MEASUREMENT ENFORCEMENT:  
A POLICY SHIFT IN THE ICE  
287(G) PROGRAM

MIMI E. TSANKOV*  
CHRISTINA J. MARTIN**

INTRODUCTION

On any given Tuesday, Thursday, and Saturday morning, representatives of the Esperanza Immigrant Rights Project of Catholic Charities of Los Angeles, Inc. (hereinafter Esperanza) convene inmates at the Los Angeles County Men’s Central Jail (MCJ) to participate in a legal rights presentation. This presentation guides foreign-born males at MCJ through the complex intersection of the criminal and immigration laws that will ultimately decide their fates in the United States.

* Mimi E. Tsankov is an Immigration Judge in the Los Angeles Immigration Court. The views expressed here are her own, and she writes in her individual personal capacity, not as an official spokesperson for the U.S. Department of Justice. Nor do her views necessarily reflect the views of her colleagues at the Los Angeles Immigration Court.

** Christina J. Martin is an Attorney Advisor in the Los Angeles Immigration Court. The views expressed here are her own, and she writes in her individual personal capacity, not as an official spokesperson for the U.S. Department of Justice. Nor do her views necessarily reflect the views of her colleagues at the Los Angeles Immigration Court.

1. The Esperanza Immigrant Rights Project is a program of Catholic Charities of Los Angeles, Inc. It provides legal representation, advocacy, and education to detained immigrants. Through the use of pro bono attorneys, Esperanza provides a general legal orientation regarding immigration law to a broad segment of the Men Central Jail’s foreign-born population. Esperanza also provides free legal representation to a select number of these individuals. For the last year, Esperanza has been conducting a program providing legal representation, advocacy, and education to destitute and vulnerable immigrants who have been detained through the implementation of 287(g) in Los Angeles County jails. See generally MERRICK J. BOBB, THE LOS ANGELES COUNTY SHERIFF DEPARTMENT, THE LOS ANGELES COUNTY SHERIFF’S DEPARTMENT: 28TH SEMIANNUAL REPORT 13 (2009), http://www.parc.info/client_files/LASD/28th%20Semiannual%20Report.pdf.


3. Id.
Some of these individuals may have committed violent crimes.\(^4\) And some of the same individuals may be present in the United States illegally.\(^5\) However, the combination of these variables creates a complex law enforcement dilemma: how to assure public safety while preserving basic civil rights in a reasonable fashion and within the spirit of the law.\(^6\) Stakeholders have differed in their interpretation of what is “reasonable” for each level of a potential criminal threat, and what the response of the legal system should be to avert that threat. A review of the legislation and enforcement statistics reveals a trend in the post-9/11 decade toward a pronounced tightening of the federal, state, and local laws and regulations in order to cast a broader net over the immigrant populations in the United States.\(^7\) However, the net catches not only those with criminal histories, but those without them.\(^8\)

Esperanza counsels detainees that through the imposition of an “ICE hold,” individuals released from criminal detention will be

---

4. *Bobb,* supra note 1, at 23. Of those inmates surveyed, only four percent had committed violent crimes. *Id.* at 22.

5. *Id.* at 23.

6. *Immigration Enforcement: Controls over Program Authorizing State and Local Enforcement of Federal Immigration Laws Should Be Strengthened: Hearing Before the Committee on Homeland Security,* 111th Cong. 6 (2009) (statement of Richard M. Stana, Director, Homeland Security and Justice) (explaining that while Immigration and Customs Enforcement (ICE) has designed some management controls to govern 287(g) program implementation in its stated effort to use the program to address serious criminal conduct such as drug trafficking, the program lacks documented program objectives to help ensure that participants work toward a consistent purpose, and suffers from uneven supervision over participating agencies’ implementation of the program), available at http://www.gao.gov/new.items/d09381t.pdf.

According to data provided by ICE for twenty-five of the twenty-nine program participants we reviewed, during fiscal year 2008, about 43,000 aliens had been arrested pursuant to the program. Of those 43,000 aliens arrested pursuant to the 287(g) authority, ICE detained about 34,000, placed about 14,000 of those detained (forty-one percent) in removal proceedings. ...The remaining 5,000 (fifteen percent) arrested aliens detained by ICE were either given a humanitarian release, sent to a federal or state prison to serve a sentence for a felony offense, or not taken into ICE custody given the minor nature of the underlying offense and limited availability of the federal government’s detention space. *Id.* at 6–7.


transferred to immigration detention immediately. Esperanza explains that the “ICE hold” is the result of a partnership between the Los Angeles County Sheriff’s Department (LASD), the U.S. Federal Government as represented by the Department of Homeland Security (DHS), and U.S. Immigration and Customs Enforcement (ICE), under the auspices of section 287(g) of the Immigration and Nationality Act (INA). Section 287(g) authorizes local law enforcement personnel to apply federal immigration law under certain parameters, specifically in task force and detention settings. This Article will explore the 287(g) program in detention settings only. Legal scholarship has already extensively evaluated the other aspects such as the constitutionality of 287(g) in light of the gradual transfer of what has historically been a federal authority to state and local law enforcement.

To be certain, the Obama Administration has sought to reform this pre-9/11 program, with the intention of protecting public safety and national security more adequately in light of the constantly evolving safety concerns. The Obama Administration argues that the new 287(g) policies provide law enforcement with effective tools to achieve their highest priority—the identification and removal of dangerous criminal aliens. The Obama Administration further contends that the new policies simultaneously promote greater consistency so that all state and local law enforcement partners use the same standards in implementing the program. The new legal framework reflects a shift in detention-setting enforcement, considers the criticisms lodged against

13. E.g., Jason G. Idilbi, Local Enforcement of Federal Immigration Law: Should North Carolina Communities Implement 287(g) Authority?, 86 N.C. L. Rev. 1710 (2008) (describing how Congress has blurred the line between local law enforcement and criminal immigration violations through the delegation of federal authority to local law enforcement); Clare Huntington, The Constitutional Dimension of Immigration Federalism, 61 Vand. L. Rev. 787 (2008) (recognizing the rancorous debate among legislators at all levels over the propriety of immigration federalism).
15. See infra Part III.
16. Id.
the program in the past few years, and registers how the administration has reacted to those very concerns.17

Supporters of 287(g) enforcement point to national security and crime prevention to justify its existence.18 However, due to the broad scope of the program and the impact on the U.S. immigrant population, its implementation has been highly controversial.19 Opponents question the value of 287(g) enforcement in light of the constitutional dilemmas it presents and its potential for impeding local law enforcement efforts by alienating immigrant communities due to fear of removal and ethnic profiling.20

With the rhetoric at a fever pitch, the newly appointed Obama Administration officials began responding to all sides: pro-immigrant advocates, members of the immigrant community, government administration officials, congressional leaders, and law enforcement agencies.21 The Obama Administration should be credited for their swift response. Within only a few short months of taking office and under the guidance of its new Secretary, the DHS had begun a comprehensive review of the 287(g) program.22 As a result, it scrapped its existing agreements with local governments, and published a new standardized legal framework that better defines the program objectives as well as the DHS’s oversight authority, and makes continued partnership contingent upon the signing of a new agreement.23 The DHS reaffirmed the obvious—the removal of aliens who have committed violent crimes is of great importance to the safety of our communities.24 The more specific definition of this broad goal in the

17. Id.
18. VAUGHAN, supra note 12, at 10.
22. See Napolitano Announcement, supra note 21.
23. Id.
24. Id.
new agreement aims to avert the chance for abuse by local authorities while applying the law.\textsuperscript{25}

This Article documents a policy shift in 287(g) enforcement since mid-2009. This appears evident in the creation of the new legal framework in the form of a standardized memorandum of agreement (Model MOA) and the implementation of various internal controls.\textsuperscript{26} Alongside this initiative, 2009 also witnessed an increased effort on the part of the Executive Branch to provide greater support to immigrants in detention.\textsuperscript{27} The Executive Office for Immigration Review (EOIR) expanded its pro bono partnership with the non-governmental legal community.\textsuperscript{28} Through a contract with Esperanza, EOIR provides Legal Orientation Program (LOP Program) support services to immigrants, both in immigration custody and, more recently, in criminal custody.\textsuperscript{29} From the EOIR’s perspective, LOP Program services yield faster processing times, more effective case preparation by pro se respondents and other resource-saving benefits to the overwhelmed immigration court dockets and ICE detention facilities.\textsuperscript{30} In addition, the LOP Program has a significant impact on case outcomes, with fewer program participants being ordered removed in absentia, increased grants of voluntary departure, and identification of detained immigrants with derivative U.S. citizenship, as well as other forms of relief.\textsuperscript{31} In immigration proceedings, immigrants will be evaluated for removal even if their crimes are misdemeanors and non-violent criminal acts.\textsuperscript{32} Many of these individuals have U.S. citizen children, parents, spouses,

\begin{itemize}
\item \textsuperscript{25} Id.
\item \textsuperscript{27} U.S. Dep’t of Justice, Executive Office for Immigration Review, EOIR Legal Orientation and Pro Bono Program, http://www.justice.gov/eoir/probono/MajorInitiatives.htm (last visited April 7, 2010).
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} \textsc{Nina Siulc et al., Vera Institute of Justice, Legal Orientation Program: Evaluation and Performance and Outcome Measurement Report, Phase II} 7 (2008), http://www.justice.gov/eoir/reports/LOPEvaluation-final.pdf. “[T]here is near universal consensus among stakeholders that a key indicator of success for the LOP is its ability to ensure that people do not spend unnecessary time in detention.” \textit{Id.} at 47. There is evidence that detained LOP participants have shorter average case times. \textit{Id.} For example, in 2006, the combined average time for LOP participants whose cases were completed while they were in detention was twenty-seven days, versus forty days for comparison groups, reflecting a difference of thirteen fewer days for LOP participants. \textit{Id.} at 48.
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Id.}
\end{itemize}
and other extended family in this country. In some cases, removal would cause permanent separation of parent and child. In recognition of this impact on immigrant communities, the Obama Administration chose to support an expanded LOP Program initiative, put in place by the Bush Administration, possibly, in part to strengthen its partnership with the non-governmental legal community.

This Article explores legislative and regulatory measures to address the issue of criminal immigrants through an in-depth examination of the 287(g) detention programs in Southern California. It evaluates how the programs have changed through the implementation of recent Administration initiatives, documenting the shift in priorities, and examining how the modifications withstand criticism.

Part I explores the legislative foundation of 287(g) enforcement. It reviews the political forces that led to the creation of the legal authority. Exploring the practical implementation of the program, as it was subsequently influenced by the events following 9/11, this Article discusses whether the implementation has been faithful to the spirit of the legislation.

Part II delves into the most prevalent type of agreement, the 287(g) detention model, and compares legacy memorandums of agreement (MOA) in Southern California and the recently released DHS Model MOA. The Southern California communities impacted have been vocal about the changes and concerns about public safety, and this Article reports those concerns as expressed on all sides of the issue in each locale.

Part III analyzes how the LASD enforced its legacy MOA, and reports the LASD’s concerns about its new areas of responsibility as defined in the Model MOA. Using the MCJ as a case study, the Article evaluates how public-private partnerships have been expanded within the context of the LOP Program in order to reach criminal immigrant detainees earlier in their legal cases, and provide them with support as per the 287(g) framework.

---


34. See e.g. Jobs Postings, Esperanza Immigration Rights Project of Catholic Charities of Los Angeles, Inc., (Oct. 17, 2008) (on file with the author). All of these job postings relate to Esperanza’s jail and detention center legal orientation presentations for detained immigrants. Id.

35. See infra Part I.

36. See infra Part II.

37. See infra Part III.
The Article concludes that there has been an increase in the collaborative efforts among federal and local authorities toward a common goal of increased safety and strengthened national security. Nevertheless, criticisms about some aspects of the legal framework appear valid. All parties need to be vigilant in evaluating the legal system as it evolves in order to find the proper balance between preserving the limited rights of detained immigrants and addressing the concerns of those who fear altering the legacy 287(g) programs could compromise public safety.

I. LEGISLATIVE AND REGULATORY FOUNDATIONS OF 287(G) ENFORCEMENT

A. Enforcement Measures Aimed at Criminal Immigrants

Against a backdrop of more than a century of public immigration law jurisprudence, pro-immigrant advocates and immigrant communities have argued that the first decade of the 20th century witnessed a marked recession in the due process rights of criminal immigrants.38 Susceptible to various spheres of influence, ranging from the social and political, to the economic, religious, and racial, immigration law is a point at which a myriad of disciplines converge in a manner that can, at times, be volatile.39 Since immigration law confers a more limited set of the basic protections ordinarily afforded to U.S. citizens, it has prompted immigrant rights advocates to challenge the fairness of the various laws and policies on due process grounds.40 Arguably nowhere is this schism more pronounced than in the context


of law enforcement efforts to ensure national security and public safety.\textsuperscript{41}

The Obama Administration has voiced its commitment to the principles espoused by the Bush Administration in “securing the homeland against 21st century threats by preventing terrorist attacks and other threats against our homeland, preparing and planning for emergencies, and investing in strong response and recovery capabilities.”\textsuperscript{42} Cognizant that the past few decades have witnessed unsurpassed migration into the United States\textsuperscript{43} and while the country has been addressing increased terrorist threats,\textsuperscript{44} finding the ideal formula for achieving security in light of the practical concerns of policing widespread migration has been elusive. The mid-1990s saw stepped-up, enforcement-oriented immigration law that was focused on criminal immigrants, and the new anti-terrorism legislation passed following the events of 9/11 continued the general climate of tougher immigration laws.\textsuperscript{45}

One fact is clear: the increased criminal and immigration enforcement initiatives have resulted in unprecedented mass imprisonment post-9/11.\textsuperscript{46} In the current fiscal year, for example, 11\% of California’s total budget, equating to approximately $13.5 billion, will have been spent on public safety.\textsuperscript{47} A number of studies report that of the population subject to mass imprisonment, immigrant arrests and

\begin{itemize}
  \item \textsuperscript{41} ACLU Massachusetts, supra note 40; ACLU Tennessee, supra note 40.
  \item \textsuperscript{43} Kevin R. Johnson, September 11 and Mexican Immigrants: Collateral Damage Comes Home, 52 Depaul L. Rev. 849, 858 (2003).
  \item \textsuperscript{44} Donald Kerwin & Margaret D. Stock, The Role of Immigration in a Coordinated National Security Policy, 21 Geo. Immigr. L.J. 383 (2007).
  \item \textsuperscript{45} Id. at 386–89 (discussing the major pieces of legislation, which were passed shortly after the events of 9/11).
  \item \textsuperscript{46} Ruben G. Rumbaut et al., Migration Policy Institute, Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men (2006), http://www.migrationinformation.org/USFocus/display.cfm?ID=403.
\end{itemize}
detentions have been increasing every year since 1980. This number quadrupled from just over 500,000 in 1980 to 2.2 million in 2005.

Legal scholars and advocates argue that while appropriate security goals will reduce the potential harm of terrorism, in order to be sustainable, they must also promote civil liberties and national unity. The concern of pro-immigrant advocates is that 50% of those non-citizens incarcerated in 2008 did not have a criminal record, and approximately 90% were charged with petty crimes. These statistics lead some to argue that limited enforcement budgets could be spent more effectively on those who present a greater risk to society.

The public outcry regarding rampant illegal immigration into the United States during the past few decades, and what was perceived as an inadequate federal response to the problem, led Congress in 1996 to begin a trend toward legislation that tightened restrictions on admission and removal of criminal immigrants. This trend continued during the years following 9/11, with the implementation of a series of congressional and policy-oriented restrictive immigration reforms, including the promulgation of the U.S. Patriot Act and the Real ID Act, as well as the development of proactive policies such as National Security Entry-Exit Registration System. It has also manifested itself in the legal concept behind 287(g), which delegates some of the federal immigration authority to state and local officials.

In the spring of 2006, immigrants and pro-immigrant activists rallied together by the millions in cities across the United States in an effort to defend immigrant rights. When immigrant workers throughout the United States observed a single-day national boycott to

48. RUMBAUT, supra note 46.
49. Id.
50. ACLU MASSACHUSETTS, supra note 40, at 5–6.
51. BOBB, supra note 1, at 22–23.
52. Id.
53. Johnson, supra note 43, at 850. While rigorously analyzed causal links have been sparse, critics on all sides of the debates are in general agreement that immigrants are concentrated in urban environments, are generally non-white, and hail from a broad range of origins and backgrounds. RUMBAUT, supra note 46. They generally speak languages other than English and have uneven socioeconomic skills and monetary resources. Id.
55. Real ID Act, supra note 7.
exhibit their economic power, the issue came to the forefront. As a result, anti-immigrant proponents became more vocal in their outrage over illegal immigration and enforcement of immigration law. What resulted was an increased division between the opposing factions and passionate arguments supporting the various viewpoints, suspending a potential comprehensive solution to the immigration problem in the United States.

One by-product of this fervor has been the heightened scrutiny over the removal of criminal immigrants. While the federal government has a broad law enforcement and homeland security mission, of which immigration law enforcement is a subset, state and local law enforcement officers are usually the first to come into contact with individuals engaging in criminal acts within the United States. Born from practicality, section 287(g) of the INA was enacted to authorize the federal government to enter into agreements with state and local law enforcement agencies to permit designated state and local officers to perform federal immigration law enforcement functions.

By law, ICE is the federal agency charged with the identification, apprehension, detention, and removal of criminal aliens. In 1996, however, when 287(g) was added to the INA through the implementation of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), the Immigration and Naturalization Service (INS), a now-defunct component of the Department of Justice (DOJ), was responsible for this enforcement
activity. With an illegal immigrant population burgeoning in cities throughout the United States, Congress took notice. The fact that state and local authorities were powerless to enforce federal immigration law became a highly contentious issue in the context of criminal immigrants, and paved the way for the advent of the 287(g) measure.

B. Legislative History

The 287(g) legislation has its roots in Iowa, under the leadership of Republican Senator Charles Grassley who was a sponsor of the legislation in the Senate. The impetus to pursue it centered upon allowing “local law enforcement officers to investigate, apprehend, and detain illegal aliens.” Senator Grassley contends that he “wrote the law for people like Justin Younie of Sheldon, Iowa” who was brutally attacked and murdered by an illegal immigrant. When the deported immigrant returned to the United States illegally in 1995, local law enforcement did not have the power to arrest and detain him. Lawmakers were frustrated that many communities were fighting increasing illegal immigration, while their state and local law enforcement agencies did not have the legal authority to arrest and

67. Vaughan, supra note 12, at 3.
69. Vaughan, supra note 12, at 3.
70. Id.
71. Id.
72. Id.

State and local officials are further frustrated when a deported illegal alien reappears in their jurisdiction. The only recourse in this scenario is to again call the INS office and wait. I offer this amendment today to empower State and local law enforcement agencies with the ability to actively fight the problem of illegal immigration. My amendment will allow State and local law enforcement agencies to enter into voluntary agreements with the Justice Department to give them the authority to seek, apprehend, and detain those illegal aliens who are subject to an order of deportation.

Id.
detain individuals for violations of immigration law.\textsuperscript{74} Rather, the only lawful action these officials could take was to call the local INS officer and report the matter.\textsuperscript{75} Lack of resources at the INS hindered the federal government’s response.\textsuperscript{76} The intention of the 287(g) program was to allow, rather than mandate, those communities that wished to participate to do so through the creation of agreements with the federal authorities.\textsuperscript{77}

Christopher Cox, Republican Congressmen from California representing Orange County, California, then Chairman of the House of Representative’s Immigration Policy Committee and the Task Force on California, argued that “the voters of California sent a very loud message all the way here to Washington, DC,”\textsuperscript{78} that, although immigration is a federal responsibility, illegal immigration affected the state of California disproportionately.\textsuperscript{79} “We have over half the illegal immigrants in America in our State,” he stated.\textsuperscript{80}

In 1996, the INS sought assistance from Congress contending that it did not have the necessary resources to address all criminal activity of non-citizens within the United States.\textsuperscript{81} Congress heeded the call, and appropriations for detention and removal efforts increased by 64\% (an increase of $399 million) between 1996 and 1997.\textsuperscript{82} IIRAIRA

---

\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{77} Id.

Residents of Orange County were reminded of the costly delays in the current deportation process 6 months ago when Officer Tim Garcia of the Anaheim Police Force was shot and seriously wounded by an illegal alien with a criminal record. This was not an isolated instance in Anaheim. A recent 60-day survey indicates that 35 percent of all the inmates sent to the Anaheim jail are illegal aliens. The manager’s amendment in this bill is going to correct this tragedy through the establishment of a 6-month project in Anaheim which will lead the way for the rest of the country. An INS agent will be stationed at the city of Anaheim’s incarceration facilities to perform frontline documentation and appropriate questioning of criminally charged suspected illegal aliens.

\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{82} \textsc{Dixon, supra} note 68, at 2.
mandated the detention of large numbers of criminal aliens and established a system for increased fees to be used primarily to fund detention and removal activities. As a result, the 287(g) program was added to the INA, setting forth that:

[T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

Soon thereafter, Representative Cox argued for a pilot project that could identify illegal aliens among those incarcerated by the City of Anaheim and the County of Ventura through the placement of an INS agent stationed in two local government jails to perform front-line documentation and appropriate questioning of criminally-charged, suspected undocumented immigrants. Assisting in the expedition of the removal process, he argued, would be a potential benefit to the entire country, as an undocumented immigrant is ten times more likely than a U.S. citizen to be convicted of a federal crime.

Legislative critics expressed concern that local law enforcement would not have the resources and training to conduct the highly complex legal analysis required to differentiate among those aliens who were present illegally, or criminal aliens who had convictions which would render them inadmissible and potentially deportable.
Nevertheless, with the strong support of Iowa Representative Tom Latham (R-IA), the passage of 287(g) met little opposition, in part, because of a public outcry regarding the 1998 release by Utah authorities of a group of unauthorized immigrants with INS detainers. These immigrants were released due to insufficient federal personnel to transport them to facilities in either Las Vegas or Denver, as well as a lack of resources to continue to detain them. Thus, with the promulgation of 287(g), Congress created a mechanism by which state and local law enforcement could work together to achieve common goals.

C. 287(g) Enforcement 2002 Through Mid-2009

Following the events of 9/11, and influenced by the fact that six of the hijackers were immigrants, the Executive Branch ramped up its 287(g) program, entering into the first MOA in 2002. In the six years that followed, the Bush Administration entered into 287(g) partnerships that fell into three general categories: (1) detention setting programs; (2) task force operations programs; and (3) hybrids of the two types of programs. By August 2007, ICE’s Office of State and Local Coordination (OSLC) had established thirteen variations on federal-level immigration or Border Patrol officers. If they are going to go through the whole training that a Border Patrol officer goes through, that is something different, and perhaps we could discuss it then, but I see nothing in this amendment that would provide for that. I see no monies in the amendment to provide for that, and what it does for me is cause a great deal of concern that what we are doing is extending the reach of the Federal government, without extending the protections that should be there with it.

Id.

90. Id.
93. VAUGHAN, supra note 12, at 4.
state-local partnership programs, of which 287(g) was one, under the umbrella initiative: Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS).  

With sixty-seven MOAs in force by 2008, the most prevalent model became the “jail model,” or, as it is now referred to, the “detention model” (Detention Model). This type of MOA allows for correctional officers working in state prisons or local jails to screen those arrested or convicted of crimes by accessing federal databases to ascertain an individual’s immigration status. The “task force model” (Task Force Model) program allows law enforcement officers participating in criminal task forces, such as drug or gang task forces, to screen arrested individuals using federal databases to assess their immigration status. Under these types of 287(g) agreements, as well as hybrids of the two, ICE trained state and local officers to identify, process, and, when appropriate, detain individuals for immigration offenses that they encountered during their regular, daily law enforcement activities.

The DHS maintains that criminal activity is most effectively combated through a multi-agency/multi-authority approach that utilizes federal, state, and local resources, skills, and expertise. Focusing on the fact that during the course of their daily duties local law enforcement may encounter foreign-national criminals and immigration law violators, the DHS has sought ways to augment its 287(g) partnership programs. DHS cites to statistics reflecting that more than 30,000 criminals have been identified as potentially deportable since the beginning of fiscal year 2006 through the 287(g) program, and that ICE deported 276,000 illegal immigrants in fiscal year 2007.

Riding this momentum, by 2008 ICE increased the number of immigration detention beds to 32,000 to hold those awaiting

95.  *Id.* at 1.
96.  *Id.* at 2; ICE Delegation, *supra* note 64.
98.  KEANEY, supra note 94, at 2.
99.  *Id.*
100.  *Id.*
102.  *Id.*
immigration court appearances regarding possible removal. Public safety concerns of releasing violent criminal aliens who had already served their sentences into the general population proved to be so politically contentious that community leaders presented only a few roadblocks to these programs, as they were loathe to be perceived as opposed to legitimate enforcement efforts. Thus, in some 287(g) enforcement programs, the local authorities developed controversial implementations of the programs that included not just post-conviction legal status interviews, but also pre-criminal sentencing, and, in some locales, pre-conviction review of legal status. Individuals determined to be undocumented were issued an immigration court hearing date and bed space at an immigration detention facility was secured to ensure that the individuals were not released when their regular prison term ended, or when released from criminal arrest.

D. Stakeholders’ Views of 287(g) Enforcement Programs Through Mid-2009

With this pronounced escalation in immigration enforcement policies, concerns about the 287(g) program were levied. The stakeholders in this process include immigrant communities and pro-immigrant advocates, state and local enforcement officers, and congressional leaders and their auditing bodies. During the period between 2002 through mid-2008, the general concerns related to the following areas: (1) ethnic profiling leading to removal of lower priority non-criminal immigration status violators thus imposing a negative impact on communities; (2) concerns that lack of adequate funding was leading to a reduction in public safety since local law enforcement

105. See generally Kerwin, supra note 44; Richard A. Johnson, Note, Twenty Years of the IRCA: The Urgent Need for an Updated Legislative Response to the Current Undocumented Immigrant Situation in the United States, 21 GEO IMMIG. L.J. 239 (2007).
109. Id.
agencies were tasked with new duties without additional resources; (3) reduction in public safety due to a chilling effect on reporting of crime by undocumented immigrants due to the fear of deportation; (4) inaccurate information in law enforcement databases harming detainees; (5) lack of transparency in 287(g) training; and (6) lack of proper oversight of the program on the state and local level by ICE.110

Immigrant rights advocates and legal scholars challenged the constitutionality of the program,111 while some law enforcement authorities feared that 287(g) would ultimately undermine public safety.112 The majority of these criticisms were lodged against the Task Force Model enforcement efforts,113 which are not the focus of this Article.114 Nevertheless, critics also have voiced some concerns about the Detention Model programs.115 They feared that there would be insufficient federal funds to support the program, which could lead to inadequate training of designated state and local law enforcement

110. KEANEY, supra note 94, at 1 (discussing the major criticisms of the 278(g) program, including former Los Angeles Police Chief William Bratton’s criticism); Seth M. Stodder & Nicolle Sciara Rippeon, State and Local Governments and Immigration Laws, 41 URB. LAW. 387, 403 (2009) (discussing the criticisms of racial profiling and the chilling effect on reporting under the 287(g) program); Muzaffar Chishti & Claire Bergeron, Signs of Change in Immigration Enforcement Policies Emerging from DHS, MIGRATION POLICY INSTITUTE, Mar. 16, 2009, http://www.migrationinformation.org/feature/display.cfm?ID=722 (discussing that some officers were concerned that the program diverts attention away from public safety); Cassandra Q. Butts, Immigration Enforcement: A Federal Matter, CENTER FOR AMERICAN PROGRESS, Apr. 24, 2006, http://www.americanprogress.org/issues/2006/04/b1573171.html (arguing that allowing local law enforcement to enforce federal laws would “handcuff state and local law enforcement in their ability to promote public safety”).


113. Id. Joan Friedland, Immigration Policy Director of the National Immigration Law Center, noted that the center is “principally concerned” about agreements used outside of jails. Id.


115. Id.
officers (Custody Assistant Officers). Critics argued that this, in turn, would lead to deficiencies in due process.

Immigration rights groups also voiced their concerns about inaccurate and outdated information in the federal databases that could impact immigrants unfairly. They explained that because all arrestees could be subjects of immigration inquiries prior to a possible conviction, the system would unfairly penalize those arrestees even if a conviction was never reached, and also create incentives for ethnic profiling on the part of state and local law enforcement officials. Even though much of this criticism has come from immigrant and civil rights groups, some of the critics have been law enforcement leaders and personnel who reported that 287(g) enforcement undermined trust within their communities, compromising public safety, and diverting resources away from other priorities.

Finally, critics argued that ICE priorities were not well-defined since 287(g)’s legislative history lacks specificity in identifying the responsibilities to be performed and the circumstances under which Custody Assistant Officers were to exercise 287(g) authority. This ambiguity provided ICE with broad discretion in establishing enforcement priorities for the program to the potentially unfair detriment of immigrants.

116. Id.
117. Immigration Enforcement, supra note 6, at 1. The authority to enter into these programs was established through Section 133 of IIRIRA. Id.
119. Immigration Enforcement, supra note 6, at 3.

My officers can’t prevent or solve crimes if victims or witnesses are unwilling to talk to us because of the fear of being deported. That basic fact led to the implementation almost 30 years ago of the LAPD’s policy on immigrants, which has come to be known as Special Order 40. The order prohibits LAPD officers from initiating contact with someone solely to determine whether they are in the country legally. The philosophy that underlies that policy is simple: Criminals are the biggest benefactors when immigrants fear the police. We can’t solve crimes that aren’t reported because the victims are afraid to come forward to the police.

With the pressure mounting as indicated by the vocal opposition from various constituency groups, congressional leaders responded. In March 2009, the U.S. Government Accounting Office (GAO), the investigative arm of Congress, issued a comprehensive report critical of the 287(g) program. Many of the concerns expressed by the immigration community and pro-immigrants rights groups were acknowledged. First, the GAO Report stated that although ICE had designed management controls to govern 287(g) program implementation, these controls were ineffective in some respects. The GAO opined that although ICE officials had articulated that the objective of the 287(g) program was to enhance the safety and security of communities by addressing serious criminal activity committed by removable immigrants, some state and local authorities were employing the 287(g) authority to process the removal of immigrants arrested for minor offenses. Second, the GAO Report asserted that ICE had not consistently articulated in program-related documents the use of 287(g) authority by participating agencies. For example, in analyzing legacy MOAs, the GAO found they lacked specificity in some instances, such as whether or not an arrest should precede an exercise of such authority. Third, the GAO reported that the processing of individuals for possible removal should result only from a state or federal felony conviction but that some MOAs failed to mention this specific requirement. Finally, the GAO reported that ICE had not developed performance measures for the 287(g) program even though government agencies typically are required to clearly define their missions, measure their performance against the goals they have set, and then report on their performance. Measuring performance allows agencies to track the progress they are making toward their goals, thus providing critical

124. *Immigration Enforcement, supra* note 6, at 2.
125. *Id.* at 3.
126. *Id.*
127. *Id.*
128. *Id.* at 10.
129. *Id.*
130. *Immigration Enforcement, supra* note 6, at 4.
131. *Id.* at 5.
information on which to base decisions for improvements. Failure to do so could be construed as a misuse of authority.

E. 287(g) Enforcement in 2009—A Policy Shift

Having entered office with the legacy 287(g) agreements in force that lacked uniformity and significant oversight, and amidst criticism that the system created opportunities for local abuse to the ire of congressional leaders, pro-immigrant advocates, and public safety officials, the Obama Administration immediately began an assessment of the program. In July 2009, within four months of the release of the GAO report, Secretary of DHS Janet Napolitano, announced the creation of the Model MOA, entitled, “Agreement for State and Local Immigration Enforcement Partnerships.” Secretary Napolitano simultaneously announced that ICE was adding eleven new MOAs in conformity with the Model MOA. She asserted that the Model MOA clearly defines the major objectives of the 287(g) program, outlines the immigration enforcement authorities granted by the agreement, and provides detailed guidelines for ICE’s supervision of Custody Assistant Officers, as well as information reporting and tracking processes, complaint procedures, and implementation measures. In the past, there was wide variation in the perception of the nature and extent of supervisory responsibility under the 287(g) program among ICE field officers and officials, and a broad range in the degree of oversight. However, the Model MOA, Napolitano argues, explicitly establishes ICE’s oversight authority, and promotes greater consistency across all partnerships by ensuring that the same standards will be used in implementing the 287(g) program in different locales. The Model MOA offers a detailed training and testing program for educating Custody Assistant Officers about their duties in accordance with the agreement.

132. Id. at 6.
133. Id. at 4.
136. Id.
137. Id.
138. Immigration Enforcement, supra note 6, at 2.
139. Napolitano Announcement, supra note 21.
140. Id.
The Model MOA aligns the 287(g) local operations with major ICE enforcement priorities, specifically, the identification and removal of criminal aliens in accordance with a tiered system prioritizing violent, drug, and property crimes, while still permitting implementation of the program against “criminal aliens who ha[d] been convicted or arrested for other offenses.”

She explained that ICE’s current 287(g) partner agencies would need to re-sign the Model MOAs, and ultimately, only those state and local agencies with newly signed agreements would be permitted to continue enforcing federal immigration law. Furthermore, a “sunset clause” would keep the new MOAs in effect for three years from the date of signing unless terminated by either party. Finally, to address concerns that individuals could be arrested for minor offenses as a guise to initiate removal proceedings, the Model MOA sets forth that participating local law enforcement agencies would be expected to pursue all original criminal charges prior to initiating any immigration proceedings. While there is no specific mechanism incorporated into the agreement to monitor this particular requirement, the Model MOA contains a complaint system established for redress of some grievances.

F. Examining the Model MOA

The Model MOA continues to permit two types of authority previously envisioned: (1) the Detention Model; and (2) the Task Force Officer Model, as well as hybrids of the two. The Model MOA proposes the following resolution to key areas of contention, which are discussed in detail below:

1) A more clearly defined program mission, responsibilities, and priorities;
2) The expectation that law enforcement will pursue all criminal charges to completion prior to any immigration proceedings;
3) The establishment of minimum requirements for 287(g) Custody Assistant Officer designation;
4) Discussion of federal civil rights implications;
5) More clearly defined limits to 287(g) authority;
6) The requirement of ICE approval for 287(g) operations;
7) More detailed complaint procedures; and
8) A clearer system of interpretation of the Model MOA.147

The Model MOA provides that the mission of the 287(g) program is “to enhance the safety and security of communities by focusing resources on identifying and processing for removal criminal aliens who pose a threat to public safety or a danger to the community.”148 Under the Detention Model, Custody Assistant Officers are authorized to interrogate, charge, serve arrest warrants, administer oaths, take evidence, issue immigration detainers, and detain and transport immigrants.149 ICE 287(g) supervisors must be notified of detainers issued within twenty-four hours of issuance.150 Custody Assistant Officers must ensure proper record checks, file conviction documents, and serve charging documents with computer databases that are updated in a timely manner.151 Through the Model MOA, state and local entities are specifically required to focus their use of the 287(g) program to identify and remove criminal aliens who reside within their jurisdiction pursuant to the following tiered system of priorities:

1) Level 1: Criminal aliens who have been convicted of or arrested for major drug offenses and/or violent offenses such as murder, manslaughter, rape, robbery, and kidnapping;152
2) Level 2: Criminal aliens who have been convicted of or arrested for minor drug offenses and/or mainly property offenses such as burglary, larceny, fraud, and money laundering;153
3) Level 3: Criminal aliens who have been convicted of or arrested for other offenses. Level 3 is the most contentious aspect of the three-tiered system, as it opens the possibility for discretionary enforcement of the federal immigration laws.154 It

148. Id. at 1.
149. Id. at 21.
150. Id. at 6.
151. Id.
152. Id. at 17.
153. Model MOA, supra note 147.
154. Id. at 17.
is worth noting that legacy 287(g) agreements failed to establish priorities for the various types of criminal convictions.155

Another key difference between many of the legacy 287(g) agreements and the Model MOA is that the new agreement articulates an expectation that state and local law enforcement agencies will pursue to completion all criminal charges which caused the agencies to take the alien into custody.156 The Model MOA states that ICE will assume custody of an alien “who has been convicted of a State, local, or Federal offense only after . . . such alien has concluded service of any sentence of incarceration,” has prior criminal convictions, or is in a catchall third custody option, in which both parties deem it appropriate on a case-by-case basis (emphasis added).157 This section of the Model MOA seems to indirectly address the racial ethnic profiling concern. However, some critics charge that the Model MOA is devoid of an enforcement mechanism to ensure that local authorities comply with the proscribed structure, and argue that the Model MOA’s catchall third custody option could be abused and broad-based profiling could still occur.158

The Model MOA outlines the specific terms and conditions pursuant to which selected state and local personnel are to be nominated, trained, and approved by ICE to perform certain functions of an immigration officer. This includes five-year background checks, continuous review of any disciplinary history, and a two-year tour of duty in the role.159 It limits the exercise of the immigration enforcement authority to that which is specifically provided for in the agreement.160 In addition, state and local Custody Assistant Officers are limited to exercising their federal authority during the conduct of their regular professional duties.161 They must pass an examination before engaging in actions as a Custody Assistant Officer.162 While information has not been disseminated publically that reflects how ICE Custody Assistant Officer training materials have been modified, the Model MOA states that it will provide training consistent with the updated program.163

155. Id.
156. Id. at 2.
157. Id.
158. ACLU Tennessee, supra note 40.
159. Model MOA, supra note 147, at 3.
160. Id. at 1.
161. Id. at 21.
162. Id. at 4.
163. Id.
The Model MOA identifies that the Custody Assistant Officers must perform in conformance with a detailed list of civil rights laws. Failure to do so can result in a complaint to ICE, for which a sophisticated complaint resolution procedure is articulated in the Model MOA. The Model MOA complaint and allegation reporting procedure requires state and local review, with ICE oversight, within ninety days of receipt.

The Model MOA mandates how the agreement can be interpreted and grants ICE final authority in this matter. Under the Model MOA, ICE takes greater control of 287(g) program implementation such that Custody Assistant Officers may participate only in detention operations approved by ICE. The Model MOA also establishes that ICE retains oversight authority regarding implementation of the local programs. The regional ICE representative and the state and local authorities will meet on an as-needed basis, at least one time per year, to ensure compliance with the agreement. Moreover, ICE controls the release of information to the media about the program.

The Model MOA provides for the allocation of costs and expenditures, with the state and local authorities bearing the costs of salaries, benefits, local transportation, and official documents as well as the cost of training and travel-related expenses. ICE assumes all personnel costs for instructors and supervisors. On a case-by-case basis, ICE may cover travel, housing, and per diem costs for some state and local personnel. ICE will, if able, provide technology and its maintenance to support 287(g) investigative functions. State and local authorities must cover the cost of cabling and power upgrades to support the technology as well as network access and office supplies. The state and local authorities must provide ICE officials with an office space, if needed, free of charge. State and local authorities must

164. Id. at 8.
165. Model MOA, supra note 147, at 8, 13–15.
166. Id. at 15.
167. Id. at 1.
168. Id.
169. Id. at 6.
170. Id. at 18.
171. Model MOA, supra note 147, at 9.
172. Id. at 5.
173. Id.
174. Id.
175. Id.
176. Id.
177. Model MOA, supra note 147, at 5.
provide qualified foreign language interpreters, if needed, for those
detained who have limited English language proficiency. 178 To the
extent they wish, state and local authorities may engage in community
outreach to promote the programs they are supporting. 179

Despite all the efforts to revamp the 287(g) program, criticism
persists. In the fall of 2009, a large and diverse group of immigrant
rights, civil rights, and community organizations submitted a letter to
President Obama calling for an end to the 287(g) program. 180 The
National Immigration Law Center, in partnership with National Day
Laborer Organizing Network and the Detention Watch Network,
gathered more than 521 organizations throughout the United States in a
united front to call for an end to the 287(g) enforcement program. 181
These organizations included police officials, immigrant rights
advocates, and others across a broad spectrum of the public. 182 The
Congressional Hispanic Caucus advised the President that “[t]he misuse
of the 287(g) program by its current participants has rendered it
ineffective and dangerous to community safety. . . . It is our opinion that
no amount of reforms, no matter how well-intentioned, will change this
disturbing reality.” 183 Some argue that the Model MOA is deficient as
ICE has not yet published performance measures for the 287(g)
program to track and evaluate the progress toward attaining the
program’s objectives. 184 Indeed, the Model MOA does not specifically
define what data should be tracked or how it should be collected,
measured, and reported. Some argue that this could result in
inconsistent data tracking and reporting between jurisdictions,
differences in the character of data that is tracked and reported, and
variations in the format in which the data is reported to ICE. 185

Despite the criticisms, the implementation of the Model MOA
represents a dramatic shift within the Executive Branch in direct
response to the concerns expressed by the stakeholders. 186 The overhaul
of the program reflects a nuanced approach to addressing the challenges
of preserving the limited rights of detained immigrants and responding

178. Id. at 8.
179. Id. at 9.
180. Letter to President Obama, supra note 111.
181. Id.
182. Id.
183. Letter from Hispanic Congressional Caucus to President Obama, Sept. 28, 2009,
184. See ACLU Tennessee, supra note 40.
185. See SHAHANI, supra note 38, at 64.
186. KEANEY, supra note 94, at 3.
to public safety concerns. 187 The Model MOA specifically calls on local programs to focus on violent criminals, drug traffickers, and other major offenders rather than individuals convicted of or arrested for other offenses. 188 The three-tiered prioritization leaves room for interpretation on a local level by those enforcing an MOA because none of the tiers are expressed in absolute terms. 189 It requires adherence to the Model MOA or cessation of the partners’ 287(g) enforcement programs. 190 By far, the most significant change is the addition of the tiered system of priorities delineating the 287(g) immigration significance of criminal offenses committed by detainees. This system has raised the most concerns. 191

Judging by the number of signed MOAs, some state and local communities appear to be satisfied with the changes. ICE reports that as of November 13, 2009, there are sixty-seven MOAs in force 192 and more than 1075 state and local law enforcement officers have been trained and certified for participation in the program. 193 A careful review of the list reveals that forty-one of these agreements, which is approximately 61% of the total number, are either solely or partially Detention MOAs. 194

II. SOUTHERN CALIFORNIA 287(G) PROGRAMS

Nowhere is the impact of this program more relevant than in Southern California, home to an estimated 24% of the entire U.S. immigrant population. 195 In 2005, the GAO revealed that of the 55,322 undocumented immigrants in prison or jail, one in every eight arrests, or less than 13%, had resulted in the detention of an undocumented immigrant. 196 It further reported that 12% of these arrests had been for

---

187. Id.
188. Model MOA, supra note 147, at 1.
189. Id. at 17.
190. Id.
191. BARRY, supra note 122.
192. ICE Delegation, supra note 64. Currently, sixty-six MOAs have been signed and seven new and active MOAs are currently in “Good Faith” Negotiations as of January 8, 2010. Id.
193. Id.
194. Id.
violent crimes such as murder, robbery, assault, and sex offenses, and that 58% of all arrests had occurred in the State of California.\textsuperscript{197} Three of the largest counties in Southern California have had Detention MOAs in force: (1) Los Angeles County, (2) Orange County, and (3) Riverside County.\textsuperscript{198} In 2008, San Bernardino County had an agreement “in principle” with ICE.\textsuperscript{199} As a result of the implementation of the 287(g) programs, the number of criminal aliens identified and processed by Custody Assistant Officers and federal officers in Los Angeles-area jails and prisons reached record levels during the years 2005 through 2008.\textsuperscript{200} This increase was not confined to Los Angeles County. On the contrary, the seven-county Southern California region reported having processed 35,562 immigrants for removal in fiscal year 2008, representing a 12% increase from the year before with about one-third of these interviews being under the 287(g) program.\textsuperscript{201}

In the late days of the Bush Administration, ICE officials were attributing the great increase in the identification and removal of criminal aliens in large part to the continued success of 287(g) partnerships with the sheriff’s departments in Los Angeles, Orange, Riverside, and San Bernardino Counties.\textsuperscript{202} Commenting on the success of this program in late 2008, Bush Administration DHS Secretary Julie Myers issued a press release specifically identifying the achievements of the Southern California programs, commending and quoting Orange County Sheriff Sandra Hutchens by stating, the “program has assisted us in identifying thousands of undocumented foreign nationals who have committed crimes and are booked into our jails. This collaboration keeps criminals from returning to the streets and increases the safety of our communities.”\textsuperscript{203}

\textsuperscript{197} Id. at 5–6.


\textsuperscript{199} Ice Delegation, supra note 64; San Bernardino County MOA, supra note 97.


\textsuperscript{201} See VENABLE, supra note 20.

\textsuperscript{202} Roche, supra note 200.

\textsuperscript{203} Id.
Upon the promulgation of the Model MOA, these local authorities set about to review the impact of the Model MOA and how it would effect their existing programs. The LASD commissioned a study by the Police Assessment Resource Center to formally examine the impact.\textsuperscript{204} The study was released in October 2009.\textsuperscript{205} As of this writing, Orange County, Riverside County, and San Bernardino County have not released details of the internal review process for their 287(g) programs. The ICE website shows that it is currently in good faith negotiations with Los Angeles, Orange, and Riverside Counties.\textsuperscript{206} The ICE website reports on November 3, 2009 the Board of Supervisors approved the San Bernardino MOA, which is now in place.\textsuperscript{207}

\textbf{A. Legacy 287(g) Programs in Southern California}

Historically, the 287(g) programs within these counties have been very similar in nature. Los Angeles County was the first of the Southern California counties to enter into an MOA with ICE on February 1, 2005.\textsuperscript{208} Orange County followed suit on November 2, 2006, and Riverside County on April 28, 2006.\textsuperscript{209} San Bernardino County’s agreement was not formalized officially for its legacy 287(g) program, and the County had in place an agreement “in principle” with ICE.\textsuperscript{210} Nevertheless, all four Counties employed the 287(g) Detention Model structure.\textsuperscript{211} Under these programs, specially-trained 287(g) Custody Assistant Officers were provided with the authority to question those incarcerated in county jails regarding their immigration status.\textsuperscript{212} Additionally, Custody Assistant Officers are given authority to consider evidence to support removal of the detainee, prepare detainers of limited duration, administer immigration oaths, take sworn statements from

\begin{footnotesize}
\begin{tabular}{ll}
204 & BOBB, \textit{supra} note 1.  \\
205 & \textit{Id.}  \\
206 & ICE Delegation, \textit{supra} note 64. As of January 5, 2010, Los Angeles County, Riverside County, and Orange County are in “good faith” negotiations with ICE regarding renegotiation of their MOAs, although San Bernardino County’s MOA is in effect. \textit{Id.}  \\
208 & ICE Delegation, \textit{supra} note 64.  \\
209 & \textit{Id.}  \\
210 & \textit{Id.}  \\
211 & \textit{Id.}  \\
212 & \textit{Id.} \\
\end{tabular}
\end{footnotesize}
detainees, prepare ICE charging documents, and notify ICE of the presence of any non-U.S. citizens in their custody.\textsuperscript{213}

In Los Angeles County, the LASD implemented and administered the 287(g) program.\textsuperscript{214} The expressed intent of the program was to create a mutually beneficial partnership to enhance the capacity of both ICE and the LASD.\textsuperscript{215} According to the \textit{Los Angeles Times}, from February 2005 to June 2008 the LASD interviewed approximately 20,000 inmates through the 287(g) program and referred 10,840 people, little more than half of the interviewed inmates, to ICE for possible deportation.\textsuperscript{216} As mentioned above, the new MOA is currently under consideration, but the future of Los Angeles County’s 287(g) program is unclear. An in-depth discussion regarding this situation follows below.

In Orange County, the 287(g) program was administered by the OCSD.\textsuperscript{217} It was created in 2005 with the establishment of a 287(g) initiative entitled the “Cross-Designation” program.\textsuperscript{218} The program’s goal was to alleviate jail overcrowding and recidivism.\textsuperscript{219} Orange County used the agreement for training and certification of Orange County Sheriff’s Deputies assigned to jail operations.\textsuperscript{220} On October 17, 2006, the Orange County Board of Supervisors approved a Detention MOA with the DHS, which is now under negotiation.\textsuperscript{221}

Pursuant to the legacy MOA, DHS instructors taught a four-week course to two sergeants and twelve deputies, completed on December 21, 2006.\textsuperscript{222} “Two sergeants and eight deputies were assigned to the

\textsuperscript{213} Id.
\textsuperscript{214} \textit{BOBB}, supra note 1, at 7–11. The 287(g) programs in the three other counties in Southern California with MOAs are also implemented through their respective Sheriff’s Departments. \textit{Orange County MOA}, supra note 198; \textit{Riverside County MOA}, supra note 198; \textit{San Bernardino County MOA}, supra note 97.
\textsuperscript{215} \textit{BOBB}, supra note 1, at 6–11.
\textsuperscript{216} \textit{VENABLE}, supra note 20, at 1.
\textsuperscript{217} \textit{Orange County MOA}, supra note 198.
\textsuperscript{218} \textit{PROGRESS REPORT}, supra note 107; \textit{Ice Delegation}, supra note 64.
\textsuperscript{219} \textit{Orange County MOA, supra note 198, at 1.}

\textsuperscript{221} \textit{ORANGE COUNTY BOARD OF SUPERVISORS, 2006-2007 ORANGE COUNTY GRAND JURY, ICE IN ORANGE COUNTY 1 (2007), http://www.ocgrandjury.org/pdfs/ice_report_final.pdf; ICE Delegation, supra note 64.}
\textsuperscript{222} Enforcing Immigration Laws, supra note 220.
Orange County Intake Release Center and four deputies were assigned to the Theo Lacy Facility.\footnote{\textsuperscript{223}} The Intake Release Center is the focal point of entry for all new arrestees brought into the Orange County jail system and where all inmates are screened and booked.\footnote{\textsuperscript{224}} The Theo Lacy Facility is one of the primary detention facilities in Orange County, housing 3100 inmates, in settings ranging from maximum to minimum security.\footnote{\textsuperscript{225}} Collectively, the fourteen specially-trained officers who were assigned to these facilities formed the ICE Cross-Designation program.\footnote{\textsuperscript{226}} As such, they actively conducted interviews of all foreign nationals booked into the Orange County jail system.\footnote{\textsuperscript{227}}

To gauge its efficacy, the unit gathered and reported statistical data to the DHS on a weekly basis.\footnote{\textsuperscript{228}} A steering committee was convened to oversee the performance of the unit to insure compliance with existing rules and regulations.\footnote{\textsuperscript{229}} The statistical data collected and disseminated to the public included the number of inmates booked, the number initially interviewed by 287(g) officers and by ICE, and the number of holds placed.\footnote{\textsuperscript{230}} The steering committee kept statistics on those who were charged with aggravated felonies, felonies, and misdemeanors by gender.\footnote{\textsuperscript{231}} In its first year of operation, OCSD reported booking and screening 70,870 individuals into its jails and conducted 287(g) interviews with 6469 of those booked.\footnote{\textsuperscript{232}} OCSD issued ICE detainers to 4683 individuals, 327 of whom had been arrested for aggravated felonies and 2968 for general felonies.\footnote{\textsuperscript{233}} The number of inmates arrested for misdemeanors was 1715, and of the number arrested, 300 were identified as gang members.\footnote{\textsuperscript{234}}
From January 19 through March 18, 2007, the program ramped up significantly and within a two-month period OCSD had already conducted approximately 1508 inmate interviews. Of those, approximately 1004 ICE holds were placed on inmates. That number increased dramatically with holds being placed on approximately 659 inmates charged with felonies and 345 inmates charged with misdemeanors, 71 of whom were affiliated with street gangs. The 2008 statistics reflected an even greater increase with 63,146 inmates screened, 4479 interviewed under the program, and 3839 individuals detained with ICE holds, amounting to about 6% of the total inmate population. Of this number, 2315 were felony convictions and 1517 were misdemeanors. In the first half of 2009, the trend continued and the OCSD reported that for the period from January through August 2009, 40,766 individuals were booked into the jail. Of those, 2767 individuals were interviewed under the 287(g) program and 2200 were issued ICE detainers.

In Riverside County and San Bernardino County, the program has been administered by their respective sheriff’s departments: the Riverside County Sheriff’s Department (RCSD) and the San Bernardino County Sheriff’s Department (SBCSD). Both the RCSD and the SBCSD have touted the effectiveness of their program in keeping violent criminals off the streets and placing barriers so that criminals cannot victimize citizens. However, they have not disclosed detailed statistics of the type reported by OCSD. Riverside County has reported that it flagged 1321 inmates for ICE interviews in the fiscal year ending June 30, 2009 from the Riverside Jail, which housed one-
third of the county’s inmates. The San Bernardino County Sheriff’s Department reported that it flagged 2359 inmates in 2008 for ICE holds, and 2742 during the period January through September 2009.

B. Fundamental Principles Underlying the Legacy 287(g) Programs

While the previous MOAs underlying each of the programs in Southern California were nearly identical, some important differences existed regarding the implementation of the programs in each of the counties. Each of the programs specified the powers delegated to their participating personnel certified with immigration responsibilities, and specified the statutory provisions that authorized these powers. Each program envisioned the power to interrogate. The 287(g) Custody Assistant Officers were granted authority to interrogate aliens to determine probable cause for a possible immigration violation. In addition, each had the power and authority to administer oaths and to take and consider evidence.

Participating personnel used their authority to process criminal immigrants including fingerprinting, photographing, interviewing, preparing affidavits, and taking sworn statements. This processing was conducted under the review of an ICE supervisor. In each of the four legacy programs, the Custody Assistant Officers were required to give their ICE supervisors “timely” notice of any alien for which the officer believed an ICE arrest or detainer would be appropriate before the alien’s release from custody. The 287(g) Custody Assistant Officers had the power to issue immigration detainers and charging documents for immigrants in categories established by their ICE supervisors. Additionally, the program prohibited the detention of

245. Id.
246. Id.
247. See Model MOA, supra note 147.
249. § 287(a)(1).
250. § 287(b); 8 C.F.R. § 287.5(a)(2).
251. Orange County MOA, supra note 198, at 2.
252. Id.
253. See Parra-Chico, supra note 26, at 333–34.
immigrants by state and local officials for more than forty-eight hours for immigration purposes.\textsuperscript{255} The 287(g) Custody Assistant Officers had the authority to transport aliens.\textsuperscript{256} They were permitted to use this authority to employ ICE procedures and policies, including the ICE use-of-force policy, while maintaining their state and local standards of conduct.\textsuperscript{257} Authorization for ICE custody assistance was to be valid for one year and could be revoked at any time by either the federal or local authorities.\textsuperscript{258}

Each of the state and local enforcement entities were free to nominate their members for ICE training.\textsuperscript{259} The candidates were then required to undergo a background check, federal security clearances, and evaluations.\textsuperscript{260} U.S. citizenship and at least two years of correctional work within their departments was required.\textsuperscript{261} The Orange County MOA also required that candidates could not be married to persons illegally present in the United States and could not have “family associations which could adversely impact their ability to perform ICE functions.”\textsuperscript{262}

ICE instructors provided mandatory training of 287(g) enforcement personnel on federal immigration laws and policies.\textsuperscript{263} This training included their scope of authority, awareness of cross-cultural issues, federal law, civil rights law, international consular law, and DOJ guidance on the use of race information in enforcement activities.\textsuperscript{264} Supervision of 287(g) Custody Assistant Officers was to

\textsuperscript{255} Parra-Chico, \textit{supra} note 26, at 334–35. ICE must be notified of a detainer within twenty-four hours after a detainer is placed. \textit{Id.} at 326.

\textsuperscript{256} 8 C.F.R. § 287.5(c)(6) (2005).

\textsuperscript{257} The ICE Use of Force Policy Continuum illustrates the levels of force ICE staff may use to gain control of a “resident”: “(1) staff presence without action, (2) verbal interventions and commands, (3) established and accepted techniques from which there is minimal chance of injury, (4) established and accepted techniques from which there is a greater possibility of injury.” \textit{U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE/DRO RESIDENTIAL STANDARD: USE OF PHYSICAL FORCE AND RESTRAINTS 4}, \url{http://www.ice.gov/doclib/pi/familyresidential/use_of_physical_force_and_restraints.pdf} (last visited Feb. 27, 2010).

\textsuperscript{258} Orange County MOA, \textit{supra} note 198, at 4.

\textsuperscript{259} \textit{Id.} at 3; Riverside County MOA, \textit{supra} note 198, at 3; San Bernardino County MOA, \textit{supra} note 97, at 3; Model MOA, \textit{supra} note 147, at 3.

\textsuperscript{260} Model MOA, \textit{supra} note 147, at 3.

\textsuperscript{261} \textit{Id.}

\textsuperscript{262} Orange County MOA, \textit{supra} note 198, at 3.

\textsuperscript{263} \textit{Id.} at 4.

\textsuperscript{264} \textit{U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES} (2003), \url{http://www.justice.gov/crt/split/documents/guidance_on_race.php}. ICE reports that this “guidance” was created in an effort to eliminate racial profiling in law enforcement.
be mandatory while they performed their immigration enforcement functions.265

Costs incurred for the ICE training programs were borne primarily by the state and local governments.266 Specifically, the state and local governments paid the salaries and overtime of their 287(g) Custody Assistant Officers while the officers participated in the training program, as well as for travel to, housing during, and per diem costs connected with their training.267 ICE provided the training personnel and materials as well as yearly administrative, legal, and operational updates for the duration of the agreement.268 While training was provided on an on-going basis, ICE certified the capabilities of the 287(g) Custody Assistant Officers who successfully completed training and passed all required examinations.269

The Riverside County MOA provided for a division of responsibility between the RCSD and ICE for some technological needs, such as computer maintenance and support.270 The Orange County MOA specified that the agreement could not obligate either the county or the federal agency to expend funds unless otherwise agreed upon.271

Section 287(g) Custody Assistant Officers were treated as federal employees only for the purposes of the Federal Torts Claims Act272 and for purposes of worker’s compensation claims,273 when they performed functions described and authorized under the MOA.274 They were provided the same immunities and defenses as ICE officers for personal tort liability in the performance of these functions.275 ICE was not to be

“Racial profiling” at its core concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity.

Id. at 1.
265. Orange County MOA, supra note 198, at 5.
266. Id.
267. Id. at 4.
268. Id.
269. Id. at 2–4.
270. Riverside County MOA, supra note 198, at 5.
271. Orange County MOA, supra note 198, at 5.
275. 8 U.S.C. § 1357(g)(8).
responsible for the “intentional misconduct” of the participating officers.\(^\text{276}\)

Each of the MOAs required the creation of a steering committee whose task it was to review enforcement activities conducted pursuant to the MOA in order to ensure compliance.\(^\text{277}\) This review was conducted using the information provided to the steering committee such as case information, participant evaluations, complaints filed, media coverage, and statistical information on increased immigration enforcement.\(^\text{278}\)

In the case of the LASD program, LASD and ICE worked together to implement community outreach measures as well as procedures for processing public complaints against LASD personnel in the exercise of their authority under 287(g).\(^\text{279}\) ICE officers and the LASD were monitored in part through complaint procedures in the interest of protecting the civil and constitutional rights of aliens.\(^\text{280}\) Complaints could be lodged with both ICE and the LASD, each adhering to their own established complaint procedures for reporting and resolution.\(^\text{281}\) The MOA required a resolution guideline of ninety days for complaints to be addressed.\(^\text{282}\)

C. The Model MOA and Its Impact in Southern California

Under the Model MOA, signatories in the four Southern California counties described above would continue to have power to interrogate for immigration violations, to process those individuals who have been convicted of state or federal felony offenses, to serve warrants for arrest for immigration violations, to administer oaths, and to take and consider evidence.\(^\text{283}\) The 287(g) Custody Assistant Officers would retain the power and authority to prepare charging documents for signature by an ICE official and retain the authority to issue immigration detainers.\(^\text{284}\) They also would retain the power to detain and transport arrested aliens to ICE approved detention facilities.\(^\text{285}\)

---

276. Id.
277. Model MOA, supra note 147, at 6.
278. Orange County MOA, supra note 198, at 7.
279. L.A. County MOA, supra note 198, at 2.
280. Model MOA, supra note 147, at 22.
281. Id.
282. Id. at 15.
283. Id. at 22.
284. Id.
285. Id.
Under the Model MOA, the Custody Assistant Officers would also have the power to engage in 287(g) enforcement of those who have been merely arrested for, and not convicted of, violating a federal, state, or local offense.\(^{286}\) Legacy MOAs were silent as to when during the criminal detention process an inmate could be evaluated for immigration violations. As a result, the local agencies had the flexibility to tailor their use of authority in the manner they felt would best serve their community. In Orange County, all inmates booked into the Orange County correctional system were given 287(g) immigration interviews.\(^{287}\) However, in Los Angeles County, the LASD had in place a policy of conducting interviews of inmates before release, but after serving their sentences.\(^{288}\) ICE holds were not placed on arrestees out of a concern for the “controversial nature of deporting undocumented immigrants who [had] committed at worst minor or trivial offenses.”\(^{289}\) The LASD reported that foreign-born inmates housed at a facility other than MCJ, and all female inmates, “would likely not [have] receive[d] an immigration interview, unless his or her crime was particularly heinous or there was a special order from prosecutors” (emphasis added).\(^{290}\)

The Model MOA’s new-tiered system focuses efforts on more serious criminal conduct, which is in accordance with ICE priorities.\(^{291}\) Legacy agreements were silent as to the identification of which immigrants were to receive a 287(g) interview. Under the Model MOA, ICE would require that the authority be focused on the aforementioned three-tiered system of prioritization.\(^{292}\)

This approach would significantly alter the legacy LASD program. Previously, LASD Custody Assistant Officers only interviewed inmates post-conviction, and typically only those inmates that would now be classified as the less serious offenders under Levels 2 and 3.\(^{293}\) In general, they did not interview the most dangerous Level 1 offenders, since they viewed them as bound for state prison and assumed that they would receive interviews regarding their immigration status later during incarceration.\(^{294}\) Under the Model MOA, LASD 287(g) Custody

---

286. Model MOA, supra note 147, at 22.
287. PROGRESS REPORT, supra note 107, at 6–8.
288. BOBB, supra note 1, at 6–7.
289. Id. at 7.
290. Id. at 6.
291. Model MOA, supra note 147, at 17.
292. See generally id. at 19.
293. BOBB, supra note 1, at 14.
294. Id.
Assistant Officers would now need to interview and place ICE holds on Level 1 inmates.\(^{295}\) Thus, LASD perceives a pronounced shift in responsibilities from those under the legacy MOA to those under the Model MOA.\(^ {296}\) While the legacy MOA permitted similar levels of responsibility in preparing an ICE deportation case, in fact, the majority of the workload was borne by ICE officials.\(^ {297}\) Under the Model MOA, LASD foresees a greater portion of the responsibility and workload being shifted to the LASD.\(^ {298}\)

Under the Model MOA, while the local agencies would retain the right to issue enforcement statistics regarding the use of 287(g) authority, they would now only be permitted to do so with ICE approval.\(^ {299}\) In the legacy agreements, ICE had not required entry of statistical or arrest data into common law enforcement databases.\(^ {300}\) However, under the Model MOA, ICE reserves the right to request that local authorities share specific tracking data and/or any information, documents, or evidence related to the circumstances of a particular alien’s arrest.\(^ {301}\)

Three of these four communities are still evaluating whether they will agree to sign the new Model MOA.\(^ {302}\) To date, only San Bernardino County has adopted the Model MOA.\(^ {303}\) This decision was not without controversy, however, as several pro-immigrant advocates, including the Justice for Immigrants Coalition of Inland Southern California,\(^ {304}\) voiced concern about the program.\(^ {305}\) They called for the creation of an oversight body, as well as a transparent complaint

\(^{295}\) Id.
\(^{296}\) Id.
\(^{297}\) Id.
\(^{298}\) Id.
\(^{299}\) Model MOA, supra note 147, at 9.
\(^{300}\) Riverside County MOA, supra note 198; Orange County MOA, supra note 198; L.A. County MOA, supra note 198; San Bernardino County MOA, supra note 97.
\(^{301}\) Model MOA, supra note 147, at 6.
\(^{302}\) ICE Delegation, supra note 64.
\(^{303}\) Action Summary, supra note 207.
\(^{304}\) Hispanic Tips, Coalition Calls for Public Oversight in New San Bernardino 287(g) Agreement, Nov. 5, 2009, http://www.hispanictips.com/2009/11/05/coalition-calls-for-public-oversight-in-new-san-bernardino-287g-agreement/ [hereinafter Hispanic Tips]. This organization consists of approximately “twenty groups from all sectors of the community, dedicated to providing direct service to the local immigrant community while working toward a just solution to an immigration system that is separating families and punishing workers.” It is “backed by faith leaders, activists, workers and families from around San Bernardino County.” Id.
\(^{305}\) Id.
procedure, to combat the kinds of civil rights violations and ethnic profiling they argued had occurred under the previous agreement.\footnote{306}{Id.}

These groups requested three key amendments which were: 1) re-insertion of a stakeholder/steering committee oversight authority, comprised of community representatives, that would have input into the program’s implementation; 2) assurance of a consistent and transparent complaint procedure whereby complaints would be responded to within thirty days; and 3) elimination of the Standard Operating Procedure Level 3 priority, which focuses on “aliens who have been convicted of or arrested for other offenses,” thereby keeping the program focused on serious felony-level criminals.\footnote{307}{Id.}

While Los Angeles, Orange, and Riverside Counties consider whether to adopt the new program, opposition to the 287(g) program from some congressional Republicans has also been growing.\footnote{308}{287(g) Is Seriously Flawed, supra note 114.} They argue that the Model “MOA gut[ted] the federal and local enforcement partnership and illegal immigration enforcement, in general.”\footnote{309}{Id.} On the other hand, the American Civil Liberties Union counters that the agreement does not go far enough in requiring that 287(g) agencies focus on major offenders because there are no stated penalties for programs that do not follow the tiered system of priorities.\footnote{310}{Id.}

The Justice for Immigrants Coalition of Inland Southern California has stated publicly that it expects to lead an anti-287(g) effort in Riverside County, which is also in negotiations to re-sign its 287(g) agreement.\footnote{311}{Hispanic Tips, supra note 304.} The Riverside Human Relations Commission has expressed concern that individuals with minor crimes will be deported under the program.\footnote{312}{Olson, supra note 244.} And though John Amaya, Associate Director of Immigration for the National Council of La Raza, the nation’s largest Latino civil rights organization, expressed some optimism about the model agreements being considered, he also expressed concern that they do not do enough to prevent the targeting of the Latino population for

\footnote{306}{Id.}
\footnote{307}{Id.; Model MOA, supra note 147, at 17.}
\footnote{308}{287(g) Is Seriously Flawed, supra note 114.}
\footnote{309}{Id.}
\footnote{310}{Id.}
\footnote{311}{Hispanic Tips, supra note 304.}
\footnote{312}{Olson, supra note 244.} The Riverside Human Relations Commission is a body within the Riverside city government, advocating for equal opportunity, justice, and access in the City of Riverside to services and opportunities. City of Riverside, Human Relations Commission, http://www.riversideca.gov/hrc (last visited Feb. 28, 2010). It encourages education and outreach, developing and promoting programs, which work to eliminate prejudice and discrimination. \textit{Id.}
immigration screening. Local law enforcement officials are defending the value of the program, and Steve Thetford, Riverside County Sheriff’s Chief Deputy, argues that in Riverside County, ICE-trained employees will put priority on inmates booked on more serious charges. Similarly, Lieutenant Rick Ells of the San Bernardino County Sheriff’s Department states that the department conducts community outreach to ensure that illegal immigrants will not be queried about their status in an effort to limit the chilling effect the 287(g) program has on crime reporting. That said, support for the transition to the new program has not been uniformly embraced, judging by the public outcry in San Bernardino County as it implemented the revised program, and by the fact that only one MOA has been signed while three others are still under review. The next few months will be critical in the continuing development of Southern California 287(g) programs. To the extent that the remaining counties engage the support of their constituent groups by placing greater emphasis on public-private partnership, these efforts may generate greater community support for 287(g) enforcement efforts leading to the adoption of the Model MOA in the remaining counties.

III. PUBLIC-PRIVATE PARTNERSHIP AND 287(G) ENFORCEMENT AT THE LOS ANGELES COUNTY MEN’S CENTRAL JAIL

A daunting process in the best of circumstances, criminal aliens with often limited language skills, and even more limited financial resources, try to navigate the maze of immigration laws. Often, within the confines of a detention facility, they seek representation so they may gain a permanent place in American society following the completion of their criminal sentences. With an arguably broader consensus that

313. Id.
314. Id.
315. Id.
316. 287(g) Is Seriously Flawed, supra note 114.

The 2000 U.S. Census found that the 6.3 million households with a foreign-born non-citizen householder in the United States had an average household size of 3.44 persons. If that average household size
criminal aliens are the highest priority and least controversial population that is subject to possible removal, the 287(g) Detention Model programs have been somewhat less controversial in this politically-charged area of the law. Alongside this enhanced enforcement effort, the Obama Administration has expanded its public-private partnership programs by enhancing support to incarcerated immigrants.

Using the LASD MCJ as a case study, this Part explores how the 287(g) program intersects with recent exploratory measures at reaching immigrants earlier in their immigration cases and providing them with improved legal support. Esperanza is just a small part of a sophisticated network of non-governmental organizations which assist in carrying out the general DOJ LOP. Through a 2002 congressional appropriation to the DOJ’s EOIR, the LOP relies on non-profit legal advocates such as Esperanza to assist immigrants in detention to learn about their rights. This is especially important given the “right of representation at no expense to the government” in immigration proceedings, resulting in a very low percentage of individuals being able to retain legal counsel.

DOJ reports that only 40% of the total number of non-detained and


319. See Stables, supra note 112.

320. Disputed Program, supra note 21.

321. SIULC, supra note 30, at 17.

322. Id. at iii.

323. Id. at 59. The Vera Institute of Justice reports that for completed cases in detention in 2006, the nationwide representation rate was fourteen percent, and was even lower for cases that began and ended in detention. Id.
detained cases that were completed in fiscal year 2008 involved immigrants that relied on legal representation in court. 324

A. EOIR LOP Program

The LOP Program was created in 2003 in an effort to protect the due process rights of detained immigrants.325 Congress appropriated $1 million to develop and implement the LOP in order to serve criminal and non-criminal immigrant detainees.326 Responding to a GAO study,327 in 1992 the DOJ concluded that an orientation program which encouraged detainees to play a more active role in their cases would be beneficial to due process, whether they were represented by counsel or not.328 In addition, the DOJ believed that greater knowledge of their immigration rights would ultimately result in a significant time savings for the government because detainees would appear in immigration court already familiar with the removal proceeding process and their eligibility for relief.329 With the goal of providing detainees with legal information from which they could make more informed decisions about how to proceed with their immigration court cases, the program was implemented in 2003 and evaluations of the LOP reveal that participants appeared to experience decreased anxiety, confusion, and discomfort about immigration proceedings, while cases were adjudicated more efficiently and resulted in outcomes more beneficial to immigrants.330

The LOP program is conducted by the EOIR, and at a basic level, strives to reach current immigration detainees, some of who may have recently been released from criminal detention.331 The goals of the program have been to provide immigrants with basic information on forms of relief from removal, how to accelerate repatriation through the removal process, how to represent themselves pro se, and how to obtain legal representation.332 The LOP brings together representatives from

325. SULOC, supra note 30, at 3.
326. Id. at 8.
328. SULOC, supra note 30, at 8.
329. Id.
330. Id. at iii.
331. Id.
332. Id.
non-profit organizations that provide a variety of services for detained immigrants and is predicated on the premise that with adequate information, participants move through immigration court more quickly and, therefore, are likely to spend less time in detention than people who do not have access to legal assistance.\textsuperscript{333}

In its 2005–2010 Strategic Plan, EOIR outlined its priorities, highlighting that “a longstanding area of concern is the large number of unrepresented aliens in immigration proceedings.”\textsuperscript{334} In response, EOIR’s Strategic Plan “committed the agency to ‘encourage pro bono representation,’ noting that ‘effective representation can add value to the adjudicative process.’”\textsuperscript{335}

Since 2005, EOIR has contracted with the Vera Institute of Justice (the Vera Institute) to manage the LOP.\textsuperscript{336} “Vera [Institute] subcontracts to non-profit organizations to provide the LOP services, and Vera [Institute] staff monitor, oversee, and measure the performance of the program.”\textsuperscript{337} As part of its contract, the Vera Institute evaluates LOP services, “assess[es] if the LOP is working as intended, determine[s] the impact of the program and the significance and extent of any impact, and make[s] recommendations for ongoing program improvements.”\textsuperscript{338} In 2006, over 25,500 detainees were served by the LOP,\textsuperscript{339} equating to 20% of all those detained by ICE during that time period.\textsuperscript{340} The Vera Institute studies report that the LOP has yielded the following results: faster immigration case processing times, fewer in absentia removal orders for failure to appear, and more effective preparation by unrepresented participants.\textsuperscript{341} “Detained LOP participants have immigration court case processing times that are an average of thirteen days shorter than cases for detained persons who did not participate in the program.”\textsuperscript{342} This suggests that the LOP may have important resource-saving benefits for the immigration courts and

\textsuperscript{333}. Id.
\textsuperscript{334}. SIULC, supra note 30.
\textsuperscript{336}. Id. at iii.
\textsuperscript{337}. Id.
\textsuperscript{338}. Id.
\textsuperscript{339}. Id.
\textsuperscript{340}. U.S. Immigration and Customs Enforcement, ICE Annual Report, Daily Statistics, http://www.ice.gov/pi/reports/annual_report/2006/ar_2006_page4.html (last visited Mar. 6, 2010). In ICE’s 2006 fiscal year, agents made on average 334 arrests per day, or approximately 121,910 arrests. Id. Thus, serving 25,500 detainees equals about 20%. Id.
\textsuperscript{341}. SIULC, supra note 30, at iv.
\textsuperscript{342}. Id.
immigration detention system. The more quickly cases for detained aliens are completed, the sooner these detained persons are eligible for release from custody or removal from the United States. This allows for more available beds in detention facilities, thereby substantially reducing costs for the federal government.

The Vera Institute reports that while very few detained persons are released on bond or on their own recognizance, LOP participants who were released from detention prior to the completion of their immigration court cases appeared for court hearings at greater rates than other comparable groups. Moreover, unrepresented people who participated in the LOP received 7% fewer in absentia removal orders than those who did not have access to the program. Low rates of in absentia removal orders were even more pronounced for those who received intensive levels of LOP service, such as individual consultations with LOP attorneys and legal interns following the general orientation.

Finally, the Vera Institute reports that the LOP can effectively prepare detained aliens to proceed pro se in Immigration Court. Some detained individuals have reported that after receiving intensive LOP services they represented themselves in court and achieved case outcomes with success rates approximating those associated with legal representation. For example, LOP participants who represented themselves were more likely to receive grants of voluntary departure, rather than simply orders of removal, than detainees who did not participate in the LOP.

From the program’s inception in 2003 through September 2007, it has reached more than 100,000 detained persons. As the use of bed space in detention facilities hosting the LOP has expanded, the program has continued to serve more people each year. However, as increased detention has outpaced the expansion of funding for the LOP, the numbers of people receiving LOP services represents a shrinking

343. Id. at 51.
344. Id. at 50–53.
345. Id. at iv.
346. Id.
347. S IULC, supra note 30, at iv.
348. Id.
349. Id.
350. Id.
351. Id. at 27.
352. Id.
percentage of the overall detained immigration court population each year.\textsuperscript{353}

\textbf{B. LASD Men’s Central Jail LOP Pilot Project}

By exploring ways to improve LOP support, Esperanza created a pilot program in 2009 (LOP Pilot Project), to reach criminal detainees during their criminal detention and incarceration.\textsuperscript{354} By reaching immigrants in criminal custody and advising them of their legal rights, criminal immigrants might avoid plea agreements that exposed them to unnecessarily severe immigration consequences.\textsuperscript{355} Moreover, they might be able to engage in immigration case preparation during their criminal incarceration, thereby limiting the period of immigration detention following release from the criminal holding facility.\textsuperscript{356}

The LOP Pilot Project is based at MCJ. The Los Angeles County jail system is operated by the LASD and books approximately 171,000 individuals annually.\textsuperscript{357} The MCJ, part of the county jail system, is the largest jail in the world, providing short-term incarceration services for the entire county and housing approximately 5000 at any one time.\textsuperscript{358} MCJ and its companion Twin Towers Correctional Facility (TTCF) are located near downtown Los Angeles,\textsuperscript{359} and house males eighteen and

\begin{itemize}
\item 353. S IULC, supra note 30.
\item 354. BOBB, supra note 1, at 13.
\item 356. S IULC, supra note 30.
\item 353. S IULC, supra note 30.
\item 354. BOBB, supra note 1, at 13.
\item 356. S IULC, supra note 30.
\end{itemize}
older, most of which are awaiting trial having not yet been convicted.\textsuperscript{360} The turnover of the inmate population is high because detainees go through MCJ during booking, before redirection to other facilities, and upon release from detention.\textsuperscript{361}

Until 2008, Esperanza provided services primarily to individuals in immigration detention.\textsuperscript{362} However, under the LOP Pilot Project, it is able to reach immigrants while still in criminal detention.\textsuperscript{363} Esperanza provides legal orientation so that inmates have a better understanding of their immigration status earlier, and have legal information to challenge removal, if they are eligible.\textsuperscript{364}

At MCJ, the Esperanza team works to educate detainees who have been classified as “foreign born” to make choices in their criminal cases cognizant of the impact of those choices made during their criminal proceedings on their immigration cases.\textsuperscript{365} Without this information, many detainees may make decisions that result in removal, present bars to obtaining lawful status in the future, and impede the chance of legalizing their status.\textsuperscript{366}

Esperanza LOP Pilot Project representatives present a general overview of important concepts in immigration and criminal law including: basic concepts of criminal law, the differences between the immigration and criminal systems, the difference between stipulated removal and voluntary departure, the definition and role of aggravated felonies, common forms of relief from removal, and bond issues.\textsuperscript{367}

The second service provided by the LOP is the individual orientation, which includes one-on-one meetings that allow participants to ask more detailed questions about the court process and specific forms of relief from removal for which they may be eligible.\textsuperscript{368} Informed immigrants are better able to assess their chances of being permitted to remain in the United States.\textsuperscript{369} Thus, they can more effectively weigh the impact of many more months in immigration Detention Center—South Facility, http://www.lasd.org/divisions/custody/pdc-south/index.html (last visited Mar. 6, 2010).

\textsuperscript{360} ACLU Report, supra note 358.
\textsuperscript{361} Id.
\textsuperscript{362} SIULC, supra note 30.
\textsuperscript{363} Id.
\textsuperscript{364} Cabrera PowerPoint, supra note 355, at 4.
\textsuperscript{365} Id. at 10.
\textsuperscript{366} Id. at 11–14.
\textsuperscript{367} Id. at 11–25.
\textsuperscript{368} SIULC, supra note 30.
\textsuperscript{369} Id.
detention, while pursuing various forms of relief, against the chance of succeeding in front of an Immigration Judge.

The third type of service provided is the Self-Help Workshop, in which small group classes are convened that allow people who will represent themselves to prepare and practice with others pursuing similar defenses. The fourth type of service provided is referral to a pro bono attorney if the individuals are unable to represent themselves or Esperanza determines that their case could especially benefit from legal representation.

In 2006, the LOP reached more than 25,000 detainees. From the program’s inception in 2003, the program has reached more than 100,000 detained persons. While the Vera Institute has not yet published any studies evaluating the success of the Pilot Project, the LOP program, in general, has been found to improve access to legal information, provide counseling, and increase rates of representation for immigrants appearing before the Immigration Courts. The Vera Institute of Justice research shows that non-profit organizations that provide LOP services achieve more efficient and effective case outcomes than in cases without LOP intervention. State and local programs may choose to actively engage in outreach to educate community leaders about this program, and at the same time communicate information about how the 287(g) program will be implemented. They may find that in doing so they build greater trust and transparency about how 287(g) will be enforced in the community.

CONCLUSION

The year 2009 witnessed the outcry by a large and diverse group of immigrant rights, civil rights, and community organizations, demanding an end to the 287(g) program. They argue that no amount of reform to the program can limit the damage done to public safety and the protection of immigrant rights. This outcry falls short, however, of offering a solution to the problem of limited federal immigration enforcement resources, and the statewide financial crisis that could prevent local law officials from assisting the federal government.

370. Id.
371. Id.
372. Id.
373. Id.
374. See generally SIULC, supra note 30.
375. Id.
376. See supra Part II.
377. See supra Part I. E.
“[N]on-U.S. citizens made up 9.0 percent of the [nationwide state and local] jail population in 2008, up from 7.7 percent in 2007, and 6.1 percent in 2000.”

Many congressional leaders represent constituencies that demand federal immigration law enforcement with respect to these convicted criminals after they have served their sentences. Without a 287(g) program, this would be difficult given severe federal budget limitations in light of the present U.S. economic downturn. Consequently, given the practical constraints of the opposing views, the Obama Administration has engaged in conscientious reform of the 287(g) program.

Through the creation of the Model MOA, the Obama Administration exhibited a nuanced understanding of stakeholder concerns in that it addresses many of the identified weaknesses of the program. Nevertheless, some have made valid arguments that it fails to go far enough in its reforms because of several concerns. First, ethnic and racial profiling can still occur. Second, public safety can be compromised through lack of reporting by immigrant communities and by stretching limited local resources to accommodate federal requests for assistance. Third, the tiered-enforcement approach is undercut by its own catchall third option, which leaves in place the chance for abuse. Fourth, the lack of clearly defined performance objectives and a transparent reporting mechanism make further improvements and oversight of the program challenging. Finally, there is the general question of the constitutionality of the legal framework as it blurs the jurisdictional lines separating federal, state, and local authorities.

In its current enhanced form, the program appears to have a stronger chance of meeting its defined goal: the identification and removal of dangerous criminal aliens. The new, more specific focus of the 287(g) program on criminal immigrants and the expectations set forth in the Model MOA that state and local authorities are to pursue convictions prior to immigration detention may temper concerns about ethnic-profiling. It remains to be seen whether federal, state, and local partnerships with more specific objectives and better federal oversight
will have an improved chance of achieving the goals of the program. Resolving the challenge of how to provide public safety and national security in the context of mass undocumented migration, while protecting basic civil rights, requires the precision of developing a complicated algorithm. 

In 2009, the EOIR expanded its legal orientation program, and the LOP Pilot Project at MCJ reflects an effort to help the LOP to work better by reaching incarcerated aliens who are not yet in ICE custody.\textsuperscript{384} The LOP Pilot Project provides legal support to detained immigrants earlier in their cases, which may have the added impact of strengthening trust relationships within the various communities. While a full report analyzing the efficacy of the Pilot Program has not been issued, the general LOP has been documented to have a positive impact on case outcomes. The LOP program services yield faster processing times, more effective case preparation by pro se respondents, and other resource-saving benefits to the overwhelmed immigration court dockets and ICE detention facilities. In addition, the LOP program has a significant impact on case outcomes, with fewer program participants being ordered removed in absentia and increased grants of voluntary departure, as well as other forms of relief. Through its expanded LOP program initiatives, the Obama Administration may find that it is strengthening partnerships with the non-governmental legal community through the support of programs that educate detainees about their rights and improve their access to legal support.\textsuperscript{385}

The past year witnessed swift and wide-ranging change in the 287(g) program, suggesting improvements in the collaborative efforts among federal and local authorities toward a common goal of increased safety and strengthened national security. The absence of published performance objectives in the public domain raises cause for concern.\textsuperscript{386} However, all parties need to be vigilant in evaluating the legal system as it enters its next round of development in order that it may reach the proper balance between preserving the limited rights of detained immigrants, responding adequately to the concerns of the pro-immigrant legal advocacy and immigrant communities in the United States, and addressing the concerns of those who fear altering the legacy 287(g) enforcement program could compromise public safety.

\textsuperscript{384} See \textit{supra} Part III.  
\textsuperscript{385} \textit{Id.}  
\textsuperscript{386} \textit{Immigration Enforcement, supra} note 6, at 6. “ICE officials stated that they are in the process of developing performance measures, but have not provided any documentation or a time frame for when they expect to complete the development of these measures.” \textit{Id.}