



The American Civil Liberties Union

Written Statement
For a Joint Hearing on

**The Public Safety and Civil Rights Implications of State and Local
Enforcement of Federal Immigration Laws**

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International Law

and

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I. Introduction

The American Civil Liberties Union (ACLU) commends both the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law and the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties for conducting a joint hearing on the public safety and civil rights implications of local police enforcement of immigration laws.

The ACLU is a nationwide, non-partisan organization of more than 500,000 members dedicated to enforcing the fundamental rights of the Constitution and United States laws. The Immigrants' Rights Project (IRP) of the ACLU engages in a nationwide program of litigation, advocacy and public education to enforce and protect the constitutional and civil rights of immigrants. The Racial Justice Program (RJP) of the ACLU engages in a nationwide program of litigation, advocacy and public education to combat racial profiling and enforce the constitutional and civil rights of people of color. Together, and through a robust network of ACLU affiliates across the country, the IRP and the RJP are actively engaged in assessing the role of state and local law authorities in immigration enforcement; investigating the impact of state and local enforcement of immigration laws on immigrant communities and people of color; and challenging constitutional and civil rights violations that arise when state and local police engage in unlawful discrimination for purposes of enforcing the immigration laws.

The ACLU submits this statement to express its grave concern about the growing trend toward shifting responsibility for enforcement of civil immigration laws to state and local police, which has resulted in racial profiling by local police of Latino U.S. citizens and immigrants.

II. The Shift Toward Local Police Enforcement of Immigration Law

Since 2002 the federal government has actively shifted significant responsibility for enforcement of civil immigration laws to state and local police and other state and local agencies. A keystone of this trend has been to enter into memoranda of understanding or agreement (MOUs or MOAs) with states and localities under Section 287(g) of the Immigration and Nationality Act, 8 U.S.C. § 1357(g), which authorizes the Department of Homeland Security (DHS) to enter into written agreements with a state or any political subdivision of a state authorizing local law enforcement officers to perform immigration-related functions under certain circumstances and provided there is oversight, supervision and training of local officers by Immigration and Customs Enforcement (ICE).¹ Section 287(g) was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act in 1996. The first agreement under the provision was not entered into until 2002 by the State of Florida.² Today a total of 67 287(g) MOAs have been signed in 23 states,³ and approximately 80 applications to join the

¹ 8 U.S.C. § 1357(g)(5) (“[T]he specific powers and duties that may be, or are required to be, exercised or performed by the individual [officer], and the position of the agency of the Attorney General who is required to supervise and direct the individual, [must] be set forth in [the] written agreement between the Attorney General and the state or political subdivision.”)

² Riley, William. Written Statement for March 4, 2009 House Committee on Homeland Security Hearing on “Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law,” p. 4.

³ GAO, *Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws*, GAO-09-109 (Jan. 2009) (hereinafter the “GAO 287(g) Report”), p. 2.

program are pending approval.⁴ ICE's budget for the program has increased as well, from \$5.4 million in 2007 to \$54.1 million in 2009.⁵

In addition to the 287(g) program, ICE has many other programs by which state and local authorities may investigate immigration law violations. State and local police, for example, may query into immigration status of individuals they arrest and book through ICE's Law Enforcement Support Center. ICE has Criminal Alien Program teams that respond to local law enforcement agencies' requests to determine alienage of individuals for crimes and other immigration violations. Secure Communities is a new program, created in 2008, that provides for fingerprint checks against DHS databases, rather than just FBI databases, during the booking process in jails.⁶ It is expected to be fully implemented in all jails and prisons throughout the country by 2013.⁷

The growth in local police involvement in immigration enforcement, in particular the 287(g) program, over the past few years has been the subject of substantial controversy and criticism. Leading police chiefs⁸, national civil and immigrants' rights organizations⁹, community advocates¹⁰ and academic researchers¹¹, among others, have raised serious concerns about the program's mission; lack of internal controls, oversight, supervision, and training of local police; and ineffectiveness. A chief concern has been that local enforcement of immigration laws undermines community trust and detracts police from their core mission; when police are deputized as ICE agents, immigrants are less likely to report crimes that affect them or that they witnessed.

The Government Accountability Office ("GAO") recently reported that ICE lacks key internal controls for the implementation of the 287(g) program even though the program has been in operation for approximately seven years.¹² The report conclusively found that 287(g) program objectives have not been documented in any program-related materials; guidance on how and when to use program authority is inconsistent; guidance on how ICE officials are to

⁴ Chishti, Muzaffar. Written Statement for March 4, 2009 House Committee on Homeland Security Hearing on "Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law" (hereinafter "Chishti Written Statement"), p. 2.

⁵ GAO 287(g) Report, p. 9.

⁶ National Immigration Law Center, *More Questions than Answers about the Secure Communities Program* (Mar. 23, 2009), available at <http://www.nilc.org/immlawpolicy/LocalLaw/secure-communities-2009-03-23.pdf>.

⁷ Id.

⁸ See, e.g., Manger, Thomas, Chief of Police, Montgomery County Police Department. Written Statement for March 4, 2009 House Committee on Homeland Security Hearing on "Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law."

⁹ See, e.g., Leadership Conference on Civil Rights and Rights Working Group. Written Testimony for March 4, 2009 House Committee on Homeland Security Hearing on "Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law."

¹⁰ See, e.g., University of North Carolina, Immigration and Human Rights Policy Clinic & ACLU of North Carolina Legal Foundation, *The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina* (Feb. 2009) (hereinafter "UNC/ACLU-NC Report"), available at <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf>; Shahani, Aarti; Greene, Judith. Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Enforcement, A Justice Strategies Report (Feb. 2009) (hereinafter "Justice Strategies Report"), p. 9.

¹¹ Id.

¹² See GAO 287(g) Report.

supervise officers from participating agencies has not been developed; data that participating agencies are to track and report to ICE has not been defined; and performance measures to track and evaluate progress toward meeting program objectives have not been developed.

Moreover, there has been significant criticism that the program, without internal controls or real oversight and supervision, effectively grants local police unbridled discretion to decide how and when to enforce federal immigration law, thereby undermining the federal government's actual ability to set priorities in immigration enforcement.¹³

III. The Problem of Racial Profiling in Local Immigration Enforcement

The ACLU submits this statement to address a particularly acute aspect of local immigration enforcement: the discrimination against Latino citizens and immigrants that has resulted from local police enforcing immigration law. As demonstrated below, racial and ethnic discrimination by local police in the context of immigration enforcement is a real phenomenon that causes an array of harms to immigrant and Latino communities and, therefore, is one that must be systematically discouraged, monitored and eliminated. In Part VI, we provide specific recommendations for addressing this problem in a concrete and effective manner.

A. Defining Racial Profiling

Racial profiling is a term used to describe improper use of race or ethnicity in targeting suspects or engaging in other law enforcement actions. It can manifest itself in at least two principal ways: (1) selective enforcement of certain laws against members of a particular racial or ethnic group; or (2) pretextual stops and arrests motivated by the race or ethnicity of the individual who is targeted even where that individual is not suspected of committing any particular crime.

Both forms of racial profiling violate the Constitution. “[T]he Constitution prohibits selective enforcement of the law based on considerations such as race.”¹⁴ Thus, the decision “whether to prosecute may not be based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification.’”¹⁵ The same standard applies to the actions of law enforcement officers. Courts have repeatedly held that any general policy of employing “impermissible racial classifications in determining whom to stop, detain, and search” violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.¹⁶ In other words, race or ethnicity cannot be used as a proxy for illegal behavior.¹⁷ There is no question that the prohibition against racial discrimination contained in the Equal Protection Clause protects non-citizens as well.¹⁸ The same legal protections exist for citizens, lawful permanent residents and non-citizens who are unlawfully discriminated against by law enforcement.

¹³ See, e.g., Chishti Written Statement, p. 6.

¹⁴ *Whren v. United States*, 517 U.S. 806, 813 (1996).

¹⁵ *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

¹⁶ *Chavez v. Illinois State Police*, 251 F.3d 612, 635 (7th Cir. 2001).

¹⁷ *Bush v. Vera*, 517 U.S. 952, 968 (1996) (plurality).

¹⁸ *Plyler v. Doe*, 457 U.S. 202, 212 (1981) (concluding that the Fourteenth Amendment applies to all individuals within a State); *Yick Wo v. Hopkins* 118 U.S. 356, 369 (1886) (concluding that the Fourteenth Amendment applies to non-citizens).

The improper use of race or ethnicity in targeting suspects without reasonable suspicion or probable cause for stops, arrests and searches also violates the Fourth Amendment, which protects individuals from unreasonable searches and seizures.¹⁹ Traffic stops are the most common reason for contact between police and the public.²⁰ An investigative stop of an automobile must be justified by some objective indication that the person is, or is about to be, engaged in criminal activity. In other words, some level of reasonable suspicion of unlawful activity is required. The law enforcement officer conducting the stop must be able to “point to specific and articulable facts which, when taken together with rational inferences from these facts, reasonably warrant” stopping a person to conduct further investigation.²¹ Race or ethnicity alone does not satisfy this standard.

Racial profiling by state and local law enforcement also violates civil rights and other federal laws. These include Title VI of the Civil Rights Act of 1964 and its implementing regulations, which prohibit discrimination by agencies receiving federal funding.²² The Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. § 3789) prohibits discrimination by state and local government that receive federal funds for law enforcement, and it authorizes enforcement of the statute in the form of civil actions by the Department of Justice and by private citizens.²³ Racial profiling in the context of 287(g) programs may also violate the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. § 14141), which authorizes the Department of Justice to file suit for declaratory and equitable relief against law enforcement agencies engaged in “patterns or practices” that violate the Constitution.²⁴ Approximately one-third of state legislatures in this country have adopted laws banning the practice as well.²⁵ Further, racial profiling violates international standards against non-discrimination and multiple treaties to which the U.S. is a party, including the United Nations Convention for the Elimination of All Forms of Racial Discrimination and the International Convention on Civil and Political Rights.²⁶

B. Understanding Race-Based Local Immigration Enforcement

Immigration enforcement by local police raises grave concerns about racial profiling against Latino U.S. citizens and immigrants. Although the overwhelming majority of Latinos in the United States are U.S. citizens and legal permanent residents—and are expected to constitute

¹⁹ U.S. Const. Amend. IV.

²⁰ Matthew R. Durose, Erica L. Smith, and Patrick A. Langan, Ph.D., *Contacts Between Police and the Public*, 2005, BUREAU OF JUSTICE STATISTICS, Apr. 2007.

²¹ *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

²² 42 U.S.C. § 2000d et seq. Title VI of the Civil Rights Act of 1964. Title VI provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

²³ U.S. Department of Justice Letter ordering investigation of Maricopa County Sheriff’s Office (focusing on “alleged patterns and practices of discriminatory police practices and unconstitutional searches and seizures”) (Mar. 10, 2009), available at <http://ndlon.org/images/documents/usdojlettertoarpaio.pdf>.

²⁴ *Id.*

²⁵ See Amnesty International USA, *Racial Profiling Laws In Your State*, available at <http://www.amnestyusa.org/us-human-rights/other/racial-profiling---laws-in-your-state/page.do?id=1106665>.

²⁶ Amnesty International USA, *Threat and Humiliation: Racial Profiling, Domestic Security and Human Rights in the United States* (Sep. 2004), p. 32.

nearly 25 percent of the U.S. population by 2050²⁷—Latinos have often been singled out as a group for immigration stops and inquiries by local law enforcement. Such race-based immigration enforcement imposes injustices on innocent racial and ethnic minorities, in particular reinforcing the harmful perception that Latinos—U.S. citizens and non-citizens alike—are presumed to be “illegal immigrants” and therefore not entitled to full and equal citizenship unless and until proven innocent or “legal.”

Because a person is not visibly identifiable as being undocumented, the basic problem with local police enforcing immigration law is that police officers who are often not adequately trained, and in some cases not trained at all, in federal immigration enforcement will improperly rely on race or ethnicity as a proxy for undocumented status. In 287(g) jurisdictions, for example, state or local police with minimal training in immigration law are put on the street with a mandate to arrest “illegal aliens.” The predictable and inevitable result is that *any* person who looks or sounds “foreign” is more likely to be stopped by police, and more likely to be arrested (rather than warned or cited or simply let go) when stopped. Indeed, as explained in the next section, officials operating under 287(g) MOUs often arrest persons whom they suspect of being undocumented based on racial or ethnic appearance for minor offenses as a pretext for initiating an immigration inquiry. And, as explained further in Part V, the federal government meanwhile provides no meaningful oversight, supervision or training.

The problem of racial profiling, however, is not limited to 287(g) field models. As previously noted, the federal government uses an array of other agreements to encourage local police to enforce immigration law. Racial profiling concerns therefore are equally present under jail-model MOUs or other jail-screening programs. Officers, for example, may selectively screen in the jails only those arrestees who appear to be Latino or have Spanish surnames. Police officers may also be motivated to target Latinos for selective or pretextual arrests in order to run them through the booking process and attempt to identify undocumented immigrants among them.

As with 287(g) agreements and other models of federal-local cooperation, the use of ICE detainers or holds also tends, especially in the absence of any countervailing training or incentives, to encourage state and local police to treat individuals who look or sound foreign differently – stopping or arresting them when they would not ordinarily do so. Indeed, local jails often detain persons whom they suspect of being undocumented without criminal charges in anticipation of an ICE detainer being issued. Local jails will also often hold persons whom they suspect of being undocumented in criminal custody for more than 48 hours after ICE issues a detainer in violation of immigration regulation.²⁸

Studies have long shown that when police officers have a high degree of discretion in enforcing the law, there is a greater risk that they will act on the basis of prejudice related to race or ethnicity in their determination of targeted individuals. As previously explained, the 287(g) and other similar federal-local cooperation mechanisms authorize a high degree of discretion to local police, without any oversight or supervision by ICE. Several Northeastern University

²⁷ U.S. Census Bureau, *U.S. Interim Projections by Age, Sex, Race, and Hispanic Origin* (Mar. 28, 2004), available at <http://www.census.gov/population/www/projections/usinterimproj/natprojt01a.pdf>.

²⁸ See 8 C.F.R. 287.7.

researchers, who produced a resource guide on racial profiling data collection systems for the U.S. Department of Justice in November 2000, found that “in the high-discretion stop category,” such as traffic stops, racial profiling is a serious threat.²⁹ “These high-discretion stops invite both intentional and unintentional abuses. Police are just as subject to the racial and ethnic stereotypes they learn from our culture as any other citizen. Unless documented, such stops create an environment that allows the use of stereotypes to go undetected.”³⁰

IV. Racial Profiling in Local Immigration Enforcement is a Real Phenomenon

Existing data and other evidence suggests that race-based immigration enforcement is widespread and significantly impacts Latinos. The full scope and depth of the racial profiling problem, however, is still unknown because ICE does not currently require racial profiling data collection from participating state and local authorities that enforce immigration law. There is no question that data collection is necessary to unravel the serious racial consequences of local immigration enforcement.

The danger of underreporting racial profiling incidents is particularly serious in the context of immigration enforcement because, as described in Part V, victims of racial profiling are especially unlikely to report police abuses. The reasons for this are varied. Many of the individuals arrested are swiftly deported and have little access to counsel; state or local officials may not exercise their ordinary oversight roles when their police are performing a “federal” function; and the federal government has not created effective oversight mechanisms. As a result, the abuses that police commit are likely to go unpunished and undeterred.

1. Disproportionate Increase in Arrests of Latino Drivers and Misuse of Authority

Available statistics nevertheless show that there has been a disproportionate increase in arrests of Latino drivers in some 287(g) jurisdictions. For example, in Tennessee, a study of arrest data found that the arrest rates in Davidson County for Latino defendants driving without a license more than doubled after the implementation of the 287(g) program in that county.³¹ In Alabama, 58 percent of motorists stopped by a 287(g) police officer were Latino, although Latinos make up less than two percent of the population.³²

In addition to the disproportionate increase in arrests of Latino drivers in certain 287(g) jurisdictions, available data suggests that 287(g) officers may be misusing their authority to target individuals for traffic stops and other minor offenses. According to a 2007 ICE Fact Sheet, the 287(g) program is aimed at “violent crimes, human smuggling, gang/organized crime

²⁹ Deborah Ramirez, Jack McDevitt, & Amy Farrell, *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned* (Nov. 2000), at 9-10, available at <http://www.ncjrs.gov/pdffiles1/bja/184768.pdf>.

³⁰ Id. See also David A. Harris, *When Success Breeds Attach: The Coming Backlash Against Racial Profiling Studies*, 6 Mich. J. Race & Law 237 (2001).

³¹ Tennessee Immigrant and Refugee Rights Coalition, *Arrests for No Drivers License by Ethnicity and Race: A Comparison of May-July 2006 to May-July 2007*, at 1 (July 31, 2007), available at <http://tirrc.bondwaresite.com/photos/File350.pdf>.

³² David C. Volk, *Police Join Feds to Tackle Immigration*, Stateline.org (Nov. 27, 2007), available at <http://stateline.org/live/details/story?contentId=259949>.

activity, sexual-related offenses, narcotics smuggling and money laundering,” and not “designed to allow state and local agencies to perform random street operations” or “impact issues such as excessive occupancy and day labor activities.”³³ Despite the program’s limited scope, at least one sheriff told the GAO investigators that his understanding was that “287(g)-trained officers could go to people’s homes and question individuals regarding their immigration status even if the individual is not suspected of criminal activity.”³⁴ In North Carolina, researchers found that a high percentage of persons arrested in 287(g) counties were charged with traffic or other minor violations. In Gaston County, for example, 83 percent of the persons arrested under 287(g) were charged with traffic offenses.³⁵ In Mecklenburg County, of the 2,321 undocumented immigrants who were put into removal proceedings in 2007, fewer than five percent of the charges against them were felonies and over 16 percent of the total charges were traffic violations.³⁶

2. Police Engaged in Discrimination Seeking Immigration Enforcement Authority

Threats of racial profiling by local immigration enforcement are especially serious where departments engaged in discrimination have sought or are seeking authority to enforce immigration law. The City of Rogers, Arkansas, for example, entered into a 287(g) MOA (as part of a Regional Task Force in Northwest Arkansas) in 2007 after it was sued for unlawfully targeting Latino motorists for stops, searches and investigations in 2001.³⁷ The plaintiffs in the lawsuit obtained a federal court order prohibiting local police from engaging in racial profiling, specifically barring them from checking individuals’ documents to prove their immigration status.³⁸ When the City of Rogers applied for 287(g) authority to enforce immigration law, it was still under federal court supervision pursuant to the lawsuit. ICE authorized the MOA notwithstanding strong objections by community and immigrants’ rights groups in light of the lawsuit and continued reports of problems.³⁹

Several communities in Illinois that have recently requested participation in the 287(g) program have also been accused of disproportionately stopping and searching Latinos at higher rates than whites.⁴⁰ A recent Chicago Reporter study examined the transportation department’s data and found that 44 out of more than 200 communities in the six-county Chicago area recorded a disparity of at least 10 percentage points when the share of Latino drivers stopped is compared to their size in the driving-age population.⁴¹ The Reporter’s analysis also found that

³³ Chishti Written Statement, p. 5. See also GAO 287(g) Report, p. 11.

³⁴ GAO 287(g) Report, at 11-12.

³⁵ UNC/ACLU Report, p.29; see also Barrett, Michael, *Officers Decide When to Arrest, But For Immigrant Community, Decision Can Lead to Deportation*, Gaston Gazette (July 1, 2008), available at http://www.gastongazette.com/news/cloninger_22388_article.html/charges_arrested.html.

³⁶ Lindsay Haddix, *Immigration and Crime in North Carolina: Beyond the Rhetoric*, Department of City and Regional Planning, UNC Chapel Hill (2008).

³⁷ See *Lopez v. City of Rogers*, No. 01-5061 (W.D. Ark. filed Mar. 23, 2001); see also MALDEF Letter to Attorney General Michael Mukasey (Apr. 1, 2008), available at <http://www.bibdaily.com/pdfs/Mukasey%20Chertoff%20MALDEF%204-1-08.pdf>.

³⁸ *Id.*

³⁹ MALDEF Letter to Attorney General Michael Mukasey (Apr. 1, 2008), available at <http://www.bibdaily.com/pdfs/Mukasey%20Chertoff%20MALDEF%204-1-08.pdf>.

⁴⁰ Fernando Diaz, *Driving While Latino*, The Chicago Reporter (Mar 2, 2009), available at <http://www.chicagoreporter.com/printi/index.php>.

⁴¹ *Id.*

Latino drivers were asked for permission to search their cars at a higher rate in 25 out of the 44 communities than white counterparts.⁴²

3. Overt Hostility and Racism Against Latinos

This danger of racial profiling is further underscored by overt hostility and racism against Latinos in certain communities. Sheriff Steve Bizzell of Johnston County, North Carolina, a 287(g) applicant, has publicly acknowledged that “his goal is to reduce if not eliminate the immigrant population of Johnston County.”⁴³ He has described “Mexicans” as “trashy” people who “breed[] like rabbits” and “rape, rob and murder American citizens.”⁴⁴ In Alamance County, North Carolina, a 287(g) participant, Sheriff Terry Johnson has expressed similar views, assuming that all undocumented immigrants are Mexican and stating that “[Mexicans’] values are a lot different – their morals – than what we have here. In Mexico, there’s nothing wrong with having sex with a 12-, 13-year-old girl . . . They do a lot of drinking down in Mexico.”⁴⁵

4. Civil Rights Lawsuits Challenging Racial Profiling in Immigration Enforcement

Litigation brought by the ACLU and other groups, including the Mexican American Legal Defense and Educational Fund (MALDEF), confirms that racial profiling resulting from local enforcement of immigration laws is a serious problem. It is a problem that affects Latinos in both areas with emerging Latino populations⁴⁶ and areas with longstanding Latino communities.

- *Latino U.S. citizens sue Maricopa County for Racial Profiling.* Last year, several Latino U.S. citizens filed a class-action lawsuit against the Maricopa County Sheriff’s Office (MCSO), Sheriff Joe Arpaio and Maricopa County in Arizona for racial profiling against Latino drivers for the purpose of selectively enforcing the immigration laws.⁴⁷ Two of the plaintiffs, David and Jessica Rodriguez, were stopped by a Maricopa County deputy and given a traffic citation for failing to follow a road sign. The Rodriguezes, however, were the only persons to receive a citation, even though deputies pulled over several other vehicles and gave oral warnings to the drivers – all of whom were white. In addition, the deputy demanded to see Mr. Rodriguez’s Social Security card, which has no bearing on his driving, but did not request Social Security information of the other drivers.

⁴² Id.

⁴³ UNC/ACLU-NC Report, p.30.

⁴⁴ Kristin Collins, *Tolerance Wears Thin*, News & Observer (Sep. 4, 2008), available at <http://www.newsobserver.com/news/immigration/story/1209646.html>.

⁴⁵ Kristin Collins, *Sheriffs Help Feds Deport Illegal Aliens*, News & Observer (Apr. 22, 2007), available at <http://www.newsobserver.com/102/story/566759.html>.

⁴⁶ See generally Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 17 (2005).

⁴⁷ The ACLU, MALDEF and Steptoe & Johnson LLP represent the Plaintiffs in the lawsuit. See *Ortega-Melendres v. Arpaio*, No. 07-02513 (D. Az. Amended Complaint filed July 16, 2008), available at <http://www.aclu.org/immigrants/gen/359981g120080716.html>.

Two other plaintiffs in the same lawsuit, siblings Velia Meraz and Manuel Nieto, were subjected to harassment and Mr. Nieto to assault by local sheriff's deputies for no justifiable reason. The siblings were harassed by sheriff's deputies as they pulled into a gas station while singing along to Spanish music with their windows down. As the siblings pulled out of the gas station, they noticed a motorcycle officer and three other Sheriff's vehicles behind them. The motorcycle officer told Mr. Nieto to pull over and get out of the car. Mr. Nieto quickly dialed 9-1-1 and reported that he was being harassed by Sheriff's officers for no apparent reason. Mr. Nieto's family business was no more than 50 yards away, so he pulled into the parking lot there. The four police vehicles descended on them, blocking off the street and their business. The officers jumped out of their vehicles and raised their weapons. One of the officers grabbed Mr. Nieto and pulled him out of the car. He was pressed face first against his car. Mr. Nieto's father ran out of the shop, told the deputies that he owned the shop, that Mr. Nieto and Ms. Meraz were his children and that they were U.S. citizens. The deputies then uncuffed Mr. Nieto and ran his identification through their computer system. The deputies did not give him any citation. Mr. Nieto asked why the officers had subjected him and his sister to such treatment. He was not given any explanation or apology.⁴⁸

- *Latinos Sue Sonoma County and ICE for Racial Profiling and Unlawful Detention.*⁴⁹ Latino drivers in Sonoma County have been unlawfully stopped, searched and interrogated as to their immigration status for no justifiable reason. One of the plaintiffs in the lawsuit, 23-year-old Christyan Sonato-Vega, and his fiancée were stopped after they had parked outside a bakery. Two deputy sheriffs approached them, saying the car had a crack in the windshield, and proceeded to question Sonato-Vega about his immigration status. The deputies searched him, without adequate justification, before allowing him to leave. About a week later, a deputy sheriff and ICE officer confronted Sonato-Vega at his job and arrested him on the sole basis of suspected immigration status. He was held in Sonoma County jail for several days without any criminal charges

⁴⁸ The Maricopa County and Sheriff's Office's pattern and practice of racial profiling is evidenced by numerous statements of Sheriff Arpaio. For example, he has claimed that physical appearance alone is sufficient to question an individual regarding her immigration status. The federal district court recently denied the County's Motion to Dismiss the lawsuit, finding that Plaintiffs had sufficiently alleged claims upon which relief could be sought and recognizing that a Latino appearance is of "little or no use" in determining which individuals should be stopped by law enforcement seeking "illegal aliens," and that reasonable suspicion of a traffic violation does not justify questioning of drivers or passengers about immigration status. See *Ortega-Melendres v. Arpaio*, No. 07-02513 (D. Az. Feb. 10, 2009 Order Dismissing Defendants' Motion to Dismiss), available at <http://www.aclu.org/immigrants/gen/387091gl20090210.html>. In addition, the U.S. Department of Justice announced on March 10, 2009, that it would conduct an official investigation of the MCSO, focusing on "alleged patterns and practices of discriminatory police practices and unconstitutional searches and seizures conducted by the MCSO." U.S. DOJ Letter ordering investigation, available at <http://ndlon.org/images/documents/usdojlettertoarpaio.pdf>. Yet ICE has remained deafeningly silent on this issue.

⁴⁹ The ACLU of Northern California represents the plaintiffs in the lawsuit against Sonoma County and ICE. See *Committee for Immigrants Rights of Sonoma County v. Sonoma Co.* (N.D. Cal. Complaint filed Sept. 5, 2008), available at http://www.aclunc.org/docs/news_room/complaint_for_declaratory_injunctive_relief_and_damages.pdf.

against him and without notice of his right to a hearing, to legal representation, or to be considered for release on bond.

- *Latino Families Sue Southern New Mexico Otero County Sheriff's Office for Racial Profiling.*⁵⁰ The lawsuit charged sheriff's deputies with raiding the homes of Latino residents without search warrants, interrogating families without evidence of criminal activity, and targeting households on the basis of race and ethnicity. In one case, sheriff's deputies ousted a family from its home by banging loudly on the home's walls in the pre-dawn hours. Without a warrant, one deputy attempted to enter through an open bedroom window where the mother had been asleep, while another shouted from the front door. The case settled after the Sheriff's Department agreed to revise Operational Procedures to ensure that the rights of all Latinos living in the County would be protected and that they would not become the targets of immigration-related investigations and detentions without justification.⁵¹ The County also agreed to pay the families monetary damages.
- *Latino U.S. Citizen Unlawfully Deported to Mexico Sues Los Angeles County and ICE.* In the notorious case of Pedro Guzman, a Latino U.S. citizen born in California, Mr. Guzman was deported to Mexico because an employee of the Los Angeles County Sheriff's Office, despite documentation that Mr. Guzman was a US citizen, insisted that Mr. Guzman was a Mexican national. This story received broad national press attention, and Mr. Guzman's lawyers previously testified before Congress.⁵² Mr. Guzman, cognitively impaired and living with his mother prior to being deported, ended up being dumped in Mexico—a country where he had never lived—forced to eat out of trash cans and bathe in rivers for several months. His mother, also a U.S. citizen, took leave from her job to travel to Mexico to search for her son in jails and morgues. After he was located and allowed to reenter the U.S., Mr. Guzman was so traumatized that he could not speak for some time. The illegal deportation of Mr. Guzman occurred pursuant to a 287(g) MOA between Los Angeles County and ICE. The ACLU of Southern California and law firm Morrison & Foerster LLP filed a civil suit last year against ICE on behalf of Mr. Guzman, alleging violation of his constitutional rights.⁵³

⁵⁰ The ACLU of New Mexico and Mexican American Legal Defense and Education Fund filed the lawsuit on behalf of five Latino families. See *Daniel T. v. Board of Co. Commissioners for the County of Otero* (D. NM Complaint filed Oct. 17, 2007), available at http://www.aclu-nm.org/News_Events/news_10_17_07.html.

⁵¹ Press Release, MALDEF, *ACLU and Otero County Sheriff's Department Resolve Civil Rights Suit* (Apr. 9, 2008), available at <http://www.aclu.org/immigrants/discrim/35336prs20080409.html>.

⁵² See Paloma Esquivel, *Suit Filed Over Disabled U.S. Citizen's Deportation Ordeal*, Los Angeles Times (Feb. 28, 2008), available at <http://articles.latimes.com/2008/feb/28/local/me-guzman28>; Testimony of James Brosnahan Before House Judiciary Committee For a Hearing on Problems with ICE Interrogation, Detention, and Removal Procedures (Feb. 13, 2008), available at <http://fdsys.gpo.gov/fdsys/pkg/CHRG-110hhr11040742/pdf/CHRG-110hhr11040742.pdf>

⁵³ *Guzman v. Chertoff*, No. CV08-01327 (C.D. Cal. Complaint filed Feb. 2008).

5. Community Trust Broken As Result of Racial Profiling

In addition to being illegal and contrary to American values and human rights standards, racial profiling undermines the trust between the police and the communities they serve. Racial profiling sends the message that some citizens do not deserve equal protection under the law and creates fear in communities, rather than trust. Latino U.S. citizen children with parents who are either immigrants or citizens may fear coming in contact with police or any public officials, including school officials for fear that they or their parents or family members will be targeted by local enforcement because of their actual or perceived immigration status.⁵⁴ Thus, racial profiling deepens racial rifts, fueling the belief by people of color that law enforcement policies are unfair and justice is not blind. Respect and trust between law enforcement and communities of color are essential to successful police work.⁵⁵ It is for this reason that police organizations such as the International Association of Chiefs of Police have adopted resolutions condemning the practice of racial profiling.⁵⁶

Indeed, without this necessary trust, local immigration enforcement also gives rise to abusive police practices against Latinos. Among recent examples of ineffective community policing and impact on children are the following:

- *In Florida, Police Ignore Domestic Violence Victim and Arrest Sister Instead.*⁵⁷ In response to a 9-1-1 call placed as a result of a domestic assault, Tavares Police completely ignored the domestic violence call to which they were responding and instead immediately asked everyone inside the home for identification to prove their citizenship. The domestic violence victim had bruises on her neck and made several pleas to press charges against her boyfriend. But the Tavares Police officers, which are not authorized to enforce immigration law, refused to remove the assailant from the home and did not follow the procedures required by Florida law for assisting victims of domestic violence. Rather, they arrested the victim's sister, Rita Cote, a twenty-three-year-old mother of three, without charge, unjustly taking her away from her U.S. citizen husband and children over an outstanding deportation order. Local authorities then detained Mrs. Cote at Lake County Detention Center without charge and without review of her detention by a judicial officer for one week until ICE assumed custody.

⁵⁴ See generally Sarah Auerbach, *English Language Learners Feel Effects of Battle Over Illegal Immigration*, The ELL Outlook (Nov/Dec 2007), available at http://www.coursecrafters.com/ELL-Outlook/2007/nov_dec/ELLOutlookITIArticle1.htm (describing the effect of local enforcement efforts on children and how some towns and states often deliberately provoke fear of schools; indeed, William Gheen of Americans for Legal Immigration, a supporter of local enforcement efforts, has said that “provoking fear—and, ultimately, flight from the schools—is an intentional effect of local enforcement”).

⁵⁵ U.S. Department of Justice Community Relations Service, *Principles of Good Policing: Avoiding Violence Between Police and Citizens* (2003), at 43-44, available at <http://www.usdoj.gov/crs/pubs/principlesofgoodpolicingfinal092003.pdf>.

⁵⁶ International Association of Chief of Police, *Resolution Condemning Racial and Ethnic Profiling in Traffic Stops* (1999), available at http://www.theiacp.org/resolution/index.cfm?fa=dis_public_view&resolution_id=41&CFID=21616957&CFTOKEN=41368191.

⁵⁷ The ACLU of Florida represents Ms. Cote in a habeas proceeding. See *Cote v. Lubins*(M.D. Fla Complaint filed Feb. 22, 2009, available at [http:// http://www.acluf1.org/pdfs/cotehabeas.pdf](http://http://www.acluf1.org/pdfs/cotehabeas.pdf).

- *In Tennessee, Sheriff's Deputies Arrest Pregnant Woman and Separate Her from Newborn Child Over Traffic Offense.* Another egregious case of police abuse involves the arrest of Juana Villegas, a young Latina mother, in Nashville. Villegas was pulled over last year by a Berry Hill police officer for “careless driving.” Mrs. Villegas, nine months pregnant, was forced to wait in her hot car with her three children for over an hour. Eventually the children were allowed to leave with a family member without Villegas’s permission, and she was taken into custody. By the time she was released from county jail six days later, she had gone through labor with a sheriff’s officer standing guard in her hospital room, where one of her feet was cuffed to the bed most of the time. County officers barred her from seeing or speaking with her husband. Up until an hour before the actual birth, her foot remained shackled to the hospital bed. As she was taken back to the Davidson County jail, she was told that her baby would be given to her husband. Mrs. Villegas was never allowed to speak to her husband. She later appeared in court on the misdemeanor charge of driving without a license, and was sentenced to time served. She did not see her newborn again until the several days after giving birth, after she was released from the sheriff’s custody on her own recognizance. The “careless driving” charge—the original basis for the stop and arrest—against Villegas was eventually dismissed in municipal court.⁵⁸
- *In North Carolina, Sheriff's Deputies Abandon Children on Highway to Arrest Mother for Traffic Offense.*⁵⁹ Maria Chavira Ventura was pulled over by Alamance County deputies on Interstate 85 near Burlington, North Carolina around 2:00 a.m. one morning as she drove to meet her husband in Baltimore. In the vehicle were her three young children and an adult male who was a fellow church parishioner but unrelated to the family. The deputies arrested Ms. Ventura for driving without a license and false vehicle tags. When they took Ms. Ventura away, the deputies also took the car keys, leaving her three children with the adult male in the car. Shortly thereafter, the adult male left looking for help. Alone, frightened and crying, the children called their father in Baltimore. He immediately drove down to get them, but it took over six hours to drive from Baltimore to Burlington. During those hours the children were stranded in the car on Interstate 85, with one bottle of water to share among them. No deputy or law enforcement official returned to the car to check on them, nor did the deputies take the children’s mobile telephone number to confirm they had returned home safely.

⁵⁸ Mrs. Villegas filed a lawsuit against the County and ICE for violation of her rights. The lawsuit is *Villegas v. Metropolitan Government of Davidson County, et al.*, and was filed in the District Court for the Middle District of Tennessee on March 4, 2009.

⁵⁹ See Kristin Collins, *Mom Arrested, Kids Left on I-85*, *News & Observer* (July 23, 2008), available at http://www.newsobserver.com/news/crime_safety/story/1150866.html.

V. ICE's Lack of Response to and Monitoring of Racial Profiling

Despite the substantial evidence of discrimination against Latino immigrants and citizens by local police enforcement of immigration law, ICE has not responded to or monitored this serious problem. It is critical that ICE collect data on racial profiling and provide strong oversight of local police engaging in immigration enforcement. Without strong oversight, clear policies to ensure that stops and arrests are undertaken in a fair manner and without genuine consequences for individuals and agencies that engage in profiling, profiling is going to arise naturally and, importantly, without actual malice or racial animus on the part of the police. Of course, without oversight, the opportunity for overt discrimination by bad officers is more acute.

ICE claims to have a complaint process for complaints involving 287(g) enforcement. But this process is completely mysterious and inadequate. There is no information available online on how to file a complaint with either ICE or state or local participating agencies. The available fact sheets and other information on ICE's website merely refer to an "agreed upon complaint process governing officer conduct during the life of the MOU."⁶⁰ But unless the state or local agency participating in the 287(g) program makes the MOU publicly available, the public has no clear way of knowing whether and how it can file a complaint, or what the process is for resolving one. It has been the ACLU's experience that some sheriffs' offices or police departments will not release the MOU to the public absent a formal public records request, making it that much more difficult, if not impossible, for the public to report specific incidents of racial profiling.

Even if the complaint procedure were transparent and accessible, which it is not, the absence of formal complaints does not mean the absence of racial profiling. There are many reasons that cause individuals who are victims of racial or ethnic profiling not to come forward to lodge official complaints against local police officers or departments who have discriminated against them. For example, victims of racial profiling may fear retaliation against themselves or their families, whose members may be of mixed immigration status, if they come forward. According to one recent study, "[m]ore than fifteen percent of U.S. families are mixed-status with at least one parent who is a non-citizen and one child who is a citizen."⁶¹ Indeed, one woman living in Johnston County, North Carolina, who is a legal permanent resident and has three citizen children, told reporters that "many Hispanics feel as if law officers are looking for excuses to deport them."⁶² Fear of profiling in the community necessarily chills victims or even witnesses of specific incidents of racial profiling from speaking out and complaining about abuses. Another reason that racial profiling may be underreported is that many arrested individuals are swiftly deported and have little, if any, access to immigration counsel. The GAO recently reported in its 287(g) study, for example, that almost half of those who are detained and placed in removal proceedings under the 287(g) program are summarily removed.⁶³ We have no

⁶⁰ See <http://www.ice.gov/> (last visited Mar. 13, 2009).

⁶¹ Justice Strategies Report, p. 9.

⁶² Kristin Collins, *Tolerance Wears Thin*, News & Observer (Sep. 4, 2008), available at <http://www.newsobserver.com/news/immigration/story/1209646.html>.

⁶³ GAO 287(g) Report, p. 23.

way of knowing how many of these individuals, like U.S. citizen Pedro Guzman, may have been profiled and unlawfully deported.

Moreover, many victims of racial or ethnic profiling may not be aware that they were singled out because of their race or ethnicity, or they may be embarrassed or even ashamed to admit the same because they do not want to feel further humiliated if their complaints go unaddressed or unresolved. As one report, quoting a victim of racial profiling, explained: “It’s almost like somebody pulls your pants down around your ankles. You’re standing there nude, but you’ve got to act like there’s nothing happening.”⁶⁴ Victims of profiling “are left with ‘psychological scar tissue’ which can result in feelings of resentment, frustration, and outrage.”⁶⁵ Rather than rushing to the same agency responsible for their mistreatment to lodge complaints, victims of profiling may “question the very legitimacy” of the criminal justice system and instead go out of their way to avoid it.⁶⁶ Victims of profiling also may believe that complaining will be futile and unlikely to result in an effective remedy.

VI. ACLU Recommendations to Stop Race-Based Immigration Enforcement

1. DHS should suspend the 287(g) program pending a comprehensive, detailed review of the 287(g) program. Review of the program shall include field hearings in those jurisdictions where 287(g) MOAs are in place. The 287(g) program review should be undertaken by independent experts charged with determining whether and to what extent these programs:

- Increase racial or ethnic profiling
- Enhance public safety
- Undermine community policing efforts
- Result in the arrest, detention, or deportation of U.S. citizens and legal permanent residents
- Reduce individuals’ likelihood of reporting crimes or serving as witnesses
- Reduce access to education, health, fire, and other services by immigrants and members of their families and communities
- Exceed the limitations established in the MOU/MOA
- Are sufficiently supervised by ICE personnel
- Collect data necessary to enable proper oversight
- Are subject to sufficient community, municipal, state and federal oversight
- Result in costs to the state/local participants
- Are cost-effective from the federal government’s perspective
- Undermine federal prosecutorial discretion or the ability of DHS to effectively set priorities in immigration enforcement

⁶⁴ Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 17 (2005).

⁶⁵ Id. (quoting David Harris) (citations omitted).

⁶⁶ Id. at 21 (noting that “legal and illegal immigrants may refrain from interacting with police since they fear being detained, interrogated or deported [and g]iven that these individuals generally live in ‘tightly knit communities,’ news of race-conscious police enforcement may spread fast and help foster a culture of fear and cynicism toward officers”).

2. ICE should require that all law enforcement agencies (“LEAs”) with 287(g) MOAs or MOUs or other agreements with ICE collect data on all contacts with the public. The data should include the following:

- Date, time and location of the stop or contact
- Length of the stop
- Make and model of the vehicle and whether the motorist was local or from out-of-state
- Race and ethnicity of the motorist
- Reason for the stop
- Result of the stop – i.e., whether a ticket was issued or an arrest was made, or whether the driver was let go without a warning
- Whether a search was conducted
- Type of search – i.e., probable cause, consent, or inventory search after an arrest was made
- What, if anything, was found in the course of the search
- Officer badge number or individual identifier
- Passenger activity, if any

3. DHS should require all LEAs with MOAs or MOUs to create transparent complaint procedures that are communicated clearly to the public. The LEAs should print and disseminate brochures describing the complaint procedures that are handed out by law enforcement officers upon every contact with the public. ICE should institute reporting requirements by all LEAs with MOAs or MOUs to ICE, as well as regular review of all reported activities. ICE should also require anti-profiling training by all LEAs entering into 287(g) MOAs or MOUs or other cooperation agreements or relationships with ICE.

4. The DHS Office of Policy should issue guidance to all LEAs explicitly clarifying that their authority to engage in immigration enforcement is limited to narrow circumstances (i.e., where there is a *criminal* immigration violation and any state-law limitations on authority are satisfied) and that any decision to assist DHS or participate in immigration enforcement must be voluntary and must comport with state and/or local laws and policies.

5. DHS should require and fund meaningful training on the complexity of immigration laws, limitations of state/local authority, ICE enforcement priorities, and problems with profiling, as a precondition to any officer’s participation in 287(g) or any other program envisioning state and local participation in immigration enforcement.

6. DHS should stop entering civil immigration violations including records relating to so-called “absconders” and “NSEERS violators” into the NCIC database and remove those records that have previously been entered. The FBI should mandate that all NCIC entries comply with the accuracy standards of the Privacy Act.

7. Congress should pass the End Racial Profiling Act without exemptions for immigration enforcement.

VII. Conclusion

The enforcement of immigration laws by state and local law enforcement agencies, pursuant to the 287(g) program or other programs, raises serious concerns about racial and ethnic profiling against Latinos. The racial profiling of immigrant communities is not only illegal and ineffective, but also anathema to closely held American values of fairness and equality. Congress should act to rein in counter-productive and unlawful practices and suspend the 287(g) program.