

# VICTIMS' RIGHTS UNRAVELING: THE IMPACT OF LOCAL IMMIGRATION ENFORCEMENT POLICIES ON THE VIOLENCE AGAINST WOMEN ACT

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*Marisol<sup>1</sup> had been living with her boyfriend James for several years and they shared a child together. However, Marisol lived in fear of her*

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1. In order to maintain confidentiality, the author has substituted the true name of the victim with the pseudonym Marisol.

*boyfriend for many of those years as he physically and sexually abused her. During one abusive incident, Marisol's boyfriend pushed her against the wall. He beat her repeatedly and then tried to slam the door on her hands. Marisol scratched her boyfriend in order to prevent him from slamming the door on her hand. Marisol subsequently called the police. When they arrived, the police department did not provide an interpreter and Marisol did not speak English. Based on the scratches on her boyfriend's hand, Marisol was arrested. Marisol was taken to the local jail where she was questioned about her immigration status. Marisol's boyfriend was also arrested but, as a U.S. citizen, he faced no immigration consequences and was released. While still in local custody, Marisol had an immigration detainer placed on her and was transferred to immigration detention without having been able to even make one phone call to an attorney. She was detained and separated from her baby, who remained in the custody of Marisol's boyfriend. Eventually Marisol was released but is still subject to immigration removal proceedings because of the arrest.*

As the immigration debate continues, the Obama administration is continuing and expanding many of the local enforcement programs created by the preceding Bush administration. Expansions in immigration enforcement have increasingly harmed and revictimized non-citizen victims of crime who are already marginalized in the larger immigration discussion. These victims, many of whom are victims of domestic violence, sexual assault, and human trafficking, are among the least understood in society and their victimization is only compounded as they interact with the immigration enforcement system.

The extension of federal civil administrative immigration enforcement programs into local law enforcement jurisdictions *in effect* creates a two-tiered society and undermines the impact of vital federal crime victim legislation. Immigration enforcement policies fail to protect some of the most vulnerable members of our society by preventing victims from seeking the protection of the criminal justice system, which can be critical in rebuilding their lives safely. Even more troubling, these initiatives encourage crimes against and exploitation of immigrants. The lack of criminal justice protections for immigrant crime victims makes all American communities more unsafe. Failing to hold accountable those criminals who are exploiting and victimizing undocumented immigrants allows those criminals to continue to perpetrate crimes against citizens of a community. These effects of local immigration enforcement efforts not only run contrary to American interests in public safety and crime victim protection, but also undermine the very motivation behind the Violence Against Women Act (VAWA).

While the Obama administration continues to expand enforcement efforts and the country continues to debate immigration reform, victimization must be included in this national dialogue. Without the inclusion of a victimization analysis, the Bush administration, the Obama administration, and Congress are unraveling the very laws Congress designed to protect immigrant crime victims. This article

provides background on the current status of the Department of Homeland Security (DHS) local law enforcement partnerships, a summary of relevant provisions of VAWA and other victim-based federal laws, and an analysis of how DHS local enforcement programs undermine the intent behind VAWA. Finally, the article suggests policy considerations to restore the United States' commitment to immigrant victims as well as local commitment to criminal justice and safety.

## I. BACKGROUND

### A. LOCAL ENFORCEMENT OF IMMIGRATION LAW

Immigration enforcement falls under the scope of federal law<sup>2</sup> focusing on the violation of immigration laws and regulations. Federal immigration laws are administrative and not criminal in nature.<sup>3</sup> Over the past seven years, the Department of Homeland Security (DHS), including its legacy Immigration and Naturalization Service (INS) that was part of the Department of Justice (DOJ), has developed policies focusing on local law enforcement partnerships.<sup>4</sup> Federal authority to enforce immigration law lies in the Department of Homeland Security, primarily with Immigration and Customs Enforcement (ICE) and secondarily with the Customs and Border Protection (CBP) as enforcement relates to borders. The Agreements in Communities to Enhance Safety and Security (ACCESS) program encompasses all of ICE's local immigration enforcement initiatives.<sup>5</sup> ACCESS programs are intended to assist ICE to carry out its mission. These initiatives include the 287(g) program, the Secure Communities program, and the Criminal Alien Program (CAP). These three programs involve the partnerships of various local jurisdictions of cities, counties, and states. The programs also involve various criminal enforcement entities, including corrections, sheriff, police, and prosecution departments.

#### 1. The 287(g) Program

Within the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Congress added section 287(g) to the Immigration and Nationality Act (INA).<sup>6</sup> When the proposed amendment was being debated on the

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2. Immigration law is largely found in legislation amending the Immigration and Nationality Act, codified in Title 8 of the U.S. Code.

3. See *infra* Section IIA.

4. The first Memorandum of Agreement (MOA) to be signed into writing, of the currently active MOAs, was with Florida's Department of Law Enforcement on July 2, 2002. DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FACT SHEET, THE ICE 287(G) PROGRAM, available at [http://www.ice.gov/doclib/pi/news/factsheets/Section287\\_g.pdf](http://www.ice.gov/doclib/pi/news/factsheets/Section287_g.pdf).

5. DEP'T. OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE ACCESS, available at <http://www.ice.gov/partners/dro/iceaccess.htm>.

6. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified at Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g)) [hereinafter IIRAIRA].

floor of the House of Representatives, proponents argued that deputizing local law enforcement officers was necessary to more effectively enforce immigration laws. This argument was premised upon the lack of enforcement efforts taken at a federal level by the Immigration and Naturalization Service (INS).<sup>7</sup> Opponents of the amendment countered that the provision raised serious constitutional issues. Representative Xavier Becerra commented:

There is a great concern . . . that we were going too far in deputizing State and local law enforcement agencies in what they could and could not do, and what that might mean . . . . I would say that when you start allowing local law enforcement to go out there and seek out people who may be undocumented, or who may have questionable immigration status, what you are doing is asking them to perform the work of immigration or Border Patrol officers. If they are going to go through the whole training that a Border Patrol officer goes through, that is something different, and perhaps we could discuss it then, but I see nothing in this amendment that would provide for that. I see no monies in the amendment to provide for that, and what it does for me is cause a great deal of concern that what we are doing is extending the reach of the Federal Government, without extending the protections that should be there with it.<sup>8</sup>

Section 287(g) of the Immigration and Nationality Act (INA) provides state and local law enforcement agencies with immigration enforcement authority through formal Memorandums of Agreement (MOAs) with the Department of Homeland Security. The section states:

The Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform **a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States** (including the transportation of such aliens across State lines to detention centers), may carry out

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7. See 142 CONG. REC. H2378 (daily ed. Feb. 6, 1996). Mr. Cox of California stated: "I rise in support of the inclusion of [287g] . . . inclusion of provisions that will help us make sure that our law really means what it says; that is, that you cannot come into this country illegally, but you must follow the rules in the process. Mr. Chairman, if the Federal Government has a law that requires an honest procedure for admission into the country, and people violate it willfully, once they are successful in doing so, once they make it across the border, they are not subject to any realistic threat of enforcement of the law if there is no realistic prospect of deportation. We are going to have ever worsening problems of illegal immigration, and with millions, millions of lawbreakers in this respect, millions of people crossing our borders illegally, it is quickly becoming beyond the capacity of the INS to keep up. There is not any realistic threat of enforcement, because they simply are not doing the job." 142 CONG. REC. H2445 (daily ed. Mar. 19, 1996).

8. 142 CONG. REC. H2445 (daily ed. Mar. 19, 1996).

such function at the expense of the State or political subdivision and to the extent consistent with State and local law.<sup>9</sup>

Section 287(g) does not require all state and local law enforcement agencies to enter into MOAs; rather, it allows local law enforcement agencies to elect to enter into these partnerships. However, political motivations present a logical rationale for the increasing number of jurisdictions that have entered into MOAs. Local law enforcement agencies with MOAs investigate immigration violations, collect evidence for prosecution or removal, and detain undocumented immigrants. Sixty-six jurisdictions currently have MOAs with the DHS.<sup>10</sup> Since 2006, these officers have identified more than 120,000 unauthorized immigrants.<sup>11</sup>

Following September 11, 2001, the federal government identified policy priorities that shifted immigration enforcement efforts towards national security and preventing terrorist-related activity.<sup>12</sup> In hopes of streamlining national security efforts, Congress consolidated the Immigration and Naturalization Service (INS) with several other agencies to form the Department of Homeland Security (DHS).<sup>13</sup> Before September 11 and the formation of DHS, INS had less than 2,000 immigration agents.<sup>14</sup> After September 11th, the Department of Justice (DOJ) declared that state and local police had the authority to make immigration arrests.<sup>15</sup> Until then, the 287(g) program had not been extensively put into practice. The 287(g) program was one of the many efforts by the Bush administration to advocate for increased immigration enforcement as method of improving national security.<sup>16</sup> In large part, these efforts to redefine immigrants

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9. IIRAIRA, *supra* note 6 (emphasis added).

10. The number of 287(g) jurisdictions fluctuates significantly. The current 287(g) jurisdictions are listed at [http://www.ice.gov/pi/news/factsheets/section287\\_g.htm](http://www.ice.gov/pi/news/factsheets/section287_g.htm) (last visited Feb. 16, 2010).

11. Press Release, Dep't of Homeland Sec., Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements (Jul. 10, 2009), available at [http://www.dhs.gov/ynews/releases/pr\\_1247246453625.shtm](http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm).

12. LISA SEGHELLI ET AL., CONGRESSIONAL RESEARCH SERVICE, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 1 (2005).

13. Homeland Security Act of 2002, Pub. L. No. 107-296, § 101, 116 Stat. 2135 (2002), (codified as amended at 6 U.S.C.A. § 111); see also Greg K. Venbrux, *Devolution or Evolution? The Increasing Role of the State in Immigration Enforcement*, 11 UCLA J. INT'L L. & FOREIGN AFF. 307, 308–09 (2006).

14. SEGHELLI ET AL., *supra* note 12, at 2.

15. "When federal, state and local law enforcement officers encounter an alien of national security concern who has been listed on the NCIC for violating immigration law, federal law permits them to arrest that person and transfer him to the custody of the INS. The Justice Department's Office of Legal Counsel has concluded that this narrow, limited mission that we are asking state and local police to undertake voluntarily—arresting aliens who have violated criminal provisions of the Immigration and Nationality Act or civil provisions that render an alien deportable, and who are listed on the NCIC—is within the inherent authority of states." U.S. Dep't of Justice, Attorney General Prepared Remarks on the National Security Entry-Exit System (Jun. 5, 2002), available at <http://justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm>.

16. Under the Bush administration, many rather mundane actions were transformed into national security enforcement, such as driver's license eligibility. See generally Kevin R. Johnson, *Immigration and Civil Rights After September 11: The Impact on California—An Introduction*, 38 U.C. DAVIS L. REV.

as criminals effectively conflate undocumented immigrants and criminals in the eyes of the public.

Florida and Alabama were two of the first states to implement MOAs. In 2002, thirty-five local Florida police officers participated in a six-week immigration enforcement training program.<sup>17</sup> Opponents of the 287(g) program have stridently raised civil rights concerns that the program promotes racial profiling. In an effort to identify growing numbers of undocumented immigrants for deportation, local law enforcement officers are more likely to profile immigrants and those appearing not to be U.S. citizens. Law enforcement agencies have been found to use traffic stops and other racial profiling methods to identify undocumented individuals as part of 287(g) agreements.<sup>18</sup> The 287(g) program is particularly problematic in that it is designed to identify people who are not already detained on a violation of a criminal law. It allows local law enforcement to pursue individuals who may not have otherwise had any contact with law enforcement.<sup>19</sup> This clearly contradicts DHS's stated purpose for the program, which is to identify and remove aliens who are criminals.<sup>20</sup>

For example, Sheriff Joe Arpaio of Maricopa County, Arizona, has used the program to highlight his position on immigration.<sup>21</sup> Sheriff Arpaio's unabashed intent to racially profile immigrants has negatively associated the program with a curtailing of immigrants' civil rights. The Department of Justice, Civil Rights Division, commenced an investigation of Arpaio on March 10, 2009.<sup>22</sup> After the commencement of this investigation, the Department of Homeland Security took some steps to limit Sheriff Arpaio's authority to only run immigration background checks of those arrested.<sup>23</sup> Nevertheless, Arpaio has continued street raids and questioned any legal limitation on his authority.<sup>24</sup>

The United States Government Accountability Office (GAO) raised other

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599 (2005); Kevin R. Johnson & Bernard Trujillo, *Immigration Reform: National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369 (2007).

17. DEP'T OF HOMELAND SEC., 287(G) IMMIGRATION AND NATIONALITY ACT, A LAW ENFORCEMENT PARTNERSHIP (2006), available at <http://www.ice.gov/doclib/pi/news/factsheets/060816dc287gfactsheet.pdf>.

18. See Carrie L. Arnold, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 119 (2007).

19. *Id.* at 116. A recent study also found that of the data provided by DHS related to the basis for deportation, there were no data on 44% of the deportations. HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS) 28, 29 (2009), available at <http://www.hrw.org/en/reports/2009/04/15/forced-apart-numbers-0>.

20. Press Release, Dep't of Homeland Sec., *supra* note 11.

21. See, e.g., Paul Giblin, *Arpaio's View on Who to Go After Has Changed*, E. VALLEY TRIB., Jul. 9, 2008, available at [http://www.eastvalleytribune.com/page/reasonable\\_doubt](http://www.eastvalleytribune.com/page/reasonable_doubt).

22. Letter from Dep't. of Justice, Civil Rights Division, to Sheriff Joseph Arpaio, Re: Investigation of the Maricopa County Sheriff's Office (Mar. 10, 2009) (on file with author).

23. Memorandum of Agreement between United States Immigration and Customs Enforcement and the Maricopa County Sheriff's Office (Oct. 26, 2009), available at [http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r\\_287gmaricopacountyso102609.pdf](http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gmaricopacountyso102609.pdf).

24. Nicholas Riccardi, *Arizona Sheriff Ups the Ante Against His Foes*, L.A. TIMES, Dec. 12, 2009, available at <http://articles.latimes.com/2009/dec/12/nation/la-na-joe-arpaio12-2009dec12>.

significant concerns about the program. Namely, it suggested a lack of systemized training and support for deputized officers as well as a lack of overall guidance about the scope and the purpose of the program.<sup>25</sup> In spite of these findings, instead of pausing to evaluate the challenges raised by the program, Secretary of Homeland Security Janet Napolitano expanded the 287(g) program by adding additional MOA partnerships.<sup>26</sup> Coupled with the expansion, the Secretary announced a newly standardized MOA to promote consistency of standards among 287(g) partners.<sup>27</sup> The standardized MOA requires local law enforcement agencies to pursue “all criminal charges that originally caused the offender to be taken into custody.”<sup>28</sup> Additionally, the new MOA provides guidelines for implementation, reporting, and complaint procedures. While the expansion addresses some criticisms outlined in the GAO’s findings, it also ignored other GAO criticisms of the program, namely the lack of support, supervision, and overall decentralization of the programs. The new MOA also reiterates the DHS priority of using the program to identify and remove criminal aliens.<sup>29</sup> However, as before, DHS did not outline any ways to ensure that these priorities are clearly followed or any mechanism to ensure oversight and compliance with this priority.

## 2. The Secure Communities Program

In March 2009, ICE unveiled a new immigration enforcement program called Secure Communities, for which Congress allocated \$1.4 billion for the fiscal year 2009.<sup>30</sup> The Secure Communities program is a federal administrative initiative established by DHS. The purpose of the program is to use technology to “effectively identify, detain and return removable criminal aliens incarcerated in federal, state and local prisons and jails.”<sup>31</sup> The Secure Communities program links the DHS Automated Biometric Identification System and the FBI Integrated Automated Fingerprint Identification System, allowing local law enforcement agents to determine an arrested person’s immigration history.<sup>32</sup> Unlike 287(g)

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25. U.S. GOV'T. ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 4-6 (2009).

26. Press Release, Dep't. of Homeland Sec., *supra* note 11.

27. *Id.*

28. *Id.*

29. *Id.*

30. DEP'T. OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS, *available at* [http://www.ice.gov/pi/news/factsheets/secure\\_communities.htm](http://www.ice.gov/pi/news/factsheets/secure_communities.htm).

31. Dep't. of Homeland Sec., U.S. Immigration and Customs Enforcement, ICE unveils sweeping new plan to target criminal aliens in jails nationwide, <http://www.ice.gov/pi/news/newsreleases/articles/080328washington.htm> (last visited Feb. 8, 2010).

32. Previously, ICE screened 100% of federal and state prisons but only 10% of the local jails. DEP'T. OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES FACT SHEET (2008) (on file with author).

agreements, Secure Communities programs do not require an MOA with DHS and it is unclear how such duties are defined.

To date, approximately eighty-one jurisdictions are performing the biometrics screening outlined by this program.<sup>33</sup> In North Carolina, immigrant rights advocates have insisted that the Secure Communities program is too similar to 287(g) MOAs for a county to comfortably participate in the Secure Communities Program if there is not an existing 287(g) MOA.<sup>34</sup> Fairfax County, Virginia initially resisted a 287(g) MOA out of concern it would hurt the relationship between the police and the immigrant population.<sup>35</sup> Yet Fairfax County later announced that its jails will participate in the Secure Communities program, and will check the fingerprints of all persons incarcerated in county jails against the DHS database.<sup>36</sup>

DHS announced that though the program is in the initial stages, the ultimate program goal is to expand Secure Communities to every jail and prison by the end of 2013.<sup>37</sup> Furthermore, Congress granted \$350 million for the program for fiscal years 2008-2009.<sup>38</sup>

Though the Secure Communities program is too new to study its effectiveness, DHS is rapidly expanding this program without reviewing and addressing many of the concerns raised about the similar 287(g) program.

### 3. Criminal Alien Program (CAP)

Some local law enforcement agencies participate in the Criminal Alien Program (CAP) jail program, in which “criminal aliens” are screened in local and state jail facilities.<sup>39</sup> CAP does not derive from a federal statute or from any public ICE protocols but appears to have been created through an internal DHS policy. CAP identifies immigrants incarcerated in jail facilities and prisons and subjects them to immigration enforcement.<sup>40</sup> The ICE Office of Detention and

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33. The current number of jurisdictions implementing this biometrics screening is regularly updated at [http://www.ice.gov/secure\\_communities/deployment/](http://www.ice.gov/secure_communities/deployment/) (last visited Mar. 24, 2010).

34. Matt Saldana, *Secure Communities: 287(g) with Lipstick?*, INDY WEEK, Jan. 23, 2009 (on file with author).

35. Michele Waslin, Immigration Impact Blog, *Secure Communities and 287(g): A Tale of Two Counties*, <http://immigrationimpact.com/2009/03/12/secure-communities-287g-prince-william-fairfax-county/> (last visited Feb. 20, 2010).

36. See Jennifer Buske, *Jail Steps Up Screening for Illegal Immigrants*, WASH. POST, Oct. 8, 2009.

37. DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *SECURE COMMUNITIES FACT SHEET* (2009), available at [http://www.ice.gov/doclib/pi/news/factsheets/secure\\_communities.pdf](http://www.ice.gov/doclib/pi/news/factsheets/secure_communities.pdf).

38. Anna Gorman, *3 California Counties Will Check Immigration Status as Inmates Enter Jail*, L.A. TIMES, May 14, 2009, available at <http://articles.latimes.com/2009/may/14/local/me-immigjail14>.

39. Marjorie Korn, *Police Group Cites Concerns with Immigration Duties*, DALLAS MORNING NEWS, May 26, 2009 (on file with author); see also Press Release, U.S. Cong., Marchant Announces Carrollton and Farmers Branch Partnership with U.S. Immigration and Customs Enforcement (Apr. 25, 2008), available at [http://marchant.house.gov/list/press/tx24\\_marchant/pr\\_080425\\_usimmigration.shtml](http://marchant.house.gov/list/press/tx24_marchant/pr_080425_usimmigration.shtml).

40. Dep't of Homeland Sec., U.S. Immigration and Customs Enforcement, *Criminal Alien Program*, [http://www.ice.gov/pi/news/factsheets/criminal\\_alien\\_program.htm](http://www.ice.gov/pi/news/factsheets/criminal_alien_program.htm) (last visited Mar. 24, 2010) [hereinafter *Criminal Alien Program*].



Removal Operations (DRO) assigns officers to prisons and jails to screen inmates.<sup>41</sup> Because the program covers not only prisons but jails, many of the individuals identified through this program have been arrested but not convicted of criminal activity. In order to keep them incarcerated while awaiting DHS action, officers place immigration detainers on criminal aliens to process them for removal and, when required, ICE DRO officers issue charging documents to formally begin removal proceedings.<sup>42</sup>

Less is known about how CAP partnerships operate. DHS has limited publicly available information about the program.<sup>43</sup> It is unclear how many jails participate in CAP. In fiscal year 2007, immigration charging documents were issued through CAP to 164,296 individuals and the number rose to 221,085 in 2008.<sup>44</sup> Local community members do not always know if their local jurisdiction participates in CAP and what local measures are taken when jails are participating in CAP. In Austin, Texas, in the fiscal year 2008, CAP efforts led to more than double the number of incarcerated undocumented immigrants.<sup>45</sup>

#### 4. State and Local Anti-Immigration Laws

Several states have supplemented DHS local partnerships with state and local laws. For example, Oklahoma passed a law with many anti-immigrant provisions allowing local law enforcement to enforce federal immigration law, creating criminal penalties for employers and others to knowingly help undocumented immigrants.<sup>46</sup> North Carolina has also enacted several state laws related to 287(g) agreements. In 2006, House Resolution 2692 urged local counties to enter into 287(g) agreements.<sup>47</sup> House Bill 2436 created oversight for training protocols to help implement local immigration enforcement programs.<sup>48</sup>

DHS efforts to expand federal immigration enforcement are being bolstered by state legislation that facilitates increased participation in the ACCESS programs.

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41. *Id.*

42. *Id.*

43. See generally DEP'T. OF HOMELAND SEC., FACT SHEET: CRIMINAL ALIEN PROGRAM (2008), available at [http://www.ice.gov/doclib/pi/news/factsheets/criminal\\_alien\\_program.pdf](http://www.ice.gov/doclib/pi/news/factsheets/criminal_alien_program.pdf).

44. *Id.*

45. Tim Ruzek, *False Identification Cases Up in Mower County*, POST-BULL., Jul. 11, 2009 (on file with author).

46. Oklahoma Taxpayers & Citizen Protection Act of 2007, 2007 Okla. Sess. Law Serv. Ch. 112 (H.B. 1804) (West). In addition to the Oklahoma law and the North Carolina laws discussed *infra*, Arizona passed SB 1070 as this article went to press. This law will require local law enforcement officers to investigate anyone they merely suspect of being undocumented and creates a crime of being present in the United States without lawful immigration status. 2010 Ariz. Sess. Laws ch. 113. The law has tremendous and potentially devastating implications for the relationship between local law enforcement and immigrant victims of crime and is expected to be challenged in court. While there has been significant public outcry over this law's potential to encourage racial profiling and endanger victim safety, these outcomes are in fact not dissimilar from the outcomes of the 287(g), Secure Communities, and Criminal Alien Programs.

47. H.R. 2692, 2005 Gen. Assem., Reg. Sess. (N.C. 2005).

48. H.R. 2436, 2007 Gen. Assem., Reg. Sess. (N.C. 2007).

DHS is not monitoring the impact of these programs and their effectiveness at meeting the stated goals. Despite this, DHS is maintaining and expanding such programs, thereby encouraging states to take more initiative on a state legislative level. This will lead to further expansion beyond the reach and oversight abilities of the federal government.

## B. IMMIGRANT VICTIMS

### 1. VAWA: Law Enforcement and Domestic Violence

In 1994, Congress passed the Violence Against Women Act (VAWA) in order to improve government protections for victims of domestic violence, sexual assault, and stalking.<sup>49</sup> Among other initiatives, VAWA established grant programs within the Department of Justice (DOJ) for state, local, and Indian governments as well as for service providers.<sup>50</sup> In 2000, President Clinton signed the Victims of Trafficking and Violence Protection Act (VTVPA), which reauthorized and expanded VAWA by adding funding for dating violence programs, transition housing, and protections for elderly, disabled, and immigrant victims.<sup>51</sup>

VAWA included funding of grants to the Encourage Arrest Policies and Enforcement of Protection Orders Program (ARREST).<sup>52</sup> The purpose of this program is to “encourage state, local, and tribal governments and state, local, and tribal courts to treat domestic violence, dating violence, sexual assault, and stalking as serious violations of criminal law requiring coordination with non-profit, nongovernmental victim advocates, and representatives from the criminal justice system.”<sup>53</sup> In other words, the ARREST grant program encourages the arrest and prosecution of abusers.

The ARREST program has succeeded in making domestic violence a priority for both law enforcement officers and prosecutors. The program’s focus on domestic violence in states and localities has led to increased arrests and warrants for domestic violence abusers’ prosecutions.<sup>54</sup> Prosecutors whose jurisdictions received the grant filed a higher percentage of domestic violence cases and reduced the rate of domestic violence case filing dismissals.<sup>55</sup>

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49. The Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended at scattered sections of 18 U.S.C. and 42 U.S.C.) [hereinafter VAWA].

50. GARINNE P. LANEY, CONGRESSIONAL RESEARCH SERVICE, VIOLENCE AGAINST WOMEN ACT: HISTORY AND FEDERAL FUNDING 2 (2007).

51. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 [hereinafter VTVPA].

52. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40231, 108 Stat. 1796 [hereinafter VCCLEA].

53. U.S. DEP’T OF JUSTICE, GRANTS TO ENCOURAGE ARREST POLICIES AND ENFORCEMENT OF PROTECTION ORDERS PROGRAM, available at [http://www.ovw.usdoj.gov/arrest\\_grant\\_desc.htm](http://www.ovw.usdoj.gov/arrest_grant_desc.htm).

54. CASSANDRA ARCHER ET. AL, INSTITUTE FOR LAW AND JUSTICE, NATIONAL EVALUATION OF THE GRANTS TO ENCOURAGE ARREST POLICIES PROGRAM 5 (2002), available at [http://www.ilj.org/publications/docs/Evaluation\\_Grants\\_Arrest\\_Policies\\_Exec\\_Summ.pdf](http://www.ilj.org/publications/docs/Evaluation_Grants_Arrest_Policies_Exec_Summ.pdf).

55. *Id.*

Prior to the passage of VAWA, domestic violence was often treated by law enforcement as a *domestic matter* and was not necessarily seen as a crime. The ARREST grants encourage law enforcement agencies to ensure that every case of domestic violence is taken seriously as a crime.

In the United States, nearly one in four women will be a victim of domestic violence in her lifetime.<sup>56</sup> One in six women will be a victim of sexual assault.<sup>57</sup> For domestic violence and sexual assault victims born in the United States, many factors prevent victims from seeking the protection of law enforcement. Domestic violence and sexual assault victims, including U.S. born victims, fear reporting their crimes to law enforcement. Victims fear testifying and retaliation from their perpetrators.<sup>58</sup> Over the years, law enforcement agencies have made significant strides to address existing barriers that keep victims from reporting domestic violence and sexual assault crimes. These efforts have expanded their accessibility to victims to ultimately prevent victimization.<sup>59</sup> However, community-based law enforcement collaborations for domestic violence and sexual assault victims have not adequately extended to immigrant communities.

Foreign-born crime victims face numerous additional barriers in accessing police protection. Many impose their notions of their home countries' law enforcement on American law enforcement agencies. Even before local agencies began to enforce immigration laws, many immigrants already expected police to be unresponsive, biased, or corrupt.<sup>60</sup>

In a sense, VAWA shifted the tone of law enforcement towards domestic violence and sexual assault victims by requiring local law enforcement to treat violence against women as a serious problem. In doing so, law enforcement agencies were required to understand the nuances of abusive relationships and all

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56. CTR. FOR DISEASE CONTROL & PREVENTION, ADVERSE HEALTH CONDITIONS AND HEALTH RISK BEHAVIORS ASSOCIATED WITH INTIMATE PARTNER VIOLENCE—UNITED STATES 2005 (2008), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5705a1.htm>.

57. NAT'L INSTITUTE OF JUSTICE & CTR. FOR DISEASE CONTROL & PREVENTION, PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN SURVEY (1998), available at <http://www.ncjrs.gov/pdffiles/172837.pdf>.

58. ANDREW KLEIN, U.S. DEP'T OF JUSTICE, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS, AND JUDGES 39 (2009), available at <http://www.ncjrs.gov/pdffiles1/nij/225722.pdf>.

59. The Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009, allocated considerable grant money and funding to the law enforcement to "enhance tools to combat domestic violence" and to improve services for victims. When discussing the renewal of VAWA funding in 2005, Representative Mark Green said, "Because of the Violence Against Women Act, victims have found help to escape violence and get treatment. Law enforcement and the judicial system have learned how to better help these victims through what can be a very daunting and difficult legal process, and more people recognize the signs of abuse because of our public awareness campaigns." 151 CONG. REC. H8425 (daily ed. Sept. 28, 2005) (statement of Rep. Green).

60. See generally RUNNER ET AL., INTIMATE PARTNER VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: CHALLENGES, PROMISING PRACTICES AND RECOMMENDATIONS (2009), available at <http://www.rwjf.org/files/research/ipvreport20090331.pdf>.

of the challenges that prevent victims from trusting law enforcement.<sup>61</sup> During its fifteen year history, VAWA has significantly bridged the gap between victims and law enforcement.

VAWA also created a Services Training Officers Prosecutors (STOP) program, which funds a coordinated state approach to improving criminal justice system efforts to address violence against women.<sup>62</sup> At least 25 percent of each state's STOP funding is allocated to law enforcement agencies, 25 percent to prosecution, and 5 percent to courts. This emphasis on funding in the criminal justice system to address domestic violence and sexual assault demonstrated federal support to protect some of the most vulnerable crime victims who had previously not been adequately protected. Congress also placed significant importance on coordination between the law enforcement and victim advocacy communities at the state level and required a state implementation plan.<sup>63</sup> This cohesive plan, which includes community-based service providers, leads to increased community dialogue and relationship building.

## 2. Immigration Relief Under the Violence Against Women Act

VAWA did not just address violence against women in the context of the criminal justice system. Congress notably created immigration relief for domestic violence victims. Congress established a self-petitioning process for immigrant spouses and children of abusive U.S. Citizen or Lawful Permanent Resident spouses and parents, who did not have lawful status as a consequence of abuse they experienced.<sup>64</sup> Through this provision, an immigrant victim can self-petition to obtain lawful status without relying on the sponsorship of his or her abusive family member.<sup>65</sup> A self-petitioner must demonstrate that he or she is the victim of battery or extreme cruelty, has good moral character, and lived with the abuser. The self-petitioner must be a spouse, parent, or child of a U.S. Citizen abuser or Lawful Permanent Resident abuser.<sup>66</sup> In the first four years after the interim self-petition regulations, INS received more than 11,000 VAWA self-petitions and approved more than 6,500.<sup>67</sup>

While the VAWA self-petition has provided long-term immigration relief to a sizable number of immigrant victims, this law is still largely unknown in

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61. The Department of Justice's Office of Violence Against Women provides money to be used for training and education of law enforcement. U.S. DEP'T. OF JUSTICE, STOP VIOLENCE AGAINST WOMEN FORMULA GRANT PROGRAM, available at [http://www.ovw.usdoj.gov/stop\\_grant\\_desc.htm](http://www.ovw.usdoj.gov/stop_grant_desc.htm).

62. *Id.*

63. *Id.*

64. Violence Against Women Act of 1993: Summary and Purpose, H.R. REP. NO. 103-395, at 25 (1993).

65. VCCLEA, *supra* note 52, § 40701 (1994) (codified at 8 U.S.C. § 1154(a)(1)).

66. *Id.*

67. See *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the Subcomm. on Immigration and Claims of the House Comm. On Judiciary*, 106th Cong. 91 (2000) (statement of Barbara Strack, Action Executive Associate Commissioner, INS).

immigrant communities, and perhaps most significant, is unknown to many of those who need its protection most. The pattern of control in domestic violence includes isolation. Immigrant victims are often even more isolated in their abusive households without any family or friends of their own.<sup>68</sup> Even if they are able to operate outside of their household, they still lack knowledge about their rights and access to services.<sup>69</sup> As a result, undocumented immigrant victims perpetually fear deportation because they are largely unaware of their rights to potentially remain in the United States.<sup>70</sup> Until all immigrants are provided with information about the self-petitioning process upon their entry to the United States, the inherent isolation that exists in abusive relationships allows lawful immigration status to remain elusive and known to the very victims the laws were intended to protect.

The VTVPA, which in 2000 reauthorized VAWA, removed some of the statutory barriers that had prevented applicants from successfully self-petitioning under the original provisions of VAWA. For example, under VAWA 1994, an immigrant victim whose marriage was defective because her husband did not tell her he was already married was ineligible for VAWA self-petition; under VAWA 2000, individuals who believed they were married, but were not because of the abusers' bigamy, were able to self-petition.<sup>71</sup> VAWA 2000 also allowed immigrant victims to self-petition even if they were divorced from their abuser, if the divorce occurred within the past two years due to the abuse.<sup>72</sup>

In addition, VAWA 2000 responded to some of the strict provisions created by the Illegal Immigration Reform and Immigration National Act of 1996 (IIRAIRA) particularly as it related to waiving particular criminal convictions.<sup>73</sup> Domestic violence victims, both citizens and non-citizens, may be arrested in the course self-defense or in the course of an incident that does not account for a larger context of violence against them.<sup>74</sup> Others are arrested because law enforcement agents do not always make the correct assessment in identifying the domestic violence perpetrator and the victim.<sup>75</sup> Because domestic violence includes a cycle of power and control, many victims also commit crimes forced on

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68. See RUNNER ET AL., *supra* note 60.

69. See generally *id.*

70. Patricia Simms, *Immigrant Women Face Unique Risk of Abuse*, WISC. STATE JOURNAL, Oct. 10, 2008.

71. VTVPA, *supra* note 51, § 1503 (codified at 8 U.S.C. § 1154(a)(1)(A)(iii)).

72. *Id.*

73. *Id.* § 1505(e) (codified at 8 U.S.C. § 1182(h)).

74. See M. CRAGER, M. COUSIN, & T. HARDY, KING COUNTY COALITION AGAINST DOMESTIC VIOLENCE, VICTIM-DEFENDANTS: AN EMERGING CHALLENGE IN RESPONDING TO DOMESTIC VIOLENCE IN SEATTLE AND THE KING COUNTY REGION (2003), available at <http://www.mincava.umn.edu/documents/victimdefendant/victimdefendant.html>.

75. See *id.*

them by their abusers<sup>76</sup> or due to mental health issues related to the abuse.<sup>77</sup>

An abuser's English language proficiency as compared with the victim only increases the odds of the victim being arrested. When a victim is unable to communicate in English and law enforcement does not provide an interpreter, English-speaking abusers convince the police that no crime occurred, the injuries resulted from an accident, or the victim is actually the abuser.<sup>78</sup> Using children, neighbors, and abusers' family members as the interpreters instead of accessing unbiased interpreters can result in immigrant victims being wrongfully arrested as the crime perpetrators. When law enforcement agencies fail to provide qualified interpreters, victims are often forced to try to directly communicate with law enforcement agents, creating misunderstanding and miscommunication about the criminal incident.

Finally, the wrongful arrest of victims can often lead to criminal convictions. Victims make statements adverse to their interests, accept plea bargains, or fail to follow through with the criminal justice process for a variety of reasons, many of which are related to the abuse.<sup>79</sup> Identifying a domestic violence victim as a criminal without investigating the underlying circumstances of a victim's arrest has dangerous consequences for the victim. The imposition of immigration penalties on those immigrants with criminal histories arbitrarily penalizes many victims whose nuanced experiences have been lost in the criminal justice system. It also penalizes immigrant victims who were arrested because police failed to obtain a qualified interpreter. Congress understood that law enforcement practices resulted in increased criminal convictions for immigrants who had not in fact committed any crimes.<sup>80</sup> To help address this problem, Congress in VAWA 2000 created exceptions to immigrant inadmissibility provisions that had otherwise prevented immigrant victims from applying for immigration relief.<sup>81</sup>

Congress also included in VAWA 2000 a new form of relief for crime victims called the U-visa.<sup>82</sup> Even before local law enforcement began to enforce immigration laws, Congress acknowledged the problems that exist between immigrant communities and local law enforcement agencies and sought to create a shield of protection for undocumented crime victims so that they could safely seek the protection of the police without fear of deportation.<sup>83</sup> Congress therefore created the U non-immigrant visa which provides temporary lawful status in the United States, permission to accept employment, accompanying visas for certain

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76. See generally Shelby A.D. Moore, *Understanding the Connection Between Domestic Violence, Crime, and Poverty: How Welfare Reform May Keep Battered Women From Leaving Abusive Relationships*, 12 TEX. J. WOMEN & L. 451 (2003).

77. See generally *id.*

78. See RUNNER ET AL., *supra* note 60, at 17.

79. See CRAGER ET AL., *supra* note 74.

80. 146 Cong. Rec. S10169-S10170 (daily ed. Oct. 11, 2000) (statement of Senator Kennedy).

81. VTVPA, *supra* note 51, § 1505(e) (codified at 8 U.S.C. § 1182(h)).

82. *Id.* § 1513 (codified at 8 U.S.C. § 1101, 1184, 1182(d), et. seq.).

83. *Id.*

family members, and an opportunity to eventually apply for lawful permanent residence.<sup>84</sup> To qualify for a U-visa, the applicant must prove substantial physical or emotional abuse, possession of information about the criminal activity, that the crime occurred in the United States, likeliness to help an investigation or prosecution of criminal activity, and that the criminal activity fits an enumerated category.<sup>85</sup> Congress hoped the U-visa would encourage crime victims to step forward with information about crime and encourage law enforcement to better serve immigrant victims.<sup>86</sup> Congress recognized that immigrant women are especially vulnerable to domestic violence and sexual assault and included these crimes in its list of the U-visa qualifying crimes.<sup>87</sup>

Through the same legislation, Congress also created a T non-immigrant visa available specifically to victims of “a severe form of trafficking in persons.”<sup>88</sup> As part of a comprehensive federal anti-trafficking law, Congress enacted a federal anti-trafficking crime and needed to create a parallel visa provision that was originally intended to encourage trafficking victims to work with federal law enforcement agencies investigating these federal crimes.<sup>89</sup> Following the enactment of the federal law, states began to pass laws creating state crimes of trafficking in persons that are investigated by local law enforcement agencies.<sup>90</sup> Similar to the U-visa, the T-visa provides temporary status in the United States, permission to accept employment, and accompanying visas for certain family members.<sup>91</sup> To qualify for a T-visa, the applicant must prove that he or she is a victim of a severe form of trafficking in persons, is physically present in the United States on account of the trafficking, is or has been cooperating with the investigation or prosecution of the trafficking, and would face an extreme hardship if he or she had to return to his or her home country.<sup>92</sup>

Congress also notably created broad and expansive waivers for T-visa and U-visa eligible victims. U-visa applicants can apply for a waiver of inadmissibil-

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84. *Id.*

85. *Id.*

86. Congress stated the purpose of the U-visa is to: “facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status. It also gives law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions. Providing temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States.” VTVPA, *supra* note 51, § 1513.

87. Immigration and Nationality Act of 1952, ch. 477, § 101(a)(15)(U)(iii), 66 Stat. 163 (codified as amended at 8 U.S.C. § 1101(a)(15)(U)(iii)) (listing many gender-related crimes qualifying immigrant victims, such as rape, domestic violence, sexual assault, abusive sexual contact, prostitution, and female genital mutilation) [hereinafter INA 1952].

88. VTVPA, *supra* note 51, § 107(e)(1)(C) (codified at 8 U.S.C. § 1101(a)(15)(T)).

89. *Id.*

90. See CTR. FOR WOMEN AND POLICY STUDIES, FACT SHEET ON STATE ANTI-TRAFFICKING LAWS (2008) available at [http://www.centerwomenpolicy.org/programs/trafficking/documents/FactSheetonStateAntiTraffickingLawsDecember2008\\_001.pdf](http://www.centerwomenpolicy.org/programs/trafficking/documents/FactSheetonStateAntiTraffickingLawsDecember2008_001.pdf).

91. Cf. VTVPA, *supra* note 51, § 107(e)(1) and (4) (codified at 8 U.S.C. § 1101(a)(15)(T)).

92. VTVPA, *supra* note 51, § 107(e)(1) (codified at 8 U.S.C. § 1101(a)(15)(T)).

ity if it is in the national public interest to do so for any ground of inadmissibility triggered except for being admissible as a Nazi persecutor.<sup>93</sup> Similarly, T-visa applicants can apply for a waiver of any grounds of inadmissibility except those related to national security, international child abduction, and tax evasion.<sup>94</sup> These waivers clarify that Congress felt it was important not to predetermine that all immigrants with criminal convictions posed a risk to American communities. Second, these waivers of inadmissibility based on criminal convictions are available to *crime victims*. Congress understood that one could be a crime victim and still have a criminal conviction.

Possibly reflecting the emphasis of the Bush administration on immigration enforcement, DHS delayed the implementation of the U-visa until September 2007, nearly seven years after the original legislation passed.<sup>95</sup> Over those seven years, many eligible immigrants were unable to obtain lawful immigration status and remained vulnerable. The lack of regulations meant that local law enforcement agencies for the most part did not implement U-visa protocols as well. Local police also failed to screen immigrants in the context of immigration enforcement for VAWA, T-visa, and U-visa eligibility. The first U-visas were not granted until 2008.<sup>96</sup> While there is now increased information available on U-visas, there is no federal directive instructing local law enforcement that they may encounter someone who is VAWA, T-visa, or U-visa eligible, either as a victim, as an alleged perpetrator, or as a witness or in other interactions, including civil immigration enforcement, where an immigrant encounters law enforcement.

### 3. VAWA Confidentiality Provisions

Though VAWA 1994 included provisions protecting immigrant victims of domestic violence, Congress recognized that abusers threaten victims with deportation and thus immigrant victims needed special protections. To stop abusers from discovering, interfering with, or undermining a victim's immigration case, Congress created VAWA confidentiality in Section 384 of IIRAIRA.<sup>97</sup> VAWA confidentiality provisions preclude DOJ, Department of State (DOS), and Department of Labor (DOL) employees from relying on abuser-provided information<sup>98</sup> or using or disclosing information contained in immigration files of VAWA self-petitioners.<sup>99</sup> VAWA 2005 expanded these protections to protect against an immigration enforcement action against a victim at a shelter, rape crisis center, visitation center, community-based organization, or courthouse in

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93. *Id.* § 107(e)(3) (codified at 8 U.S.C. § 1182(d)).

94. *Id.*

95. *See generally* Department of Homeland Security Appropriations Bill, H.R. REP. NO. 110-181 (2008). This report was introduced by Rep. David Price (D-NC).

96. Jessie Mangaliman, *First U Visas for Immigrant Victims of Crime Issued*, OAKLAND TRIB., Aug. 9, 2008.

97. IIRAIRA, *supra* note 6, § 384 (codified at 8 U.S.C. § 1367(a)(1)).

98. *Id.*

99. IIRAIRA, *supra* note 6, § 384 (codified at 8 U.S.C. § 1367(a)(2)).



some situations.<sup>100</sup> VAWA confidentiality provisions were also amended in VAWA 2000 and 2005 to protect T-visa and U-visa applicants, and extended to the newly created DHS.<sup>101</sup> Understanding how local immigration enforcement can conflict with these protections, Congress expressly included those performing immigration functions in order to expand the reach of VAWA confidentiality to local law enforcement agents.<sup>102</sup>

VAWA confidentiality laws illustrate Congressional understanding that crime perpetrators use the immigration system against immigrant victims. The protections prevent DHS from making an adverse determination about an individual if relying *solely* on the information of that perpetrator.<sup>103</sup> Congress enacted these provisions in a climate with far less scope for immigration enforcement. At the time, enforcement agents were able to weigh someone's victimization more favorably than lack of immigration status, which was in many cases linked to an abuser's failure to sponsor the victim. However, the political incentives and misleading rhetoric encouraging the identification of undocumented immigrants means that immigration enforcement agents fail to use their discretion in favor of an undocumented victim. Crime perpetrators report their victims to immigration authorities and ICE independently verifies the victim's lack of lawful status, thus complying with the legal mandate while not utilizing the discretion available to them.<sup>104</sup>

Furthermore, as the Department of Homeland Security has expanded ACCESS programs, ICE has delayed training and implementation of confidentiality protections. Congress originally enacted VAWA confidentiality protections to prevent crime perpetrators from using the government as a tool in controlling their victims. However, these protections at a minimum lack teeth and are possibly rendered meaningless in light of the prioritization of removing all undocumented immigrants.

## II. RECONCILING LOCAL ENFORCEMENT WITH CRIME VICTIM PROTECTIONS

DHS has three different immigration-related divisions: United States Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Patrol (CBP). The mission of USCIS is to grant legal immigration benefits, which include the VAWA self-petition, T-visa, and U-visa and their derivative protections.<sup>105</sup> Conversely, ICE's mission is "to

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100. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 825(c), 119 Stat. 2960 (2006) (codified at 8 U.S.C. § 1229(e)) [hereinafter VAWA 2005].

101. VTVPA, *supra* note 51, § 1513(d); VAWA 2005, *supra* note 100, § 817.

102. IIRAIRA, *supra* note 6, § 133 (codified at 8 U.S.C. § 1357(g)).

103. IIRAIRA, *supra* note 6, § 384 (a)(1) (codified at 8 U.S.C. § 1367(a)(1)).

104. See Memorandum from U.S. Immigration and Customs Enforcement to Field Office Directors and Special Agents in Charge (Jan. 22, 2007) (on file with author).

105. United States Citizenship and Immigration Services: About Us, <http://www.uscis.gov/aboutus> (last visited Feb. 16, 2010).

protect the security of the American people and homeland by vigilantly enforcing the nation's immigration and customs laws."<sup>106</sup> In analyzing DHS program implementation in light of these missions, it appears that DHS prioritizes the enforcement objectives of ICE and its related enforcement programs over the immigration relief available through USCIS policy. While the local enforcement of immigration laws is problematic in many manners, this article focuses on those problems that undermine federal victim-based protections offered by USCIS. The other negative consequences of local immigration enforcement have been widely addressed in other studies.<sup>107</sup>

#### A. REDEFINING PUBLIC SAFETY BY CRIMINALIZING UNDOCUMENTED IMMIGRANTS

The Department of Homeland Security reports that there are approximately 11.6 million undocumented immigrants as of January 2008.<sup>108</sup> Enforcement against immigrants has expanded through direct federal efforts and the partnership of local law enforcement. From 2002 to 2008, the number of deported criminal non-citizens rose 60% and the total number of deported non-criminals rose 400%.<sup>109</sup>

As the immigration debate continues to percolate, those advocating for expansive immigration enforcement often conflate the violation of immigration laws, which are administrative, and the violation of criminal laws. Undocumented immigrants are increasingly being defined as criminals without having actually committed any crime. Anti-immigration organizations regularly relate the scope of undocumented immigrants to criminal activity, without evidence of this connection. The Center for Immigration Studies, one such organization, has stated that "[s]ome of the most violent criminals at large today are illegal aliens" and "[i]n recent years, it has become difficult to avoid perceiving immigrants, legal or not, as overwhelming this country with serious crime."<sup>110</sup> In 2000, a National Opinion Research Center found that 73% of Americans believe that undocumented immigrants are at least casually related to criminal activity.<sup>111</sup>

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106. United States Citizenship and Immigration Services: About, <http://www.ice.gov/about/index.htm> (last visited Feb. 16, 2010). "ICE's mission is to protect the security of the American people and homeland by vigilantly enforcing the nation's immigration and customs laws."

107. See, e.g., DEBORAH WEISSMAN ET AL., IMMIGRATION AND HUM. RTS. POL'Y CLINIC OF U. N.C. CHAPEL HILL, THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS (2009), available at <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf>.

108. MICHAEL HOFFER ET AL., DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2008 (2009), [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf).

109. Thomas Frank, *New Effort Helps Net Potential Deportees*, USA TODAY, May 12, 2009 (on file with author). See also U.S. DEP'T OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 185 (1999), available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/1997YB.pdf>.

110. Tom Barry, *Truth About Illegal Immigration and Crime*, AMERICAS PROGRAM COMMENTARY, Jan. 18, 2008, available at <http://americas.irc-online.org/am/4903>.

111. *Id.*

ICE, too, confuses immigrants with criminals. For example, a Human Rights Watch report cited ICE's misleading language from Marc Moore, San Antonio ICE Field Office Director for Detention and Removal Operations (DRO): "Our citizens may sleep better knowing that these dangerous criminals no longer pose a threat to our communities. ICE will continue to work to aggressively remove those who have no legal right to remain in the United States, especially those who terrorize our communities."<sup>112</sup> Even ICE's Criminal Alien Program extends beyond convictions to undocumented individuals who are merely incarcerated, even if they have no criminal convictions.<sup>113</sup> This rhetoric is dangerous and misleading. Undocumented immigrants do not commit crimes at a disproportionately higher rate than citizens, and removing undocumented criminals will not lead to the elimination of dangerous criminals in the United States.<sup>114</sup> Consequently, removing immigrants from the United States, whether criminals or not, will not lead to increased public safety.

Even if removing dangerous criminals achieves a particular public policy goal, the perception that all immigrants are criminals increases the likelihood of racial profiling in immigration enforcement. Profiling results in increased immigration enforcement against undocumented immigrants who have committed minor or no criminal offenses.<sup>115</sup>

State criminal laws have created opportunities to identify large numbers of undocumented immigrants through local law enforcement actions. In particular, where states have criminal codes penalizing particularly petty or typically administrative violations, DHS partnerships enable local law enforcement to identify large numbers of undocumented immigrants to be processed for immigration enforcement. In Davidson County, Tennessee, people arrested for driving without a license are subject to 287(g) immigration enforcement.<sup>116</sup> In Mecklenburg County, North Carolina, Hispanic drivers are especially concerned about minor traffic violations, which can also lead to arrest and subsequent deportations under 287(g).<sup>117</sup> Similarly, in Oklahoma, people stopped for

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112. HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 41 (2007).

113. Criminal Alien Program, *supra* note 40.

114. See RUBEN RUMBAUT & WALTER EWING, IMMIGRATION POLICY CTR., THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN (2007), available at <http://www.immigrationpolicy.org/special-reports/myth-immigrant-criminality-and-paradox-assimilation>.

115. See Jason G. Idilbi, *Local Enforcement of Federal Immigration Law: Should North Carolina Communities Implement 287(g) Authority?*, 86 N.C. L. REV. 1710, 1723 (2008).

116. *Id.* at 1727. If a state precludes undocumented immigrants from obtaining drivers' licenses, traffic stops will identify large numbers of undocumented immigrants driving without a driver's license, only because they are ineligible to apply.

117. *Id.* at 1728. "North Carolina has become a national testing ground for programs between ICE and local enforcement. Local police set up roadblocks for the purpose of checking licenses outside of Latino markets on the weekends and on Sundays, they station themselves at roads that provide access to Latino churches. Johnson County Sheriff Steve Bizzell has stated that "they [immigrants] are breeding like rabbits," and that they "rape, rob and murder American citizens." Despite this attempt to link immigrants

operating a car with a suspended or an expired driver's license constituted the majority of immigrants placed on an immigration detainer in 2007.<sup>118</sup> Failure to pay a traffic ticket has led many undocumented immigrants to be identified to law enforcement and later processed for DHS removal proceedings.

#### B. THE PARADOX OF THE IMMIGRANT CRIME VICTIM

In general, immigrants have been made to feel like criminals for their violations of an immigration law. Even if an undocumented crime victim does not risk immediate removal from the United States, many immigrant crime victims may not identify as victims for a variety of reasons. Crime victims may not feel victimized since such a crime does not exist in their home country.<sup>119</sup> For example, most victims of human trafficking are unfamiliar with the crime of human trafficking and do not self-identify as victims.<sup>120</sup>

This lack of self-identification of crime victims requires government systems to anticipate barriers and bridge gaps through affirmative efforts that will help a victim self-identify. These efforts must also counter increased immigration enforcement and perceptions about undocumented immigrants as criminals. To demonstrate that government agents still care about protecting immigrant victims, they must convince immigrant victims to trust them.

Many law enforcement agencies create obstacles in identifying immigrant victims by failing to provide meaningful language access. Title VI of the Civil Rights Act of 1964 requires recipients of public funding not to discriminate on the basis of national origin.<sup>121</sup> Furthermore, an executive order requires federal agencies to implement a system that gives individuals meaningful access to services.<sup>122</sup> However, this law has not been systematically enforced. In many jurisdictions across the country, immigrants are so linguistically isolated that when they call the police for help, officials do not access the interpretation services needed to understand the caller.<sup>123</sup> This is particularly true for callers who speak languages other than English and Spanish. Lack of language access

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to violent crime, in one North Carolina county, 83 percent of immigrants arrested in one month by ICE-authorized police officers were charged with traffic violations. Still, criminal alien programs do not require data collection on race or ethnicity to verify that racial profiling does not exist." IMMIGRATION JUSTICE NETWORK, DANGEROUS MERGERS 2 (2009).

118. Curtis Killman, *Jail Sees Fewer Detained for ICE*, TULSA WORLD, Dec. 6, 2009 (on file with author).

119. Edna Erez and Carolyn Capps Hartley, *Battered Immigrant Women and the Legal System: A Therapeutic Jurisprudence Perspective*, 4(2) W. CRIMINOLOGY REV. 155, 158 (2003).

120. Twenty-four percent of surveyed service providers and trafficking victims felt that the inability to identify as a victim of trafficking prevented victims from being able to access services. HEATHER CLAWSON ET AL., NEEDS ASSESSMENT FOR SERVICE PROVIDERS AND TRAFFICKING VICTIMS 29 (2003), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/202469.pdf>.

121. The Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, § 601, 78 Stat. 241 (codified at 42 U.S.C. § 2000d et seq.).

122. Exec. Order No. 13166, 65 Fed. Reg. 50121 (Aug. 11, 2000).

123. See, e.g., DEP'T ON THE STATUS OF WOMEN, CITY AND COUNTY OF SAN FRANCISCO, SAFETY FOR ALL: IDENTIFYING AND CLOSING THE GAPS IN SAN FRANCISCO'S DOMESTIC VIOLENCE CRIMINAL JUSTICE RESPONSE 24-26 (2007).

policies sends a message to immigrant communities that law enforcement is not available and willing to protect them.

In order for law enforcement agencies to fight crime and protect immigrant victims, they must also develop a U-visa certification protocol. All successful U-visa applicants must demonstrate helpfulness in an investigation or prosecution of a criminal activity.<sup>124</sup> Congress included a provision that this requirement must be met through a certification from the agencies responsible for investigating or prosecuting the crime.<sup>125</sup> In order to obtain such a certification, each law enforcement agency should develop a protocol. This protocol will help victims, advocates, and attorneys know from which officials to seek certification. It should clearly delineate what the agency requires for each certification.

Since the publication of the U-nonimmigrant visa rule, advocates and attorneys have reported widespread challenges in obtaining certifications for crime victims who come forward and cooperate with an investigation.<sup>126</sup> There are very few comprehensive U-visa policies in the country. Advocates report that law enforcement agents are unavailable and assert a lack of knowledge requisite to sign certifications.<sup>127</sup> Put simply, many agencies are unwilling to take the steps like developing U-visa certification protocols that are so necessary to protect immigrant crime victims.

The lack of protocol leaves attorneys and advocates representing crime victims reluctant to report victimization. Increased immigration enforcement coupled with law enforcement's unwillingness to sign U-visa certifications creates an atmosphere requiring preparatory steps before an immigrant victim will contact law enforcement. In case their clients become subject to an immigration enforcement action, lawyers often advise clients to arrange emergency childcare and custody, carry important numbers, inform family members and friends, and take an attorney with them to make the police report. This preparation is relatively impossible for many immigrant domestic violence victims, most of whom lack support systems or who fear confiding their story to family or friends. Such preparations would never be possible in the event that a victim needed to make a 911 emergency call. Even after accessing victim services, immigrant victims are also routinely advised to carry proof of victimization, immigration receipts, and any other documentation that may encourage immigration enforcement to exercise discretion. Immigrant victims often must advocate on their own behalf, without access to attorneys.<sup>128</sup> The odds are not in their favor.

For the few jurisdictions with U-visa certification policies, this protection is significantly undermined when the very same local police department also en-

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124. INA 1952, *supra* note 87, § 101(a)(15)(U)(i)(III) (codified at 8 U.S.C. § 1101(a)(15)(U)(i)(III)).

125. *Id.* § 214(p)(1) (codified at 8 U.S.C. § 1184(p)(1)).

126. Dep't of Homeland Sec., Questions and Answers from USCIS Ombudsman's Teleconferences, [http://www.dhs.gov/xabout/structure/gc\\_1192724755499.shtm#3](http://www.dhs.gov/xabout/structure/gc_1192724755499.shtm#3) (last visited Feb. 28, 2010).

127. *Id.*

128. LEGAL MOMENTUM, KNOW YOUR RIGHTS FOR IMMIGRANT VICTIMS (2009) (forthcoming).

forces immigration laws that could lead to the crime victim's deportation. In essence, a law enforcement agent must decide whether to view the immigrant as someone subject to immigration enforcement or someone who needs the protection of law enforcement from his or her perpetrator.

Though ICE agents are instructed to exercise discretion when encountering immigrant crime victims,<sup>129</sup> the emphasis on partnerships with local law enforcement mitigates this discretion. As such, a call to the police may lead to drastic consequences. For example, the ACLU reported an incident in which a domestic violence crime led to an immigration enforcement action:<sup>130</sup>

*In Miami in February 2009, Rita Cote's sister called 911 to seek police protection after a domestic violence incident. Ms. Cote's sister had lawful immigration status but had a limited capacity to speak English. Law enforcement agents asked for identification for everyone at the scene. Ms. Cote urged the agents to first address the domestic violence issue but they insisted that Ms. Cote's sister could only press charges by going to the police station. After Ms. Cote showed her passport to the officers the officers arrested her and took her away. The domestic violence crime went unaddressed.*

Experiences like Ms. Cote's create apprehension among immigrant victims. A recent survey supports the notion that experiences like Ms. Cote's are not unique.<sup>131</sup> Over the past several years, the number of law enforcement agencies interviewing victims and witnesses for their immigration status has increased from eight to more than sixty.<sup>132</sup> Stories like this often circulate in immigrant communities and as a result, immigrants do not believe that local law enforcement is willing to protect immigrant communities. Heightened enforcement efforts lead those subject to enforcement to feel that they are treated like criminals and that being without lawful immigration status constitutes a crime.<sup>133</sup> Many immigrants worry that if they report a crime to the police, they will be taken into immigration detention and deported.

A national study of law enforcement agents found that the vast majority of law

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129. See generally DEP'T. OF HOMELAND SEC., IMPROVING THE PROCESS FOR VICTIMS OF HUMAN TRAFFICKING AND CERTAIN CRIMINAL ACTIVITY: THE T AND U VISA (2009), available at [http://www.dhs.gov/xlibrary/assets/cisomb\\_tandu\\_visa\\_recommendation\\_2009-01-26.pdf](http://www.dhs.gov/xlibrary/assets/cisomb_tandu_visa_recommendation_2009-01-26.pdf); Memorandum from John Torres, Immigration and Customs Enforcement, Re: Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005 (Jan. 22, 2007).

130. See Press Release, American Civil Liberties Union, Family is Torn Apart After Police Responding to Domestic Assault Call Ignore Assault, Arrest Mother of Three Instead (Feb. 23, 2009), available at <http://www.aclu.org/immigrants/detention/38814prs20090223.html>.

131. See DECKER ET AL., IMMIGRATION AND LOCAL POLICING: RESULTS FROM A NATIONAL SURVEY OF LAW ENFORCEMENT EXECUTIVES 170 (2008), available at <http://ccj.asu.edu/research/immigration-research-section/current-project/immigration-and-local-policing-results-from-a-national-survey-of-law-enforcement-executives-a-paper-presented-for-the-police-foundation/view>.

132. *Id.*

133. See generally, HUMAN RIGHTS WATCH, DETAINED AND DISMISSED (2009).

enforcement officers believed that undocumented victims or witness were less likely to contact law enforcement than their counterpart U.S. citizen victims and witnesses.<sup>134</sup> More disturbingly, only 30% of the law enforcement agents surveyed felt that the victimization of immigrants was a significant problem.<sup>135</sup> While VAWA funding programs strive to improve law enforcement response to domestic violence, local law enforcement agencies partnering with DHS jeopardize their commitment to community safety and in this case, the effectiveness of programs Congress created under VAWA.

Increased enforcement targeting undocumented immigrants also has a significant impact on immigrant crime victims. Victims who are single parents are sometimes separated from their children and removed from the United States, leaving their U.S. citizen child to a foster care system.<sup>136</sup> Other victims are returned to home countries where resources are less likely to address all the needs of an immigrant victim. Simple categorization of immigrants as criminals predetermines an immigrant's destiny without taking into account the various circumstances of a crime victim.

### C. EXPLOITING AND PERPETRATING CRIMES AGAINST IMMIGRANTS

Increasing press attention has made individuals and immigrant communities far more aware of the role played by local law enforcement when in partnership with DHS. Media and other coverage about these local immigration enforcement initiatives create a climate in which unscrupulous employers, landlords, family members, and others see a window to exploit undocumented immigrants knowing that undocumented immigrants will never call the police for assistance. This control over immigrants is particularly alluring to unsavory employers who exploit workers and prevent them from reporting labor violations, sexual assault in the workplace, and other crimes.

For example, the criminal prosecutions and lawsuits related to the raid of the Agriprocessors Inc. plant in Postville, Iowa, revealed an entire community so reliant on this factory's employment that workers knowingly came and returned daily to a factory where people were assaulted and subject to extortion, child labor, exploitation, and other crimes.<sup>137</sup> The plant had inadequate worker safety protections and required workers to work overtime with no additional pay.<sup>138</sup> The

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134. See DECKER ET AL., *supra* note 131, at 174.

135. *Id.* at 173-74.

136. See, e.g., *In re Angelica L. v. Maria L.*, 277 Neb. 984 (2009). Maria Luis' parental rights were terminated based on her inability to perform the activities required for reunification, including visitation, despite her incarceration in immigration detention. Maria Luis was deported without her children, but ultimately the Nebraska Supreme Court reversed and remanded the case so she could be reunited.

137. See Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief at 3-6, *Candido v. ICE*, No. 08-1015 (N.D. Iowa Jul. 1, 2008).

138. Julia Preston, *Iowa Rally Protests Raid and Conditions at Plant*, N.Y. TIMES, Jul. 28, 2008, available at <http://www.nytimes.com/2008/07/28/us/28immig.html>.

plant also employed minors and forced them to work long hours, often at night.<sup>139</sup> Local religious leaders, professors, and union organizers said that Agriprocessors was notorious for its exploitation of workers.<sup>140</sup>

Similarly, women migrating are systematically exposed to more human rights violations, including sexual assault.<sup>141</sup> Women entering the United States are more vulnerable to the sexual assault of smugglers, often referred to as *coyotes*, because the coyotes know the women will not report the crime to the police. It is difficult to find a reliable coyote, and choosing the wrong coyote can have life-threatening consequences. One immigrant said she switched coyotes after her first-choice coyote tried to isolate her from her family.<sup>142</sup> Government officials estimate that Border Patrol receives reports of about three to four rapes of undocumented immigrants on the border a day.<sup>143</sup> One staff member for a sexual assault agency near the border estimated that 80 percent of the sexual assaults on the border go unreported.<sup>144</sup>

In the domestic violence context, the concern about U.S. citizens repeating a pattern of sponsoring and then abusing foreign-born spouses led Congress to pass the International Marriage Brokers Regulation Act (IMBRA) as part of the VAWA 2005.<sup>145</sup> In this legislation, Congress limited the number of fiancés a U.S. citizen could sponsor, citing potential abuse.<sup>146</sup> They coupled these provisions with a requirement that the consulate issue a brochure about domestic violence rights and protections to all fiancés who immigrate to the United States.<sup>147</sup> While IMBRA has yet to be fully implemented<sup>148</sup> and it only applies to foreign spouses or fiancés brought through lawful immigration channels, it illustrates a growing concern about the exploitation of immigrants through violent marriages.

Increased immigration enforcement efforts have a high cost for immigrant victims. Not only are immigrant victims isolated from criminal justice protections but increased immigration enforcement increases crimes against immigrants. In fact, law enforcement officers believe that immigrants are more likely to be victims than the non-immigrant community realizes,<sup>149</sup> creating an in-

139. *Id.*

140. Nathaniel Popper, *In Iowa Meat Plant, Kosher 'Jungle' Breeds Fear, Injury, Short Pay*, JEWISH DAILY FORWARD, May 26, 2006, available at <http://forward.com/articles/1006>.

141. See U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective*, ¶¶ 42–43, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000) (prepared by Radhika Commeraswamy).

142. Matthew Casey, *Think Immigration, Following the Trail of Immigrants Killed in SUV Crash* (Jan. 17, 2009), <http://migranttrail.wordpress.com/>.

143. David McLemore, *Border Rapes Cause Alarm: Recent Attacks Suggest Pattern in Crimes Against Immigrants*, DALLAS MORNING NEWS, Jun. 5, 2006.

144. *Id.*

145. VAWA 2005, *supra* note 100, 831–834.

146. *Id.* 832(a).

147. *Id.* 833.

148. See U.S. GOV'T ACCOUNTABILITY OFFICE, INTERNATIONAL MARRIAGE BROKER REGULATION ACT OF 2005, AGENCIES HAVE IMPLEMENTED SOME, BUT NOT ALL OF THE ACT'S REQUIREMENTS (2008).

149. See DECKER ET AL., *supra* note 131, at 173.



teresting paradox. By conflating undocumented immigrants with criminals and by increasing enforcement efforts to remove undocumented immigrants, plausibly to make communities safer, law enforcement is indirectly causing increased crime against immigrant victims.

#### D. LOCAL GOVERNMENT RECEIVES INCENTIVES TO ENFORCE IMMIGRATION LAWS

DHS provides financial incentives to local law enforcement agencies that partner with DHS. As outlined above, CAP provides local sheriff and jail programs with clear financial benefits for identifying undocumented immigrants. Since immigrant victims are often arrested as perpetrators, they are likely to fall prey to CAP's financial incentives for local jails. When encountering an immigrant victim who is undocumented, it benefits the jurisdiction to place an immigration detainer on an individual while they await a response from ICE.<sup>150</sup> Local jails may also apply for funding through the State Criminal Alien Assistance Program (SCAAP) based on individuals detained in the jail facility on immigration charges.<sup>151</sup>

Jails also benefit from detaining undocumented immigrants who would have been likely released through the local criminal justice process by placing an immigration detainer on them.<sup>152</sup> This is particularly problematic in locations with successful diversion programs and other alternatives to incarceration.<sup>153</sup> Many who might be eligible for such programs and indeed may not in the end be deportable or subject to mandatory detention miss the opportunity to participate in such alternative criminal justice programs.

Particularly for those who would have been eligible for bail and other criminal justice diversion programs, the detainer incarceration process is not without permanent impact.

When victims are placed on detainer, even if ICE ultimately uses their discretion not to deport, the victim experiences trauma and stigma. Perpetrators often exert control over immigrant victims by threatening to report them to the police or immigration authorities.<sup>154</sup> The detained victim associates law enforcement with the perpetrator because law enforcement agents are in effect carrying out the threats of the perpetrator. But probably more significant in this content, a victim who has been incarcerated will have a very hard time believing that law enforcement will ever exist to protect victims.

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150. Karma Ester, Congressional Research Service, CRS Report No. RL3343, Immigration: Frequently Asked Questions on the State Criminal Alien Assistance Program, CRS-2 (2007), available at [http://assets.opencrs.com/rpts/RL33431\\_20071017.pdf](http://assets.opencrs.com/rpts/RL33431_20071017.pdf).

151. *Id.*

152. *See id.*

153. *See* NEW YORK CITY BAR, COMMITTEE ON CRIMINAL JUSTICE OPERATIONS, IMMIGRATION DETAINERS NEED NOT BAR ACCESS TO JAIL DIVERSION PROGRAMS 3 (2009), available at [http://www.nycbar.org/pdf/report/NYCBA\\_Immigration%20Detainers\\_Report\\_Final.pdf](http://www.nycbar.org/pdf/report/NYCBA_Immigration%20Detainers_Report_Final.pdf).

154. MARY ANN DUTTON ET AL., USE AND OUTCOMES OF PROTECTION ORDERS BY BATTERED IMMIGRANT WOMEN (REVISED FINAL TECHNICAL REPORT) 1 (2006).

This has been well documented in the context of human trafficking crimes. Human trafficking is a crime of exploitation in labor or commercial sex. While there are many victims who are trafficked by an individual trafficker into a home or a private setting, many trafficking cases involve multiple victims and are unearthed in the course of a local law enforcement raid of a facility. However, victims of human trafficking have a strong mistrust of law enforcement, whether that fear is based on government corruption in their home country, or threats of retaliation or deportation.<sup>155</sup>

Though awareness about human trafficking has increased over the past ten years, victims are often arrested or detained by law enforcement agents who are untrained to identify trafficking victims. Instead, they may assume that anyone identified through a worksite immigration enforcement is an undocumented worker without any immigration relief. Because most trafficking victims do not trust law enforcement, victims will not volunteer their story.<sup>156</sup> Consequently law enforcement will not identify them as an individual eligible for immigration relief.

Law enforcement investigating trafficking crimes are encouraged to immediately work with NGO service providers to identify victims before placing victims on detainers, but the reality is that trafficking victims continue to be seen as criminals. The same lessons can be applied to other immigrant crime victims. Jail programs that detain a victim for monetary benefits will eliminate any trust between that individual and law enforcement. Not only will the victim never trust law enforcement about a particular crime, but it will prevent that victim from ever calling law enforcement about future crimes, and these experiences will increase such perceptions in the larger immigrant community.

#### E. LOCAL GOVERNMENT LACKS KNOWLEDGE ABOUT IMMIGRATION PROTECTIONS

The various ACCESS programs (287(g), Secure Communities, and the Criminal Alien Program) are all premised on a local partnership with DHS. This necessarily means that all involved law enforcement agents must understand not only the broad strokes of immigration law but the detailed nuances. It also requires clear, centralized, and immediately accessible oversight and supervision by DHS, in addition to ongoing training regarding immigration law. A 2009 GAO Report has already found that local law enforcement agents lack supervision, training, and oversight from DHS.<sup>157</sup>

Immigrant victims of crime are in a particularly precarious predicament. The eligible application referenced in the VAWA confidentiality provisions, including the VAWA self-petition, U-visa, and T-visa, must comply with VAWA confidentiality provisions and therefore may be inaccessible to local law enforcement

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155. See CLAWSON ET AL., LAW ENFORCEMENT RESPONSE TO HUMAN TRAFFICKING AND THE IMPLICATIONS FOR VICTIMS: CURRENT PRACTICES AND LESSONS LEARNED 33 (2006).

156. *Id.*

157. U.S. GOV'T. ACCOUNTABILITY OFFICE, *supra* note 25, at 14-16.

agencies. While this keeps vulnerable immigrants from being further exploited by their perpetrators, this database is currently inaccessible to immigration enforcement officers. Until this system is integrated such that confidentiality is maintained but case status is made accessible, local law enforcement will have to affirmatively identify eligible crime victims. Lack of training, screening protocols, and trusting relationships with immigrants makes this prospect extremely unlikely.

Despite the increasing number of local jurisdictions participating in ACCESS programs, DHS has not implemented any type of screening and identification program to ensure that victims are not subject to immigration enforcement. Many local enforcement agents participating in an ACCESS program are not necessarily trained to accurately identify documents that establish proof of legal status or a pending application or eligibility for victim-based immigration relief. Officers do not have an understanding of all forms of immigration relief and the range of waivers of inadmissibility and removability and VAWA confidentiality provisions that exist under immigration law, making it difficult for them to use their discretion. Until all immigrant victims can be identified by immigration enforcement agents as eligible for protection and not subject to enforcement actions, these local partnerships will undermine community trust and safety.

Since victim-based applications constitute a very small number of the immigration applications filed every year, these provisions are less familiar to immigrants, immigration attorneys, immigration officers and judges, and other professionals who interact with immigrants.<sup>158</sup> Law enforcement agents are likely to have very little working knowledge of VAWA immigration protections. Without proactive efforts from DHS, immigrant victims will continue to be detained and subject to enforcement activities.

#### F. THE EFFECT ON LOCAL COMMUNITIES

With public commitment to local enforcement programs and widespread fear of law enforcement among immigrant communities, the United States is returning to a dangerous era of creating rights and privileges that exist only for certain populations. Local law enforcement has always shared a common mission of keeping local communities safe through the detection, investigation, and prosecution of crimes. The lack of screening protocols for victimization and the perpetuation of immigrant fear of law enforcement contribute to law enforcement reprioritization that in essence only protects the safety of U.S. born crime victims.

Furthermore, if the goal is to keep communities safe, then creating a two-tier

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158. An organization that provides training and support to law enforcement agencies created a background document on immigration law recognizing the nuances and complicated nature of immigration law and the extensive resources that would be required to provide sufficient oversight and expertise on these laws. *See* INT'L ASS'N OF CHIEFS OF POLICE, POLICE CHIEF GUIDE TO IMMIGRATION ISSUES 131-32 (2007).

law enforcement system affects entire communities, not just immigrant communities. Today, 25% of the United States population is either immigrants themselves or those born to immigrant parents.<sup>159</sup> Large urban areas attract sizable immigrant communities. San Jose's foreign-born population is 37.2%, and the foreign-born populations of both Miami and Los Angeles exceed 30%.<sup>160</sup> Overall, 12.5% of the U.S. population is foreign-born.<sup>161</sup>

In communities with significant immigrant populations, law enforcement is de facto excluding perpetrators of crimes against immigrants from any criminal liability. Perpetrators of crime against immigrants are not likely to limit themselves to that population. In San Jose, Miami, and Los Angeles, this would result in at least one-third of the crimes going uninvestigated and those criminals not being held accountable. In the end, this makes communities one-third less safe.

The conflation of immigration violations and criminal behavior has in many ways misled the American public. The public is made to believe that most crimes are committed by undocumented immigrants and that the removal of undocumented immigrants will eliminate crime in the U.S.<sup>162</sup> However this rhetoric actually fuels actions that make our communities less safe. It has also resulted in an implementation that targets non-criminals in contradiction to ICE's stated policies. A recent DHS report found that for fiscal year 2009, of those detained based on a 287(g) program, 53% were non-criminal and, for those detained under CAP, which requires an immigrant to be in a local jail system, 41% of those detained were non-criminal.<sup>163</sup> The public is led to believe, however, that local enforcement efforts prioritize the deportation of violent criminals.

### III. RECOMMENDATIONS FOR THE FUTURE OF LOCAL ENFORCEMENT EFFORTS

Local law enforcement can only be effective in protecting public safety if *all* community members feel that law enforcement's role is to protect them. Community policy that builds relationships of trust with culturally and linguistically isolated communities can be extremely effective. The lack of clear delineation of the roles between the missions of ICE and local law enforcement puts both immigrants and communities at peril and vulnerable to crime and exploitation.

Several measures must immediately be taken to address victimization among

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159. RANDALL MONGER & MACREADIE BARR, DEP'T OF HOMELAND SEC., NONIMMIGRANT ADMISSIONS TO THE UNITED STATES: 2008 1 (2009), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois-ni\\_fr\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois-ni_fr_2008.pdf). According to DHS estimates, there were 175 million non-immigrant admissions in 2008. *Id.*

160. WILLIAM A. FREY ET AL., BROOKINGS INSTITUTION, GETTING CURRENT: RECENT DEMOGRAPHIC TRENDS IN METROPOLITAN AMERICA 11 (2009).

161. Aaron Terrazas & Jeanne Batalova, Migration Policy Inst., *Frequently Requested Statistics on Immigrants and Immigration in the United States* (Oct. 2009), <http://www.migrationinformation.org/USfocus/display.cfm?ID=747#1a>.

162. See *supra* section IIA.

163. DR. DORA SCHIRO, DEP'T. OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 13 (2009), available at [http://www.ice.gov/doclib/091005\\_ice\\_detention\\_report-final.pdf](http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf).

immigrants. In order to overcome the presumption of a two-tier society where only U.S. citizens are protected as crime victims, law enforcement must build trust with immigrant communities. While trust building can be an abstract concept, there are several steps DHS must take if the ACCESS programs are to accomplish any reasonable goals without long term negative consequences.

1. Create and Require 100% Participation in a Centralized Training on Immigrant Victim Issues

First and foremost, all participating agencies must be extensively trained in immigration law and documentation, and training must include separate components on sensitivity to immigrant crime victims and their legal rights. Only those who have been trained should be able to participate in any activity related to ICE ACCESS. This training curriculum should be vetted with national experts on immigration generally and those working with immigrant crime victim communities. Finally, all information about training, participants, and syllabus should be made publicly available.

2. Require All Participating Agencies to Provide Meaningful Language Access that Complies with Title VI Requirements.<sup>164</sup>

All local programs must also provide meaningful language access to any individual interacting with the agency. Ms. Cote would have never been involved with the police had she not needed to provide interpretation for her sister. Every agency must adopt and make publicly available a language access protocol that includes participation in a service that provides qualified interpreters in multiple languages, a priority to hire bilingual staff representative of significant languages in the population, and mandatory provision of a language identification card.

3. Implement a DHS Computer System Database that Red Flags Victim Cases and Is Made Available to Local Law Enforcement Agencies

DHS must develop a computerized system that red flags VAWA confidentiality protected cases. DHS must implement a policy requiring every immigration enforcement agent to check this system before commencing an enforcement action against any individual. Until the database in which victims cases are red flagged is operational, victims who are the most vulnerable will be the most overlooked in any enforcement process. While this issue has been raised with DHS for several years, the increase in local enforcement efforts necessitates DHS prioritizing of this red flagging system.

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164. Exec. Order No. 13166, 65 Fed. Reg. 50121 (Aug. 11, 2000).

4. Create and Require a Victim Screening Protocol for All DHS and ICE ACCESS Participating Agencies

DHS must create a uniform screening protocol that screens all immigrants subject to immigration enforcement for VAWA, T-visa and U-visa eligibility, crime victimization, and eligibility for humanitarian release. This protocol must be developed in consultation with national immigrant victim experts and should be implemented and utilized by every local ICE ACCESS partner in addition to DHS personnel. The protocol should include a time frame to ensure that this screening happens before an individual is jailed or detained, specific questions to help identify victims, guidance for how to work best with immigrant victims once identified, and steps to exclude such victims from any enforcement action by DHS or law enforcement agents participating in an ICE ACCESS program. This screening protocol must be included in every 287(g) MOA and all other written contracts for participation in ICE ACCESS programs.

5. Establish a Clear and Uniform DHS Protocol Requiring All Local Agencies to Exempt Victims from Such Enforcement Actions

Every participating jurisdiction must clearly set forth that their goal is only to pursue those immigrants with serious criminal convictions who are unlikely to be eligible for immigration relief. DHS must set forth unequivocal guidance that excludes from enforcement those who are identified in traffic stops, victims of crime, witnesses to a crime, interpreters, those contacting third party agencies regarding labor or child welfare violations, and those accessing health care and other social services.

6. Provide Immediate and Ongoing DHS Supervision and Oversight to All Participating Law Enforcement Agencies

Even with sufficient training, local law enforcement agents need to be able to access centralized supervision. The GAO report cites a lack of communication between DHS and local partner agencies that must be rectified.<sup>165</sup> Each agency must be assigned one central officer to be responsible for providing twenty-four-hour-a-day assistance. DHS must regularly review and assess each partner agency's compliance with DHS policies. Local enforcement programs must provide a full accounting of the criminal convictions of each person identified and referred to DHS.

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165. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 25, at 5.

7. Eliminate All Language from DHS and Participating Agencies' Policies and Statements Conflating Criminals and Immigrants

Because of the lack of clarity with local protocols, even DHS and local law enforcement agents do not necessarily understand the difference between undocumented immigrants and criminals who may be subject to immigration enforcement.<sup>166</sup> While public rhetoric may continue this conflation, local agencies can make significant progress to building trust if they cease use of confusing language and instead draw clear distinctions between perpetrators of crime and non-violent and non-criminal immigrant populations.

8. Create a National Violation Complaint Protocol

None of these suggested recommendations will be needed unless DHS establishes a clear administrative complaint protocol for violations of the proposed policies. This protocol must include relief available to those immigrants whose rights are violated. Such relief may include a release from detention or withdrawal of any immigration enforcement based proceedings. Violation penalties should include civil monetary penalties for violations of these policies modeled after the civil penalties imposed by VAWA confidentiality violations.<sup>167</sup>

9. Pursue Effective Community-based Outreach that Provides Clear and Transparent Dissemination of Enforcement Protocols

All law enforcement agencies in a DHS partnership must take significant steps to develop trusting relationships within immigrant communities. All policies developed to implement the DHS partnerships should be vetted by immigrant advocates and community members and widely disseminated in immigrant communities. Immigrant victimization must be included in press talking points so that accurate information reaches all victims in the community.

Undocumented immigrants will be reasonably apprehensive to attend law enforcement-hosted events and enforcement agencies should be cognizant of this apprehension and seek effective alternatives to build trust. Law enforcement agencies will be far more successful if they seek out immigrant-based community organizations and engage in dialogue at a higher level and enter into partnerships so that trusted immigrant-based organizations can disseminate information as appropriate.

The problems and recommendations set forth here focus on immigrant crime victims. There are however many other problematic aspects of ICE ACCESS

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166. See *supra* section IIA.

167. IIRAIRA, *supra* note 6, § 384(a)(2) (codified at 8 U.S.C. § 1367(a)(2)).

policies. Even these extensive recommendations will require significant effort and resources and will not be achieved in a short period of time. **Until these recommendations are implemented, DHS should cease expansion of ICE ACCESS programs and stop seeking additional funds for such programs.**

Finally, in order for communities to be safe from crime and victimization, the United States needs to return to its clearly delineated policies of the past, where local law enforcement addressed state and local crimes and DHS through ICE would enforce immigration violations. The successful passage of comprehensive immigration reform legislation will provide an opportunity for many of the undocumented immigrants to come out of the shadows and apply for lawful status.<sup>168</sup> This will reduce the need for continued expansion of enforcement efforts and DHS can return to its original enforcement priorities carried out through ICE and CBP without the fractured and varied partnerships with local law enforcement. Even without the passage of comprehensive immigration reform, the recommendations set forth above will help DHS streamline efforts and refocus resources towards centralized enforcement of immigration laws. Eliminating ICE ACCESS programs and utilizing the existing ICE infrastructure to pursue their enforcement agenda will ensure consistency to protect the safety of all members of American society.

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168. At the time of publication, it is anticipated that Congress will attempt to pass comprehensive immigration reform in 2010.