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Enforcement of Federal Immigration Laws”

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I. Introduction

The University of North Carolina School of Law's Immigration/Human Rights Policy Clinic and the ACLU of North Carolina Legal Foundation recently released a policy review entitled *The Policies and Politics of Local Immigration Enforcement Laws, §287(g) Program in North Carolina* in order to raise public concern about a recent and growing phenomenon particularly in the State of North Carolina: local enforcement of immigration laws under the Immigration and Nationality Act § 287(g).¹ This report raises substantive issues about the changing demographics in North Carolina, failed immigration reform at the national level, and the way in which our state and localities have responded. More specifically, the policy brief has focused on the implementation of the § 287(g) program in accordance with the Immigration and Nationality Act, and the impact on our communities when local law enforcement agencies undertake immigration enforcement duties. Our report made a number of findings about the detrimental impact of 287(g). Such effects include:

- The marginalization of an already vulnerable population, as 287(g) encourages, or at the very least tolerates, racial profiling and baseless stereotyping, resulting in the harassment of citizens and isolation of the Hispanic community.
- A fear of law enforcement that causes immigrant communities to refrain from reporting crimes, thereby compromising public safety for immigrants and citizens alike.
- Economic devastation for already struggling municipalities, as immigrants are forced

¹ Co authors of the report are Katherine Bandy, Catherine Currie, Evelyn Griggs, Jill Hopman, Nicole Jones, Rashmi Kumar, Marty Rosenbluth, Christina Simpson (UNC law students and law graduates), and Rebecca Headen and Katherine Lewis Parker of the ACLU of North Carolina Legal Foundation, available at <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf>

to flee communities, causing a loss of profits for local businesses and a decrease in tax revenues.

- Violations of basic American liberties and legal protections that threaten to diminish the civil rights of citizens and ease the way for future encroachments into basic fundamental freedoms.

The current implementation processes of 287(g) also present a number of legal issues which implicate many individual rights and threaten to compromise the rights of the community as a whole.

II. 287(g) in North Carolina in Context : Rapidly Changing Demographics

Implementation of 287(g) in North Carolina must be considered in the context of the state's changing demographics. North Carolina has had one of the fastest growing Latino populations. Response to the changing population has varied from constructive adaptation and supportive policies to nativist and racist reactions that deny and deprive Latino residents of their human and legal rights in ways that can be measured both formally and informally. A Carolina Poll, conducted by the University of North Carolina at Chapel Hill School of Journalism, of long-time residents uncovered anxieties and distrust of Latino newcomers and public discomfort with changing demographics whether newcomers are documented or undocumented.²

In some places in North Carolina, local elected officials, including those who have signed or supported 287(g) agreements, have contributed to nativist sentiment and have publicly expressed views that have denigrated immigrants regardless of their status based on racist

² See James H. Johnson, Jr. et al., A Profile of Hispanic Newcomers to North Carolina, Popular Gov't, Fall 1999. See Letter to the Editor, Just Too Many Folks, News & Observer (Raleigh, N.C.), Jan. 24, 2000, at 10A; Patsy McCormick, Must We Accept Excessive Immigration?, News & Observer (Raleigh, N.C.), Feb. 26, 2000, at 19A; Ron Woodard, Letter to the Editor, Uphold Immigration Law, News & Observer (Raleigh, N.C.), Apr. 23, 2000, at 10A.

stereotypes and baseless assumptions. Through the 1990s, immigrant labor was welcomed in North Carolina; efforts were made to increase their numbers through the North Carolina Growers Association (farm workers) and through partnerships between textile employers and the local employment security commission.³ Latinos who settled in Alamance County, NC, which has had one of the fastest growing Latino populations, for example, played a critical role in agricultural work that helped to slow the decline of small farms and to sustain the textile and furniture industry.⁴

However, as Alamance county's demographic landscape changed, and with the increase of Latinos in all facets of community, tensions arose. In an interview with the Raleigh News & Observer, Alamance County Sheriff Terry Johnson complained that more Latino criminals were arriving to the area.⁵ In an example where a local official implementing federal law reveals ignorance and hostility, Johnson made brazenly racist claims about Mexicans, stating, "[t]heir values are a lot different -- their morals -- than what we have here," Johnson said. '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.'"⁶ He linked the Latino presence with growing crime rates.⁷

A study of North Carolina court statistics, however, contradicts Johnson's claims.⁸

³ Hannah Gill, *North Carolina and the Latino Experience*, (forthcoming, UNC Press).

⁴ *Id.*

⁵ Kristen Collins, *Sheriffs Help Feds Deport Illegal Aliens*, News & Observer, (Raleigh, NC) Apr. 22, 2007.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* (noting that according to the Administrative Office of the Courts records, between

Moreover, according to both national and state studies, the incidence of criminal activity by foreign-born residents is actually lower than that of natural-born citizens.⁹ In fact, incarceration rates among young men have been lowest for immigrants over the past three decades.¹⁰ As the undocumented immigrant population has doubled its size since 1994, the violent crime rate in the United States has declined 34.2 percent and property crime has fallen 26.4 percent.”¹¹ Similarly, a comprehensive study of population growth and crime between 1997 and 2006 in all counties in North Carolina demonstrates that the counties with the highest Hispanic population growth rate have the lowest violent and property crime rates.¹² The same study showed a positive correlation between *total population* growth and increased crime rates. In other words, counties with high growth rates find increased crime rates, but counties with high growth rates of *Hispanic populations*, find decreased or steady crime rates.¹³

Of course, not all public officials have engaged in these types of attacks on immigrants.

Mike Williams, the Chief of Police for the city of Burlington in Alamance County has

2002 and 2006, Hispanics accounted for 12 percent of Alamance County's criminal cases. In 2005, they made up 10 percent of the county's population).

⁹ Rubén G. Rumbaut and Walter A. Ewing. *The Myth of Immigrant Criminality and the Paradox of Assimilation:: Incarceration Rates among Native and Foreign-Born Men*," The Immigration Policy Center (Spring 2007) available at http://www.aifl.org/ipc/special_report/sr_feb07_resources.shtml. Lindsay Haddix, *Immigration and Crime in North Carolina: Beyond the Rhetoric*, Dept. of City and Reg. Planning, UNC Chapel Hill, Master's Project, Spring 2008.

¹⁰ Haddix, *supra* note 9 at 19.

¹¹ Rumbaut and Ewing, *supra* note 9.

¹² Haddix, *supra* note 9 at 11.

¹³ *Id.*

emphasized that the “vast majority [of immigrants] coming are looking for a better life.”¹⁴

However, notwithstanding the studies that dispel myths about crime rates and immigration, responding to faulty public opinions and misperception is often politically advantageous for the agencies that take part in §287(g) programs.

III. 287(g) as an Instrument of Hostile Responses to Newcomers

The purposes for which the 287(g) program was enacted have been subject to debate. According to ICE, the program was originally intended to target and remove undocumented immigrants convicted of “violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling and money laundering.”¹⁵ In September 2008, the report accompanying the Department of Homeland Security Appropriations Bill, 2009, while allocating funds generally to local law enforcement of immigration laws, expressed its intention that ICE prioritize the removal of criminal vs. non criminal aliens.¹⁶ Also at the national level, Senator Elizabeth Dole’s campaign advertisement in the spring of 2008 promoted 287(g) as a program designed to deport “the ones who are tough, hardened criminals.”¹⁷ The recently released U.S. Government Accountability Report on 287(g) found that although local 287(g) programs

¹⁴ Gill, *supra* note 3.

¹⁵ United States Immigration and Customs Enforcement, Partners, available at http://www.ice.gov/partners/287g/Section287_g.htm

¹⁶ **Error! Main Document Only.** 110TH Congress, Report, House of Representatives, 2d Session, 110-862, Department of Homeland Security Appropriations Bill, 2009, September 18, 2008, <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr862&dbname=110&>

¹⁷ Rob Christensen, *Elizabeth Dole’s Ad*, News & Observer, May 29, 2008, available at <http://www.newsobserver.com/politics/story/1088652.html>.

“are not prohibited from seeking the assistance of ICE for aliens arrested for minor offenses, detention space is routinely very limited and it is important for ICE to use these and other 287(g) resources in a manner that will most effectively achieve the objective of the program—to process for removal those aliens who pose the greatest threat to public safety.”¹⁸

Furthermore, neither ICE nor local law enforcement agencies have emphasized the need for assistance in enforcing civil immigration law; instead the agreements are promoted as an important way to guarantee that “criminal aliens incarcerated within federal, State and local facilities are not released into the community upon completion of their sentences.”¹⁹

The rhetoric used to convince communities of the necessity of the program often offers assurances that the program will target dangerous criminals. In entering into a Memorandum of Agreement (MOA), a contracting municipality or sheriff’s department invariably issues a statement asserting that the 287(g) program will only apply to the violent repeat offender.²⁰ Prior to finalizing an agreement with ICE, local law enforcement officials routinely assert that the MOA will not affect general relations with the Hispanic and immigrant community, assuring that nothing would happen unless these individuals were arrested for the commission of a crime.²¹ For example, one district attorney in North Carolina stated: “It’s not a broad sweeping net that’s going to cast about to get everybody who may have a [sic] questionable status

¹⁸ United States Government Accountability Office, *Immigration Enforcement: Better Controls Needed Over Program Authorizing State and Local Enforcement of Federal Immigration Laws*, at 12, Jan. 2009.

¹⁹ **Error! Main Document Only.** United States Immigration and Customs Enforcement, Partners, available at http://www.ice.gov/partners/287g/Section287_g.htm.

²⁰ Kareem Fahim, *Should Immigration Be a Police Issue?*, N.Y. Times, Apr. 29, 2007.

²¹ *Id.*

immigration wise. It's trying to get to the problem of illegal immigrants who commit crimes."²²

Notwithstanding the stated purposes of the programs, data reveals that the majority of undocumented immigrants caught in the snare of 287(g) in North Carolina have been charged with traffic infractions and low level misdemeanors.²³ For example, during the month of May 2008, eighty-three percent of the immigrants arrested by Gaston County ICE authorized officers pursuant to the 287(g) program were charged with traffic violations.²⁴ In Alamance County, approximately seventy percent of immigrants detained through 287(g) were arrested on routine traffic offenses; another sixteen percent for driving while impaired charges, and only fifteen percent for felony charges.²⁵ Furthermore, local law enforcement have set up roadblocks for the purpose of checking licenses outside of Latino markets on the weekends and on Sundays, they

²² John Harbin, *Henderson County Gets OK for Illegal Immigration Program*, BlueRidgeNow.com Times-News Online, Feb. 21, 2008, available at <http://www.blueridgenow.com/article/20080221/NEWS/802210334>.

²³ Matt Tomsic, *Many Latinos Deported, Not For Felonies But for Minor Offenses*, The Independent, Dec. 24, 2008 (noting that traffic offenses, not including DWIs, make up the largest percentage of initial charges against Latinos in Mecklenburg, Gaston, and Alamance counties), available at <http://www.indyweek.com/gyrobase/Content?oid=oid%3A272683>. Mai Nguyen and Hannah Gill, *Preliminary Data Analysis: NC Court and U.S. Census Bureau Statistics for No Operators License Charges Against Latinos/Hispanics in Mecklenburg and Alamance County* (demonstrated a significantly disparate increase in the number of Hispanic drivers cited from July 2005 and December 2007) (on file with the ACLU of North Carolina).

²⁴ American Civil Liberties Union of North Carolina, Letter to the Members of the Joint Legislative Crime Control and Juvenile Justice Oversight Committee, Mar. 11, 2008.

²⁵ Barry Smith, *Most Immigrants Detainees Brought in on Minor Traffic Violations*, Burlington Times, July 5, 2008, available at http://www.thetimesnews.com/articles/people_15271___article.html/charges_alamance.html.

have stationed themselves at roads that provide access to Latino churches.²⁶ Because these roadblock checkpoints are excluded from racial profiling data collection, it is difficult to know the statistics of individuals arrested pursuant to these tactics; however, their location is indicative of an effort to target Latinos as they go about their family shopping and worship.

Independently of the purpose with which 287(g) was enacted at the federal level, programs are in fact implemented within and mediated by local cultural traditions and social practices. It could hardly be otherwise. Communities are the sum total of their histories and traditions. These form the context in which communities arrive to their collective perception of reality. Local mediation of federal programs such as 287(g) is neither inherently good nor bad, but too often in the case of North Carolina, local histories and cultural attitudes toward newcomers have resulted in discriminatory applications of the program. As it happens, some communities that are participating in or supporting the 287(g) program also have histories of racial violence and traditions of white supremacy, which often contribute to an environment hostile to the local Latino community. In the context of local traditions, 287(g) thus often serves to enforce local practices of racism and racial bigotry.

²⁶ Gill, *supra* note 3. Elizabeth DeOrnellas, *Immigrants Feel the 'Shadow of Fear'*, Daily Tar Heel, July 2, 2008, <http://www.dailytarheel.com/2.3568/immigrants-feel-the-shadow-of-fear-1.160005>.

It is, unfortunately, not difficult to identify such practices and histories in certain localities in North Carolina. In her forthcoming book, *North Carolina and the Latino Immigrant Experience*, Hannah Gill, a social anthropologist and resident of Alamance County, has closely examined the reactions to immigrant newcomers in North Carolina. In a chapter on Alamance County, she notes that in 1997, in reaction to the changing demographics, Alamance County Commissioners approved a resolution calling for a moratorium on immigration to the county.²⁷ She describes the anti-immigrant rhetoric used in electoral politics and describes one politician's campaign ads that refers to immigrants as aliens and invaders who have taken over state agencies.²⁸ One Alamance county court interpreter had to resign after allegations that he posted racist and anti-immigrant statements on the website of a white supremacists magazine.²⁹

African-American voter suppression efforts in North Carolina have both a long history that survives in current practices.³⁰ As one study of voting rights in North Carolina during the period of 1982 through 2006 reported, "African American voters are no longer the only minority group to be targeted for intimidation campaigns" as new scare tactics have been directed at Latinos.³¹ Before the 2004 presidential election, Sheriff Johnson threatened to go door-to-door to

²⁷ Gill, *supra* note 3.

²⁸ *Id.* (describing a campaign ad used by Vernon Robinson from Winston-Salem running for North Carolina's 5th Congressional district in 2004).

²⁹ *Id.* (noting the posting on the *American Renaissance*).

³⁰ Anita S. Earls, Emily Wynes, LeeAnne Quattrucci, 17 S. Cal. Rev. L. & Soc. Just. 577, 579, 589 (2008).

³¹ *Id.* at 590.

investigate registered voters with Hispanic last names.³² Andrea Bazan-Mason, then the executive director of a North Carolina Latino Advocacy group, El Pueblo noted that efforts to scare Latinos from casting their votes was not new and added, “[i]t’s a message that some people have told me to my face. It’s OK if you’re here and work in our restaurants, but just don’t get involved in politics.”³³

Recently, hate groups were invited to join in the battles over whether counties should sign on to 287(g). On January 29, 2009, after commissioners of Chatham County, NC unanimously approved a resolution stating their opposition to participation in 287(g), a group that calls itself

NC FIRE that, according to its website, seeks to “‘educate American citizens who turn a blind eye to the many costly and destructive aspects of illegal immigration,’ including the ‘8 Ways Illegals Make You Sick,’” distributed a flyer urging recipients to “‘Fight Back Against Chatham County’ and urged members of such groups as the N.C. Minuteman Patriots and the Minuteman Civil Defense Corps to attend.”³⁴ This was not the first time hate groups have been implicated in North Carolina’s response to increasing rates of Latino immigrants. In 2000, white supremacist David Duke spoke at a Ku Klux Klan rally in Siler City advertised as a protest against

³² Collins, *supra* note 5.

³³ Jon Elliston, *El Pueblo Votes!* The Independent Weekly, Nov. 24, 2004, available at <http://www.indyweek.com/gyrobase/Content?oid=oid%3A23148>.

³⁴ Taylor Sisk, *Conservative Group, ICE Supporters Clash in Chatham*, The Carrboro Citizen, Mar. 5, 2009, available at <http://www.carrborocitizen.com/main/2009/03/05/conservative-group-ice-supporters-clash-in-chatham/#more-5083>.

Hispanics.³⁵ News reports have documented an alarming rise in the Ku Klux Klan's once-diminishing numbers as fears over illegal immigration are exploited. The report noted that North Carolina has grown from twenty-seven to thirty-five extremist groups, including eight Klan chapters, in the past five years, with illegal immigration at the top of the list of concerns.³⁶

The North Carolina Sheriffs Association (NCSA) has been designated as the agency responsible for administering an allocation of state funds to support the 287(g) programs throughout the state. A resolution adopted by the NCSA Executive Committee and sent to the North Carolina House of Representatives demonstrates cause for concern. It perpetuates many myths and misinformation about immigrant populations; indeed it is a document which a proper immigration enforcement training program should discourage.³⁷ The resolution claims that there is "reliable documented evidence" that terrorist groups are entering the US through the southern border, that the influx of "illegal aliens" drains the resources of the State, and that "illegal aliens" do not pay taxes. All these claims are disputable at best and have largely been proven to be inaccurate. The resolution also refers to undocumented immigrants as "illegal alien invaders."³⁸ And perhaps most notably, the resolution advocates not only for the reduction of illegal

³⁵ Siler City Residents Pray For Peace In Anti-Immigration Rally, Feb. 17, 2000. www.wral.com/news/local/story/139624/

³⁶ Franco Ordoñez, *More Joining Hate Groups*, News and Observer, Feb. 12, 2007 at 4B. (quoting the imperial wizard of the Mount Holly-based chapter of the Klan in Gaston County who says he has not seen membership grow so fast since the 1960s, when he joined).

³⁷ January 2007 Resolution by the North Carolina Sheriffs' Association regarding Immigration.

³⁸ *Id.* at #8.

immigration but also for the reduction of legal immigration as well.³⁹ Since the NCSA functions as an advisor to sheriffs in counties considering implementation of § 287(g) MOAs, the content of the resolution indicates the need for additional or other oversight as to the use of funds and implementation of the program.

³⁹ *Id.* at #7.

This is not to suggest that North Carolina's response to immigrants is monolithically racist. In 1998, Governor James B. Hunt, Jr. created the Office of Hispanic/Latino Affairs and the North Carolina Governor's Advisory Council on Hispanic/Latino Affairs to "coordinate and develop state and local programs" and to "bring attention to issues affecting the Hispanic population in North Carolina."⁴⁰ The North Carolina Hispanic Chamber of Commerce was formed in 1996 and has been supporting dues-paying members throughout the state. As part of the Latino Initiative for Public Policy, in 2000, twenty-four state officials and community leaders took a "fact-finding" trip to Mexico to educate themselves on the culture and experiences of Latino newcomers.⁴¹ School districts are experimenting with strategies aimed at teaching Spanish-speaking students. State health care delivery systems have formally recognized the challenges in serving Latino newcomers. The Administrative Office of the Courts has established a program for certification for court interpreters.⁴² Moreover, North Carolina's reaction to increased immigration must be considered through the lens of "institutional strain and fiscal pressures" that result from the particularities and intersectionalities of state, local, and federal laws and policies.⁴³

However, the nativist and racist commentary by law enforcement officials suggests that federal programs cannot simply be passed on to localities without concern for troubling attitudes

⁴⁰ North Carolina Governor's Advisory Council on Hispanic/Latino Affairs, 1st Year Report (1999).

⁴¹ Ned Glascock, *Delegates Get Preview for Mexico Trip*, News & Observer (Raleigh, N.C.), Jan. 11, 2000, at 1B.

⁴² <http://www.nccourts.org/Citizens/CPrograms/Foreign/Default.asp>.

⁴³ See Rick Su, *a Localist Reading of Local Immigration Regulations*, 86 N.C. L. Rev.

that may control the way the program is implemented at the local level. Consider again the comments of Johnson County Sheriff Steve Bizzell, who was president of the NCSA from July 2007 until he was named the association's chairman in July 2008 and described an incident of drunk driving that resulted in the death of a young boy by saying that the child paid the "ultimate price for *another drunk Mexican* [emphasis added]." ⁴⁴ Bizzell further vocalized his hostility toward immigrants. He stated that they are "breeding like rabbits," and that they "rape, rob and murder American citizens." ⁴⁵ He classified "Mexicans" as "trashy" and said that he thinks "all they do is work and make love." Additionally, Bizzell announced his resentment toward civil rights advances that have helped the immigrant population in Johnston County. In the article, he reminisced about the "Johnston County of his youth" when immigrants "were all in a

1619 (2008).

⁴⁴ Sarah Ovaska, *Deportation Fear Fuels Flight*, News & Observer, Jun. 12, 2008, available at http://www.newsobserver.com/news/immigration/story/1105229.html#MI_Comments_Link.

⁴⁵ Kristin Collins, *Tolerance Wears Thin*, News & Observer, Sept. 4, 2008, available at <http://www.newsobserver.com/news/immigration/story/1209646.html>.

group, down a path somewhere in a camp,” even though living that way “was bad for them as human beings.”⁴⁶ Sheriff Bizzell claimed to be fulfilling the requests of Johnston County residents. He maintained that everywhere he goes, “people say, ‘Sheriff, what are we going to do about all these Mexicans?’” He acknowledged that his goal is to reduce if not eliminate the immigrant population of Johnston County. Through 287(g) agreements, deputies and officers across the state, who may be led by men like Sheriff Johnson, or influenced by Sheriff Bizzell who have held a leadership position with the NCSA that has championed the § 287(g) program, have the resources and virtually unfettered authority to act on the discriminatory sentiment that they have espoused. Such a situation cultivates the illegal activity of racial profiling.

IV. Impact of 287(g) on North Carolina Communities

The method of implementation of 287(g) has serious implications for the larger community. Indeed, the 287(g) program must be understood to have a universal impact on the community. It encourages, or at the very least tolerates, racial profiling and baseless stereotyping, resulting in the harassment of local residents and the isolation of an increasingly marginalized community. Racial profiling is not only legally impermissible, but because it is based on stereotypes and wrongful assumptions about the propensity of certain groups to commit crimes, it is also immoral and ineffective.⁴⁷ As our courts and the federal government have noted, assumptions based on race “perpetuate negative racial stereotypes that are harmful to our

⁴⁶ *Id.*

⁴⁷ See Reginald T. Shuford, *Any Way You Slice It: Why Racial Profiling is Wrong*, 18 St. Louis Univ. Public Law Rev. 371, 372 (1999); Guidance Regarding the Use of Race by Law Enforcement Agencies, U.S. Dep’t of Just. Civil Rights Division, June 2003, available at http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm.

rich and diverse democracy, and materially impair our efforts to maintain a fair and just society.”⁴⁸ The societal and human costs as a result of such profiling are enormous.

Hannah Gill's interviews with Latino residents in Alamance County provide a clear picture of the fear they have experienced. She describes one business owner as explaining, “It doesn't matter what you are doing in the car, you could be pulled just because you are *hispano*.”⁴⁹ Immigrant crime victims are fearful of contacting the police, and are thus more vulnerable to criminals who target them. There are few places perceived to be safe; Latino immigrants have been arrested for fishing without a license and while working in a public library after local law enforcement reportedly probed health department records in an effort to find undocumented immigrants.⁵⁰ Little regard has been shown for the protection of children of immigrants; in one now notorious arrest in June, 2008 an Alamance County sheriff stopped a Latina motorist a deputy along I-85 at 2 a.m. for an improper license tag. The driver, who spoke no English and had her three children with her, was taken to jail while the children were left with a male passenger, who was not a relative and later fled. The children were left alone all night alongside I-85.⁵¹ Many families are “mixed status:” some are documented and others are U.S. citizens or permanent residents. All are afraid to drive, afraid to go to church, and fearful of

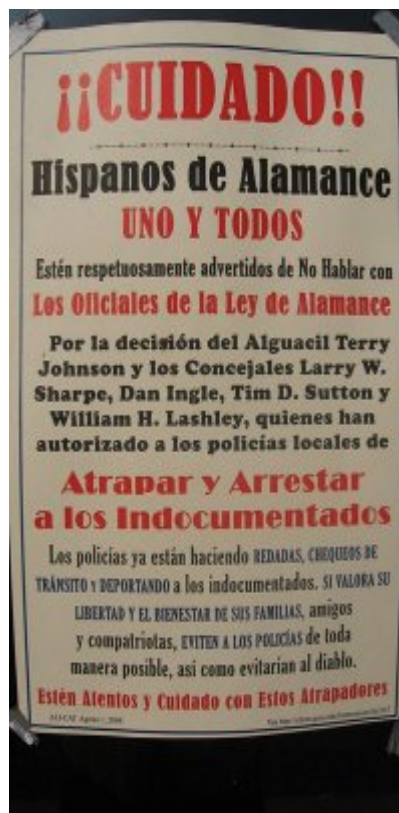
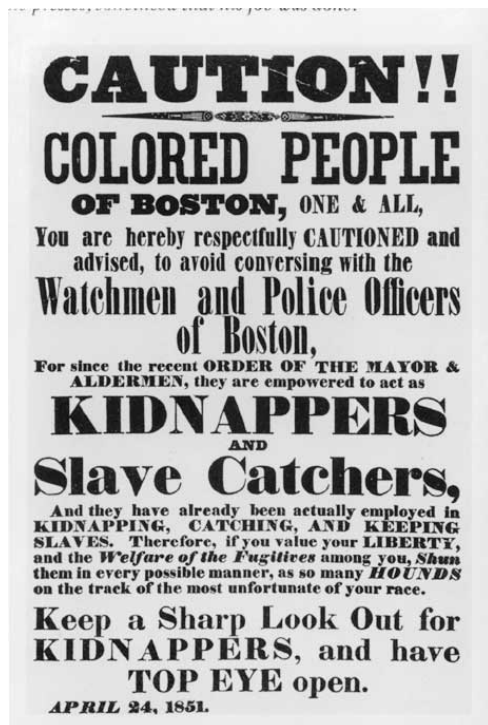
⁴⁸ Guidance Regarding the Use of Race by Law Enforcement Agencies, U.S. Dep't of Just. Civil Rights Division, June 2003, available at http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm, [*hereinafter DOJ Guidelines*]. 66 *Id.* See also *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000).

⁴⁹ Gill, *supra* note 3.

⁵⁰ Lorraine Ahearn, *Hispanics Fear Profiling as ICE Plans Roadblocks*, News-Record.com, Aug. 8, 2008, available at http://www.news-record.com/content/2008/08/07/article/hispanics_fear_profiling_as_ice_plans_roadblocks

taking their children to school, to the doctor, or to grocery shop.⁵² Indeed, health care providers report that Latinos were missing appointments; businesses including the local Wal-Mart in Alamance County that catered to Latinos are on the decline, and community centers where individuals might otherwise receive counseling, advice, and other assistance are quiet.⁵³

Fear can best be demonstrated by a poster that was put up throughout Alamance County:



(English translation: Caution!! Hispanics of Alamance, one and all. You are respectfully advised not to talk to police because of the decision of Sheriff Terry Johnson and Commissioners Larry W. Sharpe, Dan Ingle, Tim D. Sutton, and William Lashley, who have authorized the local police to catch and arrest

⁵¹ *Id.*

⁵² Gill, *supra* note 3.

⁵³ *Id.*

undocumented immigrants. Police are doing raids, traffic checks and are deporting undocumented people. If you value your liberty and well-being of your families, friends, and compatriots, avoid the police in all ways possible as you would avoid the devil. Be watchful and look out for these catchers. Agosto 1, 2008).

The poster was translated from an advertisement in a Boston newspaper in 1851 created by abolitionist Theodore Parker, warning escaped slaves of bounty hunters from the South looking to capture and take them back.

From the book, Hannah Gill, *North Carolina and the Latino Experience*, UNC Press (forthcoming).

Regardless of one's personal stance on this issue, history demonstrates that there is a very thin line dividing anti-immigrant laws from those that diminish the civil rights and due process protections of citizens. Today's anti-immigrant law facilitates tomorrow's encroachments on American liberties. Examples of racial profiling against U.S. citizens and lawful permanent residents who are foreign-appearing or Latino are not hard to come by, although individuals who have experienced such discrimination are nonetheless fearful and reluctant to tell their stories publicly, often for fear of retribution or because they do live in "mixed status" families. The following are examples of 287(g)'s slippery slope and documents the ways in which U.S. citizens have been affected.

1. The Case of a U.S. citizen with a wrongful immigration detainer.⁵⁴

In June, 2008, R.I.K. a U.S. citizen who was born outside of the United States, was transferred to correctional facility for youth in North Carolina after pleading guilty to larceny and fraud. His charges and his initial confinement occurred in a 287(g) county. After arriving at

⁵⁴ These facts were provided in a statement by Marty Rosenbluth, attorney with the Southern Coalition for Social Justice, who represents R.I.K.

the institution, his custody review officers began telling him that he had an immigration detainer on him and that he would be deported immediately at the conclusion of his sentence. His family checked the North Carolina Department of Correction Public Access Information System's website and saw that indeed he had a detainer on him, and further that the "U.S. Immigration" had unspecified federal charges pending against him.

After trying to resolve this issue on their own, in his family contacted the Southern Coalition for Social Justice, (SCSJ) a Durham based non-profit organization. A lawyer working with the group immediately contacted ICE agents to inform them that R.I.K. was a US citizen, and thus the detainer was illegal and invalid. At first, ICE claimed that R.I.K. was not a citizen and that their records showed he was only a lawful permanent resident (LPR) and was therefore deportable. The SCSJ attorney informed ICE that he had a copy of R.I.K.'s passport which was conclusive evidence of his client's U.S. citizenship, and that further, ICE's record were out of date.

ICE then insisted on more proof, suggesting that perhaps the passport was a forgery. Eventually, however, after several phone calls, ICE confirmed that indeed R.I.K. was a U.S. citizen and agreed to have the detainer lifted. However, after further investigation, ICE determined that their agency had not lodged the detainer, but that instead it had been put into the system by local law enforcement. Despite this information, and after numerous phone calls to the institution where his client was held, the SCSJ has been unsuccessful in getting the detainer removed.

In February, 2009 R.I.K. was transferred to another correctional institution, several hours drive from his home. The improperly lodged detainer still appeared on his record, and he was

still being told by his custody review officers at the facility that he would be likely be deported upon finishing his sentence. Further, he was told that because he had a detainer, he could not be transferred to a facility closer to his home because he was a security risk. Although the SCSJ attorney has recently taken to calling three times a week, every Monday, Wednesday and Friday to date the wrongful detainer remains lodged against him. His release date is Apr. 6, 2009.

2. Paul Cuadros, Assistant Professor in the School of Journalism and Mass Communication at UNC, U.S. Citizen.

The following is a column from the Chapel Hill News, dated Feb. 15, 2009 by Paul Cuadros, entitled *Profiling Just Got Easier*.⁵⁵ Cuadros describes his experience with profiling in a county where the issue of whether to sign onto 287(g) is currently the subject of a contentious community dispute.

Two months ago I was on my way to the Sunday soccer pickup game in Pittsboro with my friend Francisco. It was a beautiful, cool, sunny afternoon, and so we wore our sunglasses as I drove to the elementary school where people gather from all over Chatham County to play. As I passed the courthouse circle, I spotted one of Pittsboro's finest in my rear view mirror. Francisco and I both knew instantly what was going to happen. We were two Hispanic men in dark sunglasses on a slow Sunday afternoon. A wave of emotions flowed over me: from anger to frustration to resignation.

The police car followed me for at least a mile and through four turns and finally hit his lights when I pulled into the school for our game. Francisco, who sports a military-style haircut, flashed a smile and shook his head and said, "Driving while brown."

⁵⁵ Paul Cuadros, *Profiling Just Got Easier*, Chapel Hill News, Feb. 15, 2009, <http://www.chapelhillnews.com/front/story/41670.html>

The federal immigration program 287 (g) has been in the news lately in both Orange and Chatham counties. This is the program that trains county sheriff's deputies to check the immigration status of every person taken into custody. Its use has become controversial because some immigrant rights and Latino groups say it leads to racial profiling by those deputies. If you have never been racially profiled, then you don't know how much control it takes to restrain your anger over the violation of your civil liberties.

The program now adds an extra level of suspicion in the already suspicious minds of some law enforcement officers when it comes to Latinos. Now instead of just asking for my license and registration I might have to answer questions about my legal status. If I forget to bring my driver's license, I might be on a bus to a detention center.

How do you prove you are a U.S. citizen in your car? What documents do you bring in your Ford to prove you were born here? Officers see all kinds of fake IDs. How do you convince someone who has just stopped you and questioned you and is suspicious of you?

With the power of 287 (g), deputies may take Latino U.S. citizens into custody under the guise of checking their immigrant status back at the jail. A small infraction that would never result in an arrest, like forgetting your driver's license, can have immense consequences. This is the pernicious thing behind 287 (g) and its little brother, the "Secure Communities" program. Citizenship questions are only asked because of the way you look or the way you sound. My father was a naturalized U.S. citizen but never lost his Spanish accent. It's a free country, but freer for some more than others.

There are many in Orange and Chatham who think that profiling doesn't happen now. They are wrong. I cannot tell how many times over the past several years I have gone through

license checkpoints in Siler City driving a soccer kid home from a game. The checkpoints would be set up right in front of his neighborhood, which is predominantly Latino.

When you're stopped by the police, you go through a mental checklist to find what it is you did wrong to get pulled over. I wasn't driving fast; the courthouse circle prevents that. And I didn't miss any stop signs or lights, again the circle. I hadn't had a ticket in three years, my license was just renewed and my registration, plates and vehicle test were up to date.

After asking for my license and registration and keeping me and Francisco waiting for what seemed an unusually long time to check my information, the young cop walked up and leaned down to tell me why he had stopped me. He said my license plate monthly sticker had faded. The year was fine, new in fact, but the month was hard to see. He just wanted to let me know that. I knew exactly what he wanted me to know.

3. E___, U.S. citizen.⁵⁶

E, trembling and then openly weeping, told of her trauma and fright at her place of employment in Alamance County. She explained that she was a naturalized citizen and had been working for some time in an office near Elon. She described her employer's actions over a course of time that began after 287(g) was entered into and told of how she was being significantly mistreated and discriminated against at work. She explained that when she brought her complaints and concerns to her employer, he told her that she was crazy to think that she would have any recourse and because she was an immigrant, she should stop complaining. He

⁵⁶ The story was told to the author at the conclusion of a presentation at the Conference, "Why We Can't Wait: Reversing the Retreat on Civil Rights" of the National Campaign to Restore Human Rights in Durham, NC on Oct. 19, 2007.

referred to the passage of 287(g) as an indication of her lesser status.⁵⁷

4. S____, U.S. citizen.⁵⁸

S., a Puerto Rican and U.S. citizen, worked for social services in Durham County. She explained that as a result of her work, she knew many of the law enforcement officers and had no difficulty in respect to racial profiling in her county. However, she recounted that on more than a few occasions, she was pulled over while driving to Wake County (a 287(g) county) for no apparent reason. She noted that her car was not a new one, and that although she was pulled over, she never was given a reason why she was pulled over. She expressed great distress and stated that she sure that her being pulled over as a result of her Latina appearance.

5. A____, U.S. citizen.⁵⁹

A, a Puerto Rican U.S. citizen was driving to the flea market in Johnston County (Sheriff Bizzell's county). There were four passengers in the car: her boyfriend, her mother, her sister, her brother-in-law. Local law enforcement pulled her over and told her that he was "just doing a check because there were too many people in the car." He asked for A's license, which she provided, and then asked all of the passengers in the car for their licenses. All obliged. The officer then asked all of the passengers, including A. whether they had any warrants for their arrests. They did not. A's father is a minister. The family was distressed by this incident of

⁵⁷ Hannah Gill tells a similar story of a woman who was an immigrant from El Salvador and who describes how after the implementation of 287(g), working conditions at a textile factory in Burlington worsened. Gill, *supra* note 3.

⁵⁸ The story was told to the author at the conclusion of a presentation at the Conference, "Why We Can't Wait: Reversing the Retreat on Civil Rights" of the National Campaign to Restore Human Rights in Durham, NC on Oct. 19, 2007.

⁵⁹ Facts based on a phone intake by the ACLU-NC.

racial profiling and called the ACLU for that reason.

6. Ricardo Velasquez, U.S. citizen

Ricardo Velasquez is a lawyer in Durham, NC (a 287(g) city) who was stopped by the Durham police on his way home. After handing over his license and registration, he was told to roll down his window further upon which he asked whether he was under arrest or free to go. As an attorney who knew his rights, he opened his window wider at the demand of the officer, and was then put under arrest, accused of being under the influence of alcohol or some other substance. After taking the alcohol breath test, he blew a point zero-zero, indicating that he had nothing in his system. Nonetheless, he was arrested and charged with driving while impaired and resisting an officer. Although the charges were dismissed, Velasquez questions the incident as another incident of racial profiling of Latinos.⁶⁰

V. The Need for Oversight, Accountability, and Compliance with Equal Protection and Civil Rights

Section 287(g) of the Immigration and Nationality Act requires that any officers certified under the program “shall have knowledge of and adhere to Federal law relating to the function.” As such, deputized § 287(g) officers must comply with federal laws, standards, and guidelines when employing their immigration-enforcement functions. At this point, the public has no way of knowing whether the program as implemented and supervised ensures such compliance.⁶¹ Given that local cultural practices and histories mediate the implementation of what remains federal law and standards, greater oversight and accountability is needed.

⁶⁰ Anne Blythe, *Durham Lawyer Fights Charge*, News & Observer, Jun. 19, 2008, <http://www.newsobserver.com/news/story/1113156.html>

⁶¹ See GAO report, *supra* note .

The North Carolina Report on 287(g) made a number of findings with regard to local law enforcement compliance with the MOA.⁶² While the MOA exists as a contract between the federal agency and the local law enforcement agency, the terms and conditions of the contract are often vague and confusing, with both parties often in noncompliance with the contract. Such concerns with regard to the MOA include:

- Complaint mechanisms. The 287(g) programs are required to offer a complaint mechanism for individuals who believe they have been aggrieved in the implementation of the program.

However, because of (1) confusion caused by the complaint mechanism as described in the MOA, (2) the lack of notice and information about the right to file a complaint, (3) insufficient guidelines regarding the complaint forwarding process, (4) conflicts of interest in reviewing a complaint, and (5) unclear complaint resolution procedures, this aspect of the MOA is elusive and ineffective.

- Designation of functions. Nowhere does the Alamance County MOA publicize the policies and procedures that must be followed in immigration enforcement.

- Nomination of personnel. While the MOA requires a background check and evaluation of Alamance County Sheriff's Office law enforcement personnel who may be authorized to participate in the program, there is no indication as to how suitability is to be determined. Lack of transparency in the implementation of the program prevents assessment of suitability determinations.

- Training of personnel. Although it appears that there is a curriculum in place for the training of

⁶² *The Policies and Politics of Local Immigration Enforcement in North Carolina*, <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf>

personnel, the length of the training appears to be too short given the complexities of the subject matter, and content of the curriculum is unclear. Lack of transparency in the implementation of the program prevents assessment of the training.

- **Certification and authorization.** While authorization of the MOA by ICE may be revoked at any time, the language indicating what merits such a revocation is unclear making oversight of and remedy for the program uncertain.
- **ICE supervision.** Although the MOA requires that there be ICE supervision before any local officer can perform an immigration function, there is no indication as to the nature or degree of the necessary supervision, nor is there any mechanism for review to ensure that the officers comply with immigration law and procedure.
- **Civil Rights standards and interpretation services.** In addition to the obligations set forth in federal civil right statutes and regulations, including the U.S. Department of Justice “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies,” the language in the MOA requires an interpreter for those who do not speak English. Yet how law enforcement should comply with this requirement is unclear. The MOA fails to establish the process by which an interpreter is obtained, the procedure through which law enforcement officers confirm that an interpreter is necessary, whether an interpreter must be requested before one must be provided, and how the affected individual will be informed of the right to an interpreter.
- **Required steering committee.** The MOA requires that ICE and the local Sheriff establish a steering committee. However, the existence, purpose, function, and the selection process of the steering committee are not sufficiently clear.
- **Community Outreach.** Although the MOA provides that the local agency will engage in

community outreach programs with organizations interested in the MOA, there is a great deal of discretion left with the agency in determining with which organizations to work, thereby creating the opportunity to limit or deny participation from critics of the program.

- Relations with the news media. This provision of the MOA also allows too much discretion with the local agency creating the possibility that important information about the MOA will not be communicated to the public in order to enhance the program's accountability and transparency.
- Modification of the MOA. While the MOA can be modified, there is no mention as to how these amendments will be communicated to the public or whether the amended document will be made publicly available.
- Duration and termination of the MOA and liability disclaimers. Although the MOA states that authorization of immigration enforcement can be revoked at any time, there is no requirement that the termination of the program be made public. Additionally, language in the agreement attempts to insulate ICE and the local agency from liability if they fail to comply with the requirements agreed upon in the MOA.

VI. Proposals for Improvement

In addition to bringing to light the many issues presented by the 287(g) program and the way that the program is currently implemented, a number of proposals would, if implemented, help to resolve many of the current implementation problems. The recommendations include:

- Transparency in the implementation of the program.
- Full conformity with the letter and the spirit of the law.
- Increased community participation in the program's implementation and/or oversight.

- Revision of all current 287(g) programs and implementation in all new 287(g) programs, to permit 287(g) processing only for those convicted of felonies.
- Amendments to the complaint mechanism in the MOA, including clarification of the process, providing notice of the right to file a complaint, enacting amendments to the guidelines regarding the complaint forwarding process, and changes to the method of complaint review.
- Ensuring the availability of the MOA and detailing the MOA purpose and policy.
- Improving personnel performance by outlining personnel designation and functions, providing guidelines for nomination of personnel, detailing and updating the training of personnel, continued certification and authorization of personnel through consistent complaint reports, and monitoring ICE supervision of personnel.
- Clarification of notice of the Civil Rights standards and provision of interpretation services.
- Detailing the steering committee's selection process that includes a broad range of community interests and setting forth the committee's required review of activities.
- Opening executive steering committee meeting to the public.
- Increasing information and participation for effective community outreach and input.
- Improving relations with the news media and other organizations.
- Updated officer training and MOA availability after modification as well as providing duration and termination of the MOA and avoiding impunity.

These proposals for improvement also include suggestions and examples of other complaint mechanisms that could be implemented in order to achieve greater effectiveness in ensuring compliance on the part of local law enforcement agencies with applicable law and MOAs.

Conclusion

Ultimately, the complexities of the 287(g) program and the difficulties in its implementation, suggests that the program is actually an ineffective means of immigration enforcement. It is too problematical, too costly, and too difficult to implement. The reliance on local law enforcement by the federal government for the enforcement of immigration laws is a strong indication of a systemic problem in the federal program, which points to the need for comprehensive immigration reform at the federal level that would allow local police and county sheriffs to return to their primary function of protecting their local communities from crime. Until this reform occurs, the deficiencies and illegalities of 287(g) agreements must be remedied and communities and lawmakers must be encouraged to implement change under the current system.