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¡SILENCIO! UNDOCUMENTED IMMIGRANT WITNESSES AND THE RIGHT TO SILENCE

Violeta R. Chapin*

At a time referred to as “an unprecedented era of immigration enforcement,” undocumented immigrants who have the misfortune to witness a crime in this country face a terrible decision. Calling the police to report that crime will likely lead to questions that reveal a witness’s immigration status, resulting in detention and deportation for the undocumented immigrant witness. Programs like Secure Communities and 287(g) partnerships evidence an increase in local immigration enforcement, and this Article argues that undocumented witnesses’ only logical response to these programs is silence. Silence, in the form of a complete refusal to call the police to report crime or participate in local prosecutions, is a potent and defensible act of civil disobedience by the estimated twenty-two million immigrants in this country with anything less than full-citizenship status.

There is a growing body of empirical evidence showing that local immigration enforcement leads to racial profiling, is unjustifiably expensive for local crime-fighting budgets, and results in the local immigrant population simply deciding not to call the police for any reason at all. This Article takes those arguments one step further, contending that immigrant communities can take matters into their own hands and protect themselves by choosing silence as an organized response to a regime that has rendered local police a threat, not a support, to millions of people within our borders. A commitment to silence by the immigrant community will lend a sense of urgency to these protests and spur real action from local law enforcement officials who appreciate the dangers of prioritizing immigration enforcement over community safety for all residents, citizen and noncitizen alike.

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INTRODUCTION

On December 29, 2009, Abel Moreno called the police in Charlotte, North Carolina to report that a man was assaulting his girlfriend. He told police that a Charlotte police officer, Officer Marcus Jackson, was fondling his girlfriend during a traffic stop. After Mr. Moreno made these allegations, five other women came forward and reported that Officer Jackson had also tried to molest them. Officer Jackson was fired and now faces eleven counts of sexual battery, extortion, and interfering with emergency communication.¹

As a direct result of his cooperation with police, however, Mr. Moreno now faces deportation to his country of origin, Mexico. The Mecklenburg County Sheriff's Office in Charlotte is "one of sixty-seven local law enforcement agencies in twenty-four states that have signed up under Section 287(g) of the federal Immigration and Nationality Act," which deputizes local law enforcement officials, allowing them to enforce federal immigration laws as part of their normal duties.² After Mr. Moreno made his call to police to report the crime, he was arrested and jailed himself when authorities investigated his immigration status and discovered that he was undocumented. A judge granted Mr. Moreno a six-month deferment on his deportation because he was a witness in a criminal investigation, but those six months ended November 2010, with no relief from deportation available for Mr. Moreno.³

The above story was broadcast on a local NBC news channel in North Carolina and was available online to a much broader audience for

1. Alex Johnson & Glenn Counts, *Crime Stopper Faces Deportation; Local Police Enforce Immigration Laws, Leave Many in Limbo*, MSNBC.COM (May 26, 2010, 9:40 AM), http://www.msnbc.msn.com/id/37263917/ns/us_news-immigration_a_nation_divided/ [hereinafter Johnson & Counts].

2. *Id.*

3. *See id.* A follow-up story reported that the city of Charlotte agreed to pay Mr. Moreno \$12,000 after Mr. Moreno's allegations that Officer Jackson arrested him unlawfully when he tried to intervene in the officer's assault on his girlfriend. Cleve R. Wootson Jr. & Gary L. Wright, *City Settles in CMPD Sex Case Involving Former Officer Marcus Jackson*, THE CHARLOTTE OBSERVER (Jan. 28, 2011), <http://www.charlotteobserver.com/2011/01/28/2014451/city-pays-350000-to-rogue-officers.html>.

several weeks. It is likely that thousands, if not tens of thousands of people read about Mr. Moreno's plight in the news. If any of those readers are undocumented or in possession of less than full-citizenship status in this country, the lesson they learned was clear: noncitizen witnesses that call the police to report a crime will likely face swift and brutal consequences.

In a time being called "an era of unprecedented immigration enforcement,"⁴ undocumented immigrant witnesses to local crimes face a terrible quandary. If they have the misfortune to witness a crime against a loved one, a neighbor or even a complete stranger, picking up the telephone to offer information to local police is entirely out of the question. With the expansion of government programs such as the 287(g) agreements⁵ and Secure Communities,⁶ which enlist the help of local police to assist in the enforcement of federal immigration laws, undocumented immigrant witnesses can no longer risk contacting the police to report crimes for fear that they will be questioned about their immigration status. Discovery of their status could lead to detention and possible deportation from the country.

A simple analysis of the pros and cons of calling the police will most certainly lead undocumented immigrant witnesses to conclude that reporting a crime to local police will place them in the crosshairs of immigration officials. Once in those crosshairs, the outcome will most likely be catastrophic. The losses of their freedom, their employment, and their home are not only possibilities, but in some jurisdictions today, absolute guarantees. Such costs are unthinkable for most, and will indisputably outweigh any benefit received from involving the police in solving or stopping crimes.

The problem of immigrant underreporting of crimes for fear of deportation is by no means a new development.⁷ However, the recent proliferation of federal and state legislation targeting undocumented immigrants, coupled with the spread of federal programs such as Section 287(g) agreements and Secure Communities, has created a new, frightening landscape for the immigrant community. Arguments from immigrant advocates, immigration scholars, and even some law enforcement agencies that

4. Jennifer M. Chacón, *A Diversion of Attention: Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1565 (2010) [hereinafter *A Diversion*].

5. Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2006). See *infra* Part 3.A (discussing 287(g) agreements).

6. See generally *Secure Communities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Oct. 25, 2011) (describing U.S. Immigration and Customs Enforcement Secure Communities program). See *infra* Part 3.B (discussing Secure Communities program).

7. See Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 669 (2003) (reporting the plight of immigrants who are the victims of workplace abuses and criminal activity, but who are "loathe to report" these crimes to the police for fear of deportation).

anti-immigrant legislation leads to immigrant underreporting of crimes and ultimately endangers entire communities, have not yet yielded favorable results. Numerous states are proposing legislation similar to Arizona's harsh anti-immigration law, Senate Bill 1070, which grants local police the power to try and determine the immigration status of the people they contact and detain them should the police believe they are undocumented.⁸ Consequently, the police and the laws they enforce are not a source of safety or redress for undocumented immigrants today; they are a threat and a frightening menace to be avoided at all costs.

This Article argues that the only logical option for undocumented immigrant witnesses to crime in this punitive and unpredictable legal and social climate is silence. A complete refusal to call the police to report any crime whatsoever would serve as the last line of defense for an immigrant community facing the harsh reality that the Obama administration deported a record number of people in fiscal year 2010.⁹ Given those numbers, an organized commitment to silence on the part of the immigrant community is both reasonable and legally defensible as a form of civil disobedience.

Immigrant advocates may be concerned that a public commitment to silence would lead to the increased victimization of an already vulnerable community, but the present reality of immigrant underreporting necessitates drastic action. This Article submits that immigrant advocates, law enforcement and the American public should be aware of two realities: first, the current anti-immigrant climate in this country has already led immigrants to underreport crimes.¹⁰ Second, the acceleration of state and federal cooperation agreements to identify and deport human beings has gone unchecked. Criticisms of Secure Communities and 287(g) partnerships by immigrant advocates and even prominent members of law enforcement have both fiscal and legal merit, but have largely fallen on deaf ears. Valid objections to such partnerships would be amplified and

8. See Support Our Law Enforcement and Safe Neighborhoods Act, S. 1070, 49th Leg. § 1 (Ariz. 2010); see also *To Copy or Not to Copy: State Lawmaking on Immigration After Arizona SB 1070*, IMMIGRATIONWORKS USA (Oct. 22, 2010), http://www.immigrationworksusa.org/uploaded/IW_AZ_copcats_report.pdf (“[P]oliticians and political candidates in more than 25 states have promised to introduce Arizona-like immigration enforcement bills when their state legislatures convene in 2011.”).

9. Julia Preston, *Deportations from U.S. Hit a Record High*, N.Y. TIMES, Oct. 6, 2010, <http://www.nytimes.com/2010/10/07/us/07immig.html> (explaining that immigration authorities deported 392,862 people in fiscal year 2010).

10. See SOUTHERN POVERTY LAW CENTER, UNDER SIEGE: LIFE FOR LOW-INCOME LATINOS IN THE SOUTH 26–27 (2009), available at <http://www.splcenter.org/sites/default/files/downloads/UnderSiege.pdf>, [hereinafter SPLC Report] (“If a victim does not have the proper documentation to be living legally in the United States, reporting a crime carries the distinct risk of being jailed and deported. Even those who are here legally may fear harassment or may not report crimes because they want to protect friends, family members and witnesses from that risk.”).

strengthened by strategies to involve the immigrant community itself in the movement for a humane and realistic solution to immigration reform in this country. Immigrant communities can become involved in the movement to protect their rights and their humanity in this country by making a conscientious decision to choose silence.

This decision to choose silence lends a new urgency to the response of local police officials who have already begun to publicly voice their concerns about enlisting local police to enforce federal immigration laws. Several prominent members of local law enforcement find themselves in the unusual position of *agreeing* with immigrant advocates that aggressive immigration enforcement at the local level will increase racial profiling by the police and discourage immigrant witnesses from reporting crime, thereby rendering their communities less safe.¹¹ Indeed, programs that require local police not only to investigate local crimes but also to enforce possible federal immigration violations face several problems. First, asking local police to detect potential immigration violations in their communities invites the inevitable outcome that some residents will be racially profiled as undocumented immigrants, regardless of their citizenship status.¹² Second, once the immigrant community learns of local police partnerships with federal immigration agents, they will take every measure necessary to avoid contact with the police. Local police chiefs recognize that undocumented immigrant witnesses to crime will simply choose the logical alternative—to remain silent—given the likelihood that calling the police to report that crime will result in an inquiry into their immigration status.

11. See Chris Burbank, Phillip Atiba Goff and Traci L. Keese, *Policing Immigration. A Job We Do Not Want*, THE HUFFINGTON POST (June 7, 2010, 12:15 AM), http://www.huffingtonpost.com/chief-chris-burbank/policing-immigration-a-job_602439.html [hereinafter *A Job We Do Not Want*] (“When legislators require state and local law enforcement to enforce federal immigration policy, they make it much harder for officers to do their job. Sheriffs and chiefs have long voiced their concerns that asking officers to be immigration agents will scare undocumented community members out of calling on law enforcement for help.”).

12. In discussing recent “Memorandums of Agreement” between local police and federal immigration officials allowing local police to investigate suspected civil immigration violations, author Carrie Arnold discussed the widespread racial profiling of Arabs and Muslims after September 11, 2001. Carrie Arnold, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 136–39 (2007). A side effect of the “war on terrorism” was that Muslims and Arab-Americans in the United States were “raced” as terrorists, “foreign, disloyal and imminently threatening.” *Id.* at 136–37 (citing Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists”*, 8 ASIAN L.J. 1, 12 (2001)). Arnold makes the argument that racial profiling is certainly possible in today’s environment because “[t]he current state of the law regarding immigration enforcement permits federal immigration officers to consider the race or ethnic appearance of an individual when the police are deciding whom to stop.” *Id.* at 141.

Part I of this Article makes the argument that silence is the logical recourse for the undocumented immigrant witness to crime. Silence, in the form of a complete withdrawal from participation with local law enforcement, is not only rational, but defensible as a form of civil disobedience in the punitive and unpredictable legal environment for immigrants in this country. Part II addresses the concerns that immigrant advocates may have that a commitment to silence may further isolate and even endanger immigrant communities. This section also describes what such a movement would entail and how the immigrant community can be educated and involved in a commitment to silence. Part III discusses the criticisms leveled at federal programs such as 287(g) and Secure Communities that cross-deputize local law enforcement to enforce federal immigration laws, highlighting concerns that immigrants will, as a result of these programs, avoid all contact with the police. Part IV encourages local police officials that have already recognized the danger of a withdrawal into silence by the immigrant community to become actively involved in the push to leave federal immigration enforcement in the hands of the federal government and to advocate for currently non-existent protections for undocumented witnesses. The police must act to defend the entire community they are tasked with serving and protecting, citizen and noncitizen alike.

I. ¡SILENCIO! A CALL FOR ORGANIZED SILENCE AS CIVIL DISOBEDIENCE

On February 16, 2009, Rita Cote called the police in Tavares, Florida on behalf of her sister, who could not speak English, to report that her sister was the victim of domestic violence. When the police arrived at Ms. Cote's house, they asked everyone in the house for identification, and requested Ms. Cote's passport after she gave them an identification card with her married name. When police learned that Ms. Cote is in the country illegally, they took her into custody, detained her in jail for a week, and contacted Immigration and Customs Enforcement (ICE) officials.

Ms. Cote is married to a United States citizen who is a retired member of the armed forces. They have four children, all of whom are citizens. She has no criminal record. She arrived in the United States as a minor from her native Honduras in 1998, escaping the aftermath of Hurricane Mitch. She now faces deportation at any time, and, if forced to leave the country, may be separated from her husband and her children for up to a decade.¹³

13. Elise Foley, *Honduran Immigrant Faces Deportation After Helping Her Sister Report Domestic Violence*, THE HUFFINGTON POST (Feb. 16, 2011, 11:13 AM), http://www.huffingtonpost.com/2011/02/16/honduran-immigrant-faces-deportation_n_823962.html.

The average United States citizen does not contemplate the possibility that contacting the police to report a crime could result in detention by those same police. For the average undocumented resident in this country, however, this possibility is an ever-present reality. For a sizable segment of our population, the police are not a welcome or even innocuous presence; they are a threat.

That a witness to a crime would decide to remain silent is likely already a frequent occurrence in this country. In Mr. Moreno's case (discussed above), even the police who arrested him acknowledged that his phone call led to the arrest of a "dirty cop."¹⁴ The same police also agreed that Mr. Moreno should not have been arrested after making the report once his immigration status was discovered.¹⁵ But he was. After reporting a domestic violence incident, Ms. Cote spent a week in jail and now faces deportation and forced separation from her family. Had she decided not to call the police, she would have avoided detention and the specter of deportation for a while longer, but her sister would have remained at the mercy of her abuser.

It is difficult to quantify how many crimes go unreported to the police by undocumented immigrants; however, common sense suggests that the number is substantial. Newspaper accounts of undocumented immigrant witnesses being detained by immigration officials after contacting local police appear periodically in local papers and they are ominous warnings to the immigrant community that silence is often the better option.¹⁶

In one well-publicized case in Louisiana, six undocumented immigrants in Slidell were held at the local jail for eight months solely because prosecutors believed that they had witnessed the murder of their roommate, another undocumented immigrant.¹⁷ The prosecutor sought material witness warrants to detain the witnesses because he feared the men might come to the attention of federal immigration authorities and

The article reports that Ms. Cote is not eligible to apply for citizenship under normal visa marriage laws because she entered the country illegally as a child; instead, she will have to leave the country and wait 10 years before returning, unless that waiting period is waived by immigration officials. Ms. Cote's immigration lawyer, John Barry, stated that given the high-publicity generated by the case and the fact that the ACLU has filed a lawsuit on her behalf, in addition to the fact that Ms. Cote's husband is a combat veteran, may result in her receiving "parole status" and avoiding deportation. Barry went on to say that other immigrants in similar situations may not be as lucky, particularly as programs such as Secure Communities and 287(g) expand ICE's reach.

14. Johnson & Counts, *supra* note 1.

15. *Id.*

16. See SPLC Report, *supra* note 10.

17. Benjamin Alexander-Bloch, *Immigrants Held As Witnesses May Get Home Soon*, NEW ORLEANS TIMES PICAYUNE (Dec. 27, 2007, 7:54 PM), http://www.nola.com/news/index.ssf/2007/12/immigrants_held_as_witnesses_m.html [hereinafter *Immigrant Witnesses May Get Home*].

be deported before the homicide case came to trial. In the affidavit in support of his request for material witness warrants, the prosecutor alleged that all six men were either “eyewitnesses to the homicide” or possessed evidence “critical to the presentation of the case.”¹⁸ The six men were not provided lawyers, nor were they brought to court for a status hearing during their eight months of incarceration; they later told the judge that they did not know why they were being held.¹⁹ Several of the men believed they were suspects in the homicide.²⁰

The *New Orleans Times Picayune* ran several articles about the plight of the six undocumented witnesses. Each story reiterated the fact that none of the men were accused of a crime; rather, they had the misfortune of *witnessing* the murder of their roommate.²¹ The immigrant community in Louisiana likely followed the Slidell story with horrified dismay. The combination of witnessing a crime and being undocumented was a disastrous one for the six men who spent eight months of their lives in jail, unable to work, unable to understand what was happening to them, and without access to attorneys.²²

Scholars have already picked up on and studied the silencing effect that allowing police to enforce federal immigration violations may have on undocumented immigrants who are the *victims* of crime.²³ In the context of undocumented victims of sexual trafficking in the United States, Professor Jennifer M. Chacón writes:

U.S. immigration law and policy unintentionally helps traffickers assert control over victims once those victims are in the United States. Unauthorized peoples are more vulnerable to threats because they know that efforts to seek legal recourse can result in protracted immigration detention, criminal prosecution, and, of course, removal. The legal limbo of

18. Benjamin Alexander-Bloch, *Long Wait in Jail to End for Trio*, NEW ORLEANS TIMES PICAYUNE (Dec. 21, 2007, 9:26 PM), http://www.nola.com/news/index.ssf/2007/12/long_wait_in_jail_to_end_for_t.html. [hereinafter *Long Wait To End*]

19. *Immigrant Witnesses May Get Home*, *supra* note 17.

20. *Id.*

21. *See id.*; *see also Long Wait to End*, *supra* note 18; Benjamin Alexander-Bloch, *Remaining Illegal Immigrants To Go Home After Long Jail Stay in St. Tammany Parish*, NEW ORLEANS TIMES PICAYUNE (Dec. 27, 2007, 3:25 PM), http://blog.nola.com/tpnorthshore/2007/12/remaining_illegal_immigrants_t.html [hereinafter *Immigrants To Go Home*].

22. *See Immigrant Witnesses May Get Home*, *supra* note 17; *see also Long Wait To End*, *supra* note 18.

23. *See* Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609 (2010); Ajmel Quereshi, 287(G) and Women: The Family Values of Local Enforcement of Federal Immigration Law, 25 WIS. J. L., GENDER & SOC'Y 261, 282–96 (2010) (discussing the deterrent effect of state immigration enforcement programs on female victims of domestic violence who are often unaware of the availability of visas for victims of domestic violence and other crimes).

unauthorized migrants has left many migrant laborers reluctant to report crimes and labor violations.²⁴

There has been little attention paid, however, to the numbers of *witnesses* to crimes who are unwilling to contact the police for the same reasons. Undocumented immigrant witnesses to crime undoubtedly outnumber the undocumented victims of crime in this country. Undocumented persons who have not been directly victimized but are only contemplating whether to report harm committed upon someone else have less incentive to report, since they have no personal investment in capturing the perpetrator.

Undocumented immigrant witnesses are generally not eligible for the subsets of specialized visas, U visas, and T visas that currently exist, albeit in limited numbers, for undocumented immigrant *victims*.²⁵ S visas, colloquially known as “snitch visas,” are the only visas potentially available to undocumented immigrant witnesses. But S visas are specifically available only to those who have information regarding a “criminal” or “terrorist *organization*.”²⁶ The number of undocumented witnesses and informants who may be admitted to the United States through the S visa program is limited by Congressional mandate to 250 per year,²⁷ and they are usually reserved as bargaining chips for terrorism suspects who have agreed to plead guilty and cooperate with government prosecutors in terrorism investigations.²⁸

Professor Orde F. Kittrie writes, “[t]he S, T, and U visas are too narrow in scope and limited in availability to have an impact on more than a small proportion of even the *violent* crimes committed against unauthorized aliens in the United States.”²⁹ On July 21, 2010, Citizenship and Immigration Services announced that they had already reached the

24. Chacón, *supra* note 23, at 1612 (footnote omitted).

25. In passing the Victims of Trafficking and Violence Protection Act in 2000, Congress created two new categories of nonimmigrant visas, the U-visa and the T-visa. T-visas are available to immigrants who have been victims of sex trafficking or recruitment for labor by coercion or force. There is a limit of 5,000 T-visas available per year. U-visas are for immigrants who are victims of criminal activity including rape, torture, and incest. A limit of 10,000 U-visas can be issued each year. See *Congress Creates New “T” and “U” Visas for Victims of Exploitation*, IMMIGRANTS’ RIGHTS UPDATE, NATIONAL IMMIGRATION LAW CENTER, Oct. 19, 2000, at 3, available at <http://www.nilc.org/inmmlawpolicy/obtainlpr/oblpr039.htm>.

26. USAM, 9-72.100, CRIMINAL RESOURCE MANUAL, 1862 S VISA PROGRAM-ELIGIBILITY (last updated July 2007) (emphasis added), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01862.htm.

27. *Id.*

28. Carrie Johnson, *All Things Considered: ‘Snitch’ Visa: Tool To Get Terrorism Suspects Talking* (National Public Radio July 16, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=128543298>.

29. Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L.REV. 1449, 1465 (2006).

10,000-visa limit for visas available to undocumented crime victims.³⁰ The fact that all of the visas available to victims who cooperate with prosecutors in solving local crimes were exhausted just a few months after they became available in 2010 shows how necessary they are in the successful investigation and prosecution of local crimes. Even so, Kittrie writes,

[t]he S, T, and U visa criteria are so narrowly defined that many unauthorized alien victims of violent crimes are not eligible for some or all of these visas. For example, a lone thug's shooting of an unauthorized alien victim in the course of a robbery gone awry would fit neither the S-visa (no "criminal organization or enterprise") nor the T-visa (no trafficking involved). Whether the shooting would fit the U-visa criteria would depend on whether the forthcoming regulations include such shootings within the ambit of "substantial physical or mental abuse."³¹

Undocumented immigrant witnesses have been left with little recourse should they have the misfortune to witness a crime committed against anyone in this country, citizen or noncitizen. Their one remaining act of rational self-preservation in this environment may simply be to remain silent.

A. *The Case for Silence*

In the face of a civil immigration enforcement regime that has increasingly made use of the more punitive elements of our criminal law to swiftly penalize, detain, and deport thousands of undocumented residents without due process,³² a commitment to silence by the immigrant community is not only powerful, it is rational. Using this means of empowerment and basic self-preservation, undocumented immigrant witnesses to crime can—and should—withdraw as a unified front in a promise to remain silent.

30. Suzanne Gamboa, *All 10,000 Crime Victim Visas Issued*, MSNBC.COM (Jul. 15, 2010, 3:00 PM), http://www.msnbc.msn.com/id/38265654/ns/us_news-immigration_nation_divided/t/all-crime-victim-visas-issued/#.

31. Kittrie, *supra* note 29, at 1465.

32. Ingrid Eagly, *Prosecuting Immigration*, 104 Nw. U. L. REV. 1281, 1286 (2010). Eagly writes that "[i]mmigrants are increasingly subject to the burdens of criminal law (for example, when deported as a consequence of a criminal conviction), but they receive none of its benefits (because criminal procedural protections, such as *Miranda* warnings, jury trials, and the right to appointed counsel, do not apply in immigration proceedings)." *Id.* (citing Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (2002) and DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICA HISTORY* 4 (2007)).

Organized efforts to inform immigrant communities about the dangers of interacting with police have occurred in local communities before. In the summer of 2008, posters began to appear in public places in Alamance County, North Carolina, warning Latinos to avoid law enforcement officers at all costs.³³ One such poster read:

Attention Hispanos! It is respectfully advised NOT to speak with police in Alamance because of the decision of the sheriff . . . and county commissioners . . . who have authorized local police to trap and arrest unauthorized immigrants Avoid them as if you would avoid the devil.³⁴

In today's anti-immigrant climate, a call for the immigrant community to avoid the police and withdraw into silence is appropriate and should be sounded nationwide. The American public's hysteria over "criminal aliens," coupled with exaggerated and sometimes blatantly untrue reports of an explosion of violence along the U.S.–Mexico border,³⁵ has created a truly frightening and unpredictable environment for immigrants living in this country who possess anything less than full legal status. In some jurisdictions that have signed up to assist Immigration and Customs Enforcement with police civil immigration violations, the rhetoric from police authorities sends a clear message to the immigrant community that the police are anti-immigrant and hostile to the legitimate crime concerns of noncitizens.

Jim Pendergraph, the former Sheriff of Mecklenburg County, North Carolina, made the following statements: "We've got millions of illegal immigrants that have no business being here These people are coming to our country without documents, and they won't even assimilate . . . this is about homeland security. This is about the sovereignty of our country."³⁶ When asked if he advocated "rounding up Latinos" that live in the country without legal status, Pendergraph was not opposed to the idea.³⁷

33. MAI THI NGUYEN & HANNAH GILL, *THE 287(C) PROGRAM: THE COSTS AND CONSEQUENCES OF LOCAL IMMIGRATION ENFORCEMENT IN NORTH CAROLINA COMMUNITIES* 44 (2010).

34. *Id.* Poster found in Southern Alamance County on August 10, 2008, in the private collection of the authors.

35. See Brad Knickerbocker, *Jan Brewer Corrects the Record on Headless Bodies in the Desert*, *THE CHRISTIAN SCIENCE MONITOR* (Sept. 4, 2010), <http://www.csmonitor.com/USA/Politics/The-Vote/2010/0904/Jan-Brewer-corrects-the-record-on-headless-bodies-in-the-desert>. Jan Brewer, who rose to fame by signing the controversial Arizona Senate Bill 1070, initially claimed that headless bodies were turning up in the Arizona desert, only later telling the Associated Press that if she said that, she was in "error." *Id.* Sen. John McCain, facing a tough primary fight, told Fox News host Bill O'Reilly in April 2010 that "drivers of cars with illegals in it . . . are intentionally causing accidents on the freeway." *Id.*

36. NGUYEN & GILL, *supra* note 33, at 10.

37. *Id.*

Alamance County Commissioner Tim Sutton, who was instrumental in the adoption of the 287(g) Program in his county in North Carolina, discussed the intent of the program by noting, “287(g) deters local crime by illegal aliens. But that’s not the only thing I am after. I want illegal aliens, to be honest with you, out of here. I don’t blink an eye.”³⁸

Undocumented immigrants are publicly vilified by an increasingly anxious, fearful, and sometimes blatantly racist segment of the citizen population susceptible to the scaremongering tactics of the conservative media. Despite statistics from the Border Patrol that show that the flow of illegal immigrants from our southern borders is clearly in decline,³⁹ 65 percent of the American public who participated in a CBS/Times poll in May 2010 identified immigration as a “very serious problem,” up from 54 percent in 2006.⁴⁰ Wide majorities of the participants in the poll also stated that they expected laws like the Arizona bill to be a burden to police departments, lead to racial profiling of Latino residents, and result in Latinos, legal and undocumented, being less inclined to report crimes to police.⁴¹ Despite those concerns, 51 percent of the people polled believed that the proposed legislation is “about right” in its approach.⁴²

This deeply entrenched anti-immigrant sentiment is a powerful political force resulting in campaign promises by politicians across the country to do what they can to deport the “illegal invaders” as fast as possible.⁴³ Several states hoping to emulate the recent Arizona legislation seek to purge their jurisdictions of noncitizens through a strategy called “attrition through enforcement.”⁴⁴ The lack of procedural due process protections for noncitizens prosecuted by ICE officials in civil removal

38. *Id.*

39. James C. McKinley, Jr., *Flow of Illegal Immigrants to U.S. Starts to Slow*, N.Y. TIMES (Feb. 20, 2007), <http://www.nytimes.com/2007/02/20/world/americas/20iht-border.4661915.html>.

40. Brian Montopoli, *Poll: Majority Backs Arizona Immigration Bill*, CBSNEWS.COM (May 3, 2010, 6:30 PM), http://www.cbsnews.com/8301-503544_162-20004030-503544.html?tag=mncol;lst;2#_=1320112093690&align=&button=blue&id=twitter_tweet_button_0&lang=en&link_color=%23024382&screen_name=cbsnewshotsheet&show_count=&show_screen_name=&text_color.

41. Randal C. Archibold & Megan Thee-Brenan, *Poll Shows Most in U.S. Want Overhaul of Immigration Laws*, N.Y. TIMES (May 3, 2010) <http://www.nytimes.com/2010/05/04/us/04poll.html>.

42. *Id.*

43. *C.f.* Amy Worden, *Metcalf Vows to Defend Marriage, Deport “Illegal Invaders”*, PHILLY.COM (Dec. 24, 2010, 2:47 PM), http://www.philly.com/philly/blogs/harrisburg_politics/Metcalf_vows_to_defend_marriage_deport_illegal_invaders.html.

44. See Robert Suro, *In the fight over Arizona’s immigration law, everybody loses*, WASH. POST (Aug. 1, 2010), <http://www.washingtonpost.com/wpdyn/content/article/2010/07/30/AR2010073002675.html>.

proceedings adds another frightening layer of unpredictability for residents who could be subject to deportation and detention by police.⁴⁵

B. Silence as Civil Disobedience

This country has a long history of resistance by the people to laws perceived to be unjust or cruel.⁴⁶ Harriet Tubman organized the Underground Railroad to help Blacks enslaved in the South escape to the North, and to escape the law in many Southern states that still allowed Whites to own Blacks as common property. During the civil rights movement, Martin Luther King, Jr. encouraged Black people and sympathetic White activists to participate in illegal marches and sit-ins to oppose laws that were perceived to be racist and unjust. Going one step further, Malcolm X advocated a strategy to achieve the liberation of Black people “by any means necessary.” One scholar characterized Malcolm X’s “any means necessary” as a “defiant phrase that threatens the establishment, opposes the notion of law and order, and exposes the failure of the legal system to provide justice.”⁴⁷ In his essay titled “Civil Disobedience,” Henry David Thoreau wrote, “All men recognize the right of revolution; that is, the right to refuse allegiance to, and to resist, the government, when its tyranny or its inefficiency are great and unendurable.”⁴⁸

The retreat into silence by the immigrant community today has already begun. Failing to report a crime, however, is a crime in several states, placing the noncitizen witness in a catch-22 situation, where they weigh the dangers of deportation against the danger of prosecution for failing to report.⁴⁹ This Article makes the case for a refusal to report crimes to the

45. See *A Diversion*, *supra* note 4, at 1632 (pointing out that ICE is now the largest law enforcement agency in the U.S., with the power to initiate removal proceedings against over 10 percent of the population, but with no oversight mechanism or control board to oversee its actions). Discussing the numerous procedural deficiencies in the immigration context, Chacón writes, “[A]s a result, there are inadequate mechanisms in place to address many of the rights violations that are occurring in the context of immigration enforcement.” *Id.* at 1563.

46. See Susan Tiefenbrun, *Civil Disobedience and the U.S. Constitution*, 32 Sw. U. L. REV. 677, 677 (2003) (citing Harris G. Mirkin, *Rebellion, Revolution, and the Constitution: Thomas Jefferson's Theory of Civil Disobedience*, 13 AM. STUD. 61, 64 (1972)) (explaining that Mirkin’s article argues “Jefferson saw resistance as beneficial to society because it prevented the need for full-scale revolution. Acts of resistance ‘forced the society to deal with problems before they assumed proportions that would justify real revolution.’”).

47. Ali Khan, *Lessons from Malcolm X: Freedom By Any Means Necessary*, 38 HOW. L.J. 79, 83 (1994).

48. Henry David Thoreau, *Civil Disobedience*, in THOREAU: PHILOSOPHER OF FREEDOM, 9, 13 (James Mackaye ed., The Vanguard Press 1930).

49. Ken Levy, *Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism*, 44 GA. L. REV. 607, 619 n.26 (2010) (Florida, Hawaii, Massachusetts, Ohio, and Washington make failure to report crime a crime in itself). See also FLA. STAT. ANN. § 794.027 (West 2007) (defining failure to report sexual battery as a misdemeanor of the first

police as a legitimate act of civil disobedience in objection to an unjust civil and criminal enforcement regime that effectively penalizes undocumented residents for having witnessed a crime.

Laws that effectively encourage immigrants to avoid the police and to therefore forego the benefit of any assistance for crimes committed against them and/or others have been discussed in the First Amendment context as a violation of the right to “petition the Government for redress of grievances.”⁵⁰ This Article takes that argument one step further, urging every immigrant living in this country with anything less than full citizenship status to choose not to redress grievances with the police, in objection to an unjust and frightening reality imposed upon them by unjust laws. The response from the immigrant community should take the form of organized silence and a complete refusal to participate in the criminal justice system as witnesses for the prosecution.

II. A PROPOSAL FOR ORGANIZING SILENCE AND A RESPONSE TO ADVOCATES

A. *A Call to the Community*

An organized call for silence from the undocumented immigrant community would not be logistically complicated or difficult to market as a tactic of choice. There would be no need to organize any marches, sit-

degree); HAW. REV. STAT. § 663-1.6 (1993) (defining failure to report crime in progress as a petty misdemeanor); MASS. GEN. LAWS ANN. ch. 268, § 40 (West 2008) (imposing “fine of not less than five hundred . . . dollars” for failure to report violent crime in progress); OHIO REV. CODE ANN. § 2921.22 (West 2006 & Supp. 2009) (“[N]o person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities.”); WASH. REV. CODE ANN. § 9.69.100 (West 2003) (defining failure to report violent crime or sexual crime or assault against child as gross misdemeanor). Arguably, immigrant arrestees with anything less than full citizenship have a valid Fifth Amendment privilege to refuse to provide information to police that might lead to discovery of their immigration status; however, that is a discussion for another article.

50. Wishnie, *supra* note 7, at 670, 714–16, 716 n.292. In response to the Supreme Court’s declaration in *United States v. Verdugo-Urquidez* that many noncitizens were not afforded First Amendment protections, Professor Wishnie wrote:

It would seem a foolish policy to discourage millions of people from communicating with law enforcement officials about unlawful activity. Yet this is, in effect, what our federal, state, and local governments have done by refusing to guarantee that complainants will not be deported for petitioning law enforcement agencies for redress. The consequence has been to embolden lawbreakers who prey on immigrants, frustrate civil and criminal law enforcement generally, undermine public safety and health, entrench undocumented immigrants in a caste hierarchy, and foster an underground economy that depresses the terms and conditions of employment for all workers.

Id. at 670.

ins, or visible demonstrations at all; indeed, such public protests are unwise for the undocumented population anyway since identification by the police is to be avoided. The benefit of choosing silence as the primary tactic for protesters is that it is, by its nature, a passive act. Refusing to speak out is one of the few things that the immigrant community can do privately.

The goal is both simple and precise: realistic and humane immigration reform that does not place immigrants at risk for speaking up. It is a necessary part of the reform effort that local police are not given the option, and certainly not required, to participate in federal immigration enforcement. Toward that end, immigrant advocates should host informational meetings for their constituents to explain anti-immigrant legislation being proposed in their jurisdiction and how such legislative efforts will negatively impact immigrants. Immigrant advocates can provide the details about the partnership agreements between local police and federal authorities (such as 287(g) and Secure Communities) in spaces that those with anything short of citizenship status will feel safe.

An honest conversation about the dangers of contacting local police for any reason would acknowledge that a commitment to silence carries with it some real dangers as well. In jurisdictions where a refusal to report a crime carries criminal penalties, immigrant advocates could make their constituents aware of that fact and provide practical advice about how to protect themselves by maintaining silence in the event that the police are questioning them.

Because the immigrant community has long been more vulnerable to crime, a public commitment to silence could have immediate consequences for that population. The fact that undocumented immigrants as a community are more vulnerable to crime is not a new development. In 2007, an article published in the *Washington Post* revealed that undocumented immigrants were being targeted for robberies so often that the practice had been given the unofficial name of “amigo shopping.”⁵¹ If it became public knowledge that the immigrant community, as an organized group, would no longer contact the police, incidents of “amigo shopping” would surely increase. In our current, frighteningly anti-immigrant climate, the number of hate crimes committed against perceived immigrants may increase as a commitment to silence becomes public. Indeed, the hate-motivated incidents we have witnessed already may be a bellwether of what is to come.

On April 5, 2010, a twenty-six-year-old Mexican immigrant named Rodulfo Olmedo was attacked by four young men outside his apartment in the Port Richmond section of Staten Island, New York. His attackers “yelled racial slurs at him, beat him with wooden planks, metal chains and a baseball

51. Ernesto Londoño and Theresa Vargas, *Robbers Stalk Hispanic Immigrants, Seeing Ideal Prey*, WASH. POST (Oct. 26, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/25/AR2007102502740.html>.

bat, and took his money, leaving him with a fractured skull.”⁵² This attack followed closely on the heels of the nationally publicized murder of Marcelo Lucero, an Ecuadorean immigrant, who was stabbed to death by a White teenager in Patchogue, New York, in 2008.⁵³ Defendant Jeffrey Conroy and six of his friends were found to have carried out a series of assaults on immigrants, which they called “beaner-hopping,” or “Mexican-hopping.”⁵⁴ Mr. Conroy was convicted of first-degree manslaughter as a hate crime, as well as attempted assaults on three other Hispanic men.⁵⁵

An organized commitment to silence undoubtedly comes fraught with additional dangers for an already vulnerable community, but history shows that the immigrant community will likely prefer these dangers over the danger of deportation. A look at the criminalization of immigrants in the employment context provides some insight into the difficult decision that undocumented immigrants must now make between matters of personal safety and discrimination versus deportation.

In 1986, congressional enactment of the Immigration Reform and Control Act “criminalized the employment relationship between an undocumented worker and an employer and signaled a new approach to immigration law enforcement, allowing border enforcement to permeate the workplace.”⁵⁶ Professor Lori A. Nessel argues that undocumented workers who assert their rights in the workplace are vulnerable to deportation because of the unwillingness of courts to recognize “the punitive nature of deportation and the criminalization of immigration law.”⁵⁷ Not surprisingly, then, one study found that undocumented workers have an ever-present fear of deportation that inhibits them from formally confronting abusive employers or filing workplace protection claims.⁵⁸ Yet immigrants continue to constitute a significant segment of our labor force; indeed, one in nineteen civilian workers in the United States is undocumented.⁵⁹

Undocumented immigrants are likely aware of the risks of silence. This Article seeks instead to explore the need to consider the benefits of organized silence as a way to meet the goals of those with less than full citizenship who wish to remain here and participate in all aspects of society.

52. Ishita Srivastava, *How Many More Hate Crimes Against Immigrants Will it Take?*, RESTORE FAIRNESS (Apr. 12, 2010), <http://restorefairness.org/tag/rodulfo-olmedo/>.

53. Manny Fernandez, *L.I. Man Gets 25-Year Term in Killing of Immigrant*, N.Y. TIMES (May 27, 2010), <http://www.nytimes.com/2010/05/27/nyregion/27patchogue.html>.

54. *Id.*

55. *Id.*

56. Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.I. L. REV. 345, 404 (2001).

57. *Id.*

58. Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561, 561 (2010). *Id.*

59. *Id.*

B. *A Response to Advocates*

The recent surge in anti-immigrant legislation and partnership agreements has worsened the situation for the immigrant community. Instead of being asked to remain quiet so as not to further offend, or to remain frightened to even go outdoors, the immigrant community must be invited to choose silence as an informed, politicized objection to this unjust and increasingly hostile social and political climate. An organized withdrawal into silence by the immigrant community may be what is needed for advocates to truly gain some traction. This will show the American public and the legislators who represent them that our current strategies of targeting and deporting people from the country are dangerous as well as fiscally and socially irresponsible.

The millions of undocumented immigrants in this country make the prospect of their withdrawal into silence both awesome and fairly alarming. The Pew Hispanic Center estimates that 11.2 million unauthorized immigrants were living in the United States as of March 2010.⁶⁰ A commitment to silence may not only be the best (or least undesirable) choice for undocumented immigrant witnesses to crime, it may also be best for all of the estimated twenty-two million people who are not yet naturalized citizens and who therefore remain subject to removal.⁶¹ A commitment to silence from approximately thirty-three million people currently living in this country would surely impact the social and political backdrop of the immigration debate.

For immigrant advocates who are rightfully concerned about a withdrawal into silence by an already marginalized community, this Article presents two responses. First, it is an inescapable reality that the withdrawal into silence by the immigrant community is happening already. It is happening, however, in a sporadic and unorganized manner. The increasing number of local police deputized to enforce civil immigration violations through 287(g) agreements and the Secure Communities program has already led Latino communities to become distrustful of police and to underreport crimes as a result, making them even more vulnerable.⁶² Hispanic informants in 287(g) jurisdictions have told researchers that “immigrants—legal and unauthorized—have increasingly developed fear and distrust of police.”⁶³ But there is no real way to quantify the impact that underreporting of crime is having on local communities when immigrants choose, on an individual and haphazard basis, not to report a crime simply to avoid

60. JEFFREY S. PASSEL AND D'VERA COHN, UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS 9 (2011).

61. *A Diversion*, *supra* note 4, at 1599 (citing Census figures estimating that, of the thirty-eight million non-native born persons living in the United States, more than twenty-two million are not naturalized citizens and remain subject to removal).

62. NGUYEN & GILL, *supra* note 33, at vi.

63. *Id.* at 44.

police contact. An organized, nationwide commitment to silence, on the other hand, may have the impact needed to truly engage in the conversation.

Second, in response to the very real concern that urging an already marginalized and frequently targeted population to publicly endorse silence only makes it more vulnerable, I agree that it is a danger. However, unauthorized immigrants can no longer be expected to participate in local prosecutions of crimes they have witnessed, even if the person victimized was a family member or a friend, and not just a total stranger. The costs are simply too high: detention in a local jail for months at a time, or in an immigrant detention center without access to their families, solely because they had the misfortune to *witness* a crime.

Immigrant advocates can focus their efforts not only on informing and organizing the immigrant community they serve, but also on informing the public of the very real consequences to local communities stemming from the cross-deputization of their police to enforce federal immigration laws. Three things should be made very clear. First, the increasingly punitive and unpredictable legal environment for undocumented people who find themselves involved in our criminal justice system as witnesses to local crimes is, and should be, discussed as a modern civil rights issue. Concerns about racial profiling of Latino residents, lengthy detentions without due process, and the steady deportation of people who have long-standing positive ties to their U.S. communities should be incorporated into the immigration discussion. Second, citizens should be made well aware of the negative social impact on local communities that partnerships with federal immigration agents can have. A significant segment of local communities will withdraw not only from participation in local law enforcement efforts, but also from other kinds of civic involvement such as owning and working in local businesses and spending the money they earn, which could prove to be financially and socially disastrous for local neighborhoods. Finally, while local partnerships with federal immigration officials undoubtedly assist the federal government in their goal of detaining and deporting undocumented immigrants as quickly and as efficiently as possible, the financial costs of these efforts could be devastating to local crime-fighting budgets. Local police would have to find space to detain those suspected of federal immigration violations, spend money setting up the partnership programs and training their officers, as well as reserve some money for litigation that is likely to follow from alleged civil rights violations from Latino residents who believe they have been the victims of racial profiling.

The following section details the 287(g) partnerships and the Secure Communities program, the criticisms that have been leveled against both programs by immigrant advocates and governmental agencies alike. Concerns that local enforcement of federal immigration law will lead immigrant communities to avoid the police, thereby making communities

as a whole less safe, will be discussed in conjunction with concerns about racial profiling and the financial costs of such programs.

III. 287(G) AND SECURE COMMUNITIES: ENCOURAGING SILENCE

A. 287(g) Partnerships

At the writing of this Article, state and local police in twenty-four states have entered into sixty-nine 287(g) partnerships with ICE as a way to expand local authority to enforce civil immigration violations.⁶⁴ As of January 2010, over one thousand police officers had completed a four-week training program to better equip them to perform federal immigration enforcement functions.⁶⁵

The Illegal Immigration Reform and Immigration Responsibility Act of 1996 added Section 287(g) to the Immigration and Nationality Act.⁶⁶ It authorizes the Deputy Director of ICE to enter into agreements with state and local law enforcement agencies, allowing the law enforcement agencies to perform immigration enforcement functions under the training and supervision of ICE officers.⁶⁷ The 287(g) program had a slow start. The first agreement did not materialize until Florida participated in a pilot program in 2002.⁶⁸ Over the next four years, the Department of Homeland Security delegated the power to enforce immigration violations to six more jurisdictions.⁶⁹ After 2006, however, there was substantial growth in the number of 287(g) partnerships, due in part to increased interest from the states in “interior immigration enforcement” and in part to an increase in federal funding for the program.⁷⁰

The stated goal of the 287(g) program is to enhance public safety by “remov[ing] criminal aliens who pose a threat” to communities across the country.⁷¹ The program attempts to achieve this goal by enabling local law enforcement to facilitate the deportation of “foreign-born criminals and

64. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Nov. 1, 2011) (hereinafter ICE 287(g) Fact Sheet).

65. JESSICA SAUNDERS, NELSON LIM & DON PROSNITZ, *ENFORCING IMMIGRATION LAW AT THE STATE AND LOCAL LEVELS 3* (2010), available at http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP273.pdf [hereinafter RAND REPORT].

66. ICE 287(g) Fact Sheet, *supra* note 64.

67. *Id.*

68. RAND REPORT, *supra* note 65, at 3.

69. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF THE INSPECTOR GENERAL REPORT, OIG-10-63, *THE PERFORMANCE OF 287(G) AGREEMENTS 2* (2010) [hereinafter OIG REPORT], available at http://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf.

70. *Id.*

71. *Id.* at 8.

immigration violators who pose a threat to national security or public safety.”⁷² Specifically, ICE states that the 287(g) program provides resources to local agencies to “pursue investigations relating to violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling, and money laundering.”⁷³

Observers of the 287(g) program, however, have raised serious questions about the efficacy of the program in achieving those goals, the state financial costs for taking on federal responsibilities with respect to undocumented residents, and the social consequences to communities should the police be racially profiling and detaining Latino residents.⁷⁴ A recent study conducted by the Latino Migration Project at the University of North Carolina at Chapel Hill examined the costs and consequences of the 287(g) program in North Carolina.⁷⁵ It found that *traffic violations*, rather than human smuggling or sex-offenses, were the most common charges for people incarcerated under the 287(g) program, representing 32.7 percent of the total charges.⁷⁶ The same report found that the program was extremely costly, with direct expenditures—including start-up, daily operating, and maintenance costs for each program operated in a local or state jurisdiction—costing millions of dollars.⁷⁷ In estimating the costs of the 287(g) program in the rest of the country, the authors wrote, “[w]hen indirect costs, such as litigation fees, are accounted for, the sixty-seven 287(g) intergovernmental partnerships currently operating around the country are costing taxpayers hundreds of millions of dollars.”⁷⁸ Finally, the report analyzed the effect of the 287(g) program on civil liberties in North Carolina and found evidence that the program enabled law enforcement officers to racially profile Hispanics in North Carolina.⁷⁹ The report revealed that law enforcement officers “pulled over Hispanic-appearing drivers

72. NGUYEN & GILL, *supra* note 33, at v (quoting ICE 287(g) Fact Sheet, *supra* note 64).

73. *Id.* at 10 (quoting ICE 287(g) Fact Sheet, *supra* note 64).

74. In August 2009, a coalition of 522 civil rights organizations signed a letter addressed to President Obama urging the immediate termination of the 287(g) program, citing racial profiling concerns and other civil rights abuses as primary concerns. *Letter from Marielena Hincapie, Exec. Dir., Nat'l Immigration Law Ctr., to Barack Obama, U.S. President* (Aug. 25, 2009) (on file with MICH. J. RACE & L.). Signatories included the American Civil Liberties Union (ACLU), the Immigrant Legal Resource Center (ILRC), the Mexican American Legal Defense and Educational Fund (MALDEF), and the National Council of La Raza (NCLR). *Id.*

75. See NGUYEN & GILL, *supra* note 33.

76. *Id.* at 37.

77. *Id.* at 31.

78. *Id.*

79. *Id.* at 39 (citing THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(C) PROGRAM IN NORTH CAROLINA, Immigration & Human Rights Policy Clinic at UNC Chapel Hill and the ACLU-NC (2009), available at <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf>).

under the pretense of a traffic infraction but with the intention of determining immigration status.”⁸⁰

Rogue jurisdictions that abuse the powers delegated to them through partnerships with federal immigration agents are and will continue to be a problem, as evidenced by Sheriff Joe Arpaio in Maricopa County, Arizona.⁸¹ In October 2009, the federal government curbed the authority of the now infamous “Sheriff Joe,” limiting his powers to enforce immigration violations through his county’s 287(g) agreement with DHS.⁸² The change was spurred by an outcry over Sheriff Joe’s extensive raids in Latino towns and neighborhoods, including accusations that his deputies were racially profiling Latino residents and making pretextual stops for the purpose of investigating suspected immigration violations.⁸³ The mayor of Phoenix, Phil Gordon, decried Arpaio’s “reign of terror,” referring to Arpaio’s wide-ranging campaign against undocumented immigrants in Maricopa County.⁸⁴ Following a Department of Justice investigation into reports of abuse by Arpaio’s deputies, the Obama administration rescinded the authority of Arpaio’s deputies to arrest suspected illegal immigrants in the streets as part of their local duties.⁸⁵ Seemingly undeterred, Sheriff Joe responded aggressively, making the following statement on a local radio station:

I don’t need the feds to do my crime suppression to opt to arrest illegals. I can do it without the federal authority, and I’m going to continue to do it. It makes no difference. It helps us. Because I don’t have to do all the paperwork for the feds, number one. And number two, I won’t be under their umbrella, their guidance. So I will operate the same way, nothing is going to change Nothing changes . . . because pursuant to our duties in these crime suppression [sweeps] we arrest anybody that violates the law. If we find during the arrests that there are illegals, we arrest them. Now the only difference [is] we’re going to take ‘em down to ICE. I hope they accept them, if they don’t, I’ll bring ‘em myself to the border. So nothing really has changed. This is all politics. They want to use me to get rid of this 287 agreement across the country . . . I will do another crime suppression very soon to show Washington and everybody else I’m not changing, I will not be intimidated by Congress, by alleged racial profiling investigations by the Justice Department, by all

80. *Id.*

81. See Miriam Jordan, *Arizona Sheriff’s Powers Cut*, WALL ST. J., Oct. 7, 2009, at A4 [hereinafter Jordan].

82. *Id.*

83. *Id.*

84. William Finnegan, *Sheriff Joe*, THE NEW YORKER, July 20, 2009, at 42, 45.

85. Jordan, *supra* note 81.

these demonstrators, these politicians, all trying to keep me from doing my job, so nothing will change. Stay tuned.⁸⁶

Part of what Sheriff Joe was railing about was a report critical of the 287(g) program issued by the Government Accountability Office in January 2009, stating that governmental controls needed to be strengthened.⁸⁷ Among other things, the GAO found that “over half of the 29 [participating police] agencies GAO contacted reported concerns from community members that use of program authority would lead to racial profiling and intimidation by law enforcement officials.”⁸⁸

In March 2009, a top official at DHS testified before a House Committee that the 287(g) program lacked key internal controls stating:

Specifically, 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 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. Taken together, the lack of internal controls makes it difficult for ICE to ensure that the program is operating as intended.⁸⁹

In response to this criticism and the Sheriff Arpaio fall-out, the Obama administration rewrote all 287(g) partnership agreements with local police to step up ICE supervision and address complaints about racial profiling and civil rights violations.⁹⁰

86. *DHS Restricts Joe Arpaio 287g Enforcement to Jails; Arpaio Pledges to Continue Sweeps*, 24AHEAD.COM: IMMIGRATION AND POLITICS (Oct. 5, 2009, 4:40 PM), <http://24ahead.com/dhs-restricts-joe-arpaio-287g-enforcement-jails-arpaio-pledg>.

87. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-109, *BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS* (2009), available at <http://www.gao.gov/new.items/d09109.pdf>.

88. *Id.* at ii.

89. *Immigration Enforcement: Controls Over Program Authorizing State and Local Enforcement of Federal Immigration Laws Should Be Strengthened: Testimony Before the Committee on Homeland Security, House of Representatives* (2009) (statement of Richard M. Stana, Dir. of Homeland Sec. and Justice, Testimony before the Comm. on Homeland Sec.) (on file with MICH. J. RACE & L.), available at <http://www.gao.gov/new.items/d09381t.pdf>.

90. On July 1, 2009, the Department of Homeland Security changed the 287(g) Program to emphasize a stronger focus on apprehending “criminal illegal aliens” as opposed to minor infractions and crimes. DHS issued a new standardized Memorandum of Agreement (MOA) for all existing and future local partners. The new MOA required that “participating local law enforcement agencies are expected to pursue all criminal charges that originally caused the offender to be taken into custody” in order to “address concerns that individuals may be arrested for minor offenses as a guise to initiate removal proceedings.” Press Release, U.S. Dep’t of Homeland Sec., *Sec. Napolitano Announces New*

In March 2010, however, the Office of the Inspector General issued its report evaluating the progress of the federal government in effectively addressing and resolving these problems. The report found that “civil rights and civil liberties considerations are not consistently weighed in the 287(g) review and selection process.”⁹¹ The report further found that despite DHS having identified categories of aliens who are of top priority for arrest and removal—such as those with convictions for murder, rape, and major drug offenses—the overwhelming majority of illegal immigrants removed through the program had been convicted of much less serious offenses.⁹² The findings led the authors of the report to conclude that “these results *do not show* that 287(g) resources have been focused on aliens that pose the greatest risk to the public.”⁹³ The OIG report further noted that there were “instances in which Immigration and Customs Enforcement and participating law enforcement agencies were not operating in compliance with the terms of the agreements[, and] several areas in which Immigration and Customs Enforcement had not instituted controls to promote effective program operations and address related risks.”⁹⁴ The report critically cited a participating law enforcement agency in the 287(g) program that “is the subject of (1) an ongoing racial profiling lawsuit related to 287(g) program activities; (2) a lawsuit alleging physical abuse of a detained alien; and (3) a DOJ investigation into alleged discriminatory police practices, unconstitutional searches and seizures, and national origin discrimination.”⁹⁵ All in all, the report issued thirty-three recommendations for ICE to improve management controls and address related risks to inconsistent program operations, thirty-two of which ICE agreed to.⁹⁶

B. *Secure Communities*

The Secure Communities program, colloquially referred to as “S-Comm,” is now steadily making its way across the fifty states and the District of Columbia.⁹⁷ S-Comm is equally rife with both fiscal and community safety concerns. S-Comm is a strategy developed by the ICE

Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements (July 10, 2009) (on file with MICH. J. RACE & L.), available at http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm.

91. OIG REPORT, *supra* note 69, at 22.

92. *Id.* at 8–9.

93. *Id.* at 9 (emphasis added).

94. *Id.* at Executive Summary.

95. *Id.* at 23.

96. *Id.* at 64.

97. See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ACTIVATED JURISDICTIONS (2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf> [hereinafter ACTIVATED JURISDICTIONS].

Agency to locate “criminal aliens,” or those noncitizens who pose a threat to public safety, so that they can be removed from the United States.⁹⁸ It requires that local police add ICE to the list of law enforcement agencies that they currently share biometric (fingerprint) information with once suspects are arrested for a crime and booked into local law enforcement custody.⁹⁹ ICE then compares that information to DHS immigration records.¹⁰⁰ If there is a match or if the named person does not appear in the database at all, ICE will make a determination about whether to issue a detainer on that particular inmate. The ICE detainer would result in the inmate’s transfer from local custody to immigration custody once his local matter is resolved.¹⁰¹

S-Comm currently operates in 1,049 jurisdictions in thirty-nine states and is much like the 287(g) program in that it enlists state and local police as central participants in the enforcement of federal immigration laws. Every single person detained by the police will automatically have their fingerprints processed through immigration databases, “even if their criminal charges are minor, eventually dismissed, or the result of an unlawful arrest.”¹⁰²

Internal government documents detailing the S-Comm program were recently obtained by the National Day Laborer Organizing Network (NDLON), the Center for Constitutional Rights (CCR), and the Kathryn O. Greenberg Immigration Justice Clinic of the Benjamin N. Cardozo School of Law after they filed a Freedom of Information Act lawsuit in New York Federal Court in April 2010.¹⁰³ Information contained in the documents provided support for the following claims:

First, that ICE has been dishonest with the public and with local law enforcement regarding S-Comm’s true mission and impact. While ICE markets S-Comm as an efficient, narrowly tailored tool that targets “high threat” immigrants, it actually functions as a dragnet for funneling people into the mismanaged ICE detention and removal system. ICE’s own records

98. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT: SECURE COMMUNITIES, http://www.ice.gov/secure_communities/ [hereinafter SECURE COMMUNITIES WEBSITE].

99. *Id.*; see also Shankar Vedantam, *Local jurisdictions find they can't opt out of federal immigration enforcement program*, WASH. POST (Sept. 30, 2010, 10:50 PM) <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/30/AR2010093007225.html> (explaining that Arlington Co., Virginia, the District of Columbia, San Francisco, and Santa Clara, CA had all voted to opt out of participation in the Secure Communities Program).

100. SECURE COMMUNITIES WEBSITE, *supra* note 98.

101. *Id.*

102. Press Release, Center for Constitutional Rights, Rights Groups Release Documents from Immigration and Customs Enforcement (ICE) Agency FOIA Lawsuit (Aug. 10, 2010), available at [http://ccrjustice.org/newsroom/press-releases/rights-groups-release-documents-u.s.-immigration-and-customs-enforcement-\(ice\)-agency-foia-lawsuit](http://ccrjustice.org/newsroom/press-releases/rights-groups-release-documents-u.s.-immigration-and-customs-enforcement-(ice)-agency-foia-lawsuit).

103. *Id.*

show that the vast majority (79 per cent) of people deported due to S-Comm are not criminals or were picked up for lower level offenses. Second, that the program serves as a smokescreen for racial profiling, allowing police officers to stop people based solely on their appearance and arrest non-citizens, knowing that they will be deported, even if they were wrongfully arrested and are never convicted. Preliminary data confirms that some jurisdictions, such as Maricopa County, Arizona, have abnormally high rates of non-criminal S-Comm deportations.¹⁰⁴

Pablo Alvarado, the executive director of NDLOM, stated that expansion of S-Comm means “potential proliferation of racial profiling, distrust of local police, fear, and xenophobia.”¹⁰⁵ Such conditions will only fracture local communities by exacting social and financial costs that cannot be sustained by individual jurisdictions. Sunita Patel, an attorney for the Center for Constitutional Rights, stated the issue bluntly: “S-Comm co-opts local police departments to do ICE’s dirty work at significant cost to community relations and police objectives.”¹⁰⁶

C. Organized Silence as a Push to Concerned Police

The thoughtful and carefully researched criticism of the 287(g) partnerships and the S-Comm program comes not just from immigrant advocates but from internal government oversight organizations as well. Despite this groundswell of criticism and warning from advocates and oversight agencies, S-Comm is spreading and local jurisdictions continue to sign up with federal immigration authorities through 287(g) partnerships. An organized commitment to silence by the immigrant community may be an immediate and powerful check to this mounting threat. Local police departments must be made aware that their mandate to protect the *entire* community from crime can be compromised by their own decision to also enforce federal immigration law. The safety concerns raised by these partnerships may not be fully appreciated by an American public that has long been frustrated by the federal government’s failure to overhaul the immigration system. The financial burdens imposed upon local communities by these partnerships are underappreciated as well. The federal immigration agency is receiving a substantial benefit from partnering with local law enforcement agencies in various states, yet they may be unaware of—or worse, indifferent to—the toll that those partnerships exact on those individual local jurisdictions.

104. *Id.*

105. *Id.*

106. *Id.*

A growing number of police chiefs who *are* concerned about public safety in their individual jurisdictions have begun to make their criticisms of these federal partnerships known.¹⁰⁷ As these police chiefs take their concerns to Washington to speak directly to lawmakers and the American public, an organized commitment to silence by the immigrant community may lend a sense of urgency to such warnings from the police themselves. Should local police be made aware that a significant segment of the residents in their jurisdiction have decided *not* to call the police for any reason whatsoever, then they will see that their duties to protect and serve the entire community may be seriously compromised. The realization that the immigrant community has taken matters into its own hands by electing silence over reporting may spur the involvement of police who need the American public to appreciate the difficulties that will result from a commitment to silence by their neighbors, undocumented or not.

IV. POLICE CRITICISM OF LOCAL IMMIGRATION ENFORCEMENT

The fact that local law enforcement and advocates for immigrants and low-income people agree on a particular issue is an unusual confluence of opinion. The two groups have different priorities and different perspectives: immigrant advocates see noncitizens as a vulnerable and targeted group, and through grassroots and legal advocacy they seek to improve the social and economic conditions of immigrants in this country.¹⁰⁸ But advocates are also rightfully concerned about the safety of an already-vulnerable immigrant community, not only from governmental abuse but also from street crime and workplace abuses. Police departments are also interested in arresting and prosecuting lawbreakers. Police departments can be diametrically opposed, however, to the goals of immigrant rights advocates as far as the question of whether local jurisdictions ought to participate in federal immigration enforcement. As can be seen by the growing number of partnerships between local police departments and federal immigration agents to arrest and deport undocumented immigrants,¹⁰⁹ it is clear that many local police officials consider undocumented immigrants to be merely criminals.

107. See Declaration of Roberto Villasenor at 2, *U.S. v. Arizona*, 703 F. Supp.2d 980 (D. Ariz. 2010) (No. 10-16645) [hereinafter Villasenor Declaration]; see Declaration of Jack Harris at 1–2, *U.S. v. Arizona*, 703 F. Supp.2d 980 (D. Ariz. 2010) (No. 10-16645) [hereinafter Harris Declaration].

108. The ACLU Immigrants' Rights Project believes that "non-citizens are often the first and most vulnerable targets of government abuse," and works to protect the legal and due process rights of immigrants, taking the position that no human being is "illegal." See *About the ACLU's Immigrants' Rights Project*, AM. CIVIL LIBERTIES UNION, <http://www.aclu.org/immigrants-rights/about-aclus-immigrants-rights-project>.

109. See ACTIVATED JURISDICTIONS, *supra* note 97.

However, an increasingly vocal contingent of police chiefs and sheriffs believe that their officers' involvement in federal immigration enforcement has had the adverse effect of making communities *less* safe, regardless of the fact that some immigrant residents may be in violation of federal immigration laws. This belief has created an unlikely meeting of the minds. Immigrant advocates in the difficult position of organizing their constituents to remain silent as an alternative to contacting local police certainly recognize that such efforts, while necessary, may leave an already-vulnerable community completely exposed. The strategic union of immigrant advocates who are concerned about the safety of the immigrant community, and like-minded police officials who are equally concerned about the safety of the entire community, has potential for tremendous success. This success, however, is dependent on how great the risk of police involvement in federal immigration enforcement actually is. Should the immigrant community make a public commitment to silence, effectively withdrawing from any participation in local policing efforts, a real sense of urgency will be added to the movement.

The growing criticism of the 287(g) partnerships and the S-Comm program, combined with an actual commitment to silence from the immigrant community, can be capitalized upon to push sympathetic law enforcement to real action. The police can pressure the prosecutors they work with to come up with creative ways to protect undocumented immigrant witnesses to crime, and they can use their influence to pressure the federal government to expand the number of visas provided to immigrants who participate in the prosecution of real criminal wrongdoers. Local police should also be actively involved in educating an American public that may not listen to the concerns of partisan immigrant advocates, but will be receptive to police concerns that enlisting local police to participate in federal immigration enforcement actually endangers entire communities. Finally, police can take advantage of the federal government's own stated concerns about the permissible and desirable scope of state involvement in federal immigration enforcement expressed in the Justice Department's recent lawsuit challenging the validity of Arizona's anti-immigrant legislation, the infamous Senate Bill 1070. Police officials can build on this tension by pressuring the Obama administration for a redirection of energies, away from federal-state partnerships like 287(g) and S-Comm.

A preliminary examination of Arizona's controversial Senate Bill 1070 and the Justice Department's lawsuit attempting to stop its implementation¹¹⁰ provides a helpful example of the federal government's own indecision about how much to ask the states for assistance in the

110. See Press Release, U.S. Dep't of Just., Citing Conflict with Federal Law, Department of Justice Challenges Arizona Immigration Law (July 6, 2010) (on file with author), available at <http://www.justice.gov/opa/pr/2010/July/10-opa-776.html> [hereinafter USDOJ Press Release].

immigration arena. It also reflects the Justice Department's own stated concerns that a patchwork system of state immigration enforcement would be "counterproductive."¹¹¹

Arizona Senate Bill 1070, signed by Governor Jan Brewer in April 2010, states specifically that its intent is to "discourage and deter the unlawful entry and presence of aliens and economic activity by [undocumented] persons" in Arizona through a method called "attrition through enforcement."¹¹² Simply put, the aim of the "attrition through enforcement" method is to make living and working in Arizona difficult (to say the least) for undocumented immigrants.¹¹³ Among the several mandates included in Senate Bill 1070 is the directive that local police decide whether "reasonable suspicion" exists that a particular person is unlawfully present in the United States and if so, then to determine the immigration status of that person.¹¹⁴

The Justice Department filed a lawsuit in federal court in July 2010, challenging Senate Bill 1070.¹¹⁵ The lawsuit alleged that "S.B. 1070 unconstitutionally interferes with the federal government's authority to set and enforce immigration policy."¹¹⁶ The Justice Department explained that "the Constitution and federal law do not permit the development of a patchwork of state and local immigration policies throughout the country."¹¹⁷ The brief went on to state that Senate Bill 1070 would significantly burden federal agencies by diverting resources from high-priority targets like aliens implicated in terrorism, drug smuggling, and gang activity.¹¹⁸ Additionally, the Justice Department complained that Arizona's law would result in "the detention and harassment of authorized visitors, immigrants and citizens" that cannot readily prove their lawful status.¹¹⁹

Senate Bill 1070 is the subject of several lawsuits filed by a number of advocacy organizations, including the American Civil Liberties Union, the National Coalition of Latino Clergy and Christian Leaders, and the League of United Latin American Citizens.¹²⁰ More surprising, however,

111. Nicholas Riccardi and Anna Gorman, *Federal judge blocks key parts of Arizona immigration law*, L.A. TIMES (July 28, 2010), <http://articles.latimes.com/2010/jul/28/nation/la-na-arizona-immigration-20100729>.

112. S. 1070, 49th Leg. (Ariz. 2010).

113. *Id.*

114. *Id.* at § 11-1051.

115. USDOJ Press Release, *supra* note 110.

116. *Id.*

117. Complaint at 2, *United States v. Arizona*, 703 F. Supp.2d 980 (D. Ariz. 2010) (No. CV 10-1413).

118. *See id.* at 6.

119. *Id.* at 3.

120. *See* Nicholas Riccardi, *ACLU Sues To Stop Arizona's Immigration Law*, L.A. TIMES (May 17, 2010), <http://articles.latimes.com/2010/may/17/nation/la-na-arizona-immigration-20100518>; *see also* Nicholas Riccardi, *First Lawsuits Filed To Challenge Arizona Illegal-Immigrant Law*, L.A. TIMES (Apr. 30, 2010), <http://articles.latimes.com/2010/apr/>

are the number of high-profile law enforcement officials that filed declarations in support of the Justice Department's lawsuit against Senate Bill 1070.¹²¹

Several law enforcement officials in Arizona, including the Chiefs of Police of Phoenix and Tucson, filed declarations in support of the Justice Department's lawsuit.¹²² The Tucson Police Chief, Roberto Villasenor, raised both fiscal and community safety concerns with Senate Bill 1070. Chief Villasenor stated that laws like Senate Bill 1070 amount to "an unfunded mandate that impose a Federal responsibility on local law enforcement,"¹²³ one his budget simply could not cover. He went on to state that requiring his officers to try and determine the immigration status of people in their community would jeopardize police relationships with the community, causing people to become more distrustful of the police.¹²⁴ Chief Villasenor stated that it is difficult to determine what constitutes "reasonable suspicion" regarding immigration status, and the likely result would be that

[e]ach police agency in this state will therefore develop its own definition, no doubt resulting in a patchwork of policies and procedures, with obvious danger to both law enforcement agencies and their communities. The relationship between law enforcement agencies and their communities will be seriously strained. Many community leaders now believe that their constituents will be unfairly targeted in the eyes of law enforcement. The concern is not over persons illegally present, but rather with legal citizens of the United States, who may, they believe, experience unnecessary and prolonged police contact based on their appearance of national origin or ethnicity. They fear the legislation codifies racial profiling, despite its wording, and such fear could destroy the good relationships that currently exist between police and local communities that have taken years to build through our efforts in community policing.¹²⁵

Phoenix Police Chief Jack Harris stated, "I am very concerned that victims and witnesses will be afraid to call police for fear of deporta-

30/nation/la-na-arizona-immigration-20100430; see also League of United Latin American Citizens, *LULAC Finds New Arizona Immigration Law Unconstitutional* (Apr. 15, 2010), http://lulac.org/news/pr/New_Arizona_Immigration_Law_Unconstitutional.

121. See Villasenor Declaration, *supra* note 107; see also Harris Declaration, *supra* note 107.

122. *Id.*

123. Villasenor Declaration, *supra* note 107, at 2.

124. *Id.* at 2-4.

125. *Id.* at 4.

tion.”¹²⁶ Chief Harris referred to a recent incident in which an undocumented witness physically intervened to prevent a suspected child molester from fleeing before the police arrived.¹²⁷ Chief Harris stated that had Senate Bill 1070 been in effect at that time, the witness may not have called for police for fear that his immigration status would result in his own detention.¹²⁸

Arizona has become the epicenter for the national debate over the role that states can and should play in federal immigration enforcement. The federal lawsuit filed against Senate Bill 1070, following closely on the heels of the Obama administration’s curbing of 287(g) authority from Sheriff Joe Arpaio in Maricopa County, Arizona, is one example of how the federal government itself is struggling with the fact that local enforcement of federal immigration law may be more trouble than it is worth. The critical reports from the Office of the Inspector General and the Latino Migration Report of the federal 287(g) program raise additional concerns about the capabilities of federal oversight and control over rogue states that have agendas of their own.¹²⁹

Local law enforcement officials that are critical of the cross-deputization of local police to enforce federal immigration laws generally focus their objections on three likely outcomes: (1) that community safety will suffer as undocumented witnesses choose not to report crimes, (2) that cross-deputization of local police will result in their officers racially profiling Latino residents, and (3) that the financial burden on their local police budgets will be too great.¹³⁰

A. Community Safety Concerns

On May 26, 2010, a group of police chiefs from across the country travelled to Washington D.C. to meet with Attorney General Eric Holder and voice their objections to Arizona’s anti-immigrant law.¹³¹ Los Angeles Police Chief Charlie Beck stated that Arizona’s law would not increase public safety and would, in fact, “make it much harder for us to do our jobs.”¹³² Chief Beck went on to say that “[c]rime will go up if this be-

126. Harris Declaration, *supra* note 107, at 1.

127. *Id.*

128. *Id.* at 1–2.

129. See OIG REPORT, *supra* note 69; NGUYEN & GILL, *supra* note 33.

130. See Villasenor Declaration, *supra* note 107; see also Harris Declaration, *supra* note 107.

131. Pete Yost, *Charlie Beck Speaks Out Against Arizona Immigration Law*, THE HUFFINGTON POST (May 26, 2010, 6:05 PM), http://www.huffingtonpost.com/2010/05/26/charlie-beck-speaks-out-a_n_590872.html?view=screen.

132. Spencer S. Hsu, *U.S. Police Chiefs Say Arizona Immigration Law Will Increase Crime*, WASH. POST, May 27, 2010, at A03.

comes law in Arizona or in any other state.”¹³³ Like other city residents, Chief Beck said, “undocumented immigrants are witnesses in all kinds of crime, and this does not just affect them,”¹³⁴ reflecting the reality that entire communities suffer when a significant segment of the population drops out of community crime reporting due to fear of the police.

Building relationships with an immigrant community that is already afraid of the police is challenging for local police departments, and the passage of Arizona’s immigration law would, according to Chief Beck, “increase the reluctance [to come forward] tenfold.”¹³⁵ People who believe that contacting the police may lead to an inquiry into their own immigration status, or their family members’ immigration status, will most certainly err on the side of caution and simply not make the call. Local police, who interact much more closely with their communities than any federal agent would, will find that their participation in federal immigration enforcement inevitably negatively affects those relationships on the street that are often crucial to timely and successful police investigations into local crime. Police departments across the country that have either experienced this drop in crime reporting firsthand from immigrant communities or have learned of its impact in other jurisdictions are rightfully concerned about the rise in state and federal cooperation agreements to police immigration.

Several members of the Consortium for Police Leadership in Equity in Denver, Colorado published a joint editorial in June 2010, titled *Policing Immigration: A Job We Do Not Want*.¹³⁶ They wrote:

When legislators require state and local law enforcement to enforce federal immigration policy, they make it much harder for officers to do their job. Sheriffs and chiefs have long voiced their concerns that asking officers to be immigration agents will scare undocumented community members out of calling on law enforcement for help.¹³⁷

This concern from local police departments that significant numbers of people will simply cease to rely on the police for help, or stop reporting crimes they have witnessed, has significant possibilities for informing the ongoing debate over state immigration enforcement. It simply cannot be denied that local police depend on their community members, documented and undocumented, to assist in solving crimes through

133. *Id.*

134. Richard A. Serrano and Kate Linthicum, *Justice Department poised to challenge Arizona Immigration Law*, LOS ANGELES TIMES (May 27, 2010), <http://articles.latimes.com/2010/may/27/nation/la-na-holder-immigration-20100527>.

135. *Id.*

136. *A Job We Do Not Want*, *supra* note 11.

137. *Id.*

cooperation with police and prosecutors.¹³⁸ The specter of an increase in unsolved crimes is one that police chiefs should be raising at community town hall meetings and with their local political representatives when a proposal to join federal cooperation programs such as 287(g) partnerships and Secure Communities is being publicly debated. The number of police organizations making their opposition to state immigration enforcement known is small, however, and they are in danger of having their voices drowned out by the police chiefs and local politicians across the country who are eagerly enlisting their communities to participate in federal immigration enforcement. Given their small numbers, police opponents to local policing of immigration violations must increase their efforts to change the hearts and minds of those within their own ranks. They must also take advantage of their position as law enforcement agents to influence a public that may be anti-immigrant, but is likely receptive to police concerns that local immigration enforcement will undermine the trust and cooperation necessary for effective policing of their neighborhoods, their streets, and their homes.

This message about effective community policing was sounded years ago by the Major Cities Chiefs Association (MCC), a group of police chiefs from the sixty-four largest police departments in the United States and Canada.¹³⁹

In a position paper adopted in June 2006, the MCC raised police concerns about the negative impact that local immigration enforcement would have on police relationships with the immigrant community, stating,

without assurances that contact with the police would not result in purely civil immigration enforcement action, the hard won trust, communication and cooperation from the immigrant community would disappear. Such a divide between the local police and immigrant groups would result in increased crime against immigrants and in the broader community, create a class of silent victims and eliminate the potential for assistance from immigrants in solving crimes or preventing future terroristic acts.¹⁴⁰

Members of the Committee who authored this position paper came from some of the largest police departments in the country, including Los

138. See GENE VOEGTLIN, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE, TRIBAL AND LOCAL LAW ENFORCEMENT 5 (Feb. 2004), available at <http://www.theiacp.org/Portals/0/pdfs/Publications/ImmigrationEnforcementconf.pdf>.

139. M.C.C. IMMIGRATION COMMITTEE RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES, ADOPTED BY MAJOR CITIES CHIEFS, June 2006, available at http://www.houstontx.gov/police/pdfs/mcc_position.pdf.

140. *Id.* at 6.

Angeles, New York, Houston, Miami-Dade, and Tucson.¹⁴¹ In warning that how local police responded to the call to enforce federal immigration laws could fundamentally change how those police protect and serve their local communities, MCC members were clearly hoping their message would reach other police departments considering an affirmative answer to that call. The renewed push for state cooperation in immigration enforcement through 287(g) partnerships and Secure Communities, however, has added a new sense of urgency to police concerns about the decline of police participation by the immigrant community, and organizations such as the MCC must be increasingly vocal in their opposition to these efforts if they hope to be heard.

A more recent study carried out by the Consortium for Police Leadership in Equity (CPLE) in 2009 was meant to assist the Salt Lake City Police Department in evaluating the consequences of state legislation encouraging the practice of cross-deputizing police officers for the purpose of immigration enforcement. The study reveals that police departments continue to have valid concerns about their role in policing immigration.¹⁴² Chris Burbank, the Chief of Police in Salt Lake City, testified in Washington, D.C. before the Subcommittee on the Constitution, Civil Rights and Civil Liberties about the results of the study, revealing that:

providing municipal police the powers of federal immigration agents is likely to discourage cooperation with law enforcement and encourage contempt and suspicion. The report indicates that when local law enforcement officers act as immigration agents, civilians become less convinced of their legitimacy. As a result, undocumented and documented Latinos, Latino citizens and White residents are less willing to report crimes when they occur.¹⁴³

Chief Burbank was able to provide specific examples, speaking about a client of Casa del Hispano in Lewisville, Texas who witnessed a murder

141. *Id.* at 2. The authors of the M.C.C. position paper were members of the M.C.C. Immigration Committee at the time of publication: Craig E. Ferrell, Jr., Houston Police Department, Leroy D. Baca, Los Angeles County Sheriff's Department, William J. Bratton, Los Angeles Police Department, Ella M. Bully-Cummings, Detroit Police Department, Raymond W. Kelly, New York City Police Department, Gil Kerlikowske, Seattle Police Department, Richard Miranda, Tucson Police Department, Robert Parker, Miami-Dade Police Department, and Richard D. Wiles, El Paso Police Department. *Id.*

142. See *Racial Profiling and the Use of Suspect Classifications in Law Enforcement Policy: Hearing before the Subcomm. on the Const., Civ. Rights, and Civ. Liberties of the Comm. of the Judiciary H. of Reps.*, 111th Cong. 14–20 (2010) (testimony of Christopher Burbank, Chief of Police, Salt Lake City Police Department) [hereinafter *Burbank Testimony*].

143. *Id.* at 2.

but made no report of it to local police for several months for fear of deportation.¹⁴⁴

Police concerns that undocumented immigrant witnesses to crime have already and will continue to choose silence over reporting crimes to police are well founded. The problems that this poses for communities across the country cannot be overstated. Should immigrants choose silence over reporting crimes to police, prosecutions fall apart and police cannot effectively do their jobs. Police officials who appreciate the potential consequences of a significant segment of their communities choosing silence have voiced their concerns; now, they must support their words with action.

Police action to avoid a complete loss of contact with the immigrant communities in their jurisdictions must involve placing real pressure on local prosecutors and government officials to offer meaningful protection to immigrants who become involved in the criminal justice system through no fault of their own. Enlisting their colleagues in local law enforcement in these efforts to protect immigrants must necessarily climb to the federal level, because deportation proceedings are the purview of the federal immigration agency. Local law enforcement officials who wish to maintain contact with the immigrant community must also pressure the federal government for the expansion of witness visa programs if they wish to hold back the tide of more silent witnesses.

B. Racial Profiling Concerns

The concern that state immigration enforcement will lead to the racial profiling of Latino members of their community is another problem that several police chiefs have identified as particularly troubling with regards to state policing of immigration violations.

In August 2010, the Consortium for Police Leadership in Equity convened a gathering in New York City to address issues of racial equity in law enforcement. It was a timely gathering of police leadership, sheriffs, researchers, federal officials and advocates in the aftermath of intense media coverage of the Oscar Grant shooting, the Sean Bell shooting, and Arizona's Immigration Law (Senate Bill 1070).¹⁴⁵ The nation's attention had turned toward the reality that racial tensions between law enforcement and the communities they police had increased, and the convention was meant to compel local police departments to address this problem with their communities in mind.¹⁴⁶ Efforts to have an honest and public

144. *Id.*

145. See Press Release, The Consortium for Police Leadership in Equity, Setting a National Agenda for Research on Equity in Law Enforcement at the 2010 CPLE Summer Conference (Aug. 13, 2010) (on file with author).

146. *Id.* The event was projected to include "over 30 researchers from leading universities and representatives from police and sheriff departments in Atlanta, Austin, Baltimore

conversation about the corrosive effects of racial profiling by police on any members of our communities must be made more often to a wide variety of audiences, and should be initiated by the police departments who know firsthand the detrimental effects racial profiling has on effective crime fighting.

Chief Burbank had addressed the problem of racial profiling in his testimony before Congress as well, reminding Congress of a not-so-ancient history when police served as agents of oppression during slavery and the civil rights era:

Police officers should enforce and uphold the law regardless of race, ethnicity, gender, religion, sexual orientation, or national origin. The ideal that all people are created equal with certain unalienable rights is the basis upon which the United States of America was founded. However, we have labored with this notion from its inception over 230 years ago. Unfortunately, law enforcement has been an effective tool of oppression throughout the history of our nation. Biased laws and practices have forced officers to engage in institutional racism. Prior to 1865, officers and deputies were tasked with protecting the property rights of slave owners by patrolling for runaway slaves and even detaining free Black Americans if they failed to carry the proper documentation. Local law enforcement played a similar role during World War II, when a number of police agencies were required to enforce curfew and detain suspected “enemy aliens,” tantamount to the harassment and persecution of Japanese Americans. It was barely a generation ago that law enforcement was charged with keeping water fountains separate and high schools racially segregated. In these and countless other cases, legislators buoyed by public sentiment directed law enforcement to protect the predominant race against the contrived threat of others. We are still struggling to repair the mistrust, resentment and rage that many communities continue to feel.¹⁴⁷

These words make it clear that local police departments, who are tasked with both enforcing local laws and upholding the United States Constitution, may find themselves in the untenable position of engaging in unconstitutional racial profiling through state immigration enforcement, while at the same time asking their community to continue to trust them.¹⁴⁸

County, Calgary, Chicago, Denver, Houston, Fort Worth, Las Vegas, Los Angeles (City and County), Montgomery County (MD), Newark (NJ), Oklahoma City, Philadelphia, Phoenix, Tucson, Salt Lake City, San Diego, San Jose, St. Louis, Toronto, Vancouver, and Virginia Beach.” *Id.*

147. *Burbank Testimony, supra* note 142, at 1.

148. *Id.*

In jurisdictions that have signed up to police immigration through programs like 287(g) and Secure Communities, immigrant advocates have been especially vocal in their protests about the racial profiling of residents by police. According to Rebecca Headen, staff attorney with the ACLU of North Carolina,

[t]he 287(g) program has created a climate of racial profiling and community fear throughout the state of North Carolina. Local law enforcement has established immigration checkpoints in areas frequented by Latinos including churches, flea markets, and trailer parks. Latinos have been arrested for improper vehicle tags, driving without a license, and fishing without a license. State troopers and local sheriffs' officers detained a bus with Latino passengers for hours for no reason other than the assertion they look foreign. Across North Carolina, Latinos now live under the constant threat that a trip to the grocery store or to Sunday worship could result in the deportation of their families.¹⁴⁹

The "face" of illegal immigration today is undoubtedly Latino and/or Mexican, and this country cannot deny its regrettable history of racially profiling the disfavored minority of the moment. Police departments that do not wish to risk participating in such bigoted and constitutionally offensive practices again, now with a new target, must seriously evaluate the impact that state immigration enforcement has on their own internal policies about racial profiling and discrimination. Collaborating with immigrant rights organizations, as well as members of historically disenfranchised groups who have experienced the detrimental effects of racial profiling in their own communities, should be a priority of local police departments considering a move into state immigration enforcement. African Americans who have experienced the same kind of profiling that Latinos and Mexicans face today can be influential voices of support as well as powerful reminders of the discrimination that the police have exposed marginalized groups to in the past.¹⁵⁰

149. Press Release, American Civil Liberties Union, House Hearing Today Will Examine Problems With Local Immigration Enforcement (Mar. 4, 2009), available at <http://www.aclu.org/immigrants-rights/house-hearing-today-will-examine-problems-local-immigration-enforcement>.

150. *Mission and History*, BLACK ALLIANCE FOR JUST IMMIGRATION, <http://www.blackalliance.org/mission-and-history/> (last visited Nov. 6, 2011) ("African Americans, with our history of being economically exploited, marginalized and discriminated against, have much in common with people of color who migrate to the United States, documented and undocumented.").

C. Budgetary Pressures

The cost of state immigration enforcement on local police departments is one that must be considered at a time of fiscal austerity on all fronts. On July 1, 2010, President Obama spoke at American University School of International Service on the subject of immigration reform and specifically addressed the budgetary pressures that state immigration enforcement can impose:

Laws like Arizona's put huge pressures on local law enforcement to enforce rules that ultimately are unenforceable. It puts pressure on already hard-strapped state and local budgets. It makes it difficult for people here illegally to report crimes—driving a wedge between communities and law enforcement, making our streets more dangerous and the jobs of our police officers more difficult. And you don't have to take my word for this. You can speak to the police chiefs and others from law enforcement here today who will tell you the same thing.¹⁵¹

Sheriff Bill Pribil of Coconino County, Arizona commented on the proposed anti-immigration bills in his state in March of 2010, stating, “[a]t this point, I see it interesting on the one hand [that] counties are being eviscerated by the state Legislature when it comes to budget . . . and yet they continue to find ways for us to spend our precious resources on programs we can't support.”¹⁵² Sheriff Pribil added that “this is just one more unfunded mandate that is being put onto counties . . . [a]nd now we're being asked to put another layer of duties onto law enforcement that we cannot support.”¹⁵³

Nevada Sheriff Mike Haley stated,

Any unfunded mandate, any direction by the federal government, that I use my precious resources to affect a federal outcome would affect my ability to do what the taxpayers in my county have asked me to do, and that is to keep them safe from criminals.¹⁵⁴

151. Barack Obama, Remarks at the American University School of International Service addressing Immigration Reform (July 1, 2010), <http://www.american.edu/sis/Obama-Transcript.cfm>.

152. *Proposed New AZ Immigration Bills Draw Concern*, ARIZ. DAILY SUN (Mar. 16, 2010, 4:05 AM), http://azdailysun.com/news/local/state-and-regional/article_1c897f3b-b20b-581b-a948-03fd3c6f8f28.html.

153. *Id.*

154. Lisa Halverstadt, *3 Police Leaders Oppose Arizona Immigration Law*, THE ARIZONA REPUBLIC (May 17, 2010, 2:21 PM), <http://www.azcentral.com/news/articles/2010/05/17/20100517arizona-immigration-law-police-leaders-oppose.html>.

In the University of North Carolina at Chapel Hill study discussed earlier,¹⁵⁵ researchers found support for police officials' budgetary concerns about state immigration enforcement. The study found that in Prince William County, Virginia, the estimated cost of the 287(g) program is \$6.4 million annually and \$25.9 million for five years.¹⁵⁶ Researchers found that the initial costs of the Prince William County program had been higher than anticipated, so the Board of Commissioners had to raise property taxes by 5 percent and reduce funds reserved for police and fire services.¹⁵⁷ Similarly,

[t]he annual direct and indirect costs of the 287(g) program in the state of Arkansas were an estimated \$7.9 million. These costs include training for twenty-one officers, incarceration, transportation, foster care for children of arrestees, police education campaigns, litigation and legal liability, and increases in wages and prices due to less labor from unauthorized immigrants.¹⁵⁸

The report concluded that the cost of direct expenditures alone, which included start-up, daily operating, and maintenance costs of the 287(g) program in a local or state jurisdiction, would be in the millions.¹⁵⁹ The researchers accounted for indirect costs as well, such as litigation fees, and found that the sixty-seven 287(g) partnerships currently in operation across the country are costing the American taxpayers hundreds of millions of dollars.¹⁶⁰

The police are right to be concerned about their local crime-fighting budgets. In these difficult economic times, everyone is concerned with how resources are being allocated. If programs like 287(g) and Secure Communities require local police to acquire new duties and responsibilities without the necessary financial assistance from the federal agency that is enlisting them, then the police should actively object. Local police departments that cannot afford an unfunded mandate to enforce federal immigration violations cannot be satisfied simply stating their objections; they must act to prevent such a mandate from being imposed upon them.

The police have valid concerns and objections to the involvement of local police departments in federal immigration enforcement. Police efforts to educate their own members, politicians, and the American public about the dangers outlined above can be redoubled through collaboration with

155. See *supra* p. 37.

156. NGUYEN & GILL, *supra* note 33, at 30.

157. *Id.*

158. *Id.*

159. *Id.* at 31.

160. *Id.*

immigrant advocacy organizations. In the meantime, the immigrant population must act to protect itself in an era when local police and federal immigration agents are equally menacing forces.

CONCLUSION

The cost for undocumented immigrant witnesses to report crime in this country today has grown too high. In the face of an increasingly intertwined state and federal immigration enforcement regime, the possibility that a report to police may lead to questions about immigration status will lead the rational undocumented witness to choose silence over calling the police. Examples like that of Abel Moreno in North Carolina, detained because of his lack of legal status after reporting an alleged sexual assault to police, have wide-ranging consequences for local communities should the immigrant community decide that next time, they will simply remain silent. The plight of the six men in Louisiana who witnessed the murder of their friend and then spent several months in jail because of the possibility that they might be deported before they could testify sent a loud and clear message to the immigrant community: If you value your job, your home, and any ties you have to this country, then the police are to be avoided at all costs by those without proper legal documentation to live here.

A collective movement to endorse silence as an organized act of civil disobedience should be encouraged throughout the immigrant community for those residents with anything less than full citizenship status. As an organized group of some thirty-three million strong who commit to silence in the form of a complete refusal to contact local police for any reason whatsoever, willful silence will be a potent mechanism for radical social change in a political and social climate that demonizes immigrants. Immigrant advocates can play a central role in organizing a widespread commitment to silence from immigrant communities while still acknowledging the ramifications of such a commitment.

The increasing number of federal immigration enforcement programs that enlist local police to identify possible immigration violations has only worsened the situation for immigrants. In a growing number of jurisdictions, the police are rightfully perceived to be anti-immigrant and eager to prioritize federal immigration enforcement over local policing objectives. The police community has grown divided, however, over the appropriate role of local police in federal immigration enforcement. A growing number of law enforcement officials believe that the costs to community safety, community relations, and local budgets are too high. These police officials are voicing their criticisms and concerns, emphasizing the potential dangers of a situation where the immigrant community declines to contact law enforcement to report crime for fear that their immigration status will be revealed. Indeed, police recognize that it is

already happening, albeit in a haphazard fashion. A public commitment to silence by the immigrant community, as a chosen tactic of civil disobedience, would make these fears not just a vague possibility, but an immediate threat. While a commitment to silence is certainly not what any police officer, sympathetic or not, desires, such a commitment would contribute a sense of urgency to what is currently merely a discussion.

By some estimates there are approximately 11.2 million undocumented persons currently in the United States and some twenty-two million with something less than full citizenship status. A commitment to silence on this scale takes the problem out of the realm of debate over immigration reform and into concerns about police and community involvement in the safety and fair treatment of community members, regardless of citizenship status. A public commitment to silence of this magnitude would give immigrants the ability to demand a solution that would meet the needs of vulnerable witnesses as well as law enforcement authorities and the communities that they protect.