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GYPSIES, TRAMPS & THIEVES¹: WHAT EUROPE'S ROMANIES CAN TEACH THE UNITED STATES ABOUT CRIME-MOTIVATED IMMIGRATION REFORM

*Allie Karoline Sievers**

This comment proposes that the United States could learn a great deal about the dangers of extreme immigration policy-making by looking to the European states and their dealings with the Romani, specifically the French expulsions of the Romani in 2010. Through this lens, this comment analyzes flaws in the U.S.' crime-motivated immigration enforcement programs, and argues that the U.S. needs to move quickly to remedy flaws in immigration enforcement before it repeats many of the mistakes that led to the current condition of Europe's Romanies and creates its own class of un-integrated ethnic minorities.

INTRODUCTION: THE CRIMES THAT SPARK THE DEBATE

On July 16, 2010, police in the small town of Saint-Aignan, France shot and killed Luigi Duquet.² According to media reports, Mr. Duquet failed to stop his car at a checkpoint, continued to drive with an officer on the hood of his car, and was killed after driving his car at officers policing a second checkpoint – one of whom opened fire.³ Mr. Duquet was twenty-two years old and a member of France's "Gens du voyage" population,⁴ made up of Romani⁵ and other travelling

¹ CHER, *GYPSIES, TRAMPS & THIEVES* (Kapp Records 1971).

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² See Bruce Crumley, *Anger as Sarkozy Targets Roma in Crime Crackdown*, TIME, July 23, 2010, <http://www.time.com/time/world/article/0,8599,2005818,00.html>.

³ See Ruadhán Mac Cormaic, *Rioting over Traveller Killed by Police Sparks Debate on Security*, IRISH TIMES, July 21, 2010, at 10.

⁴ See Crumley, *supra* note 2; see also Council of Europe, *Roma and Travellers Glossary* 5 (Dec. 11, 2006), www.coe.int/t/dg3/romatravellers/Source/documents/GlossaryRoma.doc [hereinafter *Roma and Travellers Glossary*] (defining "Gens du voyage" as a French administrative term applicable to Roma and non-Roma groups with nomadic lifestyles).

peoples. In the days following Mr. Duquet's death, approximately fifty youths from his encampment rioted in and around Saint-Aignan, attacking the local police station with hatchets and iron bars, burning cars, and causing damage to local businesses and public property.⁶ These events are believed to have played a major role in prompting French President Nicolas Sarkozy to make several controversial policy decisions regarding the Romanies,⁷ including efforts to expel illegal Romani from France⁸ and break-up Romani encampments.⁹

Meanwhile, in the U.S., a number of high-profile crimes have been linked to similar fear-driven proposals for immigration reform. Most notably, on March 27, 2010, rancher Robert Krentz was found shot to death on his Arizona ranch shortly after radioing to his brother that he was stopping to assist somebody he believed to be an illegal immigrant.¹⁰ Officials and commentators have often cited his death as the impetus for Arizona's controversial immigration law, SB 1070.¹¹

Robert Krentz's murder, of course, is just one in an increasingly long line of crimes in the U.S. that have been attributed to immigrant populations and used to fuel the fire of the immigration debate. In September 2008, an illegal Guatemalan immigrant who had been arrested in the U.S. at least twelve times drove his S.U.V. through a busy intersection in Colorado and smashed into a pick-up truck.¹² The pick-up truck was propelled forward, and ultimately crashed into an ice cream parlor, killing three people, including a three-year-old child.¹³ And more recently, in August 2010, an elderly nun was killed in Virginia when a drunken driver crashed into her

⁵ In this comment, the term "Romani" (plural "Romanies") will be used in any discussion of Gypsy, Roma, or appropriate Traveller populations. While the term "Gypsy" continues to be used in common parlance, it is viewed as pejorative by many European Romani populations and will not be used in this comment unless it appears in a quote or statistic. I have chosen to use Romani in lieu of "Roma," as this term is embraced by all Romani groups, has been adopted by the Library of Congress as the official Subject Heading for materials on the Romani people, and has been given preference by preeminent scholars of Romani culture, including Ian Hancock. *See Roma and Travellers Glossary, supra* note 4, at 7; *see also* Interview by Rory Litwin with Barbara Tillett, Chief of the Library of Congress Cataloging Policy and Support Office (Aug. 9, 2006), *available at* <http://libraryjuicepress.com/blog/?p=115>; IAN HANCOCK, WE ARE THE ROMANI PEOPLE xxvii – xx (2002).

⁶ *See* Crumley, *supra* note 2.

⁷ *See id.*

⁸ In late July 2010, Mr. Sarkozy ordered the expulsion of Romanies who had committed "public-order offenses." As of September 2, 2010, it was estimated that France had removed 8,313 Romanies in 2010. *See* Matthew Saltmarsh, *World Briefing Europe; France: Plan on Gypsy Camps Opposed*, N.Y. TIMES, July 30, 2010, at A7; *see also* Stephen Castle, *European Union Report Questions France's Expulsions of Roma*, N.Y. TIMES, Sept. 2, 2010, at A11.

⁹ In addition to announcing plans to expel illegal Romani from France, Mr. Sarkozy also announced plans to take down illegal Romani camps. France's Interior Minister indicated that he planned to take down about 300 illegal camps, 200 of which were Romani. *See* Saltmarsh, *supra* note 8.

¹⁰ *See* Randal C. Archibold, *Ranchers Alarmed by Killing*, N.Y. TIMES, Apr. 5, 2010, at A9.

¹¹ *See* Dan Stein, Op-Ed., *Arizona's Simple, Legal Goal: The State Is Just Doing What the Federal Government Isn't -- Enforcing Our Laws*, L.A. TIMES, Apr. 30, 2010, at 19.

¹² *See* Dan Frosch, *In Colorado, Debate Over Program to Check Immigration History of the Arrested*, N.Y. TIMES, July 30, 2010, at A16.

¹³ *See id.*

car.¹⁴ The driver was an immigrant who was work-authorized at the time of the accident but had been residing in the U.S. illegally since 1996 and was in deportation proceedings for two prior D.U.I. convictions.¹⁵

While France and the U.S. have frequently diverged over international affairs, perhaps most notably during the immediate aftermath of September 11, 2001,¹⁶ there are unavoidable similarities between the ways in which each government has responded to perceived increases in crime attributed to immigrant populations at home. For instance, there are indications that the French population is supportive of Mr. Sarkozy's recent moves against the Romani population,¹⁷ and recent polls in the U.S. suggest that Americans are in favor of legislation such as Arizona's SB 1070.¹⁸ It is undeniable that immigration has sparked an intense debate in each country.

This comment proposes that the U.S. could stand to learn a great deal about its immigration problems by looking at the mistakes that have been made with the Romani population in Europe for centuries, highlighted by the actions taken in France in 2010. Specifically, the U.S. should look at accusations that France has violated core principles of the European Union (EU) by moving against the Romani and should strive to avoid promoting immigration policy that threatens to create a permanent sub-class of U.S. citizens and residents.

After providing a sample of the high-profile violence that has ignited the immigration debate in France and the U.S. in the Introduction,¹⁹ Part I continues with a brief history of the Romani in Europe intended to give flesh to Mr. Sarkozy's recent efforts to expel Romani populations from France.²⁰ Part I will also provide a brief overview of the EU's Free Movement Directive and its application to recent events in France.²¹

Part II provides a short overview of several leading U.S. immigration law cases, as well as the recent shift in the focus of immigration enforcement towards crime and national security.²² Part II also provides a snapshot of current immigration enforcement operations, focusing on three major programs: the 287(g) program, the Criminal Alien Program, and Secure Communities.²³

¹⁴ See Robert McCartney, *A World of Both Grace, Disgrace is Revealed in Nun's Death*, WASH. POST, Aug. 7, 2010.

¹⁵ See *Police Chief Says Illegal Immigrant Accused in Driving Death had Work Permit*, WASH. POST, Sept. 4 2010.

¹⁶ See Elaine Sciolino, *Aftereffects: Paris; France Works to Limit Damage from U.S. Anger*, N.Y. TIMES, Apr. 25, 2003, at A13.

¹⁷ See Ruadhán Mac Cormaic, *Sarkozy Requests Law Revoking Citizenship*, IRISH TIMES, Sept. 7, 2010, at 10.

¹⁸ See Denis Bunis, *Polls Show U.S. Torn Over Arizona Law*, THE ORANGE COUNTY REG., July 11, 2010; see also Randy Krehbiel, *Strict Immigration Bills Still Enjoy Solid Support*, TULSA WORLD, Jan. 31, 2011, at A1.

¹⁹ See *supra* Introduction.

²⁰ See *infra* Part I.A.

²¹ See *infra* Part I.B.

²² See *infra* Part II.A.

²³ See *infra* Part II.B.

Part III focuses on the criticisms that have been articulated against both French and U.S. immigration policy, and strives to highlight how the U.S. could improve its own immigration outlook by looking to the mistakes made in Europe with the Romani populations.²⁴ Specifically, Part III suggests that the U.S. needs to move quickly to remedy apparent flaws in immigration enforcement before it repeats many of the mistakes that led to the current condition of Europe's Romanies and creates its own class of un-integrated minorities.²⁵ Part III concludes by recommending that the departments and agencies responsible for immigration move to streamline current enforcement programs, clarify enforcement goals, and make serious efforts to edify the U.S. public regarding immigration crime rates and other statistics.²⁶

I. PERSECUTION & FREE MOVEMENT IN EUROPE

A. *A Brief History of the Romani Population in Europe & the Development of Modern Anti-Romani Sentiment*

In order to fully understand why France's recent "expulsions" of the Romani population have generated so much negative commentary, it is necessary to understand the history of Romani persecution in Europe and the Romani culture that has developed as a result. The Romani people originally hailed from the Indian subcontinent, beginning their migration to Europe and North Africa late in the first millennium C.E.,²⁷ and their presence in Europe quickly became turbulent. In 1471, the first anti-Romani law was recorded in Lucerne, Switzerland, and since 1504, France has periodically enacted laws under which Romani were barred from residing in French territory.²⁸ In 1830, Germany began implementation of a policy by which Romani children were removed from their homes and placed with non-Romani families²⁹ in an effort to rid children of deviant Romani traits.³⁰ In 1934, the condition of the Romani further disintegrated when Sweden began sterilizing their Romani population, and the circumstance of the Romani reached its ultimate low during World War II, when the Romani were singled out by Hitler for eradication

²⁴ See *infra* Part III.A-C.

²⁵ See *infra* Part III.C.

²⁶ See *infra* Part III.D.

²⁷ See DIRECTORATE-GENERAL FOR EMP'T AND SOC. AFFAIRS, EUROPEAN COMM'N, THE SITUATION OF ROMA IN AN ENLARGED EUROPEAN UNION 7 (2004), available at <http://bookshop.europa.eu/en/the-situation-of-roma-in-an-enlarged-european-union-pbKE6204389/> [hereinafter EUROPEAN COMMISSION REPORT].

²⁸ See The Patrin Web Journal, Timeline of Romani (Gypsy) History, <http://www.reocities.com/Paris/5121/timeline.htm> (last visited Oct. 26, 2010). In addition to the 1504 law prohibiting Roma residences in France, similar laws were passed by various French monarchs and leaders in 1510, 1539, 1561, 1660, 1724, 1764 and 1803. Apart from the various residence prohibitions, France has a long history of other anti-Roma laws. For example, in 1601, Henry IV prohibited Roma gatherings of more than three or four persons. In 1647, 1666 and 1682, Louis XIV instituted policies by which Roma were sent to the galleys as a result of their status as "bohemians," and beginning in 1719, Roma were deported to the French colonies for the same reason.

²⁹ See *id.*

³⁰ See EUROPEAN COMMISSION REPORT, *supra* note 27.

along with Europe's Jewish population.³¹ The U.S. Holocaust Memorial Museum estimates that 200,000 Romani were killed in German concentration camps.³² Furthermore, it is believed that in some areas, including the modern Czech Republic, the Romani population was almost entirely wiped out during this "Romani Holocaust."³³ In the years following the war, efforts were made throughout Europe to stifle the nomadic and anti-social lifestyle of the Romani.³⁴ Across Europe, coercive sterilization policies and the systematic removal of children from Romani families became common.³⁵

Today, Europe's Romani population faces widespread anti-Romani sentiment.³⁶ Recent polls conducted in the Czech Republic and Germany are indicative of this trend, finding that seventy-nine percent of Czechs would not want a Romani neighbor, and sixty-four percent of Germans had an unfavorable opinion of the Romani people as a whole.³⁷

The Romani response to this unyielding persecution has largely been to withdraw from mainstream European society. While the various Romani populations do not share a common language, religion, or defined cultural identity,³⁸ nearly all Romani groups share a common "gypsy law,"³⁹ which has developed in an effort to further insulate the Romani from the general population of each host country.⁴⁰

Certain aspects of the gypsy law have exacerbated the anti-Romani sentiment prevalent in Europe today. For example, under the Romani legal tradition, theft and fraud crimes are considered to be true crimes only when perpetrated against other Romani.⁴¹ Theft crimes committed against non-Romani are often praised, while theft crimes committed against other Romani frequently lead to public shaming and banishment.⁴² Furthermore, Romanies tend to insist that their law is superior to the law of the host nation, making it easier for them to justify violations of the host nation's theft and fraud laws.⁴³ European governments have often cited problems with theft, begging, and other violence in support of actions taken against Romani communities.⁴⁴

³¹ *See id.*

³² *See* Saltmarsh, *supra* note 8.

³³ *See* EUROPEAN COMMISSION REPORT, *supra* note 27, at 8.

³⁴ *See id.*

³⁵ *See id.*

³⁶ *See id.* at 9.

³⁷ *See id.* at 9-10.

³⁸ *See* Iskra Uzunova, *Roma Integration in Europe: Why Minority Rights are Failing*, 27 ARIZ. J. INT'L & COMP. L. 283, 290 (2010).

³⁹ *See* generally Symposium, *Gypsy Law Symposium*, 45 AM. J. COMP. L. 225 (1997), for additional information regarding the history and substance of gypsy law.

⁴⁰ *See* Uzunova, *supra* note 38, at 294.

⁴¹ *See id.* at 295.

⁴² *See id.*

⁴³ *See id.*

⁴⁴ *See* Elisabetta Povoledo, *Italian Cities Plan to Shut Roma Camps*, N.Y. TIMES, Sept. 4, 2010, at A4; *see also* Suzanne Daley & Raphael Minder, *In Spain, Gypsies Find Easier Path Toward Integration*, N.Y. TIMES, Dec. 6, 2010, at A5.

The recent events in France are no exception. In the days and weeks following Mr. Sarkozy's announcement that his government would begin targeted removals of the French Romani population, various officials attempted to justify the move by stating that Romani camps in France were "sources of illegal trafficking, profoundly shocking living standards, the exploitation of children for begging, prostitution, and crime."⁴⁵ Mr. Sarkozy himself indicated that his decision to focus on the Romani was part of an "implacable struggle the government is leading against crime,"⁴⁶ and France's Interior Minister pointed to crime statistics suggesting that there had been a 138% increase in the number of Romani arrested in Paris in the preceding year.⁴⁷

In addition to the legal and criminal issues that seem to drive most of the anti-Romani sentiment in Europe today, there are indications that other factors, including financial considerations, also figure into modern negative perceptions of the Romani.⁴⁸ For example, a recent study conducted by the World Bank concluded that the failure of the Romani to integrate in Bulgaria, Romania, Serbia, and the Czech Republic cost the host countries an estimated \$7.3 billion per year.⁴⁹ As a result, while institutions including the EU,⁵⁰ the Catholic Church,⁵¹ and the European Roma Rights Centre⁵² have spoken out against the actions taken by Mr. Sarkozy, the French people have been notably absent from the international debate. This relative quiet suggests that the French may not be as opposed to Mr. Sarkozy's proposals as the rest of the world might expect them to be. Indeed, a survey conducted by the French newspaper *Le Figaro* shortly after Mr. Sarkozy announced his plans for the Romani in late July found that nearly seventy-five percent of French voters supported his tough stance against the Romani.⁵³ A separate poll by the newspaper *Le Parisien* found that forty-eight percent of the French supported the removals.⁵⁴

B. *An Introduction to the Free Movement Directive*

While many of the criticisms of Mr. Sarkozy's recent decision to break up Romani encampments and expel illegal Romani from France have centered on issues

⁴⁵ Gavin Hewitt, *The Roma Repatriation*, Gavin Hewitt's Europe, BBC NEWS, Aug. 19, 2010, http://www.bbc.co.uk/blogs/thereporters/gavinhe Witt/gavin_hewitt/.

⁴⁶ Crumley, *supra* note 2.

⁴⁷ See Doreen Carvajal, *France Vows to Continue Deporting Roma*, N.Y. TIMES, Aug. 25, 2010, <http://www.nytimes.com/2010/08/26/world/europe/26iht-roma.html?scp=2&sq=doreen+carvajal&st=nyt>; see also *EU to test Roma removals*, THE AUSTRALIAN, Aug. 27, 2010, at 9.

⁴⁸ See *Europe's Roma: Hard Travelling*, ECONOMIST, Sept. 4, 2010, at 29.

⁴⁹ See *id.*

⁵⁰ See Katrin Bennhold & Stephen Castle, *France May Face Legal Action Over Expulsions of Roma*, N.Y. TIMES, Sept. 15, 2010, at A6.

⁵¹ See Steven Erlanger, *France: Sarkozy and Pope Meet Over French Actions Against Roma*, N.Y. TIMES, Oct. 9, 2010, at A6; see also Carvajal, *supra* note 47; *EU to test Roma Removals*, *supra* note 47.

⁵² See European Roma Rights Ctr., *Submission in Relation to the Analysis and Consideration of Legality Under EU Law of the Situation of Roma in France: Factual Update (2010)*, available at <http://www.errc.org/cikk.php?cikk=3715> [hereinafter European Roma Rights Centre Submission].

⁵³ See Mac Cormaic, *supra* note 17.

⁵⁴ See *EU to Test Roma Removals*, *supra* note 47.

of racism and past persecutions, the European Commission has questioned the legality of France's decisions on another basis – claiming that France's policies violate the EU's Free Movement Directive (the Directive).⁵⁵ The Directive, which was drafted in 2004 and entered into force in April 2006,⁵⁶ reflects the fundamental EU principle that “[c]itizenship in the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States” subject to certain limitations set forth in the Directive and the governing treaties of the EU,⁵⁷ including the Maastricht Treaty of 1992.⁵⁸

The Free Movement Directive is an expansive document, addressing everything from family membership to registration and documentation requirements in seven chapters and forty-two articles; several of these articles are directly on point with respect to the French expulsion of the Romani.⁵⁹ Initially, it is important to note that the Directive affords to EU citizens the right of residence in another Member State for a period of three months with no conditions or formalities aside from possession of a valid identity card or passport.⁶⁰ This right is afforded to all Union citizens so long as they do not impose an “unreasonable burden” on the host Member State's social assistance systems.⁶¹ Union citizens who are self-employed, who obtain employment in the host Member State, or who have sufficient resources (including insurance) to support themselves and any accompanying family members are not subject to the three-month limitation.⁶² The right to residence afforded to Union citizens in another Member State covers the entire territory of the host state, and may be restricted only if the same restrictions apply to nationals of the host state.⁶³

With respect to expulsion from the host state, the Directive is extremely strict, mandating that no Union citizen or family member may be automatically expelled due to reliance on social assistance programs.⁶⁴ The Directive does, however, allow restrictions to be imposed on rights to free movement and residence on grounds of public policy, public security, or public health.⁶⁵ Nevertheless, any action taken by a host state on these grounds must be proportional and must be

⁵⁵ See Stephen Castle, *Europe Advances Case Against France Over Expulsions*, N.Y. TIMES, Sept. 30, 2010, at A14; see also Press Release, Eur. Comm'n, Eur. Comm'n Assesses Recent Developments in France, Discusses Overall Situation of the Roma and EU Law on Free Movement of EU Citizens (Sept. 29, 2010) [hereinafter European Commission Press Release].

⁵⁶ See Eur. Union Agency for Fundamental Rights, *The Situation of Roma EU Citizens Moving to and Settling in Other EU Member States*, at 11 (2009), available at <http://ec.europa.eu/social/main.jsp?catId=813&langId=en&moreDocuments=yes>.

⁵⁷ Council Directive 2004/38/EC, 2004 O.J. (L 158).

⁵⁸ See Eur. Union Agency for Fundamental Rights, *supra* note 56, at 18; see also Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191), available at <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html#0068000003>.

⁵⁹ See Council Directive 2004/38/EC, 2004 O.J. (L 158).

⁶⁰ See *id.* at art. 6(1).

⁶¹ *Id.* at art. 14(1).

⁶² See *id.* at art. 7(1).

⁶³ See *id.* at art. 22.

⁶⁴ See Council Directive 2004/38/EC, art. 14(3), 2004 O.J. (L 158).

⁶⁵ See *id.* at art. 27(1).

based solely on the personal conduct of the individual who will be restricted.⁶⁶ The conduct of the individual to be restricted must represent a “genuine, present and sufficiently serious threat” affecting a fundamental interest of the host state.⁶⁷ General preventative measures are not permitted.⁶⁸ When considering expulsion, the host Member State must also consider how long the individual has resided in the host state, his or her age and health, economic status, as well as the degree to which he or she has socially and culturally integrated into the host state.⁶⁹

Once the host Member State has decided to initiate the expulsion of a Union citizen, the individual concerned must be notified of this decision in writing, and in most cases, the writing must specify the grounds on which the expulsion decision was made.⁷⁰ The notification must also advise the individual being expelled of the court or administrative agency responsible for appeals, and the individual must be given at least one month to depart the host state.⁷¹

Lastly, the Directive requires that all Member States transpose the elements of the Directive into their own laws, regulations, and administrative processes.⁷²

II. UNITED STATES IMMIGRATION LAW – CUSTOM & ENFORCEMENT

A. Plenary Power & the Origins of Crime-Based Deportation Programs in a Post 9-11 United States

In 1889, the U.S. Supreme Court decided one of the first major U.S. immigration law cases, *Chae Chan Ping v. United States*, also known as the Chinese Exclusion Case.⁷³ In this seminal case, the Court recognized that Congress and the Executive Branch have inherent authority to regulate immigration issues pertaining to the exclusion of noncitizens seeking admission to the U.S.⁷⁴ As the basis for this holding, the Court declared that the power to exclude noncitizens was an “incident of sovereignty”⁷⁵ and that the power of the legislature to exclude aliens was a proposition not “open to controversy.”⁷⁶ In 1893, the Court extended the application of this inherent authority to the expulsion, or deportation, of noncitizens in *Fong Yue Ting v. United States*.⁷⁷ Specifically, the Court stated that “[t]he right of a nation to expel or deport foreigners, who have not been naturalized or taken any

⁶⁶ See *id.* at art. 27(2).

⁶⁷ *Id.*

⁶⁸ See *id.*

⁶⁹ See Council Directive 2004/38/EC, art. 28(1), 2004 O.J. (L 158).

⁷⁰ See *id.* at art. 30(1, 2).

⁷¹ See *id.* at art. 30(3).

⁷² See *id.* at art. 40(1).

⁷³ See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

⁷⁴ See JON FERRE, CTR. FOR IMMIGRATION STUDIES, PLENARY POWER: SHOULD JUDGES CONTROL U.S. IMMIGRATION POLICY? 3 (2009), available at <http://www.cis.org/articles/2009/back209.pdf> (discussing the roots of the plenary power doctrine in U.S. immigration law).

⁷⁵ *Chae Chan Ping*, 130 U.S. at 609.

⁷⁶ *Id.* at 603.

⁷⁷ See generally *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.”⁷⁸

Taken together, these cases support the premise that a sovereign state generally has wide latitude to establish the criteria by which outsiders can be admitted to and expelled from its territory. Over the decades, the U.S. has established many such criteria, barring individuals from admission if they suffered from HIV/AIDS,⁷⁹ practiced polygamy, advocated the forcible overthrow of the government, failed a literacy test, or engaged in prostitution.⁸⁰

In recent decades, there has been increased emphasis on the application of criminal and national security criteria to immigration enforcement. One of the earliest examples of this application occurred in 1979, following the Iranian Hostage Crisis.⁸¹ On November 13, 1979, President Carter directed the promulgation of Regulation 214.5, requiring all Iranian post-secondary students in the U.S. to report to a local INS office so that their nonimmigrant status could be verified.⁸² The U.S. Court of Appeals for the D.C. Circuit upheld this regulation in *Narenji v. Civiletti*, with Circuit Judge MacKinnon stating that the regulation at issue lay within the realm of foreign affairs and therefore “implicat[ed] matters over which the President has direct constitutional authority.”⁸³ The court also cited to the Supreme Court holding in *Matthews v. Diaz*, stating that “any rule of constitutional law that would inhibit the flexibility of the political branches of the government to respond to changing world conditions should be adopted only with the greatest caution.”⁸⁴

Following the terrorist attacks of September 11, 2001, there has been an even more marked shift toward the enforcement of immigration laws on criminal and national security grounds. On October 26, 2001, in the immediate aftermath of the attacks, President Bush signed into law the USA Patriot Act,⁸⁵ which was designed, in part, to increase the authority of U.S. law enforcement agencies to investigate terrorism and to facilitate the sharing of information between the various law enforcement agencies.⁸⁶ Shortly thereafter, in September 2002, the Department of Justice initiated the National Security Entry-Exit Registration System (NSEERS),⁸⁷

⁷⁸ *Id.* at 707.

⁷⁹ See STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 462 (Robert C. Clark et al. eds., 5th ed. 2009).

⁸⁰ See *id.* at 422-425.

⁸¹ See *Narenji v. Civiletti*, 617 F.2d 745, 746 (D.C. Cir. 1979).

⁸² See *id.*

⁸³ *Id.* at 748.

⁸⁴ *Id.* (citing *Matthews v. Diaz*, 426 U.S. 67, 81 (1976)).

⁸⁵ See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (USA PATRIOT Act), 115 Stat. 272 (2001).

⁸⁶ See U.S. Dep’t of Justice, *Highlights of the USA PATRIOT Act*, <http://www.justice.gov/archive/ll/highlights.htm> (last visited Nov. 5, 2010).

⁸⁷ On April 28, 2011, DHS announced that the NSEERS program would be suspended, effective immediately. See *Removing Designated Countries From the National Security Entry-Exit Registration System (NSEERS)*, 76 FED. REG. 82, 23,830 (Apr. 28, 2011); see also Miriam Jordan, *Controversial Surveillance Program Launched After 9/11 Ends*, WALL ST. J., Apr. 27, 2011,

requiring nonimmigrant aliens from countries presenting “elevated national security concerns” to be fingerprinted and photographed upon entry to the U.S. as well as to provide detailed background information to officers of the INS.⁸⁸ These targeted registration requirements were upheld by the U.S. Court of Appeals for the First Circuit in *Kandamar v. Gonzales* because they served the “legitimate government objectives of monitoring nationals from certain countries to prevent terrorism.”⁸⁹

These cases and policies are illustrative of the broad brush that has been utilized by Congress and the Executive when formulating immigration policies. Understanding these trends is essential to appreciating the basis of the criminal immigration programs that have come into effect in recent decades, primarily under the umbrella of U.S. Immigration and Customs Enforcement (ICE) Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS), including the 287(g), Criminal Alien, and Secure Communities programs.⁹⁰

B. Immigration Enforcement under ICE ACCESS

1. Immigration Cross-Designation 287(g)

Roughly fifteen years ago, Congress enacted amendments to the Immigration and Nationality Act (INA) via the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).⁹¹ Included in these amendments was a new section, 287(g),⁹² permitting the Department of Homeland Security (DHS) (formerly the U.S. Immigration and Naturalization Service (INS)) to enter into agreements with state and local law enforcement agencies whereby those agencies can perform immigration officer functions after training and under the supervision of ICE.⁹³ Initially developed by Senator Charles Grassley of Iowa, the 287(g) program was meant to address frustration among his constituents that local law enforcement was powerless against immigration problems, having to report violators to overburdened

http://online.wsj.com/article/SB10001424052748704187604576289682985267902.html?mod=google_news_wsj.

⁸⁸ See Press Release, U.S. Dep’t of Justice, Second Phase of National Security Entry-Exit Registration System Announced (Nov. 22, 2002), *available at* http://www.justice.gov/opa/pr/2002/November/02_ag_649.htm.

⁸⁹ *Kandamar v. Gonzales*, 464 F.3d 65, 73-74 (1st Cir. 2006).

⁹⁰ The ICE ACCESS initiative currently consists of fourteen programs: Asset Forfeiture/Equitable Sharing, Border Enhancement Security Task Force (BEST), Criminal Alien Program (CAP), Customs Cross-Designation (Title 19), Document and Benefit Fraud Task Forces, Fugitive Operations, Immigration Cross-Designation – 287(g), Intellectual Property Rights (IPR) Center, Law Enforcement Support Center (LESC), Operation Community Shield, Operation Firewall, Operation Predator, Rapid REPAT, and Secure Communities. See U.S. Immigration and Customs Enforcement, ICE ACCESS, <http://www.ice.gov/access/> (last visited Apr. 18, 2012) [hereinafter ICE ACCESS Overview].

⁹¹ See U.S. Immigration and Customs Enforcement, Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Apr. 17, 2012) [hereinafter 287(g) Fact Sheet].

⁹² See 8 U.S.C. § 1357(g) (2006).

⁹³ See 287(g) Fact Sheet, *supra* note 91. See also 8 U.S.C. § 1357(g).

ICE officials instead of taking direct action.⁹⁴ The program operates through memoranda of agreement (MOA) entered into by DHS, ICE, and the local law enforcement agency (LEA), the first of which was entered into by the Bush Administration in 2002.⁹⁵ A majority of the agreements currently in existence are detention model programs, which permit correctional officers to screen any individuals arrested or convicted against federal databases to check their immigration status.⁹⁶

In response to widespread criticism of the 287(g) program, including a report published by the U.S. Government Accountability Office (GAO) in January 2009,⁹⁷ the Obama Administration immediately re-assessed the program upon taking office.⁹⁸ In July 2009, DHS Secretary Janet Napolitano announced sweeping changes to the program,⁹⁹ including the introduction of a new Model MOA,¹⁰⁰ which aligned the priorities of the 287(g) program with those of ICE generally.¹⁰¹ As such, the new Model MOA prioritizes the removal of aliens who have been arrested or convicted in connection with “major drug offenses” or violent crimes such as murder, rape, or manslaughter.¹⁰² Aliens convicted of minor drug offenses, property crimes, or other offenses are to be given lesser priority.¹⁰³

From a statistical standpoint, the 287(g) program has proven to be an effective tool for ICE as the department focuses on the removal of criminal aliens from the U.S.; from January 2006 to December 2009, immigration charges were

⁹⁴ See Mimi E. Tsankov & Christina J. Martin, *Measured Enforcement: A Policy Shift in the ICE 287(g) Program*, 31 U. LA VERNE L. REV. 403, 413-14 (2010).

⁹⁵ See JESSICA VAUGHN & JAMES R. EDWARDS, CTR. FOR IMMIGRATION STUDIES, THE 287(G) PROGRAM: PROTECTING HOME TOWNS AND HOMELAND 4 (2009), *available at* <http://www.cis.org/287greport> [hereinafter CIS 287(G) BACKGROUNDER].

⁹⁶ See Tsankov, *supra* note 94, at 417.

⁹⁷ The Government Accountability Office criticized the execution of the 287(g) program on several fronts: (1) federal objectives to prioritize the most dangerous criminals were not clearly communicated to participating LEAs; (2) it was unclear from federal materials how participating LEAs could use their authority under the program; (3) the nature and extent of ICE’s supervision of the program was imprecise; and (4) data requirements imposed on the LEAs were unspecific. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-109, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (2009) [hereinafter GAO REPORT].

⁹⁸ See Tsankov, *supra* note 94, at 422.

⁹⁹ See Press Release, U.S. Dep’t of Homeland Security, Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements (July 10, 2009), *available at* http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm.

¹⁰⁰ See Nat’l Immigration Law Ctr., Model MOA (Memorandum of Agreement), *available at* <http://www.nilc.org/immlawpolicy/LocalLaw/287g-MOA-2009-07-14.doc> [hereinafter Model MOA].

¹⁰¹ See Tsankov, *supra* note 94, at 422-23; see also Memorandum from John Morton, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (June 30, 2010), *available at* http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf (articulating three clear immigration enforcement priority groups: aliens posing a danger to national security or public safety, recent illegal entrants, and aliens who are fugitives or who obstruct immigration control).

¹⁰² See Model MOA, *supra* note 100, at 17.

¹⁰³ See *id.*

lodged against 81,000 criminal or undocumented aliens by 287(g) officers.¹⁰⁴ Furthermore, the program has been touted as a “force multiplier,” allowing ICE to supplement its regional forces to accomplish more arrests and removals.¹⁰⁵

2. *Criminal Alien Program*

Another noteworthy program falling under the umbrella of ICE ACCESS is the Criminal Alien Program (CAP),¹⁰⁶ which seeks to prevent criminal aliens from being released into the general population by securing a final order of removal prior to their release from federal, state, or local prison.¹⁰⁷ Like the other programs falling within ICE ACCESS, CAP is meant to be utilized to target and remove the most serious criminal aliens.¹⁰⁸ Generally speaking, the program has proven to be very efficient, with ICE reporting that in fiscal year 2008, 221,085 charging documents were issued to initiate the removal of criminal aliens in the U.S. prison system.¹⁰⁹ This represents a forty-six percent increase over the 2007 fiscal year, during which 164,296 charging documents were issued under CAP.¹¹⁰ The program is currently active in all 114 U.S. federal prisons, and as of March 2008,¹¹¹ the program was active in approximately ten percent of the nation’s local jails.¹¹²

Like the 287(g) program, CAP relies on cooperation with local law enforcement to accomplish its goals. Specifically, local officers are asked to notify the ICE Office of Detention and Removal Operations (DRO) whenever they identify foreign-born detainees during their facility’s booking process.¹¹³ DRO officers then interview inmates flagged by local officers to determine whether they wish to initiate an immigration hold against the individual.¹¹⁴ Traditionally,

¹⁰⁴ See CIS 287(G) BACKGROUNDER, *supra* note 95, at 1.

¹⁰⁵ See *id.* at 2. In 2008, the ICE investigations office based in Denver made 1,594 arrests in Colorado and several other states covered by that team. In the same period, the 287(g) force in Colorado made 777 in-state arrests.

¹⁰⁶ CAP as it exists today was created in 2007 through the merger of two older programs: the Institutional Removal Program and the Alien Criminal Apprehension Program. See MELISSA KEANEY & JOAN FRIEDLAND, NAT’L IMMIGRATION LAW CTR., OVERVIEW OF THE KEY ICE ACCESS PROGRAMS, 287(G), THE CRIMINAL ALIEN PROGRAM, AND SECURE COMMUNITIES 4 (2009), available at <http://www.nilc.org/immlawpolicy/LocalLaw/ice-access-2009-11-05.pdf> [hereinafter NILC ICE ACCESS OVERVIEW].

¹⁰⁷ See U.S. Immigration and Customs Enforcement, Criminal Alien Program, <http://www.ice.gov/criminal-alien-program/> (last visited Nov. 15, 2011).

¹⁰⁸ See TREVOR GARDNER II & AARTI KOHLI, THE CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY, AND DIVERSITY, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM 1 (2009), available at http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf [hereinafter WARREN INST. REPORT].

¹⁰⁹ See 2008 ICE ANN. REP. at 3, available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf [hereinafter 2008 ICE ANNUAL REPORT].

¹¹⁰ See *id.*

¹¹¹ See *id.*

¹¹² See NILC ICE ACCESS OVERVIEW, *supra* note 106, at 4.

¹¹³ See *id.*

¹¹⁴ See *id.*

interviews were conducted in person.¹¹⁵ However, since 2006 the interviews have increasingly been conducted telephonically.¹¹⁶ The switch to remote interviewing has been accompanied by the creation of a real-time computer system providing LEAs with 24-7 access to ICE.¹¹⁷ If an immigration hold is in place, the local facility is required to notify ICE prior to releasing the individual from custody and may hold the individual for an additional period, not to exceed forty-eight hours, so that they may be transferred to ICE custody.¹¹⁸

3. *Secure Communities*

A third major program falling under the umbrella of ICE ACCESS is the Secure Communities program, which was introduced by DHS in 2008.¹¹⁹ Secure Communities, intended to expand CAP, is specifically targeted towards state and local prison systems¹²⁰ and, like the other ICE ACCESS programs, relies upon cooperation and coordination with LEAs.¹²¹ The program functions by transmitting digital fingerprints, taken from aliens upon arrest or imprisonment, to ICE where they are matched against federal immigration databases.¹²² Upon creation of the program, Congress requested that it accomplish four goals: (1) identify and process all criminal aliens subject to removal in state and local prison systems; (2) enhance ICE detention strategies to ensure that no removable criminal alien is released into the public due to lack of detention space; (3) reduce the time a removable criminal alien remains in detention prior to removal; and (4) maximize cost effectiveness.¹²³ Like the 287(g) program and CAP, the Secure Communities program is intended to target the most dangerous criminal aliens for removal,¹²⁴ with a focus on aliens convicted of major drug offenses and violent crimes such as rape and murder.¹²⁵

Secure Communities is similar to its predecessors in that it has been, numerically speaking, successful in accomplishing federal deportation goals. In a letter to the *New York Times* in December 2009, John Morton, then Assistant Secretary for ICE, reported that Secure Communities identified 11,000 aliens convicted of serious crimes such as rape and murder in its first year alone, 1,900 of whom had been removed.¹²⁶ In March 2010, the *Los Angeles Times* reported that Secure Communities had identified 18,000 aliens convicted of serious crimes and

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See NILC ICE ACCESS OVERVIEW, *supra* note 106, at 4; see also WARREN INST. REPORT, *supra* note 108, at 1.

¹¹⁸ See NILC ICE ACCESS OVERVIEW, *supra* note 106, at 4.

¹¹⁹ See 2008 ICE ANNUAL REPORT, *supra* note 109, at iii.

¹²⁰ See *id.* at 5.

¹²¹ See ICE ACCESS Overview, *supra* note 90.

¹²² See Thomas Frank, *New Effort Helps Finger, Net Potential Deportees: Program Uses Inmates' Prints to Discover Illegal Status*, USA TODAY, May 12, 2009, at 3A.

¹²³ See 2008 ICE ANNUAL REPORT, *supra* note 109, at 5.

¹²⁴ See *Hearing on Priorities Enforcing Immigration Law Before the H. Appropriations Subcomm. on Homeland Security*, 111th Cong. (2009) (statement of David Venturella, Executive Director, Secure Communities, Immigration and Customs Enforcement).

¹²⁵ See 2008 ICE ANNUAL REPORT, *supra* note 109, at 5.

¹²⁶ See John Morton, Letter to the Editor, *Immigration Reform*, N.Y. TIMES, Dec. 8, 2009.

that 4,000 had been removed.¹²⁷

III. HOW IT ALL COMES TOGETHER

A. French Criticism

On September 29, 2010, the European Commission issued a warning to the French government in response to its efforts to expel members of the Romani community from France in the late summer and fall of 2010.¹²⁸ In the accompanying press release, the Commission acknowledged that it had been assured by France that measures taken to remove Romani persons from France were not undertaken with the intent to discriminate against the Romani ethnic minority; however, the Commission also stated that France had not fully transposed the 2004 Free Movement Directive as required.¹²⁹ The Commission gave France just over two weeks to respond to its warning with a detailed plan for full transposition of the Directive.¹³⁰

In 2010, France's flawed transposition of the Free Movement Directive existed, primarily, in two sources of law: Law No. 2006-911 of July 24, 2006 and Ministerial Decree No. 2007-371 of March 21, 2007.¹³¹ Collectively, these instruments addressed immigration, integration, and Union citizens' rights of residence.¹³² Additional guidance with respect to transposition was also found in various *circulaires*, which addressed a variety of issues ranging from health care to admission and expulsion criteria.¹³³ In June 2011, France added to its transposition of the Free Movement Directive by enacting Law No. 2011-672.¹³⁴ Following the enactment of this new legislation, questions remained regarding the accuracy and completeness of France's transposition of the Directive;¹³⁵ however, these issues are

¹²⁷ See Paloma Esquivel, *O.C. Jail Inmates' Status Checked: The County Joins 11 Others in the State in Seeking to Deport Illegal Immigrants*, L.A. TIMES, Mar. 17, 2010, at 4.

¹²⁸ See European Commission Press Release, *supra* note 55; see also Castle, *supra* note 55.

¹²⁹ See European Commission Press Release, *supra* note 55; see also Council Directive 2004/38/EC, art. 40(1), 2004 O.J. (L 158) (requiring all Member States to implement laws, regulations, and administrative policies to incorporate the principles of Directive into their domestic law within two years).

¹³⁰ See European Commission Press Release, *supra* note 55.

¹³¹ See MILIEU ENVTL. LAW & POLICY, CONFORMITY STUDY FOR FRANCE: DIRECTIVE 2004/38/EC ON THE RIGHT OF CITIZENS OF THE UNION AND THEIR FAMILY MEMBERS TO MOVE AND RESIDE FREELY WITHIN THE TERRITORY OF THE MEMBER STATES 6 (2008) (Belg.), available at <http://www.scribd.com/doc/30160637/null> [hereinafter CONFORMITY STUDY].

¹³² See *id.*

¹³³ See *id.* at 6-7.

¹³⁴ See Loi 2011-672 du 16 juin 2011 relative à l'immigration, à l'intégration et à la nationalité [Law 2011-672 of June 16, 2011 on Immigration, Integration and Nationality], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], June 17, 2011.

¹³⁵ See Eur. Parliament, *Parliamentary Question: Compliance of French Law No 2011-672 of 16 June 2011 on Immigration, Integration and Nationality with EU legislation* (Sept. 22, 2011), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2011-008463+0+DOC+XML+V0//EN>; see also *France's Compliance with the European Free Movement Directive and the Removal of Ethnic Roma EU Citizens: A Briefing Paper Submitted to the European Commission in July 2011*, HUMAN RIGHTS WATCH (Sept. 28, 2011), <http://www.hrw.org/news/2011/09/28/france-s->

beyond the scope of this comment, which focuses on the law as it existed in 2010.

Leading up to France's Romani expulsions in 2010, several independent studies criticized the French transposition of the Directive. In 2008, the University of Edinburgh and Milieu Ltd. conducted a conformity study that analyzed the correctness and sufficiency of France's efforts to transpose the Directive into their domestic law.¹³⁶ In pertinent part, the study concluded that France's transposition of Article 27 of the Directive, speaking to the restriction of free movement based on the personal conduct of the individual concerned, was incomplete.¹³⁷ Specifically, the study suggested that France's failure to prohibit the use of expulsion to facilitate economic advantage, as well as its failure to specify that the conduct of the individual to be expelled must constitute the only grounds for expulsion, rendered the transposition inadequate.¹³⁸ Furthermore, the study found that France's transposition of Article 28(1) of the Directive, speaking to protections against expulsion, was nonexistent,¹³⁹ and that the notice requirements and procedural safeguards of the Directive had not been fully transposed.¹⁴⁰

In February 2009, the European Parliament released its own evaluation of the French transposition, concluding that it was ambiguous and, in some instances, contrary to the spirit of the Directive itself.¹⁴¹ Like the Edinburgh study above, the European Parliament study found that there were insufficient protections in place with respect to expulsion, stating that protections against expulsion prompted by reliance on social assistance were not guaranteed as required under the Directive.¹⁴²

The European Roma Rights Center (ERRC) released an additional study on this topic in September 2010.¹⁴³ This study alleged violations of the non-discrimination clauses of the Directive, suggesting that France had a pattern of singling out the Romani ethnic minority for law enforcement actions.¹⁴⁴ In addition, the study indicated that expulsion documents utilized in 2010 were produced en masse; making it unlikely that adequate consideration was afforded to individual circumstances as required under Article 28 of the Directive.¹⁴⁵ Furthermore, the ERRC study suggested that France, in 2010, facilitated the expulsion of Romani persons who had resided in France for less than three months in violation of Article

compliance-european-free-movement-directive-and-removal-ethnic-roma-eu-citi#_Legal_Provisions_in.

¹³⁶ See CONFORMITY STUDY, *supra* note 131.

¹³⁷ See *id.* at 10-11.

¹³⁸ See *id.* at 11.

¹³⁹ See *id.* at 10-11.

¹⁴⁰ See *id.* at 11.

¹⁴¹ See EUROPEAN PARLIAMENT, DIRECTORATE GENERAL INTERNAL POLICIES OF THE UNION, APPLICATION OF DIRECTIVE 2004/38/EC OF 29 APRIL 2004 ON THE RIGHT OF CITIZENS OF THE UNION AND THEIR FAMILY MEMBERS TO MOVE AND RESIDE FREELY WITHIN THE TERRITORY OF THE MEMBER STATES iv (Feb. 2009) (Executive Summary), *available at* www.statewatch.org/news/2009/feb/ep-free-movement-report.pdf.

¹⁴² See *id.*

¹⁴³ See European Roma Rights Centre Submission, *supra* note 52.

¹⁴⁴ See *id.* at 1.

¹⁴⁵ See *id.* at 2.

6 of the Directive.¹⁴⁶

Collectively, the studies analyzing France's failed compliance with the Free Movement Directive, the actions taken against the Romani in 2010, and the rapid response from the European Commission suggest that the position taken by the French, with respect to the right of free movement within the European Community, is at odds with the fundamental right of Europeans "to move and reside freely within the territory of the Member States."¹⁴⁷ This most recent saga of Europe's Romani, combined with their tumultuous history, could provide law and policy makers in the U.S. with an excellent, modern example of the risks associated with policy making in the realm of migration.

B. U.S. Policy Criticism

As the sections above illustrate, crime-motivated immigration policy in the U.S. today is largely comprised of the various programs administered under the umbrella of ICE ACCESS. The ICE ACCESS programs operate under the common auspice of assisting local LEAs as they deal with immigration enforcement issues in their communities,¹⁴⁸ and at first blush, the numbers suggest that the programs have been successful. For example, in the 2010 fiscal year, DHS removed 387,000 foreign nationals from the U.S., including 169,000 known criminal aliens.¹⁴⁹ However, criticism of these programs has persisted, and there are legitimate questions as to their overall functionality.

The criticisms plaguing the 287(g) program are illustrative of the criticisms that have followed many of the ICE ACCESS programs in recent years. As previously discussed,¹⁵⁰ the 287(g) program was recently overhauled by the Obama Administration following criticisms by the GAO.¹⁵¹ Nevertheless, some of the criticisms that beleaguered the program prior to the changes made under the Obama Administration persist today.¹⁵² In March 2010, DHS promulgated a report

¹⁴⁶ See *id.* at 3.

¹⁴⁷ Council Directive 2004/38/EC, 2004 O.J. (L 158).

¹⁴⁸ See U.S. Immigration and Customs Enforcement, Fact Sheet: ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS), <http://www.ice.gov/news/library/factsheets/access.htm> (last visited Dec. 30, 2010).

¹⁴⁹ U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION ENFORCEMENT ACTIONS: 2010, *available at* <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>.

¹⁵⁰ See *supra* Part III.B.1.

¹⁵¹ See GAO REPORT, *supra* note 97.

¹⁵² On August 12, 2010, the National Council of La Raza (NCLR), a Hispanic civil rights and advocacy group based in Washington D.C. released a report on the status of the 287(g) program entitled "The Impact of Section 287(g) of the Immigration and Nationality Act on the Latino Community." In the report, the NCLR outlines various criticisms of the program, including: (1) its application to noncitizens who commit minor crimes instead of the violent criminals who are the program's intended target; (2) its tendency to divert police attention away from traditional law enforcement; (3) its propensity to undermine community-based strategies that rely on population groups, such as immigrant populations, to report crimes to authorities; and (4) its vulnerability to racial profiling and other civil rights violations. See A. ELENA LACAYO, NAT'L COUNCIL OF LA RAZA, THE IMPACT OF SECTION 287(G) OF THE IMMIGRATION AND NATIONALITY ACT ON THE LATINO COMMUNITY (Aug. 12, 2010), *available at*

recommending thirty-three changes to the 287(g) program,¹⁵³ a majority of which pertained to the training and supervision of officers as well as the availability of program information to the public.¹⁵⁴ However, other recommendations set forth in the report pertained to more serious civil rights and civil liberties concerns frequently raised by advocacy groups.¹⁵⁵

Specifically, the DHS report highlights concerns that the civil rights and civil liberties track records of applicant LEAs are not formally evaluated during the application process and that several participating LEAs have been embroiled in claims of civil rights violations.¹⁵⁶ Of particular concern is the fact that at the time of the report, one LEA participant was involved in at least three lawsuits implicating civil rights concerns; one pertaining to allegations of racial profiling in connection with 287(g) participation, another pertaining to allegations of physical abuse inflicted upon a detained noncitizen, and yet another pertaining to allegations of national origin discrimination.¹⁵⁷ The report also addresses concerns raised by various NGOs that by permitting LEAs with suspect civil rights backgrounds to participate in the 287(g) program, ICE is increasing the likelihood that noncitizens will be subjected to racial profiling.¹⁵⁸

Criticism of the 287(g) program has also been reflected in the news media. In December 2010, the *New York Times* published an in-depth expose of the risks faced by illegal immigrants in the U.S. who drive without a valid license.¹⁵⁹ The article centered on the case of Felipa Leonor Valencia, whose car was hit when a U.S. citizen driver failed to stop at a red light in Lawrenceville, Georgia.¹⁶⁰ The accident, which triggered only a fine for the U.S. citizen driver, resulted in Ms. Valencia's being placed in immigration detention, as Gwinnett County, where Lawrenceville is located, is a participant in the 287(g) program.¹⁶¹ Ms. Valencia's story is representative of the fear, surrounding the 287(g) program, that minor offenders will be caught up in enforcement as the program expands into more communities nationwide. Meanwhile, in Lawrenceville, Hispanic leaders have suggested that 287(g) enforcement in their community has resulted in decreased attendance at church services and decreased patronage at Latino restaurants because unlicensed drivers are fearful of any interactions with local police.¹⁶² Enforcement has also

http://www.nclr.org/index.php/site/pub_types/issue_briefs; see also Jeremy Redmon, *Metro Agencies to Feds: Let Us In*, ATLANTA J. AND CONST., Aug. 28, 2010, at A1.

¹⁵³ See DEP'T OF HOMELAND SECURITY, OIG-10-63, THE PERFORMANCE OF 287(G) AGREEMENTS 1 (Mar. 2010), available at http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_10-63_Mar10.pdf [hereinafter PERFORMANCE OF 287((G)].

¹⁵⁴ See *id.* at 22.

¹⁵⁵ See *id.*

¹⁵⁶ See *id.* at 22-23.

¹⁵⁷ See *id.* at 23.

¹⁵⁸ See PERFORMANCE OF 287(G), *supra* note 153, at 23.

¹⁵⁹ See Julia Preston & Robert Gebeloff, *Unlicensed Drivers Who Risk More Than a Fine*, N.Y. TIMES, Dec. 10, 2010, at A1.

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² See *id.* Accord RANDY CAPPES ET AL., MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 48 (2011) [hereinafter MIGRATION POLICY INST.].

prompted some illegal aliens to relocate to other, friendlier parts of Georgia.¹⁶³ While the Gwinnett County Sheriff is pleased with these effects of the 287(g) program,¹⁶⁴ it seems that enforcement policies that force immigrant populations underground and discourage civic participation could have long term negative effects on communities. The *New York Times* estimates that 4.5 million illegal immigrants drive regularly,¹⁶⁵ most without licenses as only two states currently allow undocumented immigrants to obtain a license.¹⁶⁶ This is a huge group of people who could be targeted by the 287(g) program if enforcement is not limited to the most dangerous criminals it is meant to prioritize.

Persistent criticisms also plague the Criminal Alien Program. In September 2009, a policy brief published by the Warren Institute at Berkeley Law alleged that ICE is not abiding by congressional directives to focus removal proceedings on the most dangerous criminal aliens and that LEAs may be utilizing the program to facilitate racial profiling.¹⁶⁷ The study, based on data collected in Irving, Texas, suggests that the transition to telephonic interviews and 24-7 access to ICE led to a spike in the number of Hispanic arrests in Irving as well as a spike in the number of discretionary arrests based on low-level misdemeanor offenses, indicating that Irving police may have been using CAP to facilitate increased deportations of Hispanic immigrants.¹⁶⁸ Further, the study found that only two percent of immigration detainers issued by ICE in Irving under CAP were based on felony charges.¹⁶⁹

Additional criticism of CAP has come from the Obama Administration itself, which issued a report on immigration detention in 2009.¹⁷⁰ Data relied upon in the report showed that of the 178,605 people detained by ICE through CAP in 2009, fifty-seven percent had no criminal conviction.¹⁷¹ These numbers provide substance to arguments frequently made by immigrant rights groups that enforcement of criminal alien programs is too broad.

Finally, the Secure Communities program has also faced stiff criticism since its development in 2008. As with the other programs falling under the umbrella of ICE ACCESS, critics have expressed frustration with the program's failure to prioritize the most dangerous criminals.¹⁷² Recently, the National Institute of

¹⁶³ See Preston, *supra* note 159.

¹⁶⁴ See *id.*

¹⁶⁵ See *id.*

¹⁶⁶ See Marc Lacey, *License Access in New Mexico is Heated Issue*, N.Y. TIMES, Aug. 24, 2011, at A1 (indicating that, as of August 2011, only New Mexico and Washington issue driver's licenses to illegal immigrants that are the same as those issued to citizens); see also *House Leader Proposes Immigrant License Changes*, ASSOCIATED PRESS, Sept. 9, 2011 (discussing legislation recently introduced by New Mexico House Speaker Ben Lujan to restrict immigrants' access to state driver's licenses).

¹⁶⁷ See WARREN INST. REPORT, *supra* note 108, at 1.

¹⁶⁸ See *id.* at 5.

¹⁶⁹ See *id.* at 7.

¹⁷⁰ See Nina Bernstein, *Report Critical of Scope and Cost of Immigration Detention*, N.Y. TIMES, Oct. 7, 2009, at A17.

¹⁷¹ See *id.*

¹⁷² In June 2011, John Morton issued a memorandum that greatly expanded the discretion of ICE officials operating under the Secure Communities program. The memo, for example, permits agents to consider factors such as length of residence, education, military service, and the seriousness

Corrections issued a report analyzing Secure Communities statistics through March 22, 2009, finding that out of the 19,495 individuals identified through the program thus far, only 1,436 were classified as dangerous criminals.¹⁷³ Furthermore, immigrants' rights groups have also expressed concerns that fears of racial profiling, augmented by a jurisdiction's enrollment in Secure Communities, may undermine trust between immigrant communities and law enforcement, limiting the effectiveness of traditional law enforcement.¹⁷⁴ Specifically, many people fear that implementation of the program will make immigrants less likely to report crimes or testify.¹⁷⁵

Just as the Obama Administration has acknowledged concerns with the 287(g) program and CAP, in recent months there has been a substantial effort made to reign in Secure Communities. Specifically, on June 17, 2011, John Morton issued an agency-wide memorandum clarifying the role of "prosecutorial discretion" in immigration enforcement.¹⁷⁶ The memo, in part, discussed the scope of prosecutorial discretion in the immigration system, enumerated factors that may be taken into consideration when determining whether or not to exercise discretion, and clarified which ICE employees may exercise discretion in accordance with their specific responsibilities.¹⁷⁷ The memo also makes clear that discretion may be exercised at any stage of the deportation process.¹⁷⁸ This memo has been interpreted by many in the immigration field as an effort to focus the program more closely on immigrants convicted of serious crimes and limit the extent to which individuals with minor convictions, or no conviction at all, are caught up in the system.¹⁷⁹ And the memo has already had a seemingly positive impact on the program. Building upon the parameters established by Morton, the Obama Administration announced in August 2011 that it would suspend deportation proceedings in cases where there was no national security or public safety threat, and that it would review cases one by one to determine whether or not to exercise prosecutorial discretion.¹⁸⁰ Further, the portion of ICE's website dedicated to the Secure Communities program now includes a "What's New" section outlining the agency's various initiatives developed in response to civil rights concerns, including: Advisory Committee & Minor Traffic Offenses, Prosecutorial Discretion, Training for States, and Protecting Victims &

of a criminal act when deciding whether or not to pursue deportation in a given case. See Julia Preston, *U.S. Pledges to Raise Deportation Threshold*, N.Y. TIMES, June 18, 2011, at A14.

¹⁷³ See NILC ICE ACCESS OVERVIEW, *supra* note 106, at 6-7.

¹⁷⁴ See Frosch, *supra* note 12.

¹⁷⁵ See Kirk Semple, *Program to Have Police Spot Illegal Immigrants is Mired in Confusion*, N.Y. TIMES, Nov. 10, 2010, at A26; see also Sam Dolnick & Kirk Semple, *Report Questions the System Used to Flag Rikers Island Inmates for Deportation*, N.Y. TIMES, Nov. 11, 2010, at A30.

¹⁷⁶ See Memorandum from John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [hereinafter June Morton Memo].

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

¹⁷⁹ See Julia Preston, *U.S. Pledges to Raise Deportation Threshold*, N.Y. TIMES, June 18, 2011, at A14.

¹⁸⁰ See Robert Pear & Julia Preston, *Fewer Youths to be Deported in New Policy*, N.Y. TIMES, Aug. 19, 2011, at A1; see also Editorial, *Toward Immigration Sanity: The Obama Administration Resets its Deportations Priorities*, N.Y. TIMES, Aug. 20, 2011, at A18.

Witnesses of Crimes.¹⁸¹

However, these are not the only changes that have been made to the Secure Communities program. In recent months, several states have expressed a desire to opt-out of Secure Communities due to concerns about its over-inclusive nature and the chilling effect it may have on traditional law enforcement.¹⁸² However, in August 2011, the Obama Administration announced that the program would be mandatory for all states and that it is to be effective nation-wide by 2013.¹⁸³ This push to move forward with the program, in spite of the concerns that have been raised by various groups, is disconcerting even in light of the advancements signaled by the increased application of prosecutorial discretion.

C. Challenges to Meaningful Immigration Reform in the United States & How Europe's History with the Romani Can Guide the Path Forward

As the increasing prevalence of criminal immigration enforcement programs suggests, the national discourse on immigration is increasingly focused on violence, be it on the southern border or in our nation's jails and prisons. As the sections above suggest, the programs developed in recent years by DHS (and ICE) to identify and remove criminal aliens are flawed but necessary to protect our communities from some of the most dangerous threats to our daily life. However, while the threats are real, we must remember that there are other aspects of the immigration system in the U.S. that are desperately in need of reform and avoid falling into the trap of turning a blind eye to the larger problems. The saga of the European Romani, specifically recent events in France, can teach us a great deal about the pitfalls of trying to legislate migration and the risks associated with using preconceived notions of immigrant populations for political gain.

Ever since the first recorded anti-Romani law was enacted in 1471, the Romani have faced a steady stream of discrimination throughout Europe, a trend that continues today.¹⁸⁴ In August of 2010, high-ranking officials within the Sarkozy administration justified their removals of hundreds of Romani from France by pointing to crime statistics,¹⁸⁵ while seemingly violating key portions of the EU's Free Movement Directive at every turn. Many outside observers surmised that Mr. Sarkozy's primary motivation for initiating the removals was political gain; he was seeking to bolster an approval rating that had been devastated by a series of political scandals in 2010.¹⁸⁶ But while Mr. Sarkozy's motivations may never be fully

¹⁸¹ See U.S. Immigration and Customs Enforcement, Secure Communities, http://www.ice.gov/secure_communities/ (last visited Jan. 15, 2012).

¹⁸² See Brian Bennett, *States Can't Opt Out of Secure Communities Program*, L.A. TIMES, Aug. 6, 2011, <http://www.latimes.com/news/nationworld/nation/la-na-secure-communities-20110806,0,5832833,print.story>.

¹⁸³ See Kirk Semple & Julia Preston, *Deal to Share Fingerprints is Dropped, Not Program*, N.Y. TIMES, Aug. 6, 2011, at A11.

¹⁸⁴ See Steven Erlanger & Scott Sayare, *France Intensifies Effort to Expel Roma, Raising Questions*, N.Y. TIMES, Aug. 20, 2010, at A4. See also Povoledo, *supra* note 44.

¹⁸⁵ See Stephen Castle, *France: Government Defends Deportation of Roma*, N.Y. TIMES, Sept. 1, 2010, at A6.

¹⁸⁶ See Crumley, *supra* note 2.

disclosed, one thing is clear: France's expulsion of the Romani in 2010 is simply the latest in a long line of abuses directed towards an un-integrated ethnic minority in Europe.¹⁸⁷

Likewise, immigration reform has become a hot issue in American elections,¹⁸⁸ and several regional lawmakers have been catapulted onto the national stage as a result of their divisive proposals. In April 2010, Arizona's Governor, Jan Brewer, became a central figure in the U.S. immigration debate after she signed SB 1070 into law, a controversial law that proposed, in part, to make failure to carry immigration documents a crime and sought to give local law enforcement broad powers to detain anybody suspected of being in the U.S. illegally.¹⁸⁹ Although several portions of the law were struck down in a July 2010 decision by the U.S. District Court for the District of Arizona,¹⁹⁰ many other states are following Arizona's lead.¹⁹¹ Governor Brewer and her like-minded peers have frequently relied on criminal justifications when speaking in support of Arizona-style legislation,¹⁹² arguing that federal inaction with respect to immigration reform has forced state governments to take control of the matter.¹⁹³ But what immigration pundits in regional governments and many news outlets often fail to report is that crime rates along the southern border have actually declined, with instances of violent crimes in Arizona falling to 447 per 100,000 residents in 2008 from 532 per 100,000 residents in 2000.¹⁹⁴ Further, President Obama recently sent an additional 1,200 National Guard troops to the southern border in an effort to further bolster security,¹⁹⁵ and there is evidence that

¹⁸⁷ See generally *Violence in Bulgaria: Out in the Streets: Anti-Roma Rioting Spreads Across the EU's Poorest Country*, ECONOMIST, Oct. 8, 2011, at 25, for an example of continuing conflict. See also Steve Erlanger, *France: Time Limits on Begging*, N.Y. TIMES, Sept. 16, 2011 at A5.

¹⁸⁸ See Jeff Zeleny & Trip Gabriel, *Gingrich's Words on Immigration Become a Target*, N.Y. TIMES, Nov. 24, 2011, at A24.

¹⁸⁹ See Randal C. Archibold, Helene Cooper, & Carl Hulse, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1.

¹⁹⁰ See *U.S. v. Arizona*, 703 F. Supp. 2d 980 (2010), cert. granted 132 S.Ct. 845 (2011).

¹⁹¹ Recently, several states have followed Arizona's lead by passing restrictive immigration legislation modeled on SB 1070. Alabama's law, known as HB 56, has been labeled one of the toughest laws of its kind and is currently facing legal challenges initiated by the U.S. Department of Justice and other organizations. See *Justice Dept. Challenges Alabama Immigration Law*, N.Y. TIMES, Aug. 2, 2011, at A16; see also *The Nation's Cruellest Immigration Law: Religious Leaders Sue to Block Sweeping and Punitive New Regime*, N.Y. TIMES, Aug. 29, 2011, at A22. Georgia and South Carolina have also recently enacted restrictive immigration legislation. See Robbie Brown, *South Carolina: U.S. Challenges Immigration Law*, N.Y. TIMES, Nov. 1, 2011, at A16; Kim Severson & Robbie Brown, *Parts of Georgia Immigration Law Blocked*, N.Y. TIMES, June 28, 2011, at A17.

¹⁹² See Archibold, *supra* note 189; see also Randal C. Archibold, *Emotions Flare After Immigration Law is Blocked*, N.Y. TIMES, July 30, 2010, at A10; *Most Illegal Immigrants Bring Drugs, Brewer Says*, ARIZONA REPUBLIC, June 26, 2010, at B1.

¹⁹³ Randy Terrill, a Republican lawmaker in Oklahoma, spoke out in support of his own state's plans to pass Arizona style immigration legislation, stating that "[t]he federal government's failure to enforce our border has functionally turned every state into a border state." See Julia Preston, *Political Battle on Immigration Shifts to States*, N.Y. TIMES, Jan. 1, 2011, at A1.

¹⁹⁴ See Randal C. Archibold, *In Border Violence, Perception Is Greater Than Crime Statistics*, N.Y. TIMES, June 20, 2010, at A18; see also Julia Preston, *Napolitano Accuses Critics of Politicizing Border Issues*, N.Y. TIMES, Feb. 1, 2011, at A17.

¹⁹⁵ See Archibold, *supra* note 194.

illegal border crossings have slowed dramatically.¹⁹⁶

Another obstacle to achieving meaningful immigration reform in the U.S. that closely mirrors problems with the Romani in Europe is the public perception of immigrant criminality. Stories regarding criminal immigration issues regularly appear in the news media,¹⁹⁷ feeding popular stereotypes that immigrant populations are plagued with higher levels of crime and imprisonment than the general population. However, a 2007 study by the Immigration Policy Center found that these stereotypes are largely unsupported by crime statistics.¹⁹⁸ The Immigration Policy Center concluded that, for every ethnic group, incarceration rates for young men are lower for immigrants than for their American-born counterparts, including Mexican, Salvadoran, and Guatemalan immigrants who account for a majority of the undocumented population in the U.S.¹⁹⁹ Strikingly, for the period studied, foreign-born Mexican immigrants had an incarceration rate of just 0.7% compared with a rate of 5.9% for males of Mexican descent born in the U.S.²⁰⁰ The public perception of crime rates among immigrant populations must be brought into line with reality if we hope to defuse the arguments of those who would strip immigrant populations of constitutional rights in the name of public safety.

D. How Do We Avoid the Pitfalls?

It is becoming increasingly clear that the U.S. needs to recalibrate not only its immigration policy, but also its public perception of immigrant populations, lest the U.S. fall into the same pitfalls that the countries of Europe have fallen into when dealing with the Romani. If the U.S. fails to address these issues in a timely fashion, it runs the risk of alienating immigrant populations within its borders and creating a lesser class of minorities not fully assimilated into mainstream society. Several options are available to address these issues, ranging from federal legislation to administrative reform.

In the current political climate, it seems highly unlikely that any federal legislation addressing immigration concerns is likely to pass successfully through Congress. The failure of the DREAM Act²⁰¹ in December 2010²⁰² highlighted for

¹⁹⁶ See Editorial, *The Next Immigration Challenge*, N.Y. TIMES, Jan. 12, 2012, at A27.

¹⁹⁷ A quick and dirty search of Westlaw for the thirty-day period leading up to January 6, 2011 returned 403 newspaper articles from the United States including the search terms “crime & immigration & ‘United States.’”

¹⁹⁸ See RUBEN G. RUMBAUT & WALTER A. EWING, IMMIGRATION POLICY CTR., THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN (2007), available at <http://www.immigrationpolicy.org/special-reports/myth-immigrant-criminality-and-paradox-assimilation>.

¹⁹⁹ See *id.* at 1.

²⁰⁰ See *id.*

²⁰¹ DREAM Act legislation was first introduced in Congress in 2001 and seeks to provide conditional permanent residence, and a path to legal permanent residence and citizenship, to certain undocumented immigrants who have grown up in the United States and consistently exhibited good moral character. See NAT’L IMMIGRATION LAW CTR., DREAM ACT: SUMMARY (2010), available at <http://www.nilc.org/immlawpolicy/dream/dream-bills-summary-2010-09-20.pdf>.

many just how difficult it will be to pass any immigration legislation in the near future. As a result, the key to reforming criminal immigration programs likely lies with the departments and agencies that administer them – DHS and its main enforcement arm, ICE. These organizations must take steps to consolidate programming and clarify enforcement goals so that it is clear to observers who will be targeted for immigration enforcement and why.

The first step DHS and ICE should take is to reevaluate and condense some of the programs operating under ICE ACCESS. From the analysis of the 287(g) program, CAP, and Secure Communities above, it appears that there are many redundancies in the various programs currently administered by ICE. Administrators should strive to isolate the strongest aspects of each program and consolidate them into one overarching program. CAP and Secure Communities, which already share the same identification and interview processes, could be merged with the deputization approach utilized in the 287(g) program so that trained officers are physically present at more detention centers across the U.S. to conduct interviews. The presence of more federally trained officials on-site should help allay fears of local law enforcement using these programs as a cover for racially motivated immigration sweeps.

Second, DHS and ICE should make every effort to build upon the memoranda which have been disseminated by John Morton in 2011²⁰³ by developing and applying clear enforcement priorities that apply to all ICE ACCESS programs. These priorities should include clear indications that not all deportees will be criminals, so that there is less confusion over enforcement goals and techniques. By being more straightforward regarding how immigration laws will be enforced, misconceptions and unrealistic expectations that give rise to criticism may be avoided, making it easier for ICE to move forward. Clarifying enforcement goals will require more explicit instruction from both the Executive and Legislative branches. If the goal is to have higher deportation numbers, this needs to be explicitly stated, especially as it will likely result in fewer criminal deportations, which are more time consuming.²⁰⁴ If, on the other hand, the goal is to remove more criminal aliens, this also needs to be explicitly stated, as this will likely result in fewer total removals and allegations from political opponents that the federal government is being “soft” on immigration. Either way, clarity is key, and all involved parties should be prepared to be more transparent going forward.

Lastly, all parties with a stake in the reform, from ICE’s leadership to the President, should be prepared to encourage public edification on the subject of immigration reform. As long as the public perception of immigration continues to be shaped by ever increasing fears of rising crime rates and immigrant criminality, it

²⁰² See Lisa Mascaro & James Oliphant, *111th Congress: Immigration and Arms Control – Dream Act Was Key to Bigger Plan*, L.A. TIMES, Dec. 19, 2010, at 27.

²⁰³ See June Morton Memo, *supra* note 176; see also Memorandum from John Morton, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

²⁰⁴ See Spencer S. Hsu & Andres Becker, *ICE Officials Set Quotas to Deport More Illegal Immigrants*, WASH. POST, Mar. 27, 2010, at A04.

will be impossible to achieve meaningful immigration reform that brings immigrant populations in the U.S. out of the shadows and into mainstream society where they can be active and contributing members of our communities.

IV. CONCLUSION

Since their arrival in Europe centuries ago, the Romani people have endured unyielding mistreatment, causing them to largely withdraw from mainstream society. Their withdrawal from the community has only cemented the public perception that they are undesirable neighbors, criminals, and an economic drain. This perception was highlighted for the world, once again, when France's Nicolas Sarkozy announced in late July 2010 that illegal Romani would be expelled from France and that their camps would be dismantled.²⁰⁵ The U.S. is drifting perilously close to following in these footsteps as it continues to implement immigration programs in the name of national security and public safety but allows them to be executed haphazardly. Critics of these programs paint a picture of illegal immigrants living in the U.S. who are scared to drive, attend church services, or report crimes to local law enforcement because they worry that they will be caught up in the ever increasing web of enforcement programs implemented by ICE.²⁰⁶

While programs that strive to remove the most dangerous criminal aliens from society are undoubtedly necessary in today's world, the departments and agencies that administer them need to be very clear about their goals, consider policy changes to calm fears of racial profiling and other civil rights violations, and strive to educate the public about the realities of immigration in the U.S. today. Unless steps are taken to allay public fears and misconceptions, the U.S. is at risk of enacting policies that permanently push minority groups and new waves of immigrants into a Romani-like lesser class that will be unable or unwilling to fully integrate into mainstream society. As a nation built on immigration and fueled by diversity,²⁰⁷ the U.S. cannot afford to follow this path.

²⁰⁵ See Saltmarsh, *supra* note 8.

²⁰⁶ See Preston, *supra* note 159; see also MIGRATION POLICY INST., *supra* note 162.

²⁰⁷ See generally Sam Dolnick, *Even Mayor Cannot Escape Complexity of Immigration Issue*, N.Y. TIMES, Jan. 21, 2011, at A21 ("Our lifeblood is a constant stream of new immigrants to improve our cuisine, our culture, our language, and, mainly, our economy.").