration records at the time of arrest, flags might have been raised as to Atta's terrorist activities.¹⁸

Senator Saxby Chambliss (R-GA) made a similar argument while speaking about another September 11th hijacker, Ziad Jarrah.¹⁹ Jarrah was stopped by Maryland police for speeding, but was released despite being on a Central Intelligence Agency terrorist list.²⁰ Such incidents led to legislation being introduced in both houses of Congress that would allow greater state law enforcement cooperation in immigration enforcement.²¹ By allowing local police access to immigration records and the ability to make arrests, immigration laws and national security can be more adequately upheld.

At the time of the September 11th attacks, immigration remained largely a federal responsibility. This was true despite a provision in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) that enabled

immigration lobbying groups. The right-leaning, non-profit group, U.S. Border Control ranks senators and congresspersons on how closely their votes match the group's goal of tougher immigration laws. The list is available online at Project Vote Smart, U.S. Border Control, http://www.vote-smart.org/issue_rating_detail.php?r_id=3497 (last visited Jan. 24, 2008).

16. Julia Malone, *Immigration Enforcement Spurs Debate; Senate Panel Mulls Greater Role for States*, ATLANTA J.CONST., Apr. 23, 2004, at 3A.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

states to enter into a Memorandum of Understanding (MOU) with the federal government to enlist state and local police for assistance.²² Through an agreement with the Attorney General, state and local officers may be granted the authority to identify, process, and detain immigration offenders they encounter during their routine duties.²³ The Act requires as a precondition that the officers receive “adequate training regarding the enforcement of relevant Federal immigration laws.”²⁴ After completing the necessary training program, these officers become, in practical terms, deputies of the federal agents with the power to assist in federal enforcement efforts. Liability is assigned to the federal government for actions taken pursuant to the MOU.²⁵

Despite the existence of this statute for more than a decade, the majority of states have opted not to pursue the options provided by the amendment.²⁶ Over the past few years, however, there have been increased efforts to take advantage of the statute and deputize local law enforcement officers at the county and local level.²⁷ The more undocumented immigration becomes linked in the public’s mind with threats of terrorism, the more pressing the need for increased detection of immigrants appears.

The CLEAR Act was introduced in 2003 and reintroduced in 2005 and 2007 to create a nation-wide move toward deputizing local law enforcement officers.²⁸ Each of these bills gives local law officers an inherent authority to investigate, identify, arrest, and detail aliens while assisting in the enforcement of immigration laws.²⁹ Allowing police to enforce immigration laws initially appears to be a logical extension of their existing duties. Rather than merely ensuring the safety of citizens within their jurisdictions, police officers would be key players in the larger national security problem against terrorism. The

22. ICE Fact Sheet Section 287(g) Immigration and Nationality Act (August 16, 2006), available at <http://www.ice.gov/doclib/pi/news/factsheets/060816dc287gfactsheet.pdf>

23. Illegal Immigration Reform & Immigrant Responsibility Act (IIRIRA), 8 U.S.C. § 1357(g)(1) (2007).

24. *Id.* § 1357(g)(2).

25. *Id.* § 1357(g)(8).

26. See U.S. Immigration and Customs Enforcement, Fact Sheets, Section 287(g), Immigration and Nationality Act, <http://www.ice.gov/pi/news/factsheets/070622factsheet287gprogover.htm> (last visited Mar. 9, 2008). Only three states have 287(g) agreements with the ICE: the Alabama Department of Public Safety/State Police, Arizona Department of Corrections, and the Florida Department of Law Enforcement. *Id.*

27. See U.S. Immigration and Customs Enforcement, News Release, *ICE Begins Immigration Training for Maryland and Virginia Officers*, <http://www.ice.gov/pi/news/newsreleases/articles/080204federickcounty.htm> (last visited Mar. 25, 2008) (stating that in February of 2008, there were 34 section 287(g) agreements nationwide).

28. H.R. 3494, 110th Cong. (2007); H.R. 3137, 109th Cong. (2005); H.R. 2671, 108th Cong. (2003).

29. H.R. 3494, 110th Cong. (2007); H.R. 3137, 109th Cong. (2005); H.R. 2671, 108th Cong. (2003).

effects of police deputizing, however, are concerning and merit careful consideration.

B. Problems for Immigrant Victims of Domestic Violence and Other Crimes

Critics of the CLEAR Act are concerned that the Act will lead to racial-profiling. For example, immigrant advocates worry that drivers will be pulled over for "driving while Hispanic," which will cause anger and distrust of police officers in the community.³⁰ Fear of the police has dire consequences on female immigrant victims of crime. Notably, being unwilling or unable to reach out to police because of immigration status puts the lives of immigrant victims of domestic violence and trafficking at serious risk.

Immigrant women are often reluctant to report abuse to law enforcement officers.³¹ Deportation fears affect women's willingness to reach out to the police; one study conducted in San Francisco revealed that 64% of undocumented women interviewed said that their fear of deportation was the primary reason why they chose not to seek social services.³²

In addition to the social pressures and fear that keep citizen victims of domestic violence from reporting abuse, there are additional barriers for immigrant victims. Differences in language and culture make many immigrant women slow to contact authorities when faced with domestic violence or other crimes in their lives or communities.³³ Additionally, many immigrants come from cultures that either do not see domestic violence as a crime, or who believe that reporting such abuse is a threat to the community as a whole.³⁴ Police who work with immigrants in prosecuting crimes acknowledge that many come from countries where police are seen as corrupt and not to be trusted to lend assistance.³⁵ Establishing trust is a constant struggle for police not trained in the culture or language of the victims, even in communities like

30. See ACLU, Statement on H.R. 2671, the "Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2003" before the House Subcommittee on Immigration, Border Security and Claims (Nov. 1, 2003), <http://www.aclu.org/immigrants/gen/11793leg20031001.html> (last visited April 9, 2008); *State/Local Police Enforcement of Immigr. Laws (CLEAR Act)*, NCLR, <http://www.nclr.org/content/policy/detail/1063/> (last visited April 9, 2008).

31. Indira K. Balram, *The Evolving, Yet Still Inadequate, Legal Protection Afforded Battered Immigrant Women*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 387, 409 (2005).

32. Leslye E. Orloff & Rachel Little, *Overview of Domestic Violence and Battered Immigrant Issues*, in SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRATION WOMAN - A 'HOW TO' MANUAL FOR BATTERED WOMEN'S ADVOCATES AND SERVICE PROVIDERS, http://new.vawnet.org/category/Main_Doc.php?docid=739 (last visited Jan. 20, 2008).

33. *Id.*

34. Balram, *supra* note 31, at 390-91.

35. Barry Adams, *Miami Detective Gives Immigrant Talk*, WIS. ST. J., Oct. 22, 2003, at C1; Orloff & Little, *supra* note 32.

Miami where information and resources are designed specifically to encourage the Latino community to reach out to police about domestic violence.³⁶

Into this mix of cultural and linguistic barriers, immigrant women's fears of deportation act as a powerful disincentive to contacting the police for help.³⁷ This fear is intensified for women who came to the U.S. fleeing persecution or who believe they could be separated from their citizen children if deported.³⁸ Even immigrant women who have a legitimate claim to legal status in the U.S. are frequently unaware that there are legal avenues for leaving an abusive marriage and remaining in the country.³⁹ Convinced by their abusers or their own beliefs that any contact with governmental agents will result in arrest or deportation, many immigrant women will not take active measures to inform police about abuse in their lives.⁴⁰

A potential powerful tool for control exists in victims' perceptions and the realities of immigration law. Immigrant women whose abusers are citizens or legal permanent residents (LPRs) are particularly vulnerable to threats of deportation.⁴¹ If the husband is a citizen or a LPR, he can petition for her to receive a green card, allowing her to reside legally in the country.⁴² The spouse is responsible for applying and submitting the application for attaining the green card.⁴³ It is expected that the citizen or LPR spouse will actively be involved throughout the entire process, unless the woman specifically seeks to self-petition under the Violence Against Women Act (VAWA).⁴⁴

Victims' lack of a green card or legal immigration status can become a permanent tool for abusers.⁴⁵ Without access to information or immigration attorneys, many female immigrants do not know that they have the ability to become legal residents or citizens independent of their husbands.⁴⁶ Abusers can threaten to or actually sabotage the immigration process by not following the

36. Adams, *supra* note 35, at C1.

37. *Id.*

38. *Id.*

39. Tien-Li Loke, *Trapped in Domestic Violence: The Impact of United States Immigration Laws on Battered Immigrant Women*, 6 B.U. PUB. INT. L.J. 589, 591 (1996-1997).

40. *Id.*

41. This vulnerability exists because these women likely depend on their abusers for legal status. These women may continue to hope that, through marriage, they might be able to attain a green card.

42. A detailed explanation of the green card procedure can be found on the U.S. Citizenship and Immigration Services website, available at <http://www.uscis.gov/portal/site/uscis/menuitem> (follow "Permanent Residence (green card)" hyperlink) (last visited Mar. 15, 2008).

43. *Id.*

44. *Id.*

45. Leah Platt, *Regulating the Global Brothel*, AM. PROSPECT, July 2006, at 10.

46. Elizabeth Shor, *Domestic Abuse and Alien Women in Immigration Law: Response and Responsibility*, 9 CORNELL J.L. & PUB. POL'Y 697, 705 (1999-2000).

required procedures or by refusing to initiate it at all.⁴⁷ Abused immigrant women report threats from their spouses to tell immigration caseworkers that the women did not actually live with their husbands.⁴⁸ More insidiously, an abuser may keep a woman's name off of bills and shared bank accounts, thus making it harder for her to show residency and frustrating her attempts to attain legal status.⁴⁹ A survey conducted among Latina immigrants in the Washington, D.C. area found that although 50.8% of the immigrant victims of domestic violence were married to citizen or permanent residents, 72.3% of abusers never filed immigration papers on behalf of their immigrant spouses.⁵⁰

Human traffickers use similar abusive tactics to intimidate their victims and prevent them from contacting the police. Estimates vary, but one study shows that while nearly 18,000 people are trafficked into the U.S. annually, only 450 victims were discovered and 110 traffickers were charged in a three-year period.⁵¹ Faced with such a dismal reality, many local law enforcement officers have devoted significant time and resources into developing connections with immigrant communities and overcoming cultural and linguistic barriers that prevent reporting.⁵² The CLEAR Act, or any legislation that encourages local police to arrest undocumented immigrants, can only serve as a setback for these outreach efforts at a time when trafficking continues to be a pressing security and human rights issue in the U.S.

While significant barriers already prevent many immigrant women from contacting the police, these problems will only be exacerbated by the CLEAR Act. Many women already believe, incorrectly, that any attempt to reach out to the police will be met with deportation.⁵³ In reality, few police contact federal immigration officers when they encounter victims who are undocumented immigrants or have over stayed their visas.⁵⁴

While immigrant women's beliefs about deportation are extremely problematic and discourage the reporting of crimes, at present there is the hope that accurate information can be disseminated to immigrant communities.

47. See generally *id.* at 701-02 (noting that the 1994 VAWA attempted to address this problem by removing the abusive spouse from the petitioning process).

48. Kara Platoni, *American Nightmare: They fear their husbands, but fear deportation more, leaving abused immigrant women with little hope*, E. BAY EXPRESS (Cal.), Apr. 13, 2005.

49. *Id.*

50. Leslye E. Orloff & Janice V. Kaguyutan, *Offering A Helping Hand: Legal Protections For Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 111 (2002).

51. Jeanne Smoot & Layli Miller-Muro, *So-Called 'Anti-Terrorism' Measures Harm Battered Immigrant Women*, CTR. FOR AM. PROGRESS, Nov. 5, 2004, <http://www.americanprogress.org/issues/2004/11/b241219.html>.

52. See Tanya Pérez-Brennan, *Police reach out to immigrants to break down wall of mistrust*, THE BOSTON GLOBE, Feb. 10, 2008, at 1.

53. See N.Y. Mayor's Office to Combat Domestic Violence, *Special Issues: Immigrants*, (follow "Special Issues" hyperlink, then "Immigrants" hyperlink) (last visited Feb. 10, 2008).

54. *Id.*

Those with regular interactions with immigrant victims of crime, such as sympathetic members of their communities, domestic violence and trafficking advocates, and police officers who know the law, are uniquely poised to counter these misconceptions. One hopeful sign is a survey finding that immigrant women did speak about the domestic violence in their lives, although nearly exclusively to other women.⁵⁵ The sample study revealed that the majority spoke to a female friend (49.6%), while others spoke to their mothers (30.1%), to sisters (22.5%), and to other battered women (10.4%). Still others spoke to a shelter worker, police officer, lawyer, or clergy member (8-9%).⁵⁶ Thus, it seems that attempts to educate communities about the limited role of police when it comes to immigration may pay off immeasurably. If the information is not given to a victim directly, it may still be disseminated in ways that will encourage her to contact the police.

The danger in deputizing local police officers is that the reluctance many women experience in reporting abuse could no longer be contradicted by accurate information. Hearing of a single incident where an undocumented immigrant was deported after contacting the police might be sufficient to prevent immigrant women from reporting domestic violence or trafficking.

Many local government officials have spoken out against deputizing local law enforcement officers to arrest and begin deportation proceedings for immigrants they encounter during the course of their duties.⁵⁷ Officials from New York, Los Angeles, San Francisco, Denver, Chicago and many of the cities with the largest immigration populations have resisted deputizing.⁵⁸ Police officers are in the best position to assess the impact of deputizing on the communities they are charged with keeping safe. Police officers have intimate, daily contact with individuals within their jurisdiction and need to understand local dynamics to fulfill their duties. It is notable then, that many have voiced concern that the CLEAR Act may prevent them from forming the necessary community ties to function effectively in preventing crimes.⁵⁹ For example, a police captain in Fresno stated, "Sometimes folks are here illegally, and they're the victim of a crime. We want them to call us. If someone is a witness, we want them to trust us."⁶⁰ Police chiefs and city mayors have written to newspapers and to their legislators to caution that deputizing police will damage important ties to the community and the trust necessary for law enforcement to function.⁶¹

55. Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 81 (2003).

56. *Id.*

57. McKenzie, *supra* note 13, at 1160.

58. *Id.*

59. *Id.*

60. Douglas McGray, *Shift Work: Should policing illegal immigrants fall to nurses and teachers?*, WASH. MONTHLY, Apr. 2006, at 17.

61. NAT'L IMMIGRATION FORUM, PROPOSALS TO EXPAND THE IMMIGRATION AUTHORITY OF STATE AND LOCAL POLICE: DANGEROUS PUBLIC POLICY ACCORDING TO LAW ENFORCEMENT, GOVERNMENTS, OPINION LEADERS, AND COMMUNITIES (Sept. 18, 2006),

The opinions of police are important in any discussion of the repercussions of the CLEAR Act, since many have witnessed firsthand the dangers of under-reporting of crimes. Seattle Police Department Chief R. Gil Kerlikowske wrote into a local newspaper:

Traditionally we have seen that reporting of crime is much lower in immigrant communities because many are leaving countries where the police cannot be trusted for good reason. Adding the fear of arrest or deportation to this could have a tremendous impact on the rate of reporting. At a time when trusting relationships between immigrant communities and the police are vital, the CLEAR Act would have just the opposite effect.⁶²

While drafted with an eye to ensure public safety, many police officers believe that the CLEAR Act would instead hamper crime control by damaging ties to the community and discouraging the reporting of crime.⁶³ The dangers such legislation poses have not gone unnoticed by domestic violence advocates. As early as September of 2003, the year that the CLEAR Act was first proposed, more than eighty organizations working with victims of domestic violence, trafficking, and other crimes wrote to Congress to voice their concerns.⁶⁴ They specified the chilling effect that the Act would have on crime reporting by victims and witnesses, predicting that this effect would be immediate and severe.⁶⁵ Domestic violence victims, they cautioned, could face an impossible choice between suffering continued abuse or risking deportation by contacting the police. The choice of deportation carries with it the abrupt separation from family and possible danger to victims' children.⁶⁶ For domestic violence advocates, the CLEAR Act is diametrically opposed to the public safety measures envisioned by the Act and its supporters in Congress.⁶⁷

Another concern is how the CLEAR Act would interact with the Victims of Trafficking and Violence Protection Act, which includes the Violence Against Women Act (VAWA).⁶⁸ While not legally inconsistent with the provisions, it is difficult to see how the CLEAR Act can be reconciled with them if it is enacted in any of its forms. While the original VAWA extended immigration relief to cooperative victims of sexual assault, human trafficking, and other violent crimes, VAWA 2005 went ever farther in its goal of assisting

<http://www.immigrationforum.org/documents/TheDebate/EnforcementLocalPolice/CLEARHSEAQuotes.pdf>.

62. *Id.* at 4.

63. *See id.*

64. *Id.* at 22.

65. *Id.*

66. *Id.*

67. *Id.* at 25.

68. Violence Against Women Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006).

immigrant victims of violence.⁶⁹ For example, VAWA 2005 exempted victims of these crimes from sanctions for failing to voluntarily depart the country and made it easier for judges to grant domestic violence waivers to cancel removal proceedings against them.⁷⁰

Congress went further by creating the U and T visa provisions, which offer protection to immigrants who were victims of sexual assault, domestic abuse, or severe forms of trafficking if they have suffered substantial injury and if they cooperate with law enforcement officers in prosecuting the crime.⁷¹ T visas are available to individuals who are “victims of a severe form of trafficking in persons.”⁷² A T visa can lead to legal permanent resident status after three years if the visa holder meets certain requirements.⁷³ U visas are granted to immigrants who are victims of or who possess information about criminal activity (including rape, torture, domestic violence, sexual assault, and many other crimes).⁷⁴ VAWA 2005 facilitates the T and U visas for immigrant victims through provisions that improve protection for children of U visa recipients and extend the visas’ duration.⁷⁵

Congress has sought to create an environment where immigrant women will feel free to come forward for help and to report serious crimes against them, without fear of retribution.⁷⁶ No version of the CLEAR Act, however, has included special provisions or exceptions for domestic abuse or trafficking reporting. The message of VAWA is imperiled by the language of the CLEAR Act, which demonstrates no awareness of the serious problems in police reporting or the persistence of violence in the lives of immigrant women.

69. Memorandum from Joanne Lin & Leslye Orloff, Legal Momentum, on VAWA 2005 Immigration Provisions 1 (Dec. 18, 2005), http://www.nationalimmigrationproject.org/DVPage/vawa05_imm_provisions_summary.pdf

70. *Id.* at 2.

71. 8 U.S.C. § 1101(a)(15)(T)(i)-(U)(i) (2006).

72. *Id.* § 1101(a)(15)(T)(i)(I).

73. *Id.* § 1255(l).

74. *Id.* § 1101(a)(15)(U)(i), 1101(a)(15)(U)(iii).

75. Memorandum, *supra* note 69, at 2.

76. *See* 22 U.S.C. § 7101(b)(19)-(20). Section 7101 details the findings supporting passage of the Act and states that “[b]ecause victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked, because they are often subjected to coercion and intimidation including physical detention and debt bondage, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.” The Act recognizes this fact: “[v]ictims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.” *Id.*

C. Possible Solutions to the Problem of Deputizing Local Law Enforcement Officers

Even without the CLEAR Act and similar legislation, it is possible that renewed concerns about undocumented immigration will cause more local and state governments to pursue deputizing local law enforcement officers.⁷⁷ Section 287(g) of the Immigration and Nationality Act would allow a state to enter into an agreement with the Director of Homeland Security to allow qualified officers to function as immigration officers in relation to investigation, apprehension, and detention of aliens.⁷⁸

Despite the reservations of many police officers and advocates for immigrant safety, some legislators and officials believe that local law enforcement officers are necessary partners in enforcing immigration law and ensuring the safety of American citizens.⁷⁹ For example, Homeland Security Assistant Secretary Julie Myers, who heads the Immigration Customs and Enforcement (ICE) office stated that, “the ultimate goal of the partnership [between ICE and local police officers] is to improve public safety and homeland security.”⁸⁰ More states and municipalities may be convinced of the legitimacy of this argument and pursue agreements with the federal government; unfortunately this will increase immigrants’ fears that contact with the police will result in deportation.

States and local municipalities can address this issue head-on by working in positive ways with immigrant communities and crafting programs for immigration enforcement in a manner that does not discourage the reporting of crimes. Police forces that have already opted-in to the federal deputizing program provide a helpful example of a workable policy.

Florida was the first state to respond to then-Attorney General John Ashcroft’s request for assistance in 2002, creating a pilot program that authorized select local law enforcement to perform certain duties previously limited to immigration officers.⁸¹ The selected officers went through six weeks of training and testing, far more than the seventeen hours required.⁸² They participated in sessions on cross-cultural communication and civil rights.⁸³ Correctly realizing the threat to their ties with immigration communities, the program sent individuals into the communities and spoke to immigrants through the local media, explaining that the function of the program was not to

77. 8 U.S.C. § 1357(g)(1).

78. McKenzie, *supra* note 13, at 1156.

79. The most obvious example of this is Governor Mitt Romney who signed an agreement with the federal government to deputize Massachusetts state troopers to arrest immigrants on civil immigration violations. Katie Zezima, *Massachusetts Set for Its Officers to Enforce Immigration Law*, N.Y. TIMES, Dec. 13, 2006, at A24.

80. Jerry Seper, *Sheriff’s deputies help ICE roundup illegal aliens*, WASH. TIMES, Nov. 28, 2006, at A5.

81. McKenzie, *supra* note 13, at 1157.

82. *Id.*

83. *Id.*

hunt down undocumented immigrants in their midst.⁸⁴ Both resources and time were devoted to communicating that their new immigration law enforcement powers would be focused solely on countering terrorism, not in rounding up immigrants for any violation.⁸⁵ This program proved a success and was later expanded.⁸⁶ The program led to 165 arrests of immigrants in its first year with only 35 deputized officers, but received no community complaints.⁸⁷

Certainly this approach will not appeal to individuals who want all undocumented immigrants arrested and deported from the U.S. However, a community outreach program such as Florida's has the potential not merely to avoid harm caused by deputization of local law enforcement officers, but even to positively affect the current situation for immigrant victims of crime. The Florida program worked because it actively focused on preventing terrorism while also devoting itself to reassuring immigrants that reporting violence against them would not result in automatic deportation. It struck the proper balance between advancing national security issues related to terrorism and maintaining the local police officer's duties to protect individuals in her jurisdiction from crime, including domestic violence and trafficking. Florida's pilot program thus offers hope that new anti-terrorism measures may be tempered by a steadfast commitment to public safety and local communities for the best possible results. If the CLEAR Act passes, it is this approach that police departments should look to in crafting an effective policy toward immigrant communities.

III. THE REAL ID ACT

A. Legislative History of the Real ID Act

Creation of the Real ID Act was conceived with a similar desire as the CLEAR Act - to toughen laws in the name of protecting the nation from terrorists.⁸⁸ Representative James Sensenbrenner (R-WI) introduced the bill in the House, specifying that the Act was in direct response to the September 11th terrorist attacks. He stated "the goal of the Real ID Act is straightforward: it seeks to prevent another 9/11-type attack by disrupting terrorist travel."⁸⁹ The two most significant changes made by the bill were the creation of uniform and

84. *Id.* at 1158.

85. *Id.*

86. *Id.*

87. Alonso-Zaldivar, *supra* note 14, at A1.

88. The Act specifies that its purpose is to "To establish and rapidly implement regulations for State driver's license and identification document security standards, to prevent terrorists from abusing the asylum laws of the United States[...]" See Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 312 (2005).

89. Press Release, U.S. House of Representatives, Committee on the Judiciary, Sensenbrenner Introduces Terrorist Travel Legislation *Real ID Act Includes Provisions Dropped from 9/11 Legislation* (Jan. 26, 2005), available at <http://judiciary.house.gov/newscenter.aspx?A=430>.

more extensive standards for identification cards and a tightening of the application system for asylum-based immigration claims.⁹⁰

The Real ID Act has yet to go into effect. At the time of publication of this article it has been delayed again, until 2011.⁹¹ The Department of Homeland Security released a final rule on January 11, 2008 that allows states an additional extension beyond the May 11, 2011 deadline by demonstrating material compliance with the core requirements of the Act.⁹²

B. The Specifics of the Real ID Act

For anyone living or working in the U.S., the identification cards required under the Real ID Act will be a necessity.⁹³ These cards will be required for traveling on airplanes, opening bank accounts, collecting Social Security payments, and accessing any governmental service.⁹⁴ The Act requires that, when attaining a new license or confirming an old one, applicants must show extensive records of their identity.⁹⁵ They must provide documentation of birth dates, full legal names, Social Security numbers, addresses, and that they are legally present in the U.S.⁹⁶ The standard for these ID cards will not rest with individual states, but with the Department of Homeland Security (DHS).⁹⁷ Only ID cards that meet the standards approved by DHS will be accepted for any official purpose.⁹⁸ However, the duty falls to the states to verify the documents provided by applicants as proof of identity in order to secure these cards.⁹⁹

For its drafters, this provision of the Real ID Act is a straightforward security measure. Sensenbrenner justified the new ID requirement, stating “[A]merican citizens have the right to know who is in their country, that people are who they say they are, and that the name on a driver’s license is the holder’s real name, not some alias.”¹⁰⁰ Supporters argue that this provision is a necessary step in stopping terrorists and that it follows the ID card recommendations made by the September 11th commission in 2004.¹⁰¹

90. Real ID Act of 2005, Pub. L. No. 109-13, § 202, 119 Stats. 312, 303 (2005).

91. Associated Press, *New rules on licenses pit states against feds*, CNN, Jan. 11, 2008, <http://www.cnn.com/2008/US/01/11/real.id.ap/index.html>.

92. Dep’t Homeland Sec., *REAL ID Final Rule*, http://www.dhs.gov/xprevprot/laws/gc_1172765386179.shtm (last visited Mar. 15, 2008).

93. Anita Ramasastry, *Why the ‘Real ID’ Act is a real mess*, CNN, Aug. 12, 2005, <http://www.cnn.com/2005/LAW/08/12/ramasastry.ids/index.html>.

94. *Id.*

95. *Id.*

96. Real ID Act of 2005, Pub. L. No. 109-13, § 202(c)(1), 119 Stat. 302, 312-13 (2005).

97. *Id.* § 202(a)(2).

98. *Id.* § 202(a)(1).

99. *Id.* § 202(c)(3)(A).

100. Press release, *supra* note 89.

101. Declan McCullagh, *FAQ: How the Real ID Act will Affect You*, C/NET NEWS.COM, May 6, 2006,

The Real ID Act also affects asylum law. Currently, asylum eligibility is first determined by an officer or immigration judge, who determines whether an applicant is unable to return to his or her home country because of a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹⁰² The asylum seeker must establish that there is a pattern or practice of persecution in the home country of nationality and that it is reasonable to consider him or herself a member of this group.¹⁰³ The seeker has the burden of proving that the fear of persecution is well-founded.¹⁰⁴ The intent of the persecutor is key to determining if persecution occurred. However, courts have ruled that the persecution may have more than one motive, as long as one motive is based on race, religion, nationality, membership in a particular social group, or political opinion.¹⁰⁵ The Real ID Act attempts to strengthen asylum law against misuse. Representative Sensenbrenner believes the Act will “weed out fraudulent asylum applications made by people lying through their teeth.”¹⁰⁶

The refugee claims of female immigrants are potentially weakened by these changes. The bill requires an asylum applicant to prove that one of the enumerated grounds for asylum was “at least one central reason” for her persecution.¹⁰⁷ This is an attempt to address mixed-motive cases where a refugee applicant’s persecutor may have been motivated by several factors, one or more of which may not fit within the definition required for asylee status.¹⁰⁸ Earlier versions of the bill were even stricter, requiring that one of the designated grounds had to be “the central reason” for the persecution.¹⁰⁹

The purpose of these provisions is to prevent terrorists from using the asylum system to gain lawful immigration status in the U.S.¹¹⁰ As with the provision controlling ID requirements, this section of the Act was designed and signed into law with the idea of combating terrorism, but without the public discussion that might have demonstrated to legislators the dangers this Act poses.¹¹¹ The original bill passed the House, but stalled in the Senate.¹¹² It was

http://news.com.com/FAQ+How+Real+ID+will+affect+you+-+page+2/2100-1028_3-5697111-2.html?tag=st.num.

102. 8 U.S.C. §1101(a)(42)(A) (2007).

103. RUTH ELLEN WASEM, CONGR. RESEARCH SERV. (CRS), CRS REPORT FOR CONGRESS: U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 8 (Feb. 16, 2005), <http://fpc.state.gov/documents/organization/43985.pdf>.

104. *Id.* at 7.

105. *Id.* at 8.

106. Press Release, Congressman F. James Sensenbrenner, Jr., House Passes Real ID (May 5, 2005), <http://sensenbrenner.house.gov/News/DocumentSingle.aspx?DocumentID=55591>.

107. Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101, 117 (2006).

108. *Id.*

109. *Id.* at 119.

110. *Id.* at 101-02.

111. This lack of debate is attributed to the manner in which the Real ID Act was passed. It slipped into legislation funding the war on Iraq that seemed certain to pass. Barry

subsequently reintroduced as a rider to the 2005 Emergency Supplemental Appropriations for Defense, the Global War on Terror and Tsunami Relief Act.¹¹³ It passed the Senate without debates or hearings.¹¹⁴ This lack of floor debate was likely due to it having been attached to an emergency Iraq appropriations bill.¹¹⁵ Without any debate or significant opposition, it is unclear if its signers considered the impact the new legislation would have on immigrants with good-faith asylum claims or victims of domestic violence. Both provisions, although intended to bolster the security of all Americans, potentially place the lives of immigrant women at greater risk.

C. Problems with the New ID Requirements for Victims of Domestic Violence

While the Real ID Act threatens women in perhaps more subtle ways than the CLEAR Act, the potential problems are still of concern. The ID requirement raises serious concerns of confidentiality for women fleeing abusive relationships, as well as the practical problems associated with securing a card.

Despite the lack of debate surrounding the passage of the Real ID Act, some commentators were already aware of the potential impact the law could have on domestic violence victims. Senator Russ Feingold (D-WI), while a signer of the Act, addressed a letter to President Bush that specifically mentioned his concern that domestic violence victims might be negatively impacted.¹¹⁶ He pointed out that a variety of states had laws or policies addressing confidentiality, which allowed domestic violence victims to list something other than their home address on their drivers' licenses.¹¹⁷ Feingold warned that the Real ID Act would override these important protections by mandating that the home address be printed.¹¹⁸ Additionally, immigrant rights

Steinhardt, the director of the ACLU's technology and liberty program, described it as "legislation [that] was created in the backrooms of Congress without hearings and without any real understanding or thought about what was being created." Kim Zetter, *No Real Debate for Real ID*, WIRED, May 10, 2005, <http://www.wired.com/politics/security/news/2005/05/67471>.

112. H.R.418 was passed in the House on February 10, 2005. The last reported action taken in the Senate was its referral to the Committee on the Judiciary on February 17, 2005. A full list of all congressional actions taken is available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00418:@@S>.

113. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 232 (2005).

114. Cianciarulo, *supra* note 107, at 115.

115. *Id.*

116. Senator Russ Feingold, Statement on the Emergency Supplemental Spending Bill From the Senate Floor (May 10, 2005), <http://www.feingold.senate.gov/statements/05/05/2005510A41.html>.

117. *Id.*

118. *Id.*

groups and other non-profit organizations were active in attempting to communicate the implications of this Act before its passage.¹¹⁹

The ID requirement poses a threat to all victims of domestic violence, regardless of immigration status.¹²⁰ Addresses cannot be P.O. boxes, which pose a problem for anyone fearing for her safety, particularly battered women attempting to hide their location.¹²¹ Unlike the current requirements of many states, the Act does not exempt people fearing for their safety from the address requirement, such as judges and police officers, in addition to domestic violence victims.¹²²

Some states have already taken steps to address these concerns. Twenty-five states allow "masking," i.e., not printing the address of principal residence on the card for people in protected classes, including victims of domestic violence.¹²³

These state measures to protect victims' information are threatened by the Real ID Act.¹²⁴ For instance, Melissa Ngo, Staff Counsel and Director of the Identification and Surveillance Project Electronic Privacy Information Center drew attention to the threat the Real ID Act posed to Maryland's confidentiality program that allows domestic violence victims to use a substitute address when interacting with the state.¹²⁵ Under the program, victims register with the state and the program forwards mail received at the substitute address.¹²⁶ The address can be used by the Maryland Motor Vehicle Administration, allowing the victim to keep an accurate residential address off the driver's license and vehicle registration lists.¹²⁷ Ngo cautioned that the Real ID Act's driver's license requirement is a serious threat to this program and that there were no guarantees that the program could continue if Maryland implemented the Act.¹²⁸

On a practical level, many women may have trouble accessing the records required to attain a card. Regardless of their status as citizens or immigrants, women may have left behind the necessary documentation with their abusers

119. Many domestic rights and civil rights groups released publicity surrounding the dangerous measures of this legislation with regards to domestic violence victims and continue to oppose the Act. *See e.g.* Nat'l Coal. Against Domestic Violence, REAL ID Laws, http://www.ncadv.org/publicpolicy/REALIDLaws_229.html (last visited Jan. 20, 2008); ACLU, What's Wrong with Real ID?, <http://www.realnightmare.org> (last visited Jan. 20, 2008).

120. Ramasastry, *supra* note 93.

121. *See id.*

122. *Id.*

123. NAT'L GOVERNORS ASSOC. ET AL., THE REAL ID ACT: NATIONAL IMPACT ANALYSIS 14 (2006), <http://www.nga.org/Files/pdf/0609REALID.pdf>.

124. Senator Russ Feingold, *supra* note 116.

125. Melissa Ngo, Prepared Testimony and Statement for Hearing on "Maryland Senate Joint Resolution 5" before the Judicial Proceedings Committee of Maryland Senate 6 (Feb. 15, 2007), http://epic.org/privacy/id-cards/ngo_test_021507.pdf.

126. *Id.*

127. *Id.*

128. *Id.*

and be unable to secure them without putting their lives, or the lives of others, at risk.¹²⁹ Immigrant women are particularly vulnerable to this risk since they are likely to need extra documentation to prove their identity and residence.¹³⁰ Even if they have legal status as legal permanent residents or visa holders, immigrant women may not have their passport if they quickly fled their abuser. The only foreign document accepted under the Act is a passport, something abusers often take away from their victims.¹³¹

D. Risks Posed to Gender-Based Asylum Seekers

The changes to asylum law brought about by the Real ID Act are equally worrying as the proposed ID requirements. For supporters like Representative Sensenbrenner, the changes may appear to be a straightforward response to national security concerns. He believes “[t]he Real ID Act tightens our asylum system that has been abused by terrorists with deadly consequences.”¹³² However, the specific changes to asylum requirements and procedures are troubling in light of its effects on female asylum-seekers with legitimate claims.

Most concerning is the centrality of motive requirement, which requires that the applicant demonstrate that at least one of the enumerated grounds was a central reason for her persecution.¹³³ The modifications to current asylum laws will likely serve to discourage many asylum seekers, some with legitimate fears of persecution. These changes will have a particularly harsh impact on immigrant women, as explored below.

A strict interpretation of the centrality requirement is likely to have a severe impact on women seeking asylum for gender-related claims. Motive is always difficult to prove in asylum cases; immigrants rarely have direct evidence and bear the burden of proof in demonstrating the motive of their persecutors.¹³⁴ However, when a persecutor is a private actor, as is common for female applicants, it becomes particularly difficult.¹³⁵ More frequently than in the case of male applicants, the persecution against women and girls occurs at the hands of private individuals, often family members.¹³⁶ Often, the violence is seen as appropriate and acceptable because of cultural norms and practices.¹³⁷ The persecutors may have multiple motivations for harming their female

129. Electronic Privacy Information Center, REAL ID and Domestic Violence, http://epic.org/privacy/dv/real_id.html (last visited Jan. 24, 2008).

130. *Id.*

131. *Id.*

132. Press Release, *supra* note 89.

133. Real ID Act of 2005, Pub. L. No. 109-13, § 101(a)(3)(B)(i), 119 Stat. 302, 303 (2005).

134. Aubra Fletcher, *The REAL ID Act: Furthering Gender Bias in U.S. Asylum Law*, 21 BERKELEY J. GENDER L. & JUST. 111, 127 (2006).

135. *Id.* at 128.

136. *Id.*

137. *Id.*

victims.¹³⁸ This makes it hard to identify a single motive, as required by the Act.

Often the harm done is not clearly related to the persecutor's intent. In cases of female genital cutting (FGC) (also referred to by some as female genital mutilation), the people performing the procedure generally do not do so with the intent to persecute or punish.¹³⁹ Their motivations often do not fit neatly under the Real ID Act's enumerated reasons for an asylum claim.¹⁴⁰ Case law removed this problem by examining motive in a societal and governmental, rather than an individual, context.¹⁴¹ If the Real ID Act is interpreted according to existing asylum jurisprudence, applicants should face little trouble with FGC claims for asylum. However, if a stricter approach is followed, emphasis on the centrality requirement could cause difficulties to asylum applicants fleeing from gender-based persecution.¹⁴² They might be faced with convincing a total stranger that a procedure performed by a member of their own family, in compliance with cultural practices, is in fact persecution.¹⁴³ This is a burden usually missing from a non-gender basis for asylum, where the persecution was by a readily identifiable state actor or group.¹⁴⁴

Another troubling change to asylum law brought about by the Real ID Act involves the new provisions for credibility. The majority of established guidelines concerning assessment of an applicant's credibility for asylum remain, with one important difference. The Real ID Act establishes, in contradiction to case law, that, when considering whether to grant asylum, adjudicators should take *minor* inconsistencies and omissions in the application in determining credibility into consideration, even if they are peripheral to the applicant's claim.¹⁴⁵

This inclusion would have a more deleterious effect on gender-based claims than other asylum claims. Past experiences with government officials or other traumatic experiences may undermine an applicant's credibility and ability to coherently recount her story.¹⁴⁶ This is a particular concern for

138. Cianciarulo, *supra* note 107, at 118 (citing *Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir. 1995)) (holding that "persecutory conduct may have more than one motive, and so long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied.").

139. The World Health Organization's report on female genital mutilation details the many reasons why female genital mutilation is perceived as necessary based on cultural beliefs and values. See John Maurice, WORLD HEALTH ORGANIZATION, 72 PROGRESS IN SEXUAL AND REPROD. HEALTH RESEARCH (WORLD HEALTH ORG.), *Female genital mutilation – new knowledge spurs optimism* 5 (2006), <http://www.who.int/reproductive-health/hrp/progress/72.pdf>.

140. Cianciarulo, *supra* note 107, at 118.

141. Fletcher, *supra* note 134, at 127.

142. *Id.* at 129.

143. *Id.* at 128.

144. *Id.*

145. Cianciarulo, *supra* note 107, at 135.

146. *Id.* at 138.

applicants seeking asylum based on such traumatic and culturally shameful occurrences as sexual assault, FGM, and domestic violence.¹⁴⁷ Typically, without having received any psychological help or legal counsel, women must explain their persecution to an adjudicator, relating deeply emotional and traumatic experiences.¹⁴⁸ Interviews are conducted in settings that can only serve to heighten the stress of a traumatized applicant, such as detention centers with formal questioning sessions.¹⁴⁹

The enhanced decision-making power granted to immigration officers is in itself cause for concern. Women seeking asylum must share the experiences that caused them to flee persecution—typically extremely personal and even shameful experiences such as rape—with immigration officers, the majority of whom are male.¹⁵⁰ There is nothing in the provisions of the Real ID Act relating to asylum law that offer any protection for women in these circumstances. It is possible that these male interviewers may even resemble the abusers that drove the women to seek asylum in the first place. If they are unable to relate their stories in a coherent, convincing way, outside help is unlikely to be available, since assistance from counselors or attorneys are rare resources for detained immigrants.¹⁵¹

E. Possible Solutions to the Problems Raised by the Real ID Act

There is reason to be cautiously optimistic in regards to the first provision of the Real ID Act. A possible solution exists at the local level for ensuring immigrant women's safety. Almost two-dozen states are considering legislation that would oppose the Act.¹⁵² State representatives and agencies have recognized the confidentiality problems with the proposed ID requirements.¹⁵³

The Real ID Impact Analysis report, created by the National Governors Association, offered recommendations for further protection for victims of domestic violence.¹⁵⁴ These include 1) allowing the address of the principal residence to be determined by affidavit and corroborating documentation, and 2) "masking" the address for all domestic violence victims while retaining the

147. *Id.*

148. *Id.*

149. See John Linarelli, *Violence Against Women and the Asylum Process*, 60 ALB. L. REV. 977, 984 (1997).

150. *Id.*

151. Immigrants have the right to be represented by counsel, but there are no government-funded attorneys. Immigration and Nationality Act, Pub. L. No. 104-208, § 292, 110 Stat. 3009 (1996). The American Bar Association has recognized this problem with lack of representation for immigration issues in general, and asylum law in particular. See AMERICAN BAR ASSOCIATION, RECOMMENDATION 7 (Feb. 13, 2006), <http://www.abanet.org/intlaw/policy/humanrights/immigration2.06107A.pdf>.

152. Nicole Gaouette, *National ID requirements postponed under criticism; The law calling for new tamper-proof driver's licenses has raised alarms about privacy and the cost for states*, L.A. TIMES, Mar. 2, 2007, at A16.

153. *Id.*

154. NAT'L GOVERNORS ASSOC. ET AL., *supra* note 123, at 14.

information securely in a database.¹⁵⁵ Both of these changes would protect confidential information about victims' locations from abusers. The first recommendation would help women secure licenses if, having fled their homes, they lack the extensive documentation requirements mandated under the Real ID Act. The second recommendation would serve as an additional level of security, protecting the contact information of domestic violence victims from abusers.

The National Conference of State Legislatures, the National Governors Association, and the American Association of Motor Vehicle Administrators also addressed their recommendations to the Department of Homeland Security (DHS).¹⁵⁶ They expressed concern about placing certain information required by the Act on the card because a majority of states have laws that protect the identity and security of certain classes of individuals, such as domestic violence victims.¹⁵⁷ Particularly helpful to domestic violence victims escaping their abusers, the recommendations suggest allowing interim methods of tracking address changes without the requirement for the full issuance of a replacement card.¹⁵⁸ Additionally, licenses should display an alternative address, with the principal address stored securely in a database.¹⁵⁹ Since not all states currently have these options available to domestic violence victims, the Act, with these additions, might actually prove beneficial to a larger number of victims.

An effective solution to the dangers posed to immigrant women seeking asylum seems much more elusive. Since asylum law operates at the federal level through federal agencies, state or local solutions are impossible.¹⁶⁰ Instead, the responsibility will fall to immigration judges and officers to encourage the granting of asylum for women with gender-based persecution claims.

In keeping with asylum jurisprudence, adjudicators should continue to take a thoughtful approach to the motivation requirement of the persecutor, recognizing that persecution based on gender is real, even if ingrained in an applicant's culture. The mere fact that it was a relative or a respected community member who committed the act does not mean the danger to the woman is any less real. Since the intent of the persecutor is an element for asylum, judges need to consider women's claims within the cultural context from which they originate.

Advocates concerned with the impact of the Real ID Act should work toward passing legislation that limits implementation of these new asylum provisions when handling gender-based claims. There is promising evidence that such efforts are already being undertaken before the Real ID Act has even

155. *Id.*

156. *Id.* at 2.

157. *Id.* at 14.

158. *Id.*

159. *Id.*

160. 8 U.S.C § 1158 (2008).

gone into effect.¹⁶¹ Groups working for civil rights and others concerned for immigrants seeking asylum have long been vocal about the dangers the Real ID Act poses. This advocacy will hopefully inspire more Americans to preserve a path to asylum for all immigrants with good faith claims to gender-based persecution.¹⁶²

The U.S. Commission on International Religious Freedom issued a report criticizing federal immigration authorities' handling of asylum-seekers at the border.¹⁶³ Senator Joseph Lieberman (I-Conn), Chairman of the Homeland Security Committee, has pledged to introduce legislation to address the concerns raised by this report.¹⁶⁴ He and Senator Edward Kennedy (D-Mass) issued a joint statement reaffirming their commitment to asylum seekers and urged members of Congress to "reject any proposals that would make it even more difficult for persons fleeing human rights abuses to seek safe haven in the United States."¹⁶⁵ While this does not amount to addressing all the changes introduced by the Real ID Act, at a minimum, it demonstrates that there are legislators who might be willing to ensure that gender-based claims for asylum receive priority.

IV. CRIMINALIZING UNLAWFUL PRESENCE IN THE U.S.

The CLEAR Act and Real ID Act were both drafted in the shadow of September 11th, and they both addressed perceived weaknesses in national security. Lurking in the background of these debates on immigration is a far more radical idea: that all "illegal" immigrants living in the U.S. should not merely be deported, but charged criminally for a misdemeanor or felony.¹⁶⁶

With the 2006 Congressional shift in power to Democrats, the chances of legislation criminalizing unlawful presence in the country seems increasingly unlikely in the near future. It is worthwhile to consider briefly this proposal simply because of the frequency with which it is debated. Like the CLEAR and Real ID Acts, the consequences of criminalizing unlawful presence could put the lives of immigrant women at risk. Unfortunately, this possibility is commonly absent from debates over the measures.

Currently, although unlawful *entry* into the U.S. is a criminal offense and grounds for removal from the country, unlawful *presence* is only a ground for

161. Fletcher, *supra* note 134, at 130.

162. *Id.*

163. Darryl Fears, *Policy on Asylum-Seekers Faulted; Report Criticizes Detentions by U.S. Immigration Officials*, WASH. POST, Feb. 10, 2007, at A06.

164. *Id.*

165. *Id.*

166. See MICHAEL JOHN GARCIA, CONG. RESEARCH SERV. (CRS), CRS REPORT FOR CONGRESS: CRIMINALIZING UNLAWFUL PRESENCE: SELECTED ISSUES 1 (2006), <http://trac.syr.edu/immigration/library/P585.pdf>. Several bills introduced in 2006, for instance, sought to make the unauthorized presence of aliens in the U.S. a criminal offense. *Id.*

deportation and does not bring with it a criminal penalty.¹⁶⁷ The appeal for some legislators in criminalizing unlawful presence is the hope that it will discourage illegal immigration and more effectively root out undocumented immigrants currently residing in the U.S.¹⁶⁸

Several bills created in 2005 and 2006 sought to make unauthorized presence in the U.S. a criminal offense.¹⁶⁹ There are immediate concerns that would arise if unlawful presence was criminalized, especially if it was classified as a felony rather than a misdemeanor. The financial and practical costs of such a scheme are worrying. The simple lack of resources needed to tackle such a large number of violators is reason enough to hesitate before passing such harsh legislation.

As with deputizing local law enforcement through the CLEAR Act, immigrant women victimized by domestic abuse or who have been trafficked into the country would be increasingly unlikely to approach a police officer if they knew that their very presence in the U.S. was grounds for arrest and criminal punishment. Furthermore, it would serve to enhance the power that abusers have over their undocumented victims. An abuser could honestly threaten to call the police and report the victim's unlawful status to the authorities with resulting criminal repercussions.

Domestic violence shelters might also be put into an untenable situation. Shelters currently are bound by funding requirements and confidentiality laws to protect the identity of individuals staying at the shelter.¹⁷⁰ If unlawful status was made a felony, it is conceivable that service providers would face the impossible task of either obeying the law or continuing to provide aid to victims – but not both. Anyone wishing to assist a victim of domestic abuse could potentially be deterred by the harsh language of an act like the Border Protection, Anti-terrorism, and Illegal Immigration Control Act of 2005, which provided prison terms for anyone assisting, encouraging, directing, or inducing an illegal immigrant to stay in the U.S.¹⁷¹

Finally, it is unclear how criminalizing unlawful presence would interact with the protections of the Violence Against Women Act (VAWA). Many of the immigration protections offered under that Act are reserved for

167. 8 U.S.C. § 1182(a)(9)(B)(ii) (2008).

168. See Craig Gilbert & Daniel W. Reilly, *Leading Charge, Taking the Fire: Chairman's Bill Rallies His Foes on Immigration*, J. SENTINEL ONLINE, Mar. 25, 2006, www.jsonline.com/story/index.aspx?id=410903.

169. See The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005); Securing America's Borders Act, S. 2454, 109th Cong. (2006).

170. See Nat'l Network to End Domestic Violence, VAWA Confidentiality, <http://www.nnedv.org/legislative-priorities/hmis/vawa-confidentiality.html> (last visited Mar. 15, 2008).

171. The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, § 274(2)(A), 109th Cong. (2005).

undocumented victims who are of good moral character.¹⁷² If an act designates victims of domestic abuse as criminals due to their unlawful status in the U.S., it is unclear whether this could be used to show moral turpitude and make such protections unavailable.

Fortunately, at this time, it is unlikely that criminalization of undocumented immigrants will become law. Democrats have stood against this approach and polls show that a majority of Americans do not favor criminalizing undocumented aliens.¹⁷³ Many Republicans also seem cautious of appearing to favor making unlawful presence a felony.¹⁷⁴ However, the debates surrounding this issue highlight the potential tide-shift in this area of immigration law, and the significant impact it would have upon vulnerable immigrant women.

V. CONCLUSION

If an examination of these three quite dissimilar proposals affecting immigration reveals anything, it is the need for sensitivity to the problems facing immigrant women who are victims of domestic violence and other crimes when modifying our current immigration system. Too often, the human face of those affected by legislation is lost. Instead, proposals are designed solely in the vein of broad policy concerns regarding border protection and the economy. Laws designed to promote strong national security are essential, but they must be tempered by a proper concern for the wellbeing of immigrant women. Put bluntly, laws created to shield Americans should not be used to punish or put at risk women whose lives are in danger from domestic violence, trafficking, persecution, and other forms of abuse.

Consideration of both the CLEAR Act and the Real ID Act gives rise to cautious optimism. There are ways to balance the competing concerns of national security and the safety of immigrant women who have been affected by violence. Examples such as Florida's trial program for enforcing federal immigration laws demonstrate that legislators are not truly faced with an either/or conundrum when it comes to women's safety and national security.

172. For a list of what does not constitute good moral character, see 8 U.S.C. § 1101(a)(49)(f) (2008).

173. Time Poll, conducted by Schulman, Ronca & Bucuvalas Public Affairs, Mar. 29-30, 2006, <http://www.pollingreport.com/immigration2.htm>. The poll offered those surveyed the option of either (1) making illegal immigration a crime and not allowing anyone who entered the country illegally to work or stay in the United States under any circumstances, or (2) allowing illegal immigrants to get temporary work visas with a path to permanent residence after six years if they learn English, pay a fine, pay any back taxes, and have no criminal record. Twenty-five percent favored the first choice, while 72% preferred allowing immigrants to attain work visas. *Id.*

174. Jonathan Weisman, *Immigrant Bill Fallout May Hurt House GOP*, WASH. POST, Apr. 12, 2006, at A01 (stating that the then House Speaker J. Dennis Hastert (R-Ill) and Senate Majority Leader Bill Frist (R-Tenn) backed off a measure criminalizing unlawful presence, issuing a joint statement to clarify: "It remains our intent to produce a strong border security bill that will not make unlawful presence in the United States a felony.").

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Legal exceptions provided for domestic violence victims and local outreach to immigrant communities can go a long way toward ensuring victims' safety. In the Florida program, police were able to maintain, and even improve, their relationship and trust with immigrant communities within their jurisdiction.¹⁷⁵ They used proactive methods and education while still assisting ICE with counter-terrorism and meeting national security needs.¹⁷⁶ States and municipalities can lead the way in reaching out to vulnerable immigrant populations, and play an active role in encouraging immigrant victims to seek assistance.

In 2008, further changes to immigration again appear imminent. New legislation should facilitate assistance for women at risk from abuse and urge the Department of Homeland Security to promulgate regulations for issuance of the U visa.¹⁷⁷ Ultimately, legislators must not lose sight of the individual immigrant women affected by even seemingly minor changes to immigration laws. The challenge in 2008 and beyond will be to develop immigration laws that complement our commitment to national security as well as the safety of everyone living within our borders.

175. See McKenzie, *supra* note 13, at 1158.

176. *Id.*

177. See Gregory Siskind, *U Visas*, IMMIGRATION DAILY, 1999-2006, <http://www.ilw.com/articles/2006,0227-siskind.shtm>. Although created five years ago, the U visa will not be available until DHS creates regulations for its issuance. However, "U visa interim relief" is available and allows for deferred action and work authorization. *Id.*