

287(G) AND WOMEN:
THE FAMILY VALUES OF LOCAL ENFORCEMENT OF
FEDERAL IMMIGRATION LAW

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INTRODUCTION.....	261
I. THE HISTORY OF INA § 287(G).....	263
II. THE IMPACT OF 287(G) AGREEMENTS ON MINORITY COMMUNITIES.....	265
A. The Prevalence of Racial Profiling	266
B. The Program’s Disproportionate Focus on Traffic Offenses and Misdemeanors.	273
C. Lack of Adequate Federal Oversight	276
D. Lack of Adequate Data Collection.....	279
III. THE IMPACT OF THE 287(G) PROGRAM ON WOMEN.....	282
A. The Deterrent Effect on Female Victims of Domestic Violence	282
B. The Availability of U-Visas in Participating Localities.....	292
C. The Increased Financial and Parental Burden on Female Relatives of Deported Individuals.	296
CONCLUSION	299

INTRODUCTION

As Congress prepares to consider legislation revamping America’s immigration system, the attention of many immigration advocates remains squarely focused on the advantages that might come from the multiple proposals Congress is considering. Unquestionably, they would be significant. Any proposed legislation would likely include a path to legalization for the approximately 11 million undocumented persons¹ currently in the United States. However, not as apparent may be the cost of punitive measures that

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1. Tara Bahrapour, *Illegal Immigrant Population in U.S. Drops, Report Says*, WASH. POST, Sept. 2, 2010, at A06.

may be included in such legislation. According to a March 19, 2010, editorial piece penned by Senators Charles Schumer and Lindsey Graham in *The Washington Post*, any legislation must include a combination of increased electronic verification, personnel deployment along the borders, and enhanced “interior enforcement” as a precursor to any discussion regarding legalization.² While the parameters of the final piece have yet to be concretely defined, it can be expected that any legislation will include an attempt to expand local enforcement of federal immigration law—namely, the “287(g) program” or similar counterparts.³

Existing largely only in name for nearly a decade after its initial creation by the Illegal Immigrant Responsibility and Reform Act of 1996,⁴ the 287(g) program saw a rapid expansion after 2006.⁵ As the program has continued to expand, various dangerous consequences of its implementation – namely racial profiling resulting from the Department of Homeland Security’s failure to adequately supervise participants – have begun to come to the surface as a result of civil rights litigation, internal government reports, and the testimony of victims of abuse and immigration advocates before Congress. Unfortunately, while the risks associated with these programs are well known to immigrant advocates, they remain, at best, anecdotal and, at worst, hyperbolic to the program’s supporters and, by and large, the general public.

Furthermore, yet to be explored even by immigrant advocates are the program’s effects on women, specifically. The delegation of authority to local police to enforce federal immigration law and, conversely, aid undocumented, female victims of crimes places direct and conflicting responsibilities on the shoulders of local police. This reality is not lost on victims of domestic violence who increasingly may be deterred from interacting with officers in participating jurisdictions. Unfortunately, in some cases, these fears may be perpetuated by the actions of particular officers, specifically with the availability of U-visa certifications, or lack thereof, in jurisdictions hostile to undocumented populations. Furthermore, beyond the 287(g) program’s effect on victims of crime, the program, like the “War on Drugs”⁶ and the “War on

2. Charles E. Schumer & Lindsey O. Graham, Editorial, *The Right Way to Mend Immigration*, WASH. POST, Mar. 19, 2010, at A23.

3. See, e.g., Jena Baker McNeill, *Secure Communities: A Model for Obama’s 2010 Immigration Enforcement Strategy*, THE HERITAGE FOUNDATION, Jan. 6, 2010, <http://www.heritage.org/research/reports/2010/01/secure-communities-a-model-for-obamas-2010-immigration-enforcement-strategy> (arguing that President Barack Obama should continue to expand the 287(g) program and “Secure Communities,” a similar program requiring local police to use an arrestee’s biometric data to check his or her immigration status, as he formulates future immigration enforcement policy).

4. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified at scattered sections of 8 U.S.C.).

5. See *infra* Part I.

6. Sherri Sharma, *Beyond “Driving While Black” and “Flying While Brown”*: Using Intersectionality to Uncover the Gendered Aspects of Racial Profiling, 12 COLUM. J. GENDER & L. 275, 287 (2003) (“But the War on Drugs has had a disproportionate effect on women as

Terror,⁷ may have significant latent effects on female family members, in this case, those of deported spouses, brothers, and sons.

Ultimately, the reality remains that while undocumented immigration is a significant problem in some communities, local enforcement of federal immigration law carries with it dangers of its own, which must be more fully explored before the program is expanded – specifically, its impact on women. In beginning to explore these dangers, this article will proceed in three sections. The first will trace the history of the 287(g) program, including a recounting of the program’s rapid expansion during the Bush administration. The second section will examine the myriad of documented problems associated with the program, including: a) racial profiling; b) the program’s inordinate focus on civil offenders as opposed to violent felons; c) the failure of ICE to adequately monitor and coordinate participating agencies’ actions; and d) the lack of adequate data collection by ICE and participating agencies. Finally, the third section will highlight three potential effects the program may have on women, of which additional research is required before the program is expanded further: (a) the deterrent effect of the program on victims of domestic violence; (b) the availability of U-visas in 287(g) jurisdictions; and (c) the increased financial and parental responsibility for women whose male family members are placed into deportation proceedings.

I. THE HISTORY OF INA § 287(G)

On September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act, thereby adding Section 287(g) to the Immigration and Nationality Act (INA).⁸ The limited legislative history available suggests that proponents initially envisioned the section to be used broadly as a means of detaining absconders⁹ – persons for whom a final order of removal has been issued, but who have not left the country. Despite their intentions, the first agreement, commonly termed a Memorandum of Agreement (MOA),¹⁰ was not signed until 2002.¹¹ As of 2005, only 3 localities

well, and has led to a steep rise in the number of women incarcerated. . . . ‘Often the dealers are boyfriends, spouses, or other relatives that use the threat of retaliation if the women do not agree to carry large amounts of drugs, frequently across state or national borders.’”)

7. See *ALIENS AMONG US* (2009) (film recounting the stories of immigrant families who had male family members deported after they registered as part of the Special Registration program implemented after September, 11, 2001), available at <http://www.cultureunplugged.com/play/1420/Aliens-Among-Us> (last visited Oct. 2, 2010).

8. *Delegation of Immigration Authority Section 287(g): Immigration and Nationality Act*, 1 (Aug. 18, 2008), <http://cdpsweb.state.co.us/immigration/Meetings/October21/10-21-08%20287%20Delegation%20of%20Authority.pdf> [hereinafter *Delegation of Immigration Authority*].

9. 143 CONG. REC. 5,639-40 (1996) (statement of Rep. Latham, Republican-Iowa).

10. According to ICE:

The MOA defines the scope and limitations of the authority to be designated. It also establishes the supervisory structure for the officers working under the cross-designation and prescribes the agreed upon

had entered into corresponding agreements with the Bureau of Immigrations, Customs and Enforcement (ICE).¹²

As a means of gaining wider acceptance for the program, Deputy Assistant Director of ICE's Office of Investigations, Paul M. Kilcoyne, emphasized, during a 2005 House Homeland Security subcommittee hearing, that the program would not to be used to target individuals who had committed minor traffic offenses — such as driving with a broken headlight — but rather would focus on criminal organizations.¹³ Spurred by Congress' failure to pass comprehensive immigration reform and the Bush administration's emphasis on using local governments to enforce federal immigration law,¹⁴ sixty-four agencies entered into 287(g) agreements between January 1, 2005 and October 2008.¹⁵ During this same period, federal funding for the program rapidly

complaint process governing officer conduct during the life of the MOA. Under the statute, ICE will supervise all cross-designated officers when they exercise their immigration authorities. The agreement must be signed by the ICE Assistant Secretary, and the governor, a senior political entity, or the head of the local agency before trained local officers are authorized to enforce immigration law.

Delegation of Immigration Authority, *supra* note 9, at 1. It is worth noting that a locality generally bears all costs related to the program outside of the initial training for deputized officers, *see* Immigration & Customs Enforcement, *Freedom of Information Act Reading Room*, <http://www.ice.gov/foia/readingroom.htm#37> (last visited Aug. 17, 2010) (a selection of certain Memorandums of Understanding).

11. *Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law: Hearing Before the H. Comm. on Homeland Sec.*, 111th Cong. 33 (2009) (statement of Muzaffar A. Chishti, Director, NYU School of Law Office, Migration Policy Institute), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:49374.pdf [hereinafter *Hearing on Examining 287(g)*].

12. *Id.* at 36.

13. *The 287(g) Program: Ensuring the Integrity of America's Border Security System Through Federal-State Partnerships: Hearing Before the H. Subcomm. on Mgmt., Integration, & Oversight of the H. Comm. on Homeland Sec.*, 109th Cong. 34 (2005) (statement of Paul M. Kilcoyne, Deputy Assistant Director, Office of Investigations, U.S. Immigration and Customs and Enforcement), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:28332.pdf.

14. In 2002, however, the Department of Justice (DOJ) composed a memo encouraging state and localities to enforce federal immigration law under their alleged inherent authority. OFFICE OF LEGAL COUNSEL, DEP'T OF JUSTICE, Memo for the Attorney General: Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations (Apr. 3, 2002), <http://www.aclu.org/files/FilesPDFs/ACF27DA.pdf>. In doing so, it explicitly rejected the constitutional preemption analysis from a similar 1996 memo, *Assistance by State and Local Police in Apprehending Illegal Aliens* (Feb. 5, 1996), <http://www.usdoj.gov/olc/immstopo1a.htm>.

15. U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 2 (2009), available at <http://www.gao.gov/new.items/d09109.pdf> [hereinafter GAO 287(G) REPORT].

2010]

287(G) AND WOMEN

265

increased, from approximately 5 million dollars in 2006 to 68 million dollars in 2010.¹⁶

Despite expectations to the contrary, the Obama administration has continued to expand the program. On July 10, 2009, Secretary of the Department of Homeland Security (DHS), Janet Napolitano, announced that DHS would sign a new MOA with each participating locality; in addition, Secretary Napolitano announced the approval of eleven new agreements with participating localities.¹⁷ Currently, 71 agreements are in effect¹⁸ and over eighty applications are still pending.¹⁹ Current ICE informational materials continue to emphasize that participating agencies target immigrants who have committed violent crimes or have been involved in human smuggling, gang/organized crime activity, narcotics smuggling and money laundering.²⁰ According to publicly available promotional materials, participation in the program is not intended to impact day laborers or persons violating local excessive occupancy regulations.²¹

II. THE IMPACT OF 287(G) AGREEMENTS ON MINORITY COMMUNITIES

Governmental reports, together with data collected pursuant to local reporting requirements, and in combination with the testimony of victims and advocates have brought to light a variety of interrelated problems associated with the 287(g) program. Of paramount concern is evidence indicative of an increased focus among participating agencies on the arrest of minorities, specifically in the form of discriminatory traffic stops. In fact, available data suggests that while the program has been promoted as a means to capture violent felons, the vast majority of persons deported are initially arrested for misdemeanors or traffic offenses. These dangers have been heightened by the government's failure to adequately supervise those involved in the program, specifically its decision not to impose independent data collection requirements upon participating agencies.

16. *Id.* at 9; U.S. DEP'T OF HOMELAND SEC, OFFICE OF INSPECTOR GEN., THE PERFORMANCE OF 287 (G) AGREEMENTS, 4 (2010), available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-63_Mar10.pdf [hereinafter THE PERFORMANCE OF 287(G) AGREEMENTS]; C. STEWART VERDERY, JR., BRICK BY BRICK 25 (2010), available at http://www.americanprogress.org/issues/2010/06/pdf/dhs_enforcement.pdf.

17. Press Release, Sec'y Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements, Dep't of Homeland Sec. (July 10, 2009), available at http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm [hereinafter New Agreement Press Release].

18. U.S. Immigration & Customs Enforcement, *Updated Facts on ICE's 287(g) Program* (Apr. 9, 2010), <http://www.ice.gov/news/library/factsheets/287g-reform.htm>.

19. *Hearing on Examining 287(g)*, *supra* note 11 at 35 (statement of Muzaffar A. Chishti).

20. THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 17, at 8, 79-80.

21. *Id.* at 36.

A. *The Prevalence of Racial Profiling*

While some may argue that the program's disproportionate impact on Latino residents merely reflects the fact that most undocumented persons are Hispanic, significant evidence indicates that this is, in fact, a result of an increased focus on minorities overall, specifically in the form of discriminatory traffic stops. As discussed below, the 287(g) program, itself, does not create any independent data collection requirements. However, data collected pursuant to local requirements indicates that once a locality joins the program, there is a dramatic increase in the number of Hispanics stopped and arrested by participating officers.²² These concerns are further supported by the experiences of individual victims in litigation across the country.

The law regarding selective police enforcement on the basis of race is clear. "[T]he Constitution prohibits selective enforcement of the law based on considerations such as race."²³ The choice of "whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'"²⁴ Police officers, likewise, are prohibited from relying on such bases in stopping or arresting individual suspects. To the extent that an officer relies on race in place of criminal activity, his actions are subject to "strict scrutiny"²⁵ — which in the context of racial classifications all but ensures that the officer's actions are unconstitutional.²⁶ The law is uniform regardless of whether the victim of such classifications is documented or undocumented. The Supreme Court has made clear that the Fourteenth Amendment's prohibition on racial discrimination protects non-citizens as well as citizens.²⁷

Because of the lack of sufficient federal regulation, once an officer is deputized under the program, he is given virtually unlimited authority to detain and refer suspected undocumented persons to ICE.²⁸ While more aggressive localities have taken it upon themselves to conduct individual immigration

22. See *infra* notes 40, 125.

23. *Whren v. U.S.*, 517 U.S. 806, 813 (1996).

24. *U.S. v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

25. *Bush v. Vera*, 517 U.S. 952, 968 (1996) (plurality).

26. Evan Tsen Lee & Ashutosh Bhagwat, *The McCleskey Puzzle: Remedying Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 178-79 (1998) ("The crucial consequence of subjecting a governmental [racial] classification to 'strict scrutiny' is that the classification then becomes presumptively unconstitutional, and the burden falls on the government to establish an extremely persuasive justification for use of that classification (a burden which is essentially never met).").

27. *Plyler v. Doe*, 457 U.S. 202, 205, 212 (1982) (finding that a state law discriminating against undocumented children was unconstitutional under the Fourteenth Amendment); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (concluding that the Fourteenth Amendment applies to non-citizens).

28. See *infra* Part II.c.

raids, most localities claim that they refer individuals to ICE in conjunction with an arrest which they otherwise would already make.²⁹

While this may be the case, available data from participating localities suggest that once an agreement is entered into, the actions of police in participating agencies are adjusted to reflect deputized officers' newfound powers. The most dramatic evidence of such is the rapid increase in the number of Hispanic persons stopped for crimes — primarily Driving Without a License — for which the officer could not have had a factual basis at the time of the stop and the number of Hispanic persons arrested for crimes for which individuals would otherwise have not been arrested.³⁰

The incentive for such actions is provided by the fact that once an individual is arrested, no matter the offense, the officer may transport the individual to the local police station from which the officer, under the program's auspices, may contact ICE to determine if the individual in custody is lawfully present within the United States.³¹ If ICE determines that the individual is subject to deportation, it issues a detainer, under which the locality may hold the individual for up to 48 hours. During this time, ICE must detain and accept custody of the suspected undocumented individual.³² By ICE estimates, in approximately 30-40 percent of cases, the individual already detained is quickly transferred into ICE custody.³³ The individual is never prosecuted for the crime for which they were originally arrested, leaving the locality's judicial officers without an opportunity to scrutinize the basis of the stop or the merits of the crime for which the person was arrested.³⁴ As stated by an ICE employee, "[t]his has resulted in ICE becoming a dumping ground for individuals arrested on criminal charges who were never cleared of those charges in a court of law."³⁵

Meanwhile, the individual transferred into ICE custody, assuming he is able to obtain prompt and capable representation — which may not be the

29. See, e.g., *Hearing on Examining 287(g)*, *supra* note 12 (statement of Charles A. Jenkins). See *infra* notes 77-83 (noting the crimes for which persons detained under the program are originally arrested).

30. See *infra* notes, 40, 41, 77-83, 125.

31. *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001) (finding that police decision to arrest defendant for a seat-belt violation or any other fine-only misdemeanor did not violate the Fourth Amendment). An individual state may impose limits on officers beyond those provided by the Fourth Amendment, *id.* at 352.

32. 8 C.F.R. § 287.7(d) (2010).

33. *Hearing on Examining 287(g)*, *supra* note 12 (statement of Charles A. Jenkins).

34. See *Moving More Effective Immigration Detention Mgmt.: Hearing Before the H. Subcomm. on Border, Maritime & Global Counterterrorism of the H. Comm. on Homeland Sec.*, 111th Cong. (2009) (statement of Chris Crane, Vice President of Detention and Removal Operations, National Immigration and Customs Enforcement Council 118 of the American Federation of Government Employees), available at <http://homeland.house.gov/SiteDocuments/20091210105603-99475.pdf>.

35. *Id.*

case,³⁶ is left to challenge his detention in the context of a deportation hearing in which the Fourth Amendment's exclusionary rule is generally inapplicable.³⁷ As opposed to being merely a latent effect of participation in the 287(g) program, individuals detained pursuant to such stops constitute the vast majority of persons referred to ICE by local deputized officers.³⁸

While proponents of the program have criticized such assertions as mere propaganda, data collected, pursuant to local requirements, bears this concern out. In Tennessee, which has two MOAs, the arrest rates in Davidson County for Hispanic defendants driving without a license more than doubled after the county implemented the program.³⁹ In Alabama, fifty-eight percent of motorists stopped by a deputized officer were Latino, although they constitute less than two percent of the population.⁴⁰

These concerns are further enhanced by the questionable history, in terms of race relations, of many of the localities entering into such agreements. Eighty percent of the agreements have been signed by localities in states in the southern half of the United States.⁴¹ Eighty-seven percent of the localities that have entered into 287(g) agreements have Hispanic populations growing faster than the national average.⁴²

The experiences of Latino plaintiffs challenging their treatment by deputized officers highlight some of the more egregious abuses by participating agencies. In July 2008, for example, several Latino U.S. citizens and a Mexican filed a class-action lawsuit against the Maricopa County Sheriff's Office (MCSO), Sheriff Joe Arpaio and Maricopa County for selectively enforcing immigration laws against Latinos under the existing 287(g) agreement.⁴³ Velia Meraz and Manual Nieto, two of the individual plaintiffs in

36. See AMERICAN BAR ASS'N, COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM ES-7 (Am. Bar Assoc., 2010) (noting that "[m]ore than half of respondents in removal proceedings, and 84 % of detained respondents, do not have representation").

37. *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1046 (1984). Accordingly, any evidence gathered, even if the product of an unlawful arrest, remains admissible, *id.* at 1051.

38. See *infra* Part II.b.

39. Tennessee Immigrant & Refugee Rights Coalition, *Arrests for No Drivers License by Ethnicity and Race*, 1 (July 31, 2007), http://www.tnimmigrant.org/storage/misc/Arrests_for_NDL_by_Race_and_Ethnicity%206-2008.pdf.

40. David C. Vock, *Police Join Feds to Tackle Immigration*, STATELINE.ORG (Nov. 27, 2007), <http://stateline.org/live/details/story?contentId=259949>.

41. Am. Civil Liberties Union of Ga., *Terror and Isolation in Cobb: How Unchecked Police Power under 287(g) Has Torn Families Apart and Threatened Public Safety*, 6 (Oct. 2009), http://www.aclu.org/files/intlhumanrights/immigrantsrights/asset_upload_file_306_41281.pdf [hereinafter *Terror and Isolation in Cobb*].

42. *Id.*

43. See Amended Complaint, *Ortega Melendres v. Arpaio*, 3, 4, 8, 10 (July 16, 2008), <http://www.aclu.org/files/pdfs/immigrants/filedfirstamdc071608%282%29.pdf> (U.S. Dist. Ct. of Ariz., No. CV-07-02513-PHX-MHM). The ACLU, the Mexican American Legal Defense and Educational Fund, and lead counsel Steptoe & Johnson LLP represent the

2010]

287(G) AND WOMEN

269

the case, related the following story regarding their experiences with the Maricopa County Sheriff's Department:

On March 28, 2008, the siblings drove into a Quick Stop gas station while singing along to Spanish music with their windows down. As they pulled into the Quick Stop, they noticed a Sheriff's vehicle behind one of the vehicles at the pumps. The officer was speaking with two Latino-looking men in handcuffs. As soon as Mr. Nieto parked the car, the officer yelled over to them that they should leave. . . . [After leaving the gas station,] Mr. Nieto then saw the motorcycle officer and three other Sheriff's vehicles behind them. The motorcycle officer told Mr. Nieto to pull over and get out of the car. . . . Mr. Nieto's family business was no more than 50 yards away, so he pulled into the parking lot there. The four police vehicles descended on them, blocking off the street and their business. The officers jumped out of their vehicles and raised their weapons. One of the officers grabbed Mr. Nieto and pulled him out of the car. He was pressed face first against his car. Mr. Nieto's father ran out of the shop, told the deputies that he owned the shop, that Mr. Nieto and Ms. Meraz were his children and that they were U.S. citizens. The deputies then uncuffed Mr. Nieto and ran his identification through their computer system. The deputies did not give him any citation. Mr. Nieto asked why the officers had subjected him and his sister to such treatment. He was not given any explanation, or any apology.⁴⁴

On March 10, 2009, the Department of Justice initiated its own investigation of Sheriff Arpaio.⁴⁵

While Sheriff Arpaio has drawn the lion's share of attention from critics, the program's problems are not limited to Maricopa County. According to a lawsuit filed on her behalf by the Puerto Rican Legal Defense and Education Fund and CASA de Maryland, Roxana Orellana Santos alleges that while eating lunch alone at a pond in Frederick, MD on Oct. 7, 2008, "two deputies approached her, asked for identification, then detained her and turned her over to immigration authorities for possible deportation."⁴⁶ The officers have

plaintiffs in the lawsuit, *Ortega Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2010 U.S. Dist. LEXIS 20311, at *1 (U.S. Dist. Ct. Ariz. Feb. 12, 2010). While the case has yet to be decided, on February 11, 2010, the presiding federal judge imposed sanctions on the Maricopa County Sheriff's office for destroying evidence indicative of racial profiling in anticipation of discovery related to the lawsuit, *id.* at 4, 18, 24.

44. Am. Civil Liberties Union, *Written Statement for a Hearing on Examining 287(g)*, 8 (Mar. 4, 2009), http://www.aclu.org/files/images/asset_upload_file717_39062.pdf (Submitted to the U.S. House of Representatives Committee on Homeland Security) [hereinafter *Statement on Examining 287(g)*].

45. Daniel González, *Feds Investigate Arpaio*, ARIZ. REPUBLIC, Mar. 11, 2009, at A1.

46. N.C. Aizenman, *Lawsuit Targets Immigration Enforcement; Racial Profiling Alleged in Salvadoran's Arrest in Frederick*, WASH. POST, Nov. 11, 2009, at B02; Complaint,

defended their actions on the grounds that Ms. Orellana Santos hid from the officers thereby creating reasonable suspicion that she had committed a crime.⁴⁷ The officers, however, have admitted that the stop was unrelated to a suspicion regarding any specific criminal act.⁴⁸ According to the complaint, neither of the deputies who arrested Ms. Santos was among the twenty-six members of the sheriff's force trained under the federal program.⁴⁹

The testimonies of victims before Congress have revealed similarly troubling incidents. On April 2, 2009, two House Judiciary Subcommittees heard testimony from Julio Cesar Mora, a 19-year-old, native-born US citizen, who recounted how he and his father (who has had his green card since 1976) were stopped in their car on the way to work, patted down, bound with zip ties and taken to an undisclosed location place where a number of other Hispanic persons were being held by officers, some in black uniforms and masks.⁵⁰ After several hours Mr. Mora and his father were released after proving their legal immigration status.⁵¹ Mora stated: "[t]o this day, I don't know why the officers stopped us out of all the cars on the road."⁵²

Making such stories even more troubling are indications that civil rights violations by program participants may be grossly underreported. As Richard Stana, Director of Homeland Security and Justice Issues at the U.S. Government Accountability Office, testified in 2009, the 287(g) complaint process is "at best hazy."⁵³ Until July 2009, available fact sheets and other

Orellana Santos v. Frederick Cnty. Bd. of Comm'rs, 2, 11-13 (Nov. 10, 2009), http://latinojustice.org/civil_rights/cases/Frederick_Complaint.pdf (U.S. Dist. Ct. Md.) [hereinafter Orellana Santos Complaint].

47. Gina Gallucci-White, *Sheriff Fires Back over Discrimination Suit*, FREDERICK NEWS-POST, Nov. 14, 2009, available at <http://www.save-the-us.com/sheriff-fires-back-over-discrimination-suit-t>.

48. *Id.* (noting any criminal suspicion arose solely out of Ms. Santos' decision to hide from the police).

49. See Orellana Santos Complaint, *supra* note 47, at 14; Nicholas C. Stern, *Advocates, Families Wary of Immigration Policies*, FREDERICK NEWS-POST, June 8, 2008, available at <http://www.fredericknewspost.com/sections/news/display.htm?StoryID=76024>. The ACLU of Georgia in October 2009 released a report which highlighted the existence of similar problems in Cobb County, Georgia. Terror and Isolation in Cobb, *supra* note 42. According to the report, Hispanic community members report being stopped for rolling through stop signs or for having bad tags, being denied interpreters, having their cars searched without a basis and without their consent, and being arrested on suspicion of shoplifting without any evidence of such, only to later be charged with a loitering offense, *id.* at 10-13, 16, 18.

50. *Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws: J. Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Boarder Sec., & Int'l. Law & the Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 12-13, 62 (2009) (testimony of Julio Cesar Mora), available at http://judiciary.house.gov/hearings/printers/111th/111-19_48439.PDF.

51. *Id.* at 13.

52. *Id.*

53. *Statement on Examining 287(g)*, *supra* note 45, at 3 (internal quotation marks omitted).

information on ICE's website merely referred to an "agreed upon complaint process governing officer conduct during the life of the [Memorandum of Agreement]."⁵⁴ While a participating locality's individual MOA may have included information as to how to file a complaint, because participating agencies had not clearly disseminated them before the fall of 2009, members of the public were generally unaware of how to file a complaint.⁵⁵ According to a March 2010 report issued by the Office of Inspector General within the Department of Homeland Security, "ICE managers in the field and LEA [Law Enforcement Agency] officials agree[] that ICE [has not done] enough to disseminate program information to the public, and describe[s] ICE outreach efforts as minimal."⁵⁶ In fact, the report suggests that even participating officers lack sufficient information as to how to respond to a complainant: "287(g) officers informed [Office of Inspector General inspectors] that ICE instructors have not consistently delivered training on these topics during their basic training course."⁵⁷

In October 2009, the Obama administration openly posted instructions for filing a complaint on its website and made available on the same site the MOA of participating agencies.⁵⁸ However, the mere filing of a report does not ensure that ICE will follow-up on the complaint. The July 2009 MOA template requires participating agencies to immediately notify ICE of "any complaint or allegation filed against 287(g) personnel involving (1) violations of the MOA or (2) any action that might result in employer discipline, a criminal investigation, or a civil lawsuit."⁵⁹ In addition, the MOA requires localities to report any complaints that a non-deputized officer has performed functions delegated to officers participating in the program.⁶⁰ Nevertheless, "ICE OPR [Office of Professional Responsibility] agents and LEA internal investigation representatives whom [the Office of the Inspector General within the DHS]

54. *Id.* (citing <http://www.ice.gov/>).

55. *Id.* Representatives of NGOs and community groups advised the DHS' Office of Inspector General "that it was difficult for individuals to pursue many of these complaints because of insufficient information about the complaint process. . . . at the time of our fieldwork 287(g) complaint reporting procedures were not available in ICE or LEA facilities where individuals affected by the 287(g) program are most likely to see them." THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 17, at 38.

56. THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 17, at 35.

57. *Id.* at 8.

58. Elizabeth Maudlin, *ICE Reforms Fail to Solve Fundamental 287(g) Problems*, NATIONAL IMMIGRATION LAW CENTER, 4 (Apr. 2010), <http://www.nilc.org/immlawpolicy/LocalLaw/287g-OIG-report-2010-04-29.pdf>; U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *287(g) Results and Participating Entities*, (Aug. 2, 2010), <http://www.ice.gov/news/library/factsheets/287g.htm>; U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *287(g) complaint process*, <http://www.ice.gov/287g/287g-complaint.htm> (details the complaint process).

59. THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 17, at 18.

60. *Id.*

interviewed were either not aware of this requirement or did not have a clear understanding of their respective roles in the process.”⁶¹

Furthermore, there are a variety of disincentives for an aggrieved person to make a complaint; primarily the fear that such a complaint may lead to their own or a family member’s deportation. According to February 2009 study, more than fifteen percent of American families include both documented and undocumented members.⁶² Such fears are often stoked by the inflammatory remarks of participating officers. According to the Office of Inspector General (OIG) report, in at least one county, “ICE had effectively ceded the role of primary spokesperson for the 287(g) program to [an] elected official, which was counterproductive because of the inflammatory nature of [the official’s] statements” regarding the program.⁶³

In many instances, detained individuals are swiftly deported and have little, if any, access to immigration counsel. The U.S. Government Accountability Office (GAO), in a 2009 report on the program, recounted that almost half of those who are detained by participating agencies are thereafter, placed in removal proceedings.⁶⁴ Even before their removal, over half of detainees are transferred between detention centers,⁶⁵ thereby severely compromising access to counsel for those detainees who have been fortunate enough to retain counsel.⁶⁶ In 2008, one out of every four detainees was transferred more than once.⁶⁷ Sixty percent of detainees were deported without ever having been represented.⁶⁸

In some cases, victims may simply be unaware that they were stopped on the basis of their race or, if they are, they may be too ashamed or humiliated to admit that they were the victims of such acts.⁶⁹ In other cases, they may simply not want to return to file a complaint with the same agency that was the perpetrator of the actions forming the basis for the complaint.⁷⁰

61. *Id.*

62. Aarti Shahani & Judith Greene, *Local Democracy on ICE*, JUSTICE STRATEGIES, 9 (Feb. 2009), <http://www.justicestrategies.org/sites/default/files/JS-Democracy-On-Ice.pdf> [hereinafter JUSTICE STRATEGIES REPORT].

63. THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 17, at 35-36.

64. GAO 287(G) REPORT, *supra* note 16, at 23.

65. Transactional Records Access Clearinghouse, *Huge Increase in Transfers of ICE Detainees*, <http://trac.syr.edu/immigration/reports/220/> (last viewed July 24, 2010) [hereinafter *Huge Increase in Transfers*].

66. See HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 43-53 (2009), available at <http://www.hrw.org/sites/default/files/reports/us1209webwcover.pdf> (discussing the impact of a transfer on a detainee’s access to counsel).

67. *Huge Increase in Transfers*, *supra* note 66.

68. U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FISCAL YEAR 2008 STATISTICAL YEAR BOOK A1 (2009), available at <http://www.justice.gov/eoir/statspub/fy08syb.pdf>.

69. *Statement on Examining 287(g)*, *supra* note 45, at 4.

70. *Id.*

Even when complaints are filed, it is not clear what effect, if any, such complaints have. As discussed below, “ICE has [yet to provide] guidance on how information about allegations, complaints, and other indications of misconduct should be reported, maintained, or used as part of the suitability determination process.”⁷¹

As noted, in July 2009, Secretary Napolitano issued a revamped MOA, which each participating agency would have to sign to continue participating in the program.⁷² While ICE hailed the “new” MOA as solving many of the problems addressed above,⁷³ in significant regards, it increases them. Perhaps most importantly, the experience requirement for participating officials was reduced from two years as a police official to one, raising the potential that an officer lacking substantive work experience with immigrants would be assigned to the program.⁷⁴

Additionally, as opposed to threatening termination of a locality’s participation if deputized officials abuse their authority, the new MOA’s termination provisions are directed towards under-enforcement, providing that only if ICE makes a “good faith determination that the [agency] is not fulfilling its duties” will participation be terminated.⁷⁵

B. The Program’s Disproportionate Focus on Traffic Offenses and Misdemeanors

As noted above, available data indicates that localities participating in the program have seen a disproportionate increase in the number of minorities stopped and arrested for minor traffic offenses. These stops are concerning not only because of questions regarding racial profiling, but because they suggest a disproportionate focus by program participants on minor traffic offenses and misdemeanors, as opposed to violent felony offenses – in contrast with what ICE and the program’s proponents have claimed. As with concerns regarding racial profiling, changes instituted in the new MOA create insufficient safeguards to redirect participating agencies’ actions.

Statistics from across the country indicate that the vast majority of persons detained by deputized officers were originally arrested for misdemeanors or non-alcohol related traffic offenses.⁷⁶ For example, in Davidson, Tennessee, a

71. THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 21, at 18.

72. See New Agreement Press Release, *supra* note 18.

73. See *Id.* (alleging that the new MOA “defines the objectives of the 287(g) program, outlines the immigration enforcement authorities granted by the agreement and provides guidelines for ICE’s supervision of local agency officer operations, information reporting and tracking, complaint procedures and implementation measures.”).

74. American Civil Liberties Union, Side-by-Side Comparison of Old and New 287(g) Memoranda of Agreement 4-5, http://www.aclu.org/pdfs/immigrants/287g_comparison_20090716.pdf (last visited October 10, 2010) [hereinafter Side-by-Side 287(g) Comparison].

75. *Id.* at 4.

76. Statistics from localities that have independent data collection requirements indicate the program’s lack of focus on serious felony offenders, see *supra* Part II.d. While

2008 newspaper investigation found that of the roughly 3,000 persons deported during the county's first year participating in the program, approximately eighty-one percent were charged with misdemeanors and half were detained during traffic stops.⁷⁷ In Gaston County, NC, eighty-three percent of the persons deputized officers detained in May 2008 were arrested for traffic violations.⁷⁸ In Mecklenburg County, NC, of the 2,321 undocumented immigrants turned over to ICE in 2007, less than five percent were charged with felonies, while over sixteen percent were charged with traffic offenses.⁷⁹ In 2008, the Cobb County, Georgia jail referred 3,180 inmates to ICE custody.⁸⁰ Of those, 2,180 were initially detained for traffic offenses – almost sixty-nine percent of the persons for whom ICE issued detainers.⁸¹ In Frederick, Maryland, of the 285 individuals referred to ICE in 2008, over ninety percent were initially arrested for misdemeanors and over fifty-eight percent were initially detained for non-alcohol related traffic offenses.⁸² Less than two percent had a prior criminal conviction.⁸³ According to OIG, less than two percent of the persons detained under the program nationwide were absconders – the original focus of the program.⁸⁴

Not only do such statistics raise the concerns regarding selective enforcement discussed above, they explicitly conflict with ICE's public statements regarding the program. According to OIG:

ICE does not collect nationwide data on 287(g), it does collect such information regarding the "Secure Communities" program, *see* Press Release, Sec'y Napolitano & ICE Assistant Sec'y Morton Announce That the Secure Communities Initiative Identified More Than 111,000 Criminal Aliens in Its First Year, Dep't of Homeland Sec. (Nov. 12, 2009), *available at* http://www.dhs.gov/ynews/releases/pr_1258044387591.shtm. These statistics reaffirm such concerns. A November 2009 ICE press release announced that, since its inception, Secure Communities had identified more than 111,000 criminal aliens in local custody, of which more than 11,000 were charged with or convicted of Level 1 crimes – the most serious offenses as identified by ICE, while more than 100,000 had been convicted of Level 2 and 3 crimes, *id.* For a further discussion of the various levels, please see *infra* notes 90-92.

77. Kate Howard, *Report Hits Davidson Immigration Program*, THE TENNESSEAN, Mar. 5, 2009.

78. DEBORAH M. WEISSMAN ET AL., THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS 29 (2009), *available at* <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf>; [arrested.html](#).

79. Lindsay Haddix, *Immigration and Crime in North Carolina*, 2 (Spring 2008), <http://isa.unc.edu/migration/haddix%20mp%20executive%20summary.pdf> (unpublished thesis, University of North Carolina Chapel Hill) (on file with author).

80. Terror and Isolation in Cobb, *supra* note 42, at 8.

81. *Id.*

82. Frederick Cnty. Sheriff's Office Corr. Bureau, *2008 Annual Report*, 27 (2008), <http://www.frederickcountymd.gov/documents/Sheriff%27s%20Office/Adult%20Detention%20Center/Annual%20Reports/2008%20Corrections%20Annual%20Report.pdf> [hereinafter Frederick County Sheriff's Office].

83. *Id.*

84. THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 17, at 6.

ICE provided misleading information to the public in a September 2007 Fact Sheet. Information in this fact sheet included ICE's explanation that "The 287(g) program is not designed to allow state and local agencies to perform random street operations. It is not designed to impact issues such as excessive occupancy and day laborer activities." However, 287(g) officers have used their authorities during large-scale street operations with the aim of detaining individuals for minor offenses and violations of local ordinances. . . . The fact sheet added that "Police can only use 287(g) authority when people are taken into custody as a result of violating state or local criminal law." However, 287(g) officers have apprehended aliens for federal immigration violations *even when the aliens had no prior arrests on state or local charges.* . . . [In addition,] we identified *task force officers who focus exclusively on cases related to violations of state laws and had never assisted ICE with long-term investigations or large-scale enforcement activities.*⁸⁵

Ultimately, participating localities' failure to adhere to the priorities ICE has identified stem in large part from ICE's failure to comprehensively create, distribute and enforce related requirements. For instance, although the processing of individuals for possible removal is to be conducted in connection with a conviction of a state or federal felony offense, this issue was not mentioned in seven of the twenty-nine agreements GAO reviewed prior to issuing its 2009 report.⁸⁶

Additionally, this is not to mention the latent effects of participating agencies' focus on minor offenders. The reality is that while participating agencies are not prohibited from seeking the assistance of ICE for aliens arrested for minor offenses, ICE lacks the detention space to detain the increased number of persons who have been transferred to it as a result of the 287(g) program and other programs which grant local officers the discretion to enforce federal immigration law. As a result, ICE has increasingly delegated the responsibility for detention of such individuals to private agencies, which ICE similarly has properly failed to monitor.⁸⁷ A combination of overcrowding and lack of appropriate medical services has often led to serious results for detained immigrants. According to a N.Y. Times report, between 2003 and 2009, ninety persons died while in ICE custody.⁸⁸

The MOA template created by the Obama administration constitutes a step forward in that it explicitly groups aliens into one of three categories, while

85. *Id.* at 36-37 (emphasis added).

86. GAO 287(G) REPORT, *supra* note 16, at 13.

87. Ajmel Quereshi, *Hope for Change in Immigration Policy: Recommendations for the Obama Administration*, 16 HUM. RTS. BRIEF. 19, 20 (2009).

88. Nina Bernstein & Margot Williams, *Immigration Agency's Revised List of Deaths in Custody*, N.Y. TIMES, Apr. 3, 2009, available at <http://www.nytimes.com/2009/04/03/nyregion/03detainlist.html>.

specifying that Level 1 persons — immigrants who have been convicted of or arrested for major drug offenses or violent offenses such as murder, manslaughter, rape, robbery, and kidnapping are to be the focus of the program.⁸⁹ All other detainees are classified as either Level 2 — “those who have been convicted of or arrested for minor drug offenses or property offenses such as burglary, larceny, fraud, and money laundering [– or] Level 3 priorities [– persons] who have been convicted of or arrested for other offenses.”⁹⁰ However, the MOAs do not include any mechanism for ensuring “prioritization,” such as comparing arrest information to the priority levels or requiring the agency to show that its policies and procedures communicate and implement an effective prioritization system. Accordingly, as data from the OIG report suggests, the aforementioned language has been similarly ineffective:

We obtained arrest information for a sample of 280 aliens identified through the 287(g) program at four program sites we visited. Based on the arresting offense, 263, or 94%, were within one of the three priority levels; however, only 26, or 9%, were within Level 1, and 122, or 44%, were within Level 2. These results do not show that 287(g) resources have been focused on aliens who pose the greatest risk to the public.⁹¹

Likewise, while the new MOA provides that participating agencies are “expected to pursue to completion all criminal charges that cause[] [an immigrant] to be taken into custody and over which the AGENCY has jurisdiction[,]”⁹² it does not require such nor include any oversight measures to ensure that agencies do not simply arrest individuals presumed to be unlawfully within the country for minor offenses so that they may be transferred into ICE custody before adjudication.

C. *Lack of Adequate Federal Oversight*

The concerns outlined in the previous sections have emerged, in large part, as a result of ICE’s failure to properly assess, limit and guide participating agencies’ and officers’ activities, despite the fact the 287(g) program has been functioning for eight years. These problems not only include a failure to monitor participating localities, but a failure to properly select and train participating officers, and assess complaints against them once they are received.

89. See Side-by-Side 287(g) Comparison, *supra* note 75, at 1; THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 20, at 8.

90. THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 17, at 8-9.

91. *Id.* at 9.

92. Side-by-Side 287(g) Comparison, *supra* note 75, at 4.

As described in a 2009 report authored by the United States Government Accountability Office, the problem, at its heart, arises out of ICE's fundamental failure to define "the nature and extent of [its'] supervision over participating agencies' implementation of the program. This has led to wide variation in the perception of the nature and extent of supervisory responsibility among ICE field officials and officials from . . . the participating agencies[.]"⁹³

For example, while in some locations, ICE supervisors required deputized officers "to prepare operational plans for field activities and submit them to ICE for review and approval prior to implementation. At another program site, ICE did not require [deputized officers] to provide operational plans even for large-scale undertakings."⁹⁴ To date, ICE has not clarified the responsibilities of its field officers participating in local agency operations or issued requirements for pre-approval of plans for immigration enforcement activities.⁹⁵

ICE's failure to properly supervise participating agencies has in turn led to wide variations among local agencies as to their understanding regarding the scope of their authority under the program. The statements of participating sheriffs highlight the discretion participating agencies understand they have been given. For example, in response to criticism that he has not followed the requirements of the Maricopa County MOA, Sheriff Arpaio has stated: "Do you think I'm going to report to the federal government? I don't report to them."⁹⁶ Likewise, at least one sheriff told GAO investigators that, as he understood the matter, "287(g)-trained officers could go to people's homes and question individuals regarding their immigration status even if the individual is not suspected of criminal activity."⁹⁷ Their understandings are a direct result of the program's structure, which, lacking sufficient internal controls and objectives, gives local authorities unbridled authority and discretion to enforce federal immigration laws without the guidance of or accountability to the federal government.

In some instances, participating agencies have explicitly violated limitations imposed by their governing MOA. OIG found that at least four participating localities used 287(g) officers in jail settings, despite the fact that they had only been authorized to act as part of a task force.⁹⁸

ICE's failure to supervise is not limited to merely its failure to set out adequate standards, but is also apparent in its disregard on the part of its employees to adhere to the internal procedures and protocols the agency has set out to monitor participating agencies. For example, ICE field office staffing templates provide that employee-to-supervisor ratios shall not exceed nine to

93. GAO 287(G) REPORT, *supra* note 16, at 4.

94. THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 17, at 12.

95. *Id.* at 13.

96. JUSTICE STRATEGIES REPORT, *supra* note 63, at 51.

97. GAO 287(G) REPORT, *supra* note 16, at 11-12.

98. THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 17 at 7.

one.⁹⁹ At one site, “an ICE supervisor was responsible for three ICE employees and nineteen 287(g) officers. At another location, an ICE supervisor was responsible for two ICE employees and eighty 287(g) officers.”¹⁰⁰ Additionally, at several locations, these same ICE supervisors were also responsible for providing oversight for other ICE programs, requiring participation by additional officers.¹⁰¹

Additionally, ICE supervisors have frequently delegated day-to-day direction of 287(g) program activities to nonsupervisory ICE subordinates. At six of the seven sites OIG visited, it “identified 287(g) officers who received guidance from nonsupervisory special agents.”¹⁰²

Within the participating agencies themselves, ICE has not ensured that those officers entering the program are in fact suitable for the responsibilities accorded them under the program. Without a formal review of every participating officer’s history, the potential arises that an officer with a history of problems working with minority communities may be assigned to the program. According to OIG, from the initiation of the program through 2007, ICE “determined officers’ suitability for immigration enforcement functions on an informal basis.”¹⁰³ In fact, ICE “did not maintain records documenting the process or outcome of [participating] officers’ suitability reviews.”¹⁰⁴ OIG “identified 57 officers for whom [the DHS’ Office of Professional Responsibility] had no record of a suitability review.”¹⁰⁵ Nine of the fifty-seven are active program participants.¹⁰⁶

Nor does ICE properly train participating officers who are deputized. Despite the fact that the program’s proponents have described the training as comprehensive, training is particularly sparse regarding: 1) non-enforcement related matters; 2) civil rights law; 3) the terms and limitations of the MOA; and 4) public outreach and complaint procedures.¹⁰⁷ For example, while the 287(g) basic training course is 4 weeks long, it includes only two hours of instruction on special status immigrants and two hours on victim and witness awareness.¹⁰⁸ Of the “four examinations administered during the 287(g) basic training course, only three questions relate to victim and witness protections

99. *Id.* at 10.

100. *Id.*

101. *Id.*

102. *Id.* at 11.

103. *Id.* at 17.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 29-31.

108. *Id.* at 31; Press Release, U.S. Immigration & Customs Enforcement, 32 Local & State Law Enforcement Officers Complete ICE Immigration Enforcement Training: Officers Graduate After Rigorous Four-Week Training (May 13, 2010), *available at* <http://www.ice.gov/news/releases/1005/100513charleston.htm>.

and asylum. No examination questions address the asylum process or immigration benefits.”¹⁰⁹

Training does not improve once an officer is deputized. While ICE field staff is required to ensure that participating agencies complete refresher training annually, OIG found that “88% of active 287(g) officers who were vetted by ICE prior to FY 2008 had not completed all required refresher training.”¹¹⁰ Training for supervisors within each participating agency varies by locality. While some supervisors receive “287(g) basic training and [are] certified to perform federal immigration enforcement functions,” others receive no training at all.¹¹¹

Nor are the terms and limitations of the MOA or its public outreach and complaint procedures sufficiently addressed in ICE’s basic training course. According to the course schedule, each subject is to be presented during a one-hour training session.¹¹² However, participating officers informed OIG that ICE instructors, nonetheless, often failed to administer the sessions concerning the aforementioned topics.¹¹³ In fact, “[o]fficers in several locations [stated] that they did not receive instruction on the MOA or complaint process as part of the basic training course, and were unfamiliar with both.”¹¹⁴ Officers were not tested on either topic.¹¹⁵

Unfortunately, as noted above, once a complaint is filed, it seems to be of questionable consequence. As reported by OIG, “information regarding complaints, allegations, or the results of LEA investigations” plays no role in “the recertification process.”¹¹⁶ In fact, at the time OIG conducted its fieldwork, “ICE did not retain information regarding allegations and investigations of 287(g) personnel or non-287(g) personnel exercising federal immigration authorities in violation of MOAs.”¹¹⁷ As the OIG found, the ultimate reality is that ICE has yet to establish “a comprehensive process for assessing, modifying, and terminating current agreements.”¹¹⁸

D. Lack of Adequate Data Collection

One particularly significant aspect of ICE’s failure to properly monitor participants is the lack of any meaningful data collection associated with the conduct of participating agencies. DHS has neither defined what, if any, data to collect from participating agencies nor investigated the racial and ethnic

109. THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 17 at 31-32.

110. *Id.* at 32.

111. *Id.* at 39.

112. *Id.* at 29.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 18.

117. *Id.* at 19.

118. *Id.* at 14.

distribution of traffic stops and other offenses under the program once allegations of discrimination have been made. Unfortunately, this problem has not been remedied in the MOA issued by the Obama administration. Such oversights might seem minor were it not for the troubled race-related history of many participating localities.

The MOA used during the Bush administration provided that participating agencies would “be responsible for tracking and maintaining accurate data and statistical information for their 287(g) program, including any specific tracking data requested by ICE.”¹¹⁹ However, because the MOA did not: 1) elaborate further as to what data each participating agency would be asked to keep; 2) require collection of data as opposed to merely making participating localities responsible for it; or 3) threaten punitive measures for those localities who failed to comply, participating agencies generally ignored the provision. Of the seven localities OIG requested data from regarding the prosecutorial disposition of the crimes for which persons referred to ICE were originally arrested, three were unable to produce any data in return.¹²⁰

The MOA composed by the Obama administration suffers from the same failings. While “ICE reserves the right to request [that] the [participating agency] provide specific tracking data and/or any information, documents, or evidence related to the circumstances of a particular alien’s arrest,” the MOA does not create any additional data collection requirements beyond those required by the locality or the state.¹²¹ As a result, agencies located in localities that do not have any local independent data collection requirements remain virtually unmonitored as they are unable to produce any data if or when a request for such is made.

ICE’s failure to collect adequate information regarding participating agencies takes root even before agencies sign agreements. While ICE performs background checks on individuals applying to participate, it does not consider or investigate the background of the locality as a whole.¹²² Accordingly, ICE

119. Side-by-Side 287(g) Comparison, *supra* note 75, at 5.

120. THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 17 at 26.

121. Side-by-Side 287(g) Comparison, *supra* note 75, at 5. ICE currently maintains data regarding detainees, including those processed through the 287(g) program in its Enforcement Case Tracking System or ENFORCE, *see* DEP’T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., IMMIGRATION AND CUSTOMS ENFORCEMENT’S TRACKING AND TRANSFERS OF DETAINEES, 3 (2009), available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-41_Mar09.pdf [hereinafter ICE TRACKING AND TRANSFERS]. ENFORCE “track[s] detainees” as they move “in and out of ICE detention facilities,” *id.* ENFORCE does not require agencies to provide any data “to maintain data regarding (1) the circumstances and basis for [Task Force Officer] contacts with the public, (2) the race and ethnicity of those contacted and arrested, and (3) the prosecutorial and judicial disposition of 287(g) arrests,” THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 17, at 27 (recommending that ICE consider tracking the aforementioned data as it is not currently maintained). Furthermore, as the Office of Inspector General found, “ICE staff interviewed . . . did not always update ENFORCE properly or timely,” ICE TRACKING AND TRANSFERS, *supra* note 121, at 4.

122. *See* THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 17, at 22 (“Civil Rights and Civil Liberties Considerations Are Not Consistently Weighed in the 287(g)

2010]

287(G) AND WOMEN

281

regularly approves agencies for participation despite their troubling histories of race relations. The ICE Office of State and Local Coordination, responding to the OIG's investigative inquiry,

reported that ICE field offices expressed concerns about 69 [law enforcement agency] applications for 287(g) authority and recommended that these applications not be approved. ICE denied applications for 53 of these 69 applications, but approved the remaining 16 despite objections from the field units responsible for providing direct program supervision.¹²³

This is particularly troubling given the questionable history of many recent applicants. A recent Chicago Reporter study found that several communities in Illinois that have requested to participate in the program may be engaging in racial profiling. The Reporter, upon an examination of the transportation department's data, "found that 44 out of more than 200 communities in the six-county Chicago area recorded a disparity of at least 10 percentage points" between the percentage of Latino drivers stopped and the percentage of Latinos making up the driving-age population.¹²⁴ The foreign born population of twenty-three of the forty-four localities doubled between 1990 and 2000.¹²⁵

In North Carolina, eight jurisdictions have signed MOAs, while sixteen more have submitted applications to participate.¹²⁶ Sheriff Steve Bizzell of Johnston County, North Carolina, a 287(g) applicant, has openly stated that "his goal is to reduce if not eliminate the immigrant population of Johnston County."¹²⁷ He has described "Mexicans" as "trashy" people who "breed[] like rabbits."¹²⁸ Alamance County, North Carolina, a 287(g) participant, Sheriff Terry Johnson, has expressed similar views regarding the county's Mexican population, which he assumes makes up most of its undocumented population: "[Mexicans'] values are a lot different—their morals—than what we have here.

Application Review and Selection Process"); U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: CONTROLS OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS SHOULD BE STRENGTHENED 2 (2009), available at <http://www.gao.gov/new.items/d09381t.pdf>.

123. *Id.* at 24.

124. Fernando Diaz, *Driving While Latino*, CHICAGO REPORTER (Mar. 1, 2009), available at http://www.chicagoreporter.com/index.php/c/Cover_Stories/d/Driving_While_Latino, at 10(7).

125. *Id.*

126. *Statement on Examining 287(g)*, *supra* note 45, at 7.

127. WEISSMAN ET AL., *supra* note 79, at 30.

128. Kristin Collins, *Tolerance Wears Thin*, NEWS & OBSERVER, Sept. 7, 2008, available at <http://www.newsobserver.com/2008/09/07/85689/tolerance-wears-thin.html>.

. . . In Mexico, there's nothing wrong with having sex with a 12-, 13- year-old girl . . . They do a lot of drinking down in Mexico."¹²⁹

III. THE IMPACT OF THE 287(G) PROGRAM ON WOMEN

Not as well explored as the program's impact on minority communities is the program's impact on women. The program, by placing the responsibility to enforce federal immigration law in the hands of local police who already are responsible for protecting many of the same persons the program may require them to report, creates conflicting responsibilities for deputized officers. As a result, immigrant victims of crime may hesitate from contacting police for fear that, as opposed to receiving protection, they may themselves be detained. This danger is particularly acute for female victims of domestic violence as they, separate from the program, have traditionally underreported crimes against them at dramatic rates.¹³⁰ Beyond merely the disincentive for immigrants to come forward, there also are questions as to the quality of relief they may receive once they actually seek assistance. The responsibilities associated with the 287(g) program as currently administered directly conflict with those associated with the U-Visa program, under which local police may assist certain undocumented victims of crime to apply for nationalization if they help local officials with the prosecution of a crime of which they were a victim.¹³¹ Finally, like the War on Drugs and the War on Terrorism, the 287(g) program and similar programs aimed at deporting non-violent undocumented individuals en masse have an untold effect on the female relatives of male family members who are deported, specifically in the form of increased economic and/or parental responsibilities.

A. *The Deterrent Effect on Female Victims of Domestic Violence*

All available evidence indicates that domestic violence against women is as prevalent in immigrant communities as in the general populace.¹³² A study conducted in New York City found that 51% of intimate partner homicide victims were foreign-born, while only 45.7% were born in the United States.¹³³ A separate study of immigrant Latina women found that 49.3% of the 280 immigrant women surveyed had been the victim of physical intimate partner

129. Kristin Collins, *Sheriffs Help Feds Deport Illegal Aliens*, NEWS & OBSERVER, Apr. 22, 2007.

130. See *infra* notes 165-67.

131. See 8 CFR § 214.14(b) (2010).

132. While there is some evidence that the incidence of domestic violence against men is increasing, it is estimated that 95 percent of domestic violence is perpetrated by men against women. See Federal Bureau of Investigation, *Uniform Crime Report* (1990); NAT'L INST. OF JUSTICE, U.S. DEPT. OF JUSTICE, DOMESTIC VIOLENCE, STALKING, AND ANTISTALKING LEGISLATION, 3 (1996).

133. N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, FEMICIDE IN NEW YORK CITY: 1995-2002, 5, http://www.nyc.gov/html/doh/downloads/pdf/ip/femicide1995-2002_report.pdf.

violence, and 42.1% had suffered severe physical intimate partner violence during their lifetime.¹³⁴ A study of U.S. and immigrant women of Japanese descent found that between 61 and 80% had been the victim of domestic violence.¹³⁵ Even more troubling, 48% of Hispanic women reported that the frequency of violent acts had increased since they immigrated to the United States.¹³⁶ Despite such high rates, immigrant women, according to various studies, underreport domestic violence at rates below even those of the general populace.¹³⁷ A number of factors unrelated to the local enforcement of federal immigration law play a role in this. However, the context provided by these factors underscores the precarious danger of adding yet another factor – the increased threat of deportation as a result of local police participation in the 287(g) program – which may further deter immigrant victims of violence from seeking assistance.

Battered Latinas often marry younger, have larger families, and are more economically and educationally disadvantaged than Caucasian or African-American battered women.¹³⁸ Immigrant women are less likely to classify actions such as pushing, shoving, grabbing, and throwing things at them as physical abuse.¹³⁹ In many cases, because their communities are smaller and of more recent origin, they may lack culturally appropriate responsive services.¹⁴⁰

As for those services which do exist, immigrant victims may simply lack sufficient information as to their existence or how to access them. According to a 2006 study, 60.9% of battered immigrant victims had no prior knowledge

134. MARY ANN DUTTON ET AL., USE AND OUTCOMES OF PROTECTION ORDERS BY BATTERED IMMIGRANT WOMEN v (2006), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/218255.pdf>.

135. *Id.* (citing Mieko Yoshihama, *Domestic Violence Against Women of Japanese Descent in Los Angeles*, 5 VIOLENCE AGAINST WOMEN 869 (1999); Mieko Yoshihama & Susan B. Sorenson, *Physical, Sexual, and Emotional Abuse by Male Intimates*, 9 VIOLENCE & VICTIMS 63 (1994)).

136. Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 250 (2000).

137. See *infra* notes 165-67.

138. See Edward W. Gondolf et al., *Racial Differences Among Shelter Residents: A Comparison of Anglo, Black, and Hispanic Battered*, 3 J. FAM. VIOLENCE 39, 48 (1988); see also Sara Torres, *A Comparison of Wife Abuse Between Two Cultures*, 12 ISSUES IN MENTAL HEALTH NURSING 113, 126 (1991) (reporting a finding of 40% of Mexican Americans having been in the relationship more than 5 years compared with 20% of Anglo women); see also Carolyn M. West et al., *Sociodemographic Predictors and Cultural Barriers to Help-Seeking Behavior by Latina and Anglo American Battered Women*, 13 VIOLENCE & VICTIMS 361, 371 (1998) (finding battered Latinas to be younger and more educationally and economically disadvantaged than their Anglo counterparts).

139. Torres, *supra* note 139 at 127.

140. See Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 45 (2003).

of protection orders before seeking help from a law enforcement or social services agency.¹⁴¹

In communities in which there are a limited numbers of bilingual 911 operators, police, and court personnel, the batterer may be the only translator available to the victim.¹⁴² As a result, the batterer may often be able to effectively limit the information the victim receives. This problem is especially prevalent in 287(g) jurisdictions where undocumented persons generally “decrease their involvement in community activities designed to educate, inform and assist them because they fear harassment by police or immigration officers.”¹⁴³

Often times, police may be unaware of the protections so as to inform battered victims they come into contact with. For example, despite the fact that U-visa was created in 2000, creating protections for battered women who are undocumented, immigrant advocates regularly field calls from victims and social service providers who are unaware the visa exists.¹⁴⁴ If battered women were aware of these protections, they may be more likely to leave their husbands and seek help from the police.

In those cases in which she is aware of the services, she may hesitate to use them for fear that they may be focused on assisting English-speaking victims¹⁴⁵ and, as a result, may not have a translator available.¹⁴⁶

Another important factor is the history of police hesitation to investigate domestic violence reports in immigrant communities. Domestic violence, when perpetrated against a person of the same race or ethnicity as the batterer, is often perceived by law enforcement officials as common within immigrant communities.¹⁴⁷ Officials may understand such violence as being a regular “part of the immigrant culture and the lives of immigrant women, leading some police officers to conclude that domestic violence is not a crime when the victim is an immigrant.”¹⁴⁸ Other times, police may simply misperceive a victim’s reluctance to interact with the police or other officials, often caused by

141. DUTTON ET AL., *supra* note 135, at iv.

142. Holly Maguigan, *Wading into Professor Schneider’s “Murky Middle Ground” Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL’Y & L. 427, 441 (2003).

143. Virginia Martinez et al., *A Community Under Siege: The Impact of Anti-Immigrant Hysteria on Latinos*, 2 DEPAUL J. FOR SOC. JUST. 101, 134 (2008).

144. Jessica Farb, *The U Visa Unveiled: Immigrant Crime Victims Freed from Limbo* 15 HUM. RTS. BRIEF 26, 29 (2007) (“Recent immigration raid statistics suggest that an estimated 15% of undocumented immigrants may qualify for U visas but fail to apply because they are unaware of the relief.”).

145. Nimish R. Ganatra, *The Cultural Dynamic in Domestic Violence: Understanding the Additional Burdens Battered Immigrant Women of Color Face in the United States*, 2 J.L. SOC’Y 109, 112-13 (2001).

146. Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II*, 17 BERKELEY WOMEN’S L.J. 137, 142 (2002).

147. See EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE 46 (1990).

148. ORLOFF ET AL., *supra* note 141, at 54.

the lack of sufficient language abilities or unfamiliarity with the process, as an indication that she may not actually assist with the prosecution of the criminal case.¹⁴⁹ Additionally, when a U.S. batterer and an undocumented victim's stories conflict, police are more likely to believe the former.¹⁵⁰

The degree of control that a batterer, who is a U.S. citizen or lawful, permanent resident, may exercise over an undocumented spouse is reflected in the increased instance of abuse among spouses with differing immigration statuses. The abuse rate when a U.S. citizen is married to a foreign woman is approximately three times higher than the abuse rate in the general population in the United States.¹⁵¹ According to a study conducted by Ayuda,¹⁵² seventy-seven percent of Hispanic, immigrant women married to U.S. citizens or lawful, permanent residents have been the victims of domestic violence; in sixty-nine percent of these cases, the spouse had failed to file a visa petition on the behalf of their abused immigrant spouse.¹⁵³

In some cases, a batterer may threaten his spouse with deportation if she leaves or seeks assistance from service agencies. For example, "72.3% of the battered Latinas surveyed in [one] study reported that their spouses never filed immigration petitions for their wives even though 50.8% of the victims qualified to have petitions filed on their behalf."¹⁵⁴ A separate study found that fifteen percent of the one-hundred and thirty-seven battered, immigrant women interviewed reported that their spouse had threatened them with deportation once they arrived in the United States.¹⁵⁵ Abusers who eventually filed petitions on their spouse's behalf did so almost four years after their spouses became eligible for relief.¹⁵⁶ For example, "in 1998, an immigrant woman in New Jersey, Elena Gonzalez, was found murdered in the basement of her

149. *Id.*

150. *Id.* at 55.

151. Giselle Aguilar Hass et al., *Battered Immigrants and U.S. Citizen Spouses*, LEGAL MOMENTUM, 5 (Apr. 24, 2006), <http://legalm.convio.net/site/DocServer/dvusc.pdf?docID=314>.

152. Ayuda is a nonprofit agency that offers legal and social services to battered immigrant women living in the D.C. metropolitan area, *see* AYUDA, <http://www.ayudainc.org> (last visited Oct. 22, 2010).

153. H.R. REP. NO. 103-395, at 26-27 (1993); *see also* Katerina Shaw, *Barriers to Freedom: Continued Failure of U.S. Immigration Laws to Offer Equal Protection to Immigrant Battered Women*, 15 CARDOZO J.L. & GENDER 663, 670 n.65 (2009).

154. Sudha Shetty & Janice Kaguyutan, *Immigrant Victims of Domestic Violence: Cultural Challenges and Available Legal Protections*, NAT'L ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN, 2 (Feb. 2002), http://www.vawnet.org/Assoc_Files_VAWnet/AR_immigrant.pdf ("Immigrant women, unlike citizens, often may not legally work and face a constant threat of deportation by their abuser.")

155. EDNA EREZ & NAWAL AMMAR, VIOLENCE AGAINST IMMIGRANT WOMEN AND SYSTEMIC RESPONSES 83-92 (2003), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/202561.pdf> (reporting that twenty-five percent of the surveyed immigrant women said their spouses used threats of deportation or threats of withdrawing immigration papers as a control tactic in their relationship).

156. Shetty & Kaguyutan, *supra* note 155, at 2.

apartment. Elena's friends reported that the murderer, her former boyfriend, consistently threatened to report her to ICE if she did not do what she was told."¹⁵⁷

Nor is the threat of abuse limited to merely the abuser's spouse. In many cases, abusers' and traffickers' families may terrorize the victim's family members in her home country.¹⁵⁸ Victims' concerns are often heightened by the fear that law enforcement officials in their home countries may not be able to keep their family members safe.¹⁵⁹

Of course, the most significant deterrent for many victims is the fear of deportation, which the presence of the 287(g) program may significantly advance. In addition to being forced to leave the country — there are a number of other considerations related to deportation that may weigh on the mind of a battered spouse. Perhaps most significantly, she may lose custody of her children. Fathers who abuse their children's mother are twice as likely to request sole physical custody compared to non-abusive fathers.¹⁶⁰ If deported, she may not be allowed to enter the country to see her children for a period of years.¹⁶¹ Further, she

may return to poverty, famine, or political persecution, and may no longer be able to financially assist her family in her home country. She may be deported to a country whose laws do not protect her from domestic violence. She may be ostracized by friends and family members because she got a divorce.¹⁶²

157. Maria Fernanda Parra-Chico, *An Up-Close Perspective: The Enforcement of Federal Immigration Laws by State and Local Police*, 7 SEATTLE J. SOC. JUST. 321, 337-38 (2008).

158. See 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, 104 (2002).

159. See Joyce Koo Dalrymple, *Human Trafficking: Protecting Human Rights in the Trafficking Victims Protection Act*, 25 B.C. THIRD WORLD L.J. 451, 466 (2005) ("U.S. law enforcement typically lacks the power to prevent traffickers from retaliating against family members in other countries, especially when police in those countries are unresponsive, underfunded, or corrupt.").

160. AM. PSYCHOLOGICAL ASS'N, VIOLENCE AND THE FAMILY 40 (1996). See also MiaLisa McFarland & Evon M. Spangler, *A Parent's Undocumented Immigration Status Should Not Be Considered Under the Best Interest of the Child Standard*, 35 WM. MITCHELL L. REV. 247, 272-75 (2008) ("Courts throughout the United States have dealt differently with the issue of whether or not to consider a parent's immigration status in making a custody determination.").

161. 8 U.S.C. § 1182(a)(9) (2006).

162. Karyl Alice Davis, *Unlocking the Door by Giving Her the Key: A Comment on the Adequacy of the U-visa as a Remedy*, 56 ALA. L. REV. 557, 571 (2004) (citing LETI VOLPP, WORKING WITH BATTERED IMMIGRANT WOMEN: A HANDBOOK TO MAKE SERVICES ACCESSIBLE 17 (Leni Marin ed., 1995)).

2010]

287(G) AND WOMEN

287

Given each of these factors, it is no surprise that studies have repeatedly found that the reporting rates for undocumented women are far below those of women with stable immigration statuses. According to one study, 43.1% of women with stable permanent immigration statuses were likely to call the police for help in a domestic violence case.¹⁶³ This “reporting rate dropped to 20.8% for battered immigrants who were in the United States legally . . . and . . . dropped to 18.8% if the battered immigrant was undocumented. These reporting rates are significantly lower than reporting rates of battered women generally in the United States, which range between 53% and 58%.”¹⁶⁴ A separate study found that that

roughly fifty-five percent of women in the U.S. who have been victims of domestic violence report the abuse. This statistic falls to thirty percent of domestic abuse reports among immigrant women lawfully present in the U.S., although actual instances of domestic abuse have been shown to be higher in the immigrant population. Finally, only fourteen percent of undocumented battered women officially reported the abuse.¹⁶⁵

It is given this context, in which a variety of significant disincentives for undocumented immigrant victims already exist, that localities have chosen to enter the program, thereby enhancing a victim’s fears that she may be deported and suffer the various adverse consequences noted. Preliminary reports bear out concerns that local enforcement of federal immigration law may be preventing women from coming forward. “A survey among Latina immigrants in the Washington, D.C. area found that 21.7% . . . listed fear of being reported to immigration as their primary reason for remaining in an abusive relationships.”¹⁶⁶ That said, further research is required.

There are a number of reasons to believe that the 287(g) program perpetuates and enhances the fear of deportation in a number of significant regards. First, because the program’s participants have focused disproportionately on persons who were initially detained for traffic offenses and misdemeanors or, in some cases, no offense at all, victims may reasonably believe that an officer overly sympathetic to his responsibilities under the program may investigate the victim’s immigration status as opposed to protecting her from her batterer. According to a mental health counselor working at a nonprofit agency in Butler County, Ohio, a 287(g) participant:

I can tell you that Butler County’s policy has harmed greatly not only Latinos, undocumented immigrants, permanent residents, and citizens but our general population. I work specifically with Spanish

163. Orloff et al., *supra* note 141, at 68.

164. *Id.*

165. Shaw, *supra* note 154, at 678.

166. See Orloff & Kaguyutan, *supra* note 159, at 98.

speakers and I see how terrified my clients are. Women are afraid to report domestic violence for fear of the police.¹⁶⁷

Second, fears regarding deportation are further enhanced by the fact that a number of local law enforcement participants have not only supported, but actively coordinated their activities with those of “nativist” organizations. According to the Southern Poverty Law Center, organizations identified as nativist are:

groups that go after people, not policy. Rather than limiting themselves to advocating within the mainstream political process for tighter border security, stricter immigration controls or tougher enforcement of immigration laws already on the books, these fringe outfits target and confront immigrants as individuals. Some conduct armed “citizen border patrols.” Others confront Latino immigrants congregated at day labor centers or informal roadside pick-up sites. Some conduct surveillance of apartment houses and private homes. Almost all of them disseminate vicious, immigrant-bashing propaganda.¹⁶⁸

According to Help Save Maryland, a self-proclaimed anti-immigrant organization based in Montgomery County, Maryland and identified as a “nativist extreme group” by the Southern Poverty Law Center (SPLC), Frederick County Sheriff Charles Jenkins, a 287(g) participant, has “spoken at

167. *Talk of the Nation: Immigration Issues in the Buckeye State* (National Public Radio broadcast Oct. 9, 2008), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=95554551>. When questioned regarding the veracity of such allegations, Sheriff Richard Jones of Butler county, a 287(g) participant, admitted that immigrants did not come forward but alleged any fear was a result of victim’s experiences of corrupt police within their own country and unrelated to any fear of deportation, *id.* See also Maria Sacchetti, *Agencies Halt Their Immigrant Scrutiny; Barnstable Sheriff, Framingham Police Say No*, BOSTON GLOBE, Oct. 2, 2009, Metro 1 (quoting executive director of the Massachusetts Immigrant and Refugee Advocacy Coalition, who called the end of the program in her county “a great victory,” because “[i]mmigrants who fear deportation are less likely to report crimes . . . forcing victims of domestic violence and others to suffer in silence.”); See also Nicholas C. Stern, *Hood Panel Challenges Stereotypes, Covers Issues with Immigration*, FREDERICK NEWS-POST, Apr. 28, 2009 (“Acts of domestic violence are sometimes kept from police because people are worried about being deported.”); See also Deborah Horan, *Deportation Training Lags; Mayors in Waukegan, Carpentersville Fume*, CHI. TRIB., May 26, 2008, C1 (“Herrera said she has had trouble placing Latino women in domestic-violence shelters in Lake County. ‘They don’t want to go there because of all the rumors they are hearing,’ Herrera said.”).

168. David Holthouse, *Sinister Intentions: The Hard Core of the Anti-Immigration Movement Is Growing*, INTELLIGENCE REP., Spring 2009, at 28, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2009/spring/sinister-intentions>.

several events organized by Help Save Maryland.”¹⁶⁹ Additionally, Sheriff Jenkins testified on the same self-selected panel with members of the group during a 2010 hearing on legislation that would have required all police agencies in the state to sign a 287(g) agreement.¹⁷⁰ Help Save Maryland advocates that all undocumented immigrants be placed into deportation proceedings regardless of whether they have committed a separate state or federal non-immigration offense.¹⁷¹ During a March 2010 hearing before the Maryland State Legislature regarding the advisability of legislation requiring all state contractors to use E-verify, an electronic employment verification system, members of the groups complained that they had seen an increasing number of “Hispanics” and “persons who could not speak English” take jobs previously given to others.¹⁷² Help Save Maryland representatives have further admitted that the group has worked “hand-in-hand” with the Federation for American Immigration Reform (FAIR),¹⁷³ an organization that SPLC alleges has worked closely with hate groups.¹⁷⁴

Sheriff Arpaio, similarly, has worked closely with the American Freedom Riders, an Arizona-based organization that, likewise, has been classified by the Southern Poverty Law Center as a “nativist/extremist” organization.¹⁷⁵ According to the lawsuit filed against Arpaio and Maricopa County, deputized officials regularly team with members of AFR to conduct large scale sweeps of areas where day laborers are known to gather and seek work or where Hispanics are thought to live.¹⁷⁶ Additionally, AFR members have harassed

169. Tina Irgang, *Anti-Illegal-Immigration Group Draws Controversy*, CAPITAL NEWS SERVICE (Oct. 30, 2009), http://www.journalism.umd.edu/cns/wire/2009-editions/10-October-editions/091030-Friday/SaveMaryland_CNS-UMCP.html.

170. *Public Safety - Enforcement of Federal Immigration Law by Law Enforcement Agencies: Hearing on HB 866 Before the H. Comm. on the Judiciary* (Md. 2010) (notes taken by the author while attending this hearing).

171. See Brad Botwin, *Major Victory in Arizona*, HELP SAVE MARYLAND BLOG (Apr. 25, 2010), http://helpsavemaryland.blogspot.com/2010_04_25_archive.html (characterizing Arizona’s SB 1070, which criminalizes undocumented presence as a victory: “THIS SENDS AN IMPORTANT MESSAGE TO THE ILLEGAL ALIEN COMMUNITY, THEIR SUPPORT GROUPS, AMNESTY SUPPORTERS AND THE GOVERNMENT OF MEXICO THAT ILLEGAL IMMIGRATION WILL NO LONGER BE TOLERATED IN OUR COMMUNITIES.”).

172. *State Procurement - Use of Federal E-Verify Program to Prevent Employment of Unauthorized Alien Workers: Hearing on HB 721 Before the H. Comm. on Health and Gov’t Operations* (Md. 2010) (notes taken by the author while attending this hearing).

173. Nicholas C. Stern, *Report: Hate Groups on Rise Nationally but Quiet Locally*, FREDERICK NEWS-POST, Feb. 28, 2009, available at <http://www.fredericknewspost.com/sections/news/display.htm?StoryID=87039>.

174. *Ignoring Its Own Ties, Anti-Immigration Group Denounces White ‘Separatist’*, INTELLIGENCE REP., Fall 2004, at 4, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2004/fall/white-supremacy>.

175. *The Groups*, INTELLIGENCE REP., Spring 2007, at 46, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2007/spring/shoot-shovel-shut-up/the-groups-a-lis>.

176. Amended Complaint, *supra* note 44, at 11.

individuals, specifically Latinos, as they have entered and left a local legal center.¹⁷⁷

Third, undocumented women's concerns regarding deportation are further legitimized by the statements of program participants or local political proponents explaining that under the program, as they understand it, localities are authorized to target any undocumented individual, regardless of whether he or she may be the victim of a crime. For example, Charlotte Mayor Pat McCrory, a proponent of expansion of the program throughout North Carolina, has repeatedly voiced his support for law enforcement checks on the immigration status of the crime victims and the witnesses themselves, despite the fact that Charlotte Chief of Police Darrel Stephens has resisted.¹⁷⁸ Similarly, at a 2007 press conference, Sheriff Arpaio described his operations as a "pure program" designed "to go after illegals, not the crime first."¹⁷⁹ As he admitted, his department's approach is to "go after illegals . . . You go after them, and you lock them up."¹⁸⁰

Fourth, in many cases women living in participating localities may fear seeking police assistance as a result of insufficient foreign language services. Unfortunately, many ethnic immigrant populations continue to have little or no representation in most law enforcement agencies. For example, despite the fact that 11.4% of Frederick County's population of 23,668 persons speak a language other than English,¹⁸¹ only 4 of the Frederick County Sheriff's Office's 174 officers are non-Caucasians.¹⁸² According to an OIG report;

officers with few or no foreign language skills . . . interviewed and processed non-English-speaking aliens without the aid of interpreters. One 287(g) officer said that he does not speak any Spanish, but used what is referred to as a "cheat sheet" of questions in Spanish to determine aliens' removability during interviews.¹⁸³

177. *Id.* at 14.

178. Editorial, *Mayoral Meddling: Back Off, Mr. Mayor. Chief, Stick to Your Guns*, CHARLOTTE OBSERVER, May 26, 2006, at 12A; MAYOR'S IMMIGR. STUDY COMM'N, IMMIGRATION: LEGAL AND ILLEGAL 31 (2007) available at <http://www.greencards.com/docs/Immigration+Final+Report.pdf>.

179. Richard Ruelas, *Arpaio Stays Silent on Real ICE Plan*, THE ARIZ. REP., Mar. 2, 2007, at B10. *But see Arpaio Grilled in 7-hour Deposition for Civil Rights Lawsuit*, CHANNEL 15 ABC NEWS, http://www2.abc15.com/dpp/news/region_phoenix_metro/central_phoenix/Arpaio-grilled-in-7-hour-deposition-for-civil-rights-lawsuit.

180. Ruelas, *supra* note 180, at B10.

181. MD. DEP'T OF LEGIS. SERVS., OFFICE OF POLICY ANALYSIS, INTERNATIONAL IMMIGRATION: THE IMPACT ON MARYLAND COMMUNITIES 16 (2008), available at http://dls.state.md.us/data/polanasubare/polanasubare_intmatnpubadm/International-Immigration_The-Impact-on-Maryland-Communities.pdf.

182. Frederick County Sheriff's Office, EE-O4 Survey (on file with author).

183. THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 17 at 34.

Finally, participating localities and or applicants have deported victims of domestic violence or their family members. In March 2009, Lake County Sheriff Gary S. Bowers, a 287(g) applicant and promoter of local enforcement of federal immigration law, gained national attention after local police within his county took a Honduran mother into custody because of her immigration status.¹⁸⁴ Similarly, members of the Maricopa County sheriff's office jailed the brother of a domestic violence victim who had contacted the police to file a police report.¹⁸⁵

Many of these concerns were recently reiterated in a letter to President Obama from a group of immigrants' and women's rights' advocates opposing the continuation and expansion of the program because of its effects on victims of domestic violence. As stated in the letter:

. . . [d]omestic violence abusers are extremely effective at having their victims arrested as alleged "perpetrators." Despite the Violence Against Women Act (VAWA) barring the practice of dual arrest by law enforcement grantees, the practice persists and leads to immigrant and non-immigrant victims from being arrested. . . . In 287(g) jurisdictions, an arrested immigrant victim will likely be screened for undocumented immigration status, detained, and placed in removal proceedings before authorities learn that she is a victim.¹⁸⁶

Concerns about programs such as 287(g), which empower local police to enforce federal immigration law, are not limited to immigrant advocates. The deterrent effect of such programs on victims has been acknowledged by national police associations such as the International Association of Police Chiefs who, for the reasons discussed above, have also opposed similar programs' expansion.¹⁸⁷

184. Victor Manuel Ramos, 'America's Toughest Sheriff' Under Fire for Treatment of Immigrants, ORLANDO SENTINEL HISPANOSPHERE BLOG (Mar. 11, 2009, 10:26 AM), http://blogs.orlandosentinel.com/news_hispanicaffairs/2009/03/high-profile-sheriff-under-investigation-for-treatment-of-immigrants.html. Letter from Gary S. Border, Sheriff of Lake Cty., Fla., to Julie Myers, Assistant Sec'y of U.S. Immigration & Customs Enforcement (Mar. 18, 2008), available at <http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/lakecountyfl.pdf>.

185. Daphne Eviatar, *Feds Fail to Prevent Police Abuse*, THE WASH. INDEP. (Mar. 9, 2009), available at <http://washingtonindependent.com/32926/scrutiny-of-immigration-policy-finds-wide-spread-abuse>.

186. Letter from Break the Cycle et al., to Barack Obama, President of the U.S. (Nov. 10, 2009) (on file with author).

187. See INT'L ASS'N OF CHIEFS OF POLICE, POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES 28 (2007), available at www.theiacp.org/Portals/0/pdfs/Publications/PoliceChiefsGuidetoImmigration.pdf ("Immigrant women may be less likely to report abuse than nonimmigrant women due to language barriers, cultural differences, varying perceptions of law enforcement response, and a fear of deportation if they are not legally documented to live within the United States.").

B. The Availability of U-Visas in Participating Localities

Congress has recognized the significant deterrents immigrant victims of violent crimes face. Accordingly, in 2000, as part of the reauthorization of the Violence Against Women Act, it created the “U-visa,” which permits non-citizen women who have been the victims of severe mental or physical abuse while in the United States to stay and receive assistance benefits.¹⁸⁸ The Act’s legislative history emphasized that the its primary purpose was to assist undocumented victims by eliminating one of the “residual immigration law obstacles standing in the path of battered immigrant spouses and children seeking to free themselves from abusive relationships.”¹⁸⁹

To qualify for a U-visa, a noncitizen crime victim must: 1) have suffered substantial physical or mental abuse from criminal activity; (2) have information regarding the criminal activity; (3) assist government officials in the investigation or prosecution of such criminal activity; and (4) have been the victim of criminal activity that violated U.S. law or occurred in the United States or the territories or possessions of the United States.¹⁹⁰ Before an applicant may apply, however, she must obtain certification from a law enforcement official or agency investigating the crime that she has assisted or is likely to assist in the investigation or prosecution of the crime against her.¹⁹¹

Despite Congress’ intentions, victims seeking to obtain the U-visa have faced a number of obstacles, most recently the hostility of localities that have prioritized the enforcement of federal immigration law. As noted, Congress initially created the U-visa in 2000; however, implementation of the program was slowed by the fact that DHS did not create implementing regulations until 2007.¹⁹² As a result, strikingly few U-visa applications were granted during the first decade years of its existence.¹⁹³ A nominal number were approved in

188. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466, 1533 (2000).

189. 146 CONG. REC. S10,195 (daily ed. Oct. 11, 2000) (recognizing the need to prevent abusers from using immigration law to prevent battered immigrant women from leaving them). An article in the Los Angeles Times tells the story of a sample U-visa applicant:

[Lopez’s] boyfriend had been drinking when he hit her in the face and threatened to kill her. She ran outside their Los Angeles apartment, but he chased her around the block and dragged her back inside, where he kicked her, threw her against the door and stabbed her in the arm before stabbing himself. When Garcia saw that he had fallen, she ran outside and into the middle of the street. But she said he caught her again, threw her on the ground and stabbed her several times before police arrived and arrested him.

Anna Gorman, *Victim’s U-visa Program Falters*, L.A. TIMES, Jan. 26, 2009, at B1.

190. 8 CFR § 214.14(b) (2010).

191. *Id.* at § 214.14(a)(12).

192. See Claire Smearman, *Second Wives’ Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKELEY J. INT’L L. 382, 425 n. 313 (2009).

193. Katherine Ellison, *A Special Visa Program Benefits Abused Illegal Immigrants*, N.Y. TIMES, Jan. 8, 2010, at A19.

2008.¹⁹⁴ Shortly afterwards, the pace began to increase. “In the fiscal year ending last September, immigration officials approved 5,825. Another 2,244 were approved in October and November. More than 10,000 applications are pending.”¹⁹⁵

All this said, many women unfortunately remain unable to obtain even the certification from local officials necessary to apply for naturalization. In many cases, officers, either as a result of personal disagreement with the U-visa program or a misunderstanding as to their role in the process often hesitate to certify that an undocumented victim of violence has assisted in the investigation or prosecution of the crime against her.¹⁹⁶

A number of factors facilitate these problems. Sample certification forms distributed by DHS emphasize that officials are under no legal obligation to give certification even if the victim has been helpful with the investigation or prosecution of the crime.¹⁹⁷ The addition of the “no legal obligation” language found on the Form I-918B (Form B) instruction sheet undermines the U statute by suggesting that an officer has discretion beyond that which the regulation provides. The language is not reflected in the applicable regulation, which advises the law enforcement certifier, simply, to provide a fact-specific account of the crime and how “the petitioner has been, is being, or is likely to be, helpful in an investigation or prosecution of that qualifying criminal activity.”¹⁹⁸

Additionally, in most localities, there are no local processes and protocols governing who has the authority to sign such forms and at what point a victim has provided sufficient assistance to obtain certification. As a result, finding an official to certify Form B has been, and continues to be, the first roadblock in successfully submitting the complete U petition. These certification problems arise from both an overall lack of knowledge regarding the U-visa regulations and the mistaken opinion that certifying will mark them as “pro-immigration.”¹⁹⁹ In those localities in which protocols have been created, the responsibility may be delegated to a single high-ranking official exclusively who may not have the time to complete and sign the necessary documentation.²⁰⁰

194. *Id.*

195. *Id.*

196. *See* 8 CFR § 214.14(a)(12) (2010); *see also* Tahja L. Jensen, *U Visa “Certification”: Overcoming the Local Hurdle in Response to a Federal Statute*, 45 IDAHO L. REV. 691, 693 (2009).

197. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., I-918, PETITION FOR U NONIMMIGRANT STATUS (2010), *available at* <http://www.uscis.gov/files/form/i-918.pdf> (certification form) [hereinafter I-918, PETITION].

198. 8 CFR § 214.14(c)(2)(i) (2010).

199. Jensen, *supra* note 197, at 693.

200. *See* Heidi Evans, *VICS CAN’T GET VISAS Say NYPD Not Aiding Immigs Using New Law for Protection*, N.Y. DAILY NEWS, Mar., 21, 2010, *available at* http://www.nydailynews.com/ny_local/2010/03/21/2010-03-21_vics_cant_get_visas_say_nypd_not_aiding_immigs_using_new_law_for_protection.html (“[T]he NYPD has set up an

DHS, rather than pushing localities to create concrete and reasonable policies, has instead played down expediency of process in public statements. In response to criticism that the program has not fulfilled Congress' original intentions, the U.S. Citizenship and Immigration Services has responded that the process may take some time and that "U- visas are very complicated, and we have to work with law enforcement agencies to make sure that the people are qualified."²⁰¹

In some cases, individual localities have simply chosen to opt out of the program because they disagree with its purposes. Weld County, Colorado District Attorney Ken Buck told the Associated Press in February 2009 that he had denied all requests for U-Visas that have come through his office.²⁰² The referrals include boilerplate language – alleging that individual victims were not helpful, did not have useful information, or that the investigation of the crime had closed – in place of an individual evaluation of the victim's helpfulness as Congress envisioned.²⁰³ "The denials involve compelling cases

unwieldy 20-step process - a bureaucratic nightmare where each request must pass through five chains of command even before hitting Police Commissioner Raymond Kelly's desk for his approval."). Thus, victims often have an easier time with non-police officials. It is clear that when the petition process required certification of Form B, practitioners dealing in the interim process had success in getting certifications from sources that are non-traditional arms of law enforcement. For example, certifying officials have come from Child Protective Services, the Department of Labor, and the Equal Employment Opportunity Commission (EEOC), New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53019 (Sept. 17, 2007) (to be codified at 8 C.F.R. 214(a)(2)).

201. Gorman, *supra* note 190. Deciding whether the U-Visa is a good program is constitutionally impermissible on a state level, *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1947). As the Supreme Court has stated:

The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.

Id. The sole authority granted to local officials under the applicable statutes and regulations is the simple question of whether they have been helpful—not whether more people should have the opportunity to gain documented status. See I-918, PETITION *supra* note 198, at Supplement B, 1.

202. Amy Taxin, *Few Crime Victims Helped by Visa Law OK'd in 2000*, DESERET MORNING NEWS, Feb. 8, 2009, A02, available at <http://www.deseretnews.com/article/705283637/Few-crime-victims-helped-by-visa-law-OKd-in-2000.html> (noting that he had denied all applications which he had seen because the investigations of the crimes at issue were closed); see also Ricardo Romero & Alonzo Barron, *DA Refuses to Help Some Victims*, GREELEY TRIBUNE (Dec. 29, 2009), <http://www.greeleytribune.com/article/20091229/READERS/912299995> (explaining that certifications have continued to be repeatedly denied).

203. Romero & Barron, *supra* note 203.

— victims of assault , sex crimes, domestic violence, who had the courage to work with police and the district attorney.”²⁰⁴

Immigrant rights advocates have begun to receive complaints of similar problems from jurisdictions participating in the 287(g) program. Chief Charles Deane of the Prince William County police has stated that his department will not certify U-visas for the stated reason that he does not want to inadvertently participate in the submission of a fraudulent U-visa application, such as when a wife beats herself up for purposes of obtaining a visa.²⁰⁵

Problems may, in fact, be exacerbated in jurisdictions with 287(g) agreements because the U-visa does not contain a training component, while the 287(g) program does.²⁰⁶ Accordingly, the only training deputized officers receive is under the 287(g) program, which, as discussed above, is disproportionately enforcement focused to the exclusion of any significant discussion of benefits due immigrants. As a result, agencies are largely unaware that the petition process exists in the first place.²⁰⁷ This lack of training often creates many of the misperceptions among participating localities about the U-visa, particularly that certifying Form B is equivalent to approving an undocumented individual for legal status.²⁰⁸ A short-term solution may be to incorporate proper training regarding certification into the 287(g) training program. While the program’s aim differs substantially in practice from what would be anticipated or expected of training for Form B certifications, it is not ideologically too distinct to stop the discussion there. As ICE has presented it, “[t]he 287(g) program is only one component under the ICE ACCESS umbrella of services and programs offered for assistance to local law enforcement officers.”²⁰⁹ Many state and local law enforcement leaders support increasing the reach of ICE training for a number of immigration law issues.²¹⁰

Not all of the problems with the U-visa program are the fault of local officials. DHS’ failure to implement an internal computerized system for flagging U-visa applicants has created the potential for program participants to inadvertently place victims into removal proceedings.²¹¹ Because “U-visa

204. *Id.*

205. *But see* Janell Ross, *Police Block Witness Visas*, TENNESSEAN, Apr. 18, 2010 (noting that “Davidson County district attorney’s office has issued about 80 certifications for crime victims since December 2007 and rejects about one out of every six requests”).

206. Jensen, *supra* note 197, at 710; *Delegation of Immigration Authority*, *supra* note 9 (noting that before a locality can join, participating officers must complete a four week training program).

207. *See* Jensen, *supra* note 197, at 701.

208. *See id.* at 704.

209. *Delegation of Immigration Authority*, *supra* note 9.

210. *See generally*, Jim Kouri, *Exclusive: The Big Lie about Immigration Enforcement*, FAM. SECURITY MATTERS (Nov. 18, 2008), available at http://www.familysecuritymatters.org/publications/id.1787/pub_detail.asp.

211. *Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws: J. Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, & Int’l Law & the Subcomm. on the Constitution, Civil Rights, &*

filings are protected in a confidential database[.]. . . unless a victim provides DHS with a receipt notice, law enforcement agents will not be able to otherwise access information to identify the individual as a victim.”²¹² While this danger may not have been as great previously, because local police under the program increasingly detain individuals who may be undocumented, the likelihood for the detention and removal of a protected applicant increases.

C. The Increased Financial and Parental Burden on Female Relatives of Deported Individuals

Finally, in addition to merely the program’s impact on those deported – most of whom are male, local participation may have an indirect but significant impact on the female family members of those deported, specifically, in terms of increased economic and parental responsibility. The impact of a male family member’s deportation may be particularly severe given the limited resources that may be available to the family, and more specifically a female, even before a spouse or parent’s deportation.

While most of the coverage related to the program and its impact has been focused on the fact that it affects Hispanics primarily, it is informative to consider the other demographic characteristics of persons placed into deportation proceedings. For example, “[o]f the 32,000 immigrants in ICE custody on January 25, 2009, 91 percent were male and 9 percent were female.”²¹³ As discussed above, most have no prior criminal history. Additionally, many help to provide financial or parental support for family members. Approximately 5.5 million U.S. children have at least one parent who is undocumented, according to a 2008 report by the Pew Hispanic Center.²¹⁴ Accordingly, when a male family member is placed into deportation proceedings, it does not solely impact the individual, but rather his entire family—particularly the women in it.

Making this even more problematic is that immigrant women are often particularly susceptible to the negative consequences of having a male family member deported. Undocumented women have lower levels of access to

Civil Liberties, 111th Cong. 385 (2009) (written testimony of Kavitha Sreeharsha, Senior Staff Att’y).

212. *Id.*

213. Donald Kerwin & Serena Yi-Ying Lin, *Immigration Detention: Can Ice Meet Its Legal Imperatives and Case Management Responsibilities?*, MIGRATION POL’Y INST., 11 (Sept. 2009), www.migrationpolicy.org/pubs/detentionreportSept1009.pdf.

214. Aaron Terrazas & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL’Y INST. (Oct. 27, 2009). Similarly, according to a recent study by the Pew Hispanic Center, seven percent of Maryland schoolchildren have at least one parent who is undocumented, Len Lazarick, *About 7% of School Age Children in Maryland Have Illegal Immigrant as a Parent*, MD. REP. (Aug. 16, 2010), <http://marylandreporter.com/page5503216.aspx>. Four out of five of these children surveyed are themselves United States Citizens, *id.*

checking accounts, savings accounts, credit and drivers' licenses.²¹⁵ Accordingly, they generally are unable to work in areas not serviced by reliable public transportation or obtain mortgages that would allow them the purchase of stable housing.²¹⁶ As a result, this lack of access is often associated with higher economic hardship and psychological distress among parents.²¹⁷

Employment limitations generally relegate undocumented women to low paying work. In fact, "many women are forced to work in restaurants, garment factories, and other businesses that typically pay below minimum wage and provide no benefits."²¹⁸ Hispanic women had the lowest incomes of the immigrant groups surveyed.²¹⁹ The majority of Hispanic women who were employed worked only part-time.²²⁰ Those who do not work outside the home are, in many cases, dependent upon male family members: "Of the immigrant Latina women who were not working, 53% were supported by their husbands and 20% by other family members."²²¹ Furthermore, their employment opportunities are further limited by the lack of English speaking capabilities, which, as a result, often forces them to remain within their abusive relationship.²²²

Finally, many undocumented persons "come to the United States with little or no independent financial resources."²²³ Accordingly, their general family income is usually low even before a family member's deportation. Studies have found that "mixed-status families 'are more likely to be poor than other families."²²⁴ Additionally, "children in low-income working immigrant

215. Hirokazu Yoshikawa et al., *Access to Institutional Resources as a Measure of Social Exclusion: Relations with Family Process and Cognitive Development in the Context of Immigration*, 121 NEW DIRECTIONS FOR CHILD & ADOLESCENT DEV. 63, 65-66 (2008) (finding that groups with higher proportions of undocumented parents had lower levels of access to checking accounts, savings accounts, credit and drivers' licenses).

216. See, e.g., Miriam Jordan, *Mortgage Prospects Dim for Illegal Immigrants*, WALL ST. J., Oct. 22, 2008, at A3, available at <http://online.wsj.com/article/SB122463690372357037.html>.

217. Yoshikawa et al., *supra* note 216, at 65 (noting that this lack of access was associated with higher economic hardship and psychological distress among parents).

218. 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, 593 (1997).

219. Dutton, *supra* note 137, at 250.

220. Dutton, *supra* note 137, at 250 (citing CHRIS HOGELAND & KAREN ROSEN, DREAMS LOST, DREAMS FOUND 57 (1991)).

221. *Id.* (citing CHRIS HOGELAND & KAREN ROSEN, DREAMS LOST, DREAMS FOUND 59 (1991)).

222. See *id.* (citing CHRIS HOGELAND & KAREN ROSEN, DREAMS LOST, DREAMS FOUND 55 (1991)). ("Forty-eight percent of the Latinas interviewed spoke no English, and another 38% knew only basic English.")

223. See Loke, *supra* note 219, at 593.

224. David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 471 (2007-2008) (quoting Michael E. Fix & Wendy Zimmerman, *All Under One Roof: Mixed-Status Families in an Era of Reform*, URB. INST., 2 (Oct. 6, 1999), <http://www.urban.org/UploadedPDF/409100.pdf>).

families were more than twice as likely as those in comparable native families to lack health insurance coverage in 2002.²²⁵ Children of immigrants are, likewise, “significantly less likely to be in any regular nonparental child care arrangement.”²²⁶

The following case examples illustrate some of the situations which have arisen as a result of deportation of male family members.

A National Public Radio broadcast from April of 2009 recounted the story of Celia and her father Jorge who lived in a home in a peaceful neighborhood in Minneapolis, Minnesota.

Earlier that morning, after Celia had left for school, agents with Immigration and Customs Enforcement’s Fugitive Operations Team arrested her dad outside the family’s home in Minneapolis, according to ICE spokesman Tim Counts. Authorities considered Jorge Hernandez a fugitive, because he had ignored an earlier order by a federal immigration judge to leave the country, Counts said. . . .

. . . [Celia’s] mom tried to keep up with the \$2,500 monthly mortgage payments after her dad was gone. But it was just too much money, and within a year, the bank foreclosed [sic] on the house. . . . A year after the deportation, Marina Hernandez [Celia’s mother] was desperate to reunite her family. She wasn’t willing to wait for immigration reform, or some other legal way to do so. So in November, she paid a coyote \$2,500 to bring her husband back across the border. But the family has been so damaged by the separation, they weren’t able to come together again. Celia says her dad now lives on his own in a small studio in Minneapolis. And she doesn’t want to see him anymore.²²⁷

A separate, but similar article related the stories of Guadalupe Bueno and Maria Torres who attended an immigration forum organized by Congressman Gutierrez, aimed at highlighting the need for legislative action allowing families with deported spouses to be reunited.²²⁸ Bueno, 38, related the increased burden she has borne after her husband of 20 years was deported in March of 2009.²²⁹ Maria Torres, a mother of three, likewise recounted the impact on her family after her husband was detained and deported to Mexico as

225. Thronson, *supra* note 225 (Quoting Randy Capps et al., *A Profile of Low-Income Working Immigrant Families*, B.67. URB.INST. 1, 4 (2005)).

226. Randy Capps et al., *A Profile of Low-Income Working Immigrant Families*, B-67 URB. INST. at 1, 5 (2005) (“37 percent versus 57 percent for children of natives”).

227. *Children of the Deported* (Minnesota Public Radio broadcast Apr. 14, 2009) (news coverage by Elizabeth Baier), available at http://minnesota.publicradio.org/display/web/2009/04/14/children_of_deported/.

228. Jose Luis Castillo Castro, *Deportations Creating More Single-Parent Families*, LATINA LISTA (Mar. 25, 2009), http://www.latinalista.net/dallas/2009/03/deportations_creating_more_singleparent.html.

229. *Id.*

2010]

287(G) AND WOMEN

299

a result of a raid at the construction site where he worked.²³⁰ The article estimates that there may be “thousands of women who have become single mothers because of the deportations[.]”²³¹

CONCLUSION

It cannot be expected that research regarding the impact of the 287(g) program on minorities or women will halt the increasing use of local police to enforce federal immigration law. In fact, all available evidence suggests the opposite. While this article has focused primarily on the impact of 287(g) agreements on women, the 287(g) program is not the only, nor necessarily even the most widespread, the most dangerous or the most recent program that enlists local law enforcement officials in the enforcement of federal immigration law. In April 2010, Arizona governor Jan Brewer signed Senate Bill 1070, which requires any Arizona police officer who reasonably suspects an individual is undocumented to make a reasonable effort to determine whether the individual is unlawfully present in the United States.²³² While the bill exempts officials from having to investigate immigration status if it would hinder a separate investigation, whether a law enforcement official approached by a crime victim the officer suspects to be undocumented chooses to investigate the crime or the victim’s suspected undocumented status is the officer’s choice.

The Obama administration has condemned the Arizona bill; however, its actions have, to a degree, perpetuated the problem. The administration, earlier this year, announced that it intends to extend the Secure Communities program to local jails and police stations in all fifty states by 2013.²³³ Although Secure Communities does not grant local authorities the discretion to conduct large scale immigration operations, like the 287(g) program, it requires local officials to check the immigration status of any person arrested regardless of the crime, without creating any procedures to ensure that violent suspects are prioritized or that local officials follow through on the prosecution of the underlying crime.²³⁴

Advocates may ultimately have to focus their efforts not on repealing the programs at issue, but instituting workable protections within them for minorities and women affected. The shape and effectiveness of such programs

230. *Id.*

231. *Id.*

232. Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1.

233. See Press Release, U.S. Immigrations & Customs Enforcement, ICE Launches Secure Communities Strategy in 24 Additional North Texas Counties (July 8, 2010), available at <http://149.101.23.4/news/releases/1007/100708dallas.htm>.

234. See Immigration Policy Ctr., *Secure Communities: A Fact Sheet*, <http://immigrationpolicy.org/just-facts/secure-communities-fact-sheet> (last updated Oct. 1, 2010).

300 *WISCONSIN JOURNAL OF LAW, GENDER & SOCIETY* [Vol. 25:2

will depend in large part on the continuation and furtherance of the research highlighted here.